

**NATIONAL PARLIAMENTS AND  
EUROPEAN CONSTITUTIONALISM:  
ACCOUNTABILITY BEYOND BORDERS**

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**National Parliaments and European Constitutionalism:  
Accountability Beyond Borders**

(with a summary in English)

**Nationale parlementen en Europees constitutionalisme:  
politieke verantwoordelijkheid voorbij grenzen**

(met een samenvatting in het Nederlands)

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door

**Davor Jančić**

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te Novi Sad, Servië

**Promotor:**

Prof. dr. L. Besselink

**Assessment committee:**

Prof. dr. S. Weatherill (Oxford University)

Prof. dr. R. Dehousse (Sciences Po Paris)

Prof. dr. F. de Quadros (University of Lisbon)

Prof. dr. D. Curtin (University of Amsterdam and Utrecht University)

Prof. dr. H. Kummeling (Utrecht University) (Chairman)



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# Table of Contents

<b>ACKNOWLEDGMENTS</b>	i
<b>CHAPTER 1</b>	
<b>INTRODUCTION: EUROPEAN PARLIAMENTARY DEMOCRACY TRANSCENDING NATIONAL BORDERS</b>	1
1. FRAMING THE STUDY: WHOSE ARE OUR NATIONAL PARLIAMENTS?	1
1.1. Topic	1
1.2. Objectives and added value	2
2. LITERATURE OVERVIEW: TOWARDS A QUALITATIVE CONSTITUTIONAL ANALYSIS	3
2.1. The pre-Maastricht placidity: adjusting the lens	3
2.2. The Maastricht frenzy: parliamentary decline diagnosis	4
2.3. The post-Maastricht avalanche: scrutiny as a democracy fix	6
3. STRUCTURE: SUBSTANTIVE PARLIAMENTARY FUNCTIONS IN FOCUS	9
4. METHODOLOGY: LEGAL AND EMPIRICAL ANALYSIS COMBINED	12
<b>CHAPTER 2</b>	
<b>PARLIAMENTARY INTERDEPENDENCE: CONCEPTUALISING THE RELATIONS BETWEEN NATIONAL PARLIAMENTS AND EU INSTITUTIONS</b>	15
1. IN SEARCH OF A THEORETICO-METHODOLOGICAL DEVICE	15
2. INTERDEPENDENCE AND EU GOVERNANCE	16
3. INTERDEPENDENCE AND EU CONSTITUTIONALISM	18
3.1. Federalism	19
3.2. Constitutional pluralism	21
3.3. Multilevel constitutionalism	22
3.4. Composite constitutionalism	24
3.5. Synthetic constitutionalism	26
3.6. Multilevel parliamentary field	26
4. THE CONCEPT OF PARLIAMENTARY INTERDEPENDENCE	27
4.1. Parliamentary role perceptions	27
4.2. Rationale behind parliamentary interdependence	28
4.3. Definition and added value of the concept	31
<b>PART I – CONDITIONS</b>	
<b>THE LOST AND FOUND OF EUROPE'S DEMOCRACY</b>	
1. VISIONS OF A UNITED EUROPE: A PRELUDE	37
2. METHOD	39
2.1. Questions	39

*Table of Contents*

2.2. Case studies selection	39
3. ARGUMENT AND STRUCTURE	42

**CHAPTER 3**

***OVERTURE***

<b>THE COAL AND STEEL COMMUNITY: THE NATIONAL PARLIAMENTS' EUROPEAN YOUTH</b>	43
1. THE BIRTH OF THE FIRST EUROPEAN COMMUNITY: A HUMBLE BEGINNING	43
2. THE PREROGATIVES OF THE FLEDGLING COMMON ASSEMBLY	46
3. THE NATURE OF THE DOUBLE MANDATE: POSITIVE BUT UNSUSTAINABLE?	49
3.1. The High Authority as the Community's powerhouse	49
3.2. National parliaments as archetypal repositories of popular representation	50
4. THE COAL AND STEEL COMMUNITY TREATY IN NATIONAL PARLIAMENTS	55
4.1. France: sowing the germ of supranational parliamentarism	55
4.2. Britain: strategic abstention	57
4.3. Portugal: obstructed by dictatorship	61
5. CONCLUDING REMARKS	62

**CHAPTER 4**

***INTERMEZZO***

<b>THE MAASTRICHT TREATY: PARLIAMENTS BECKONED TO THE UNION</b>	65
1. EXPLORING INTERPARLIAMENTARISM ACROSS LEVELS	65
2. CHALLENGING NATIONAL PARLIAMENTS THROUGH TREATY REFORM	68
2.1. The parliaments' comeback in the Treaties and in practice	68
2.1.1. Declarations on national parliaments	68
2.1.2. The Assizes: a failed experiment	69
2.1.3. COSAC: a success story	70
2.2. Codecision: empowering the national parliaments' counterpart	71
2.3. Wading into intergovernmentalism	72
2.4. Consecrating a principled organisation of EU competences	72
3. THE MAASTRICHT TREATY IN NATIONAL PARLIAMENTS	73
3.1. France	73
3.1.1. Constitutionality	74
3.1.2. Codecision	76
3.1.3. Intergovernmentalism	78
3.1.4. Subsidiarity	79
3.2. Britain	81
3.2.1. Codecision	82
3.2.2. Intergovernmentalism	84
3.2.3. Subsidiarity	87
3.3. Portugal	87
3.3.1. Codecision	88

3.3.2. Intergovernmentalism	91
3.3.3. Subsidiarity	91
4. CONCLUDING REMARKS	92

## **CHAPTER 5**

### ***FINALE***

<b>THE LISBON TREATY: NATIONAL PARLIAMENTS ANCHORED IN THE UNION</b>	95
1. CALIBRATING INTERPARLIAMENTARISM ACROSS LEVELS	95
2. THE POWERS OF NATIONAL PARLIAMENTS UNDER THE LISBON TREATY	97
3. GENERIC EUROPEAN FUNCTIONS OF NATIONAL PARLIAMENTS	100
3.1. Good functioning of the Union	100
3.2. Democratic principles of the Union	101
4. SUBSIDIARITY GUARDIANSHIP	102
4.1. Early warning mechanism	102
4.1.1. Scope and method of application	102
4.1.2. Procedural aspects	103
4.1.3. Constitutional value	107
4.2. Late warning mechanism	109
4.3. The Barroso initiative	110
4.3.1. Origins, definition and characteristics	110
4.3.2. Modes of national parliamentary participation	112
A. Differences	112
B. Similarities	113
4.3.3. Effects	113
5. THE LISBON TREATY IN NATIONAL PARLIAMENTS	115
5.1. FRANCE	116
5.1.1. Constitutionality	116
5.1.2. Subsidiarity	119
5.1.3. Good functioning of the Union	122
5.1.4. Extension of codecision	123
5.2. BRITAIN	125
5.2.1. Subsidiarity	126
5.2.2. Good functioning of the Union	130
5.2.3. Extension of codecision	131
5.3. PORTUGAL	136
5.3.1. Subsidiarity	137
5.3.2. Good functioning of the Union	138
5.3.3. Extension of codecision	140
6. CONCLUDING REMARKS	141

*Table of Contents*

**PART II – COMPETENCES**

**EUROPEAN SCRUTINY AFTER LISBON: LOCKED AND LOADED**

1. OBJECTIVES	147
2. METHOD	148
2.1. Area of Freedom, Security and Justice	149
2.1.1. Passerelles	150
2.1.2. The Environmental Crimes case	151
2.1.3. Europol	152
2.2. Common Foreign and Security Policy and Common Security and Defence Policy	154
2.3. Experimental and comitology decision making	157
2.3.1. Open method of coordination	157
2.3.2. Comitology	160

**CHAPTER 6**

**FRANCE: A FOUNDER WITH UNABATED ZEAL**

1. THE FRENCH PARLIAMENT IN THE CONSTITUTIONAL ORDER OF FRANCE	163
1.1. Parliament	163
1.1.1. Composition	163
1.1.2. Legislative process	164
1.2. The Government	168
1.2.1. Composition	168
1.2.2. Ministerial responsibility	169
A. Information instruments	169
B. Resignation instruments	170
1.3. The President of the Republic	172
2. THE CONCEPT OF <i>PARLEMENTARISME RATIONALISÉ</i> : THE BRIDLING OF PARLIAMENT	174
2.1. Origins and definition	174
2.2. Two tenets against Parliament's resurrection to its mighty past	175
2.2.1. Parliament's loss of the monopoly of law	175
A. Parliament as the legislature	175
B. Government as the legislature	177
C. People as the legislature	178
2.2.2. Parliament's loss of sovereignty	178
2.3. Five decades after: <i>parliamentarisme rationalisé</i> in peril?	180
2.3.1. The emergence of partisan politics	181
2.3.2. Cohabitations	183
3. THE FRENCH PARLIAMENT... STILL OF THE FIFTH REPUBLIC	185
4. LIMITED TRANSFER AS THE CENTERPIECE OF FRANCE'S RELATIONS WITH THE EU	187

5. THE FRENCH PARLIAMENT'S COMPETENCE OF EUROPEAN SCRUTINY	189
5.1. Adapting to Europe	189
5.2. Information for scrutiny	193
5.3. Instruments of scrutiny	195
5.4. Scope of scrutiny	203
5.4.1. Area of Freedom, Security and Justice	203
A. Passerelles and EU criminal law competence	203
B. Europol	207
5.4.2. Common Foreign and Security Policy and Common Security and Defence Policy	209
5.4.3. EU international agreements	213
5.5. Addressee of scrutiny	213
5.5.1. Relations with the European Parliament	214
5.5.2. Relations with the Commission	216
A. Informal contacts	216
B. Scrutiny of the Commission's legislative planning	218
C. The Barroso initiative	219
6. CONCLUDING REMARKS	221
<b>CHAPTER 7</b>	
<b>THE UNITED KINGDOM: A VIGILANT AND ASSIDUOUS SCRUTINEER</b>	223
1. WESTMINSTER IN THE CONSTITUTIONAL ORDER OF THE UNITED KINGDOM	223
1.1. The British constitution	223
1.2. Parliament	225
1.2.1. Composition	225
1.2.2. Legislative process	226
1.3. The Government	228
1.3.1. Composition	228
1.3.2. Ministerial responsibility	229
1.4. The monarch	234
2. PARLIAMENTARY SOVEREIGNTY AS THE KEY TO BRITAIN'S RELATIONS WITH THE EU	235
2.1. Defining the concept	236
2.2. Foundations of parliamentary sovereignty	237
2.3. The European Communities Act	240
2.4. Parliamentary sovereignty in the courtrooms	241
3. THE BRITISH PARLIAMENT'S COMPETENCE OF EUROPEAN SCRUTINY	246
3.1. Adapting to Europe	246
3.2. Information for scrutiny	247
3.3. Instruments of scrutiny	250

## Table of Contents

3.4.	Scope of scrutiny	261
3.4.1.	Area of Freedom, Security and Justice	261
A.	Opt-ins	262
B.	Passerelles and EU criminal law competence	267
C.	Europol	270
3.4.2.	Common Foreign and Security Policy and Common Security and Defence Policy	275
3.4.3.	EU international agreements	281
3.4.4.	Open method of coordination	282
3.4.5.	Comitology	283
3.5.	Addressee of scrutiny	284
3.5.1.	Factors conducive to 'scrutiny beyond borders'	287
3.5.2.	Relations with the European Parliament	289
3.5.3.	Relations with the Commission	292
A.	Informal contacts	292
B.	Scrutiny of the Commission's legislative planning	293
C.	The Barroso initiative	295
3.5.4.	Influencing the EU level: far-flung or genuine?	296
4.	CONCLUDING REMARKS	298
<b>CHAPTER 8</b>		
<b>PORTUGAL: A PROPITIOUS NEWCOMER</b>		
		301
1.	TAKING EUROPE'S SOUTH SERIOUSLY	301
2.	THE ASSEMBLY OF THE REPUBLIC IN THE CONSTITUTIONAL ORDER OF PORTUGAL	302
2.1.	The thorny road to democracy	302
2.2.	The Portuguese Constitution	303
2.3.	The Assembly of the Republic	305
2.3.1.	Composition	305
2.3.2.	Legislative process	305
2.4.	The Government	306
2.4.1.	Composition	306
2.4.2.	Ministerial responsibility	307
2.5.	The President of the Republic	309
3.	DEMOCRACY AS THE CRUX OF PORTUGAL'S RELATIONS WITH THE EU	311
4.	THE PORTUGUESE PARLIAMENT'S COMPETENCE OF EUROPEAN SCRUTINY	312
4.1.	Adapting to Europe	312
4.2.	Constitutional framework of the Assembly's European scrutiny	316
4.3.	Statutory and informal framework of the Assembly's European scrutiny	317
4.4.	The 2010 scrutiny reform: reinforcing <i>ex ante</i> involvement	319
4.5.	Information for scrutiny	320

4.6. Instruments of scrutiny	321
4.7. Scope of scrutiny	326
4.7.1. Area of Freedom, Security and Justice	326
A. Passerelles and EU criminal law competence	326
B. Europol	326
4.7.2. Common Foreign and Security Policy and Common Security and Defence Policy	327
4.7.3. EU international agreements	329
4.7.4. Open method of coordination and comitology	329
4.8. Addressee of scrutiny	329
4.8.1. Relations with the European Parliament	331
4.8.2. Relations with the Commission	331
A. Informal contacts	331
B. Scrutiny of the Commission's legislative planning	332
C. The Barroso initiative	335
5. CONCLUDING REMARKS	339

### **PART III – CLAIMS**

#### **NATIONAL PARLIAMENTS AND EU INSTITUTIONS: DETACHMENT OR RAPPROCHEMENT?**

1. OBJECTIVES	345
2. METHOD	345
2.1. Case study selection	345
2.1.1. Political salience	346
2.1.2. Representativeness	347
2.2. Questions and hypotheses	347

### **CHAPTER 9**

#### **THE SERVICES DIRECTIVE: A POLARISED RESPONSE TO MARKET LIBERALISATION**

1. BACKGROUND	351
2. FRANCE	354
2.1. Assemblée nationale	354
2.1.1. Scrutiny claims	354
2.1.2. Analysis	360
2.2. Sénat	361
2.2.1. Scrutiny claims	361
2.2.2. Analysis	365
3. THE UNITED KINGDOM	366
3.1. House of Commons	366
3.1.1. Scrutiny claims	366
3.1.2. Analysis	368

*Table of Contents*

3.2. House of Lords	369
3.2.1. Scrutiny claims	369
3.2.2. Analysis	371
4. PORTUGAL	372
5. CONCLUDING REMARKS	373

**CHAPTER 10**

**THE SWIFT AGREEMENTS: PITTING PRIVACY AGAINST TERRORISM**

<b>PREVENTION</b>	375
1. BACKGROUND	375
2. FRANCE	379
2.1. Assemblée nationale	379
2.1.1. Scrutiny claims	379
2.1.2. Analysis	382
2.2. Sénat	383
2.2.1. Scrutiny claims	383
2.2.2. Analysis	386
3. THE UNITED KINGDOM	387
3.1. House of Commons	387
3.1.1. Scrutiny claims	387
3.1.2. Analysis	390
3.2. House of Lords	390
3.2.1. Scrutiny claims	390
3.2.2. Analysis	392
4. PORTUGAL	393
5. CONCLUDING REMARKS	393

**CHAPTER 11**

**THE EUROPEAN EXTERNAL ACTION SERVICE: KEEPING THE EUROPEAN  
PARLIAMENT AT BAY**

	395
1. BACKGROUND	395
2. FRANCE	399
2.1. Assemblée nationale	399
2.1.1. Scrutiny claims	399
2.1.2. Analysis	403
2.2. Sénat	404
2.2.1. Scrutiny claims	404
2.2.2. Analysis	406
3. THE UNITED KINGDOM	407
3.1. House of Commons	407
3.1.1. Scrutiny claims	407
3.1.2. Analysis	408

3.2. House of Lords	409
3.2.1. Scrutiny claims	409
3.2.2. Analysis	411
4. PORTUGAL	412
4.1. Scrutiny claims	412
4.2. Analysis	412
5. CONCLUDING REMARKS	413

## **PART IV – CAPACITIES**

### ***NATIONAL PARLIAMENTS AND THE EUROPEAN UNION: DEMOCRATIC LEGITIMACY AND ACCOUNTABILITY?***

#### **CHAPTER 12**

##### **CONCLUSION: NATIONAL PARLIAMENTS AS ORGANS OF THE EUROPEAN UNION**

1. A SKETCH OF AN ANSWER	417
2. CONDITIONS: NATIONAL PARLIAMENTS AS GATEKEEPERS	417
3. COMPETENCES: NATIONAL PARLIAMENTS EUROPEANISED	418
4. CLAIMS: NATIONAL PARLIAMENTS AS EUROPEAN ACTORS	419
4.1. Interpreting the results	419
4.2. Contextualism vindicated	421
4.3. The heuristic value of parliamentary interdependence	422
5. EPILOGUE: NATIONAL PARLIAMENTS IN THE EUROPEAN CONSTITUTIONAL ORDER	422

<b>LIST OF TABLES AND FIGURES</b>	425
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<b>LIST OF INTERVIEWEES</b>	427
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<b>LIST OF EVENTS OBSERVED</b>	429
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<b>APPENDIX 1 Questionnaire for interviews with permanent parliamentary representatives in Brussels</b>	431
---	-----

<b>APPENDIX 2 Discussion points for interviews with members of the House of Lords</b>	433
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<b>APPENDIX 3 Questionnaire for interviews with members of the Portuguese Assembly</b>	437
--	-----

<b>BIBLIOGRAPHY</b>	439
---------------------	-----

*Table of Contents*

<b>SUMMARY</b>	483
<b>SAMENVATTING (SUMMARY IN DUTCH)</b>	485
<b>CURRICULUM VITAE</b>	487

# Chapter 1

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## **Introduction: European Parliamentary Democracy Transcending National Borders**

### **1. FRAMING THE STUDY: WHOSE ARE OUR NATIONAL PARLIAMENTS?**

#### **1.1. Topic**

Parliaments are about democracy and democracy is about what one could call public justice. When you vote, you agree that a group of other persons represent your interests in the reaching of decisions on the organisation of the state and society to which you belong. These representatives then create laws, so that your everyday life could be more orderly and so that society can thrive. These laws affect all members of your political community, yourself and your neighbour alike. If you do not vote, you do not participate in the shaping of the world around you.

This is the situation in a state, but when your state joins a larger entity, such as the European Union, which itself possesses a parliament, matters become more intricate. This book deals with how the national parliaments of the Member States of the European Union, composed of representatives for whom you may vote in national parliamentary elections, use your vote to project your preferences onto EU decisions. National MPs and senators do so predominantly by holding the Government to account for decisions agreed at the EU level. It has become a hackneyed observation, however, that this method of control is deficient, because EU decision making is dominated by qualified majority voting. This means that even though the minister in charge adheres to the standpoint of his or her parliament, there is always a risk that he or she will be outvoted by other ministers in the Council and that, therefore, the parliament will not be able to hold the minister responsible for the unfavourable result of Council negotiations.

Yet both the founding treaties and domestic constitutional developments have incrementally brought about the diversification of national parliamentary participation in EU affairs, not least through bilateral and multilateral cooperation with the European Parliament, the Commission and other national parliaments. At the root of these developments lies the expectation, fostered in both scholarly and policy-making milieus, that national parliaments, as longstanding and venerable conveyors of their populaces' political will, could and would assuage the tarnished image of the EU as an insufficiently democratic and responsible lawmaker. More important than any formal arrangements are informal exchanges between national parliaments and EU institutions. These 'invisible' links add an important dimension to

the national parliamentary scrutiny of EU policies. Hence, although national parliaments operate from domestic constitutional orders, their European scrutiny activities are no longer restricted to these orders. They have pierced the veil of the Union's public realm. From this flows the main research question: *to what extent can national parliaments be considered a source of democratic legitimacy and political accountability for the European Union as such and not only for their own Member State?* In other words, are national parliaments a part of EU democracy? The exercise of constitutional functions by national parliaments beyond the domestic legal confines as well as the opportunities and constraints that shape their participation in the decisional processes of the European Union are the general theme of this book.<sup>1</sup>

## 1.2. Objectives and added value

The present study is placed in the field of European constitutional law. It is a comparative enterprise, since a small number of national parliaments are selected for in-depth inquiry.<sup>2</sup> Academically, the main innovative aspect of the study lies in the bridging of the fields of constitutional law and political science, an approach that has so far largely been missing. The main objective is to steer the academic debate on national parliaments in the European Union towards a contextual constitutional analysis. This is carried out by linking the study of national parliaments with the kindred study of EU constitutionalism, since these two academic camps have so far not had a close encounter in a systematic manner. The assessment of formal scrutiny mechanisms is complemented with an empirical appraisal of their actual operation in political practice, and that not only in relation to the national government but also in relation to EU institutions. The insight to be gained is how national parliaments relate to the contemporary conceptions of EU constitutionalism. Findings related to these questions ultimately tell us more about the elusive nature of the EU's constitution and its complex system of government. These research objectives fit the type of comparative constitutional inquiry that Hirschl labelled *concept formation through multiple description*.<sup>3</sup>

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<sup>1</sup> This theme is embedded in the perception that "Europe constitutes a political opportunity structure that provides domestic actors with new constraints and opportunities, providing some with additional resources while depriving others". Börzel, Tanja A. and Sprungk, Carina. "Undermining democratic governance in the Member States? The Europeanisation of national decision-making," in *Democratic governance and European integration: linking societal and state processes of democracy*, by Ronald Holzhaecker and Erik Albæk (eds), Cheltenham: Edward Elgar Publishing, 2007: 116. Similarly, it has been emphasised that "constraints are always also enabling conditions, and it is impossible to conceive of politics at any site as a duly situated activity without an enabling – and situating – frame of some sort". Walker, Neil. "Not the European Constitution," *Maastricht Journal of European and Comparative Law*, Vol. 15, No. 1, 2008: 140 (emphasis in original).

<sup>2</sup> See *infra* Table 1 and the accompanying text under Section 4 of this Chapter.

<sup>3</sup> Hirschl, Ran. "On the blurred methodological matrix of comparative constitutional law," in *The migration of constitutional ideas*, by Sujit Choudhry (ed.), Cambridge: Cambridge University Press, 2006: 43.

## **2. LITERATURE OVERVIEW: TOWARDS A QUALITATIVE CONSTITUTIONAL ANALYSIS**

### **2.1. The pre-Maastricht placidity: adjusting the lens**

In the early days of the uniting Europe, national parliaments were not the object of sustained and systematic intellectual endeavour. Some of the first academic works appeared in the 1970s. These initial accounts grappled with the growing executive dominance in the processes of national and Community decision making and with the ensuing transformation of the mechanisms of democratic accountability. In his pioneering probe into the national parliaments' position in the Community legal order, Niblock asserted that "a moment's reflection makes it clear that they are by no means totally detached from that complex of procedures and relationships which have been established under the Paris and Rome Treaties" and that "the six national parliaments of the Member States are themselves part of the processes of the Community".<sup>4</sup>

Parliamentary intervention in Community affairs was twofold. First, by virtue of the national systems of government, national parliaments were participants in the Community processes through governments' political accountability to parliaments.<sup>5</sup> Second, by virtue of the founding treaties, national parliaments intervened in two groups of cases: (a) where parliamentary approvals were necessary, such as Treaty amendments, the conclusion of association and trade agreements between the Community and third countries, enlargement, decisions on direct elections to the European Parliament and on the Community's own resources, etc.; and (b) for the implementation of Community directives.<sup>6</sup> In the vernacular of political science, the lack of any meaningful *ex ante* input qualified national parliaments as "external veto players".<sup>7</sup> Despite these legal possibilities, their activity was "isolated and sporadic"

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<sup>4</sup> Niblock, Michael. *The EEC: national parliaments in Community decision-making*. London: Chatham House, 1971: 5 and 8.

<sup>5</sup> Niblock, Michael. *The EEC: national parliaments in Community decision-making*. London: Chatham House, 1971: 8 and 13. However, with regard to the double mandate operative in that period, some authors dealt with the accountability not of the Community executive to the parliamentary bodies, but of MEPs to their national political parties. See for instance: Hearl, Derek and Sargent, Jane. "Linkage mechanisms between the European Parliament and the national parliaments." in *The European Parliament and the national parliaments*, by Valentine Herman and Rinus van Schendelen (eds), Westmead, Farnborough, Hants: Saxon House, 1979: 5; Lodge, Juliet. "MP-MEP links: members of the House of Commons and the dual mandate." in *The European Parliament and the national parliaments*, by Valentine Herman and Rinus van Schendelen (eds), Westmead, Farnborough, Hants: Saxon House, 1979: 223.

<sup>6</sup> Niblock, Michael. *The EEC: national parliaments in Community decision-making*. London: Chatham House, 1971: 20-21.

<sup>7</sup> Benz, Arthur. "Compounded representation in EU multilevel governance," in *Linking EU and national governance*, by Beate Kohler-Koch (ed.), Oxford: Oxford University Press, 2003: 89.

and the Common Market was, with the exception of agriculture, treated as a matter of foreign policy.<sup>8</sup>

Due to the existence of the double mandate, the academic analysis continued through the lens of the relations between national parliaments and the European Parliament as two sites of democratic representation.<sup>9</sup> As two officials of the European Parliament noted, "until the directly elected Parliament acquires adequate powers of scrutiny of the Council of Ministers [...], the national parliaments will continue to exercise their present function of influencing the Council through their own national representatives therein" and added that "such scrutiny is normally exerted in a national, rather than in a Community sense".<sup>10</sup> The channel of influence through the government became the paradigm of national parliamentary involvement in EU decision making. The institutional position of national parliaments in the Community was, nonetheless, acknowledged:

[T]he European Parliament falls short of meeting a series of basic political, constitutional and decision-making requirements concerning the performance of traditional legislative, financial and control parliamentary functions. These are shared by other Community institutions – mainly the Commission and the Council of Ministers – and the national parliaments. Hence, the European Parliament is but one of several national and Community institutions which exercise parliamentary functions in the governing process of the EC.<sup>11</sup>

To capture the repercussions of these shortcomings of the European Parliament for the legitimacy of the Community, the phrase "democratic deficit" was coined in the late 1970s.<sup>12</sup> The works using this phrase mushroomed rapidly over the following decades.

## 2.2. The Maastricht frenzy: parliamentary decline diagnosis

The following phase of the study of national parliaments in the EU was prompted by the direct elections to the European Parliament, catalysed by the Single European Act agenda for the Common Market and fortified by the Maastricht Treaty.

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<sup>8</sup> Niblock, Michael. *The EEC: national parliaments in Community decision-making*. London: Chatham House, 1971: 24 and 33.

<sup>9</sup> Niblock, Michael. *The EEC: national parliaments in Community decision-making*. London: Chatham House, 1971: 66-93; Burban, Jean-Louis. "Relations entre Parlement européen et parlements nationaux." *Revue de Marché Commun*, No. 160, 1972: 780-790. See also: European Parliament, Directorate-General for Research and Documentation, *Relations between the European Parliament and the national parliaments*, Luxembourg, 1978.

<sup>10</sup> Kieffer, Gerard and Millar David. "Relations between the European Parliament and the national parliaments." In *The European Parliament and the national parliaments*, by Valentine Harman and Rinus van Schendelen (eds), Saxon House, 1979: 44.

<sup>11</sup> Herman, Valentine. "The European Parliament and the national parliaments: some conclusions." In *The European Parliament and the national parliaments*, by Valentine Harman and Rinus van Schendelen (eds), Saxon House, 1979: 266.

<sup>12</sup> See: Marquand, David. *Parliament for Europe*. London: Jonathan Cape, 1979.

The comprehensive overhaul performed at Maastricht fuelled the already existing perceptions of the erosion of national parliamentary prerogatives.<sup>13</sup> Namely, as early as 1921, Lord Bryce assessed that the causes of the decline are "either independent of the legislatures themselves, or arise from the intensity of party spirit, or indisposition of men qualified to serve their country to offer themselves as candidates". In spite of this, he argued that "representative assemblies must remain the vital centre of the frame of government in every country not small enough to permit of the constant action of direct popular legislation; and even in such countries they cannot be altogether dispensed with".<sup>14</sup> Decades later, Wheare affirmed the relevance of these findings.<sup>15</sup>

The reasons for parliamentary decline were *inter alia*: the mass electorate; the state's intervention in the economy; the growth of bureaucracy; the need for strong and rapid executive decisions in an age of economic and international crisis; the concentration of public attention and loyalty on heads of government through the mass media; the complexity of modern military and economic problems, and so on.<sup>16</sup> All of these tendencies have been described as a "worldwide crisis of parliamentarism".<sup>17</sup> Houdbine and Vergès, by contrast, described the trend not as a crisis of democracy but as a transformation of the means of expressing it.<sup>18</sup>

Three quarters of a century after Bryce's caveat, Lodge explained the democratic deficit by referring to the inadequacies of the parliamentary control of the Commission and the Council by both the European Parliament and national parliaments:

National parliaments failed to engineer an effective scrutiny, monitoring or control role for themselves vis-à-vis national ministers and governments. They also failed, until 1990, to engage in constructive dialogue – and more importantly, in continuing, regular, communication – with the European Parliament. Given that European parliamentary scrutiny and control were negligible and deficient, the overall result was to increase the democratic deficit.<sup>19</sup>

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<sup>13</sup> Pélassy, Dominique. "Le déclin du parlement en Europe." In *The evolving role of parliaments in Europe*, by Cees Flinterman et al. (eds), Antwerp-Apeldoorn: MAKLU Uitgevers, 1994: 55-71.

<sup>14</sup> Bryce, James. *Modern democracies*, Vol. 2. New York: Macmillan, 1921: 344.

<sup>15</sup> Wheare, Kenneth Clinton. *Legislatures*. Oxford: Oxford University Press, 1963: 219.

<sup>16</sup> Williams, Philip M. *The French Parliament 1958-1967*. London: Allen & Unwin, 1968: 11.

<sup>17</sup> Chandernagor, André. *Un parlement, pour quoi faire ?* Paris: Gallimard, 1967: 19.

<sup>18</sup> Houdbine, Anne-Maire and Vergès, Jean-Raymond. *Le Parlement européen dans la construction de l'Europe des Six*, Paris: Presses Universitaires de France, 1966: 12-14.

<sup>19</sup> Lodge, Juliet. "The European Parliament." In *The European Union: how democratic is it?*, by Svein Andersen and Kjell Eliassen (eds), Sage Publications, 1996: 188.

The threat of a democratic deficit was, therefore, double.<sup>20</sup> To mitigate it, both bilateral and multilateral initiatives were taken between the European and national parliaments.<sup>21</sup> Democracy was a missing element increasingly also in policy implementation processes led by comitology committees.<sup>22</sup> There was no scholarly agreement as to the scale of the democratic deficit. While some authors, such as Majone,<sup>23</sup> took a more balanced view, others defended perhaps extreme positions: whereas Kuper<sup>24</sup> maintained that the Union suffered from a fourfold democratic deficit, Moravcsik<sup>25</sup> and Gustavsson<sup>26</sup> denied it entirely.

Yet the orthodoxy of dire understandings of parliaments adumbrated above has been partially qualified by some authors. While acknowledging the dual nature of the democratic deficit, Judge challenged the notion of an inexorable failure of national parliaments by stressing that they have provided the legitimating frame within which the development of the European Community has been able to take place.<sup>27</sup> Chrysochoou, too, emphasised that the decline of legislatures in Western Europe and the EU's democratic deficit are separate yet interrelated and mutually catalysing phenomena.<sup>28</sup>

### 2.3. The post-Maastricht avalanche: scrutiny as a democracy fix

The wide-ranging transfer of powers to the Union resulted in a variety of adaptations in government-parliament relations, the objective of which was to improve the

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<sup>20</sup> Laprat, Gérard. "Réforme des traités: le risque du double déficit démocratique. Les parlements nationaux et l'élaboration de la norme communautaire," *Revue du Marché Commun*, No. 351, 1991: 710-721.

<sup>21</sup> Quinty, Danièle and Joly, Gilles. "Le rôle des parlements européen et nationaux dans la fonction législative," *Revue du Droit Public*, Vol. 107, 1991: 430-433; Scoffoni, Guy. "Les relations entre le Parlement européen et les parlements nationaux et le renforcement de la légitimité démocratique de la Communauté," *Cahiers de Droit Européen*, Vol. 28, No. 1-2, 1992: 36-40; Bonnamour, Marie-Christine. "Les relations Parlement européen et parlements nationaux à la veille de la Conférence Intergouvernementale de 1996," *Revue du Marché Commun*, No. 393, 1995: 638.

<sup>22</sup> Bignami, Francesca. "The democratic deficit in European Community rulemaking: a call for notice and comment in comitology." *Harvard International Law Journal*, Vol. 40, No. 2, 1999: 456.

<sup>23</sup> Majone, Giandomenico. "Europe's 'democratic deficit': the question of standards." *European Law Journal*, Vol. 4, No. 1, 1998: 5-28.

<sup>24</sup> Kuper, Richard. "The many democratic deficits of the European Union." In *Political theory and the European Union: legitimacy, constitutional choice and citizenship*, by Albert Weale and Michael Nentwich (eds), London: Routledge, 1998: 143-158.

<sup>25</sup> Moravcsik, Andrew. "In defence of the 'democratic deficit': reassessing legitimacy in the European Union." *Journal of Common Market Studies*, Vol. 40, No. 4, 2002: 603-624.

<sup>26</sup> Gustavsson, Sverker. "Defending the democratic deficit." In *Political theory and the European Union: legitimacy, constitutional choice and citizenship*, by Albert Weale and Michael Nentwich (eds), London: Routledge, 1998: 63-81.

<sup>27</sup> Judge, David. "The failure of national parliaments?" *West European Politics*, Vol. 18, No. 3, 1995: 79-100.

<sup>28</sup> Chrysochoou, Dimitris et al. "European democracy, parliamentary decline and the 'democratic deficit' of the European Union." *Journal of Legislative Studies*, Vol. 4, No. 3, 1998: 109-129; Chrysochoou, Dimitris. *Democracy in the European Union*. London: Tauris, 2000: 107-134.

governments' provision of information on EU affairs to parliaments, to enable parliaments to voice their opinion on draft EU legislative dossiers and otherwise to improve their participation in the legislative processes of the Union.

These tendencies have led analysts in the fields of law and political science in the post-Maastricht period to focus mainly, and rightly so, on the evolving norms and practices of national parliamentary scrutiny of EU decision making. These have yielded a comprehensive and insightful body of literature addressing the scrutiny reforms for most of the present 27 Member States.<sup>29</sup> This vast academic output was primarily developed in light of the agency theory, in order to explain the evolving accountability relationships in EU affairs between governments as agents and parliaments as principals.<sup>30</sup> The prevailing approaches have been of a quantitative nature, which directed the debate towards analysing the amount of information parliaments receive from their governments, measuring national parliaments' influence, ranking them according to the 'strength' of their formal powers and explaining the variations in scrutiny regimes.

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<sup>29</sup> See as an illustrative sample: Barrett, Gavin (ed.). *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other Member State legislatures*. Clarus Press, 2008; Cygan, Adam. *National parliaments in an integrated Europe: an Anglo-German perspective*. The Hague: Kluwer Law International, 2001; Katz, Richard and Wessels, Bernhard (eds). *The European Parliament, the national parliaments and European integration*. Oxford University Press, 1999; Kiiver, Philipp. *National parliaments in the European Union: a critical view on EU constitution-building*. Aspen Publishers, 2006; Kiiver, Philipp (ed.). *National and regional parliaments in the European constitutional order*. Groningen: Europa Law Publishing, 2006; Laursen, Finn and Pappas, Spyros A. (eds). *The changing role of parliaments in Europe*. Maastricht: European Institute of Public Administration, 1995; Maurer, Andreas and Wessels, Wolfgang (eds). *"National parliaments on their ways to Europe: losers or latecomers?"*. Baden-Baden: Nomos Verlagsgesellschaft, 2001; Norton, Philip (ed.). *National parliaments and the European Union*. London: Frank Cass, 1996; O'Brennan, John and Raunio, Tapio (eds). *National parliaments within the enlarged European Union: from victims of integration to competitive actors?* Abingdon: Routledge, 2007; Raunio, Tapio. "Always one step behind? National legislatures and the European Union." *Government and Opposition*, Vol. 34, No. 2, 1999: 180-202; Rizzuto, Francesco. "National parliaments and the European Union: part of the problem or part of the solution to the democratic deficit in the European constitutional settlement?" *The Journal of Legislative Studies*, Vol. 9, No. 3, 2003: 87-109; Smith, Eivind (ed.). *National parliaments as cornerstones of European integration*. Kluwer Law International, 1996; Tans, Olaf et al. (eds). *National parliaments and European democracy: a bottom-up approach to European constitutionalism*. Groningen: Europa Law Publishing, 2007.

<sup>30</sup> See for instance: Auel, Katrin. "Democratic accountability and national parliaments: redefining the impact of parliamentary scrutiny in EU affairs." *European Law Journal*, Vol. 13, No. 4, 2007: 487-504; Benz, Arthur. "Path-dependent institutions and strategic veto players: national parliaments in the European Union," *West European Politics*, Vol. 27, No. 5, 2004: 875-900; Bergman, Torbjörn. "National parliaments and EU affairs committees: notes on empirical variation and competing explanations," *Journal of European Public Policy*, Vol. 4, No. 3, 1997: 373-387; Raunio, Tapio. "Holding governments accountable in European affairs: explaining cross-national variation," *The Journal of Legislative Studies*, Vol. 1, No. 3, 2005: 319-342; Saalfeld, Thomas. "Deliberate delegation or abdication? Government backbenchers, ministers and European Union legislation," *Journal of Legislative Studies*, Vol. 11, No. 3-4, 2005: 343-371.

The most recent contributions to the literature correctly identify the necessity of moving the focus of analysis away from describing the scrutiny powers towards examining the actual use of these powers from a qualitative perspective and theorising a more direct inclusion of national parliaments in the EU decision-making process.<sup>31</sup> This does not mean that scrutiny reforms should be neglected altogether, but that the analysis needs to be complemented with empirical data. For instance, in this book we, too, inspect parliamentary scrutiny arrangements, but we also test how they are used in practice in a number of case studies.

The majority of the literature to date remains descriptive and at a quite general stage of reflection. The main drawback is that it isolates national parliaments from the European Union rather than integrating them into a broader constitutional perspective. Such approaches have resulted in an insufficient differentiation between various actors, decision-making contexts and the natures of those decisions, and in ambiguities regarding the position that a national parliament has or could have in these various contexts.<sup>32</sup> This is why this study intends to situate national parliaments within the emerging European constitutional law and order.<sup>33</sup>

The existing literature, nonetheless, provides a solid platform on which to carry out the present study. The intention of this book is to carry forward the research in the field by tying together the hypotheses hitherto developed and by crafting a more

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<sup>31</sup> See: Raunio, Tapio. "National parliaments and European integration: what we know and agenda for future research," *Journal of Legislative Studies*, Vol. 15, No. 4, 2009: 317-334; Sprungk, Carina. "Designing accountability? The impact of formal rules on parliamentary behaviour in EU affairs," *Paper prepared for the workshop "Europeanisation of parliamentary behaviour", Oxford University, 21-22 July 2009*; Kiiver, Philipp. "Legal accountability to a political forum? The European Commission, the Dutch parliament and the early warning system for the principle of subsidiarity," *Maastricht Faculty of Law Working Paper 2009-8*; Miklin, Eric. "Visibility of choices and better scrutiny? The effects of a politicisation of EU decision-making on national parliaments," *Paper prepared for the 5<sup>th</sup> ECPR General Conference, Potsdam, 10-12 September 2009*; Verhey, Luc. "Political accountability: a useful concept in EU inter-institutional relations," in *Political accountability and European integration*, by Luc Verhey et al. (eds), Groningen: Europa Law Publishing, 2009: 68; O'Brennan, John and Raunio, Tapio. "Conclusion: national parliaments gradually learning to play the European game," in *National parliaments within the enlarged European Union: from victims of integration to competitive actors?*, by John O'Brennan and Tapio Raunio (eds), London: Routledge, 2007: 273; Tans, Olaf. "Conclusion: national parliaments and the European Union: coping with the limits of democracy," in *National parliaments and European democracy: a bottom-up approach to European constitutionalism*, by Olaf Tans et al (eds), Groningen: Europa Law Publishing, 2008: 242.

<sup>32</sup> Maduro has rightly highlighted the importance of a contextual institutional analysis, since "authors tend to identify a constitutional deficit in a current institution (for example, the Council) and propose a transfer of decision-making to an alternative institution (for example, the European Parliament) without comparing the relative ability of these institutions in the specific settings under analysis [...]". Maduro, Miguel Poiars. "Europe and the constitution: what if this is as good as it gets?," in *European constitutionalism beyond the state*, Cambridge: Cambridge University Press, 2003: 88-89.

<sup>33</sup> See: Gerkrath, Jörg. *L'émergence d'un droit constitutionnel pour l'Europe*. Brussels: Université de Bruxelles, 1997; Schwarze, Jürgen (ed.). *The birth of a European constitutional order: the interaction of national and European constitutional law*. Baden-Baden: Nomos Verlagsgesellschaft, 2001.

refined and precise tool for evaluating the place of national parliaments in the Union's material constitution.

### **3. STRUCTURE: SUBSTANTIVE PARLIAMENTARY FUNCTIONS IN FOCUS**

The structure of the book follows the analytical framework laid out below and is accordingly divided into four parts. The first three parts are each composed of three chapters presenting descriptive and analytical material, whereas the last part sums them up in a single chapter. Each part contains its own research sub-questions, objectives and methods of achieving them.

The analytical framework is ramified into four abstract elements that most decisively define the status of national parliaments in the EU. These are:

- conditions
- competences
- claims and
- capacities.

These elements are concatenated so as to draw as complete a picture of the research problem as possible. They refer to the substance of parliamentary functions in order to facilitate a comparative appraisal of the performance of parliamentary tasks across legal orders. The elements chosen are indispensable to the present research goals, because they carry the necessary analytical weight while preserving the simplicity of synthetic thinking in a multiparliamentary European setting. Each of these elements represents a part of this book.

*1. The "conditions" part* inquires both about the manner in which the European functions of national parliaments have been crafted in the founding treaties and about the manner in which these parliaments have agreed to a transfer of sovereignty to the EU. As representative institutions engendered through domestic electoral processes, national parliaments have an interest in this fundamental issue, because the takeover of powers by EU institutions qualifies the exercise of their own powers. Since the representation of citizens is a universal ingredient of parliaments,<sup>34</sup> it needs to be tested whether there is a clash between national parliaments and the European Parliament and, if so, in which areas and how it manifests itself.<sup>35</sup> The conditions of

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<sup>34</sup> Laundry, Philip. *Parliaments in the modern world*. Aldershot: Dartmouth Publishing, 1989: 11.

<sup>35</sup> It has been argued that "the EU has consciously sought to develop dual legitimation in practice, through an acknowledgment that both national parliaments and the European Parliament have roles to play in providing authorisation, representation and accountability in the Union". Judge, David and Earnshaw, David. *The European Parliament*, Basingstoke: Palgrave Macmillan, 2008: 273. National parliaments and the European Parliament may be envisaged as acting as "collective representatives of a constitutive power of the European peoples". Gerkrath, Jörg. *L'émergence d'un droit constitutionnel pour l'Europe*. Brussels: Université de Bruxelles, 1997: 265. Moreover, it has been held that "[u]ntil the institutions of the European Union achieve a similar level of legitimacy, then it can be argued that national parliaments – at a minimum – must fill the gap". Norton, Philip. "National parliaments and the European Union: where to from here?," in *Lawmaking in the European Union*, by Paul Craig and Carol Harlow, London: Kluwer Law International, 1998: 213. The principal reason, therefore, as to why a national parliament could be deemed entitled to act directly within the European legal order is that the

sovereignty transfer therefore shed light on the national parliaments' attitudes towards European integration in general as well as towards the state of democracy in the Union. In this sense, national parliaments reveal their role perceptions concerning the EU. Such parliamentary self-assessments offer valuable clues for the study of their perceived functions within the European constitutional order. They represent signposts on the road of the 'soft' evolution of the Union's material constitution, tacitly unravelling beneath its formal, 'hard' coating. This part thus analyses the national parliamentary scrutiny of primary EU law that was carried out during the procedures of Treaty ratification or, where relevant, of constitutional amendment. This is the only part that combines a top-down approach, i.e., an approach that views national parliaments from the EU perspective, with a bottom-up approach, i.e., an approach that views national parliaments from their Member State's perspective. The remaining parts adopt a bottom-up approach.<sup>36</sup>

2. *The "competences" part* is a collection of the rights and duties that pertain to national parliaments for the scrutiny of secondary EU law, i.e., draft EU initiatives in the broadest sense. These competences exist as compensation for the fact that a portion of the two core parliamentary prerogatives, those of legislation and control of the executive,<sup>37</sup> are now spread across EU institutions. An examination of the national constitutional, statutory and informal rules and practices governing parliamentary involvement in EU decision making yields a valuable insight into the possibilities and constraints related to the information, instruments, scope and addressees of scrutiny. This part combines black-letter research with empirical inquiry.

3. *The "claims" part* presents the qualitative empirical data drawn from 15 detailed case studies conducted to investigate how parliamentary conditions and competences are applied in practice. For the five Houses of Parliament existing in France, the United Kingdom and Portugal, we ask a set of questions regarding their scrutiny of three dossiers: the Services Directive, the EU-US SWIFT Agreements and the European External Action Service Decision. In particular, we search for the arguments employed by these parliaments during the course of the *ex ante* scrutiny as regards not merely their own government but also the relevant EU institutions.<sup>38</sup> The

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Union exercises public power over the citizens whom they represent. Yet since the European Parliament also represents the citizens, the question of the division of labour arises. Namely, there is no systematic empirical evidence as to whether national parliaments act with more determination in the fields where the European Parliament is excluded from decision making and, correspondingly, whether they act with less determination when the European Parliament decides with the Council.

<sup>36</sup> See a similar analytical orientation in: Tans, Olaf et al. (eds). *National parliaments and European democracy: a bottom-up approach to European constitutionalism*. Groningen: Europa Law Publishing, 2007.

<sup>37</sup> Laundry, Philip. *Parliaments in the modern world*. Aldershot: Dartmouth Publishing, 1989: 65 and 84.

<sup>38</sup> Several authors envisage direct relations between national parliaments and EU institutions. See for instance: Besselink, Leonard. *A composite European constitution*. Groningen: European Law Publishing, 2007: 18-19; Kiiver, Philipp. "The composite case for national parliaments in the European Union: who

crux of the analysis is to extract the reasoning underlying their scrutiny claims. More specifically, we wish to discover whether there are instances that prompt national parliaments to transcend their national mandate and assume what could be labelled their European mandate.<sup>39</sup> As with the conditions, we seek to expose national parliaments' role perceptions in different EU decision-making contexts. Claims, hence, are an instrumental element.

4. *The "capacities" part* is a sublimation of all the previous parts. They assess whether and, if so, to what degree national parliaments operate not only as national but also as EU organs.<sup>40</sup> It is hypothesised that the power that the Union wields over the citizens may lure national parliaments into acting beyond the strictly domestic frame of reference. Their interactions with the EU level, such as formal or informal meetings, or quasi-interactions, such as interdependent scrutiny, are revelatory of this phenomenon. These cross-level contacts are the focus of analysis. The added value of this lies in evaluating the national parliaments' aptitude for balancing executive dominance inherent in the EU constitution by lending the Union some of its legitimising and accountability functions. The study will show whether what Scelle dubbed *dédoublement fonctionnel* or role-splitting applies to national parliaments.<sup>41</sup> This closing part is, therefore, an interpretative enterprise.

Below is a figure that assembles each of the analysed elements of national parliamentary involvement in EU affairs.

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profits from enhanced involvement?" *European Constitutional Law Review*, Vol. 2, No. 2, 2006: 230 and 251.

<sup>39</sup> Senden, Linda and Vandamme, T.A.J.A. "Het Verdrag van Lissabon en het Europese mandaat van nationale parlementen." *SEW Tijdschrift voor Europees en economisch recht*, No. 1, 2009: 21-27; Eijssbouts, W. T. "Fundering en geleding: opmerkingen over Lissabon en de institutionele evolutie van de Unie," *SEW Tijdschrift voor Europees en economisch recht*, No. 3, 2008: 84.

<sup>40</sup> Jančić, Davor. "A new organ of the European Union – 'National Parliaments Jointly'." *Federal Trust for Education and Research, Policy Commentary*, London, February 2008.

<sup>41</sup> See more in: Scelle, George. *Précis de droit des gens: principes et systématique*. Paris: Recueil Sirey, 1932-1934; Cassese, Antonio. "Remarks on Scelle's theory of "role splitting" (*dédoublement fonctionnel*) in international law." *European Journal of International Law*, Vol. 1, No. 1, 1990: 210-231; Thierry, Hubert. "The thought of Georges Scelle." *European Journal of International Law*, Vol. 1, No. 1, 1990: 193-209.

Figure 1. *Elements of national parliamentary involvement in EU decision making*



#### **4. METHODOLOGY: LEGAL AND EMPIRICAL ANALYSIS COMBINED**

The general method applied is the *legal analysis* of constitutional literature and parliamentary documents. A number of semi-structured interviews were conducted with relevant clerks and members of the European Affairs Committees of the parliaments studied as well as with the latter's permanent parliamentary representatives in Brussels. The aim of these interviews was to confirm or falsify the research results or gain further knowledge about the matters discussed.

The nature and goals of the research project have demanded certain choices to be made. The most important among them was the choice of the Member States to be studied. France, the United Kingdom and Portugal were selected as the optimal representative sample. Even though they are not and cannot be representative of the parliaments of all 27 Member States, these three countries furnish a sufficiently broad sample for a qualitative comparison. The key selection criteria are based on the data available in the literature and include the following categories: system of government, structure of parliament, type of legislature, scrutiny powers, type of scrutiny, type of constitution, date of EU accession and territory.<sup>42</sup>

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<sup>42</sup> See some of the criteria that Norton used in his edited volume: Norton, Philip. "Introduction: adapting to European integration.", In *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 9-11.

Table 1. *Selection of countries according to the politico-constitutional parameters*

	France	United Kingdom	Portugal
<b>System of government</b>	semi-presidential	parliamentary	premier-presidential <sup>43</sup>
<b>Structure of parliament</b>	bicameral	bicameral	unicameral
<b>Type of legislature<sup>44</sup></b>	policy-influencing	policy-influencing	little or no policy effect
<b>Scrutiny powers<sup>45</sup></b>	medium	intensive	low
<b>Type of scrutiny<sup>46</sup></b>	document-based, scrutiny reserve	document-based, scrutiny reserve	document-based, no scrutiny reserve
<b>Type of constitution</b>	revolutionary	evolutionary	revolutionary
<b>Date of EU accession</b>	1951	1973	1986
<b>Territorial aspect</b>	west	north	south

The research project focuses both on primary and secondary EU law. For this purpose, several dossiers have been selected. As regards the founding treaties, we analyse the national parliamentary scrutiny of the Coal and Steel Community Treaty, the Maastricht Treaty and the Lisbon Treaty. As regards secondary EU law, we analyse the Services Directive, the EU-US SWIFT Agreements and the European External Action Service Decision. The reasons for choosing these specific dossiers are further explained in Part III of this book.

<sup>43</sup> Roper, Steven D. "Are all semipresidential regimes the same? A comparison of premier-presidential regimes." *Comparative Politics*, Vol. 34, No. 3, 2002: 254.

<sup>44</sup> Norton, Philip. "The legislative powers of parliament." In Flinterman, Cees et al. (eds). *The evolving role of parliaments in Europe*. Antwerp-Apeldoorn: MAKLU Uitgevers, 1994: 18 and 20; Mezey classified parliaments into five types: vulnerable, marginal, active, reactive and minimal. See more in: Mezey, Michael. *Comparative legislatures*. Durham: Duke University Press, 1979: 36.

<sup>45</sup> Maurer, Andreas and Wessels, Wolfgang. "National parliaments after Amsterdam: from slow adapters to national players?" In *National parliaments of their ways to Europe: losers of latecomers?*, by Andreas Maurer and Wolfgang Wessels (eds), Baden-Baden: Nomos Verlag, 2001: 449 and 463; Fraga, Ana. "The Parliament of Portugal: loyal scrutiny and informal influence." In *National parliaments on their way to Europe: losers or latecomers*, by Andreas Maurer and Wolfgang Wessels (eds), Baden-Baden: Nomos Verlag, 2001: 359-375; Raunio, Tapio. "Ensuring democratic control over national governments in EU affairs." In *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other Member State legislatures*, by Gavin Barrett (ed.), Clarus Press, 2008: 11.

<sup>46</sup> COSAC website. "Models of scrutiny in national parliaments.", available at: <http://www.cosac.eu/en/info/scrutiny/scrutiny/>, accessed on 28 March 2009.



## Chapter 2

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### Parliamentary Interdependence: Conceptualising the Relations between National Parliaments and EU Institutions

#### 1. IN SEARCH OF A THEORETICO-METHODOLOGICAL DEVICE

This book departs from the academic quest, particularly pronounced in political science, for a greater effectiveness of national parliamentary scrutiny or for solutions to those aspects of EU democracy that do not fit state-induced concepts. Instead of treating national parliaments solely as national actors, we approach them as European actors in their own right in order to illuminate the legal and political context in which national parliaments scrutinise EU decision making. We do so by incorporating national parliaments into the Union's constitution rather than restricting them to the classic, statal analytical scheme.<sup>47</sup> To achieve this, we examine not only the provisions of the founding treaties and national constitutions but also the 'living' law and politics. This is vital because the mere existence of formal mechanisms of accountability and their translation into constitutional added value have often been erroneously equated.<sup>48</sup>

Yet there is an emphatic lack of a methodological apparatus that would enable this type of inquiry. So, how can we go about accomplishing our goal? One way is to look through the spectacles of interdependence in the constitutional relations of the European polity. The first step is to regard the European Union not as an association of states, but as an association of actors exercising public power over the citizens. We therewith 'unlock' the state and release the actors into a wider constitutional framework.<sup>49</sup> The second step is to gauge the extent to which the actions of these

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<sup>47</sup> See also: Crum, Ben and Fossum, John E. "Multilevel parliamentary field: a framework for theorising representative democracy in the EU," *European Political Science Review*, Vol. 1, No. 2, 2009: 250.

<sup>48</sup> This problem has rightly been noticed by several authors. See: Auel, Katrin. "Democratic accountability and national parliaments: redefining the impact of parliamentary scrutiny in EU affairs," *European Law Journal*, Vol. 13, No. 4, 2007: 494; Benz, Arthur. "Path-dependent institutions and strategic veto players: national parliaments in the European Union," *West European Politics*, Vol. 27, No. 5, 2004: 896.

<sup>49</sup> Several authors envisage direct relations with EU institutions as a possible course of action of national parliaments and some of them call this "strategic Europeanisation". See: Auel, Katrin. "Adapting to Europe: strategic Europeanisation of national parliaments," in *Democratic governance and European integration: linking societal and state processes of democracy*, by Ronald Holzhaecker and Erik Albaek (eds), Northampton: Edward Elgar Publishing, 2007: 166; Benz, Arthur. "Path-dependent institutions and strategic veto players: national parliaments in the European Union," *West European Politics*, Vol. 27, No. 5, 2004: 887-888; Hendrik Vos. "National/regional parliaments and EU decision-making under the new Constitutional Treaty," *European Institute of Public Administration Working Paper No. 2005/02*,

actors are mutually interdependent. To these ends, parliamentary interdependence is introduced both as a theoretical approach and a heuristic device customised for the study of national parliaments in EU constitutionalism.

Interdependence, however, is by no means a novel term or idea. Many scholars of EU governance and constitutional studies have employed it for their own analytical purposes. Parliamentary interdependence draws inspiration from these existing concepts and uses them as a new layer of analysis.

## 2. INTERDEPENDENCE AND EU GOVERNANCE

The inner corpus of the EU has been described from the angle of interdependence particularly in governance and public policy studies. The Union is characterised by "diffuse control mechanisms" due to the continuous fragmentation of the executive sphere, multiple access channels to decision making and multiple control mechanisms of political authorities.<sup>50</sup> The following examples illustrate the plausibility and possible usage of interdependence as a way of studying non-hierarchical processes involving the exercise and control of public power.

In new governance networks, such as the open method of coordination, one speaks of *peer accountability*. This presupposes the precedence of informal over formal accountability mechanisms and the reliance on 'soft' sanctions, such as benchmarking and monitoring, rather than on formal, 'hard' sanctions. Mutual interdependence between actors derives from the fear of naming and shaming, which in turn results in a horizontal system of checks and balances.<sup>51</sup> Briefly, "functional interdependence" leads to joint action.<sup>52</sup>

Akin to Bovens' definition of *horizontal accountability* as a relationship between an actor and a forum in which the rendering of account is voluntary and in which there is neither mutual hierarchy nor specific intervention by the principal.<sup>53</sup> This type of accountability mostly occurs between, on the one hand, agencies or public managers and, on the other, the public at large, civil interest groups, charities or associations of clients. In O'Donnell's version of horizontal accountability, the emphasis is not on actors possessing formal accountability powers or not, but on

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p. 21; Töller, Annette Elisabeth. "How European integration impacts on national legislatures: the Europeanisation of the German Bundestag," *Harvard Centre for European Studies, Germany and Europe Working Paper No. 06.2*, 2006.

<sup>50</sup> Costa, Olivier et al. "Introduction: diffuse control mechanisms in the European Union: towards a new democracy?," *Journal of European Public Policy*, Vol. 10, No. 5, 2003: 668-669.

<sup>51</sup> Papadopoulos, Yannis. "Problems of democratic accountability in network and multilevel governance," *European Law Journal*, Vol. 13, No. 4, 2007: 480-481.

<sup>52</sup> Hodson, Dermot and Maher, Imelda. "The open method as a new mode of governance: the case of soft economic policy coordination," *Journal of Common Market Studies*, Vol. 39, No. 4, 2001: 738.

<sup>53</sup> Bovens, Mark. "Analysing and assessing accountability: a conceptual framework," *European Law Journal*, Vol. 13, No. 2, 2007: 460.

them operating at the same level of governance or having the same rank.<sup>54</sup> Although these horizontal relations allow one to surpass the entire hierarchical chain of accountability,<sup>55</sup> including parliaments, their non-obligatory character may serve as an analogy for the relations between national parliaments and EU institutions, in which hierarchical accountability equally does not exist.

Among the governance accounts, Scott's *interdependent accountability* is particularly relevant:

Interdependence provides a model of accountability in which the formal parliamentary, judicial, and administrative methods of traditional accountability are supplemented by an extended accountability. Interdependent actors are dependent on each other in their actions because of the dispersal of key resources of authority (formal and informal), information, expertise, and capacity to bestow legitimacy such that each of the principal actors has constantly to account for at least some of its actions to others within the space, as a precondition to action.<sup>56</sup>

Yet the interdependence thesis that appears most applicable to national parliaments, because it blends into constitutionalism, is that charted by Sand:

[W]ithin the larger arena of the EC/EU and their Member States, there will also, however, be multiple sets of institutions with the same communicative functions which are cooperating and competing in different ways. They will each have their supremacies within different geographical or functional areas. Their relations can rather be described as some sort of mutual interdependency with both legal and more factual elements. The combination of national and supranational levels with parallel functions opens up for more complex entanglements of law and politics [...] There will thus be mutual and competing interpretations of legal and political texts and decisions both between various institutions performing the same functions, and between functionally different institutions belonging to different systems. The relations between institutions with the same type of authority belonging to different, but legally connected, political and constitutional systems might be quite difficult to establish.<sup>57</sup>

All of the above parameters of interdependence are practicable ideational parallels for the concept of parliamentary interdependence insofar as they suggest that the

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<sup>54</sup> O'Donnel, Guillermo. "Horizontal accountability in new democracies," in *The self-restraining state: power and accountability in new democracies*, by Larry Diamond et al. (eds), Boulder: Lynne Rienner, 1999: 38.

<sup>55</sup> Bovens, Mark. "Public accountability," in *The Oxford handbook of public management*, by Ewan Ferlie et al. (eds), Oxford: Oxford University Press, 2005: 199.

<sup>56</sup> Scott, Colin. "Accountability in the regulatory state," *Journal of Law and Society*, Vol. 27, No. 1, 2000: 50.

<sup>57</sup> Sand, Inger-Johanne. "Understanding the new forms of governance: mutually interdependent, reflexive, destabilised and competing institutions," *European Law Journal*, Vol. 4, No. 3, 1998: 283 (emphasis in original).

participating actors shape their institutional behaviour in relation to that of their peers.

### 3. INTERDEPENDENCE AND EU CONSTITUTIONALISM

The literature overview shows that national parliaments have hitherto been analysed autonomously from the theoretical explanations of EU constitutionalism. An incentive for the present study thus lies in placing national parliaments in the midst of an overarching academic debate on the process of the constitutionalisation of the EU. Two reasons underpin this endeavour. First, parliaments of the Member States are a part of this process.<sup>58</sup> In a sense, they always will be. As Magnette reminds us, "national elections are an important element of 'European democracy' because national governments remain the cornerstone of the European political system".<sup>59</sup> Second, constitutionalism is a potent frame of reference. As Walker explains:

Viewed as a general discursive register rather than a specific set of state-puzzle-solutions, constitutionalism is linked in a powerful and resilient chain of signification to a whole series of *substantive* institutional values – such as democracy, accountability, equality, the separation of powers, the rule of law and fundamental rights [...]<sup>60</sup>

The contemporary paradigms of EU constitutionalism have so far depicted the Union as federal, multilevel, composite, pluralist, polyarchic, polycentric, compound, synallagmatic or otherwise. Their common thread is that the EU and its Member States are interlaced as constitutive components of an encompassing entity, the European constitutional order. Because of this interlacement, these paradigms imply that the parliaments of the Member States can be regarded as founts of EU democracy. However, they do not offer an analytical toolkit to assess national parliaments in light of the principle that the "functioning of the Union shall be founded on representative democracy".<sup>61</sup> This principle itself does not expound how the two key elements of EU representative democracy, the European and national parliaments, operate in relation to one another.

We proceed with a succinct critical review of the most relevant conceptions of EU constitutionalism in order to distill the similarities and differences in their positioning of national parliaments on the Union's constitutional chart. Since they carry greater explanatory potential for the study of national parliaments, the focus is

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<sup>58</sup> Snyder, Francis. "The unfinished constitution of the European Union: principles, processes and culture," in *European constitutionalism beyond the state*, by Joseph H.H. Weiler and Marlene Wind (eds), Cambridge: Cambridge University Press, 2003: 63.

<sup>59</sup> Magnette, Paul. *La constitution de l'Europe*, Brussels: Éditions de l'Université Libre de Bruxelles, 2002: 146.

<sup>60</sup> Walker, Neil. "Postnational constitutionalism and the problem of translation," in *European constitutionalism beyond the state*, by Joseph H.H. Weiler and Marlene Wind (eds), Cambridge: Cambridge University Press, 2003: 33 (emphasis in original).

<sup>61</sup> Article 10(1) TEU.

on heterarchical rather than hierarchical concepts, whose main and most general assumption is that the constitutional relations between the Union and the Member States are cast in harmony, complementarity, interpenetration and dialogue. In the words of Quadros, "the appearance of a European constitution [...] does not provoke the disappearance, destruction or futility of national constitutions"; instead, the latter enrich the former.<sup>62</sup>

### 3.1. Federalism

The logic of federalism has fed much intellectual effort in framing the division and organisation of public power in the European Union. This effort was worthwhile insofar as, to borrow Weiler's abstraction, "European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power".<sup>63</sup> Yet with regard to national parliaments, the link between federalism and the EU is less relevant. We explain this with the example of Germany as a federal state.<sup>64</sup>

As rightly maintained by Manfred Zuleeg, a former judge of the Court of Justice, "parallel activities of parliaments at the European and at the national level are not irreconcilable with the principle of democracy even if one is much more powerful than the other".<sup>65</sup> However, he also argues that such relations exist in Germany between the Federation and the *Länder*. This would mean that the Bundestag and, for instance, the *Landtag* of North Rhine-Westphalia coexist in harmony. While this is true, any further analogy does not adequately apply to the EU, because no agency loss could be hypothesised to have occurred in the relations between the *Länder* and the Federation, and thus between the *Landtag* and the *Bundestag*.<sup>66</sup> Conversely, the EU democratic deficit stems precisely from the uneven takeover by the European Parliament of the transferred national parliaments' powers.

Namely, when the *Landtag*, with the exception of Bavaria, approved the *Grundgesetz* in May 1949, they transferred not only powers to the Federation but

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<sup>62</sup> Quadros, Fausto de. "Constituição europeia e constituições nacionais – subsídios para a metodologia do debate em torno do Tratado Constitucional Europeu," *O Direito*, Vol. 137, No. 4-5, 2005: 696.

<sup>63</sup> Weiler, Joseph H.H. "In defence of the status quo: Europe's constitutional *Sonderweg*," in *European constitutionalism beyond the state*, by Joseph H.H. Weiler and Marlene Wind (eds), Cambridge: Cambridge University Press, 2003: 9.

<sup>64</sup> See the background in: Tettinger, Peter J. "Federalism in the Federal Republic of Germany and the European Union," *Duquesne Law Review*, Vol. 44, No. 1, 2005: 53-70; See also a comprehensive comparative analysis of some other federal states in: Lenaerts, Koen. "Constitutionalism and the many faces of federalism," *American Journal of Comparative Law*, Vol. 38, No. 2, 1990: 205-264.

<sup>65</sup> Zuleeg, Manfred. "National parliamentary control and European integration," in *The European Union after Amsterdam: a legal analysis*, by Teunis Heukels et al. (eds), The Hague: Kluwer Law International, 1998: 298.

<sup>66</sup> Our focal point for the federal level must be the *Bundestag* and not the *Bundesrat*, because the *Bundesverfassungsgericht* has consistently emphasised since the *Solange I* judgment that it is the *Bundestag* that embodies the democratic representation of the citizens by virtue of Article 38 of the *Grundgesetz*.

also the *Grundnorm*. Germany is thus not governed by the principle of conferral; the EU is. The *Landtage* do not participate in the amendment procedure of the *Grundgesetz*; national parliaments do so in the EU Treaty Conventions and national approval procedures. To be sure, the *Länder* do participate in the amendment procedure of the *Grundgesetz* through the *Bundesrat*, but the *Bundesrat* is a federal and not a *Land* body, and is appointed by *Land* governments and not by the *Landtage*.<sup>67</sup> Even if, disregarding the Western occupying powers' role in the process, we agreed that the *Grundgesetz* has transferred powers from the *Länder* to the Federation and the *Bundestag*, there would still be no agency loss. The *Bundestag*, at times acting jointly with the *Bundesrat*, is fully empowered to perform constitutional functions in Germany; the European Parliament, despite the enhancement of its status through the Lisbon Treaty and political practice, is not. In a nutshell, the *Bundestag* has not only acquired powers, it has become a new principal; the European Parliament has not. It could rather be said that the European Parliament shares the role of principal with national parliaments. Therefore, from the perspective of agency theory, the *Landtage* could not be deemed to be principals in relation to the Federation, whereas national parliaments could in relation to the EU.

Scharpf's conclusion regarding political legitimacy in multilevel polities provides a good summary of these arguments:

The two-level polity, comprising the EU and its member states, shares some important structural characteristics with German federalism [...] but [...] the differences appear to be much more important. Compared to Germany, the Union is far more dependent on its member states: European legislation must be transposed through national legislatures; European law must be implemented through the administrative agencies and courts of the member states; and European revenue depends almost entirely on national contributions.<sup>68</sup>

To illustrate this further, let us take "compounded representation" as one of the most distinguishing characteristics of federalism. As Tuschhoff maintained, "[i]n federations there are not just one but multiple principals and they authorise not just one but multiple *independent* individual and corporate agents".<sup>69</sup> The fact that these agents are independent rather than interdependent implies a lack of mutual reciprocity between the actors at different levels of government in a federation. The other side of the coin is that accountability linkages also function at these separate levels without interaction. This separateness and autonomy originates in the

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<sup>67</sup> Article 51(1) of the *Grundgesetz*.

<sup>68</sup> Scharpf, Fritz W. "Legitimacy in the multilevel European polity," *European Political Science Review*, Vol. 1, No. 2, 2009: 179-180. See *contra*: Börzel, Tanja and Risse, Thomas. "Who is afraid of a European federation? How to constitutionalise a multilevel governance system," in *What kind of a constitution for what kind of polity? Responses to Joschka Fischer*, by Christian Joerges et al (eds), *Harvard Jean Monnet Working Paper No. 7/00*, p. 53.

<sup>69</sup> Tuschhoff, Christian. "The compounding effect: the impact of federalism on the concept of representation," *West European Politics*, Vol. 22, No. 2, 1999: 18 (emphasis added).

apportionment of constitutional authority by the polity's constitution. In the EU, precisely this question of the ultimate source of constitutional authority is unsettled and is the object of a chicken-and-egg dilemma. The intellectual perplexity that this almost inevitably causes is very well instantiated in labelling the EU "confederal federalism".<sup>70</sup> If one really wished to capture the Union and its parliaments in a state-like manner, the concepts of devolved (UK) or decentralised (France) unitary states would conceptually furnish a better analogy. Yet it will surely take a long time before we can encapsulate the nature of the Union by a single meaningful concept. This should certainly not keep us from studying the phenomenon and its many facets.

### **3.2. Constitutional pluralism**

Among the most abstract concepts of EU constitutionalism is that of constitutional pluralism. Dwelling on the ashes of the Westphalian state, this concept posits that the European legal order created by the Treaty of Rome makes independent constitutional claims alongside those of its Member States. This results in what could be described as 'de-hierarchisation' of interstate relations. They become heterarchical, or horizontal, as opposed to hierarchical, or vertical.<sup>71</sup> The nucleus of pluralist constitutional ordering is the argument that, since the boundaries of the EU polity are not merely territorial but also sectoral or functional, the EU's and the Member States' claims to ultimate legal authority need no longer be understood as exclusive but as coexistent.<sup>72</sup>

The reflexive trait of constitutional pluralism is of particular significance for national parliaments as potential interdependent actors in the EU public space. Rodin elucidates this in the following words:

[N]ational and supranational constitutional actors not only act as independent subjects being aware of their powers, but direct their actions towards other actors in [an] attempt to influence and restrict their respective courses of action. At this stage we do not speak merely about passive resistance to certain integration processes, but about national actors [...] taking an active role in their formation. In other words, their actions are no [longer] inward-oriented but addressed to other participants.<sup>73</sup>

Indeed, the key proponents of constitutional pluralism agree that actors at both the EU and national levels need to find ways of "overcoming their rather strongly embedded constitutional complacency in order to integrate the vision of the constitutional actors external to their respective constitutional systems into their own

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<sup>70</sup> Kincaid, John. "Confederal federalism and citizen representation in the European Union," *West European Politics*, Vol. 22, No. 2, 1999: 34-58.

<sup>71</sup> Walker, Neil. "The idea of constitutional pluralism," *Modern Law Review*, Vol. 65, No. 3, 2002: 337.

<sup>72</sup> Walker, Neil. "The idea of constitutional pluralism," *Modern Law Review*, Vol. 65, No. 3, 2002: 346.

<sup>73</sup> Rodin, Siniša. "Constitutional pluralism and the original idea," *Revista General de Derecho Público Comparado*, No. 7, 2010: 3.

perspectives".<sup>74</sup> As Kumm correctly notes, the attractiveness of constitutional monism is prejudiced by the troubles of installing a full-blown democratic process at the EU level.<sup>75</sup>

Without penetrating further into legal and constitutional theory, we carry on with an examination of other pluralist versions of EU constitutionalism that attribute specific roles to national parliaments.

### 3.3. Multilevel constitutionalism

A constitutionalist sibling of multilevel governance,<sup>76</sup> multilevel constitutionalism, coined by Pernice, argues that an inquiry into whether Europe needs a constitution is irrelevant, because Europe already has a multilevel constitution. Such an EU constitution is a *Verfassungsverbund*: "a constitution made up of the constitutions of the Member States bound together by a complementary body consisting of the European Treaties [whereby], although formally separate and belonging to the different levels of government, the institutions of the Community and those of the Member States are closely interlinked, dependent on each other".<sup>77</sup> This partially transforms national courts, administrations and legislatures into "European agencies".<sup>78</sup> This functional complementarity of the two levels of government and the ensuing unity in the substance of EU and national law transform the Union into a "composite legal system".<sup>79</sup>

One of the most distinguishing traits of multilevel constitutionalism is the assertion that by integrating into the Union, the Member States have lost their *Kompetenz-Kompetenz*.<sup>80</sup> The *Herren der Verträge* and the source of European public authority are the citizens and not the Member States.<sup>81</sup> This is a somewhat idealistic theoretical assumption, if one recalls that the citizens are as a rule not consulted in the Union's founding moments. In most Member States, political approval of European integration is a province of parliament. The fact that Treaties are concluded by the Member States' representatives "in the name of the European

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<sup>74</sup> Aybelj, Matej and Komárek, Jan. "Four visions of constitutional pluralism," *European Constitutional Law Review*, Vol. 4, No. 3, 2008: 526-527.

<sup>75</sup> Aybelj, Matej and Komárek, Jan. "Four visions of constitutional pluralism," *European Constitutional Law Review*, Vol. 4, No. 3, 2008: 527.

<sup>76</sup> Hooghe, Liesbet and Marks, Gary. *Multi-level governance and European integration*, Lanham: Rowman & Littlefield, 2001.

<sup>77</sup> Pernice, Ingolf. "Multilevel constitutionalism and the Treaty of Amsterdam: European constitution-making revisited," *Common Market Law Review*, Vol. 36, No. 4, 1999: 707 and 710.

<sup>78</sup> Pernice, Ingolf. "Multilevel constitutionalism and the Treaty of Amsterdam: European constitution-making revisited," *Common Market Law Review*, Vol. 36, No. 4, 1999: 718.

<sup>79</sup> Pernice, Ingolf. "Multilevel constitutionalism and the Treaty of Amsterdam: European constitution-making revisited," *Common Market Law Review*, Vol. 36, No. 4, 1999: 724.

<sup>80</sup> Pernice, Ingolf. "Multilevel constitutionalism and the Treaty of Amsterdam: European constitution-making revisited," *Common Market Law Review*, Vol. 36, No. 4, 1999: 710. See *contra*: Hartley, Trevor C. "The constitutional foundations of the European Union," *Law Quarterly Review*, Vol. 117, 2001: 225.

<sup>81</sup> Pernice, Ingolf. "Multilevel constitutionalism in the European Union," *European Law Review*, Vol. 27, No. 5, 2002: 518.

citizens"<sup>82</sup> does not automatically mean that the citizens thereby become the ultimate constitutional foundation of the Union. It is more a solemn proclamation than fact. Let us now consider the role of national parliaments in these constellations.

According to Pernice's concept, despite the proclaimed non-hierarchical, overlapping nature of the European constitution, a dose of separateness in the respective constitutional functions of the European Parliament and national parliaments is discernible. In his view, "to give the national parliaments a say in the legislative process of the Union in general, would conflict with the role of the European Parliament". Similarly, the national parliaments' role as watchdogs of subsidiarity exists "for their own legitimate interest" and is "limited to a specific function which does not overlap with the functions of the European Parliament".<sup>83</sup> Von Bogdandy seems to subscribe to the separateness proposition when he held that European Parliament elections partly ensure the accountability of the Commission, whereas the accountability of other EU institutions is ensured via national parliamentary elections.<sup>84</sup> Pernice, then, concludes with a normative claim:

Within a two-tiered system for the provision of legitimacy, direct democratic control must be strengthened through regular codecision of the European parliament, but national parliaments acting as European parliaments are complementary and indispensable for the functioning of the European Union [...]<sup>85</sup>

The *Bundesverfassungsgericht*, conversely, champions a diametrically opposite view, namely that national parliaments are the primary and the European Parliament the secondary source of legitimacy for European public authority.<sup>86</sup>

Finally, Pernice rightly describes the Union as a dynamic rather than static constitutional process.<sup>87</sup> The dynamism of this process is important because the roles and functions of constitutional actors evolve over time. Assessing the internal, 'esoteric' dimension of the sub-units of the Union's constitution, Kombos has properly argued that it exhibits chameleonic features: "[T]he different phases of each sub-unit are not rigid because they continue to coexist but with different intensity and

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<sup>82</sup> Pernice, Ingolf. "European v. national constitutions," *European Constitutional Law Review*, Vol. 1, No. 1, 2005: 99.

<sup>83</sup> Pernice, Ingolf. "Multilevel constitutionalism in the European Union," *European Law Review*, Vol. 27, No. 5, 2002: 526.

<sup>84</sup> Bogdandy, Armin von. "The legal case for unity: the European Union as a single organisation with a single legal system," *Common Market Law Review*, Vol. 36, No. 5, 1999: 906.

<sup>85</sup> Pernice, Ingolf. "The role of national parliaments in the European Union," *Walter Halstein Institute Paper 5/01*, p. 17.

<sup>86</sup> Jančić, Davor. "Caveats from Karlsruhe and Berlin: whither democracy after Lisbon?," *Columbia Journal of European Law*, Vol. 16, No. 3, 2010: 355.

<sup>87</sup> Pernice, Ingolf and Mayer, Franz C. "De la constitution composée de l'Europe," *Revue Trimestrielle de Droit Européen*, Vol. 36, No. 4, 2000: 632.

'brightness' in different periods". What characterises the Union's constitution, he submits, is a "plurality of constitutional pluralities".<sup>88</sup>

### 3.4. Composite constitutionalism

Another concept similar to multilevel constitutionalism in respect of its heterarchical and heteronomic approach to the relations between the Union and the Member States is that devised by Besselink under the name of *composite* or *polycentric constitutionalism*. The concept can be grasped by the following passage:

[C]onstitutional interdependence [...] is inherent in an approach to the constitutional reality of Europe in terms of a set of mutually interdependent and communicating constitutions within an overarching composite constitutional order which renders these constitutions coherent.<sup>89</sup>

A pertinent point of discord with the multilevel concept refers to the position of national parliaments. It advocates a theoretical abolition of boundaries between the European and national levels of government. National parliaments form part of an open constitutional space in which they freely interact with EU institutions as immediate counterparts, primarily for the purposes of obtaining information and seeking account. Indicators of such parliamentary action include situations where: parliaments request and receive information on draft EU legislation directly from the Commission; representatives of the Commission visit parliaments to explain their policies; national ministers are asked to justify not only the government's but also the Union's plans and programmes;<sup>90</sup> parliaments not merely defend the position to be represented in the Council but also put forth political views or ideas that, albeit communicated to the minister, are addressed to EU institutions.<sup>91</sup>

With the example of the Dutch *Staten-Generaal*, Besselink and Van Mourik argued that "the thesis that a national parliament has no significant role to play in cases in which the European Parliament has colegislative or codecisive powers is flawed". They offer two reasons: (a) only national parliaments have the power of

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<sup>88</sup> Kombos, Constantinos. "The esoteric dimension of constitutional pluralism: EU's internal constitutional sub-units and the non-symbolic cumulative constitution," in *The European Union legal order after Lisbon*, by Patrick Birkinshaw and Mike Varney (eds), Alphen aan den Rijn: Kluwer Law International, 2010: 308-309.

<sup>89</sup> Besselink, Leonard. "Case C-145/04, Spain v. United Kingdom, judgment of the Grand Chamber of 12 September 2006; Case C-300/04, Eman and Sevinger, judgment of the Grand Chamber of 12 September 2006; ECtHR (Third Section), 6 September 2007, Applications Nos. 17173/07 and 17180/07, Oslin Benito Sevinger and Michiel Godfried Eman v. the Netherlands (Sevinger and Eman)," *Common Market Law Review*, Vol. 45, No. 3, 2008: 803.

<sup>90</sup> Besselink, Leonard. *A composite European constitution*, Groningen: European Law Publishing, 2007: 18-19.

<sup>91</sup> Besselink, Leonard. "National parliaments in the EU's composite constitution: a plea for a shift in paradigm," in *National and regional parliaments in the European constitutional order*, by Philipp Kiiver (ed.), Groningen: Europa Law Publishing, 2006: 119 and 125.

control over the ministers acting in their capacity as members of the Council; and (b) the claim that national parliaments need to retreat whenever the European Parliament enjoys codecisive powers would demote the former into "surrogate parliaments", strip them of their representative function and "deny at least three centuries of European democratic and parliamentary tradition".<sup>92</sup> To use an American constitutional metaphor, this member-state parliamentary heritage is a "sedimentary rock on which we stand".<sup>93</sup>

In this regard, it is equally essential to ask two corresponding questions: first, whether and to what extent national parliaments retain the legislative tasks in policy areas where the European Parliament enjoys codecision powers; and second, whether by transferring powers to the Union national parliaments have actually consented to them being wholly and exclusively exercised by the European Parliament.

Antenbrink shares the polycentric vision of the Union when he argues that subsidiarity control by national parliaments "may in the future enhance the democratic legitimation of Union activities while at the same time adding to the accountability of the Council, the European Commission and the European Parliament".<sup>94</sup>

Yet in his discussion of individual and collective roles of national parliaments in EU affairs, Kiiver warned against an automatic inauguration of parliaments into collective actors just because of the Union's polycentric nature. He highlighted the limitations of composite constitutionalism by arguing that there is no inherent interdependence between the actions of parliaments of different Member States:

If MPs bypass their government to criticise the Council, in which their own government participates in decision making, or if MPs criticise the Commission against their own government's wishes, the scores will be always settled domestically and individually [...]<sup>95</sup>

He demonstrated this with an example of legitimacy perception: "the Irish neither consciously suffer from weak parliamentary oversight in Greece, nor are they comforted by the strict scrutiny practice in Denmark, nor are they relieved to see the

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<sup>92</sup> Besselink, Leonard and Mourik, Brecht van. "The roles of the national parliament and the European Parliament in EU decision-making: the approval of the Lisbon Treaty in the Netherlands," *European Public Law*, Vol. 15, No. 3, 2009: 316.

<sup>93</sup> Friedman, Barry and Smith, Scott B. "The sedimentary constitution," *University of Pennsylvania Law Review*, Vol. 147, No. 1, 1998: 6.

<sup>94</sup> Antenbrink, Fabian. "The multidimensional constitutional legal order of the European Union – a successful case of cosmopolitan constitution-building?," *Netherlands Yearbook of International Law*, Vol. 39, 2008: 57.

<sup>95</sup> Kiiver, Philipp. "European scrutiny in national parliaments: individual efforts in the collective interest?," in *National parliaments within the enlarged European Union*, by John O'Brennan and Tapio Raunio (eds), London: Routledge, 2007: 76.

Commission President appear to answer questions in the French Parliament".<sup>96</sup> So, any scrutiny impact is, at best, indirect.

### 3.5. Synthetic constitutionalism

The idea of synthetic constitutionalism is a variant of the pluralist, multilevel and composite concepts. Rather than endowing itself with a written constitution of the revolutionary type or with a slowly emerging constitution of the evolutionary type, the EU constitution is composed of the constitutions or fundamental laws that the Member States have seconded to the Union. As Menéndez explains, "constitutional synthesis is a slow but steady process of 'communitarisation' of constitutional norms", which rests not only on ratification and amendment of the founding treaties but also on the application of constitutional principles and adjudication.<sup>97</sup> Two of its main merits are, in his eyes, the opening of national constitutional norms to the fundamental laws of all other Member States without prejudice to the existing constitutional identities and the emphasis on the plurality of constitutional sources across the Union.<sup>98</sup>

### 3.6. Multilevel parliamentary field

A recent account by Crum and Fossum attempts to deepen the concepts of multilevel and composite constitutionalism in their parliamentary aspects. They propose a "multilevel parliamentary field" as a means of analysing democratic representation in the Union, whereby the European and national parliaments are integrated under the same analytical matrix. Their central reasoning is, correctly, that the European and national parliaments share the vocation of popular representation.<sup>99</sup>

The most innovative aspect of their analysis is the introduction of role perceptions that structure and guide interparliamentary interaction. These are conceived through the notion of 'habitus', which refers to mental dispositions and presuppositions of the participating actors. The European and national parliamentarians hence share the same role as parliamentarians. The query is

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<sup>96</sup> Kiiver, Philipp. "European scrutiny in national parliaments: individual efforts in the collective interest?," in *National parliaments within the enlarged European Union*, by John O'Brennan and Tapio Raunio (eds), London: Routledge, 2007: 75.

<sup>97</sup> Menéndez, Agustín José. "Governance and constitutionalism in the European order," in *The European Union legal order after Lisbon*, by Patrick Birkinshaw and Mike Varney (eds), Alphen aan den Rijn: Kluwer Law International, 2010: 81.

<sup>98</sup> Menéndez, Agustín José. "Governance and constitutionalism in the European order," in *The European Union legal order after Lisbon*, by Patrick Birkinshaw and Mike Varney (eds), Alphen aan den Rijn: Kluwer Law International, 2010: 82. See further: Menéndez, Agustín José. "From constitutional pluralism to a pluralistic constitution? Constitutional synthesis as a MacCormickian constitutional theory of European integration," *RECON Online Working Paper 2011/02*.

<sup>99</sup> Crum, Ben and Fossum, John E. "Multilevel parliamentary field: a framework for theorising representative democracy in the EU," *European Political Science Review*, Vol. 1, No. 2, 2009: 252 and 260.

specifically targeted at whether MPs and MEPs of a given Member State reinforce each other or compete for authority.<sup>100</sup>

The method of parliamentary interdependence propounded below follows in the footsteps of these analytical directions. It splits with the 'field' approach insofar as the latter favours the examination of "formal structures of interaction, consultation and cooperation among representative bodies",<sup>101</sup> neglecting the fact that much of the interparliamentary evolution has been precisely of an informal nature. Parliamentary interdependence stresses the contextual aspect of interparliamentary interaction and does not insist that there be actual interactions between parliaments; they can be merely ideational.

#### **4. THE CONCEPT OF PARLIAMENTARY INTERDEPENDENCE**

##### **4.1. Parliamentary role perceptions**

The insights from the scholarly works presented above add valuable interpretive shades to the meaning of national parliaments for EU democracy and, as such, provide a strong impetus to further develop some of their postulates. The goal of introducing the method of parliamentary interdependence is to tailor the key aspects of EU constitutionalism to the study of European parliamentary democracy as a constitutional process.

The analysis of parliamentary interdependence relies, beside other things, on institutional role perceptions of the actors involved in EU decision making. Role perceptions furnish the ideational context as opposed to the physical context in which parliamentary scrutiny takes place. The physical context means that national parliaments are based in their nation's capitals and act towards their governments because they are tied to them by national constitutional rules. The ideational context hypothesises that the addressees of scrutiny need not be located in the same, national physical context. Role perceptions can sometimes be even more significant than the actual practice. The centrality of the ideational context of national parliamentary scrutiny is concisely captured by the following:

Self image reports may at times be superior to actual behaviour, since self reports reveal a man's orientation and sometimes his interpretation of desired modes of behaviour, while actual behaviour very often is a victim of a variety of circumstances and hence tends to becloud orientations and preferences.<sup>102</sup>

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<sup>100</sup> Crum, Ben and Fossum, John E. "Multilevel parliamentary field: a framework for theorising representative democracy in the EU," *European Political Science Review*, Vol. 1, No. 2, 2009: 262-263.

<sup>101</sup> Fossum, John Erik. "The future of the European order," in *The European Union legal order after Lisbon*, by Patrick Birkinshaw and Mike Varney (eds), Alphen aan den Rijn: Kluwer Law International, 2010: 54.

<sup>102</sup> Sigel and Pindur cited in: Hagger, Mark and Wing, Martin. "Legislative roles and clientele orientations in the European Parliament," *Legislative Studies Quarterly*, Vol. 4, No. 2, 1979: 167.

It should immediately be conceded, however, that role perceptions are not unproblematic. They can be treacherous, for they come from the mouths and deeds of politicians, whose motives, like everyone else's, can sometimes be ulterior. Also, parliamentarians are a dynamic breed. Not only may their perceptions change, they themselves come and go. Their perceptions, nonetheless, contribute to the formation of the corporate view of a greater whole to which they belong. This is so because each parliamentarian is a representative. Therefore, in gearing the qualitative analysis of role perceptions towards individual politicians, one ought to be attentive to their political affiliations, functions and duties that they embody. The parliamentarians' allegations, declarations, assertions and other claims need to be looked at through the lens of their party membership, parliamentary function (e.g. committee chairmanship or chamber presidency) or temporary duty (e.g. rapporteurship). To paraphrase Jean Monnet, nothing is possible without men but nothing is lasting without institutions. Translated to our cause, national parliaments are not monolithic institutions and the view of a parliament is an aggregation of the views of its members. Thus, the role perceptions of parliamentarians, their political groups or coalitions, help to assemble the Union's bits with the Member States' pieces<sup>103</sup> into a single mosaic and shed light on the Union's "hidden constitutional script".<sup>104</sup> The same caveat on representativeness applies to witnesses examined by parliaments and the latter's other interlocutors.

#### 4.2. Rationale behind parliamentary interdependence

At the heart of constitutional interdependence lies agency theory. As Judge underscored in the Maastricht period, "national parliaments have proved indispensable in providing the overarching frame of legitimation required to develop the European Union".<sup>105</sup> Amtenbrink reaffirmed this in the Lisbon period arguing that "the most fundamental source of the legitimacy of the EU is the ratification of treaties forming the basis of the supranational European legal order by the national parliaments".<sup>106</sup> In Röben's inverted hierarchy model of EU constitutionalism, the highest place on the hierarchical ladder is occupied, *inter alia*, by national parliaments in their treaty-making capacity.<sup>107</sup> Von Bogdandy, furthermore, attested that the "important founding principle [...] that essential constitutional dynamics are to remain under the control of the respective national parliaments" is also embedded

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<sup>103</sup> Allusion is made here to: Curtin, Deirdre. "The constitutional structure of the Union: a Europe of bits and pieces," *Common Market Law Review*, Vol. 30, No. 1, 1993: 17-69.

<sup>104</sup> Editorial. "A constitution for Europe and other constitutions," *European Constitutional Law Review*, Vol. 1, No. 3, 2005: 336.

<sup>105</sup> Judge, David. "The failure of national parliaments?," *West European Politics*, Vol. 18, No. 3, 1995: 96.

<sup>106</sup> Amtenbrink, Fabian. "The multidimensional constitutional legal order of the European Union – a successful case of cosmopolitan constitution-building?," *Netherlands Yearbook of International Law*, Vol. 39, 2008: 50.

<sup>107</sup> Röben, Volker. "Constitutionalism of the European Union after the Draft Constitutional Treaty: how much hierarchy?," *Columbia Journal of European Law*, Vol. 10, No. 2, 2004: 346.

in the Union's duty, laid down in Article 4(2) TEU, to respect the Member States' national identities and their fundamental political and constitutional structures.<sup>108</sup> Eventually, while the parliamentary prerogative of one-off approval of the Treaties is not the most essential one for daily decision making,<sup>109</sup> it does provide fertile soil for theoretical postulation, because it enables us to conceive of national parliaments as principals not only of the national government but also of the Union's 'government', collective and dispersed as it is.<sup>110</sup>

The approach of parliamentary interdependence, however, in no way mars the fact that Europe's governments, with some exceptions,<sup>111</sup> are engendered from and are politically answerable to their parliaments. This 'genetic' constitutional link between governments and parliaments, grounded in the principle of ministerial responsibility, is the lynchpin of the Union's accountability scheme and the key legitimising channel of European integration.<sup>112</sup> Yet that link would not have been as pivotal had these same governments not occupied the decision-making limelight of the Union. But they have, and in the Union's most influential arenas: at intergovernmental conferences; in the European Council; in the Council of Ministers; in appointments of the Commission President,<sup>113</sup> the High Representative for Foreign Affairs and Security Policy,<sup>114</sup> the judges and advocates-general of the Court of Justice;<sup>115</sup> and so on. Hence, the EU does not exist of itself. It has been created by the Member States, it is based on the Member States and it depends on the Member States' constitutional arrangements for its own functioning.<sup>116</sup> EU institutions are thus

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<sup>108</sup> Bogdandy, Armin von. "Founding principles of EU Law: a theoretical and doctrinal sketch," *European Law Journal*, Vol. 16, No. 2, 2010: 110.

<sup>109</sup> See: Oberdorff, Henri. "Le Traité de Lisbonne: une sortie de crise pour l'Union européenne ou plus?," *Revue du Droit Public*, Vol. 124, No. 3, 2008: 783.

<sup>110</sup> See: Curtin, Deirdre. *Executive power of the European Union: law, practices, and the living constitution*, Oxford: Oxford University Press, 2009; Curtin, Deirdre and Egeberg, Morten. "Tradition and innovation: Europe's accumulated executive order," *West European Politics*, Vol. 31, No. 4, 2008: 639-661.

<sup>111</sup> See: Elgie, Robert (ed.). *Semi-presidentialism in Europe*, Oxford: Oxford University Press, 1999.

<sup>112</sup> Amtenbrink, Fabian. "The multidimensional constitutional legal order of the European Union – a successful case of cosmopolitan constitution-building?," *Netherlands Yearbook of International Law*, Vol. 39, 2008: 50.

<sup>113</sup> Article 17(7) TEU.

<sup>114</sup> Article 18(1) TEU.

<sup>115</sup> Article 19(2)(3) TEU.

<sup>116</sup> Besselink, Leonard. "The notion and nature of the European constitution after the Lisbon Treaty," in *European constitutionalism beyond Lisbon*, Antwerp: Intersentia, 2009: 279; Piris, Jean-Claude. "Does the European Union have a constitution? Does it need one?," *European Law Review*, Vol. 24, No. 6, 1999: 566. In what he calls "intertwined government", Ziller argues that the Member States participate in the exercise of five functions within the EU: the legislative function, the executive function, the supervisory function, the function of directing (policy guidance and programming) and the organic function. Ziller, Jacques. "Multilevel governance and executive federalism: comparing Germany and the European Union," in *The European Union legal order after Lisbon*, by Patrick Birkinshaw and Mike Varney (eds), Alphen aan den Rijn: Kluwer Law International, 2010: 260.

"simultaneously competing",<sup>117</sup> "profoundly and inescapably interdependent"<sup>118</sup> and constitute "a system of institutionalised interdependence in governance".<sup>119</sup> Does this not, then, suffice to view national parliaments as cogwheels of the Union's interdependent constitutionalism, i.e., as stakeholders in the Union's various power sites?

The key question is the following: with a view to what do national parliaments scrutinise their governments? Certainly, national parliaments safeguard the national interest. Pliakos, for instance, argued that "[m]onitoring the principles of both national identity and subsidiarity is the basic expression of a supranational role that should be established for the national parliaments" and that the aim of the national parliaments' supranational role is "not to undermine the autonomous and vital operation of the states [...]".<sup>120</sup> Indeed, if parliaments only aspire to secure the national interest, how can one claim that that upgrades the Union's democratic foundation? But if national parliaments consider the national interest to be an element of the 'European interest', safeguarded by EU institutions, then it is plausible to argue that the Union's constitutional processes involve national parliaments. Pliakos seemed to suggest this when he noted, rightly, that "[i]n a union of states and citizens, the concept of both national and European interest cannot be specified but through a wider composition of the several positions and opinions".<sup>121</sup> This led him to conclude that:

The limitation of the parliamentary control on national bodies loses its meaning. The protection of the interests of the citizens they represent cannot be achieved anymore, but only through the control of the Union's bodies.<sup>122</sup>

Although this statement grasps the ideology of parliamentary interdependence, it needs to be slightly nuanced. Whereas the Union's constitutional development indeed renders obsolete the exclusive focus of parliamentary control on their own government, the 'control' of EU institutions should be regarded as one rather than the only aspect of parliamentary scrutiny. The puzzle is not whether the European role of national parliaments trumps their domestic role, but how these roles interrelate when

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<sup>117</sup> Lindseth, Peter L. "Democratic legitimacy and the administrative character of supranationalism: the example of the European Community," *Columbia Law Review*, Vol. 99, No. 3, 1999: 656.

<sup>118</sup> Peterson, John and Shackleton, Michael. "The EU's institutions: an overview," in *The institutions of the European Union*, by John Peterson and Michael Shackleton (eds), Oxford: Oxford University Press, 2006: 11.

<sup>119</sup> Kohler-Koch, Beate. "Interdependent European governance," in *Linking EU and national governance*, by Beate Kohler-Koch (ed.), Oxford: Oxford University Press, 2003: 12.

<sup>120</sup> Pliakos, Asteris. "National parliaments and the European Union: necessity of assigning a supranational role," *European Review of Public Law*, Vol. 19, No. 3, 2007: 765 and 772.

<sup>121</sup> Pliakos, Asteris. "National parliaments and the European Union: necessity of assigning a supranational role," *European Review of Public Law*, Vol. 19, No. 3, 2007: 777.

<sup>122</sup> Pliakos, Asteris. "National parliaments and the European Union: necessity of assigning a supranational role," *European Review of Public Law*, Vol. 19, No. 3, 2007: 778.

these parliaments carry out their constitutional functions of democratic legitimacy and political accountability. Parliamentary interdependence seeks to determine whether the performance of constitutional functions by national parliaments and by the EU institutions involved in the Union's decision-making processes stand in any meaningful relation of reciprocity.

### **4.3. Definition and added value of the concept**

In light of the foregoing considerations, parliamentary interdependence can be defined as a *set of processes within the European constitutional order in which parliamentary bodies, with a view to fulfilling their prescribed or perceived constitutional tasks, not only directly interact with institutions established outside their own legal system but also shape their action in relation to that performed by or attributable to these institutions.* An essential advantage of this definition is that it allows us to distinguish, in an empirical fashion, the mere existence of parliamentary contacts across the EU and national levels from the reasoning that inspires their occurrence. As we will demonstrate in Parts II and III, although parliaments maintain links with EU institutions, their objective varies. Therefore, diagnosing the presence of relations between national parliaments and other actors within the EU constitutional space without inquiring about their nature can mislead the inattentive observer and twist his conclusions about the European functions of national parliaments. The concrete questions and hypotheses fleshing out this concept are operationalised in the text introducing Part III.

The key added value of parliamentary interdependence is that it liberates the analysis from the shackles of formal Treaty provisions by exploring the potential causality in the exercise of constitutional competences by national parliaments, on the one hand, and the European Parliament and the Commission, on the other. Though the founding treaties assign to national parliaments certain rights of participation in EU decision making, the question to pose is not solely what these rights are but also what political practice they generate,<sup>123</sup> how they shape national parliaments' action and what that action means for the Union. Jacqu e rightly stated about the merit of the Lisbon Treaty in democratising the Union:

On the institutional plane, it does not suffice to modify the rules to change the reality. The customs are tenacious and in this domain changes take time. As regards democracy, the alleged democratic deficit is today nothing more than a polemical argument.<sup>124</sup>

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<sup>123</sup> Auel, Katrin and Benz, Arthur. "Expanding national parliamentary control: does it enhance European democracy?," in *Debating the democratic legitimacy of the European Union*, by Beate Kohler-Koch and Berthold Rittberger (eds), Lanham: Rowman & Littlefield, 2007: 58.

<sup>124</sup> Jacqu e, Jean Paul. "Le trait e de Lisbonne – une vue cavali re," *Revue Trimestrielle de Droit Europ en*, Vol. 44, No. 3, 2008: 464.

Such focus is essential, because written rules are not the only source of the Union's constitution. Ink cannot square the reality, especially if the reality observed is political. By contrast, the reality sometimes becomes the rule itself and is often lent legal garb to cover its bare core. Witness, for instance, the unwritten, conventional nature of the principle as crucial for British constitutionalism as ministerial responsibility. As Bradley and Ewing acknowledge, "it is difficult to control political behaviour in absolute terms [...] Like other principles of government, it is neither static nor unchangeable and may give way before more pressing political forces".<sup>125</sup> The argument about the significance of unwritten constitutional development is also valid for states with written constitutions, such as notably the United States. An assessment of the American constitutional jurisprudence made some three and a half decades ago is telling:

In the important cases, reference to and analysis of the constitutional text plays a minor role. The dominant norms of decision are those large conceptions of governmental structure and individual rights that are at best referred to, and whose content is scarcely at all specified in the written Constitution – dual federalism, vested rights, fair procedure, equality before the law.<sup>126</sup>

These examples corroborate the submission that the same logic may also be applied to the Union's constitution. Concerning national parliaments, this means that the outlook needs to be expanded to encompass the unwritten and informal stratum of their European scrutiny activities. The existing models of EU constitutionalism help to chart the alleys of achieving this objective.

What remains opaque, nevertheless, is the nature of the relationships that bind the Union's constituent units together and whether there is a logically coherent deciphering code that explains the patterns of their mutual interaction, as these patterns are not only written in the founding treaties or constitutional texts. Treaty letter is best understood as the *law on politics*, the lowest common denominator of the conjugated European interest. It is a bare skeleton, whose living tissue is cast, besides in judicial activity, also in the facts of the incessant political process, that universal and inescapable *perpetuum mobile* of community organisation – the *law of politics*.<sup>127</sup> Defining public law as practice, Loughlin has rightly argued that public law must be conceived as "an assemblage of rules, principles, canons, maxims,

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<sup>125</sup> Bradley, Anthony W. and Ewing, Keith D. *Constitutional and administrative law*, Harlow: Pearson, 2007: 110.

<sup>126</sup> Grey, Thomas C. "Do we have an unwritten constitution?," *Stanford Law Review*, Vol. 27, No. 3, 1975: 707-708. See *contra*: Scalia, Antonin. "Is there an unwritten constitution? Are there unenumerated constitutional rights-Symposium on law and public policy-1988," *Harvard Journal of Law and Public Policy*, Vol. 12, No. 1, 1989: 1-2.

<sup>127</sup> Jančić, Davor. "The European political order and Internet piracy: accidental or paradigmatic constitution-shaping?," *European Constitutional Law Review*, Vol. 6, No. 3, 2010: 433.

customs, usages and manners that condition and sustain the activity of governing".<sup>128</sup> The subject of public law cannot be grasped without understanding informal practices that shape the activity of governing. Therefore, the argument goes, positive law acquires its meaning only within a context of conventional understandings, which themselves cannot be understood without analysing politics.

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<sup>128</sup> Loughlin, Martin. *The idea of public law*, Oxford: Oxford University Press, 2004: 30-31. In the United States, the notion of a living constitution might be taken as a parallel. See: Ackerman, Bruce. "The living constitution," *Harvard Law Review*, Vol. 120, No. 7, 2007: 1738-1812; Rehnquist, William H. "The notion of a living constitution," *Harvard Journal of Law and Public Policy*, Vol. 29, No. 2, 2006: 401-415.



# Part I

## *CONDITIONS*

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*THE LOST AND FOUND OF EUROPE'S DEMOCRACY*



## 1. VISIONS OF A UNITED EUROPE: A PRELUDE

The collapse of the majority of the states of the continent under the German steam-roller has already placed the destinies of the European populations on common ground. [...] The usefulness, even harmfulness, of organisations like the League of Nations has been demonstrated [...] And, once the horizon of the Old Continent is passed beyond, and all the peoples who make up humanity embrace in a grand vision of their common participation it will have to be recognised that European Federation is the single conceivable guarantee that relationships with American and Asiatic peoples can exist on the basis of peaceful cooperation.

*Ventotene Manifesto*, June 1941<sup>129</sup>

The first step in the re-creation of the European family must be a partnership between France and Germany. In this way only can France recover the moral leadership of Europe. There can be no revival of Europe without a spiritually great France and a spiritually great Germany. The structure of the United States of Europe, if well and truly built, will be such as to make the material strength of a single state less important. [...] We the British have our own Commonwealth of Nations.

*Winston Churchill*, Zurich University, 19 September 1946<sup>130</sup>

[T]he French government proposes that [...] Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe. [...] The solidarity in production thus established will make it plain that any war between France and Germany becomes not only unthinkable, but materially impossible.

*The Schuman Declaration*, 9 May 1950<sup>131</sup>

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<sup>129</sup> It was drafted in a political internment centre on the Italian island of Ventotene by Altiero Spinelli (1907-1986), a former communist and later an academic and founder of the European Federalist Movement, and Ernesto Rossi (1897-1967), an anti-fascist journalist. Excerpted from: Nelsen, Brent F. and Stubb, Alexander (eds). *The European Union: readings on the theory and practice of European integration*, Basingstoke: Palgrave Macmillan, 2003: 3 and 5.

<sup>130</sup> Though the leader of the Conservative opposition in Parliament after the Labour victory in the 1945 general election, the stature of the wartime Prime Minister of Britain, Sir Winston Churchill (1874-1965), allowed him to remain "a key architect of the postwar world". This speech betokened a degree of ambiguity towards Europe that remains present in Britain today. Consequently, he contributed critically to the convening of the Hague Congress that led to the establishment of the Council of Europe in 1949. Excerpted from: Nelsen, Brent F. and Stubb, Alexander (eds). *The European Union: readings on the theory and practice of European integration*, Basingstoke: Palgrave Macmillan, 2003: 7 and 9-10.

<sup>131</sup> Whilst bearing the name of the then Foreign Minister of France, Robert Schuman (1886-1963), the declaration was developed by Jean Monnet (1888-1979), Commissioner-General of the French National Planning Board, who in 1952 became the first President of the High Authority of the European Coal and Steel Community. Excerpted from: Nelsen, Brent F. and Stubb, Alexander (eds). *The European Union: readings on the theory and practice of European integration*, Basingstoke: Palgrave Macmillan, 2003: 13-14. In recognition of his great contribution to European integration, Jean Monnet is widely known as the "father of Europe" or the "founder and architect of Europe", but also as the "first statesman of interdependence". See further in: Duchêne, François. *Jean Monnet. The first statesman of interdependence*, New York: Norton, 1994; Monnet, Jean. *Mémoires*, Paris: Fayard, 1976; Fontaine,

These excerpts show that the world's first venture into supranational integration – one that was not merely based on a restriction but on a transfer<sup>132</sup> of sovereignty in a particular area,<sup>133</sup> one that transcended international organisation without constituting a federal state,<sup>134</sup> one that for that purpose established institutions whose power or influence exceeded that permitted by national governments<sup>135</sup> – was ultimately a 'marriage' out of necessity and interest. The creation of the European Coal and Steel Community (ECSC) in Paris in 1951 spawned out of the fear of another war, the fear of a militarily potent West Germany, reborn as a sovereign state only two years before, as well as out of a wish by the French to secure coal supplies from the Ruhr for their steel industry.<sup>136</sup> These were rather palpable concerns. For example, the results of a poll conducted in 1954 by the French Institute of Public Opinion indicated that almost half of the adult French population were victims of the two world wars: 24% of the interviewees had lost very close relatives; 28% of them had had their homes destroyed, plundered or seriously damaged; and 19% had either been wounded or had their health affected. No less than 64% of the male interviewees had faced the Germans either in combat or as members of the Resistance. Most members of parliament of the Fourth Republic had been members of the Resistance and a number of them had been jailed or deported.<sup>137</sup>

The bold vision in which the founding Six concurred (France, West Germany, Italy, the Netherlands, Belgium, and Luxembourg) entailed the setting up of an elaborate system of checks and balances among the Community's institutions. The final element of this system was a European assembly,<sup>138</sup> for "[f]ear of a parliament

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Pascal. *Jean Monnet: a grand design for Europe*, Luxembourg: Office for Official Publications of the European Communities, 1988 (Fontaine was an assistant to Jean Monnet); Fransen, Frederic J. *The supranational politics of Jean Monnet: ideas and origins of the European Community*, Westport: Greenwood Press, 2001.

<sup>132</sup> The term 'transfer' is used here to refer to the reconfiguration of relations of public power effected by European integration and not to convey a certain view of the implications thereof for the concept of sovereignty. Although they differ in meaning, other nouns are often also used for the same purpose, such as delegation, sharing, pooling, conferral, and so on.

<sup>133</sup> See the consequences thereof for national legal systems in: Bebr, Gerhard. "The relation of the European Coal and Steel Community law to the law of the Member States: a peculiar legal symbiosis," *Columbia Law Review*, Vol. 58, No. 6, 1958: 767-797.

<sup>134</sup> Kunz, Josef L. "Supranational organs," *American Journal of International Law*, Vol. 45, No. 4, 1952: 697.

<sup>135</sup> George, Stephen and Bache, Ian. *Politics of the European Union*, Oxford: Oxford University Press, 2001: 8.

<sup>136</sup> See further in: Goschler, Constantin. "Der Schumanplan als Instrument franzoisischer Stahlpolitik. Zur historischen Wirkung eines falschen Kalkuils," *Vierteljahrshefte fuir Zeitgeschichte*, Vol. 37, No. 2, 1989: 171-206.

<sup>137</sup> Dogan, Mattei. "Background paper: France." In *European assemblies: the experimental period, 1949-1959*, by Kenneth Lindsay, London: Stevens and Sons, 1961: 157.

<sup>138</sup> Vernon, Raymond. "The Schuman Plan: sovereign powers of the European Coal and Steel Community," *American Journal of International Law*, Vol. 47, No. 2, 1953: 200.

is the beginning of wisdom", as Paul Henri Spaak, the first President of the Common Assembly of the ECSC (Common Assembly), adapted a biblical proverb.<sup>139</sup>

## **2. METHOD**

### **2.1. Questions**

The seed of a primordial notion of European democratic governance beyond the state had thus been sown. But how was this interstate 'marriage' celebrated before the Common Assembly's counterparts in the Member States, the national parliaments? How did they perceive of the transfer of sovereignty and of some of their constitutional competences to an assembly at the European level? Was the takeover of powers by a European assembly greeted as beneficial for the principle of parliamentary democracy or was it jettisoned as damaging? Was the existence of such an assembly a factor in their ratification equations at all? Was the European Parliament a rival or a partner of national parliaments? How did the deepening and widening of European cooperation shape the national parliaments' understanding of their own constitutional functions within the rapidly changing EU? In other words, what are the conditions under which national parliaments accepted European integration? These are the questions that we pose in the three chapters that follow.

### **2.2. Case study selection**

The idea and reality of a gradual sectoral spillover and the mirroring empowerment of the European Parliament caused the initial mention of national parliaments in the ECSC Treaty to vanish for decades until its resurrection in the Maastricht Treaty and anchorage in the Lisbon Treaty. The structuring of EU parliamentary democracy, in its national and European ramifications, can optimally be studied on the basis of these three constitutive treaties. This has the following reasons.

First, the purpose of this overview of the national parliaments' association with the European processes of policy and decision making at the level of primary EU law is not to provide an exhaustive historical account, but rather to pin down with some documentary precision the key elements shaping the national parliaments' position in the European public realm.

Second, these three Treaties mark the inaugural, mid-term and current stages of European integration. Each of them has been momentous in its own fashion, not only for the development of the EU in general, but more particularly for the establishment of the decision-making procedures and for the shaping of the European role of national parliaments. We encompass the functioning of the double mandate, the national parliaments' attitude towards the strengthening of the European Parliament's legislative and accountability powers and the assumption by national parliaments of their own European portfolio.

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<sup>139</sup> Hovey, Allan J. *The superparliaments: interparliamentary consultation and Atlantic cooperation*, New York: Praeger, 1966: viii.

Third, the exclusion of the other Treaties allows for a sharper focus and more detailed examination without frustrating the research objective. For instance, although the Act on the direct elections for the European Parliament of 1976 discontinued the national parliamentarians' double mandate,<sup>140</sup> the MEPs' then fresh status of popular representatives was not matched with an increase in their decision-making clout. They were still only consulted on draft European legislation.<sup>141</sup> It took ten more years for them to win, by means of the Single European Act (SEA) of 1986, the power of cooperation and another six years to boast the acquire, by means of the Maastricht Treaty, of the power of codecision. Also amenable to achieving the research goals is an analysis of the national parliaments' reaction to the dilemma whether the Maastricht version of the codecision procedure placed the Council at an advantage over the European Parliament at the last stage of the decision-making process.<sup>142</sup> Namely, this issue revealed the operation of parliamentary

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<sup>140</sup> Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage. (*OJL* 278/1 of 8.10.1976).

<sup>141</sup> Most commentators have correctly observed that direct elections would, at least nominally, enhance the legitimacy of the European Parliament and the democratic foundation of the Community itself. The often quoted Tindemans Report of 1976 submitted to the European Council by Leo Tindemans, then Prime Minister of Belgium, argued that "[d]irect elections to the Parliament will give this Assembly a new political authority. At the same time it will reinforce the democratic legitimacy of the whole European institutional apparatus. A consequence of the Parliament's new authority will be an increase in its powers, which will take place gradually in the course of the progressive development of the European Union, notably through a growing exercise of the legislative function". Tindemans, Leo. "European Union", *Bulletin of the European Communities, Supplement 1/76*, 1976: 29, available at: <http://aei.pitt.edu/942/>, accessed on 21 November 2010. See also: Vedel, Georges. "The role of the parliamentary institution in European integration," in *European integration and the future of parliaments in Europe*, European Parliament: Directorate-General for Documentation and Research, 1975: 238. Other analyses have rightly discarded the likelihood of automatism in the transformation of the European Parliament's new legitimacy into decision-making power. All would depend on the political process. As Herman and Lodge have underscored, European elections as such will not upgrade the level of democracy of Community decision making: "At most, European elections will lead to a reappraisal of the distribution of authority among EC institutions because of the changed basis of the Parliament's legitimacy". Herman, Valentine and Lodge, Juliet. "Democratic legitimacy and direct elections to the European Parliament," *West European Politics, Vol. 1, No. 2*, 1978: 227. It has also been assessed that direct elections are not a panacea and that the European Parliament will only gain in power and stature if there is political will for that. Notwithstanding a more legitimate basis of action, "it is not clear whether the new Parliament will constitute a political force in the Community, acting as a counterweight to the member states [...]". Fitzmaurice, John. "Direct elections and the future of the European Parliament," *West European Politics, Vol. 1, No. 2*, 1978: 208, 217, 221.

<sup>142</sup> Article 189b(6) of the Maastricht Treaty provided that if the Conciliation Committee did not approve a joint text, the proposed act would fail, unless the Council confirmed the common position to which it agreed before the onset of the conciliation procedure, possibly with European Parliament amendments. The proposed act would then be deemed finally adopted, unless the European Parliament rejected the text by an absolute majority of its component members. The Amsterdam Treaty removed the possibility of reintroducing a pre-conciliation text. Curtin has argued that the Maastricht formulation of the post-conciliation procedure, which required activism on the part of the European Parliament to prevent the Council's will from prevailing, disincentivised the Council to negotiate a compromise during the

interdependence and cross-level lobbying for the rectification of the European Parliament's ill-defined codecision prerogative, which eventually occurred at Amsterdam. Therefore, the exclusion of the Direct Elections Act and the SEA does not vitiate the analysis. Nor does the exclusion of the Treaties of Rome, Amsterdam, Nice and the Constitutional Treaty. None of these Treaties was as fundamental as the selected three in terms of establishing or moulding the often latent relationship between the European Parliament and national parliaments.

Finally, the Treaties are approached not merely as legal documents establishing the rights and duties of constitutional actors but also as recognitions of the political praxis whose evolution sparked its inscription in Treaty texts.<sup>143</sup> As Farrel and Héri-tier have argued, interinstitutional relations are shaped by "an iterated process of successive formal institutional change and informal institutional development".<sup>144</sup> In studying the political side of EU constitutionalism, preference is given to a holistic analysis that wedds the liberal intergovernmentalist<sup>145</sup> focus on negotiations between

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conciliation procedure unless it was clear that there was a necessary majority in the European Parliament. She also stressed that the Council was not obliged to incorporate in its post-conciliation text the amendments made by the European Parliament prior to conciliation. Curtin, Deirdre. "The constitutional structure of the Union: a Europe of bits and pieces," *Common Market Law Review*, Vol. 30, No. 1, 1993: 37-38. Conversely, Crombez has made a case that the European Parliament's power in the Maastricht codecision procedure was as important as the Council's. Crombez, Christophe. "The codecision procedure in the European Union," *Legislative Studies Quarterly*, Vol. 22, No. 1, 1997: 113, 115.

<sup>143</sup> There have been studies that show the informal development of EU decision-making procedures, notably of codecision, to the benefit or detriment of the European Parliament. An oft-invoked example of a practice that favoured the European Parliament occurred in July 1994 concerning the Commission's proposal for a directive on open network provision in voice telephony (COM(92) 0247). After conflicting with the European Parliament over the right to control the Commission's implementation power, the Council for the first time reintroduced its common position after conciliation. In the first plenary session of the newly elected European Parliament, the Council's common position was rejected and the proposal failed. This early European Parliament's assertion of its then novel codecision power led to the establishment of an institutional compromise: never again did the Council reintroduce its common position. Instead, the Council has in almost all cases sought to reach a compromise with the European Parliament during conciliation, and the one time that this was not feasible, it decided not to reaffirm its pre-conciliation common position. As a result, the European Parliament was able to secure more amendments than was possible under the cooperation procedure. Hix, Simon, "Constitutional agenda-setting through discretion in rule interpretation: why the European Parliament won at Amsterdam," *British Journal of Political Science*, Vol. 32, No. 2, 2002: 259-280.

<sup>144</sup> Farrell, Henry and Héri-tier, Adrienne. "Codecision and institutional change," *West European Politics*, Vol. 30, No. 2, 2007: 300. On several examples, they developed hypotheses whereby informal EU decision-making rules that supplement the formal ones can, through a continued interaction between EU institutions, be formally enacted in the Treaties where the Member States unanimously agree with it, but also be formally discontinued not only where the Member States unanimously disagree with it but also where their preferences diverge. See also their previous work in: Farrell, Henry and Héri-tier, Adrienne. "Formal and informal institutions under codecision: continuous constitution-building in Europe," *Governance*, Vol. 16, No. 4, 2003: 577-600.

<sup>145</sup> See: Moravcsik, Andrew. "Preferences and power in the European Community: a liberal intergovernmentalist approach," *Journal of Common Market Studies*, Vol. 31, No. 4, 1993: 473-524.

the Member States at intergovernmental conferences with a more sub-Treaty historical approach.<sup>146</sup>

### 3. ARGUMENT AND STRUCTURE

The main argument of this chapter is twofold. First, the national parliaments' 'genetic' link to their governments has by legal, political and practical inertia remained a primary vehicle of their constitutional activity. Second, national parliaments have, nonetheless, acquired a standing in the European legal order that allows them to exercise indispensable constitutional tasks within it. To develop the argument, a two-tier analysis unfolds: (a) of the powers entrusted to national parliaments during the "semi-permanent treaty revision process" with a view to buttressing the legitimacy and accountability of the uniting Europe; and (b) of the parliaments' self-perception in this "constitutional conversation".<sup>147</sup>

The following three chapters tell a story in three acts. In the *Ouverture*, we commence with a detailed appraisal of the birth of the Common Assembly and of its implications for national parliaments in order to fathom the powers pooled in Paris on 18 April 1951.<sup>148</sup> In doing so, we adumbrate the nature of the perennial concern about democracy. At the same time, we demonstrate that every following step in the Community's democracy building was an increment accrued to this first experiment in supranational parliamentarism. In the *Intermezzo*, we proceed with a somewhat more broad-brush sketch of the Maastricht foray into drawing national parliaments under the Union umbrella. We finish with a *Finale*, an account of the parliaments' *relance* in the EU's material constitution, crowned on 13 December 2007 with the Lisbon Treaty.<sup>149</sup>

Each of the three chapters introduces the Treaty examined and lays out the key challenges for national parliamentary involvement in supranational and later also intergovernmental decision-making processes. Thereafter, we analyse the scrutiny by the French, British and Portuguese parliaments of each of the challenges selected in light of the questions posed in the previous section of this chapter.

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<sup>146</sup> See: Pierson, Paul. "The path to European integration: a historical institutionalist analysis," *Comparative Political Studies*, Vol. 29, No. 2, 1996: 123-163.

<sup>147</sup> Witte, Bruno de. "The closest thing to a constitutional conversation in Europe: the semi-permanent treaty revision process," in *Convergence and divergence in European public law*, by Paul Beaumont et al. (eds), Oxford: Hart Publishing, 2002: 39-57.

<sup>148</sup> Entered into force on 24 July 1952. Its fifty-year period of validity expired on 23 July 2002.

<sup>149</sup> Entered into force on 1 December 2009.

# Chapter 3

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## *Overture*

### **The Coal and Steel Community: The National Parliaments' European Youth**

#### **1. THE BIRTH OF THE FIRST EUROPEAN COMMUNITY: A HUMBLE BEGINNING**

To contribute to the fulfilment of the objective of a freely competing common market in coal and steel, four institutions were set up.<sup>150</sup> As Reuter underlined, this was not done according to an *a priori* theoretical scheme. The drafters concentrated on factual necessities, so that the whole edifice was "composite",<sup>151</sup> an amalgam of different familiar constitutional categories present in the Member States, a concept which, as we have seen in the previous chapter, has regained currency in contemporary theoretical explanations of the EU's constitutional origin.

The *High Authority*, composed of eight members chosen by the governments of the Member States and another member elected in turn by these members, and assisted by a Consultative Committee, was the executive institution of the Community. It could adopt: (a) decisions, which were binding in their entirety; (b) recommendations, which were binding as to the aims pursued but which leave the choice of method to their addressee; and (c) non-binding opinions.<sup>152</sup>

The *Council of Ministers* (Council), added at the insistence of the Dutch and with the support of the Germans,<sup>153</sup> consisted of representatives of national governments. Its task was to curtail the power of the High Authority by exercising

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<sup>150</sup> See more on the founding of the ECSC in: Diebold, William. *The Schuman Plan: a study in economic cooperation, 1950-1959*, New York: Praeger, 1959; Gerbet, Pierre. *La genèse du Plan Schuman: des origines à la déclaration du 9 mai 1950*, Lausanne: Centre de Recherches Européennes, 1962; Gillingham, John Rowley. *Coal, steel, and the rebirth of Europe, 1945-1955: the Germans and French from Ruhr conflict to economic community*, Cambridge: Cambridge University Press, 1991; Prieur, Raymond. *La Communauté Européenne du Charbon et de l'Acier: activité et évolution*, Paris: Montchrestien, 1962; Racine, Raymond. *Vers une Europe nouvelle par le plan Schuman*, Neuchâtel: Editions de la Baconnière, 1954; Spierenburg, Dirk and Poidevin, Raymond. *The history of the High Authority of the European Coal and Steel Community: supranationality in operation*, London: Weidenfeld and Nicolson, 1994.

<sup>151</sup> Reuter, Paul. "La conception du pouvoir politique dans le Plan Schuman," *Revue Française de Science Politique*, Vol. 1, No. 1-2, 1951: 268.

<sup>152</sup> Articles 10(1) and 14 ECSC Treaty.

<sup>153</sup> During the debate of 31 October 1951 in the Dutch *Tweede Kamer* (Lower House), Jan van den Brink, the Minister of Economic Affairs, stated that "without the Council of Ministers, the Community could practically not function". Assemblée Commune, *Le Traité C.E.C.A. devant les parlements nationaux*, Luxembourg: Communauté Européenne du Charbon et de l'Acier, 1958: 1176.

executive and advisory powers.<sup>154</sup> Apart from consultation and information exchange, the Council was required to approve some of the acts of the High Authority and could request it to examine proposals and measures necessary for the attainment of Community objectives.<sup>155</sup> One of the Council's characteristics was that its members were individually accountable to their national parliaments and collectively to nobody. In line with this, Haas' analysis reveals that not in a single instance did the Council defer to the wishes of the Common Assembly. It did not even pretend regularly to consult or submit annual reports to it. Any contact between these two institutions was *ad hoc*.<sup>156</sup>

The *Court of Justice*, composed of seven judges appointed by the governments of the Member States, ensured the observance of the rule of law and had jurisdiction over appeals brought by: (a) Member States and or by the Council against decisions and recommendations of the High Authority; or (b) by enterprises and associations in cases of individual decisions and recommendations concerning them, but also against general decisions and recommendations that they considered to involve an abuse of power affecting them.<sup>157</sup>

The *Common Assembly* was given supervisory powers and consisted of "representatives of the *peoples* of the states brought together in the Community".<sup>158</sup> This was the blueprint for supranational parliamentary democracy that survived until 2009, when the Lisbon Treaty changed it into "representatives of the Union's *citizens*".<sup>159</sup> Members of the Common Assembly were to be "designated by the respective parliaments once a year from among their members, *or* [...] elected by direct universal suffrage, in accordance with the procedure laid down by each High Contracting Party".<sup>160</sup> This double mandate of national parliamentarians was a provisional solution, which had the advantage of linking the Common Assembly with the electorates of the Member States.<sup>161</sup> As Kapteyn reports, the framers of the Treaty regarded the Common Assembly as an "*émanation des parlements des états membres*" and the possibility of direct elections was only included in the final stage of the ECSC negotiations at the insistence of the Foreign Affairs Committee of the

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<sup>154</sup> George, Stephen and Bache, Ian. *Politics of the European Union*, Oxford: Oxford University Press, 2001: 62.

<sup>155</sup> Articles 26(2)-(3), 27(1) and 28(3) ECSC Treaty.

<sup>156</sup> Haas, Ernst B. *The uniting of Europe: political social, and economic forces*, Stanford: Stanford University Press, 1968: 399.

<sup>157</sup> Articles 31, 32(1) and 33(1)-(2) ECSC Treaty.

<sup>158</sup> Article 20 ECSC Treaty, (emphasis added). It is because of this provision that the Rules of Procedure of the Common Assembly referred to its members as "representatives" rather than "delegates". Lyon, Jean. *L'Assemblée Commune de la C.E.C.A.*, Paris: Librairies Imprimeries Réunies, 1957: 17.

<sup>159</sup> Article 14(2) EU Treaty, (emphasis added).

<sup>160</sup> Articles 20 and 21(1) ECSC Treaty, (emphasis added).

<sup>161</sup> Soto, Jean de. *La Communauté Européenne du Charbon et de l'Acier*, Paris: Presses Universitaires de France, 1961: 50.

French *Assemblée nationale*,<sup>162</sup> whose position coincided with the preferences of the German Government. Lindsay has rightly underlined that the double mandate added a new element, because the appointed national parliamentarians were to perform duties "outside their immediate territory, outside the building where their mandate is clear and definite, away from their constituents, who elected them by one or other of the recognised systems of voting".<sup>163</sup> Though this direct personal linkage between national parliamentarians and the European level is nowadays long severed, this observation retains its relevance, because the rights bestowed upon national parliaments by the Lisbon Treaty, if they are to be of any utility, can hardly materialise without a degree of thinking 'outside the territory' and 'outside the mandate'. The novelty, as Robert Schuman pointed out, was that:

[F]or the first time, a parliamentary assembly gathering representatives of several states will acquire the powers of decision, and the parliaments themselves, who will have delegated a fraction of their sovereignty, will merge to exercise that sovereignty jointly.<sup>164</sup>

The insertion of the Common Assembly into the ECSC Treaty was a product of reactions primarily by the Netherlands and Belgium, who were adamant that any transfer of sovereignty to a supranational institution needed to be offset by a mechanism of rendering the High Authority accountable for its decisions. The Dutch Government had even officially made the Netherlands' participation in the Community conditional upon "an 'acceptable' solution to the accountability question".<sup>165</sup> Monnet yielded after a week of negotiations reciting the aforesaid Schuman remark: "[F]or the first time, an international assembly will become more than a purely consultative body; the parliaments which will give up a fraction of their sovereignty will [...] exercise this sovereignty jointly".<sup>166</sup> Trying to allay the Dutch and Belgian concerns that a powerful parliamentary body would jeopardise their domestic policy objectives, Monnet ascertained that "[t]his rudimentary assembly is not supposed to have decision-making and executive functions".<sup>167</sup>

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<sup>162</sup> Kapteyn, Paul. "Background paper: The Common Assembly of the European Coal and Steel Community as a representative institution." In *European assemblies: the experimental period, 1949-1959*, by Kenneth Lindsay, London: Stevens and Sons, 1961: 227.

<sup>163</sup> Lindsay, Kenneth. *European assemblies: the experimental period, 1949-1959*, London: Stevens and Sons, 1961: 10-11.

<sup>164</sup> Speech by Robert Schuman before the *Assemblée nationale* on 25 July 1950. Fondation Jean Monnet pour l'Europe, Lausanne. Fonds AMG. 5/2/9.

<sup>165</sup> Rittberger, Berthold. *Building Europe's parliament: democratic representation beyond the nation-state*, Oxford: Oxford University Press, 2005: 79.

<sup>166</sup> Rittberger, Berthold. *Building Europe's parliament: democratic representation beyond the nation-state*, Oxford: Oxford University Press, 2005: 80.

<sup>167</sup> Rittberger, Berthold. *Building Europe's parliament: democratic representation beyond the nation-state*, Oxford: Oxford University Press, 2005: 99.

## 2. THE PREROGATIVES OF THE FLEDGLING COMMON ASSEMBLY

The purpose of the Common Assembly was to supervise the executive of the newborn Community and not to legislate, make rules, be consulted or asked for advice.<sup>168</sup> It served above all as a deliberating forum for the examination of the policies of the High Authority.<sup>169</sup> The strongest instrument at its disposal was the possibility to censure the High Authority by an absolute two-thirds majority upon a review of the latter's general annual report. Furthermore, while all members of the High Authority had the right to *attend* all meetings of the Common Assembly, only the President or any other designated member of the High Authority was entitled to be *heard* at his or her request. The Common Assembly could pose *questions* to the High Authority, which was obliged to reply orally or in writing. In addition, Council members had the right to attend all meetings and be heard at their request.

By comparing the mode of designation of the Council and of the Common Assembly, an early comment highlighted the distinct nature of parliamentary representation, thereby presaging the obstacles to the transnational representation of popular interests that the EU is still coping with:

The procedure according to which the Common Assembly and the Special Council of Ministers are engendered from the parliaments and from the national Councils of Ministers is identical; however, in the two cases, it has a very different value. In effect, national governments are juridically homogenous, one of their members represents them all: the Special Council of Ministers is thus an organ that rests on a solid political basis. But a parliament is not juridically homogenous; its merit is to represent the opinions in a country; if it is to give birth to representation derived from that of its own, it is necessary to provide for precise and uniform rules.<sup>170</sup>

Still, the living constitution of the ECSC complemented the Treaty text in many respects. The Common Assembly created permanent committees,<sup>171</sup> adopted resolutions and motions, sought specialist opinions and sent their staff to take evidence.<sup>172</sup> Common Assembly members soon began to organise themselves into political groups not according to nationality but according to their political ideology. Besides, if a member of the Common Assembly were to lose the status of member of

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<sup>168</sup> Lindsay, Kenneth. *European assemblies: the experimental period, 1949-1959*, London: Stevens and Sons, 1961: 23.

<sup>169</sup> Bebr, Gerhard. "The European Coal and Steel Community: a political and legal innovation," *Yale Law Journal*, Vol. 63, No. 1, 1953: 18.

<sup>170</sup> Chronique constitutionnelle européenne. "Quelques aspects institutionnels du Plan Schuman," *Revue du Droit Public*, Vol. 67, 1951: 116.

<sup>171</sup> Kapteyn, Paul. "Background paper: The Common Assembly of the European Coal and Steel Community as a representative institution." In *European assemblies: the experimental period, 1949-1959*, by Kenneth Lindsay, London: Stevens and Sons, 1961: 219.

<sup>172</sup> Wigny, Pierre. *L'Assemblée parlementaire dans l'Europe des Six*, Luxembourg: Communauté Européenne du Charbon et de l'Acier, 1958: 33.

a national parliament, the Rules of Procedure allowed him or her to keep his seat in the Common Assembly until his or her successor was appointed.<sup>173</sup>

The Common Assembly focused on broad political decisions and not on technical aspects of proposals or their implementation, the latter of which was left to the experts gathered in the Consultative Committee of the ECSC. Any criticism of the executive action was constructive and not paralysing.<sup>174</sup> An illustration of this follows:

In the sitting of May 1954, during a discussion of the Second General Report of the High Authority, group chairmen, for the first time, gave their opinion on *certain aspects* of the policy of the High Authority. The ice was broken. This became a habit in the following sittings; in a later stage we also see a *general review* of the whole policy. It was repeatedly seen that after important declarations by the High Authority, for example, delegates asked the gathering to suspend or rearrange the agenda, so that political groups could have an opportunity to meet and decide their opinion.<sup>175</sup>

The most remarkable was the gradual development of the custom of the Common Assembly's *ex ante* control of the High Authority. This is attributed to a pledge made in 1953 by Jean Monnet, the High Authority's first president, that "the High Authority will keep the Assembly or the competent committees informed in due course of the guiding principles of its action and of the outline of its projects, will receive its observations and will provide the reasons for the decisions finally taken".<sup>176</sup> After Monnet's resignation, the Common Assembly, in a resolution of 1 December 1954, asked the six governments to commit themselves to an exchange of views before they appoint a president of the High Authority, following which the appointee would appear before the Common Assembly to present the policy programme and allow the members of the Common Assembly to pronounce themselves on it. After the second and third presidents of the High Authority, René Mayer and Paul Finet, honoured the request, it became a customary procedure.<sup>177</sup>

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<sup>173</sup> In France, for instance, pursuant to the law of 8 March 1958, the mandate of the delegates whom the *Assemblée nationale* elected to the European Parliamentary Assembly, the successor of the Common Assembly, would end with their national parliamentary mandate. Dogan, Mattei. "Background paper: France." In *European assemblies: the experimental period, 1949-1959*, by Kenneth Lindsay, London: Stevens and Sons, 1961: 164.

<sup>174</sup> Wigny, Pierre. *L'Assemblée parlementaire dans l'Europe des Six*, Luxembourg: Communauté Européenne du Charbon et de l'Acier, 1958: 12, 21, 25.

<sup>175</sup> Kapteyn, Paul. "Background paper: The Common Assembly of the European Coal and Steel Community as a representative institution." In *European assemblies: the experimental period, 1949-1959*, by Kenneth Lindsay, London: Stevens and Sons, 1961: 240 (emphasis in original).

<sup>176</sup> *Compte rendu in extenso des débats de l'Assemblée Commune, séance du mardi 23 juin 1953*, p. 185, cited in: Wigny, Pierre. *L'Assemblée parlementaire dans l'Europe des Six*, Luxembourg: Communauté Européenne du Charbon et de l'Acier, 1958: 37.

<sup>177</sup> Wigny, Pierre. *L'Assemblée parlementaire dans l'Europe des Six*, Luxembourg: Communauté Européenne du Charbon et de l'Acier, 1958: 33-34.

The key reason for such voluntary concessions lay in the High Authority's attempts "to obtain political backing for their supranational intentions as against the centrifugal forces working in the Council of Ministers".<sup>178</sup>

However, the practical impact of the Common Assembly received divergent assessments. On the one hand, Scalingi viewed this institution as "democratic window dressing for an international agreement among national governments", arguing that its "power of dismissal meant little, as the Common Assembly would have no assurance that a new High Authority would prove any more responsive than the old".<sup>179</sup> Dirk Spierenburg, the leader of the Dutch delegation to the Schuman Plan negotiations, emphasised another aspect – namely, that while the Common Assembly had some influence over the High Authority, it had none at all over the Council.<sup>180</sup> Even when a minister did appear in the Common Assembly, it was more a matter of courtesy than of effective political control or criticism.<sup>181</sup> In a similar vein, Sanderson acknowledged the work of the committees of the Common Assembly, but stated that this body "could hardly be considered essential to the functioning of the common market".<sup>182</sup> On the other hand, Lister argued that the Common Assembly in practice acquired more power than the Treaty provided and that it continuously influenced the High Authority through specialised committees and regular meetings.<sup>183</sup> Kapteyn considered that such a close and permanent cooperation amounted to a "complete parliamentary control over all the activities of the High Authority", comparable to that between a national parliament and the government.<sup>184</sup> Haas reported that the Common Assembly insisted on introducing "standard political issues and political principles of democratic accountability into the vagaries of supranational institutions". Witness a statement by Pierre Wigny, a Belgian member of the Common Assembly, which unveils the Common Assembly's aspiration to become a genuine parliament, with its own 'sovereign' field of action, reminiscent of that of a national parliament:

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<sup>178</sup> Lindsay, Kenneth. *European assemblies: the experimental period, 1949-1959*, London: Stevens and Sons, 1961: 69; Kapteyn, Paul. *L'Assemblée Commune de la Communauté Européenne du Charbon et de l'Acier: un essai de parlementarisme européen*, Leiden: Sythoff, 1962: 117.

<sup>179</sup> Scalingi, Paula. *The European parliament: the three-decade search for a united Europe*, London: Aldwych Press, 1980: 19-20.

<sup>180</sup> Spierenburg, Dirk and Poidevin, Raymond. *The history of the High Authority of the European Coal and Steel Community: supranationality in operation*, London: Weidenfeld and Nicolson, 1994: 61.

<sup>181</sup> Lindsay, Kenneth. *European assemblies: the experimental period, 1949-1959*, London: Stevens and Sons, 1961: 69.

<sup>182</sup> Sanderson, Fred H. "The five-year experience of the European Coal and Steel Community," *International Organization*, Vol. 12, No. 2, 1958: 200.

<sup>183</sup> Lister, Louis. *Europe's Coal and Steel Community: an experiment in economic union*, New York: Twentieth Century Fund, 1960: 11.

<sup>184</sup> Kapteyn, Paul. "Background paper: The Common Assembly of the European Coal and Steel Community as a representative institution." In *European assemblies: the experimental period, 1949-1959*, by Kenneth Lindsay, London: Stevens and Sons, 1961: 218.

[The Common Assembly] will use all the rights it is expressly given and, in addition, in case of doubt, it will seek solutions in the common parliamentary law and not in an unjustified comparison with non-sovereign international assemblies.<sup>185</sup>

Other scholars went even further and posed the question of whether the power of censure and the "almost continuous opportunity to draw statements of policy from the High Authority on specific issues" meant that the Common Assembly was in as strong a position as if it actually had a rule-making power. Merry, for instance, hypothesised that the Common Assembly may well have had "as much real control of the High Authority operations as the United States Congress has over an administrative agency without the technical difficulties presented by the need to formulate rules or laws".<sup>186</sup>

A snapshot of the Common Assembly's actual scrutiny seems to suggest that the interinstitutional relations in the Coal and Steel Community tended to be harmonious:

The Common Assembly had met eight times by the end of 1954 and its meetings have afforded the members of the High Authority excellent opportunity to exchange views. The second annual meeting, in May 1954, was the most extensive in this regard. The report of the High Authority for the year ending April 12, 1954, was discussed over a ten-day period with considerable participation by members of the Authority. At the end, a resolution commenting upon forty-six points and concluding with an expression of confidence was passed unanimously.<sup>187</sup>

### **3. THE NATURE OF THE DOUBLE MANDATE: POSITIVE BUT UNSUSTAINABLE?**

The efforts to constrain the High Authority's liberty of action by gathering members of national parliaments under the auspices of a European assembly were inspired by the constitutional concern of counterbalancing supranational decision-making power with a body equipped with direct electoral legitimacy. In essence, it was an attempt to democratise the Community.

#### **3.1. The High Authority as the Community's powerhouse**

The High Authority wielded formidable powers not only towards the Member States but also towards the enterprises and individuals directly. It could impose fines and penalties on enterprises, levy taxes on them, control pricing practices (though not prices themselves), give loans or refuse them in cases of overtly uneconomic investment plans, then fix production quotas, prevent certain objectionable types of mergers, or require the dissolution of specific restrictive contracts. The High

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<sup>185</sup> Haas, Ernst B. *The uniting of Europe: political social, and economic forces*, Stanford: Stanford University Press, 1968: 399.

<sup>186</sup> Merry, Henry J. "The European Coal and Steel Community. Operations of the High Authority," *Western Political Quarterly*, Vol. 8, No. 2, 1955: 181.

<sup>187</sup> Merry, Henry J. "The European Coal and Steel Community. Operations of the High Authority," *Western Political Quarterly*, Vol. 8, No. 2, 1955: 180.

Authority could also consult enterprises, workers, consumers, dealers and their associations, all of whom in turn had the right to present suggestions or observations on matters that concerned them.<sup>188</sup>

In legal terms, however, the executive power of the High Authority was not untrammelled. It had to operate under the precursors of today's principles of conferral, subsidiarity and proportionality. Community institutions had to act "within the limits of their respective powers",<sup>189</sup> "with a limited measure of intervention",<sup>190</sup> and "with a minimum administrative machinery".<sup>191</sup> As Vernon submitted, these were limitations of *extensiveness* (the Community's powers were confined only to the production and distribution of coal and steel products and that only within the boundaries of the six Member States) and of *intensiveness* (the Community's powers were confined to the activities that have a most direct bearing on the production and distribution of coal and steel products).<sup>192</sup> A similar perception was also reflected in the report drafted by the Common Assembly in 1957 to commemorate the first four years of the ECSC's activity. This report highlighted that the Member States had not abandoned their sovereignty but decided to exercise certain of their sovereign functions jointly.<sup>193</sup>

### 3.2. National parliaments as archetypal repositories of popular representation

The urge to involve national parliaments in the public life of the Community lay in the perception captured concisely by Max Suétens, the leader of the Belgian delegation to the Schuman Plan negotiations: "[N]ational parliaments are the ultimate locus of responsibility, and not some randomly selected groups of parliamentarians".<sup>194</sup> Lindsay further explains why, besides the Common Assembly, many other European assemblies of that time – the Consultative Assembly of the Council of Europe (1949), the Nordic Council (1953), the Western European Union Assembly (1954), the NATO Parliamentary Assembly (1955), and the Benelux Interparliamentary Consultative Council (1955) – were linked to national parliaments:

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<sup>188</sup> Vernon, Raymond. "The Schuman Plan: sovereign powers of the European Coal and Steel Community," *American Journal of International Law*, Vol. 47, No. 2, 1953: 195, 197-198.

<sup>189</sup> Article 3(1) ECSC Treaty.

<sup>190</sup> Article 5(1) ECSC Treaty.

<sup>191</sup> Article 5(2) ECSC Treaty.

<sup>192</sup> Vernon, Raymond. "The Schuman Plan: sovereign powers of the European Coal and Steel Community," *American Journal of International Law*, Vol. 47, No. 2, 1953: 201-202.

<sup>193</sup> Report of the Common Assembly's Committee on Political Questions and External Relations presented by Pierre Wigny (Belgium, Social Christian) during the general debate held as part of an extraordinary session in Strasbourg from 12-15 February 1957, reported in: "European Coal and Steel Community," *International Organization*, Vol. 11, No. 2, 1957: 401.

<sup>194</sup> Rittberger, Berthold. *Building Europe's parliament: democratic representation beyond the nation-state*, Oxford: Oxford University Press, 2005: 81.

This relationship is important because it directly affects the level, measure and period of participation of members of parliament in the assemblies. If national parliaments do not give responsible attention to the general proceedings of the work of assemblies and more particularly to their specific proposals, there can grow up a rift between those attending assemblies and those who concentrate on home affairs. Unless members speak the same language in assemblies and in national parliaments, the whole purpose of assemblies is lost. The interaction is complicated and subtle, because it is only through national parliaments that a direct hold can be maintained on ministers, even in their international commitments.<sup>195</sup>

Within the Common Assembly, the appointed national parliamentarians were reported to have transcended their opposition and even their national origins in order to exercise their European function. They were "not ambassadors of states, governments or parliaments, bound by instructions", but this also did not mean that they were free from any ties with their national parliaments.<sup>196</sup> They were members of national political parties, and given the re-election prospects, they had to take into account the wishes of their electorates. This direct link with the citizens was precisely the reason why, albeit provisionally, members of the Common Assembly were recruited from national parliaments.<sup>197</sup> Communist MPs, however, were denied membership of national parliamentary delegations in all Member States, for fear that they would inflame the nationalist rhetoric in this inchoate European institution, whose establishment they had opposed during the processes of ratification of the founding treaties. It has been assessed that their exclusion was hypocritical, because there were other opposition parties that also had an aversion to the creation of the Communities.<sup>198</sup>

The enhancement of the Common Assembly's public profile also depended on other factors, such as public opinion, sectoral interests, political parties themselves, and so on. Yet although Common Assembly members were not given precise instructions, and certainly not voting instructions, in the eyes of Wigny, the pressure was so overwhelming that he saw this institution as a Chamber of Parliaments rather

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<sup>195</sup> Lindsay, Kenneth. *European assemblies: the experimental period, 1949-1959*, London: Stevens and Sons, 1961: 79.

<sup>196</sup> Kapteyn, Paul. "Background paper: The Common Assembly of the European Coal and Steel Community as a representative institution." In *European assemblies: the experimental period, 1949-1959*, by Kenneth Lindsay, London: Stevens and Sons, 1961: 228. This impression was probably the strongest in the Netherlands, where the evidence shows that the Dutch members of the Common Assembly were not tied to specific party opinions, a mandate or any government control. They were usually given a large discretion by their parties and there was no deliberate effort to reach a common Dutch opinion. Daalder, Hans. "Background Paper: the Netherlands." In *European assemblies: the experimental period, 1949-1959*, by Kenneth Lindsay, London: Stevens and Sons, 1961: 120-121.

<sup>197</sup> Kapteyn, Paul. *L'Assemblée Commune de la Communauté Européenne du Charbon et de l'Acier: un essai de parlementarisme européen*, Leiden: Sythoff, 1962: 56, 115.

<sup>198</sup> Bubba, Elena. "A propos de la désignation des membres du Parlement européen par les parlements nationaux," *Revue du Marché Commun*, Vol. 9, No. 89, 1966: 129.

than as a Chamber of Peoples.<sup>199</sup> In this regard, the question of the source of the members' mandate arises: is it the designation by national parliaments or the verification of their credentials by the Common Assembly?<sup>200</sup> According to one view, the Common Assembly is best depicted as "the conscience of Europe", representative not of the Member States, of their parliaments or of the European people, but merely of itself. This illustrates well the perplexity surrounding the nature of supranational parliamentarism, one that has never ceased to provoke interest among students of European integration.

The double mandate was a means to secure daily information flow and coordination between the national and European parliamentary arenas. The advantages of this 'personal union' were deemed so important that there were calls in the Common Assembly that a certain number of its members should keep two mandates even if direct elections were organised.<sup>201</sup> That notwithstanding, the so-called Teitgen Report of 1954 gave an early estimate that interparliamentary contacts remained scant in practice and that this adversely affected the creation of a Europe-wide public opinion:

The public opinion of each of our countries would not feel the benefit of the protection of a true parliamentary regime if our national parliaments only deliberated on the basis of the information furnished by our governments. In each of our countries, and for the exercise of our parliamentary function, we are informed by our direct contacts with the public, professional, syndical and economic organisations. These contacts are missing at the level of the Community. And if the public opinion sometimes doubts the effectiveness of our control, it is because there is a feeling that there are no links between our Assembly, or its committees, and the economic, professional or syndical organisations, [who are] representatives of the interests that are at stake in the matters that the Community deals with.<sup>202</sup>

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<sup>199</sup> Wigny, Pierre. *L'Assemblée parlementaire dans l'Europe des Six*, Luxembourg: Communauté Européenne du Charbon et de l'Acier, 1958: 24.

<sup>200</sup> At the beginning of the each first, constitutive session of the Common Assembly, a committee of ten randomly selected representatives would verify the representatives' credentials according to the procedure laid down in the Rules of Procedure. The representatives whose credentials were not verified would provisionally retain their seats and have the same rights as other Common Assembly members, which conforms to the 'common parliamentary law'. Soto, Jean de. *La Communauté Européenne du Charbon et de l'Acier*, Paris: Presses Universitaires de France, 1961: 51. It has been argued that this did not give any extra power to the Common Assembly, because the designation of national parliamentarians fell squarely within the competence of the Member States, so that any intervention by the Common Assembly would cause "a delicate diplomatic problem". The Common Assembly regularly verified these credentials on the basis of a letter to that effect by the President of the national parliament concerned. Lyon, Jean. *L'Assemblée Commune de la C.E.C.A.*, Paris: Librairies Imprimeries Réunies, 1957: 21-22.

<sup>201</sup> Wigny, Pierre. *L'Assemblée parlementaire dans l'Europe des Six*, Luxembourg: Communauté Européenne du Charbon et de l'Acier, 1958: 87.

<sup>202</sup> Communauté Européenne du Charbon et de l'Acier. "Rapport sur les pouvoirs de contrôle de l'Assemblée commune et leur exercice (2 décembre 1954)," *Annuaire Français de Droit International*, Vol. 1, 1955: 711. One of the first public opinion polls on European integration, conducted in 1971 by the European Commission, and which later became Eurobarometer surveys, illustrated the variance in public

Nevertheless, Haas' incisive analysis found no evidence that national parliaments paid any deference to the resolutions of their Strasbourg colleagues. He maintained that the Common Assembly's "outstanding parliamentary artificiality" stemmed, *inter alia*, from its inability to coordinate its endeavours with the debates and votes in national parliaments.<sup>203</sup> Although some national parliaments, like the French *Assemblée nationale*, laid down in their Rules of Procedure a duty for the French members of the Common Assembly to submit a report on their activity to their fellow national parliamentarians, these appeared to make only a minor difference.<sup>204</sup>

In these initial stages of European integration, therefore, there was already a sense of separation of the functions of the Common Assembly from those of national parliaments despite the double mandate. In a report of 20 January 1958, adopted at the time when the Common Assembly was to become the European Parliamentary Assembly, this institution claimed that "to the extent that they have transferred the competences, the national parliaments do not exercise control over large sectors of public activity", and that "[i]f then the European Parliamentary Assembly proves to be incapable to ensure the control that the national parliaments no longer exercise, there will be a very serious and hardly acceptable lacuna in the political organisation of Europe".<sup>205</sup> The necessity of a greater interpenetration between parliaments at the national and Community levels was soon felt.<sup>206</sup> Prior to the first direct elections, however, the European Parliament was not propitious towards its national counterparts. Two of its reports of October 1966, which explicitly tackled the question of whether national parliaments could have any role in securing the political control of Community decisions alongside the European Parliament, were firmly against it, because, in the European Parliament's view, it alone was competent to perform this function.<sup>207</sup> It flows from these reports that there were two principal reasons why the European Parliament adopted such an attitude: (a) national parliaments were deemed less imbued with the Community spirit and were a potential brake on the evolution of the Community; and (b) the European Parliament

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attitudes towards European integration: whereas 52% of the German interviewees would have "greatly regretted" if the Common Market had been abandoned, the same percentage of the French interviewees would have been "indifferent". Commission des Communautés européennes. *L'opinion des Européens sur les aspects régionaux et agricoles du Marché commun, l'unification politique de l'Europe et l'information du public*, Table no. 26, p. 45, available at: [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_2\\_fr.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_2_fr.pdf), accessed on 14 February 2010.

<sup>203</sup> Haas, Ernst B. *The uniting of Europe: political, social, and economic forces*, Stanford: Stanford University Press, 1968: 413.

<sup>204</sup> Lyon, Jean. *L'Assemblée Commune de la C.E.C.A.*, Paris: Librairies Imprimeries Réunies, 1957: 55.

<sup>205</sup> Wigny, Pierre. *L'Assemblée parlementaire dans l'Europe des Six*, Luxembourg: Communauté Européenne du Charbon et de l'Acier, 1958: 73.

<sup>206</sup> Burban, Jean-Louis. "Relations entre Parlement européen et parlements nationaux," *Revue du Marché Commun*, Vol. 15, No. 160, 1972: 781.

<sup>207</sup> Niblock, Michael. *The EEC: national parliaments in Community decision-making*. London: Chatham House, 1971: 74.

was preoccupied with its own institutional prestige, which it strove to enhance ever since its inception in 1951.

The double mandate proved ill-suited for supranational political accountability, indeed. As Niblock reports, the relations between the European and national parliaments were a "result not of any deliberate attempt on the part of the members of the delegations, either individually or collectively, to use the procedures of their respective national assemblies in order to publicise Community issues, but of the simple fact that the mandate to the European Parliament is held jointly with a mandate to one or other of the national institutions".<sup>208</sup> A small-scale poll conducted in May 1977, in the dawn of the first European election, seemed to affirm the lack of substantial interaction between the European Parliament and national parliaments. No less than 65.6% of the interviewed MEPs found dissatisfactory the means to pass on to their colleagues in their national parliament the knowledge that they gain in the European Parliament, whereas 50.8% of them replied that their national party colleagues do not take note of their experience in the European Parliament very well.<sup>209</sup> The 'double-hattedness' was indeed an onerous task, which – given that parliamentarians were concomitantly members of several international assemblies, notably of the Council of Europe's Consultative Assembly<sup>210</sup> – led to absenteeism in national parliaments.<sup>211</sup> However, absenteeism occurred in the European Parliament too, since whole delegations sometimes had to depart for their nation's capitals in order to cast a vote to help their governments, where the latter were supported by weak parliamentary majorities.<sup>212</sup> Another survey, conducted with the members of the British House of Commons in the spring of 1978, showed that the presumed benefit of the double mandate for national parliamentary scrutiny had been overstated. Over 60% of the interviewed MPs did not consider the retention of the double mandate desirable for maintaining the communicative and institutional links with the European Parliament. In contrast, over 85% of them favoured the double

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<sup>208</sup> Niblock, Michael. *The EEC: national parliaments in Community decision-making*. London: Chatham House, 1971: 67.

<sup>209</sup> Hearl, Derek and Sargent, Jane. "Linkage mechanisms between the European Parliament and the national parliaments." In *The European Parliament and the national parliaments*, by Valentine Herman and Rinus van Schendelen (eds), Westmead: Saxon House, 1979: 29 (notes 26 and 27 respectively). The sample encompassed 67 out of a total of 194 MEPs (34.5%).

<sup>210</sup> Article 1 of the Protocol on relations with the Council of Europe, which was attached to the ECSC Treaty, stated that members of the Common Assembly "should preferably be chosen from among the representatives in the Consultative Assembly of the Council of Europe". These two assemblies held joint meetings and it was estimated that 46 of the 78 members of the Common Assembly also belonged to the Council of Europe's Consultative Assembly. *The Economist*, 20 September 1952, pp. 671-672.

<sup>211</sup> Niblock, Michael. *The EEC: national parliaments in Community decision-making*, London: Chatham House, 1971: 66-67; Kieffer, Gerard and Millar David. "Relations between the European Parliament and the national parliaments." In *The European Parliament and the national parliaments*, by Valentine Herman and Rinus van Schendelen (eds), Westmead: Saxon House, 1979: 34.

<sup>212</sup> Pöhle, Klaus. "Le Parlement européen et les parlements nationaux," *Revue du Marché Commun*, No. 309, 1987: 459.

mandate as a venue for national political parties' control over their MEPs' activities.<sup>213</sup>

These sentiments possibly paved the way for the first resolution of the European Parliament on its relations with national parliaments, which was adopted on 9 July 1981 on the basis of the Diligent Report.<sup>214</sup> Acknowledging the multiplication of parliamentarism across levels and the fact that the double mandate was never truly the motor of close interparliamentary cooperation, the European Parliament sought to improve the exchange of information with its national counterparts, as the direct personal link had been withdrawn by the first European elections in 1979.

#### **4. THE COAL AND STEEL COMMUNITY TREATY IN NATIONAL PARLIAMENTS**

We proceed with an analysis of the parliamentary debates on the ECSC Treaty in France and Britain, with the emphasis on the perceptions of supranational democracy. The reasons for Portugal's exclusion from the ECSC are also presented.

##### **4.1. France: sowing the germ of supranational parliamentarism**

The Constitution of the Fourth Republic prescribed that "under the condition of reciprocity, France consents to the limitations of sovereignty necessary for the organisation and defence of the peace",<sup>215</sup> and that "diplomatic treaties duly ratified and published shall have the force of law even when they are contrary to French laws, without there being the need to ensure their application by any legislative provisions other than those necessary for their ratification".<sup>216</sup>

The ECSC Treaty was approved in both Houses of Parliament by considerable majorities.<sup>217</sup> However, the then 'omnipotent' *Assemblée nationale*, having caused ministerial instability through what Capitant humorously called a "game of massacre",<sup>218</sup> forced the Government to move the vote of confidence two times and

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<sup>213</sup> Lodge, Juliet. "MP-MEP links: members of the House of Commons and the dual mandate," in *The European Parliament and the national parliaments*, by Valentine Herman and Rinus van Schendelen (eds), Westmead: Saxon House, 1979: 221 and 223. The sample included 46.4% of the members of the House of Commons.

<sup>214</sup> Debras, Lucile. *Les relations entre le Parlement européen et les parlements nationaux depuis 1979: étude comparative des cas allemand, belge et français*, Doctoral dissertation, Université Paris 3 Sorbonne Nouvelle, 2008: 201-202.

<sup>215</sup> Recital 15 of the Preamble to the French Constitution of 1946.

<sup>216</sup> Article 26 of the French Constitution of 1946. André Philip, a member of the committee for the drafting of the Constitution, explained that this formulation was used so that "the question of the constitutionality of a treaty, whichever it be, could never again be posed". *Le Monde*, 9 June 1954, cited in: Prieur, Raymond. *La Communauté Européenne du Charbon et de l'Acier: activité et évolution*, Paris: Montchrestien, 1962: 121. See more in: Deener, David R. "Internationalism, party politics, and the new French Constitution," *Journal of Politics*, Vol. 15, No. 3, 1953: 399-423.

<sup>217</sup> It was adopted by the *Assemblée nationale* on 13 December 1951 by a vote of 377 in favour and 232 against. In the *Conseil de la République* it was adopted on 1 April 1952 by a vote of 182 in favour and 32 against. *Assemblée Commune, Le Traité C.E.C.A. devant les parlements nationaux*, Luxembourg: Communauté Européenne du Charbon et de l'Acier, 1958: 18-19.

<sup>218</sup> Capitant, René. *La réforme du parlementarisme*, Sirey: Paris, 1934: 8.

to accept several amendments. These were aimed at channelling the Moselle River to secure an easier transport of coal and steel from Germany and at safeguarding French producers. The *Conseil de la République*, the predecessor of today's *Sénat*, adopted a motion acknowledging, among other things, the Government's commitment to hold prior consultations with Parliament whenever the list of products falling under the categories of "coal" and "steel" was to be extended and whenever a new state was to be admitted to the Community.

The Government's relations with Parliament are perhaps best summarised by one of Schuman's addresses to the *Assemblée nationale* about a month after the beginning of the ECSC negotiations:

The Government is [...] always ready to inform the *Assemblée* or the committees, to hear all the observations and all the objections or misgivings that might emerge. But it cannot [...] let its hands be tied in the middle of negotiations. [...] The point is that we can explain ourselves and that you are not faced, not even morally, with a *fait accompli*. Yet one should not forget that during the course of the negotiations, which have barely started, the Government cannot do more and cannot accept binding orders that would complicate the negotiations. The state of negotiations does not allow me to be more explicit [...].<sup>219</sup>

Within Parliament, the positions of the political parties were hardly concordant. Beside the Communists, who derided the Schuman plan as "the Truman Plan"<sup>220</sup> and "a pernicious treaty",<sup>221</sup> its strongest critiques were the Gaullists (*Rassemblement du Peuple Français*), who insisted that the ECSC was "extra-parliamentary and unconstitutional". One of their representatives, Pierre-Étienne Flandin, the former Prime Minister, then exclaimed: "We are offering to defeated Germany what victorious Germany imposed on us. Why did we fight the war?"<sup>222</sup> Referring to Monnet as "super-minister of economy" and "grey eminence", Flandin went on to criticise the secrecy of the ECSC deliberations, the unaccountability of the National Planning Board, and the sidelining of Parliament with regard to information and explanations.<sup>223</sup> The Gaullist opposition reached a climax with the tabling of a resolution in the Foreign Affairs Committee of the *Assemblée nationale*, whereby the Government was invited to bring an action for the annulment of all Common Assembly activities seeking to extend the scope of the Community through Treaty

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<sup>219</sup> Speech by Robert Schuman before the *Assemblée nationale* on 25 July 1950. The negotiations had begun on 20 June 1950. Fondation Jean Monnet pour l'Europe, Lausanne. Fonds AMG. 5/2/9.

<sup>220</sup> Haas, Ernst B. *The uniting of Europe: political social, and economic forces*, Stanford: Stanford University Press, 1968: 114.

<sup>221</sup> Fajon, Etienne. "Le traité néfaste", *L'Humanité* (French Communist daily newspaper), 5 December 1951.

<sup>222</sup> Haas, Ernst B. *The uniting of Europe: political social, and economic forces*, Stanford: Stanford University Press, 1968: 115.

<sup>223</sup> Flandin, Pierre-Etienne. "Le plan Schuman - Aspects politiques", *Nouvelle Revue de l'Économie Contemporaine*, No. 16-17, Numéro spécial: le plan Schuman, 1951: 5-10.

interpretations. The resolution was defeated by only two votes.<sup>224</sup> Nevertheless, the Gaullist disquiet centred on the paramountcy of France's economic resuscitation rather than on European integration as such.<sup>225</sup> On the other hand, Paul Ramadier, the leader of the Socialists, supported the Common Assembly. He considered that it would "acquire a status that will permit it to exercise its powers efficiently and that could permit it to play a key role if it acts in concert with the governments, national assemblies and the Council of Europe".<sup>226</sup>

There was, therefore, no clear majority in favour of integration in France, but rather floating alliances in which often disparate party interests converged to erect the Community. Especially vocal was the regret that Britain had decided to stand aloof.

#### **4.2. Britain: strategic abstention**

When invited by the French, the Labour Government refused to take part in the negotiations on the Schuman Plan, which were scheduled to take place in Paris.<sup>227</sup> Apart from the estimation that Socialists would perpetually be a minority in a federated Europe, the reasons, expounded in the official Labour pamphlet *European Unity*,<sup>228</sup> ranged from the disbelief in the proper functioning of the common market, to the unwillingness to sacrifice sovereignty, to the precedence of the British ties with the Commonwealth and the United States.<sup>229</sup> On these issues harmony with the Conservatives was almost flawless.<sup>230</sup> National pride played a part, too.<sup>231</sup>

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<sup>224</sup> Haas, Ernst B. *The uniting of Europe: political social, and economic forces*, Stanford: Stanford University Press, 1968: 119. See more on the position of the Gaullists in: Soustelle, Jacques. "France and Europe: a Gaullist view," *Foreign Affairs*, Vol. 30, No. 4, 1952: 545-553.

<sup>225</sup> For instance, for Diethelm, a Gaullist MP in the *Assemblée nationale*, the ECSC could not be successful without a common currency, a view in which Krieger, a member of the ruling Christian Democrats (*Mouvement Républicain Populaire*) in the *Assemblée nationale*, concurred. Debate of 7 December 1951 in the *Assemblée nationale. Assemblée Commune, Le Traité C.E.C.A. devant les parlements nationaux*, Luxembourg: Communauté Européen du Charbon et de l'Acier, 1958: 112.

<sup>226</sup> Ramadier, Paul. "Conférence Acier-Charbon: Accord pratiquement réalisé entre les ministres européens: le bien et le mal dans le plan Schuman", *Le Populaire* (French daily newspaper), 17 April 1951.

<sup>227</sup> See more in: Dell, Edmund. *The Schuman Plan and the British abdication of leadership in Europe*, New York: Oxford University Press, 1995; Anouil, Gilles. *La Grande-Bretagne et la Communauté européenne du charbon et de l'acier*, Doctoral dissertation, Université de Bordeaux, 1959.

<sup>228</sup> In this document, Ernest Bevin, the Labour Foreign Secretary, assessed that Britain was "[i]n every respect except distance [...] closer to our kinsmen in Australia and New Zealand on the far side of the world, than [...] to Europe", and especially in terms of language, origins, social habits, institutions, political outlook and economic interest. Dell, Edmund. *The Schuman Plan and the British abdication of leadership in Europe*, New York: Oxford University Press 1995: 199.

<sup>229</sup> Stafford Cripps, the Labour Chancellor of the Exchequer, expressed these major concerns in his speech in the House of Commons: "To have accepted them [the principles underlying the French Government's memorandum] would have bound us, provided a practical way could be found of doing it, to remove from the control of the Government of this country and of Parliament not only all matters concerning the production of coal and steel in this country but in fact a great range of other matters" (col. 1942)... "there is not an identity of view in economic matters between the principal Governments of

Yet among the ranks of both Conservatives and Liberals, the Labour decision not to attend the Paris Conference was denounced vehemently.<sup>232</sup> In June 1950, in the first week of the Schuman Plan negotiations, Anthony Eden, a Conservative MP and later Prime Minister, introduced a motion in the House of Commons inviting the Government, "in the interests of peace and full employment", to take part in the Schuman Plan negotiations subject to the same condition as that made by the Dutch Government, namely, that if the discussions showed the plan not to be practicable, freedom of action would be reserved.<sup>233</sup>

Supranationality, the bedrock of the Plan, was a point of utter confusion and resentment. It was a "hybrid monstrosity"<sup>234</sup>, an "odious phrase".<sup>235</sup> In fact, it vexed the Conservatives so much that Winston Churchill, the opposition leader in the House of Commons, had to vent his indignation.<sup>236</sup>

I would add, to make my answer quite clear to the right hon. and learned Gentleman, that if he asked me, 'Would you agree to a supranational authority which has the

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Europe" (col. 1944)... "participation in a political federation, limited to Western Europe, is not compatible either with our Commonwealth ties, our obligations as a member of the wider Atlantic community, or as a world power, and I gather from what the right hon. gentleman who opened this debate said that the Opposition would agree with that proposition" (col. 1948)... "[i]t does not, however, seem to us [...] either necessary or appropriate, in order to achieve these purposes, to invest a supranational authority of independent persons with powers for overriding governmental and parliamentary decisions in the participating countries" (col. 1948). House of Commons, Debate of 26 June 1950, Vol. 476.

<sup>230</sup> Haas, Ernst B. *The uniting of Europe: political social, and economic forces*, Stanford: Stanford University Press, 1968: 159.

<sup>231</sup> Witness the statement by Harold Adams, a Labour MP: "We feel that we have an historic role to play as a pivot of understanding between Europe, the Commonwealth, the Atlantic Community and the rest of the world, and that if we were to rush into a close federation in Europe without thinking about it [...] that would destroy the future greatness of this country" (col. 2028); or that by Julian Amery, a Conservative MP: "It is not a bad thing for ministers to think that the British people are superior to anyone else – I confess I rather share that view myself; but it does not really justify making a sort of political apartheid as the basis of one's foreign policy" (col. 2020). House of Commons, Debate of 26 June 1950, Vol. 476.

<sup>232</sup> Clement Davies, a Liberal MP, for instance, stated that "[t]here would have been nothing to prevent us sitting round that table, putting before the others our difficulties" and argued that British participation in the negotiations was not contrary either to the obligations towards the Commonwealth or to the United States, the latter of which was implicit in the Marshall Plan. House of Commons, Debate of 26 June 1950, Vol. 476, cols. 1929 and 1931.

<sup>233</sup> House of Commons, Debate of 26 June 1950, Vol. 476, col. 1907.

<sup>234</sup> Anthony Eden, Conservative MP, House of Commons, Debate of 26 June 1950, Vol. 476, col. 1914.

<sup>235</sup> Winston Churchill, Conservative MP, House of Commons, Debate of 26 June 1950, Vol. 476, col. 1942.

<sup>236</sup> This vexation possibly also came from the fact that the term "supranational" was invented by the Labour Party in a resolution in 1948, which envisaged "to cooperate with the European Socialist Parties in taking practical steps to achieve the unity of Socialist States of Europe, including the establishment of supranational agencies to take over from each nation powers to allocate and distribute coal, steel, timber, locomotives, rolling-stock, and imports from hard-currency countries, in complete military and political independence of the United States of America and the U.S.S.R.". House of Lords, Debate of 28 June 1950, Vol. 167, col.1222.

power to tell Great Britain not to cut any more coal or make any more steel, but to grow tomatoes instead? I should say, without hesitation, the answer is 'No'.<sup>237</sup>

The democratic element of the Plan, albeit not a matter of immediate significance at first, did induce reactions in Parliament.<sup>238</sup> What is perhaps astonishing given the prevailing scepticism is that Westminster was not seen as the exclusive solution to the democratisation of the ECSC. For example, John Hynd, a Labour MP, preferred "a federal government controlling Western Europe to democratic parliamentary control [...] by the individual parliaments".<sup>239</sup> For his party colleague, Richard Crossman, "[t]he only way of democratising M. Schuman's suggestion is to complete it by a federal parliament".<sup>240</sup> It appears, however, that the prevalent standpoint was the one expressed, for instance, by Lord Layton, a Liberal peer: "A body acting by delegated authority must derive its authority from the people. That is an essential condition which in present circumstances must come via governments, and not through a sovereign federal parliament".<sup>241</sup>

When in December 1953 Monnet offered Britain an agreement on a council of association with the Community,<sup>242</sup> the looming threat of isolation, propelled by the success of the integration on the Continent,<sup>243</sup> expedited Britain's subscription to it.<sup>244</sup> Although the ratification of this agreement in June 1954 was uncontroversial, democracy-related concerns surfaced again. During a debate in the House of Commons in February 1955 on mutual diplomatic privileges and immunities to be recognised to the ECSC's delegation in London and to Britain's delegation in Luxembourg, Minister Duncan Sandys gave MPs an assurance redolent of the scrutiny reserve, which is nowadays applicable in both Houses of Parliament:

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<sup>237</sup> House of Commons, Debate of 27 June 1950, Vol. 476, col. 2147.

<sup>238</sup> See the reaction regarding the High Authority by Maurice Edelman, a Labour MP: "Who are these independent people, so free from national associations, so free from economic prejudice, such paragons of wisdom that they would be qualified to direct without any form of democratic responsibility a great European industry, which, after all, affects the lives of every one of us?". House of Commons, Debate of 27 June 1950, Vol. 476, col. 2107.

<sup>239</sup> House of Commons, Debate of 26 June 1950, Vol. 476, col. 1979.

<sup>240</sup> House of Commons, Debate of 26 June 1950, Vol. 476, col. 2040.

<sup>241</sup> House of Lords, Debate of 28 June 1950, Vol. 167, col. 1214. See to that effect the statement by James Carmichael, a Labour MP: "[T]he only way we shall get real understanding in world affairs is by delegating responsibility to the governments of the countries concerned. Those governments are answerable to the parliaments of the respective countries. That is the only way to defend and extend democracy". House of Commons, Debate of 26 June 1950, Vol. 476, col. 2034.

<sup>242</sup> See more in: Driscoll, James. "Association with Schumania," *Journal of Industrial Economics*, Vol. 3, No. 1, 1955: 79-110; "European Coal and Steel Act, 1955," *International and Comparative Law Quarterly*, Vol. 5, No. 1, 1956: 132-133.

<sup>243</sup> The press helped dispel the anxiety. An appraisal had it that "the High Authority, instead of weaving in the dark compelling plots that would lay nations at its feet, may find itself in practice dependent on the willingness of governments to cooperate and hampered by the glare of publicity". *The Manchester Guardian*, "Britain and the Schuman Plan: I. Political Aspects", 19 April 1951.

<sup>244</sup> Haas, Ernst B. *The uniting of Europe: political, social, and economic forces*, Stanford: Stanford University Press, 1968: 314-315.

### Chapter 3

Knowing the feelings of the House of Commons on this subject, which I myself fully share, I made it clear that no undertaking could be given until the views of Parliament could be ascertained, and no undertaking of any kind has, in fact, been given on this question.<sup>245</sup>

Moreover, MPs asked to be associated with the Common Assembly when matters of general interest were under discussion,<sup>246</sup> and inquired about the form of parliamentary control over the deliberations of the UK-ECSC Association Council, about the possibility to pose questions, as well as to whom they should be addressed.<sup>247</sup> In reply, Anthony Nutting, the Conservative Minister of State for Foreign Affairs, described a mechanism centred on the principle of ministerial responsibility, the 'genetic link' that paved future relations between the Government and Parliament in EU affairs:

[T]he delegation is a Government delegation. It will be headed by a minister; which minister it will be will depend on what subject is under discussion [...] and any decisions which are to be taken by the Council of Association will be Government decisions, for which the Government will, of course, in the ordinary way be collectively responsible to Parliament.<sup>248</sup>

The preponderance of Westminster's sovereignty in the British political verdict on the ECSC was nicely encapsulated by Schuman's statement on why, in his opinion, the United Kingdom found it problematic to accept his Plan:

[N]ot in any domain can an English government, an English parliament, accept decisions that would be taken outside of it or perhaps even against it. The English are very attached to the principle of [...] 'unwritten constitution'. A charter, a constitution must be adaptable in any event. It is because of that that it cannot be laid down in a rigid text. Conversely, in France, the land of Descartes, everything must be specified in writing; what is not written has no value.<sup>249</sup>

This difference in the constitutional traditions of the British and the French proved to be an important obstacle for the participation of the former in the Coal and Steel Community.

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<sup>245</sup> House of Commons, Debate of 21 February 1955, Vol. 537, col. 886.

<sup>246</sup> See the interventions by George Chetwynd, a Labour MP, in: House of Commons, Debate of 21 February 1955, Vol. 537, col. 925; Debate of 7 December 1955, Vol 547, col. 352; Debate of 9 July 1956, Vol. 556, col. 34.

<sup>247</sup> See the interventions by Peter Roberts, a Conservative MP, and Frederick Mulley, a Labour MP, in: House of Commons, Debate of 21 February 1955, Vol. 537, cols. 929-930.

<sup>248</sup> House of Commons, Debate of 21 February 1955, Vol. 537, col. 946.

<sup>249</sup> Schuman, Robert. *Pour l'Europe*, Paris: Nagel, 1963: 116-117.

### **4.3. Portugal: obstructed by dictatorship**

Portugal's association with Western European integration movements started with its initially reluctant participation in the Marshall Plan, established in 1947, which continued in a more determined fashion within the Organisation for European Economic Cooperation (OEEC), established in 1948 to administer the Marshall Plan. After becoming a founding member of NATO in 1949, Portugal's European integration ground to a halt in 1950. Due to insufficient economic development and the political situation of dictatorship, which was an affront to European values of democratic government, Portugal was not invited to participate in the ECSC. In 1951, despite being invited by France to take part in the European Defence Community, Prime Minister Salazar refused to do so. Nonetheless, as Pereira argued, "the long dialogue, under the auspices of OEEC and NATO, between the Portuguese diplomats, experts and politicians and their foreign counterparts permitted a greater mutual acceptance", which later paved Portugal's road towards the European Communities in 1986.<sup>250</sup>

The elements of Portuguese foreign policy relevant for European integration that crystallised in this period were: (a) the development of interest for collaboration between the European states; (b) the necessity to rapidly integrate West Germany into the Western system of defence; (c) the need to involve Spain in Europe's economic, monetary and military cooperation; (d) the rejection of any form of supranationality that could lead to European unification, integration, confederation or federation; (e) mistrust in the United States while concomitantly recognising the importance of its assistance to Europe; (f) the resolution to confront Soviet expansion and the spread of communism; and finally, (g) the refusal of any external interference in the definition of Portuguese internal policies.<sup>251</sup>

There were three key factors that isolated Portugal from the first steps towards the uniting Europe. First, Portugal was not a democratic state but a dictatorship. Second, for Salazar, the protection of national sovereignty trumped any extensive international commitment. Third, the fear of losing control over its colonies fuelled Portugal's scepticism towards opening its legal and political borders.<sup>252</sup>

In Portugal, the earliest debates on the EU began after the Revolution of Carnations of 1974, when the major political parties in Portugal were created. Having come out of a single-party system that had lasted since 1933, during which any

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<sup>250</sup> Pereira, Pedro Cantinho. "Portugal e o início da construção europeia (1947-1953)," *Nação e Defesa*, No. 115, 2006: 252. See more on Portugal's political attitude towards European integration prior to its accession to the European Communities in: Guerra, Ruy Teixeira et al. *Os movimentos de cooperação e integração europeia no pós-guerra e a participação de Portugal nesses movimentos*, Lisbon: Instituto Nacional de Administração, 1981; Magalhães, José Calvet de. "A participação de Portugal nas instituições internacionais do pós-guerra," in *Portugal e a construção europeia*, by Maria Manuela Tavares Riberio et al. (eds), Coimbra: Almedina, 2003: 125-135.

<sup>251</sup> Pereira, Pedro Cantinho. "Portugal e o início da construção europeia (1947-1953)," *Nação e Defesa*, No. 115, 2006: 251.

<sup>252</sup> Pereira, Pedro Cantinho. "Portugal e o início da construção europeia (1947-1953)," *Nação e Defesa*, No. 115, 2006: 250.

meaningful democratic participation was suppressed, Portugal, unlike Britain and France, was democratically flaccid. For this reason, the newly established political parties generally saw the Communities as a source of democracy rather than a source of democratic deficit. Consequently, EU accession did not symbolise a possible loss of free democratic expression but a vehicle to consolidate national democratic infrastructure. As Barroso wrote in his scholarly days, except for the Communists, the majority of the political parties – including the Social Democrats, Socialists and Centrists – were clearly in favour of European integration.<sup>253</sup> This political landscape has, with minor fluctuations, survived until today.

## 5. CONCLUDING REMARKS

The founding of a European Community just years after the termination of the Second World War was highly politically charged. The Common Assembly, which was the embodiment of Europe's parliamentary *dédoulement fonctionnel*, was steeped in the strife to put the Community on a more democratically legitimate footing. National parliamentarians were viewed as the key channel for accomplishing this because of their constitutional proximity not only to the citizens but, importantly, also to the ministers. Indeed, national parliaments were and still are the sole locus of the individual responsibility of Council members. No other institution can perform this function. This was well perceived at the time and this is why national parliaments, with greater or lesser intensity, remained on the EU agenda ever since.

The predominant topics in national parliaments concerned international relations. However, preoccupations about democracy and the political accountability of supranational institutions did emerge, albeit on the margins of the discussions.

In France, the transfer of sovereignty was embraced, as demonstrated by the comfortable ratification of the ECSC Treaty. Parliament, acting in a constitutional setting that favoured its tight control of the Government, used its weapons to secure a set of concessions. Its main interlocutor and addressee was thus the Government. The takeover of certain functions by the Common Assembly was not a key issue in parliamentary deliberations. The Common Assembly and the possibility of it extending its powers without national parliamentary endorsement did, however, provoke a Gaullist 'rebellion' that nearly succeeded. This signifies a degree of institutional animosity. But the central concerns across the French political parties was not the installment of the Common Assembly as an institutional matter but rather the foreign policy gains that the Community project could bring. There is, therefore, no firm ground to conclude that the French Parliament felt particularly rivalled by the Common Assembly. Yet it was also not enchanted with the latter's establishment.

In Britain, the prospect of relinquishing a portion of national sovereignty caused consternation and dismay among both the Conservative and Labour parties. They

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<sup>253</sup> Barroso, José Durão. *Le système politique portugais face à l'intégration européenne: partis politiques et opinion publique*, Lisbon: Associação Portuguesa para o Estudo das Relações Internacionais, 1983: 128.

were wary of supranational experimentation, for Britain's strong international standing provided it with strong alternatives for stepping into the uncharted waters of continental Europe. The idea of transferring sovereignty was, hence, the central reason why the British political elite decided not to accede. The Common Assembly, even though a 'superparliament'<sup>254</sup> of sorts, was not opposed. On the contrary, several Labourites were progressive enough to voice support for a federal European parliament. The takeover of powers by the Common Assembly was compensated for by national constitutional solutions. Emphasis was soon placed on ministerial responsibility and the Government willingly conceded an inchoate scrutiny reserve arrangement. Westminster, therefore, did not regard the Common Assembly as a rival but as a partner.

In Portugal, the absence of a democratic political system disqualified Salazar's *Estado Novo* from the ECSC talks.<sup>255</sup> This was the chief reason why Portugal did not receive an invitation to sit at the negotiating table. Beyond this, conservatism and staunch adherence to national sovereignty translated into an outright dismissal of supranationalism as a guiding principle of European unification. Portugal admitted of no transfer of sovereignty. These unfavourable national politico-constitutional circumstances did have a positive side, however. Once Portugal embarked on the trail of democracy, the new supranational level was seen as an opportunity to fortify political pluralism and finalise the schism with the previous regime.

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<sup>254</sup> Hovey described superparliaments as "international regional assemblies of members of national legislatures convened regularly to investigate and debate international problems and to vote resolutions of opinion and recommendation", and which at their best exercise "a demonstrable and generally salutary influence on the formulation and the popularisation of regional programs and policies". Hovey, Allan J. *The superparliaments: interparliamentary consultation and Atlantic cooperation*, New York: Praeger, 1966: vii.

<sup>255</sup> See *infra* Chapter 8, Section 2.1.



# Chapter 4

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## *Intermezzo*

### **The Maastricht Treaty: Parliaments Beckoned to the Union**

#### **1. EXPLORING INTERPARLIAMENTARISM ACROSS LEVELS**

In the run-up to the Maastricht Intergovernmental Conference (IGC), the European Parliament adopted a series of resolutions that featured national parliaments in light of the democratic quality of what became the European Union. In a resolution of June 1988, the European Parliament aptly defined the democratic deficit as a process during which national parliaments were stripped of some of their crucial powers, which in turn not were taken over by the European Parliament but by the Council:

[I]n the institutional system of the European Community, the Council, composed of members of the Member States' governments, who at European Community level are not subject to any form of democratic parliamentary control, simultaneously holds both legislative and executive power (point 4)...a sizeable share of the powers exercised by the Council were held by the Member States' parliaments before being transferred to the Community (point 5)...the Council's legislative activity constantly entails new limitations on the powers of the national parliaments, and thereby entails a continual shrinking of democratic parliamentary rights in the Community (point 6)...in practice the limitations on the powers of national parliaments may involve either a loss of power to pass laws or an obligation to adopt certain implementing or contingency measures or to refrain from using the powers reserved to them, without those powers being transferred to the European Parliament, in a way which compromises the democratic legitimacy of its decisions (point 8)...[The European Parliament] deplores the fact that the loss of these democratic powers by the national parliaments is not counterbalanced by any increase in democratic control at European Community level (point 9)...[and] deeply regrets the 'democratic deficit' thus created...(point 10).<sup>256</sup>

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<sup>256</sup> European Parliament, Resolution on the democratic deficit in the European Community of 17 June 1988, (*OJ C 187/229* of 18.7.1988). See also the European Parliament's previous criticism of the democratic shortfalls in the Community's institutional system in its Resolution of 16 January 1986 on the position of the European Parliament on the Single Act approved by the Intergovernmental Conference on 16 and 17 December 1985, (*OJ C 36/144* of 17.2.1986), and in its Resolution on relations between the European Parliament and the Council of 8 October 1986, (*OJ C 283/36* of 10.11.1986).

In another resolution, adopted in November 1989, the European Parliament called on national parliaments to support its position on the Maastricht IGC, portraying Community legitimacy as stemming from both national and European parliaments:

In the present state of the Community, the direct democratic mandate takes two different forms: first, that of the direct European mandate embodied by the European Parliament elected by direct universal suffrage, and second, by the direct national mandates expressed according to the various national constitutions (recital D).<sup>257</sup>

Less than four months later, in March 1990, the European Parliament adopted yet another resolution invoking, *inter alia*, the various resolutions adopted by national parliaments at the time of or after the ratification of the Single European Act,<sup>258</sup> as well as the contacts and discussions that took place between its Committee on Institutional Affairs and national parliamentary delegations.<sup>259</sup> On this basis, as the first point of the resolution, the European Parliament reaffirmed that the agenda of the IGC must be enlarged beyond Economic and Monetary Union (EMU) and noted that a number of national parliaments have lent their support to this view.

In July 1990, the European Parliament expressed awareness that many national parliaments were seeking to improve their supervision over the government representatives in the Council. For that purpose, the European Parliament offered to assist their counterparts by ensuring that the latter had better access to information and by continuing to cooperate with them in the format of what it described as "regular meetings that take place at various levels between these parliaments and the

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<sup>257</sup> European Parliament, Resolution on the intergovernmental conference decided on at the European Council in Madrid of 23 November 1989, (*OJ C 323/111* of 27.12.1989).

<sup>258</sup> Very early in the process, the European Parliament obtained explicit support from national parliaments for its endeavour to acquire the rights to initiate Community legislation, to codecide with the Council, to ratify all constitutional decisions requiring the ratification of the Member States, and to elect the President of the Commission. For example, the Belgian Senate and the Chamber of Representatives adopted identical resolutions on 10 and 24 July 1986 respectively, judging that the Single European Act was insufficient to meet the needs of further European integration and called on the European Parliament to prepare a draft treaty for the Union for national parliaments to ratify. Then, on 1 October 1986, the Italian Senate also underlined the deficiency of the Single European Act and called on the Government "to support the European Parliament in its efforts to accelerate the process of European unification [...]". The Irish Parliament, in a report on the Single European Act, held that "principles of democracy are not served if the European Parliament's role is restricted to a consultative one". The Dutch Parliament in November 1986 backed the European Parliament's draft treaty of 14 February 1984 and urged that "there must be adequate support for the strategy recommended by the European Parliament's Committee on Institutional Affairs to ensure that the Assembly elected in 1989 is entrusted with the task of preparing the draft of an act of union for subsequent ratification by the national parliaments". Corbett, Richard. *The Treaty of Maastricht from conception to ratification: a comprehensive reference guide*, Harlow: Longman Current Affairs, 1993: 8.

<sup>259</sup> European Parliament, Resolution on the Intergovernmental Conference in the context of Parliament's strategy for European Union of 14 March 1990 (Martin I report), (*OJ C 96/114* of 17.4.1990).

European Parliament".<sup>260</sup> The setting up of a new EU institution comprising national parliaments was rejected, on the one hand, because its practical limitations had been exposed in the period preceding the direct European Parliament elections and, on the other, because decision making had become more complex and less transparent.

The same month, the European Parliament also appraised the principle of subsidiarity, arguing that if the Member States ceded competences to the Community without the European Parliament securing the powers of legislation and democratic oversight that would be withdrawn from national parliaments, the Community's democratic deficit would worsen.<sup>261</sup>

Moreover, the report drafted in 1991 by João Cravinho, the then Vice-President of the European Parliament, made a breakthrough in establishing functional collaboration between the committees of the European and national parliaments.<sup>262</sup> In the words of Neunreither, "during this phase of 'rapprochement' a climate of mutual trust emerged that had not existed before".<sup>263</sup>

In 1995, in a resolution taking stock of the application of the Maastricht Treaty for the purpose of providing suggestions for reform for the then forthcoming 1996 Intergovernmental Conference, the European Parliament unearthed several significant role perceptions:

Democratic accountability for matters which do not form part of the first pillar must be shared between both the European Parliament and the national parliaments [...] The Union's powers in the agricultural sector largely evade the direct scrutiny of national parliaments and must be subject to greater democratic control by the European Parliament [...] Democratic control of EU matters would be best achieved by partnership between the European Parliament and the national parliaments. The role of national parliaments should be reinforced in a number of ways, such as through strengthened cooperation between equivalent parliamentary committees of national parliaments and the European Parliament, and providing opportunities for specialist organs of national parliaments to discuss major European proposals with their ministers prior to Council meetings [...]<sup>264</sup>

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<sup>260</sup> European Parliament, Resolution on the Intergovernmental Conference in the context of Parliament's strategy for European Union of 11 July 1990 (Martin II report), (*OJ C 231/97* of 17.9.1990), point 23.

<sup>261</sup> European Parliament, Resolution on the principle of subsidiarity of 12 July 1990, (*OJ C 231/163* of 17.9.1990), point 5.

<sup>262</sup> Neunreither, Karlheinz. "The European Parliament and national parliaments: conflict or cooperation?," *The Journal of Legislative Studies*, Vol. 11, No. 3, 2005: 469.

<sup>263</sup> Neunreither, Karlheinz. "The European Parliament and national parliaments: conflict or cooperation?," *The Journal of Legislative Studies*, Vol. 11, No. 3, 2005: 486.

<sup>264</sup> European Parliament, Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference – implementation and development of the Union, (*OJ C 151/56* of 19.6.1995). After the adoption of the Amsterdam Treaty, Piet Dankert, the former President of the European Parliament, argued that EU legitimacy does not derive only from the European Parliament and that "[n]ational parliaments and representatives of Member States can guarantee the legitimacy of the intergovernmental part of EU cooperation". Dankert, Piet. "What parliament for Europe," in *The European Union after Amsterdam: a legal analysis*, by Teunis Heukels et al. (eds), The Hague: Kluwer Law International, 1998: 138.

Such protagonism on the part of the European Parliament showcases the manner in which parliamentary interdependence can operate. In defending its position, the European Parliament consulted, invited and later invoked national parliaments to shore up its own institutional position. This does not necessarily exclude rivalry between Europe's parliaments, but it does prove that cross-level interparliamentary relations could be and indeed were maintained irrespective of the lack of written Treaty 'commandments' to that effect.

## **2. CHALLENGING NATIONAL PARLIAMENTS THROUGH TREATY REFORM**

The foundation of the European Union in 1992 brought a host of institutional innovations in the decision-making procedures so as to mitigate the "inherent tension between the supranational forces of European integration and the intergovernmental forces of national self-interest".<sup>265</sup> Four such innovations were a potential challenge to national parliaments, insofar as they were likely to provoke the latter to cope with them, thus summoning them to action.<sup>266</sup> These are the inclusion of two declarations on national parliaments, the introduction of codecision, the addition of intergovernmental pillars and the inscription of principles governing the limits of EU competence. We examine them in turn below.

### **2.1. The parliaments' comeback in the Treaties and in practice**

#### **2.1.1. Declarations on national parliaments**

Two new declarations appended to the Maastricht Treaty announced, after some four decades of silence, the return of national parliaments to the Union plane not merely in structural but also in functional terms.

Declaration no. 13 (a British proposal) encouraged "greater involvement" of national parliaments in the activities of the EU, to which end the exchange of information between them and the European Parliament should be stepped up through meetings and the granting of reciprocal facilities. The Member States undertook to ensure that national parliaments receive the Commission's legislative

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<sup>265</sup> Lew, Darryl S. "The EEC legislative process: an evolving balance," *Columbia Journal of Transnational Law*, Vol. 27, No. 1, 1988-1989: 680.

<sup>266</sup> Some of these challenges are suggested in: Shell, Donald. "The House of Lords and the European Community: the evolution of arrangements of scrutiny," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 107 and 109. The most important other changes were: (a) the establishment of the Economic and Monetary Union; (b) the widening of Community policies to research and technological development, trans-European networks, health protection, education, culture, development cooperation, consumer protection, energy, civil protection and tourism; (c) the enshrinement of the subsidiarity principle to delimit the competences of the Community and of the Member States; and (d) the introduction of European citizenship. Craig, Paul and Búrca, Gráinne de. *EU law: texts, cases, and materials*. Oxford: Oxford University Press, 2007: 16-17. See also: O'Keefe, David and Twomey, Patrick M. (eds), *Legal issues of the Maastricht Treaty*, London: Chancery Law Publishing, 1994.

proposals in good time for information or possible examination.<sup>267</sup> With a view to this declaration, the European Parliament had established an administrative unit within its Secretariat General entirely devoted to relations with national parliaments.<sup>268</sup>

Declaration no. 14 (a French proposal) invited the European Parliament and the national parliaments to meet as necessary as a Conference of the Parliaments ('Assizes'), which would be "consulted on the main features" of the Union, and to which the Presidents of the European Council and the Commission would report on the state of the Union.<sup>269</sup>

These declarations could be regarded as a codification of two attempts at formalising the relations between the European Parliament and national parliaments: the Assizes and COSAC.

### **2.1.2. The Assizes: a failed experiment**

Originally proposed by the French President François Mitterand in a speech to the European Parliament on 25 October 1989, the Assizes' only meeting was held in Rome at the premises of the Italian *Camera dei Deputati* from 27-30 November 1990. A third of the delegates to the conference were MEPs (85) and the other two thirds were members of national parliaments (173).<sup>270</sup> The meeting was dominated by the European Parliament, which saw it as an opportunity to woo national parliaments and secure their backing for its empowerment.

The Final Declaration of the Assizes was an advance endorsement of almost all of the most important innovations of the Maastricht Treaty, including intergovernmental cooperation and codecision.<sup>271</sup> In particular, the Final Declaration regretted the unsatisfactory degree of parliamentary scrutiny of the powers devolved to the Community and exercised by Community institutions.<sup>272</sup> Although support was lent to "enhanced cooperation between the national parliaments and the European Parliament, through regular meetings of specialised committees [...]"<sup>273</sup> several passages of the Final Declaration demonstrate that national parliamentary

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<sup>267</sup> Declaration no. 13 on the role of national parliaments in the European Union.

<sup>268</sup> Westlake, Martin. "The view from 'Brussels'," in *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 175.

<sup>269</sup> Declaration No. 14 on the Conference of Parliaments.

<sup>270</sup> Bengtson, Christina. "National parliaments in European decision-making: a real prospect or wishful thinking," *Federal Trust for Education and Research, London, Online Paper 29/03*, 2003: 3.

<sup>271</sup> Corbett, Richard. "The prototype for the Convention? The conference of parliaments held in Rome before the Maastricht IGC," *Federal Union*, <http://www.federalunion.org.uk/europe/assizes.shtml>, accessed on 21 February 2010.

<sup>272</sup> Final Declaration of the Conference of Parliaments of the European Community ("Assizes") of 30 November 1990, recital F, reproduced in: Corbett, Richard. *The Treaty of Maastricht from conception to ratification: a comprehensive reference guide*, Harlow: Longman Current Affairs, 1993: 198-201.

<sup>273</sup> Final Declaration of the Conference of Parliaments of the European Community ("Assizes") of 30 November 1990, point 13, reproduced in: Corbett, Richard. *The Treaty of Maastricht from conception to ratification: a comprehensive reference guide*, Harlow: Longman Current Affairs, 1993: 198-201.

functions in Community affairs were mainly conceived as bound to the national level and exhausted in transposing Community directives into national law as well as influencing and holding the national government to account.<sup>274</sup> It is also worth observing that the principle of subsidiarity was to be policed in two phases. Namely, "there must be scope for *a priori* political evaluation, while enabling the Court of Justice to confirm *a posteriori* the extent of the powers of the Community".<sup>275</sup> The chairmen of the national parliamentary committees who were members of the committee that drafted the Final Declaration largely reflected the position of their parliament's majority and, therefore, that of their Government.<sup>276</sup>

Yet it seems that the speeches given during the conference by Jacques Delors, the President of the Commission, and Giulio Andreotti, the President of the Council, were a feeble incentive for this forum to survive. It soon became obvious that the Assizes would not be able to penetrate what Jean-Louis Bourlanges, a French MEP, termed the 'grey zones' within the EU's competences, such as the Common Foreign and Security Policy (CFSP), Justice and Home Affairs (JHA) and then embryonic EMU, where neither the European Parliament nor the national parliaments exercise control.<sup>277</sup> Not least because some national delegations, the British and French in particular, were disenchanted with this type of interparliamentary collaboration, the Assizes were discontinued.<sup>278</sup> Besides, the Danish and French<sup>279</sup> referendums on the Maastricht Treaty signalled the twofold discord between public opinion and parliamentary ratifications: (a) the European Parliament could not act alone as a prime explanatory and popularising agent of European integration; and (b) national parliaments, though "vital intermediaries", were also "'out of touch' with popular attitudes".<sup>280</sup>

### 2.1.3. COSAC: a success story

Known under its French acronym – *Conférence des Organes Spécialisés dans les Affaires Communautaires* – COSAC is the Conference of European Affairs

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<sup>274</sup> Final Declaration of the Conference of Parliaments of the European Community ("Assizes") of 30 November 1990, points 14, 21 and 22, reproduced in: Corbett, Richard. *The Treaty of Maastricht from conception to ratification: a comprehensive reference guide*, Harlow: Longman Current Affairs, 1993: 198-201.

<sup>275</sup> Final Declaration of the Conference of Parliaments of the European Community ("Assizes") of 30 November 1990, point 24, reproduced in: Corbett, Richard. *The Treaty of Maastricht from conception to ratification: a comprehensive reference guide*, Harlow: Longman Current Affairs, 1993: 198-201.

<sup>276</sup> Corbett, Richard. *The Treaty of Maastricht from conception to ratification: a comprehensive reference guide*, Harlow: Longman Current Affairs, 1993: 25-26.

<sup>277</sup> Westlake, Martin. "The view from 'Brussels'," in *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 171-172.

<sup>278</sup> Bengtson, Christina. "Interparliamentary cooperation within Europe," in *National parliaments within the enlarged European Union: from victims of integration to competitive actors?*, by John O'Brennan and Tapio Raunio, Abingdon: Routledge, 2007: 48.

<sup>279</sup> See *infra* note 291 of this Chapter.

<sup>280</sup> Westlake, Martin. "The view from 'Brussels'," in *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 175.

Committees of National Parliaments. Its creation is the brainchild of Laurent Fabius, the then President of the *Assemblée nationale*, who proposed it at the Conference of Speakers in Madrid in May 1989 with a view to establishing closer ties with Community policy making at a time when the double mandate of national parliamentarians had been cancelled in many Member States for a decade.<sup>281</sup>

Ever since, twice a year, six-member delegations from national parliaments have been joined by six MEPs in the parliament of the Member State holding the Presidency of the Council to discuss topics of common interest and exchange information and best practice on current scrutiny business.<sup>282</sup>

COSAC was formally recognised only in 1997 in a protocol attached to the Amsterdam Treaty. It was then agreed that COSAC could send to EU institutions any *contributions* on legislative proposals or initiatives, in particular those related to the Area of Freedom, Security and Justice, the application of subsidiarity and questions regarding fundamental rights. However, these contributions could neither bind national parliaments nor prejudice their position.<sup>283</sup> The Lisbon Treaty added in 2007 that COSAC may organise *interparliamentary conferences* on specific topics, such as on CFSP and CSDP.

Over the years, COSAC developed into a coordinator of national parliamentary activities in EU matters.<sup>284</sup> It played a vital role in setting national parliaments' subsidiarity checks in motion. Furthermore, COSAC publishes biannual reports and national parliaments' replies to comprehensive questionnaires on a variety of topics of direct relevance for scrutiny. These reports are particularly useful as they provide not only information but often also reflections by the actors directly involved in the scrutiny of EU affairs. As such, they can be a valuable research tool.

## **2.2. Codecision: empowering the national parliaments' counterpart**

The introduction of the three-reading *codecision* procedure enhanced the European Parliament's legislative function by investing it with the power to accept or reject the Council's decisions.<sup>285</sup> In addition, the European Parliament won the right to partake

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<sup>281</sup> Tordoff, Lord. "The conference of European affairs committees: a collective voice for national parliaments in the European union," *Journal of Legislative Studies*, Vol. 6, No. 4, 2000: 1-8.

<sup>282</sup> Knudsen, Morten and Carl, Yves. "COSAC – its role to date and its potential in the future," in *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other Member State legislatures*, by Gavin Barrett (ed.), Dublin: Clarus Press, 2008: 475.

<sup>283</sup> Protocol on the role of national parliaments in the European Union attached to the Amsterdam Treaty, points 4-7.

<sup>284</sup> Matthieu, Houser. "La COSAC, une instance européenne à la croisée des chemins," *Revue du Droit de l'Union Européenne*, No. 2, 2005: 357.

<sup>285</sup> The former Article 189b (6) of the TEC (later renumbered as Article 251 TEC) allowed the Council, where the Conciliation Committee did not approve a joint text, to adopt its pre-conciliation common position without having to incorporate any of the amendments that the European Parliament may have made, and that would become law unless the European Parliament rejected the text by an absolute majority of its component members, in which case the proposal would fall. The Treaty of Amsterdam

in the appointment of the President and members of the Commission and to set up committees of inquiry. These novelties were chiefly prompted by two democracy-related concerns: (a) that the indirect legitimacy of the Council through the accountability of the individual ministers to their national parliaments did not sufficiently compensate for the parliaments' loss of influence in the Maastricht-widened Union; and (b) that the EU should not divorce itself from its origins, rooted in democratic states.<sup>286</sup>

### 2.3. Wading into intergovernmentalism

The inclusion of the *intergovernmental pillars* of CFSP and JHA ushered in new modes of decision making regarding which the European Parliament was entrusted with a merely consultative function. This spelled, as Curtin maintained, "the danger of democratic retrogression [...] because governmental decisions in international matters are only very weakly accountable in modern democracies".<sup>287</sup>

National parliaments were the sole bastions of democratic legitimacy and political accountability of the Council in the intergovernmental pillars. This was no casual observation. Indeed, several years into the Maastricht Treaty's application, the need to associate national parliaments more closely in legitimising the Union, especially its CFSP and JHA pillars, was one of the features shared by the reports that EU institutions prepared for the 1996 Intergovernmental Conference.<sup>288</sup>

### 2.4. Consecrating a principled organisation of EU competences

The Maastricht Treaty enshrined the principles of *conferral*, *subsidiarity*, and *proportionality*, which govern the limits of Union competences by requiring that: (a) "the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein" (conferral); (b) "[i]n areas which do not fall within its exclusive competence, the Community shall take action [...] only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community (subsidiarity); and (c) "the Community shall not go beyond what is necessary to achieve the objectives of this Treaty" (proportionality).<sup>289</sup> Yet national parliaments were then still not entrusted with the policing of the subsidiarity principle.

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erased this stage, so that the proposal would fall wherever the Conciliation Committee could not adopt a joint text. The *current* Article 294 TFEU does not make any changes in this respect.

<sup>286</sup> Curtin, Deirdre. "The constitutional structure of the Union: a Europe of bits and pieces," *Common Market Law Review*, Vol. 30, No. 1, 1993: 34-35; Everling, Ulrich. "Reflections on the structure of the European Union," *Common Market Law Review*, Vol. 29, No. 6, 1992: 1073-1074.

<sup>287</sup> Curtin, Deirdre. "The constitutional structure of the Union: a Europe of bits and pieces," *Common Market Law Review*, Vol. 30, No. 1, 1993: 20.

<sup>288</sup> Búrca, Gráinne de. "The quest for legitimacy in the European Union," *Modern Law Review*, Vol. 59, No. 3, 1996: 365-366.

<sup>289</sup> Formerly Article 3b TEC, later renumbered as Article 5 TEC, currently Article 5 TFEU. See the abundant literature on subsidiarity in: Begg, David et al. (eds). *Making sense of subsidiarity: how much*

Much was left for the European Parliament to mourn for, as it did in its resolution of April 1992 in which it drew up a long list of shortcomings of the Maastricht Treaty. Most of them illustrated why the new Treaty "has not eliminated the parliamentary democratic deficit".<sup>290</sup> Again, in the first point of the resolution, the European Parliament, after inviting national parliaments to ratify the Maastricht Treaty, also urged them "to commit their respective governments to redress at the earliest opportunity its major shortcomings".

### **3. THE MAASTRICHT TREATY IN NATIONAL PARLIAMENTS**

We proceed below with an analysis of how these novelties were received in the national parliaments of France, the United Kingdom and Portugal. This will be done by presenting only a small selection of illustrative examples of arguments put forth in parliamentary scrutiny procedures.

#### **3.1. France**

The Maastricht Treaty was narrowly approved by a vote of 51% in the referendum of 20 September 1992, to which 69.8% of the electorate turned out to vote.<sup>291</sup> Since the authorisation for ratification was given directly by the French people, Parliament did not proceed to approve ratification.<sup>292</sup> Yet it is beyond doubt that "Maastricht is a

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*centralization for Europe?*, London: Centre For Economic Policy Research, 1993; Cass, Deborah Z. "The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community," *Common Market Law Review*, Vol. 29, No. 6, 1992: 1107–1136; Dehousse, Renaud. "Does subsidiarity really matter?," *EUI Working Paper LAW no. 92/32*, 1993; Emiliou, Nicholas. "Subsidiarity: an effective barrier against 'the enterprises of ambition'?", *European Law Review*, Vol. 17, No. 5, 1992: 383–407; Toth, A.G. "The principle of subsidiarity in the Maastricht Treaty," *Common Market Law Review*, Vol. 29, No. 6, 1992: 1079–1105; Barber, N. W. "The limited modesty of subsidiarity," *European Law Journal*, Vol. 11, No. 3, 2005: 308–325; Kirchner, Christian. "The principle of subsidiarity in the Treaty on European Union: a critique from a perspective of constitutional economics," *Tulane Journal of International and Comparative Law*, Vol. 6, 1998: 291–308; Marquardt, Paul D. "Subsidiarity and sovereignty in the European Union," *Fordham International Law Journal*, Vol. 18, No. 2, 1994: 616–640; Henkel, Christoph. "The allocation of powers in the European Union: a closer look at the principle of subsidiarity," *Berkeley Journal of International Law*, Vol. 20, No. 2, 2002: 359–386; Davies, Gareth. "Subsidiarity: the wrong idea, in the wrong place, at the wrong time," *Common Market Law Review*, Vol. 43, No. 1, 2006: 63–84.

<sup>290</sup> European Parliament, Resolution on the results of the intergovernmental conferences of 7 April 1992, (OJ C 125/81 of 18.5.1992), recital B *in fine*.

<sup>291</sup> Criddle, Byron. "The French referendum on the Maastricht Treaty September 1992," *Parliamentary Affairs*, Vol. 46, No. 2, 1993: 228.

<sup>292</sup> See more in: Blumann, Claude. "La ratification par la France du Traité de Maastricht," *Revue du Marché Commun et de l'Union Européenne*, No. 379, 1994: 393–406; Luchaire, François. "L'Union européenne et la Constitution: le référendum," *Revue du Droit Public*, Vol. 108, No. 6, 1992: 1587–1624; Oliver, Peter. "The French Constitution and the Treaty of Maastricht," *International and Comparative Law Quarterly*, Vol. 43, No. 1, 1994: 1–25.

rich and special episode in the history of the Constitution".<sup>293</sup> Since the *Conseil constitutionnel* had ruled the Treaty partially unconstitutional, both Houses of Parliament were invited by the President of the Republic to unite in *Congrès* and amend the Constitution.<sup>294</sup> Once the amending bill was passed, a fresh recourse to the *Conseil constitutionnel* was made, but this time without success. No infringement of the Constitution was found, primarily on the ground of *res judicata*.<sup>295</sup> We analyse below the parliamentary deliberations on the constitutional amendment bill drafted to satisfy the criteria set by the *Conseil constitutionnel*'s Maastricht judgment. The aim is not so much to determine the actual provisions of this constitutional statute, which are examined in Chapter 6, as to illuminate the reasoning underlying its enactment concerning the issues of codecision, subsidiarity and intergovernmentalism identified above.

### 3.1.1. Constitutionality

In a preliminary proceeding on the conformity of the Maastricht Treaty with the French Constitution,<sup>296</sup> the *Conseil constitutionnel* ruled that the Treaty provisions on the establishment of the EMU, on the crossing of the Union's external border and on the participation of EU citizens in municipal and European elections, contravene the Constitution and the essential conditions of the exercise of national sovereignty.<sup>297</sup> In such cases, a constitutional amendment is requisite before the Treaty may be ratified.

The *Conseil constitutionnel* made several relevant findings about the European Parliament: (a) that the Treaty does not modify the European Parliament's legal nature; (b) that the European Parliament is not a sovereign assembly with general lawmaking power that would enable it to participate in the exercise of national

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<sup>293</sup> Keraudren, Philippe and Dubois, Nicolas. "France and the ratification of the Maastricht Treaty." In *The ratification of the Maastricht Treaty: issues, debates, and future*, by Finn Laursen and Sophie Vanhoonacker (eds), Maastricht: European Institute of Public Administration, 1994: 148.

<sup>294</sup> Article 89(2)-(3) of the Constitution provides that a constitutional amendment may either be approved by referendum or, if the President of the Republic so decides, by a decision of Parliament convened in Congress passed by a three-fifths majority of the votes cast.

<sup>295</sup> *Conseil constitutionnel*, Decision no. 92-312 DC of 2 September 1992.

<sup>296</sup> Article 54 of the Constitution reads: "If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty members of the National Assembly or sixty senators, has held that an international undertaking contains a clause contrary to the Constitution, authorisation to ratify or approve the international undertaking involved may be given only after amending the Constitution".

<sup>297</sup> *Conseil constitutionnel*, Decision no. 92-308 DC of 9 April 1992. See further analyses in: Favoreu, Louis and Gaïa, Patrick. "Les décisions du Conseil constitutionnel relatives au Traité sur l'Union européenne," *Revue Française de Droit Constitutionnel*, Vol. 11, 1992: 389-411; Genevois, Bruno. "Le traité sur l'Union européenne et la Constitution révisée: a propos de la décision du Conseil constitutionnel no. 92-312 DC du 2 septembre 1992," *Revue Française de Droit Administratif*, Vol. 6, 1992: 937-956; Jacqué, Jean-Paul. "Commentaire de la décision du Conseil constitutionnel n. 92-308 DC du 9 avril 1992," *Revue Trimestrielle de Droit Européen*, Vol. 28, No. 2, 1992: 251-264; Luchaire, François. "L'Union européenne et la constitution: la décision du Conseil Constitutionnel," *Revue du Droit Public*, Vol. 108, No. 3, 1992: 589-616; Rideau, Joël. "La recherche de l'adéquation de la Constitution française aux exigences de l'Union européenne," *Revue des Affaires Européennes*, Vol. 3, 1992: 7-52.

sovereignty; and (c) that the European Parliament belongs to its own legal order which, although integrated into the legal orders of the Member States, does not belong to the institutional system of the French Republic.<sup>298</sup> Given the European Parliament's direct electoral mandate and an enhanced role in EU decision making, this stance by the *Conseil constitutionnel* has been criticised as legalistic and one that "does not match the political reality of a quasi-permanent bargaining process".<sup>299</sup>

However, the *Conseil constitutionnel* did not condemn, in the name of sovereignty, the principles underlying the conflicting Treaty provisions, but only some of their modalities or consequences, such as the requirement of qualified majority instead of unanimity in the fields of EMU and the common visa policy. According to the Committee of Laws of the *Assemblée nationale*, this testified to a more open approach to sovereignty in the EU integration process.<sup>300</sup> These findings indicate the *Conseil constitutionnel*'s comprehension of the EU as a separate legal order with a separate set of institutions, yet one that warrants the "transfer of competences".<sup>301</sup> The latter phrase puzzled some members of Parliament, most of whom did not support the transfer of sovereignty proper.<sup>302</sup>

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<sup>298</sup> *Conseil constitutionnel*, Decision no. 92-308 DC of 9 April 1992, para. 34. The last finding exemplifies the ubiquitous confusion about the constitutional nature of the European Union, which constantly begs new concepts and is, for that reason, often at war with logic. Namely, how can an entity be integrated into another entity without becoming a part of that entity?

<sup>299</sup> Boyron, Sophie. "The Conseil constitutionnel and the European Union," *Public Law*, 1993: 35.

<sup>300</sup> *Assemblée nationale, Commission des lois constitutionnelles, de la législation et de l'administration générale, Rapport no. 2676 sur le projet de loi constitutionnelle ajoutant à la Constitution un titre: "De l'Union européenne"* of 2 May 1992, rapporteur Gérard Gouzes (PS), p.31.

<sup>301</sup> It has been argued that the French Maastricht judgment represents a "spectacular confirmation" that the *Conseil constitutionnel* overturned its previous case law initiated in its Decision no. 76-71 DC of 30 December 1976 on the election of the European Parliament by universal suffrage, where it established a distinction between, on the one hand, *limitations of sovereignty*, which were allowed by the Preamble to the Constitution of 1946 and, on the other, *transfers of sovereignty*, which required a prior constitutional amendment. After Maastricht, a Union decision reached by qualified majority would violate the Constitution only where it detracted from the essential conditions for the exercise of national sovereignty irrespective of the said distinction. Keraudren, Philippe and Dubois, Nicolas. "France and the ratification of the Maastricht Treaty." In *The ratification of the Maastricht Treaty: issues, debates, and future*, by Finn Laursen and Sophie Vanhoonacker (eds), Maastricht: European Institute of Public Administration, 1994: 149.

<sup>302</sup> For example, at a hearing in the *Assemblée nationale*, Alain Lamassoure, an MEP of the European People's Party and a member of UDF, welcomed the fact that it was the competences and not the sovereignty that was being transferred. Nicole Catala, an RPR MP, pointed out that the Maastricht Treaty constituted a partial abandonment of sovereignty because it foresees a transfer to Community institutions of competences that are part of that same sovereignty. Jacques Brunhes, a Communist MP, stressed that recourse to qualified majority resulted not in a transfer of competences but of sovereignty. Replying to these preoccupations, Michel Vauzelle (PS), the Minister of Justice, invoked the German concept of *Kompetenz-Kompetenz* to corroborate the argument that a prior constitutional amendment ordered by the *Conseil constitutionnel* authorises only the transfer of competences and not of sovereignty, which cannot be the object of an irreversible alienation. *Assemblée nationale, Commission des lois constitutionnelles, de la législation et de l'administration générale, Rapport no. 2676 sur le projet de loi constitutionnelle ajoutant à la Constitution un titre: "De l'Union européenne"* of 2 May 1992, rapporteur Gérard Gouzes (PS), p. 36-37, 39, 42.

### 3.1.2. Codecision

The *Assemblée nationale* asserted that the democratic control by the European Parliament, albeit insufficient, remains primary at the European level. In line with it, Michel Pezet, a Socialist MP and the Chairman of the Delegation for European Communities, warned that the European Parliament must be aware that its control over Community institutions and that by national parliaments over their governments "are not competing but complementary".<sup>303</sup> He explained that a better implication of national parliaments in the Community process is indispensable not least because the French Constitution vests national sovereignty in the people, who exercise it through their representatives and by means of referendum.<sup>304</sup> The principle of representation was, thus, the central motive behind his inquiry: "How can we avoid that the parliamentarians, who exercise national sovereignty on behalf of the people, be totally removed from the matters that are the object of a transfer of competences?"<sup>305</sup>

In a similar vein, Jean-Marie Caro, a UDF MP, stressed that "national parliaments and the European Parliament are not rivals, but have a common interest: the improvement of the democratic functioning of the institutions of the Union".<sup>306</sup> Moreover, Edmond Alphandéry, also a UDF MP, argued that, given the lack of democratic discussion in the field of coordination of economic policies, national parliaments should endeavour to fill that gap through the instruments envisaged by respective national laws. He also stated that measures of harmonisation, such as directives, justify a better involvement by Parliament in the process of their elaboration.<sup>307</sup>

These assertions were fortified by Chairman Pezet's argument that, despite the enhancement of the European Parliament, this institution does not alone embody the Community's democratic legitimacy, but that national parliaments are irreplaceable in conveying the aspirations of the Member States' citizens to the Community. He added that the lack of an electoral procedure that would bring the European Parliament closer to the electorate represents its *capitis diminutio*.<sup>308</sup>

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<sup>303</sup> *Assemblée nationale, Délégation pour les Communautés européennes, Rapport d'information no. 2633 sur le Traité sur l'Union européenne signé à Maastricht le 7 février 1992* of 28 April 1992, rapporteur Michel Pezet (PS), p. 32.

<sup>304</sup> Article 3(1) of the Constitution.

<sup>305</sup> *Assemblée nationale, Délégation pour les Communautés européennes, Rapport d'information no. 2633 sur le Traité sur l'Union européenne signé à Maastricht le 7 février 1992* of 28 April 1992, rapporteur Michel Pezet (PS), p. 33.

<sup>306</sup> *Assemblée nationale, Commission des affaires étrangères, Observations et amendements, Annexe au Rapport no. 2676* of 2 May 1992, rapporteur Jean-Marie Caro (UDF), p. 5.

<sup>307</sup> *Assemblée nationale, Commission des finances, de l'économie générale et du plan, Observations et amendements, Annexe au Rapport no. 2676* of 2 May 1992, rapporteur Edmond Alphandéry (UDF), pp. 31 and 33.

<sup>308</sup> *Assemblée nationale, Délégation pour les Communautés européennes, Rapport d'information no. 2804 sur le rôle du parlement français dans le processus de décision communautaire* of 18 June 1992, rapporteur Michel Pezet (PS), p. 6.

Furthermore, the Delegation for the European Communities of the *Assemblée nationale* regretted that the qualified majority voting remained modest and expressed the hope for a limited use of the third reading stage of the codecision procedure, because the European Parliament's powers were reduced to rejecting the proposal.<sup>309</sup> An example of the interconnectedness between the European Parliament and national parliaments was a resolution in which the former urged the latter to demand from their respective governments not to use the Council's right of unilateral adoption in the conciliation phase of the codecision procedure and not to adopt legislative proposals that the European Parliament has previously rejected by an absolute majority.<sup>310</sup>

The *Sénat* offered a more sobering analysis of the relations with the European Parliament. In its view, the European Parliament, as a Community institution, has a natural and perfectly legitimate propensity to give precedence to Community interests over those of the Member States. For that reason, "the strengthening of its powers can only operate to the detriment of national parliaments, without palliating – and notably in the case of France – the democratic deficit".<sup>311</sup> Further, for the European Parliament the democratic deficit is epitomised in its meagre role in the decision-making process and in the predominance of intergovernmental mechanisms. In contrast, for national parliaments the persistence of such mechanisms shields the competences of the state and, hence, also those of national parliaments and governments. The source of the democratic deficit lies, therefore, in the decline of the 'intergovernmental'. The *Sénat* concluded that:

National parliaments remain the best guarantors of the principle of subsidiarity [...] For France, the growth of the role of the European Parliament would not in any way

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<sup>309</sup> *Assemblée nationale, Délégation pour les Communautés européennes, Rapport d'information no. 2633 sur le Traité sur l'Union européenne signé à Maastricht le 7 février 1992* of 28 April 1992, rapporteur Michel Pezet (PS), p. 52, points 8 and 12. See more on the codecision procedure *supra* note 285 of this Chapter.

<sup>310</sup> European Parliament, Resolution on the European Parliament's guidelines for a draft constitution for the European Union of 11 July 1990, (*OJ C 231/91* of 17.9.1990), point 16, second indent. By the same token, Simone Veil, the President of the first directly elected European Parliament, argued that the Maastricht lacunas could be rectified by a liberal interpretation of the Treaty provisions by the Council and through national arrangements aimed at associating national parliaments more closely with Community decisions. Veil, Simone. "Les enjeux de l'après Maastricht," in *Assemblée nationale, Délégation pour les Communautés européennes, Journée d'études sur Maastricht et sa ratification, Annexe au Rapport d'information no. 2633 sur le Traité sur l'Union européenne signé à Maastricht le 7 février 1992* of 28 April 1992, rapporteur Michel Pezet (PS), p. 105.

<sup>311</sup> *Sénat, Commission des lois constitutionnelles, de législation, du suffrage universel, du règlement et d'administration générale, Rapport no. 375 sur le projet de loi constitutionnelle adopté par l'Assemblée nationale ajoutant à la Constitution un titre: "Des Communautés européennes et de l'Union européenne"* of 27 May 1992, rapporteur Jacques Larché (RPR), p. 50.

be of such nature as to restore more democracy in the internal relations between the French Parliament and the executive power.<sup>312</sup>

Additionally, Jacques Genton, a UDF senator and the Chairman of the Delegation for the European Communities of the *Sénat*, was struck by the contrast between the surreptitious mention of national parliaments and the express installment of a committee of the regions, because "as long as the Community does not become a veritable economic and monetary union, a veritable political union and a Community of defence, the Community's internal democracy must rest on the Community Parliament and on each of its national parliaments".<sup>313</sup>

The solutions suggested to rectify the shortcomings mentioned above ranged from an institutional approximation with the European Parliament through a conference of parliaments to the requirement for the Government to seek a prior non-binding<sup>314</sup> opinion of Parliament for all draft legislative proposals, to allowing Parliament to adopt resolutions on European matters, to the establishment of a committee for European affairs, etc.<sup>315</sup> Nicole Catala, an RPR MP, insisted that *ex ante* parliamentary opinions would serve to reinforce the Government's position in the Council, especially in agricultural matters.<sup>316</sup>

### 3.1.3. Intergovernmentalism

Assessing the decision-making rules of the JHA pillar, the *Sénat* unequivocally affirmed that the passerelle<sup>317</sup> in the common visa policy did not affect the essence of national sovereignty. There were two key reasons for that: (a) the possession of a visa does not afford an unconditional right of entry into the country that issued it; (b)

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<sup>312</sup> *Sénat, Commission des lois constitutionnelles, de législation, du suffrage universel, du règlement et d'administration générale, Rapport no. 375 sur le projet de loi constitutionnelle adopté par l'Assemblée nationale ajoutant à la Constitution un titre: "Des Communautés européennes et de l'Union européenne"* of 27 May 1992, rapporteur Jacques Larché (RPR), pp. 50-51.

<sup>313</sup> *Sénat, Délégation pour les Communautés européennes, Rapport d'information no 307 sur le traité sur l'Union européenne* of 23 April 1992, rapporteurs Jacques Genton (UDF) and others, p. 115.

<sup>314</sup> The Justice Minister Vezelle explained during a hearing in the *Sénat* that it could not bind the executive branch, because the negotiation and ratification of treaties are powers of the President of the Republic and the conduct of national policy that of the Government. *Sénat, Commission des lois constitutionnelles, de législation, du suffrage universel, du règlement et d'administration générale, Rapport no. 375 sur le projet de loi constitutionnelle adopté par l'Assemblée nationale ajoutant à la Constitution un titre: "Des Communautés européennes et de l'Union européenne"* of 27 May 1992, rapporteur Jacques Larché (RPR), p. 108.

<sup>315</sup> *Assemblée nationale, Délégation pour les Communautés européennes, Rapport d'information no. 2633 sur le Traité sur l'Union européenne signé à Maastricht le 7 février 1992* of 28 April 1992, rapporteur Michel Pezet (PS), pp. 32, 35.

<sup>316</sup> *Assemblée nationale, Commission des lois constitutionnelles, de la législation et de l'administration générale, Rapport supplémentaire no. 2684 sur le projet de loi constitutionnelle ajoutant à la Constitution un titre: "De L'Union européenne"* of 9 May 1992, rapporteur Gérard Gouzes (PS), p. 16.

<sup>317</sup> Former Article 100c(3) TEC. This passerelle permitted the Council to act by qualified majority as of 1 January 1996 instead of by unanimity when establishing a list of countries whose nationals must possess a visa to enter the EU.

it is only a minor instrument of national immigration policy, which continued to apply to the entry and stay of foreigners. Whilst the *Sénat* admitted that the conditions of the exercise of national sovereignty would thus be modified, the essence of sovereignty remained intact.<sup>318</sup> In fact, Paul Masson, an RPR senator, also tried to extenuate the significance of the *passerelle* by contending that, in truth, the exercise of national sovereignty would be affected from the very entry into force of the Maastricht Treaty, because the unanimity requirement might not only enable France to oppose an EU decision on visas but also hamper a possible French initiative to have a decision adopted.<sup>319</sup>

The possible impact of the CFSP was evaluated by several MPs in light of the civil war in the former Yugoslavia, regarding which the Community faced difficulties in reaching a common approach. For example, Jean-Marie Caro, a UDF MP, and Jean de Lipkowski, an RPR MP, expressed the expectation that the Community would have done more had the Maastricht Treaty been in place at the time of the outbreak of the conflict. There were also sceptical opinions, such as that of Michel Vauzelle, a Socialist MP and the Chairman of the Foreign Affairs Committee of the *Assemblée nationale*, who feared that events such as the Yugoslav conflict could turn CFSP into a "non-policy".<sup>320</sup>

### **3.1.4. Subsidiarity**

The *Sénat* in particular was a fervent critic of the Community's incessant expansionism into 'unsolicited' fields of action. For instance, it carped at the Commission and the Council for resorting to the flexibility clause to enact directives on the conservation of wild birds, child care or – even more dubiously – on the voting rights of European citizens in order to accomplish the free movement of persons.<sup>321</sup> The level of detail in directives was deplored and likened to "pointillism [that] absurdly confines" the autonomy of Parliament and reduces it to a rubber-stamping institution.<sup>322</sup> Several solutions were invoked to remedy these problems.

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<sup>318</sup> *Sénat, Commission des lois constitutionnelles, de législation, du suffrage universel, du règlement et d'administration générale, Rapport no. 375 sur le projet de loi constitutionnelle adopté par l'Assemblée nationale ajoutant à la Constitution un titre: "Des Communautés européennes et de l'Union européenne"* of 27 May 1992, rapporteur Jacques Larché (RPR), p. 35.

<sup>319</sup> *Sénat, Délégation pour les Communautés européennes, Rapport d'information no 307 sur le traité sur l'Union européenne* of 23 April 1992, rapporteurs Jacques Genton (UDF) and others, p. 103.

<sup>320</sup> Joint meeting of the Delegation for European Communities and the Foreign Affairs Committee of 17 December 1991, reported in: *Assemblée nationale, Délégation pour les Communautés européennes, Rapport d'information no. 2633 sur le Traité sur l'Union européenne signé à Maastricht le 7 février 1992* of 28 April 1992, rapporteur Michel Pezet (PS), pp. 42-44.

<sup>321</sup> To the satisfaction of the *Sénat*, the last initiative was not successful because it raised constitutional problems in the majority of the Member States.

<sup>322</sup> *Sénat, Commission des lois constitutionnelles, de législation, du suffrage universel, du règlement et d'administration générale, Rapport no. 375 sur le projet de loi constitutionnelle adopté par l'Assemblée nationale ajoutant à la Constitution un titre: "Des Communautés européennes et de l'Union européenne"* of 27 May 1992, rapporteur Jacques Larché (RPR), pp. 41-43.

The *Sénat* called for *ex ante* consultations with the Government on EU matters, particularly in the form of resolutions. Having recalled that Parliament's right to pass resolutions was not denied in 1958 by the French Constitution but in 1959 by the *Conseil Constitutionnel*,<sup>323</sup> the *Sénat* claimed that the reason behind this restriction, aimed at preserving the dominance of the Government over Parliament, does not exist in European matters, because resolutions, if re-introduced, would not represent a new modality of control of the Government, but solely a means for Parliament to make its position known.<sup>324</sup>

Nonetheless, the *Sénat* espoused the view that an effective application of subsidiarity can best be guaranteed through an institutional evolution at the EU level. To that effect, it was proposed to create a chamber of subsidiarity, which would "provide quasi-jurisdictional control".<sup>325</sup>

As another possibility, Charles Josselin, a Socialist MP and the Chairman of the Delegation for the European Communities of the *Assemblée nationale*, advocated the creation of a congress of parliaments with an *a priori* competence in this regard, because he doubted whether the *a posteriori* control by the European Court of Justice would be a sufficient safeguard for subsidiarity.<sup>326</sup>

At a meeting in the *Assemblée nationale*, Jérôme Vignon, a principal adviser in the Commission, underscored that subsidiarity confirms the existence of two sources of legitimacy, incarnated by both the European Parliament and national parliaments, and that this principle can enrich the latter's prerogatives, if they so wish, rather than diminish them.<sup>327</sup> Chairman Genton regretted that national parliaments were not given the right to intervene in the application of the subsidiarity principle and expressed the hope that the Government would nevertheless submit annual reports on subsidiarity to Parliament for the purpose of public debate and possibly a vote.<sup>328</sup>

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<sup>323</sup> See *infra* the text accompanying note 826 in Chapter 6.

<sup>324</sup> *Sénat, Commission des lois constitutionnelles, de législation, du suffrage universel, du règlement et d'administration générale, Rapport no. 375 sur le projet de loi constitutionnelle adopté par l'Assemblée nationale ajoutant à la Constitution un titre: "Des Communautés européennes et de l'Union européenne"* of 27 May 1992, rapporteur Jacques Larché (RPR), pp. 53-54.

<sup>325</sup> *Sénat, Délégation pour les Communautés européennes, Rapport d'information no. 45 sur le principe de subsidiarité* of 12 November 1992, rapporteur Michel Poniatowski (UDF), p. 43.

<sup>326</sup> *Assemblée nationale, Délégation pour les Communautés européennes, Rapport d'information no. 2300* of 29 October 1991, rapporteur Charles Josselin (PS), referred to in: *Assemblée nationale, Délégation pour les Communautés européennes, Rapport d'information no. 2633 sur le Traité sur l'Union européenne signé à Maastricht le 7 février 1992* of 28 April 1992, rapporteur Michel Pezet (PS), p. 28.

<sup>327</sup> Vignon, Jérôme. "Nouvelles compétences et subsidiarité dans le traité sur l'Union européenne," in *Assemblée nationale, Délégation pour les Communautés européennes, Journée d'études sur Maastricht et sa ratification, Annexe au Rapport d'information no. 2633 sur le Traité sur l'Union européenne signé à Maastricht le 7 février 1992* of 28 April 1992, rapporteur Michel Pezet (PS), p. 19.

<sup>328</sup> *Sénat, Délégation pour les Communautés européennes, Rapport d'information no 307 sur le traité sur l'Union européenne* of 23 April 1992, rapporteurs Jacques Genton (UDF) and others, p. 114.

### 3.2. Britain

After obtaining approval in the House of Commons on 20 May 1993 and in the House of Lords on 20 July 1993, the United Kingdom ratified the Maastricht Treaty on 2 August 1993. There was an early recognition in Parliament that, although the European Affairs Committees had thereto functioned "remarkably well",<sup>329</sup> the channel of democratic control by national parliaments, "a matter of particular concern" at Westminster, was being ignored at the European level.<sup>330</sup> The Government, for its part, acknowledged that Parliament's scrutiny strengthens their negotiating position in the Council of Ministers.<sup>331</sup> As far as legitimacy and accountability were concerned, the idea of placing national parliaments under the Union's roof seemed to be ripening.<sup>332</sup>

Yet whereas the Government was generally favourable to a further development of contacts between MPs and MEPs, it was reluctant to equip Parliament with adequate utensils of scrutiny.<sup>333</sup> Since Parliament was forced into formal reliance on the Government for access to information, it established informal contacts in

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<sup>329</sup> House of Commons, Procedure Committee, "Review of European standing committees", *HC 31, 1<sup>st</sup> Report of Session 1991-1992* of 4 December 1991, p. xvii. See more on the changes in the scrutiny procedures in the post-Maastricht period in: Baines, Priscilla. "Parliamentary scrutiny of policy and legislation: the procedures of the Lords and Commons," in *Britain in the European Union: law, policy and Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 2004: 60-96; Cygan, Adam. "Scrutiny of EU legislation by the House of Commons after Maastricht," *King's College Law Journal*, Vol. 6, 1995-1996: 38-48.

<sup>330</sup> House of Commons, Foreign Affairs Committee, "The operation of the Single European Act", *HC 82-I, 2<sup>nd</sup> Report of Session 1989-1990* of 14 March 1990, p. xxi-xxii.

<sup>331</sup> For instance, Francis Maude, the Conservative Minister of State at the Foreign and Commonwealth Office, declared before the House of Commons in 1990 that "a good strong scrutiny process strengthens the hands of negotiators by providing a clear expression of parliamentary views". Giving the example of negotiations on economic and monetary union, he stated that "it became clear that a single currency in the manner of Delors stage 3 simply was not acceptable to the House of Commons. That is not to say that it will never be acceptable to a later House of Commons, but it is not acceptable to this House of Commons. That means that the Government's position in those negotiations is perfectly clear". House of Commons, Debate of 28 June 1990, Vol. 175, col. 585.

<sup>332</sup> Taking note of the rising political will in favour of giving national parliaments a European role, Minister Maude stated: "The documents on institutional reform prepared by the Foreign Ministers clearly stated that one of the mechanisms for improving democratic legitimacy in the Community is the greater involvement of national parliaments. Two years ago there was almost no discussion at Community level of the role of national parliaments within the Community". House of Commons, Debate of 28 June 1990, Vol. 175, col. 585.

<sup>333</sup> In the preparatory phase of the Maastricht Treaty, the Government refused to commit itself to holding parliamentary debates prior to Council meetings and instead defended the *ex post* solution of giving oral ministerial statements on these meetings only afterwards, and that only where the meetings warranted it. Furthermore, the Government did not endorse Parliament's request that oral questions on Community matters be restored. The Government also rejected the extension of the House of Commons' terms of reference that would enable it to examine broad policy areas, arguing that since the House of Lords' European Affairs Committee was already undertaking such inquiries, there was a value in keeping the narrower remit of its Commons' counterpart. Bates, T. St John N. "European Community Legislation before the House of Commons," *Statute Law Review*, Vol. 12, 1991: 113-116.

Brussels to supplement its information on Community matters.<sup>334</sup> This does not mean that Parliament was not, as Bates put it, "the handmaiden of the executive" and certainly not that its "uneasy mixture of inquiry, scrutiny and formal political judgment" was more stringent in Community affairs than in other spheres of parliamentary activity.<sup>335</sup>

Apart from the perennial concern with the compatibility of the doctrine of parliamentary sovereignty with a European Union endowed with a revamped set of decision-making tools, it has been argued that neither the Second nor the Third Pillar were a major source of disagreement between and within the two major political parties.<sup>336</sup> The following analysis reveals that issues of cross-level political accountability were indeed being raised during committee hearings on the Maastricht Treaty in many contexts.<sup>337</sup>

### 3.2.1. Codecision

In his observations to the House of Commons, Douglas Hurd, the Conservative Foreign Secretary, assured Parliament that "the democratic accountability of the Community rests both on the directly elected European Parliament and on the responsibility of ministers in the Council to their elected parliaments".<sup>338</sup> To adjust the scrutiny arrangements to the codecision procedure, which the British called the 'negative assent procedure', the House of Commons requested that the Government submit to it explanatory and supplementary memorandums at each step of the codecision procedure, including Commission proposals, Council common positions, the European Parliament's possible amendments, and the documents of the

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<sup>334</sup> Bates, T. St. John N. "European Community Legislation before the House of Commons," *Statute Law Review*, Vol. 12, 1991: 118.

<sup>335</sup> Bates, T. St. John N. "European Community Legislation before the House of Commons," *Statute Law Review*, Vol. 12, 1991: 134.

<sup>336</sup> Best, Edward. "The United Kingdom and the ratification of the Maastricht Treaty," in *The ratification of the Maastricht Treaty: issues, debates and future implications*, by Finn Laursen and Sophie Vanhoonaeker (eds), Maastricht: European Institute of Public Administration, 1994: 255-256.

<sup>337</sup> For other aspects of the Maastricht debates in Parliament see: Ware, Richard. "The road to Maastricht: Parliament and the intergovernmental conferences of 1991," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 241-260; Ware, Richard. "Legislation and ratification: the passage of the European Communities (Amendment) Act 1993," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 261-296; Baker, David et al. "Whips or scorpions? The Maastricht vote and the Conservative party," *Parliamentary Affairs*, Vol. 46, No. 2, 1993: 151-166; Baker, David et al. "The parliamentary siege of Maastricht 1993: conservative divisions and British ratification," *Parliamentary Affairs*, Vol. 47, No. 1, 1994: 37-60; Rawlings, Richard. "Legal politics: the United Kingdom and ratification of the Treaty on European Union," *Public Law*, 1994: 254-278.

<sup>338</sup> Observations by the Secretary of State for Foreign and Commonwealth Affairs on the House of Commons' Foreign Affairs Select Committee 2<sup>nd</sup> Report of session 1991-1992 of May 1992, Cm. 1965, p. 3.

Conciliation Committee. The objective was to influence the ministers before the Council decides.<sup>339</sup>

During a committee discussion on EU decision making in the House of Commons, Tristan Garel-Jones, the Minister of State for Foreign and Commonwealth Affairs, gave an unorthodox vision of the interplay between the British and EU legislative bodies:

I think what seems to me, at any rate, is beginning to emerge as far as European legislation is concerned is that this House of Commons, through its scrutiny procedures, carries out what I suppose might be called a second reading debate on draft legislation that comes forward from the Community, and the whole process then between the Council and the European Parliament conciliation procedures and so on I suppose might be, broadly speaking, parallel to the committee stage of legislation here.<sup>340</sup>

In a later correspondence, when John Stanley, a Conservative MP, stated that qualifying Westminster's scrutiny of EU affairs as a second reading is a very serious misnomer because national parliaments cannot halt EU legislation, Minister Garel-Jones agreed and explained that he used the comparison to denote the thoroughness of British parliamentary scrutiny and to stress the constancy and intensity of ministerial responsibility that he had personally felt.<sup>341</sup> In connection with these issues, Secretary Hurd thought it was up to Westminster to decide on the adequate mechanism for the scrutiny of EU decisions: "It is not easy for governments to dictate to national parliaments how to operate in this. This House [of Commons] would resent it if we started to do that". He assessed that developing a grip on their own ministers would be a vital starting point, and added that ministerial accountability for European decisions was, in his experience, "brisker and more effective than for domestic ones".<sup>342</sup>

In presumably the first evidence session that the House of Commons has held with the European Parliament, David Martin, the Vice-President of the European Parliament, clarified his institution's attitude towards national parliaments:

We want national parliaments frankly to be more effective in controlling their own ministers and making sure individual members of the Council of Ministers are brought under greater democratic control and the European Parliament making sure

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<sup>339</sup> House of Commons, Select Committee on European Legislation, "Scrutiny after Maastricht", *HC 99, 1<sup>st</sup> Special Report of Session 1993-1994* of 8 December 1993, p. v-vi.

<sup>340</sup> House of Commons, Foreign Affairs Committee, "Europe after Maastricht", *HC 223-i, Minutes of Evidence of 4 February 1992*, Q52, p. 20.

<sup>341</sup> House of Commons, Foreign Affairs Committee, "Europe after Maastricht", *HC 205-vi, Minutes of Evidence of 14 January 1993*, Q353 and 354, pp. 140-141.

<sup>342</sup> House of Commons, Foreign Affairs Committee, "Europe after Maastricht: Interim report", *HC 205-i, Minutes of Evidence of 12 October 1992*, Q43 and 47, pp. 11-12.

there is a European view on all legislation. We see the two as complementary, not in any way as rivals. We in no way seek to surpass the national parliament [...]<sup>343</sup>

Yet hints of interinstitutional incertitude transpired at times. The Foreign Affairs Committee of the House of Commons appraised its relationship with the European Parliament in the following words: "We do not believe national parliaments should become subordinate to the European Parliament. Nor do we wish to see a strict hierarchy of responsibility established". For that reason, the Committee rejected the idea of a conference of parliaments, which, in its view, could be no more than an unwieldy and unprofitable talking-shop or an audience for an annual state of the union speech from the President of the Council of Ministers. Preference was given to bilateral contacts with the European Parliament and each national parliament, and to pre-legislative intervention in EU affairs.<sup>344</sup>

### 3.2.2. Intergovernmentalism

In a series of evidence sessions on the Maastricht Treaty, the House of Commons received ample assurance – such as from Foreign Secretary Hurd,<sup>345</sup> Kenneth Clarke,<sup>346</sup> the Conservative Home Secretary, and Leon Brittan, the EU Commissioner for Competition<sup>347</sup> – that CFSP and JHA would derive their legitimacy primarily from national parliaments, which would be the ultimate bulwark against unrestricted executive freedom in these fields. On another occasion, the question was raised whether the fact that the European Parliament is excluded from decisions in the intergovernmental pillars meant that there was "a need for the national parliaments actually to meet together in order to provide that very essential thing for a democracy, to generate consent to being ruled by a majority".<sup>348</sup> The reasoning behind this question was essentially that there was insufficient pressure for ministers to account for their actions in the Council. A direct reply was evaded and diluted in vague references.

The Foreign Affairs Committee of the House of Commons acknowledged the absence of a uniform system throughout the Community for holding ministers to account for decisions reached intergovernmentally, but concluded that that did not preclude individual national parliaments from doing so. In particular, it

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<sup>343</sup> House of Commons, Foreign Affairs Committee, "Europe after Maastricht", *HC 205-viii, Minutes of Evidence of 17 February 1993*, Q405, p. 171.

<sup>344</sup> House of Commons, Foreign Affairs Committee, "Europe after Maastricht", *HC 642-I, 2<sup>nd</sup> Report of Session 1992-1993* of 29 April 1993, paras 110-111, p. xxviii.

<sup>345</sup> House of Commons, Foreign Affairs Committee, "Europe after Maastricht", *HC 223-i, Minutes of Evidence of 4 February 1992*, Q2, p. 11.

<sup>346</sup> House of Commons, Home Affairs Committee, "Intergovernmental cooperation in the fields of Justice and Home Affairs", *HC 625-i, Minutes of Evidence of 21 April 1993*, Q21 and 22, p. 10.

<sup>347</sup> House of Commons, Foreign Affairs Committee, "Europe after Maastricht", *HC 205-xi, Minutes of Evidence of 18 March 1993*, Q554, p. 218.

<sup>348</sup> House of Commons, Foreign Affairs Committee, "Europe after Maastricht", *HC 223-ii, Minutes of Evidence of 5 February 1992*, Q99, p. 47.

recommended the Government to make it its policy to consult the House before important decisions are taken under CFSP and JHA. This Committee noted that the JHA pillar might pose more immediate problems of accountability and that it would necessitate at least the same degree of scrutiny as did legislation under the Community pillar. It was further pondered whether a new procedure could be devised whereby, before it is decided to move to qualified majority voting in CFSP, the House is given an opportunity to express its views.<sup>349</sup>

Intergovernmentalism was thus not opposed. It was even desirable at times, such as in the case of the ex-Yugoslav war, which was regarded by a number of parliamentarians as a litmus test for the viability of the future CFSP. For Robert Wareing, a Labour MP, this was "a definite opportunity for the European Community to develop a common policy".<sup>350</sup>

In a discussion with Home Secretary Clarke in the Home Affairs Committee of the House of Commons, Mike O'Brien, a Labour MP, shed more light on the purpose of the scrutiny of EU action in the Third Pillar:

I think the aim is not particularly to hamstring ministers at negotiations, it is perhaps to improve the democratic deficit there is in the House of Commons, in terms of the accountability of ministers to committees and to Parliament, particularly in relation to Europe and [...] the Third Pillar.<sup>351</sup>

An impediment to accountability was quickly detected, however. In the words of Karel de Gucht, then an MEP and a member of the European Parliament's Institutional Committee, "[t]here is a very real danger that an intergovernmental Europe will degenerate into rule by senior officials cloaked by ministerial responsibilities which no longer can be modified effectively".<sup>352</sup>

The House of Lords' enquiry into the scrutiny of intergovernmental pillars yielded several insights. To begin with, the Select Committee on the European Communities found it essential for national parliaments to supervise these pillars for the following reasons:

By comparison with Community legislative procedures, the Commission will have a smaller role, there will be no automatic publicity for proposals and governments will

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<sup>349</sup> House of Commons, Foreign Affairs Committee, "Europe after Maastricht", *HC 642-I, 2<sup>nd</sup> Report of Session 1992-1993* of 29 April 1993, paras 95-96, p. xxv.

<sup>350</sup> House of Commons, Foreign Affairs Committee, "Europe after Maastricht: European Council, December 1992", *HC 205-iv, Minutes of Evidence of 23 November 1992*, Q205, p. 91. See also Lord Bonham-Carter's enquiry in: House of Lords, Select Committee on the European Communities, "House of Lords scrutiny of the inter-governmental pillars of the European Union", *HL 124, Minutes of Evidence of 29 June 1993*, Q87, 90 and 91, pp. 32-33.

<sup>351</sup> House of Commons, Home Affairs Committee, "Intergovernmental cooperation in the fields of Justice and Home Affairs", *HC 625-i, Minutes of Evidence of 21 April 1993*, Q54, p. 18.

<sup>352</sup> Gucht, Karel de. Memorandum reproduced in: House of Commons, Foreign Affairs Committee, "Europe after Maastricht", *HC 205-viii, Minutes of Evidence of 17 February 1993*, para. 20, p. 160.

tend to prefer for their negotiations the secret ways to which they are accustomed. This lays a greater responsibility on national parliaments each to hold their own ministers to account. The European Parliament's formal powers [...] are limited [...] and the [European] Parliament is less able to influence the outcome of intergovernmental negotiations through the Commission whose role is also limited. As with Community legislation, the work of the European Parliament and the work of national parliaments are complementary, but we see national parliaments as having the stronger potential in regard to the intergovernmental pillars.<sup>353</sup>

During an evidence session in the House of Lords, Michael Howard, the Conservative Home Secretary, argued that the channel of accountability to national parliaments in the Third Pillar arises "naturally and inevitably" out of the fact that decisions are taken unanimously.<sup>354</sup>

The European Parliament had claimed in a resolution of 1991 that parliamentary supervision of JHA matters is a "joint responsibility" of national parliaments and the European Parliament and called for annual conferences to be held between its Committee on Civil Liberties and Internal Affairs<sup>355</sup> and competent national parliamentary committees.<sup>356</sup> Such a division of the supervisory tasks was, nevertheless, not uncontested in Britain. For example, during a joint meeting of the Home Affairs Committee of the House of Commons with their counterpart in the European Parliament, the Committee's Chairman, Ivan Lawrence, a Conservative MP, reported that the MEPs became rampant in accusing him of "empire building" when he conveyed to them the opinion of the British Parliament and Government that scrutiny of the JHA pillar should pertain to the British Committee.<sup>357</sup> This spat certainly did not mean that joint meetings would be discontinued. It merely brought to the fore the underlying institutional jealousies. It meant that neither the European nor the British parliamentarians were ready to cede their scrutiny powers.

Their Lordships also welcomed the Government's vow to lay before their House the first full text of any convention, proposal or other document of significant importance, because "to exercise influence over the substance of international agreements and decisions it is essential to see texts in drafts".<sup>358</sup> To that effect, the

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<sup>353</sup> House of Lords, Select Committee on the European Communities, "House of Lords scrutiny of the inter-governmental pillars of the European Union", *HL 124, 28<sup>th</sup> Report of Session 1992-1993* of 2 November 1993, para. 48, p. 22.

<sup>354</sup> House of Lords, Select Committee on the European Communities, "House of Lords scrutiny of the inter-governmental pillars of the European Union", *HL 124, Minutes of Evidence of 15 June 1993*, Q2, p. 7.

<sup>355</sup> It was set up in February 1992 in response to the democratic deficiencies of the Third Pillar.

<sup>356</sup> European Parliament, Resolution on cooperation in the fields of justice and home affairs under the Treaty on European Union (Title VI and other provisions) of 17 July 1993, (*OJ C 255/168* of 20.9.1993), point 8.

<sup>357</sup> House of Commons, Home Affairs Committee, "Intergovernmental cooperation in the fields of Justice and Home Affairs", *HC 625-i, Minutes of Evidence of 21 April 1993*, Q27, p. 11.

<sup>358</sup> House of Lords, Select Committee on the European Communities, "House of Lords scrutiny of the inter-governmental pillars of the European Union", *HL 124, 28<sup>th</sup> Report of Session 1992-1993* of 2

instruments already available to the House – such as oral and written questions, inquiries, the Ponsonby Rule<sup>359</sup> and the scrutiny reserve – were assessed as appropriate. In addition, the Committee endorsed the secrecy, but not the speediness, of action in CFSP as a valid reason for the non-disclosure of information.

### **3.2.3. Subsidiarity**

The Houses of Parliament spent a considerable portion of time grappling with the legal and political aspects of subsidiarity. The essence of the parliamentary debate can be summarised by the view of the Foreign Affairs Committee of the House of Commons, which described subsidiarity "as a political or constitutional convention, rather than as a legal mechanism", but doubted that it would be effective without a new institutional mechanism for enforcing it, in which national parliaments might play their part.<sup>360</sup>

### **3.3. Portugal**

After the Assembly approved the Maastricht Treaty on 11 December 1992, the President of the Republic ratified it on 17 December 1992. The ratification debate reached a climax with the proposal by the Centrists (*Centro Democrático Social*, CDS) to hold a referendum. This proposal swiftly ran into stark opposition by both the ruling Social Democrats (*Partido Social Democrata*, PSD) and the main opposition party, the Socialists (*Partido Socialista*, PS).<sup>361</sup> The most important among the arguments against a referendum, and one that would not only retain its relevance in the post-Maastricht period but one that would actually bolster Portugal's EU membership, was that deeper European integration benefits Portugal's national interest in the areas of democratic stabilisation, the economy, social development, and so on.<sup>362</sup> Although, therefore, the parliamentary debate was "relatively serene"

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November 1993, paras 51-53, pp. 22-23. Three tests were suggested for the transmission of these documents: (a) significance, particularly where the rights or duties of individuals may be affected; (b) the eventual need for UK legislation; and (c) the imposition of legally binding commitments on the UK. As examples, the Committee mentioned that common positions merely welcoming or deploring international events are not significant for parliamentary purposes, but that those dealing with the recognition of states, arms control, nuclear proliferation, the imposition or the lifting of sanctions are, because they will impose legally binding commitments on Britain.

<sup>359</sup> See *infra* note 1094 in Chapter 7.

<sup>360</sup> House of Commons, Foreign Affairs Committee, "Europe after Maastricht: Interim report", *HC 205, 1<sup>st</sup> Report of Session 1992-1993* of 4 November 1992, p. vi. See also: Hartley, Trevor. "Subsidiarity and the Maastricht Agreement", memorandum reproduced in: House of Commons, Foreign Affairs Committee, "Europe after Maastricht: Interim report", *HC 205-i, Appendix 2 to the Minutes of Evidence of 29 October 1992*, p. 49.

<sup>361</sup> Marinho, Clotilde Lopes. "Portugal and the ratification of the Maastricht Treaty," in *The ratification of the Maastricht Treaty: issues, debates and future implications*, by Finn Laursen and Sophie Vanhoonacker (eds), Maastricht: European Institute of Public Administration, 1994: 232-233.

<sup>362</sup> In the first five years following its accession to the European Communities, Portugal experienced a "positive initial shock" in its socio-economic development and modernisation. During this period, Portugal's gross domestic product grew by some 4.6% a year. The net official reserve tripled, rising from

due to the consensus between the political parties, it brought to light the differences among them that had not emerged before.<sup>363</sup>

More arresting is certainly the aloofness of the citizenry from the ratification process. According to a 1992 Eurobarometer poll, 91% of the 1000 Portuguese surveyed knew "little or nothing" about the Maastricht Treaty.<sup>364</sup> Despite being chronically ill-informed, the Portuguese, with 70% in favour, were the biggest supporters of the increase in the European Parliament's powers.<sup>365</sup> Another 65% were satisfied with the functioning of the national democracy.<sup>366</sup>

### 3.3.1. Codecision

Among the questions that received ample attention in the Portuguese Parliament were the modifications of the decision-making rules and of the political accountability scheme at the European level. In this vein, a guest expert invited to appear before the European Affairs Committee, João Ferreira do Amaral, a former adviser to Portugal's former President and Prime Minister Mário Soares, deplored the fact that the Maastricht Treaty denied national parliaments, the European Parliament and the citizens any direct say in the formulation of the broad guidelines of the economic policies of the Member States and the Community. Even more worrisome, he considered, was that the monetary policy was entirely removed from the political control of representative organs.<sup>367</sup> This amounted to "a clear impoverishment of the political life" and "a grave error".<sup>368</sup> He went as far as to argue that the independence of the European Central Bank from the central banks of the Member States is "the assassination of the universal suffrage".<sup>369</sup> His main argument was that all these policies were traditionally the prerogative of Parliament acting upon Government

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8.5 to 26.1 billion dollars. Some 400,000 jobs were created, which helped reduce the level of unemployment from 8.4% to 4.7%. Although the economic growth slowed down, reaching only 2.5% in 1991, the unemployment rate fell further to 4.1%. There was also a dramatic surge in foreign direct investments, rising from 2% of Portugal's gross fixed capital formation at the beginning of the 1980s to 14% in 1990. Mateus, Augusto. "A economia portuguesa depois da adesão às Comunidades Europeias: transformações e desafios," *Análise Social, Vol. 27, No. 118-119*, 1992: 657, 660-662. See also: Lopes, José da Silva (ed.). *Portugal and EC membership evaluated*, London: Pinter Publishers, 1994; Villaverde, Manuel Cabral. "Portugal e a Europa: diferenças e semelhanças," *Análise Social, Vol. 27, No. 118-119*, 1992: 943-954.

<sup>363</sup> Marinho, Clotilde Lopes. "Portugal and the ratification of the Maastricht Treaty," in *The ratification of the Maastricht Treaty: issues, debates and future implications*, by Finn Laursen and Sophie Vanhoonacker (eds), Maastricht: European Institute of Public Administration, 1994: 240.

<sup>364</sup> Eurobarometer, No. 38, December 1992, p. 28.

<sup>365</sup> Eurobarometer, No. 38, December 1992, p. 67.

<sup>366</sup> Eurobarometer, No. 38, December 1992, p. 71.

<sup>367</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 23 September 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 193-195.

<sup>368</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 23 September 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 219.

<sup>369</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 23 September 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 227.

proposals and that this also allowed the public to exercise oversight over the decisions thus made.

His concern was not fully shared by MPs, however. João Oliveira Martins (PSD) stressed, on the one hand, that national parliaments did possess control over the Council of Ministers. Since it is composed of Government representatives who are answerable before their parliaments, the Council was "nothing more and nothing less than an emanation of all national parliaments".<sup>370</sup> Yet he acknowledged that this control can be malperformed, diffuse or insufficient. On the other hand, the European Parliament's accountability function, albeit complicated, was, in his view, not as pronounced.<sup>371</sup>

Along similar lines, Helena Torres Marques (PS), the Chairwoman of the European Affairs Committee, assessed the European Parliament's new decision-making powers and its increased collaboration with national parliaments as "a very important leap in terms of democracy". But she also added that it was becoming obvious that national parliaments need to amplify both their scrutiny of Union affairs and the relations with their own governments.<sup>372</sup> In her opinion, the Maastricht Treaty "perfectly permits" the exercise of democracy regarding decisions taken by unanimity whenever national parliaments are informed and approve the positions of their respective governments.<sup>373</sup> Yet there was wide consensus that it is the national governments and not the Community or EU institutions which are to be held responsible for any deficit related to democracy or the availability of information.<sup>374</sup>

For his part, João de Deus Pinheiro (PSD), the Minister of Foreign Affairs, underscored the cruciality of interparliamentary dialogue arguing that it is "absolutely indispensable" to launch the cooperation between specialised committees of national parliaments and the European Parliament, because as long as that remains unfulfilled, national parliaments will be "at a significant distance" from the EU policy-making arena.<sup>375</sup> To illustrate this, he said:

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<sup>370</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 23 September 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 200.

<sup>371</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 23 September 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 200.

<sup>372</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 23 September 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 216.

<sup>373</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 8 October 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 395.

<sup>374</sup> See the interventions by Raúl Brito (PS), Adriano Moreira (CDS) and João Amaral (PCP) in: *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 14 October 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 428, 431 and 448.

<sup>375</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 14 October 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 425.

Whether MPs want it or not, [...] no matter how synchronised our positions be, if I am your [only] channel, it is obviously a monolithic channel, no matter how hard I try.<sup>376</sup>

Indeed, according to Chairman Marques, the European Parliament's intervention in EU decision making would, regardless of the differences in the legal consequences of the four types of procedures (codecision, cooperation, consultation and assent), carry political force where there was a partnership with national parliaments, i.e., where decisions at hand acquired great political sensitivity.<sup>377</sup>

In a lucid observation, Octávio Teixeira (PCP) warned that the problem lay in the fact that although individual members of the Council of Ministers and the European Council are politically accountable to their parliaments, they are collectively not accountable to any representative body, whether national or European. This nourishes scapegoating and frustrates political accountability.<sup>378</sup>

During another hearing session in the European Affairs Committee, João Salgueiro, the former Finance Minister and Vice-President of the Portuguese Central Bank, stated that in a situation of delegated sovereignty, "the Commission must render account to various states, so that parliaments can scrutinise it, as long as there is no European Parliament".<sup>379</sup>

There was also tangible agreement that the improvement of the role of national parliaments in EU decision making is principally an internal matter of the Member States and not of the Maastricht Treaty.<sup>380</sup> Ultimately, remedying the persisting democratic deficit, in the opinion of the Constitutional Affairs Committee, transcends the reconfiguration of the European Parliament's status and is possible only by

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<sup>376</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 14 October 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 435.

<sup>377</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 14 October 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 427.

<sup>378</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 23 September 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 205; *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 30 September 1992, in:

*Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 281.

<sup>379</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 30 September 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 287.

<sup>380</sup> See, for instance, statements to that effect by Menezes Ferreira (PS) in: *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 23 September 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 210; by António Capucho (PSD), the then Vice-President of the European Parliament, in: *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 8 October 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 365; and by João de Deus Pinheiro, the then Minister of Foreign Affairs, in: *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 14 October 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 435.

restructuring a whole web of relations between the Community and national institutions.<sup>381</sup>

### **3.3.2. Intergovernmentalism**

The democratic accountability of the intergovernmental pillars was not the object of much discussion in the Assembly. One of the reasons for this might be that, as the Foreign Affairs Committee held, the European Parliament's limited rights in these fields were a sign of a reinforced national parliamentary dimension of EU foreign affairs.<sup>382</sup> In particular, the Maastricht Treaty's invitation for national parliaments to gather in a conference of parliaments represented:

[A] possibility for national parliaments to intervene in the Union's external policy more directly and beyond the European Parliament. And this is yet another avenue through which Portugal will be able to participate at the international scene in the sectors where it alone would not have any chance to have its voice heard.<sup>383</sup>

During an audition before the European Affairs Committee, António Capucho (PSD), the then Vice-President of the European Parliament, assured the members that the prospect of common EU external policy, being subject to unanimity, would not imperil the Portuguese national interest in this area. On the contrary, small Member States would be able to take part in the shaping of this policy rather than be isolated from this process.<sup>384</sup>

### **3.3.3. Subsidiarity**

Speaking before the European Affairs Committee, Jacinto Nunes, the former Vice-Prime Minister for Economy and European Integration, argued against a taxative enumeration of competences of the European Union in order to leave room for political appreciation. In his view, subsidiarity must be applied bottom-up, so that the Member States could always decide on the objectives to be pursued by the Union.

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<sup>381</sup> *Assembleia da República, Comissão de Assuntos Constitucionais, Direitos, Liberdades e Garantias, "Relatório e parecer sobre a Proposta de resolução no. 11/VI – aprova, para ratificação, o Tratado da União europeia"* of 3 December 1992, *Diário da Assembleia da República, II Série-A, No. 11*, 12 December 1992, p. 442.

<sup>382</sup> See the former Article 21 TEU.

<sup>383</sup> *Assembleia da República, Comissão de Negócios Estrangeiros, Comunidades Portuguesas e Cooperação, "Relatório sobre o Tratado de Maasticht na sua vertente de política externa"* of 27 November 1992, *Diário da Assembleia da República, II Série-A, No. 11*, 12 December 1992, p. 448.

<sup>384</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 8 October 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 368.

Otherwise, subsidiarity would not exist.<sup>385</sup> The Committee members mostly called for an *ex ante* monitoring of subsidiarity.<sup>386</sup>

Foreign Minister Pinheiro further emphasised that subsidiarity should not be used against the Commission but that a proper application of subsidiarity is a joint responsibility of both European and national institutions.<sup>387</sup> In this sense, he argued that the involvement of national parliaments in EU affairs should proceed in two channels: one through the Council and the ministers acting within it and the other through contacts with other EU institutions.<sup>388</sup> In more general terms, the Constitutional Affairs Committee assessed that the Maastricht Treaty's institutional equilibrium "permitted an adequate functioning of the principle of subsidiarity and a healthy development of relations between the Member States and the Communities".<sup>389</sup>

#### 4. CONCLUDING REMARKS

The period surrounding the preparations for the Maastricht Treaty was characterised by an increasing awareness among parliaments at national and European levels of the complementarity of their efforts in combating the democratic deficit. The European Parliament and national parliaments began opening up to cross-level cooperation. Confronted with the absence of formal powers in EU decision making, they resorted to interdependent action, which did not rely on Treaty prescriptions. This was supplemented with attempts at institutionalising interpersonal contacts between parliaments, of which COSAC is a notable case in point. The Treaty reform, therefore, seemed to follow in the footsteps of parliamentary initiatives and not *vice versa*. With the Treaty in place, national parliaments were faced with an altered European constitutional setting.

In France, the codecision procedure was greeted with statements of support. Qualified majority was encouraged and rivalry with the European Parliament rejected. More sceptical voices could be heard in the *Sénat*, which warned against what it perceived as different institutional interests of the European and national parliaments. Subsidiarity was a point of concern, as the Union displayed the tendency to use the legal bases provided by the Treaties all too casually. Intergovernmentalism

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<sup>385</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 30 September 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 300.

<sup>386</sup> See to that effect the interventions by Nogueira de Brito (CDS) and Menezes Ferreira (PS) in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 440 and 445.

<sup>387</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 14 October 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 421.

<sup>388</sup> *Assembleia da República, Comissão de Assuntos Europeus*, Meeting of 14 October 1992, in: *Assembleia da República, A Assembleia da República e o Tratado da União europeia*, Lisbon, 1993: 421.

<sup>389</sup> *Assembleia da República, Comissão de Assuntos Constitucionais, Direitos, Liberdades e Garantias, "Relatório e parecer sobre a Proposta de resolução no. 11/VI – aprova, para ratificação, o Tratado da União europeia"* of 3 December 1992, *Diário da Assembleia da República, II Série-A, No. 11*, 12 December 1992, p. 439.

was not opposed, because of the understanding that it favours the position of Parliament. The action that the Houses suggested should be taken included both reforming the national instruments of participation in EU affairs and creating an additional parliamentary chamber at the EU level. This permits the conclusion that the transfer of sovereignty put into effect at Maastricht was on the whole endorsed by the French Parliament. The European Parliament, with certain reticence among the Gaullists, was accepted as a partner. The French parliamentarians, on the basis of their function of direct representatives of the citizens, saw their role of providing democratic legitimacy as relevant not only for their Member State but also for the Union as such.

In Britain, the empowerment of the European Parliament to codecide with the Council and its eviction from intergovernmental decision making did not appear to be one of the central factors in Westminster's treatment of the Maastricht Treaty, because the first and foremost venue for political accountability was the Government. The erection of intergovernmental pillars was uncontroversial, as it provided the strongest link for the policing of ministerial responsibility. However, the European Parliament was recognised as a suitable partner for the provision of information when the Government would fail to deliver on its duties or commitments. Though there was no explicit reference to legitimising Union action, it is, however, a fact that British parliamentarians engage in informal cooperation with the EU level. This is a significant development in scrutinising EU affairs. The British Parliament's approach to the European Union, therefore, did not seem squarely to fit an allegation by Allott that the European Parliament is "an institutionalisation of all the futility of the national parliaments" and that "[t]he central and critical role of national parliaments, achieved through centuries of struggle, as the focus and symbol of the will of the people has been cynically withheld from the EC system".<sup>390</sup> Rather, as Bates attested in his empirical analysis, the European Affairs Committees of both Houses of Parliament had "regular contacts with Community institutions and MEPs, although there has been sensitivity at Westminster in encouraging formal contacts with MEPs".<sup>391</sup> In view of this, it can be concluded that the British Parliament, on the whole, viewed the European Parliament from the perspective of partnership.

In Portugal, both the transfer of sovereignty, the upgrade in the European Parliament's powers through codecision and the subsidiarity principle were warmly welcomed. Intergovernmental cooperation was uncontroversial, too. The majority of parliamentarians and Government representatives were not critical of EU institutions. For the Assembly, the locus of the democratic deficit was in the national governments. Cross-level interparliamentary cooperation was desirable as it provided

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<sup>390</sup> Allott, Philip. "The European Community at the pain-barrier", memorandum reproduced in: House of Commons, Foreign Affairs Committee, "Europe after Maastricht", *HC 223-iii, Minutes of Evidence of 19 February 1992*, p. 68.

<sup>391</sup> Bates, T. St John N. "European Community Legislation before the House of Commons," *Statute Law Review*, Vol. 12, 1991: 112.

#### *Chapter 4*

yet another opportunity for Portugal to impress its views on Europe. The European Parliament was, thus, a valuable partner. Perhaps precisely due to a virtual absence of dissent, the Portuguese Parliament was quite favourable to the idea of contributing to the Union's legitimacy.

# Chapter 5

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## *Finale*

### **The Lisbon Treaty: National Parliaments Anchored in the Union**

#### **1. CALIBRATING INTERPARLIAMENTARISM ACROSS LEVELS**

In anticipation of the entry into force of the Lisbon Treaty, in May 2009 the European Parliament passed a resolution appraising its relations with national parliaments. A host of joint activities, it found, have developed "fairly positively in recent years, but not yet to a sufficient extent".<sup>392</sup> The European Parliament's vision of EU parliamentary democracy consists of two separate channels:

[T]he necessary parliamentarisation of the European Union must rely on two fundamental approaches involving the broadening of the European Parliament's powers vis-à-vis all the Union's decisions and the strengthening of the powers of the national parliaments vis-à-vis their respective governments [...]. [T]he primary task and function of the European Parliament and the national parliaments is to take part in legislative decision making and to scrutinise political choices at, respectively, the national and the European level [...].<sup>393</sup>

While the European Parliament embraces national parliaments as stakeholders of EU decisions, the latter are consigned to their own level of governance. They are invited to concentrate their forces on holding the national governments to account and are urged to invigilate the process of the transposition and implementation of the Union's

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<sup>392</sup> European Parliament, Resolution on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon of 7 May 2009, (*OJ C 212E/94* of 5.8.2010), point 2. These activities include: joint parliamentary meetings on horizontal topics going beyond the remit of one committee; joint committee meetings at least twice per semester; ad hoc parliamentary meetings at committee level on the initiative of the European Parliament or of the parliament of the Member State holding the Presidency; interparliamentary meetings at the level of committee chairs or parliament chairs within the Conference of Speakers of the European Union Parliaments; visits by MPs to the European Parliament in order to participate in meetings of corresponding specialised committees; meetings within political groups or parties at European level, etc. Some of these forums for cooperation have been affirmed by the Guidelines for Interparliamentary Cooperation in the European Union, adopted by the Conference of Speakers of European Union Parliaments held in Lisbon from 19-21 June 2008.

<sup>393</sup> European Parliament, Resolution on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon of 7 May 2009, (*OJ C 212E/94* of 5.8.2010), recitals B and I.

laws and policies.<sup>394</sup> National parliamentary scrutiny of EU policies will raise public awareness in the Member States of the Union's activities and, thus, underpin the Union's legitimacy.<sup>395</sup> Already in 2002, the European Parliament made it clear that it "does not see itself as the exclusive representative of the citizens and guarantor of democracy" but that the peoples of the Union are represented by the European Parliament and national parliaments "each in its own realm".<sup>396</sup>

Yet where the European Parliament's controlling prerogative is deficient, cooperation with national parliaments is underscored:

[T]here is too little accountability to parliaments for the financial arrangements with regard to the CFSP and ESDP and [...] cooperation between the European Parliament and the national parliaments must therefore be improved in order to ensure democratic control over all aspects of these policies.<sup>397</sup>

In 2002, the European Parliament claimed even more explicitly that it is "particularly important for national parliaments fully to use their power of scrutiny in all cases where there is no codecision", with a special emphasis on CFSP and CSDP.<sup>398</sup>

Furthermore, the European Parliament envisages "more systematic monitoring" of the Barroso initiative so as to obtain early information about national parliamentary positions on draft EU legislation, for which reason it called on national parliaments to make their opinions available to it at the same time as to the Commission.<sup>399</sup> This could be interpreted both as a sign of the European Parliament's goodwill to pay heed to *ex ante* political assessments of national parliaments, but also as a hint of tacit institutional rivalry. It nonetheless appears that the European Parliament's activism is more than rhetorical. Its three Vice-Presidents, the Directorate for relations with national parliaments and the Conference of Presidents are in charge not least of exchanging information with and maintaining contact with national parliaments as well as organising various types of interparliamentary

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<sup>394</sup> European Parliament, Resolution on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon of 7 May 2009, (*OJ C 212E/94* of 5.8.2010), points 4 and 14.

<sup>395</sup> European Parliament, Resolution on Parliament's new role and responsibilities in implementing the Treaty of Lisbon of 7 May 2009, (*OJ C 212E/37* of 5.8.2010), point 63.

<sup>396</sup> European Parliament, Resolution on relations between the European Parliament and the national parliaments in European integration of 7 February 2002, (*OJ C 284E/322* of 21.11.2002), points 2 and 3.

<sup>397</sup> European Parliament, Resolution on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon of 7 May 2009, (*OJ C 212E/94* of 5.8.2010), point 19.

<sup>398</sup> European Parliament, Resolution on relations between the European Parliament and the national parliaments in European integration of 7 February 2002, (*OJ C 284E/322* of 21.11.2002), points 6 and 14.

<sup>399</sup> European Parliament, Resolution on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon of 7 May 2009, (*OJ C 212E/94* of 5.8.2010), point 16.

meetings and conferences. On top of that, the European Parliament has vowed to keep national parliaments regularly informed of its activities.<sup>400</sup>

## **2. THE POWERS OF NATIONAL PARLIAMENTS UNDER THE LISBON TREATY**

With the Lisbon Treaty in force on 1 December 2009, the national parliaments' democratic fiber was woven into the Union's constitutional fabric. The provisions on national parliaments are, with minor changes, a replica of those contained in the European Constitutional Treaty, defeated by the Franco-Dutch *vox populi* in 2005.<sup>401</sup> For the first time, these provisions are laid down in the texts of the Treaties proper and accompanied by two refurbished protocols.<sup>402</sup> The rights of national parliaments can be typified according to two criteria: the level of EU action and the nature of the right.

According to the *level of EU action*, the national parliaments' rights refer to: (a) primary law and the division of competences between the Union and the Member States, such as the approval and amendment of the Treaties, bridging clauses, the accession of new states, etc.; and to (b) secondary law and the exercise of competences, such as the application of the principles of subsidiarity and proportionality, evaluation and political monitoring of the Area of Freedom, Security and Justice, interparliamentary cooperation, etc.

According to the *nature of the right*, the national parliaments' rights range from: (a) the passive ones, where parliaments are merely informed or notified, such as of draft EU legislation or of recourse to the flexibility clause, etc.; to (b) the active ones, where they are empowered to act, such as to send reasoned opinions on subsidiarity to EU institutions, bring actions to the Court of Justice for infringements of subsidiarity, block the modification of decision-making procedures or other Treaty amendments, etc.

Another novelty of potential relevance for national parliaments is the transfer of the Third Pillar to the First Pillar, which subjected the Area of Freedom, Security and

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<sup>400</sup> Rule 130 of the Rules of Procedure of the European Parliament of July 2009.

<sup>401</sup> See a comprehensive account of the national parliaments' powers in: Wyrzykowski, Mirosław et al. "General report: the role of national parliaments in the European Union," in *The role of national parliaments in the European Union: proceedings of the FIDE XXIV Congress Madrid 2010 - Vol. 1*, by Gil Carlos Rodriguez Iglesias and Luis Ortiz Blanco (eds), Madrid: Universidad Complutense de Madrid, 2010: 1-78. See also: Gennart, Martin. "Les parlements nationaux dans le Traité de Lisbonne: évolution ou révolution," *Cahiers de Droit Européen*, Vol. 46, No. 1-2, 2010: 17-46; Barrett, Gavin. "'The King is dead, long live the King': the recasting by the Treaty of Lisbon of the provisions of the Constitutional Treaty concerning national parliaments," *European Law Review*, Vol. 33, No. 1, 2008: 66-84; Corthaut, Tim. "Plus ça change, plus c'est la même chose? A comparison with the Constitutional Treaty," *Maastricht Journal of European and Comparative Law*, Vol. 15, No. 1, 2008: 21-34; Devuyt, Youri. "The European Union's institutional balance after the Treaty of Lisbon: Community method and democratic deficit reassessed," *Georgetown Journal of International Law*, Vol. 39, No. 2, 2008: 311-315; Delcamp, Alain. "Les parlements nationaux et l'Union européenne: de la reconnaissance à l'engagement," *Revue du Marché Commun et de l'Union Européenne*, No. 544, 2011: 7-12.

<sup>402</sup> Protocol no. 1 on the role of national parliaments in the European Union and Protocol no. 2 on the application of the principles of subsidiarity and proportionality.

Justice to codecision and thereby enhanced the decision-making power of the European Parliament.<sup>403</sup> This led to a partial 'depillarisation' of the Union, with the CFSP persisting as the area where the European Parliament and qualified majority voting continue to be excluded.<sup>404</sup>

The scheme provided below serves to visualise the key aspects of the national parliaments' functions within the EU without rehearsing the wording of Treaty provisions, because their fairly self-evident nature permits their content to be succinctly abridged. This provides a clearer overview. The more important provisions are dealt with separately and in greater detail. It ought to be emphasised that some of the rights are not readily conducive to straightforward definition. For example, the flexibility clause, which enables the Union to act where the authorisation to do so is not foreseen in the Treaties, can be understood both as an amendment of the Treaty aimed at creating a non-existing right of the Union to act and as an application of the Treaty aimed at recognising an already existing but implicit right of the Union.<sup>405</sup> The same could be said of the bridging clauses, which refer to secondary law, but are in their nature matters of primary law, because they are permanent in effect and applicable to all future cases. These ambiguities do not eviscerate the classification, because they are of secondary importance to its purpose. Apart from cases where national parliamentary intervention might be necessary by virtue of the Treaties' reference to the constitutional requirements of the Member States, the table below exhaustively lists the rights of national parliaments in the European Union as enacted by the Lisbon Treaty.

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<sup>403</sup> See: Peers, Steve. "EU criminal law and the Treaty of Lisbon," *European Law Review*, Vol. 33, No. 4, 2008: 507-529; Hinarejos, Alicia. "The Lisbon Treaty versus standing still: a view from the Third Pillar," *European Constitutional Law Review*, Vol. 5, No. 1, 2009: 99-116; Guild, Elspeth. "The constitutional consequences of lawmaking in the third pillar," in *Lawmaking in the European Union*, by Paul Craig and Carol Harlow (eds), London: Kluwer Law International, 1998: 65-88. The importance of the democratic element of EU legislation in the Area of Freedom, Security and Justice is further underpinned by a recent proliferation of Third Pillar legislation. See: Mitsilegas, Valsamis. "The third wave of third pillar law: which direction for EU criminal justice?," *European Law Review*, Vol. 34, No. 4, 2009: 523-560. See other analyses in: Peers, Steve. *EU Justice and Home Affairs law*, Oxford: Oxford University Press, 2006; Skinner, Stephen. "The Third Pillar treaty provisions on police cooperation: has the EU bitten off more than it can chew?," *Columbia Journal of European Law*, Vol. 8, No. 2, 2002: 203-220; O'Keefe, David. "Recasting the Third Pillar," *Common Market Law Review*, Vol. 32, No. 4, 1995: 893-920.

<sup>404</sup> See: Wessel, Ramses. "The constitutional unity of the European Union: the increasing irrelevance of the pillar structure?," in *European constitutionalism beyond Lisbon*, by Jan Wouters et al. (eds), Antwerp: Intersentia, 2009: 283-306; Peers, Steve. "Finally 'fit for purpose'? The Treaty of Lisbon and the end of the Third Pillar legal order," *Yearbook of European Law*, Vol. 27, 2008: 47-64; Ott, Andrea. "Depillarisation' – entrance gate of intergovernmentalism through the backdoor?," *Maastricht Journal of European and Comparative Law*, Vol. 15, No. 1, 2008: 35-42.

<sup>405</sup> That national parliaments are informed of the Union's intention to use the flexibility clause is important in order to enable democratic oversight over the EU's implied powers, which is performed through subsidiarity monitoring. Lebeck, Carl. "Implied powers beyond functional integration? The flexibility clause in the revised EU Treaties," *Journal of Transnational Law and Policy*, Vol. 17, No. 2, 2008: 341.

Table 2. Exhaustive list of the rights of national parliaments under the Lisbon Treaty

<i>Primary EU law</i>	<b>Active</b>	1. participation in a Convention for ordinary Treaty amendment	Art. 48(3)(1) TEU
		2. opposition within 6 months to European Council proposals for simplified Treaty amendment, i.e., the two general bridging clauses authorising the Council, without ratification by the Member States, to act by qualified majority instead of by unanimity or in accordance with the ordinary legislative procedure instead of in accordance with the special legislative procedure	Art. 48(7)(3) TEU
	<b>Passive</b>	1. notification of proposals for ordinary Treaty amendment	Art. 48(2) TEU
		2. notification 6 months in advance of European Council's initiatives for simplified Treaty amendment	Art. 6 Prot. NPs
3. notification of applications for EU membership		Art. 49(1) TEU	
<i>Secondary EU law</i>	<b>Active</b>	1. subsidiarity monitoring: - in general - in the field of judicial cooperation in criminal matters and in police cooperation	Art. 5(3)(2) TEU Art. 69 TFEU
		2. sending within 8 weeks reasoned opinions to EU institutions on the compliance with subsidiarity of draft legislative acts	Art. 3 Prot. NPs and Art. 6 Prot. subs. & prop.
		3. bringing actions before the Court of Justice for infringements of subsidiarity by EU legislative acts	Art. 8 Prot. subs. & prop.
		4. opposition within 6 months to the use of the special bridging clause in cross-border family law	Art. 81(3)(3) TFEU
		5. evaluation of Eurojust's activities	Art. 85(1)(3) TFEU
		6. scrutiny of Europol's activities	Art. 88(2)(2) TFEU
		7. participation in COSAC	Art. 10 Prot. NPs
	<b>Passive</b>	1. receipt directly from the Commission of draft legislative acts, amended drafts, consultation documents (Green and White Papers and communications), annual legislative programmes and other instruments of legislative planning or policy (or from the EP and Council in case of non-Commission drafts)	Arts. 1&2 Prot. NPs and Art. 4 Prot. subs. & prop.
		2. receipt of detailed statements on subsidiarity and proportionality that accompany draft legislative acts, with information on the financial impact, implications of directives for implementation, qualitative and quantitative indicators, financial or administrative burden	Art. 5 Prot. subs. & prop.

<b>Secondary EU law</b>	<b>Passive</b>	3. assurance that no agreement may be reached in the Council on a draft legislative act during the 8 weeks between receiving a draft legislative act and its being placed on the Council's agenda for decision as well as during 10 days between its placing on the Council's agenda and the Council's decision (both periods can be overridden in cases of urgency, which needs to be duly explained)	Art. 4 Prot. NPs
		4. receipt directly from the Council of the agendas and outcomes of its meetings and minutes of meetings where draft legislative acts were deliberated	Art. 5 Prot. NPs
		5. receipt of Commission's annual reports on the application of the subsidiarity principle	Art. 9 Prot. subs. & prop.
		6. receipt of annual reports of the Court of Auditors	Art. 7 Prot. NPs
		7. information on the content and results of evaluations of the implementation by the Member States' authorities of Union policies in the Area of Freedom, Security and Justice	Art. 70 TFEU
		8. information on the proceedings of a Council standing committee charged with coordinating operational cooperation between Member States' authorities competent for internal security	Art. 71 TFEU
		9. attention drawn to the recourse to the flexibility clause	Art. 352(2) TFEU

### 3. GENERIC EUROPEAN FUNCTIONS OF NATIONAL PARLIAMENTS

The Lisbon Treaty provisions on the EU's good functioning and democratic principles, which address national parliaments in a sweeping fashion, are hazy and raise questions about their constitutional meaning. As their interpretation remains disputable, these provisions deserve further attention.

#### 3.1. Good functioning of the Union

A bulk of these parliamentary rights are summarised in Article 12 TEU, which provides that national parliaments "contribute actively to the good functioning of the Union". Though symbolic, the inclusion of this provision is important as it recognises a formal role of national parliaments in primary EU law.<sup>406</sup>

It has rightly been argued that this provision, despite its lean normative content, pushes the European function of national parliaments away from being solely an academic concept into a more pragmatic realm. As such, it means that national parliaments are prohibited from abusing the powers of involvement in EU decision making by exercising them in a manner that would disrupt the good functioning of the Union. In other words, national parliaments must use their rights *bona fide*. This could be inferred from the general duty of sincere cooperation entrenched in

<sup>406</sup> Gilliaux, Pascal. "Le traité de Lisbonne," *Courrier Hebdomadaire*, No. 1976-1977, 2007: 71.

Article 4(3) TEU.<sup>407</sup> In turn, where a breach by a national parliament of the duty of sincere cooperation occurred in the exercise of powers conferred by the Treaties, it would be imputable to the Union.<sup>408</sup> This is a far-sighted, almost clairvoyant, argument but a plausible one nonetheless. It heralds that national parliaments can be perceived as acting on behalf of the Union and for the furtherance of the Union's goals. Yet an earlier version of this provision, reading "shall contribute", resonated in some corners as implying that the EU may impose constitutional duties on national parliaments. As will be demonstrated, this irked Westminster, which then affirmed that it still holds the notion of parliamentary sovereignty rather dear.

### **3.2. Democratic principles of the Union**

Perhaps more momentous is Article 10(2) TFEU, placed among the Union's democratic principles, which lays down that:

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national parliaments, or to their citizens.

It has been argued that this provision has "a purely indicative and thus no normative value",<sup>409</sup> that it is "symbolic at best, since it does not change anything at all",<sup>410</sup> that it is an "honourable mention" and "a good example of a provision that can be safely removed from the text".<sup>411</sup> Quite clearly, no new powers or duties for national parliaments flow from it, and these standpoints rightly highlight this. What they seem to overlook, however, is that one does not need a European Union's indication to know, for instance, that in a centuries-old parliamentary democracy like the United Kingdom the Prime Minister is accountable to the House of Commons. We know this from the British constitution. The term 'accountable' is most probably borrowed from

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<sup>407</sup> Article 4(3) TEU reads: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

<sup>408</sup> Wyrzykowski, Mirosław et al. "General report: the role of national parliaments in the European Union," in *The role of national parliaments in the European Union: proceedings of the FIDE XXIV Congress Madrid 2010 - Vol. 1*, Madrid: Universidad Complutense de Madrid, 2010: 7-8.

<sup>409</sup> Louis, Jean-Victor. "The Lisbon Treaty: The Irish 'No'. National parliaments and the principle of subsidiarity – legal options and practical limits," *European Constitutional Law Review*, Vol. 4, No. 3, 2008: 431.

<sup>410</sup> Kiiver, Philipp. "European Treaty reform and the national parliaments: towards a new assessment of parliament-friendly Treaty provisions," in *European constitutionalism beyond Lisbon*, by Jan Wouters et al. (eds), Antwerp: Intersentia, 2009: 140.

<sup>411</sup> Kiiver, Philipp. "The European constitution and the role of national parliaments: hard law language, soft content," in *The European constitution and national constitutions: ratification and beyond*, by Anneli Albi and Jacques Ziller (eds), The Hague: Kluwer Law International: 226-227.

Britain, too. Had this provision been superficial and valueless it would not have been included in the Treaty. If observed through the lens of a broader principle of democracy, enshrined in Article 2 TEU,<sup>412</sup> the quoted provision offers us an EU concept of democracy: national accountability mechanisms are a constitutive element of the Union's representative democracy. If the Union relies on national accountability mechanisms, it does so with a claim, a claim that EU democracy partly stems from the Member States' repositories of democracy – national parliaments. This is a constitutional claim *par excellence* and represents one of the ingredients of "European transnational democracy".<sup>413</sup>

#### 4. SUBSIDIARITY GUARDIANSHIP

The national parliaments' power of control over subsidiarity exists in three guises: (a) as the so-called early warning mechanism; (b) as what can correspondingly be called the late warning mechanism; and (c) as the Barroso initiative. While the first two are Treaty arrangements, the last one is not. Besides explaining the national parliamentary involvement in these arrangements, the motive behind the following analysis is also to accentuate a more general trait of EU constitutionalism, namely that it can and does develop along two mutually complementing currents, of which one is formal and written and the other informal and unwritten.

#### 4.1. Early warning mechanism

##### 4.1.1. Scope and method of application

The most pivotal of all Lisbon-sponsored parliamentary rights is the monitoring of the application by EU institutions of the subsidiarity principle in the fields falling under the competences shared between the Union and the Member States.<sup>414</sup> Subsidiarity supervision, hence, does not address the question whether the Union acts

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<sup>412</sup> Article 2 TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are *common to the Member States* in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" (emphasis added). See Bogdandy, Armin von. "A disputed idea becomes law: remarks on European democracy as a legal principle," in *Debating the democratic legitimacy of the European Union*, by Beate Kohler-Koch and Berthold Rittberger, Lanham: Rowman & Littlefield, 2007: 35.

<sup>413</sup> Oberdorff, Henri. "Le Traité de Lisbonne: une sortie de crise pour l'Union européenne ou plus?," *Revue du Droit Public*, Vol. 124, No. 3, 2008: 779.

<sup>414</sup> See: Met-Domestici, Alexandre. "Les parlements nationaux et le contrôle du respect du principe de subsidiarité," *Revue du Marché Commun et de l'Union Européenne*, No. 525, 2009: 88-96. Compare this with the situation under the Constitutional Treaty: Barber, N. W. "Subsidiarity in the Draft Constitution," *European Public Law*, Vol. 11, No. 2, 2005: 197-205; Feral, Pierre-Alexis. "Retour en force du principe de subsidiarité dans le Traité constitutionnel: de nouvelles responsabilités pour les parlements nationaux et pour le Comité des régions?," *Revue du Marché Commun et de l'Union Européenne*, No. 481, 2004: 496-499.

*ultra vires*.<sup>415</sup> The question is how the Union intends to exercise its competence and whether the Union should exercise it at all. What is at hand is that national parliaments, as representatives of the peoples of the Member States, are invited to concretise the Treaties through teleological interpretation. National parliaments therewith do not amend but supplement the Treaties with their political assessment *in concreto* of the objectives and manners of pursuit of European integration intended by the Union's founding fathers. It is in this 'dynamic' sphere, where competence is allocated in constitutional practice rather than through constitutional settlement,<sup>416</sup> that national parliaments are summoned to act.

Whether it is possible for national parliaments to appraise subsidiarity without examining a broader context of the EU initiative has puzzled the minds of analysts, but there are reasons to conceive of subsidiarity as a principle necessitating an approach that is wider than that of yielding a laconic yes-or-no answer to the question of whether the Union or the Member States should take action. Namely, once adopted, the EU initiatives that have been the object of subsidiarity control will bind the Member States, trump national legislation and apply to EU citizens either directly or after transposition. Knowing whether the Union should establish certain legal rules is only possible after considering the solutions that the Union proposes and after juxtaposing them with the existing or planned national legislation, jurisprudence or constitutional principles as well as with the sentiments harboured by major national political factors interested in the matter. Often recondite technical data contained in EU initiatives will also require in-depth analysis. Subsidiarity is, therefore, tightly intervoven with assessing the proportionality, legal basis and content of EU initiatives as part of the overarching national parliamentary scrutiny of EU policy. In addition, the principle of proportionality, albeit excluded from the ambit of the early warning mechanism, must be given "constant respect" by all EU institutions.<sup>417</sup>

#### **4.1.2. Procedural aspects**

For the purpose of subsidiarity control, the Lisbon Treaty crafts the institutional arrangement dubbed early warning mechanism. Within eight weeks, national parliaments may submit reasoned opinions to the presidents of the Commission, the

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<sup>415</sup> See *contra* the view that "compliance with the principle of subsidiarity is not merely a question of how desirable a certain piece of EU legislation is or would be. What is at stake is the question whether the European Union may (lawfully) legislate at all". Kiiver, Philipp. "The early-warning system for the principle of subsidiarity: the national parliament as a Conseil d'État for Europe," *European Law Review*, Vol. 36, No. 1, 2011: 104. This interpretation is questionable, because the Union indeed possesses the competence to legislate, but since that competence is shared with the Member States, an assessment, inherently of a political nature, must be made concerning the desirable level at which action should be taken.

<sup>416</sup> Mills, Alex. "Federalism in the European Union and the United States: subsidiarity, private law, and the conflict of laws," *University of Pennsylvania Journal of International Law*, Vol. 32, No. 2, 2010: 384.

<sup>417</sup> Article 1 of Protocol no. 1 on the application of the principles of subsidiarity and proportionality in conjunction with Article 5(1) and (4) TEU.

European Parliament and the Council on the compliance with subsidiarity of draft EU initiatives.<sup>418</sup> The opinions count as votes. Each Member State has two votes, which in non-unicameral systems are apportioned to the houses of parliament or regional assemblies according to national constitutional rules.<sup>419</sup> There are three stages, which differ as to the threshold of votes and as to the consequence that these trigger.

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<sup>418</sup> There have been discussions about which EU documents are subject to the early warning mechanism and whether the Commission's delegated acts (Article 290 TFEU) and implementing acts (Article 291 TFEU) are excluded from this mechanism. First, although the Treaties define draft legislative acts, *inter alia*, as "proposals from the Commission" (Articles 2(1) of Protocol no. 1 on the role of national parliaments and 3 of Protocol no. 2 on subsidiarity and proportionality), the idea behind involving national parliaments in EU decision making is to enable them to express their views not only on draft legislative acts but also "on other matters which may be of particular interest to them" (Recital 2 of the Preamble to Protocol no. 1 on the role of national parliaments). National parliaments may, thus, request the Commission to inform them of the manner in which it intends to exercise its power of adopting delegated and implementing acts. Second, the Commission has, within the framework of the Barroso initiative, shown a great degree of openness towards national parliaments and has undertaken to send them all documents necessary for their scrutiny activities. It would be against the spirit of the Commission's proactive attitude to refuse to send national parliaments any document, especially where such a document would significantly impinge on primary EU legislation or the implementing process. Third, although it is true that delegated acts, as non-legislative acts of general application, often mask their legislative nature regardless of the nomenclature, it is also true that delegated acts may only be enacted to supplement or amend certain non-essential elements of a legislative act, which itself shall explicitly lay down the objectives, content, scope and conditions of use of the delegation of power. Craig has rightly emphasised that the Commission's delegated decision-making power implies the making of complex regulatory choices and that "the devil is often in the detail", but he also underscored that the Council and the European Parliament will often have neither the knowledge nor the time to delineate precise parameters for the exercise of these regulatory choices. The real issues mostly become apparent only after the matter has undergone detailed examination, which is why comitology procedures have been created in the first place. Can one then expect national parliaments to have the knowledge and time that the European legislature tends not to have? It is theoretically possible, but not very likely. Similar considerations apply to the Commission's implementing acts, whose goal is to lay down uniform conditions for implementing legally binding Union acts. See: Craig, Paul. "The role of the European Parliament under the Lisbon Treaty," in *The Lisbon Treaty: EU constitutionalism without a constitutional treaty*, by Stefan Griller and Jacques Ziller (eds), Vienna: Springer, 2008: 113, 116, 119. See further: Brandsma, Gijs Jan and Blom-Hansen, Jens. "The EU Comitology system: what role for the Commission?," *Public Administration*, Vol. 88, No. 2, 2010: 496-512.

<sup>419</sup> This means that unicameral parliaments have two votes. The houses of a bicameral parliament have one vote each. In systems with more than two assemblies, the two votes pertaining to that Member State are allocated in accordance with national constitutional law. For example, Declaration no. 51 by the Kingdom of Belgium on national parliaments attached to the Treaty of Lisbon clarifies that "not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliamentary assemblies of the Communities and the Regions act, in terms of the competences exercised by the Union, as components of the national parliamentary system or chambers of the national parliament". In legal terms, and for the purpose of the 'early warning mechanism', this means the French *Assemblée nationale* or the British House of Commons carry lesser weight than, for example, the parliaments of Malta, Cyprus or Luxembourg, which, one will admit, appears odd because these parliaments do not represent the same number of citizens.

*Stage 1.* If the reasoned opinions sent amount to *less than a third* of the votes allocated to national parliaments, they need to be taken into account by the Commission, the European Parliament and the Council, and where the draft originates from them, by the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank.

*Stage 2.* If the reasoned opinions amount to at least *a fourth of the votes in the Area of Freedom, Security and Justice, or at least a third in all other fields*, the Commission must review the draft proposal, whereupon it may decide to maintain, amend or withdraw it. Whatever its decision, the Commission must provide reasons for this. This is commonly referred to as 'yellow card'.

*Stage 3.* If, in the ordinary legislative procedure, the reasoned opinions amount to a *simple majority* of the votes allocated, the draft proposal, like in the second stage, must be reviewed, after which the Commission may decide to maintain, amend or withdraw it. If the Commission decides to proceed, it must justify – in its own reasoned opinion – why it considers that the draft proposal is in conformity with subsidiarity. The Commission then must, unlike in the second stage, send the national parliaments' and its own reasoned opinions to the Union legislature (the Council and the European Parliament) for final decision. This decision must take place before the end of the first reading. The proposal falls if at least a majority of 55% of the Council members *or* a majority of the votes cast in the European Parliament decide that the proposal contravenes subsidiarity. This is the 'orange card'.<sup>420</sup> The high threshold for the rejection of the proposal has rightly been criticised, because if the European Parliament and the Council can muster such massive opposition, the proposal would be rejected anyway during the ordinary legislative procedure, thereby rendering an 'early warning' superfluous.<sup>421</sup>

The Commission needs to fulfil other duties, too. Before proposing legislative acts, it shall not only consult widely, but *shall* also justify its proposals with regard to both subsidiarity and proportionality. Justification *should*, but need not, take the form of detailed statements on the proposals' financial impact, implications for the process of their implementation in the Member States, qualitative and quantitative indicators,

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<sup>420</sup> This step of the early warning procedure did not exist in the Constitutional Treaty, but was added by the Lisbon Treaty. See: Feral, Pierre-Alexis. "Retour en force du principe de subsidiarité dans le traité constitutionnel: de nouvelles responsabilités pour les parlements nationaux et pour le comité des régions?," *Revue du Marché Commun et de l'Union Européenne*, No. 481, 2004: 496-499; Tans, Olaf. "De oranje kaart: een nieuwe rol voor nationale parlementen?," *SEW - Tijdschrift voor Europees en economisch recht*, No. 11, 2007: 442-446; Rothenberger, Stefanie and Vogt, Oliver. "The "orange card": a fitting response to national parliaments' marginalisation in EU decision-making?," *Paper prepared for the conference "Fifty years of interparliamentary cooperation"*, Berlin, 13 June 2007.

<sup>421</sup> See Article 294 TFEU (the former Article 251 TEC) for the voting thresholds in the ordinary legislative procedure. See also: Kiiver, Philipp. "The Treaty of Lisbon, the national parliaments, and the principle of subsidiarity," *Maastricht Journal of European and Comparative Law*, Vol. 15, No. 1, 2008: 81.

and financial and administrative burden.<sup>422</sup> In addition, the Commission shall each year submit to national parliaments a report on the application of the principles of conferral, subsidiarity and proportionality.<sup>423</sup> These are all legal obligations of the Commission and can be used as a legal basis for national parliaments directly to hold this principal executive institution of the Union to account without interference from the national government.<sup>424</sup>

Subsidiarity monitoring, it has been maintained, may come at a cost of burdening the decision-making process and instrumentalising the mechanism for achieving purely national or sectoral interests.<sup>425</sup> As Weatherill put it, national parliaments add a "constructively critical voice" to EU lawmaking.<sup>426</sup> Any veto power in their hands, by contrast, "would distort the proper distribution of power and responsibility in the EU's complex but remarkably successful system of transnational governance by conceding too much to state control".<sup>427</sup> In the eyes of another observer, the obstructive character of the national parliaments' rights might raise the question of whether the Lisbon Treaty represents an "unbridled Trojan Horse of national interests".<sup>428</sup> The view of the present author is that these fears are somewhat far-fetched for two reasons. First, it is the governments rather than parliaments which are the key creators of national policies and which are in a position most directly to influence the EU decision-making processes. Second, the thresholds ensure that the national interest, preferences or sheer whim of a single Member State are not imposed on EU institutions. If a threshold is reached, then state control is exercised not by one but by a number of states. This is a fundamental difference, because provided a red card had been envisaged, it would have been a collective and not an individual veto. Just as there needs to be a convergence of minds for European integration to progress at all, so there needs to be a convergence of opinions for national parliaments to affect the exercise of EU competences. By 'proceduralising'

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<sup>422</sup> Article 5 of Protocol no. 2 on the application of the principles of subsidiarity and proportionality. The italicised words reflect the difference in the wording of this provision, which, on the one hand, establishes the Commission's duty to justify its legislative proposals and, on the other, recommends how the Commission could carry it out.

<sup>423</sup> Article 9 of Protocol no. 2 on the application of the principles of subsidiarity and proportionality.

<sup>424</sup> See also: Wyrzykowski, Mirosław et al. "General report: the role of national parliaments in the European Union," in *The role of national parliaments in the European Union: proceedings of the FIDE XXIV Congress Madrid 2010 - Vol. 1*, by Gil Carlos Rodriguez Iglesias and Luis Ortiz Blanco (eds), Madrid: Universidad Complutense de Madrid, 2010: 22.

<sup>425</sup> Constantinesco, Vlad. "Les compétences et le principe de subsidiarité," *Revue Trimestrielle de Droit Européen*, Vol. 41, No. 2, 2005: 316.

<sup>426</sup> Weatherill, Stephen. "Better competence monitoring," *European Law Review*, Vol. 30, No. 1, 2005: 33.

<sup>427</sup> Weatherill, Stephen. "Using national parliaments to improve scrutiny of the limits of EU action," *European Law Review*, Vol. 28, No. 6, 2003: 912.

<sup>428</sup> Le Barbier-Le Bris, Muriel. "Le nouveau rôle des parlements nationaux: avancée démocratique ou sursaut étatiste?," *Revue du Marché Commun et de l'Union européenne*, No. 521, 2008: 497.

subsidiarity,<sup>429</sup> argues Schütze, this principle is not turned into a "hard and fatally efficient political safeguard of federalism", but channels national parliamentary scrutiny to "where it can be most useful and effective: on their respective national governments".<sup>430</sup> Seen from this standpoint, the early warning mechanism does not impinge on the institutional and competence balance of the Union but protects it. In practice, though, "a transnational political culture" beyond COSAC coordination efforts will be requisite to give life to the early warning mechanism.<sup>431</sup>

#### **4.1.3. Constitutional value**

The simplest way to visualise the importance of monitoring the principle of subsidiarity is to stress that this principle, as an expression of "a policy of federal legislative self-restraint",<sup>432</sup> is one that "Community institutions may plausibly be said to violate every time they determine whether or not to act".<sup>433</sup> The concern about the democratic legitimacy of EU decision making lies at the root of the early warning mechanism.<sup>434</sup>

It has been argued that this mechanism, along with the rest of the Treaty provisions on national parliaments, carries little 'constitutive' and more 'catalytic' value, by which is meant that the EU does not empower but rather stimulates national parliaments to act.<sup>435</sup> Such an argument is plausible insofar as a single national parliament, or a chamber thereof, does not have the legal right ultimately to sanction the Commission. Still, it should not obfuscate perhaps the most crucial facet of the early warning mechanism: the Commission's duty to justify its decisions.

To fulfil this duty, which is the *sine qua non* of the concept of political accountability, the Commission in 2002 devised a method of appraising subsidiarity in the framework of impact assessment, which became fully operational in 2004. The new impact assessments include information on the consultations held prior to the Commission's drafting of a proposal, the results thereby obtained, the cost-benefit

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<sup>429</sup> Bribosia, Hervé. "Subsidiarité et répartition des compétences entre l'Union et ses États membres dans la Constitution européenne," *Revue du Droit de l'Union Européenne*, No. 1, 2005: 54.

<sup>430</sup> Schütze, Robert. "Subsidiarity after Lisbon: reinforcing the safeguards of federalism?," *Cambridge Law Journal*, Vol. 68, No. 3, 2009: 531.

<sup>431</sup> Puntischer Riekman, Sonja. "Constitutionalism and representation: European parliamentarism in the Treaty of Lisbon," in *The twilight of constitutionalism*, by Petra Dobner and Martin Loughlin (eds), Oxford: Oxford University Press, 2010: 136-137.

<sup>432</sup> Bermann, George. "Subsidiarity and the European Community," *Hastings International and Comparative Law Review*, Vol. 17, No. 1, 1993: 103.

<sup>433</sup> Bermann, George. "Taking subsidiarity seriously: federalism in the European Community and the United States," *Columbia Law Review*, Vol. 94, No. 2, 1994: 336.

<sup>434</sup> As Dougan maintained, a fundamental aspect of the early warning mechanism is that it "could increase the accountability and legitimacy of the EU's law-making bodies, and enhance in an unprecedented way the sense of 'ownership' of the European project at national level". Dougan, Michael. "The Treaty of Lisbon 2007: winning minds not hearts," *Common Market Law Review*, Vol. 45, No. 3, 2008: 659.

<sup>435</sup> Kiiver, Philipp. "The Treaty of Lisbon, the national parliaments, and the principle of subsidiarity," *Maastricht Journal of European and Comparative Law*, Vol. 15, No. 1, 2008: 82.

analysis, the reasons for choosing the proposed instrument and the budgetary implications of the proposal.<sup>436</sup> The importance of these impact assessments is twofold. On the one hand, they provide concrete yardsticks for the national parliaments' policing of the Commission's adherence to subsidiarity requirements. On the other hand, the burden of proof concerning compliance with subsidiarity is placed on the Commission.<sup>437</sup>

Even so, the accountability relationship is incomplete. Although national parliaments, as a matter of the Treaty text, may pass a judgment on the Commission in the form of reasoned opinions, they may only impose a limited range of sanctions against it.<sup>438</sup> In particular, concerted action by national parliaments may affect the exercise of the Commission's legislative initiative, but not its continuation in office. Put differently, national parliaments can *call* the Commission to account, but cannot *hold* it to account.<sup>439</sup> For Dashwood, this is not even permissible, as it would contradict the Commission's independence.<sup>440</sup>

Though arguably not 'constitutive', therefore, the early warning mechanism does exhibit a 'constitutional' attribute to the extent that the Commission is to render account for the action that it intends to undertake, regardless of the absence of hard law instruments.<sup>441</sup> Constitutionalism is not about "nuclear strike weapons"<sup>442</sup> of accountability any more than it is about the performance of day-to-day duties of government. It should certainly be highlighted that the presence of hard law instruments, such as the motion of censure, gives teeth to parliamentary scrutiny.<sup>443</sup> Their absence, however, does not preclude it. From the point of view of EU governance reform, the early warning mechanism could be described as an "enforcing mechanism", "a sanctioning mechanism" and a "legitimacy seeking

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<sup>436</sup> Vergés Bausili, Anna. "Beyond the early warning mechanism: the reform of EU governance and national parliaments," in *A constitution for Europe: the IGC, the ratification process and beyond*, by Ingolf Pernice and Jiri Zemanek (eds), Baden-Baden: Nomos Verlagsgesellschaft, 2005: 216.

<sup>437</sup> Vergés Bausili, Anna. "Beyond the early warning mechanism: the reform of EU governance and national parliaments," in *A constitution for Europe: the IGC, the ratification process and beyond*, by Ingolf Pernice and Jiri Zemanek (eds), Baden-Baden: Nomos Verlagsgesellschaft, 2005: 217 and 221.

<sup>438</sup> Bovens, Mark. "Analysing and assessing accountability: a conceptual framework," *European Law Journal*, Vol. 13, No. 2, 2007: 450.

<sup>439</sup> Verhey, Luc et al. "Political accountability in the European Union: conceptual analysis and future prospects" In *Political accountability in Europe: which way forward?* by Luc Verhey et al. (eds), Groningen: Europa Law Publishing, 2008: 328.

<sup>440</sup> Dashwood, Alan. "The relationship between the Member States and the European Union/European Community," *Common Market Law Review*, Vol. 41, No. 2, 2004: 369.

<sup>441</sup> See also: Kiiver, Philipp. "The early-warning system for the principle of subsidiarity: the national parliament as a Conseil d'État for Europe," *European Law Review*, Vol. 36, No. 1, 2011: 107.

<sup>442</sup> Craig, Paul. "The locus and accountability of the executive in the European Union," in *The executive and public law: power and accountability in comparative perspective*, by Paul Craig and Adam Tomkins (eds), Oxford: Oxford University Press, 2006: 329.

<sup>443</sup> See also *infra* note 551 of this Chapter.

scheme".<sup>444</sup> As Barents held, national parliaments become "to a significant extent co-responsible for the execution of the Union's competences".<sup>445</sup> Consequently, the central advantage of the early warning mechanism is that it creates an apt, idiosyncratic alley of *ex ante* parliamentary control over EU institutions, which could modestly alleviate the democratic deficit.<sup>446</sup>

#### **4.2. Late warning mechanism**

As a 'late warning mechanism' or a 'red card' of sorts, the Lisbon Treaty entitles national parliaments to bring actions before the Court of Justice on grounds of infringement of subsidiarity by a legislative act of the Union.<sup>447</sup> Yet national parliaments do not thereby acquire the *locus standi*; their actions are notified on their behalf by the Member State in question. The scope of this right is not defined, because the Treaty does not specify what constitutes an infringement of subsidiarity. Is it limited to the early warning mechanism or does it encompass the flanking rights, such as to receive the Commission's detailed statements on subsidiarity or the Commission's justification of the decision to proceed with the opposed draft proposal and so on?

The practical utility of subsidiarity actions should be appraised in conjunction with the fact that the Court of Justice has never invalidated a piece of EU legislation on the ground of a subsidiarity violation.<sup>448</sup> The Court's reluctance to rush into this politically sensitive terrain is evident from its: (a) narrow definition of the scope of application of subsidiarity; (b) broad recognition of the EU legislature's right to define the factual setting in which subsidiarity is to apply; and (c) formal, unspecific or inane interpretation of the principle and a lack of commitment to a substantive understanding thereof.<sup>449</sup>

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<sup>444</sup> Vergés Bausili, Anna. "Beyond the early warning mechanism: the reform of EU governance and national parliaments," in *A constitution for Europe: the IGC, the ratification process and beyond*, by Ingolf Pernice and Jiri Zemanek (eds), Baden-Baden: Nomos Verlagsgesellschaft, 2005: 220-222.

<sup>445</sup> Barents, René. "Het subsidiariteitsbeginsel in het Hervormingsverdrag," *Nederlands Tijdschrift voor Europees Recht*, No. 11, 2007: 261.

<sup>446</sup> Bermann, George. "The Lisbon Treaty: the Irish 'No'. National parliaments and subsidiarity: an outsider's view," *European Constitutional Law Review*, Vol. 4, No. 3, 2008: 455 and 459; Cooper, Ian. "The watchdogs of subsidiarity: national parliaments and the logic of arguing in the EU," *Journal of Common Market Studies*, Vol. 44, No. 2, 2006: 292. Some other authors are more sceptical. For instance, for Raunio, the early warning mechanism is "a rather harmless procedure, with only a marginal impact on the EU's legislative process". Raunio, Tapio. "Destined for irrelevance? Subsidiarity control by national parliaments," *Elcano Royal Institute, Working Paper No. 36/2010*: 13.

<sup>447</sup> Article 8 of Protocol no. 2 on the application of the principles of subsidiarity and proportionality.

<sup>448</sup> Wyrzykowski, Mirosław et al. "General report: the role of national parliaments in the European Union," in *The role of national parliaments in the European Union: proceedings of the FIDE XXIV Congress Madrid 2010 - Vol. 1*, by Gil Carlos Rodriguez Iglesias and Luis Ortiz Blanco (eds), Madrid: Universidad Complutense de Madrid, 2010: 25.

<sup>449</sup> Sander, Florian. "Subsidiarity infringements before the European Court of Justice: futile interference with politics or a substantial step towards EU federalism?," *Columbia Journal of European Law*, Vol. 12, No. 2, 2006: 542.

An example from the Netherlands demonstrates, nonetheless, that a national parliament, equipped with persuasive argumentation against EU legislation, can lead the government to initiate proceedings before the Court of Justice on its behalf.<sup>450</sup> The dilemma remains as to what would happen where the government's position differed from that of parliament with respect to the Union's compliance with subsidiarity, the merits of the claim or the desirability of bringing an action at all.<sup>451</sup> The political practice and national enactments in this regard will best resolve these ambiguities.

### 4.3. The Barroso initiative

#### 4.3.1. Origins, definition and characteristics

That one should not place too much emphasis on written norms is attested by the Barroso initiative, a precursor of the early warning mechanism. The initiative dates back to 2001 and the Commission's effort to reform EU governance. In its preparatory report for the White Paper on European Governance, the Commission sought, among other things, to make national parliaments – together with the European Parliament, the Committee of the Regions, and the Economic and Social Committee – "the architects of public debates on European matters".<sup>452</sup> This initial enthusiasm, likened by an author to *perestroika* and *glasnost* of President Gorbachev of the Soviet Union,<sup>453</sup> dissipated into thin air with the White Paper itself, since it did not make much progress in integrating national parliaments under the Union's aegis.<sup>454</sup>

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<sup>450</sup> Case C-377/98, 9 October 2001, *Netherlands v. Parliament and Council*, para. 4: "The applicant states, as a preliminary point, that it is acting at the express request of the States General [the Dutch Parliament], in the light of the opposition expressed there to genetic manipulation involving animals and plants and to the issuing of patents for the products of biotechnological procedures liable to promote such manipulation". The directive in question is Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions of 6 July 1998, (*OJL* 213/13 of 30.7.1998).

<sup>451</sup> See: Besselink, Leonard et al. "The Netherlands: the role of the States General within the European Union," in *The role of national parliaments in the European Union: proceedings of the FIDE XXIV Congress Madrid 2010 - Vol. 1*, by Gil Carlos Rodriguez Iglesias and Luis Ortiz Blanco (eds), Madrid: Universidad Complutense de Madrid, 2010: 516.

<sup>452</sup> European Commission, "European governance: preparatory work for the White Paper", Luxembourg: Office for Official Publications of the European Communities, 2002: 31.

<sup>453</sup> Cygan, Adam. "The White Paper on European Governance - have glasnost and perestroika finally arrived to the European Union?," *Modern Law Review*, Vol. 65, No. 2, 2002: 230.

<sup>454</sup> European Commission, "European governance: a White Paper", COM(2001) 428, 25.7.2001. The White Paper did recommend that "[d]emocratic institutions and the representatives of the people, at both national and European levels, can and must try to connect Europe with its citizens" (p. 3), that "the involvement of national parliaments and their specialised European affairs committees, as already practiced by the European Parliament, could also be encouraged" (p. 17), and that "[t]he European Parliament and all national parliaments of the Union and the applicant countries should become more active in stimulating a public debate on the future of Europe and its policies" (p. 30). This last recommendation became an action point. See more in: Follesdal, Andreas. "The political theory of the

It was in February 2005 that the Commission adopted what it called a "national parliaments approach". It conceded that it could not remain indifferent to the representation of the national assemblies in Brussels and that it could not afford not to exchange views with national parliaments during the period of reflection on the Constitutional Treaty. Neither could it ignore the extension of the paradigms of *ex ante* parliamentary scrutiny. The Commission did, however, declare allegiance to two principles: (a) the institutional balance, meaning that its primary discussion partners are the European Parliament and the Council; and (b) respect for the constitutional diversity of the Member States. The objectives then set in a ten-point plan by Margot Wallström, the then Vice-President of the Commission, included visits to national parliaments, participation in COSAC and the Conference of Speakers of the EU Parliaments, and a more technical support for national parliaments.<sup>455</sup>

In May 2006, the Commission announced its wish to transmit all new proposals and consultation papers directly to national parliaments and invited them to react with a view to improving the processes of policy formulation and their implementation.<sup>456</sup> The wish was endorsed at the European Council meeting in June 2006:

The European Council notes the interdependence of the European and national legislative processes. It therefore welcomes the Commission's commitment to make all new proposals and consultation papers directly available to national parliaments, inviting them to react so as to improve the process of policy formulation. The Commission is asked to duly consider comments by national parliaments – in particular with regard to the subsidiarity and proportionality principles. National parliaments are encouraged to strengthen cooperation within the framework of the Conference of European Affairs Committees (COSAC) when monitoring subsidiarity.<sup>457</sup>

The Barroso initiative is thus a broad political dialogue on all aspects of the Commission's legislative agenda, which surpasses the invigilation of the principles of subsidiarity and proportionality and encompasses the substance, legal basis and justification of the legislative initiative, as well as any other legal or political dimension of the Commission's proposals or instruments of legislative planning, the most significant of which are annual policy strategies and legislative and work programmes. Although it was launched to resuscitate the gist of the provisions on

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White Paper on Governance: hidden and fascinating," *European Public Law*, Vol. 9, No. 1, 2003: 73-86; Scott, Colin. "The governance of the European Union: the potential for multi-level control," *European Law Journal*, Vol. 8, No. 1, 2002: 59-79.

<sup>455</sup> European Commission, "Annual Report 2005 on the relations with the national parliaments", SEC(2006) 350, 22.3.2006.

<sup>456</sup> European Commission, Communication "A citizens' agenda: delivering results for Europe", COM(2006) 211, 10.5.2006, p. 9.

<sup>457</sup> Presidency Conclusions, Brussels European Council of 15-16 June 2006, para. 37.

national parliaments of the failed Constitutional Treaty, the Barroso initiative, being separate from the early warning mechanism, will continue to run in parallel with the Lisbon Treaty.<sup>458</sup> The Commission understands the early warning mechanism and the Barroso initiative as "two sides of the same coin".<sup>459</sup>

The political dialogue operates in two main modes: (a) in the early phase of the Commission's policy making in order to impart national concerns to its draft legislative proposals; and (b) at any other time through a motley array of visits to national parliaments by Commission officials, meetings with national parliamentary committees and permanent parliamentary representatives to the EU, and participation in interparliamentary forums. In an early assessment, Barroso described the fruits of the dialogue as being threefold: first, to provide an opportunity for national parliaments to take a more proactive attitude about European issues; second, to supply them with necessary information; and third, to facilitate the scrutiny of their own governments.<sup>460</sup>

### 4.3.2. Modes of national parliamentary participation

The national parliaments' participation in the political dialogue is mainly characterised by two differences and two similarities. Their scrutiny differs as to the actors of scrutiny and as to the object of inspection. Their scrutiny is similar as to the addressee and as to the nature of the scrutiny.<sup>461</sup>

#### A. Differences

As regards the actors, there is a manifest tendency of the active participation of upper chambers, in particular of the French *Sénat*, the German *Bundesrat*, the British House of Lords and the Czech *Senát*. The hitherto dormant chambers seem to have awakened. The Italian *Senato della Repubblica*, the Austrian *Bundesrat*, and the Greek, Cypriot and Bulgarian parliaments sent their first reactions in 2008, the Austrian *Nationalrat* and the Maltese House of Representatives in 2009.<sup>462</sup> The first time the Spanish and Romanian parliaments participated was in 2010.<sup>463</sup> The only parliament that has never taken part in the political dialogue is the Slovenian *Državni svet*.

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<sup>458</sup> Press release "Commission dialogue with national parliaments reaches a new high", IP/09/1368, 28 September 2009. See also: *Assemblée nationale, Délégation pour l'Union européenne, Rapport no. 562 sur le traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 88.

<sup>459</sup> European Commission, Annual report 2009 on relations between the European Commission and national parliaments, COM(2010) 291, 2.6.2010., p. 8.

<sup>460</sup> Speech by José Manuel Durão Barroso at the 3<sup>rd</sup> Joint Parliamentary Meeting on the Future of Europe, SPEECH/07/388, 12.6.2007., p. 4.

<sup>461</sup> European Commission, Annual report 2008 on relations between the European Commission and national parliaments, COM(2009) 343, 7.7.2009., pp. 4-6.

<sup>462</sup> European Commission, Annual report 2009 on relations between the European Commission and national parliaments, COM(2010) 291, 2.6.2010., p. 2.

<sup>463</sup> European Commission, Annual report 2010 on relations between the European Commission and national parliaments, COM(2011) 345, 10.6.2011., p. 5.

As regards the object of inspection, national parliaments have so far focused their reasoned opinions on the substance of Commission documents rather than on subsidiarity.<sup>464</sup> Yet they have adopted various practices, in accordance with their internal constitutional rules. For example, the Danish *Folketing* and the Swedish *Riksdag* predominantly focus on the scrutiny of the Commission's consultation documents and address the scrutiny of draft proposals to their governments. Then, whereas the French *Sénat*, the Dutch *Tweede* and *Eerste Kamer* and the Portuguese *Assembleia da República* target especially the principles of subsidiarity and proportionality, the House of Lords performs in-depth inquiries beyond these principles. The Portuguese *Assembleia*, for instance, mostly sends positive opinions but refrains from giving any further comment.

## **B. Similarities**

The first thread that binds most of the parliaments together is the fact that their positions mirror those adopted and presented by their governments in the Council.<sup>465</sup> Yet while parliaments tend to address the results of their scrutiny to their governments,<sup>466</sup> the distinction is by no means clear-cut, because in some cases their observations were directly relevant for EU action,<sup>467</sup> or were addressed both at the government and at the EU.<sup>468</sup> The second thread is that parliaments mostly examine the political issues related to the contents of EU proposals.<sup>469</sup>

### **4.3.3. Effects**

The parliaments' scrutiny of the substance of Commission proposals generally consists of requesting and receiving from the Commission more thorough

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<sup>464</sup> European Commission, Annual report 2009 on relations between the European Commission and national parliaments, COM(2010) 291, 2.6.2010., p. 8.

<sup>465</sup> European Commission, Annual report 2008 on relations between the European Commission and national parliaments, COM(2009) 343, 7.7.2009., p. 6.

<sup>466</sup> Some examples thereof concern the examination of the energy and climate package and the proposal for CAP health check. In relation to climate and energy, the Italian *Camera dei Deputati* asked the Government to make its agreement in the Council subject to certain amendments in the wording of the proposal, such as to strengthen the flexibility mechanisms to reflect the economic and financial situation. In relation to CAP, the Czech *Senát* recommended the Government to open discussions on genetically modified organisms during the Czech Presidency so as to ensure agricultural competitiveness within the EU. Likewise, the Italian *Senato della Repubblica* requested the Government to take concrete action vis-à-vis the EU institutions to introduce systems for monitoring external borders and procedures to control their implementation, in order to ensure compliance with European standards on agricultural products.

<sup>467</sup> An example is the proposal for cross-border health care, regarding which the French *Sénat*, the Dutch *Tweede* and *Eerste Kamer*, as well as the German *Bundesrat* raised concerns about subsidiarity, reaffirming that the organisation of health systems is the competence of the Member States.

<sup>468</sup> For example, regarding the climate and energy package, the House of Lords asked the Government and the EU to set an objective for 2030 in order to encourage technology and investment which will not have been fully deployed by 2020.

<sup>469</sup> European Commission, Annual report 2008 on relations between the European Commission and national parliaments, COM(2009) 343, 7.7.2009., p. 5.

explanations of the motivations and objectives underlying its legislative initiative. Some parliaments send rejoinders to the Commission's replies.<sup>470</sup> The first to do so was the French *Sénat* in 2006, when it requested additional information from the Commission on four proposals.

The Commission has promised to take parliamentary observations into account when drafting its proposals.<sup>471</sup> That has so far led, for instance, at the suggestion of the French *Sénat*, to a modification of the title of the proposal on the protection of pedestrians and other vulnerable road users and to an amendment of the recitals in the proposal on fruit and vegetables in order to make more explicit the justification on subsidiarity and proportionality grounds.

The European Parliament and the Council are kept informed of the dialogue. To show its enthusiasm for the cause, the European Parliament proposed that the interparliamentary forum taking place every autumn, which the Commission attends, should regularly focus on the latter's legislative and working programme. For their part, national parliaments sought to extend scrutiny in the Area of Freedom, Security and Justice.<sup>472</sup>

Immediate, tangible effects of the Barroso initiative are not as spectacular as one might crave for, but, as the Commission reports, "in many cases opinions expressed by national parliaments are reflected in the legislative process by either the [European] Parliament or the Council".<sup>473</sup> In the first year and a half of the political dialogue, such cross-level influence occurred on four occasions.<sup>474</sup> It is worth noting that all of these four proposals were either the object of a COSAC subsidiarity check<sup>475</sup> or of parliamentary rejoinders.<sup>476</sup> However, this should not give a negative connotation to the COSAC subsidiarity checks, because the vast majority of the

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<sup>470</sup> For example, the French *Sénat* sent a rejoinder on the proposals concerning the ban on the use of dog and cat fur, motorway infrastructure safety and penalties for employers of illegally staying third-country nationals. The House of Lords reacted twice to the proposal on the European Technology Institute. That the dialogue is a continuous process is further evidenced by the fact that the French *Sénat* and the German *Bundesrat* revised in 2007 the comments they had made a year before on the proposal for soil protection. European Commission, Annual report 2007 on relations between the European Commission and national parliaments, COM(2008) 237, 6.5.2008., p. 3.

<sup>471</sup> European Commission, Annual report 2007 on relations between the European Commission and national parliaments, COM(2008) 237, 6.5.2008., p. 4; European Commission, Annual report 2008 on relations between the European Commission and national parliaments, COM(2009) 343, 7.7.2009., p. 3.

<sup>472</sup> European Commission, Annual report 2008 on relations between the European Commission and national parliaments, COM(2009) 343, 7.7.2009., pp. 3-4.

<sup>473</sup> European Commission, Annual report 2009 on relations between the European Commission and national parliaments, COM(2010) 291, 2.6.2010., p. 9.

<sup>474</sup> European Commission, Annual report 2007 on relations between the European Commission and national parliaments, COM(2008) 237, 6.5.2008., p. 4.

<sup>475</sup> Proposal for the completion of the internal market for postal services.

<sup>476</sup> Proposals concerning soil protection, motorway infrastructure safety and the European Technology Institute.

parliamentary reactions sent to the Commission as part of these experiments were positive.<sup>477</sup>

All of these results led the Commission to proclaim the political dialogue to be "part and parcel of the EU's institutional practices".<sup>478</sup> Irrespective of that, the Barroso initiative appears to have raised awareness among the majority of national parliaments of the issues at stake in European decision making. Since the Commission's data reveal a steady increase in the participation in the political dialogue, one might consider that the dialogue is taking root. For example, in the period from 1 January 2005 to 31 December 2008, the Commission had a total of 521 contacts with national parliaments. Then, from September 2006 to June 2011, the Commission received a total of 1255 opinions from national parliaments, of which more than a half were received since January 2010.<sup>479</sup> Not so bad for a fledgling procedure after all.

More than anything else perhaps, the Barroso initiative marks the Commission's departure from its previous negative attitude towards national parliaments. Sir Christopher Soames, Commission Vice-President in the mid-1970s, for instance, expressly rejected the idea of the Commission discussing pre-legislative proposals directly with national parliaments.<sup>480</sup> This 'cultural' change is conducive to narrowing, albeit to a modest extent, the gap between the EU and national levels.

## **5. THE LISBON TREATY IN NATIONAL PARLIAMENTS**

We now turn to an analysis of the debates surrounding the ratification of the Lisbon Treaty that took place in the parliaments of France, the United Kingdom and

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<sup>477</sup> The Commission, for example, states the following results: (a) the proposal on the applicable law and jurisdiction in divorce matters: 15 reactions, of which 2 were negative, due to the lack of justification; (b) the proposal on the completion of the internal market for postal services: 14 reactions, of which 4 were negative on various aspects of the proposal; (c) the proposal for combating terrorism: 12 reactions, of which 1 was negative on the ground of subsidiarity, and several more on the lack of justification; (d) proposal on the application of the principle of non-discrimination against people on the grounds of religion, race, age or sexual orientation: 15 reactions, 1 negative. Sources: European Commission, 2006 Annual report on relations between the Commission and the national parliaments (annexed to the Memo to the Members of the Interinstitutional Relations Group meeting of 4 May 2007), SP (2007) 2202/4, 8 May 2007, p. 4; European Commission, Annual report 2008 on relations between the European Commission and national parliaments, COM(2009) 343, 7.7.2009., p. 5. There were other COSAC subsidiarity checks afterwards. It should be noted that COSAC data differ somewhat for three reasons: first, because COSAC focuses on subsidiarity and not necessarily also on the substance; second, because the Commission and COSAC may and do at times arrive at different interpretations of the parliamentary reactions; and third, because they may use different 'formulas' to count reactions (e.g. as votes, as chambers or as parliaments).

<sup>478</sup> European Commission, Annual report 2008 on relations between the European Commission and national parliaments, COM(2009) 343, 7.7.2009., p. 4.

<sup>479</sup> European Commission, Annual report 2009 on relations between the European Commission and national parliaments, COM(2010) 291, 2.6.2010., p. 2; European Commission, Annual report 2010 on relations between the European Commission and national parliaments, COM(2011) 345, 10.6.2011., p. 5.

<sup>480</sup> Kolinsky, Martin. "Parliamentary scrutiny of European legislation," *Government and Opposition*, Vol. 10, No. 1, 1975: 64.

Portugal. The emphasis is placed on three novelties of paramount relevance for national parliaments: the monitoring of subsidiarity, the interpretation of the provisions on the parliaments' contribution to the good functioning of the Union, and the empowerment of the European Parliament through the extension of codecision with the transfer of the Third Pillar to the First Pillar and in other areas. The actual application of some of these provisions in practice is presented in Part III of this book.

## 5.1. France

France ratified the Lisbon Treaty on 14 February 2008.<sup>481</sup> Just as the Maastricht Treaty, the Lisbon Treaty had been ruled partially unconstitutional by the *Conseil constitutionnel* on 20 December 2007. The Constitution was consequently amended on 4 February 2008 along the lines of the *Conseil constitutionnel's* decision. The Houses of Parliament then swiftly proceeded to authorise the ratification of the Lisbon Treaty on 7 February 2008. We analyse these elements of the ratification process below.

### 5.1.1. Constitutionality

In its Lisbon Treaty judgment,<sup>482</sup> which to a large extent invokes the findings of the Constitutional Treaty judgment,<sup>483</sup> the *Conseil constitutionnel* made the following four key decisions that are relevant for national parliaments.

1) *The French Constitution remains at the summit of the French legal order, but France may participate in the creation and development of a European organisation vested with separate legal personality and decision-making powers, because the transfer of powers was agreed by the Member States.*<sup>484</sup> The *Conseil constitutionnel* also held that "the constituent power [...] recognised the existence of a Community legal order integrated into domestic law and distinct from international law".<sup>485</sup> Therewith, the *Conseil constitutionnel* reiterated its ambiguous Maastricht doctrine that the French and EU legal orders are both integrated and separate. The *Conseil constitutionnel*, thus, fits Alland's statement that "all the ingenuity of the world would not be able to find a way for a Constitution or an organ it constitutes to place international law above itself".<sup>486</sup>

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<sup>481</sup> See [http://europa.eu/lisbon\\_treaty/countries/index\\_en.htm](http://europa.eu/lisbon_treaty/countries/index_en.htm), accessed on 24 September 2010.

<sup>482</sup> *Conseil constitutionnel*, Decision no. 2007-560 DC of 20 December 2007. See further in: Roux, Jérôme. "Le Conseil constitutionnel et le contrôle de constitutionnalité du Traité de Lisbonne: bis repetita? A propos de la décision no. 2007-560 DC du 20 décembre 2007," *Revue Trimestrielle de Droit Européen*, 2008, Vol. 44, No. 1, 2008: 5-27; Chaltiel, Florence. "La ratification du traité de Lisbonne par la France," *Revue du Marché Commun et de l'Union Européenne*, No. 518, 2008: 277-280.

<sup>483</sup> *Conseil constitutionnel*, Decision no. 2004-505 DC of 19 November 2004.

<sup>484</sup> *Conseil constitutionnel*, Decision no. 2007-560 DC of 20 December 2007, para. 8.

<sup>485</sup> *Conseil constitutionnel*, Decision no. 2007-560 DC of 20 December 2007, para. 7.

<sup>486</sup> Alland, Denis. "L'accord de Nouméa. Consécration d'un paradoxe: primauté du droit interne sur le droit international. Réflexions sur le vif à propos de l'arrêt du Conseil d'État, Sarran, Levacher et autres du 30 octobre 1998," *Revue Française de Droit Administratif*, Vol. 14, No. 6, 1998: 1094.

2) *The implementation of the principle of subsidiarity is an insufficient guarantee* that the Union's competences will not be extended beyond those authorised by the Treaties and that the essential conditions of the exercise of national sovereignty will not be adversely affected.<sup>487</sup>

3) *The modifications of the decision-making rules of the Union that reduce France's power of decision in matters inherent in the exercise of national sovereignty are unconstitutional.* Two categories of such modifications can be discerned according to whether the Lisbon Treaty changes the decision-making competence of the Union.

A. In the new areas of EU action, the extension of codecision under the ordinary legislative procedure is unconstitutional.<sup>488</sup> These new areas refer to the Area of Freedom, Security and Justice, which, after the transfer of the Third Pillar to the First Pillar, has become subject to codecision in its entirety.<sup>489</sup> The *Conseil constitutionnel* particularly singled out the provisions regulating the fight against terrorism and trafficking in human beings as well as those on border controls.

B. In the areas where the Union's competence remains unaltered, three sub-categories of modifications of decision-making rules were found unconstitutional.<sup>490</sup>

First, unanimity may not be substituted with qualified majority, because that would prevent France from opposing an EU decision.<sup>491</sup> A special form of such modification of the decision-making rules is the first general bridging clause, which

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<sup>487</sup> *Conseil constitutionnel*, Decision no. 2007-560 DC of 20 December 2007, para. 16.

<sup>488</sup> *Conseil constitutionnel*, Decision no. 2007-560 DC of 20 December 2007, para. 18.

<sup>489</sup> More concretely, the *Conseil constitutionnel* invoked the provisions laying down the decision-making procedures for judicial cooperation in criminal matters, according to which the European Parliament and the Council may adopt directives on minimum rules for mutual recognition of judgments and judicial decisions, such as on mutual admissibility of evidence between the Member States, the rights of individuals in criminal procedure, and the rights of victims of crime (Article 82 TFEU); and minimum rules for the definition of criminal offences and sanctions in cases of serious cross-border crimes, including the possibility for the Council to identify other areas of serious cross-border crime on the basis of developments in crime (Article 83 TFEU). Provisions on decision making in the field of police cooperation, which permit the European Parliament and the Council to establish measures regulating information on crimes, training of staff and investigative techniques, were also encompassed (Articles 87 and 89 TFEU). Regulations of the European Parliament and the Council determining Eurojust's and Europol's structure, operation, field of action and tasks were included, too (Articles 85 and 88). Under this modification category, the *Conseil constitutionnel* also classified the measures of the European Parliament and the Council on the use of the euro as the single currency (Article 133 TFEU).

<sup>490</sup> *Conseil constitutionnel*, Decision no. 2007-560 DC of 20 December 2007, para. 20.

<sup>491</sup> This is the case, for example, in the field of CFSP, where the Council by exception decides by qualified majority on the definition of a Union action of position on the basis of a decision of the European Council of High Representative for Foreign Affairs and Security Policy, then where it implements any decision defining a Union action of position, or where it appoints a special representative (Article 31(2) TEU). Curiously, Council decisions on the Member States' applications for enhanced cooperation in the field of CFSP, which are taken unanimously, were also ruled unconstitutional (Article 329 TFEU). This raises doubts because France would be able to block such applications.

allows the European Council to authorise the Council to act by qualified majority instead of by unanimity.<sup>492</sup>

Second, the decision-making power may not be conferred on the European Parliament without a national ratification, because it "is not an emanation of national sovereignty".<sup>493</sup> Under the Treaties, this can only be done by applying the second general bridging clause, which allows the European Council to authorise the Council to act in accordance with the ordinary legislative procedure instead of in accordance with the special legislative procedure.<sup>494</sup> In France, therefore, the ordinary legislative procedure may not replace the special legislative procedure without a prior constitutional amendment. The *Conseil constitutionnel* also invalidated the special bridging clauses in the fields of criminal law and cross-border family law. All these bridging clauses are unconstitutional, because the absence of the requirement of national ratification, notwithstanding the faculty given to national parliaments to oppose it, makes it impossible for the *Conseil constitutionnel* to review the constitutionality of the Union's recourse to such clauses.<sup>495</sup> Yet once the constitutional obstacles are removed, it is not required to approve each individual activation of the bridging clauses. However, the remaining four special bridging clauses – namely those concerning social policy, environmental policy, multiannual financial frameworks and enhanced cooperation – are spared from unconstitutionality.<sup>496</sup>

It is also noteworthy that the *Conseil constitutionnel* did not tackle the emergency brakes in criminal and social security law, as did, controversially, the German Federal Constitutional Court, the *Bundesverfassungsgericht*.<sup>497</sup> These emergency brakes empower Member State representatives in the Council of Ministers to request a draft proposal to be referred to the European Council whenever the proposal affects fundamental aspects of the criminal justice system of their Member State.

Third, France may not be deprived from acting on its own initiative.<sup>498</sup>

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<sup>492</sup> *Conseil constitutionnel*, Decision no. 2007-560 DC of 20 December 2007, para. 23. See Article 48(7)(1) TEU.

<sup>493</sup> *Conseil constitutionnel*, Decision no. 2007-560 DC of 20 December 2007, para. 20.

<sup>494</sup> See Article 48(7)(2) TEU.

<sup>495</sup> *Conseil constitutionnel*, Decision no. 2007-560 DC of 20 December 2007, para. 27 in conjunction with Decision no. 2004-505 DC of 19 November 2004, para. 35.

<sup>496</sup> This is questionable given that these four bridging clauses do not envisage the right of parliamentary veto, whereas the special bridging clause in the field of cross-border family law does, albeit not the one in criminal law. One wonders why the bridging clauses that give national parliaments the right of opposition are unconstitutional, whereas those that deny this right remain constitutional.

<sup>497</sup> See more in: Jančić, Davor. "Caveats from Karlsruhe and Berlin: whither democracy after Lisbon?," *Columbia Journal of European Law*, Vol. 16, No. 3, 2010: 364-365.

<sup>498</sup> This applies, for instance, in the fields of judicial cooperation in criminal matters, police cooperation and administrative cooperation between relevant departments of the Member States in the Area of Freedom, Security and Justice, as well as between those departments and the Commission, in which cases the Council decides either on a proposal from the Commission or on the initiative not of a single Member State but of a quarter of the Member States (Article 76 TFEU).

4) *The new rights of national parliaments are unconstitutional only insofar as they may not be directly applied in France.* They need to be transposed into the Constitution so that they could be exercised.<sup>499</sup> Of the new parliamentary rights, the *Conseil constitutionnel* explicitly mentioned the right of opposition to the two general bridging clauses, the special bridging clause in cross-border family law, the early warning mechanism and the subsidiarity actions before the Court of Justice. This finding might seem paradoxical, because national parliaments, unlike the European Parliament, are emanations of national sovereignty and because the new national parliamentary rights actually contribute to the respect for the essential conditions of the exercise of national sovereignty.<sup>500</sup> What is more, the *Conseil constitutionnel* did not offer any particular explanation for its decision, nor did it quote any constitutional provision as being infringed by new parliamentary rights.<sup>501</sup> The unconstitutionality at hand was a matter of constitutional principle: the French Constitution ranks higher than the EU founding treaties. The Union may not regulate the constitutional prerogatives of the French Parliament; only the French *pouvoir constituant* may.<sup>502</sup>

### **5.1.2. Subsidiarity**

For the *Assemblée nationale*, the principle of subsidiarity is a prime factor of EU legitimacy:

The respect for the principle of subsidiarity realises the expectation of 'added value', expressed by many European citizens with regard to the European Union. The latter must act in the domains where its intervention brings a supplement of efficiency and solidarity. *It draws its legitimacy precisely from such action.* The capacity of

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<sup>499</sup> *Conseil constitutionnel*, Decision no. 2007-560 DC of 20 December 2007, paras 29 and 32 in conjunction with *Conseil constitutionnel*, Decision no. 2004-505 DC of 19 November 2004, para. 41.

<sup>500</sup> It is worth noticing that, resembling its Constitutional Treaty judgment, the *Conseil constitutionnel* complemented the test of compliance with the essential conditions of the exercise of national sovereignty with the test of violation of "the constitutionally guaranteed rights and freedoms" (para 9), which did not feature in its Maastricht judgment. As this was sparked by the promotion of the EU Charter of Fundamental Rights to the same legal status as the founding treaties, the new constitutionality test did not give rise to claims, such as those used before Germany's *Bundesverfassungsgericht* that the Lisbon Treaty infringes the constitutional right of German citizens to vote for the *Bundestag*. See more *supra* note 497 of this Chapter.

<sup>501</sup> Magnon, Xavier. "Le Traité de Lisbonne devant le Conseil constitutionnel: non bis in idem?," *Revue Française de Droit Constitutionnel*, No. 75, 2008/2: 334-335.

<sup>502</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport no. 562 sur le traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 98. See also the speech by the Minister of Justice, Rachida Dati (UMP), in: *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 janvier 2008, 98<sup>e</sup> séance de la session ordinaire 2007-2008, JORF [2008], A.N. (C.R.) 4[2], 16.1.2008, p. 191*. Senator Patrice Gélard (UMP) has questioned this finding of the *Conseil constitutionnel*, because the introduction of new prerogatives of the French Parliament by the Lisbon Treaty does not affect the balance of powers, notably in the field of subsidiarity. *Sénat, Commission des lois, Rapport no. 175 sur le projet de loi constitutionnelle, adopté par l'Assemblée nationale, modifiant le titre XV de la Constitution* of 23 January 2008, rapporteur Patrice Gélard (UMP), p. 111.

European institutions to prove the necessity of their action depends, thus, on the respect for the principle of subsidiarity.<sup>503</sup>

In any event, confiding the control of subsidiarity only to EU institutions would be "illusory", because – as a possible means of reducing the scope of the Union's competences, especially in relatively new areas – it runs counter to the interests of EU institutions.<sup>504</sup> As regards reasoned opinions, they "will have real legal impact" since they may contribute to the blocking of a certain EU initiative.<sup>505</sup> Yet, as senator Jean-Luc Mélenchon, a member of *Parti de gauche* (PG) warned, nine Member States must join forces to effect the blockage, while national parliaments are denied the right of amendment.<sup>506</sup>

Subsidiarity actions before the Court of Justice were understood as a prerogative of Parliament, whereby, according to a statement made in 2005 by the former Minister of Justice, Dominique Perben, the Government could "neither oppose nor be compelled to comply" with a request to transmit these actions to the Court of Justice.<sup>507</sup> On the contrary, the *Assemblée nationale* interpreted it as a "binding competence".<sup>508</sup> That notwithstanding, dissenting views could also be heard from within the ruling UMP. For instance, Jacques Myard asserted that reasoned opinions and subsidiarity actions are a negation of the principle of national sovereignty, because the *Assemblée nationale*, as a sovereign assembly, is authorised merely to give non-binding opinions and is further subjugated to the Court of Justice over a principle that is political rather than juridical in nature.<sup>509</sup> However, the Committee for European Affairs of the *Assemblée nationale* has rightly maintained that the real impact of Parliament's opinions is to be sought in their political weight rather than in

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<sup>503</sup> *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 84 (emphasis added).

<sup>504</sup> *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 85. See also: Sauron, Jean-Luc. "La mise en œuvre retardée du principe de subsidiarité," *Revue du Marché Commun*, No. 423, 1998: 650.

<sup>505</sup> *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 91.

<sup>506</sup> *Sénat, Compte rendu intégral, Séance du mardi 29 janvier 2008, 57<sup>e</sup> jour de séance de la session ordinaire 2007-2008, JORF [2008], S. (C.R.) 10, 30.1.2008, p. 649.* See more on the number of votes required for different stages of the early warning mechanism in: Jančić, Davor. "A new organ of the European Union: 'National Parliaments Jointly'," *Federal Trust for Education and Research, London, Policy Commentary*, February 2008.

<sup>507</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 25 janvier 2005, 123<sup>e</sup> séance de la session ordinaire 2004-2005, JORF [2005], A.N. (C.R.) 4[2], 26.1.2005, p. 304.*

<sup>508</sup> *Assemblée nationale, Commission des affaires étrangères, Avis no. 563 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 8 January 2008, rapporteur Hervé de Charette (UMP), p. 30.

<sup>509</sup> *Assemblée nationale, Compte rendu intégral, 3<sup>e</sup> séance du mardi 15 janvier 2008, 99<sup>e</sup> séance de la session ordinaire 2007-2008, JORF [2008], A.N. (C.R.) 4[3], 16.1.2008, pp. 231-232.*

their legal nature.<sup>510</sup> In the *Sénat*, the fact that national parliaments were recognised as petitioners before the Court of Justice was seen as the grand innovation of the Lisbon Treaty.<sup>511</sup> More broadly, as Hubert Haenel (UMP), the Chairman of the *Sénat's* European Affairs Committee, pointed out:

The role of parliaments will *no longer be only to control the European action of their governments [...] They will intervene in the European decision-making process itself* to ensure that the Union respects the famous principle of subsidiarity and responds thereby to the preoccupation expressed at the last referendum: Europe does too much or does it poorly.<sup>512</sup>

He nevertheless regretted that the field of defence, where the Union is beginning to affirm itself, escapes democratic control of both national and European parliamentarians.<sup>513</sup> In this respect, Jean-Pierre Jouyet, the Secretary of State for European Affairs, confirmed that the 'Europe of Defence' is essentially intergovernmental and as such rests with the Member States, but stressed that it "will naturally be subject to the control of national parliaments".<sup>514</sup>

Similarly to Haenel, senator Jean-Pierre Bel (PS) argued that for citizens to grasp European integration Parliament needs fully to exercise the control of subsidiarity "with respect to the Commission and the Government".<sup>515</sup> In fact, the direct link between national parliaments and EU institutions is a "notable progress, which means that the European Union recognises national parliaments as such, in the same way as the governments of the Member States".<sup>516</sup> An observation made by Denis Badré, a member of *Mouvement démocrate* (MoDem) and the *Union Centriste* group, is particularly elucidating for the meaning of subsidiarity control for constitutional relations in France:

As for subsidiarity, we have after all managed to play our role, although it was not in our political culture to allow a direct dialogue between Parliament and an institution

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<sup>510</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport no. 562 sur le traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 107. Media publicity of parliamentary opinions is also a factor of their political weight.

<sup>511</sup> *Sénat, Commission des lois, Rapport no. 175 sur le projet de loi constitutionnelle, adopté par l'Assemblée nationale, modifiant le titre XV de la Constitution* of 23 January 2008, rapporteur Patrice Gélard (UMP), p. 53.

<sup>512</sup> *Sénat, Compte rendu intégral, Séance du mardi 29 janvier 2008, 57<sup>e</sup> jour de séance de la session ordinaire 2007-2008, JORF* [2008], S. (C.R.) 10, 30.1.2008, p. 604 (emphasis added).

<sup>513</sup> *Sénat, Compte rendu intégral, Séance du jeudi 7 février 2008, 62<sup>e</sup> jour de séance de la session ordinaire 2007-2008, JORF* [2008], S. (C.R.) 15, 8.2.2008, p. 1072.

<sup>514</sup> *Sénat, Compte rendu intégral, Séance du jeudi 7 février 2008, 62<sup>e</sup> jour de séance de la session ordinaire 2007-2008, JORF* [2008], S. (C.R.) 15, 8.2.2008, p. 1087.

<sup>515</sup> *Sénat, Compte rendu intégral, Séance du mardi 29 janvier 2008, 57<sup>e</sup> jour de séance de la session ordinaire 2007-2008, JORF* [2008], S. (C.R.) 10, 30.1.2008, p. 605.

<sup>516</sup> *Assemblée nationale, Rapport no. 691 sur le projet de loi autorisant la ratification du traité de Lisbonne* of 6 February 2008, rapporteur Hervé de Charette (UMP), p. 26.

of the Union: hitherto everything had to pass through the Government. This proves that we can unlock our system without undermining the columns of the temple.<sup>517</sup>

This evolution should have immediate repercussions at the national level not least because, as senator Charles Josselin (PS) held, what cumpers the transposition process is, above all, Parliament's exclusion from the preparation of EU law.<sup>518</sup>

In the *Assemblée nationale*, the Barroso initiative was deemed "not at all comparable" with the early warning mechanism, both in its scope and effect, chiefly because of its informal character and lack of legal effect.<sup>519</sup> Nevertheless, the Chairman of the European Affairs Committee, Pierre Lequiller (UMP), praised the success of the political dialogue with the Commission, stating that: "We will exercise this control of subsidiarity not in a niggling way, but positively, in order to guarantee that Europe makes a real added value".<sup>520</sup> In a report on the Lisbon Treaty that he prepared, he underlined that Parliament's more resolved *ex ante* engagement in subsidiarity control would pre-empt Eurosceptics' contestation of EU decisions to the extent that these decisions would be validated by Parliament beforehand.<sup>521</sup> The *Sénat*, moreover, urged the political dialogue to continue to run in parallel regardless of the Lisbon Treaty mechanisms.<sup>522</sup>

### 5.1.3. Good functioning of the Union

The Committee of Laws of the *Assemblée nationale* assessed that the contribution of national parliaments to the good functioning of the Union had particularly materialised through the control of subsidiarity.<sup>523</sup> Yet, Warsmann (UMP) recalled that the French Parliament, just as its counterparts in other Member States, did not wait for this Treaty provision to establish procedures of monitoring EU decision making; they had been developed without regard to the Lisbon Treaty.<sup>524</sup>

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<sup>517</sup> *Sénat, Délégation pour l'Union européenne, Rapport no. 393 les parlements nationaux et l'Union européenne après le traité de Lisbonne* of 12 June 2008, rapporteur Hubert Haenel (UMP), pp. 21-22.

<sup>518</sup> *Sénat, Compte rendu intégral, Séance du mardi 29 janvier 2008, 57<sup>e</sup> jour de séance de la session ordinaire 2007-2008, JORF* [2008], S. (C.R.) 10, 30.1.2008, p. 649.

<sup>519</sup> *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), pp. 49 and 87.

<sup>520</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 11 décembre 2007, 80<sup>e</sup> séance de la session ordinaire 2007-2008, JORF* [2007], A.N. (C.R.) 79[2], 12.12.2007, p. 5189.

<sup>521</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport no. 562 sur le traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 112.

<sup>522</sup> *Sénat, Commission des lois, Rapport no. 175 sur le projet de loi constitutionnelle, adopté par l'Assemblée nationale, modifiant le titre XV de la Constitution* of 23 January 2008, rapporteur Patrice Gélard (UMP), p. 52.

<sup>523</sup> *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 48.

<sup>524</sup> *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 78.

The Foreign Affairs Committee of the *Assemblée nationale* held that national parliaments "must contribute, in their own way, to politicise the institutional functioning of the Union further", not merely by participating in conventions amending the founding treaties but also in areas where the Union has barely made any progress, such as fiscal harmonisation, the European budget, social Europe, etc.<sup>525</sup> Such contribution, the argument goes, would consist of providing political clarifications and opening new horizons of reform, not least through *ad hoc* conventions.<sup>526</sup>

The *Sénat's* European Affairs Committee argued that, while the primary goal of the Lisbon Treaty's provision on national parliamentary contribution to the good functioning of the Union is to regroup symbolically the provisions on national parliaments, it also serves as a recognition of the collective dimension of the national parliaments' European role, i.e., of the interparliamentary cooperation between national parliaments and the European Parliament.<sup>527</sup>

#### **5.1.4. Extension of codecision**

In the view of the Foreign Affairs Committee of the *Assemblée nationale*, both the extension of the powers of the European Parliament and the introduction of those of national parliaments contribute to the reduction of the democratic deficit.<sup>528</sup> A salient feature of depillarisation is that it will extend the scope of the subsidiarity jurisdiction of the Court of Justice and, hence, also of the national parliaments' right of recourse.<sup>529</sup> Chairman Lequiller, furthermore, stressed that "the European Parliament and national parliaments can, thanks to the Lisbon Treaty, jointly play an

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<sup>525</sup> *Assemblée nationale, Rapport no. 691 sur le projet de loi autorisant la ratification du traité de Lisbonne* of 6 February 2008, rapporteur Hervé de Charette (UMP), p. 27.

<sup>526</sup> *Assemblée nationale, Rapport no. 691 sur le projet de loi autorisant la ratification du traité de Lisbonne* of 6 February 2008, rapporteur Hervé de Charette (UMP), p. 28.

<sup>527</sup> *Sénat, Délégation pour l'Union européenne, Rapport no. 76 sur le Traité de Lisbonne* of 8 November 2007, rapporteur Hubert Haenel (UMP), p. 20; *Sénat, Commission des affaires européennes*, Report no. 24 on the development of the Senate's European role of 8 October 2009, rapporteur Hubert Haenel (UMP), p. 6; *Sénat, Délégation pour l'Union européenne, Rapport no. 393 les parlements nationaux et l'Union européenne après le traité de Lisbonne* of 12 June 2008, rapporteur Hubert Haenel (UMP), p. 13.

<sup>528</sup> *Assemblée nationale, Rapport no. 691 sur le projet de loi autorisant la ratification du traité de Lisbonne* of 6 February 2008, rapporteur Hervé de Charette (UMP), p. 19. See also the interventions by François de Rugy (Les Verts) in: *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mercredi 6 février 2008, 118<sup>e</sup> séance de la session ordinaire 2007-2008, JORF [2008], A.N. (C.R.) 13[2], 7.2.2008*, p. 16; by Nicole Ameline (UMP) in: *Assemblée nationale, Compte rendu intégral, 1<sup>er</sup> séance du jeudi 7 février 2008, 119<sup>e</sup> séance de la session ordinaire 2007-2008, JORF [2008], A.N. (C.R.) 14, 8.2.2008*, p. 828; and by Élisabeth Guigou (PS), former deputy French Minister for European Affairs and later MEP, in: *Assemblée nationale, Compte rendu intégral, 1<sup>er</sup> séance du jeudi 7 février 2008, 119<sup>e</sup> séance de la session ordinaire 2007-2008, JORF [2008], A.N. (C.R.) 14, 8.2.2008*, p. 831; and by senators Josselin de Rohan (UMP), President of the Committee for Foreign Affairs, Defence and Armed Forces (p. 1066) and his party colleague Jean Bizet (p. 1082), in: *Sénat, Compte rendu intégral, Séance du jeudi 7 février 2008, 62<sup>e</sup> jour de séance de la session ordinaire 2007-2008, JORF [2008], S. (C.R.) 15, 8.2.2008*.

<sup>529</sup> *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 93.

irreplaceable role in laying the democratic foundations of Europe".<sup>530</sup> In a joint meeting of the *Assemblée nationale*, the *Sénat* and the European Parliament, Hans-Gert Pöttering, the then President of the European Parliament, assured the gathering that national parliaments and the European parliament are not competitors, but that they serve the democracy and unity of the continent together.<sup>531</sup> Jean-Luc Warsmann (UMP), rapporteur for the constitutional amendment required for the authorisation of the ratification of the Lisbon Treaty, gave an important interpretation of the meaning of this amendment for the relations between France and EU decision making:

In revising our Constitution [...] we will facilitate decision making in the European institutions by accepting more widely than in the past the principle of qualified majority and the full participation of the European Parliament in the decision-making process. [...] The legal orders of the [Member] States and the European Union improve each other [...] The European legal order, while remaining distinct from our internal legal order, both enriches and reinforces it.<sup>532</sup>

By the same token, Axel Poniatowski (UMP), the Chairman of the Foreign Affairs Committee of the *Assemblée nationale*, held that "the recognition of the legislative role of the European Parliament is a significant progress towards a more democratic Europe. It is also *an essential condition of the development of European politics*, which our citizens are calling for".<sup>533</sup> Representing the *Nouveau Centre*, François Sauvadet also welcomed the strengthening of the rights of both the European Parliament and national parliaments.<sup>534</sup>

Pessimistic views, however, could be registered both among the opposition parties as well as the UMP itself. Among the opposition parties, Pierre Moscovici (PS), for instance, held that "national parliaments become empty shells, endowed with a single right, that of protesting. Meanwhile, the European Parliament no longer strives to represent 'the peoples of the states' but a perfectly mythical European people. National parliaments without powers, a European parliament without a people: the democracy is being murdered".<sup>535</sup> Michel Vaxès (PCF), too, criticised the negative nature of parliamentary rights, because they are directed at curtailing rather

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<sup>530</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 140, Réunion conjointe avec la Commission des affaires européennes du Sénat et avec les membres français du Parlement européen, mardi 16 février 2010, p. 9.*

<sup>531</sup> *Assemblée nationale, Délégation pour l'Union européenne, Compte rendu no. 54, Rencontre des Délégations pour l'Union européenne de l'Assemblée nationale et du Sénat avec la Conférence des présidents des groupes politiques du Parlement européen, mercredi 25 juin 2008, p. 4.*

<sup>532</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 janvier 2008, 98<sup>e</sup> séance de la session ordinaire 2007-2008, JORF [2008], A.N. (C.R.) 4[2], 16.1.2008, p. 194.*

<sup>533</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 janvier 2008, 98<sup>e</sup> séance de la session ordinaire 2007-2008, JORF [2008], A.N. (C.R.) 4[2], 16.1.2008, p. 197.*

<sup>534</sup> *Congrès du Parlement, Compte rendu intégral, Séance du lundi 4 février 2008, JORF [2008], 5.2.2008, p. 9.* The same was argued by his party colleague in the *Sénat*, Pierre Fauchon (p. 8).

<sup>535</sup> *Assemblée nationale, Compte rendu intégral, 3<sup>e</sup> séance du mardi 15 janvier 2008, 99<sup>e</sup> séance de la session ordinaire 2007-2008, JORF [2008], A.N. (C.R.) 4[3], 16.1.2008, p. 227.*

than initiating EU action.<sup>536</sup> A vocal opponent of the Lisbon Treaty in the governing UMP was their MP Jacques Myard. He insisted that this Treaty disrupted the nature of European integration and radically reduced the role of Parliament by transferring numerous competences to Community institutions.<sup>537</sup> To underpin his argument, he asked the Government how it is possible to transfer dozens of competences to the Union, therewith taking them away from Parliament, and at the same time enhance the powers of that same Parliament.<sup>538</sup> Addressing these negative stands on national parliamentary involvement in EU decision making in the post-Lisbon EU, the Foreign Affairs Committee of the *Assemblée nationale* warned national parliaments against taking refuge in an opposition role, because the Lisbon Treaty gives national parliamentarians a political role without putting them in competition with MEPs.<sup>539</sup>

There is, therefore, no flawless agreement as to whether the European and French parliaments fulfil mutually complementing or separate constitutional functions and whether the French Parliament is called upon to intervene not only where the European Parliament lacks powers of decision, but also where it does possess them.

## 5.2. Britain

The United Kingdom ratified the Lisbon Treaty on 16 July 2008.<sup>540</sup> Despite the Conservatives' insistence on a referendum, ratification was by Parliament. The court case brought by Stuart Wheeler, challenging the ratification method, was unsuccessful.<sup>541</sup> The House of Commons approved the Lisbon Treaty on 11 March 2008, followed by the House of Lords' approval on 18 June 2008. That political accountability is a serious concern in Westminster is vindicated by an early reaction of the Chairman of the Foreign Affairs Committee of the House of Commons to the Government's failure to appear before it and give evidence clarifying its negotiation positions: "The Committee regards the refusal of the FCO [Foreign and Commonwealth Office] to provide a minister to give oral evidence during this crucial

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<sup>536</sup> *Assemblée nationale, Compte rendu intégral, 3<sup>e</sup> séance du mardi 15 janvier 2008, 99<sup>e</sup> séance de la session ordinaire 2007-2008, JORF [2008], A.N. (C.R.) 4[3], 16.1.2008, p. 238.* The same argument was used by his party colleague in the *Sénat*, Robert Bret. *Sénat, Compte rendu intégral, Séance du mardi 29 janvier 2008, 57<sup>e</sup> jour de séance de la session ordinaire 2007-2008, JORF [2008], S. (C.R.) 10, 30.1.2008, pp. 610 and 644.*

<sup>537</sup> *Assemblée nationale, Commission des affaires étrangères, Avis no. 563 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 8 January 2008, rapporteur Hervé de Charette (UMP), p. 42.

<sup>538</sup> *Assemblée nationale, Compte rendu intégral, 3<sup>e</sup> séance du mardi 15 janvier 2008, 99<sup>e</sup> séance de la session ordinaire 2007-2008, JORF [2008], A.N. (C.R.) 4[3], 16.1.2008, p. 231.*

<sup>539</sup> *Assemblée nationale, Rapport no. 691 sur le projet de loi autorisant la ratification du traité de Lisbonne* of 6 February 2008, rapporteur Hervé de Charette (UMP), p. 27.

<sup>540</sup> See: [http://europa.eu/lisbon\\_treaty/countries/index\\_en.htm](http://europa.eu/lisbon_treaty/countries/index_en.htm), accessed on 24 September 2010.

<sup>541</sup> High Court, Queen's Bench Division (Divisional Court), Judgment of 25 June 2008, *R (on the application of Wheeler) v. Office of the Prime Minister and Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 1409 (Admin).

phase of the discussions on the future of Europe as a failure of accountability to Parliament".<sup>542</sup> The reason for insistence on the consultation of Parliament was to enable it "to make an input into the contents of the Treaty, through the Government".<sup>543</sup> The House of Commons' European Scrutiny Committee otherwise complained about the lack of transparency of the Lisbon Treaty negotiations and held that "the process could not have been better designed to marginalise the role of national parliaments and to curtail public debate".<sup>544</sup>

### 5.2.1. Subsidiarity

Subsidiarity was one of the six principles guiding the British Government in negotiations with the German Presidency on what became the Lisbon Treaty.<sup>545</sup> As is shown below, the monitoring of subsidiarity has been extensively analysed by both Houses of Parliament.

Upon examining the Commission's communication on the reform of the Union, published around a fortnight before the opening of the IGC,<sup>546</sup> the House of Commons' European Scrutiny Committee doubted the possibility of any meaningful parliamentary input in subsidiarity issues without independence from Government whipping systems.<sup>547</sup> As the Government's White Paper on the IGC marked subsidiarity control as a priority and argued that national parliaments would be given a "direct say in the EU's law-making procedures for the first time" while the Union would assume a duty to consult national parliaments,<sup>548</sup> the Committee sought clarifications. The Government considered it "unlikely" that it would be whipping on the use of the cards and offered to work with Parliament "to help both Houses exercise this independent power".<sup>549</sup> More specifically, during a committee hearing

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<sup>542</sup> The Government's excuse was the difficulty of finding a mutually convenient date. The correspondence improved after this early spat. House of Commons, Foreign Affairs Committee, "Foreign Policy Aspects of the Lisbon Treaty", *HC 120-I, 3<sup>rd</sup> Report of Session 2007-08* of 20 January 2008, para. 32, p. 17.

<sup>543</sup> House of Commons, Foreign Affairs Committee, "Foreign Policy Aspects of the Lisbon Treaty", *HC 120-I, 3<sup>rd</sup> Report of Session 2007-08* of 20 January 2008, para. 38, p. 19.

<sup>544</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference: follow-up report", *HC 16-iii, 3<sup>rd</sup> Report of Session 2007-08* of 27 November 2007, para. 8, p. 5.

<sup>545</sup> The remaining five principles presented by Geoffrey Hoon, the Minister for Europe, were: pursuing British interests, modernisation and effectiveness, consensus, use of existing Treaties and openness. House of Commons, Debate of 5 December 2006, Vol. 454, cols. 10-11WS.

<sup>546</sup> European Commission, "Reforming Europe for the 21st century", COM(2007) 412, 10.7.2007, p. 5.

<sup>547</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference", *HC 1014, 35<sup>th</sup> Report of Session 2006-07* of 9 October 2007, para. 19, p. 8. See also: *ibid.*, para. 38, p. 13.

<sup>548</sup> British Government, Foreign and Commonwealth Office, "The Reform Treaty: the British approach to the European Union Intergovernmental Conference", Cm 7174, 23.07.2007, pp. 11-12.

<sup>549</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference: Government responses", *HC 179, 1<sup>st</sup> Special Report of Session 2007-08* of 17 December 2007, p. 4. The importance of a free vote for the operability of the early warning mechanism was illustrated by William Hague, the Conservative shadow foreign secretary, when he lamented, during a debate on the European Union (Amendment) Bill, that "[g]iven the difficulty of oppositions winning a vote in their parliaments,

in the House of Lords, Lord Rosser raised the crucial question of whether any proposal from a committee of that House about any future EU legislation would have to enjoy the support of the Government of the day if it were to have any real impact. Jim Murphy, the Minister for Europe, replied straightforwardly in the negative, but warned that this 'concession' would not extend to initiating EU legislation but only to responding and objecting to it.<sup>550</sup>

Welcoming the early warning mechanism, the House of Lords' EU Committee further conceded that the cards will seldom be invoked. It also rightly stressed that:

[T]his is true of many of the sanctions available to scrutineers in a democracy. The existence of a sanction gives scrutiny teeth, while making it less likely that the sanction will need to be deployed. The Commission can disregard adverse votes from national parliaments and maintain its proposal; but this may be politically difficult [...].<sup>551</sup>

The House of Commons' European Scrutiny Committee emphasised that, while rare, subsidiarity problems do occasionally arise.<sup>552</sup> Parliaments might also object to EU initiatives on the ground of sovereignty, but in such cases the early warning mechanism would not apply.<sup>553</sup> It further assessed that the early warning mechanism, due to the high thresholds needed to halt the Commission's intention to proceed with a legislative proposal, "add very little by way of democratic control over the Commission and the EU institutions". If this mechanism was to have "any real

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the odds against doing so in 14 countries around Europe with different parliamentary recesses – lasting up to 10 weeks in our own case – are such that even if the European Commission proposed the slaughter of the first-born it would be difficult to achieve such a remarkable conjunction of parliamentary votes". House of Commons, Debate of 21 January 2008, Vol. 470, col. 1262.

<sup>550</sup> House of Lords, EU Committee, "Initiation of EU legislation", *HL Paper 150, Minutes of Evidence of 4 June 2008*, QQ471 and 472, p. 123.

<sup>551</sup> House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. I: Report", *HL Paper 62-I, 10<sup>th</sup> Report of Session 2007-08* of 13 March 2008, para. 11.50, p. 244.

<sup>552</sup> For example, the House of Commons found that the draft Decision making 2010 the European Year for combating poverty and social exclusion, proposed by the Commission in December 2007, violated subsidiarity because it required the appointment of representatives of national parliaments to the National Advisory Groups for organising the Year. This prescription contravened the right of parliaments to regulate their own affairs. The House then asked the competent minister to discuss this point with the Commission and other Member States in the Council. As a result, the problematic provision was struck out. House of Commons, European Scrutiny Committee, "Subsidiarity, national parliaments and the Lisbon Treaty", *HC 563, 33<sup>rd</sup> Report of Session 2007-08* of 21 October 2008, paras 29-31, pp. 9-10. As further successful invocations of subsidiarity, the British Government singled out two examples. The first one concerns tax, when Britain succeeded in arguing that the 2003 Commission proposal to abolish the British VAT zero rates on food, children's clothing and other products was inconsistent with subsidiarity. The second one occurred in the field of labour law, when Britain successfully argued, following the 2006 Commission report on the steps to be taken in this field, that no new EU legislation was necessary. House of Lords, EU Committee, "Subsidiarity, national parliaments and the Lisbon Treaty: Government response", *HC 197, 1<sup>st</sup> Special Report of Session 2008–09* of 26 January 2009, p. 3.

<sup>553</sup> House of Commons, European Scrutiny Committee, "Subsidiarity, national parliaments and the Lisbon Treaty", *HC 563, 33<sup>rd</sup> Report of Session 2007-08* of 21 October 2008, para. 30, pp. 10.

utility", the thresholds had to be much lower.<sup>554</sup> The House of Lords' EU Committee, too, assessed that the scrutiny of EU policies should not be overshadowed by the policing of subsidiarity.<sup>555</sup> Despite these shortcomings, the Committee's Chairman, Lord Grenfell, reassured his fellow peers that the yellow and orange cards "enhance the direct involvement of national parliaments in EU legislative procedures".<sup>556</sup>

In a fairly heated committee hearing, Commission Vice-President Wallström told the House of Commons that the Commission should listen to the views of national parliaments even if the number of votes did not reach the threshold.<sup>557</sup> This informal political undertaking on the part of the Commission was a product of pressure by the European Scrutiny Committee members on a range of subsidiarity-related questions, which led the Commissioner constantly to justify the extent and quality of the Union's legislative activity. For example, when asked why the Commission unabatedly furthers initiatives that often seem remote, unnecessary and expensive, Commissioner Wallström assumed a defensive stance:

[W]e have to be more effective and spend money in a way which shows the added value of Europe. So I can only agree that you will probably find examples of this, but it does not say that we are not carrying out sort of good impact assessments, so that we are not improving things. I think we can show that we have improved our own impact assessment and the subsidiarity test, and this will be even better with national parliaments keeping control also over what we are doing.<sup>558</sup>

Furthermore, during a hearing before the House of Lords' EU Committee, the Commission gave a seemingly clear statement of the purpose of the Barroso initiative. As explained by Christian Leffler, Head of Cabinet to Commissioner Wallström:

It is not an attempt to somehow circumvent established procedures, to go behind the back of the Council, of governments in the Council and enlist the support of their national parliaments, or to go behind the back of the European Parliament. It is a way of trying to offer a dialogue which will allow national parliaments to be better informed and more actively engaged at an early stage in the preparation and formation of European policy so that they are better placed to engage in the dialogue at national level with their governments [...] to make sure that they fully represent

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<sup>554</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference", *HC 1014, 35<sup>th</sup> Report of Session 2006-07* of 9 October 2007, para. 68, p. 23.

<sup>555</sup> House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. I: Report", *HL Paper 62-I, 10<sup>th</sup> Report of Session 2007-08* of 13 March 2008, para. 11.57, p. 245.

<sup>556</sup> House of Lords, Debate of 5 December 2007, Vol. 696, col. 1735.

<sup>557</sup> House of Commons, European Scrutiny Committee, "Subsidiarity, national parliaments and the Lisbon Treaty", *HC 563, Oral evidence of 23 June 2008*, Q86, p. Ev 21.

<sup>558</sup> House of Commons, European Scrutiny Committee, "Subsidiarity, national parliaments and the Lisbon Treaty", *HC 563, Oral evidence of 23 June 2008*, Q80, p. 20.

their national positions because those national positions will have been built on the input of well-informed parliaments.<sup>559</sup>

As a matter of fact, Westminster advocated the enshrinement of this broad political dialogue in the Lisbon Treaty from the very start of intergovernmental negotiations.<sup>560</sup> When this did not materialise, it was argued that the Barroso initiative should be kept alongside the early warning mechanism, even though documents received from the Commission are "not usually used in the scrutiny process", because they only arrive shortly before the Government sends them.<sup>561</sup> Nevertheless, Lord Grenfell stressed that the Barroso initiative "in a certain sense could be more valuable to national parliaments than what is in the Treaty [...]".<sup>562</sup> In addition to the Barroso initiative, the House of Lords has also, on its own initiative, begun sending to the Commission those of its reports that recommend action or restraint by the Union and the Commission has responded in each case.<sup>563</sup>

Though influence is hard to measure, this Committee received evidence from the UK Permanent Representation in Brussels that the House of Lords' reports are "well regarded" in the European Parliament, that the British Government takes them into account in formulating and developing policy and that the Commission might be influenced "to a degree". It was duly acknowledged, however, that the voice of a single parliament, being one of many seeking to influence legislation, should not be exaggerated.<sup>564</sup> One of the suggestions that attracted attention was to concentrate on

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<sup>559</sup> House of Lords, EU Committee, "The EU Reform Treaty: work in progress", *HL Paper 180, Minutes of Evidence of 19 September 2007*, Q55, pp. 14-15.

<sup>560</sup> See the statement to that effect by Lord Grenfell in: House of Lords, EU Committee, "Evidence from the Minister for Europe on the June European Council and the 2007 Inter-Governmental Conference", *HL Paper 142, Minutes of Evidence of 12 July 2007*, Q25, p. 6.

<sup>561</sup> House of Lords, EU Committee, "The EU Reform Treaty: work in progress", *HL Paper 180, 35<sup>th</sup> Report of Session 2006-07* of 1 November 2007, paras 34 and 55, pp. 10 and 14.

<sup>562</sup> House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. II: Evidence", *HL Paper 62-II, Minutes of Evidence of 6 December 2007*, Q190, p. S49.

<sup>563</sup> House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. I: Report", *HL Paper 62-I, 10<sup>th</sup> Report of Session 2007-08* of 13 March 2008, para. 11.21, p. 283. In an intervention in the plenary, Lord Grenfell stated that this practice is "as yet modest", but that the Commission's responses are "prompt and thoughtful". Direct correspondence is with the Commission Vice-President in charge of relations with national parliaments. House of Lords, Debates of 5 December 2007, Vol. 696, col. 1734 and of 7 November 2007, Vol. 696, col. 73.

<sup>564</sup> House of Lords, EU Committee, "Initiation of EU legislation", *HL Paper 150, 22<sup>nd</sup> Report of Session 2007-08* of 24 July 2008, para. 126, p. 39. When asked whether the reports of the House of Lords have impact in Brussels, Jim Murphy, the Minister for Europe, stated as an example of this influence the Report on the wholesale prices of roaming charges on mobile phones: "It is now part of the established orthodoxy that your Lordships' reflections on that had an impact on the Commission, and a really effective impact". The Minister did not, however, specify what this impact consisted of. House of Lords, EU Committee, "Initiation of EU legislation", *HL Paper 150, Minutes of Evidence of 4 June 2008*, Q465, p. 122. For its part, the Commission mainly agreed with their Lordships' observations stating that these "have retained our fullest attention". See the letter by Commissioner Wallström of 30 May 2007, reproduced in: House of Lords, EU Committee, "Government and Commission responses session 2006-07", *HL Paper 199, 34<sup>th</sup> Report of Session 2007-08* of 2 December 2008, p. 78.

multi-annual programmes, such as Commission work programmes and policy strategies.<sup>565</sup>

### 5.2.2. Good functioning of the Union

Both Houses of the British Parliament found it rather serious that the Lisbon Treaty's provision on national parliamentary contribution to the good functioning of the Union contained the phrase "shall contribute", because this wording appeared to place a legal obligation directly on national parliaments.<sup>566</sup> They were resolute that this Treaty provision can only be understood as entitling and not obliging national parliaments to act, and that the British Parliament has full competence to decide whether it wishes to use the rights listed in this provision.<sup>567</sup> Any legal obligation on Westminster is out of the question.

Two particular considerations ignited the concern of the House of Commons' European Scrutiny Committee: (a) national parliaments, unlike the European Parliament, are not creations of the Treaties and their rights are not dependent on them; and (b) if national parliaments were to be placed under a duty to act, this would be enforceable before the Court of Justice and that would conflict with the 1688 Bill of Rights, which prevents debates and proceedings in Parliament from being questioned in any place out of Parliament.<sup>568</sup> Gisela Stuart, a Labour MEP who was a Presidium member and UK Parliamentary Representative on the Convention for the Future of Europe, also rejected the possibility of any EU-imposed duty on Westminster, because it conflicts with parliamentary sovereignty, whereby no Parliament may bind its successor.<sup>569</sup>

The same type of concern was voiced about the imperative form "shall" used in the Lisbon Treaty's provisions providing for national parliaments to ensure compliance with the principle of subsidiarity and for the European Parliament and national parliaments to determine the organisation of interparliamentary

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<sup>565</sup> House of Lords, EU Committee, "Initiation of EU legislation", *HL Paper 150, 22<sup>nd</sup> Report of Session 2007-08* of 24 July 2008, para. 160, pp. 49. See to that effect the evidence given by Catherine Day, the Secretary General of Commission Secretariat (Q365, p. 95), and the statement by the Chairman of the Committee: "I think we would be interested to know whether there is more scope for actually influencing what proposals come forward" (Q468, p. 123) in: House of Lords, EU Committee, "Initiation of EU legislation", *HL Paper 150, Minutes of Evidence of 8 May 2008*.

<sup>566</sup> House of Lords, EU Committee, "The EU Reform Treaty: work in progress", *HL Paper 180, 35<sup>th</sup> Report of Session 2006-07* of 1 November 2007, para. 29, p. 9. See the linguistic analysis of the "shall" in: House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. I: Report", *HL Paper 62-I, 10<sup>th</sup> Report of Session 2007-08* of 13 March 2008, Appendix 4, p. 293.

<sup>567</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference", *HC 1014, 35<sup>th</sup> Report of Session 2006-07* of 9 October 2007, paras 69 and 70, p. 23.

<sup>568</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference", *HC 1014, 35<sup>th</sup> Report of Session 2006-07* of 9 October 2007, paras 76 and 70 (note 56), pp. 23-24. The 1688 Bill of Rights declares the freedom of speech in the following words: "That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament".

<sup>569</sup> House of Commons, Debate of 26 July 2007, Vol. 463, col. 1113.

cooperation.<sup>570</sup> In response, the Government gave firm assurances to Parliament that there was no policy intention of obliging national parliaments and that the problem was one of drafting rather than of intent.<sup>571</sup> After it had negotiated the amendment of the wording, the finally adopted Lisbon Treaty dropped the "shall" forms, albeit not in the case of interparliamentary cooperation. The House of Lords' EU Committee then declared the matter settled, underscoring that the nature of the parliamentary contribution to the Union's good functioning is that of a "strong political obligation to take seriously" the new Lisbon Treaty powers.<sup>572</sup>

### **5.2.3. Extension of codecision**

The rise in the European Parliament's power of codecision was greeted mainly by the Labourites and Liberal Democrats. The Conservatives and the UK Independence Party were not as enchanted. The following two examples illustrate this very well.

In a House of Lords plenary debate preceding the European Council meeting of 13-14 December 2007, when the Heads of State and Government signed the Treaty of Lisbon, Lord Harrison, a Labour peer, was forthright in his call that "[w]e should celebrate the extension of codecision-making. [...] We should not hide the increasing of the democratic element of the European institutions under a bushel, but should celebrate it".<sup>573</sup> In contrast, Lord Blackwell, a Conservative peer, expressed concern about "the gradual evolution of the institutional structure of the European Union away from nation states, [which is] slowly but surely building and reinforcing the idea of democratic legitimacy exercised independently of the nation state by European-level institutions".<sup>574</sup>

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<sup>570</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference: follow-up report", *HC 16-iii, 3<sup>rd</sup> Report of Session 2007-08* of 27 November 2007, para. 15, p. 7. See the current Articles 63 TFEU and Article 9 of Protocol no. 1 on the role of national parliaments in the European Union.

<sup>571</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference: follow-up report", *HC 16-iii, 3<sup>rd</sup> Report of Session 2007-08* of 27 November 2007, para. 11, p. 6.

<sup>572</sup> House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. I: Report", *HL Paper 62-I, 10<sup>th</sup> Report of Session 2007-08* of 13 March 2008, para. 11.49, p. 244.

<sup>573</sup> House of Lords, Debate of 5 December 2007, Vol. 696, col. 1764. See also the intervention during the same debate by Lord MacLennan, a Liberal Democrat peer: "My Lords, before the noble Baroness sits down, does she not agree that, in promoting the benefits of the treaty as positively as she has, she might have made some reference to the strengthened democratic procedures, most notably the requirement of codecision-making with the European Parliament, which is now to become the legislative norm? Is not democracy important, as well as efficiency?" (col. 1723).

<sup>574</sup> House of Lords, Debate of 5 December 2007, Vol. 696, col. 1791. See a more dramatic intervention by Lord Pearson, a UKIP peer: "[T]he project of European integration is rooted in one big idea: that the nation states were responsible for the carnage of the two world wars and for the long history of bloodshed in Europe. Those European nation states, with their unreliable democracies, must therefore be emasculated and diluted into a new form of supra-national government run by a commission of wise technocrats. This genesis explains why the project works the way it does as the very antithesis of democracy. [...] Yet the heart of our democracy remains, and can only be, the hard-earned privilege of the British people to elect and dismiss those who make their laws. That is members of the House of Commons, assisted under our constitutional settlement by your Lordships. Millions have died for this

Several months later, during the House of Commons plenary debate on the European Union (Amendment) Bill held in February 2008, Labour MPs defended the standpoint that the Union's "democratic legitimacy is improving and increasing", because directly elected MEPs gain a greater say through the extended application of codecision. The European Parliament, a consultative body in 1979, becomes "a co-legislative body now, and that is a tremendous step forward in democratic terms".<sup>575</sup> This was squarely opposed by Conservatives, who saw the empowerment of the European Parliament as a 'conspiracy' against British democracy:

The problem is that it is all part of the process of greater integration, with more centralisation and less democracy. The European Parliament is involved in certain areas of codecision, but that *only serves to lock down and contain Member States' national parliaments*. We are in the ridiculous situation of being invited to congratulate the EU on allowing national parliaments to be involved. General elections take place on a national basis, but the process of making laws is being handed over to the undemocratic procedure that I have set out. That is the system in which we are effectively imprisoned.<sup>576</sup>

Significantly, neither the Conservative nor the Labour and Liberal Democrat MPs accept the diminution in national parliaments' powers because of the strengthening of those of the European Parliament. The only difference is that the Labourites and Liberal Democrats espouse the two-channel scheme of European accountability, according to which EU decisions are accounted for both in the European Parliament and national parliaments, whereas the Conservatives attach less importance, if not

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principle over hundreds of years, but it has been frittered away in pursuit of the outdated European dream by our political establishment without the people's informed consent. I am often asked how an unelected peer such as myself dares to extol the value of our democracy over the brave new system of Brussels government. The answer is simple and comes in the form of a question: how would you feel if most of our law was proposed in secret by the unelected House of Lords; was processed in secret largely by collaborating bureaucracies; and was then executed by the selfsame House of Lords? When you put it like that, the penny begins to drop". House of Lords, Debate of 8 June 2007, Vol. 692, col. 1359, cols. 1411-1412.

<sup>575</sup> Interventions by Mark Hendrick, a Labour MP, in: House of Commons, Debate of 26 February 2008, Vol. 472, cols. 989-990. He further added: "I am proud to be a member of the House, and I was proud to be a member of the European Parliament. Having both those parliaments working well and parliamentarians working hard for the constituents whom they represent is important in bringing power and law-making closer to the people" (col. 1017). Similarly, Lord Bach observed that "MEPs are increasingly effective, both at raising issues of key concern – for example, climate change in recent times – and at scrutinising and improving legislation. Strengthening the European Parliament's role increases transparency and democratic accountability". House of Lords, Debate of 12 May 2008, Vol. 701, col. 885.

<sup>576</sup> Intervention by William Cash, a Conservative MP, in: House of Commons, Debate of 26 February 2008, Vol. 472, col. 990 (emphasis added). See also the statement during the same debate by his party colleague Angela Browning about the Lisbon Treaty: "The Treaty compounds the ever-rolling forward programme of giving democratic legitimacy to the citizens' representation through the EU Parliament, thereby bypassing more of their representation through their national parliaments" (col. 988).

negate, the role of the European Parliament. Replying to a question by Peter Bone, a Conservative MP, on this specific issue, Mike Gapes, a Labour MP, explained:

The real question that we have as parliamentarians is how we can make the Commission and the Council of Ministers more accountable to parliaments in the 27 Member States and in the common European Parliament. It is not about centralisation or taking powers away from parliaments; if anything, it is about taking power away from unelected bureaucrats and civil servants.<sup>577</sup>

The reason why the Labourites adopted this position lies, as Mark Hendrick MP argued, in the principle of popular representation: "Directly elected parliaments, whether we are talking about the House of Commons or the European Parliament, contain the representatives of the people who are closest to the people".<sup>578</sup> The UK Independence Party, for its part, was critical even of the role of Westminster.<sup>579</sup>

Notwithstanding the European Parliament's enhanced posture, there was a palpable consensus that the British Parliament's performance of the constitutional function of political accountability should be preserved and burnished to accommodate the post-Lisbon decision-making environment. The House of Lords' EU Committee corroborated this with the example of agriculture and fisheries. It argued that the move to codecision in these two fields not only brings more accountability but also facilitates national parliamentary scrutiny, because witness evidence showed that the decision-making process had been opaque, allowing agriculture ministers to operate as a "collusive club with rather little external scrutiny and in a way which was not very easy for national parliaments to get any handles

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<sup>577</sup> House of Commons, Debate of 26 February 2008, Vol. 472, col. 999. See also a statement by Edward Davey, a Liberal Democrat MP: "I welcome the Lisbon Treaty, because it provides a new dynamic for CAP reform, namely greater democratic accountability and scrutiny, and increases the powers of the European Parliament in its relations with the Council of Ministers over law making and budget setting. Many more areas of legislation and budget setting will now use the codecision process, including CAP. For Liberal Democrats such as me who have complained about CAP and, indeed, about Europe's democratic deficit for many years, the Lisbon Treaty addresses that point with real reforms. Interestingly, Conservative Front Benchers are against extra democracy going to the European Parliament". House of Commons, Debate of 11 March 2008, Vol. 473, col. 185. The argument by Baroness Deech, a crossbench peer, is also noteworthy: "The structure of the European Union, the nature of its decision-making process and the legislation make full democratic accountability difficult to achieve. The Commission cannot properly be held to account by a national parliament [...]". House of Lords, Debate of 1 April 2008, Vol. 700, col. 956

<sup>578</sup> House of Commons, Debate of 26 February 2008, Vol. 472, col. 1000. His fellow party member in the House of Lords, Lord Harrison, seemed to concur in this assessment when he spoke of "rectifying the democratic deficit by making the European Parliament co-decision-makers with the Council". House of Lords, Debate of 1 April 2008, Vol. 700, col. 941.

<sup>579</sup> In the opinion of Lord Pearson the "EU scrutiny committees can do only that: they can scrutinise, report and debate, but they cannot change anything. I fear that I have come to wonder what the point of them is at all. They have certainly done nothing over the years to stem the steady handover of our once-proud sovereignty to Brussels". House of Lords, Debate of 11 March 2008, Vol. 700, col. 918.

on".<sup>580</sup> Another example, in the field of the environment, testifies to the fact that the nature and quality of the European Parliament's involvement in EU decision making was an important factor in Westminster's acceptance of the reform of the Union's legislative processes and that the Conservatives' animosity towards the European Parliament was not out of caprice.<sup>581</sup> Though one wonders whether such reasoning applies to all EU fields, the logic is clear: even the enhancement of powers of directly elected institutions entails responsibility. Effectively, the European Parliament and Westminster do not exclude each other. If the European Parliament's increased involvement underpins that of national parliaments, then their action must be appraised as complementary rather than conflicting.

That being so, the role of national parliaments, according to Michael Connarty, a Labour MP and the Chairman of House of Commons' European Scrutiny Committee, is not to communicate their views to the European Parliament so that it would then try to impress them on the Commission and the Council, but to "focus on making their governments go to the Council and agree the right thing".<sup>582</sup> The Conservatives and Liberal Democrats share this view. As David Heathcoat-Amory, a Conservative MP, stressed, "[t]he parliaments' loss of powers is shown by the massive switch to qualified majority voting, which practically removes the veto powers of this House over such legislation".<sup>583</sup> For Lord Teverson, a Liberal Democrat peer, holding ministers to account for their activity in the Council is "a key way in which national parliaments can control the European Union and it is a very powerful way if they do it properly".<sup>584</sup>

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<sup>580</sup> House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. I: Report", *HL Paper 62-I, 10<sup>th</sup> Report of Session 2007-08* of 13 March 2008, paras 10.22 and 10.36, pp. 228 and 230.

<sup>581</sup> Witness the query by Viscount Ullswater: "[W]e act as a scrutiny committee, with very limited powers, powers to make comments and make speeches occasionally, but will that role of scrutiny now be taken over by the European Parliament because they will actually be able to affect the end decision whereas we do not, we cannot? [...] Where do you think that input will be, at the end of the process? I do not know what your experience was with the Chemical Directive, was it at the very end of the process that the [European] Parliament took an interest in what had been decided by experts and officials up until that moment, or did they get involved at an earlier stage in order to formulate the policy? In reply, Lord Rooker, the Minister for Sustainable Farming and Food and Animal Welfare, positively assessed the European Parliament's democratic input and added that it was the first time the European Parliament would be involved in this area. House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. II: Evidence", *HL Paper 62-II, Minutes of Evidence of 16 January 2008*, Q13-14, p. D6.

<sup>582</sup> House of Commons, Debate of 11 December 2007, Vol. 469, col. 210. During another plenary session, he declared: "The role of national parliaments will be massively diminished. In fact, as recently as December it was suggested by European parliamentarians from a number of parties at a Future of Europe conference, that our parliaments' role will be to try to influence the European Parliament, so that it can make the appropriate amendments to what comes out of the Council. As Chairman of the European Scrutiny Committee, I am not prepared to accept that". House of Commons, Debate of 21 January 2008, Vol. 470, col. 1273.

<sup>583</sup> House of Commons, Debate of 4 March 2008, Vol. 472, col. 1626.

<sup>584</sup> House of Lords, Debate of 1 April 2008, Vol. 700, col. 1010.

The accountability role for national parliaments was specifically underlined in the field of Common Foreign and Security Policy, where the European Parliament does not codecide with the Council. In the words of Lord Roper, the then Chairman of the House of Lords' Subcommittee C on Foreign Affairs, Defence and Development Policy:

I was pleased that in his introduction, the noble Lord, Lord Bowness, referred to *the presence of the high representative and the Commissioner for External Relations at the biennial meetings of COFAC*; the meeting bringing together the foreign affairs chairmen of the national parliaments. Their presence gives a reality to those meetings and *ensures that they are held to account by the national parliaments*. That is important because, in these areas of intergovernmental cooperation, *the national parliaments have particular responsibility*.<sup>585</sup>

In a recent statement, the Government concurred with this position declaring that "[g]iven the intergovernmental nature of the EU's Common Security and Defence Policy, we believe that this remains entirely a matter for national parliaments and coordination between them. There is no reason and no case for the European Parliament to expand its competence in this area".<sup>586</sup>

While primary, the accountability of the national government is not the only and exclusive concern of the British Parliament. The accountability of the Commission is, according to Lord Astor, a Conservative peer, also pertinent because:

In nation states, that power [of legislative initiative] normally belongs to elected governments, who change as voters decide. No such limit exists for the Commission. This explains why dossiers tend to keep being pushed until the other European institutions accept them. [...] Yet perhaps the unhappy disconnect between bottom-up democracy and the need for the Commission to act impartially in the general European interest is irreconcilable. If so, it makes it all the more important that national parliamentarians are scrupulous in holding this power to account and making sure that scrutiny is maintained to the utmost level.<sup>587</sup>

Furthermore, the central theme of the depillarisation in both the Houses of Parliament was the future operation of the opt-in arrangement in the merged Area of Freedom, Security and Justice. The Conservatives' disaffection with the European Parliament was, again, tangible.<sup>588</sup> All the more so since "the protection of the UK's

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<sup>585</sup> House of Lords, Debate of 8 February 2007, Vol. 689, col. 860 (emphasis added).

<sup>586</sup> See the written statement by Baroness Kinnock, a Minister of State in the Foreign and Commonwealth Office, in: House of Lords, 30 March 2010, Vol. 718, col. WS225.

<sup>587</sup> House of Lords, Debate of 12 December 2008, Vol. 706, col. 601.

<sup>588</sup> See Lord Blackwell's intervention: "I do not believe that a European council voting by majority is democratic representation of a nation. Nor do I believe that a European Parliament, however much language is used about it directly representing European citizens, represents a national voice on these matters or is an appropriate forum to decide the national laws that apply in this country. The European Union is not a nation. The United Kingdom is a nation. Its Parliament is the place where criminal laws,

common law system and the protection of police and judicial processes" was one of the Government's four red lines.<sup>589</sup> Britain's right to decide to opt into negotiations on a new EU measure in the transferred fields under the revised 'opt-in Protocol'<sup>590</sup> and the right to pull the 'emergency brake' in certain matters of criminal law envisaged under the Lisbon Treaty provided little comfort, however. The risk remained that the negotiations could result in amendments that were disadvantageous to Britain and that the Government would be unable to prevent this, either due to qualified majority voting and the consequent loss of the veto power or due to the inability to revoke the decision to opt in, especially in the fields where the emergency brake does not apply, such as in civil law matters.<sup>591</sup> The Government argued that opting out after opting in was "unworkable in practice [because] other Member States would not take UK views in negotiation seriously" then.<sup>592</sup>

Finally, the increasing trend in the Union towards 'first reading deals' alerted the House of Lords, because this practice of speedy decision making affects the scrutiny of EU policy.<sup>593</sup> Even more alarming is that the European Parliament, the Council and the Commission have explicitly agreed to encourage the adoption of legislation in trilogues and at first reading.<sup>594</sup>

### 5.3. Portugal

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policing laws and the role of justice in this nation are decided until such time as the Government tell us that we are no longer a nation and the European Union has become that nation – a proposition which, thankfully, they continue to deny". House of Lords, Debate of 12 May 2008, Vol. 701, col. 899.

<sup>589</sup> The other three red lines referred to CFSP and CSDP, tax and social security and the Charter of Fundamental Rights.

<sup>590</sup> Articles 3 and 4 of the Protocol no. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

<sup>591</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference", *HC 1014, 35<sup>th</sup> Report of Session 2006-07* of 9 October 2007, para. 67, p. 22; House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference: follow-up report", *HC 16-iii, 3<sup>rd</sup> Report of Session 2007-08* of 27 November 2007, paras 45 and 47, p. 13.

<sup>592</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference: Government responses", *HC 179, 1<sup>st</sup> Special Report of Session 2007-08* of 17 December 2007, p. 11. The same argument was evinced by Andrew Duff MEP during a hearing in the House of Lords in: House of Lords, EU Committee, "The EU Reform Treaty: work in progress", *HL Paper 180, Minutes of Evidence of 19 September 2007*, Q77, p. 20.

<sup>593</sup> House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. I: Report", *HL Paper 62-I, 10<sup>th</sup> Report of Session 2007-08* of 13 March 2008, para. 11.53, p. 245. See further: Farrell, Henry and Héritier, Adrienne. "Interorganisational negotiation and intraorganisational power in shared decision making: early agreements under codecision and their impact on the European Parliament and Council," *Comparative Political Studies, Vol. 37, No. 10*, 2004: 1184–1212.

<sup>594</sup> Joint Declaration of the European Parliament, the Council and the Commission on practical arrangements for the codecision procedure, (*OJ C145/6* of 30.06.2006). Para. 7 thereof reads: "Cooperation between the institutions in the context of codecision often takes the form of tripartite meetings ('trilogues'). This trilogue system has demonstrated its vitality and flexibility in increasing significantly the possibilities for agreement at first and second reading stages [...]". Para. 11 thereof reads: "The institutions shall cooperate in good faith with a view to reconciling their positions as far as possible so that, wherever possible, acts can be adopted at first reading".

Portugal ratified the Lisbon Treaty on 17 June 2008.<sup>595</sup> The *Assembleia da República* (Assembly) had given its approval by an overwhelming majority on 23 April 2008, two days before the 34<sup>th</sup> anniversary of the Revolution of Carnations, which ushered democracy into Portugal. While the motor of the scrutiny process was the European Affairs Committee, an innovation of vital importance for a full utilisation of the Lisbon-proffered possibilities was the inclusion of specialised parliamentary committees in the approval procedure. This is a significant step towards diversifying the Assembly's scrutiny of EU policies, though, admittedly, the endeavour is still in its infancy.

The key bone of contention during the ratification process was the actual mode of ratification rather than the mode of the Assembly's participation in the creation of primary and secondary EU law. Whereas four opposition parties – the Communists, the Left Block, the Centrists and the Greens – requested a referendum, the ruling Socialist Party and the main opposition party, the Social Democrats, rejected it.<sup>596</sup> An analysis of the plenary debates reveals that the parliamentary discussion of the contents of the Lisbon Treaty was to a great extent tarred by the bickering between the Government and the opposition over the necessity of a referendum.<sup>597</sup> This robbed the parliamentary scrutiny of much rigour.

Nonetheless, comparable to Westminster's calls for evidence, the Assembly's European Affairs Committee conducted public consultations with 149 civil society organisations on a variety of topics related to the Lisbon Treaty. However, only 42 replies were received (29%). The conclusions of this public consultation, parsimonious and escaping easy classification, did not refer to the national parliaments' European role.<sup>598</sup>

The ratification *à la Portugaise* also included an element, which, albeit present, was less accentuated in France and Britain: the promotion of the contents of the Lisbon Treaty by Parliament outside Parliament. A series of conferences were organised in different Portuguese cities by the officials of the Assembly's European Affairs Committee in the spirit of informing the public of the novelties of this Treaty. These conferences were attended by Portuguese and other Member States' MEPs and among the issues discussed were the new rights of national parliaments.

### **5.3.1. Subsidiarity**

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<sup>595</sup> See: [http://europa.eu/lisbon\\_treaty/countries/index\\_en.htm](http://europa.eu/lisbon_treaty/countries/index_en.htm), accessed on 12 October 2010.

<sup>596</sup> *Assembleia da República, Comissão de Assuntos Europeus, "Parecer sobre a Proposta de Resolução no. 68/X – Aprova o Tratado de Lisboa"*, rapporteurs Ana Catarina Mendes (PS) and Mário David (PSD), p. 49.

<sup>597</sup> See, for instance, the debates in: *Diário da Assembleia da República, I Série, No. 99*, 28 June 2007; *No. 12*, 20 October 2007; *No. 26*, 14 December 2007; and *No. 45*, 8 February 2008.

<sup>598</sup> The major concerns related to the complexity of the Treaty text and the Government's avoidance of a referendum. *Assembleia da República, Comissão de Assuntos Europeus, "Parecer sobre a Proposta de Resolução no. 68/X – Aprova o Tratado de Lisboa"*, rapporteurs Ana Catarina Mendes (PS) and Mário David (PSD), p. 59-60.

The claims adduced by MPs during plenary sessions testify to the fact that the two largest political forces in Portugal intend seriously to approach EU scrutiny in general and subsidiarity monitoring in particular.

During the final plenary debate approving the Lisbon Treaty, the Chairman of the European Affairs Committee, Vitalino Canas (PS), held that "if there is a power that the Assembly of the Republic now has that is not merely symbolic [...], it is precisely the power to assess the application of the principle of subsidiarity". He thereby foretold what gradually became a hallmark of the Assembly's involvement in EU affairs – subsidiarity assessment.<sup>599</sup>

Especially articulate in this regard was Carlos Costa Neves (PSD), an opposition MP. After assessing as positive the greater involvement of both the European and national parliaments in the Union's legislative process, he particularly focused on the latter, laying out the ambition that the Assembly should pursue:

It is necessary that the European agenda becomes [...] the agenda of national parliaments, and, for that, the Assembly of the Republic must assume, as a mechanism and in its entirety, one of the attributions now entrusted to it: the verification of the effective application of the principle of subsidiarity in the politico-legislative process of the European Union. [...] It is a big challenge. To overcome it, we must carefully scrutinise all the initiatives, which requires strong political will of this Parliament; which requires the existence and mobilisation of the means and the transversal involvement of the entire Parliament, of all parliamentary committees in this task, adequate correspondence with the Government, necessary links with other national parliaments. It is a demanding task, very complex and of enormous responsibility. There is a recurrent affirmation that [...] more than two thirds of the national legislation originates from the European Union. True, with the participation of the Portuguese Government, but it also true that it is not always sufficiently democratically scrutinised by this Parliament. It must be effectively scrutinised by this Parliament. We must, indeed, live up to this challenge, to this responsibility.<sup>600</sup>

That there is a close tie between the policing of subsidiarity and the galvanisation of popular credence regarding the democratic nature of decisions descended upon the citizenry was highlighted by Maria de Belém Roseira (PS). She explained the constitutional value of the early warning mechanism on the example of health protection, stressing that "if the options voted for are undermined by the intervention of European institutions, the core of the democratic functioning is also called into question".<sup>601</sup>

### 5.3.2. Good functioning of the Union

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<sup>599</sup> *Diário da Assembleia da República, I Série, No. 75, 24 April 2008, p. 22.*

<sup>600</sup> *Diário da Assembleia da República, I Série, No. 5, 19 November 2009, p. 41.*

<sup>601</sup> *Diário da Assembleia da República, I Série, No. 2, 6 November 2009, p. 71.*

Defending the Lisbon Treaty in Parliament on the occasion of the vote of approval, Luís Amado, the Minister of Foreign Affairs, recalled that "at the moment that the democratic legitimacy is reinforced in the new institutional architecture in Europe [...], it is important that the MPs, members of the Portuguese representative democracy, also assume their responsibilities".<sup>602</sup> In the same spirit, Vitalino Canas (PS), the Chairman of the European Affairs Committee, reminded the MPs that while the Assembly would indeed gain new competences, it would "above all assume new responsibilities", to which end he promised a swift reform of the EU scrutiny toolkit in order to accommodate the Lisbon 'mandate'.<sup>603</sup> Taking the argument further, his fellow party member, Ana Catarina Mendonça, explicitly stated that the Lisbon Treaty "obliges all MPs, and the European Affairs Committee in particular, to scrutinise legislative and non-legislative proposals coming from the European Union [...] This is a responsibility of national parliaments [...]".<sup>604</sup> Though the opposition MPs did not clamour their disapproval of this interpretation of the Treaty, the Communists did briefly protest from their seats.

Perhaps the most essential for the future evolution of the Portuguese Parliament's involvement in the Union's processes of policy and decision making is the recognition that scrutiny is by and large a matter of persuasive political argumentation and not of acquiescent surrender to the often unfortunate formulations in the legal provisions of the Treaties. Fodder for this conclusion is aptly provided by Chairman Canas in his speech during the plenary debate on the entry into force of the Lisbon Treaty. After conceding that one should not exaggerate the parliaments' post-Lisbon posture, he asserted that, besides the supervision of the Government, particularly in areas of intergovernmental cooperation, the first of the Assembly's new functions is "the supervision of European institutions" through the monitoring of subsidiarity application, political control of Europol, evaluation of Eurojust and the scrutiny of EU policies in the Area of Freedom, Security and Justice. However, the Treaty framework should not eclipse the national parliaments' genuine trait as representatives of nations:

[N]ational parliaments have the legitimacy to strengthen their substantive and qualitative involvement in European matters. The Treaties do not prevent national parliaments from pronouncing themselves on the application or observance of the principle of proportionality, nor on the extent, contents and object of draft legislative acts, even in the areas not falling under the exclusive competence of these parliaments. It is true that such pronouncements will have a merely political meaning and value, because they will not create any legal effect, as opposed to the pronouncement on the fulfilment of the principle of subsidiarity. But this is one of

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<sup>602</sup> *Diário da Assembleia da República, I Série, No. 75, 24 April 2008, p. 42.*

<sup>603</sup> *Diário da Assembleia da República, I Série, No. 75, 24 April 2008, p. 22.* As we show in Section 4.4. of Chapter 8, this promise was fulfilled with the reform implemented on 20 January 2010, less than two months after the entry into force of the Lisbon Treaty.

<sup>604</sup> *Diário da Assembleia da República, I Série, No. 74, 19 April 2008, p. 46.*

the faculties of national parliaments whose political outreach and effect should not be underestimated. This new protagonism of national parliaments certainly has its reverse side: it is expected of these parliaments to assume, with revived vigour, the role of agents and promoters of the European project.<sup>605</sup>

### 5.3.3. Extension of codecision

The empowerment of the European Parliament was widely greeted as a positive development. In a general sense, the Assembly's Foreign Affairs Committee considered the Lisbon Treaty "a pragmatic response to the need of reviewing the [Union's] participative and decisional processes and institutional framework according to a dynamic that is above all internal, formal and democratically legitimised".<sup>606</sup> As the central procedural novelty in the Area of Freedom, Security and Justice, the Constitutional Affairs Committee underlined the reinforced role of both national parliaments and the European Parliament.<sup>607</sup> The Budget and Finance Committee and the Health Committee similarly noted the strengthening of democracy in the Union. While the former Committee underlined the increased participation of national parliaments, the latter opined that the key reasons justifying the ratification of the Lisbon Treaty were the improved efficiency of the Union's decision-making process and the enhanced powers of both national parliaments and the European Parliament.<sup>608</sup>

Based on these reports of specialised committees and following numerous hearings with Government representatives, the European Affairs Committee concluded rather positively that the Lisbon Treaty "improves the legitimacy, transparency, efficacy, democracy and coherence of the decision-making process" of the European Union and that it clearly enunciates the fundamental values, *inter alia*, of democracy and the rule of law.<sup>609</sup> The positions of the specialised and the

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<sup>605</sup> *Diário da Assembleia da República, I Série, No. 5*, 19 November 2009, p. 46.

<sup>606</sup> *Assembleia da República, Comissão de Negócios Estrangeiros e Comunidades Portuguesas, Relatório*, rapporteur Marta Rebelo (PS), quoted in: *Assembleia da República, Comissão de Assuntos Europeus, "Parecer sobre a Proposta de Resolução no. 68/X – Aprova o Tratado de Lisboa"*, rapporteurs Ana Catarina Mendes (PS) and Mário David (PSD), p. 56.

<sup>607</sup> *Assembleia da República, Comissão de Assuntos Constitucionais, Direitos, Liberdades e Garantias, Relatório*, rapporteur Teresa Diniz (PS), in: *Assembleia da República, Comissão de Assuntos Europeus, "Parecer sobre a Proposta de Resolução no. 68/X – Aprova o Tratado de Lisboa"*, rapporteurs Ana Catarina Mendes (PS) and Mário David (PSD), p. 56.

<sup>608</sup> *Assembleia da República, Comissão de Orçamento e Finanças, Relatório*, rapporteur Duarte Pacheco (PSD) and *Comissão de Saúde, Relatório*, rapporteur Maria Antónia Almeida Santos (PS), in: *Assembleia da República, Comissão de Assuntos Europeus, "Parecer sobre a Proposta de Resolução no. 68/X – Aprova o Tratado de Lisboa"*, rapporteurs Ana Catarina Mendes (PS) and Mário David (PSD), p. 57-58.

<sup>609</sup> *Assembleia da República, Comissão de Assuntos Europeus, "Parecer sobre a Proposta de Resolução no. 68/X – Aprova o Tratado de Lisboa"*, rapporteurs Ana Catarina Mendes (PS) and Mário David (PSD), p. 66.

European Affairs Committee resembled that of the Government.<sup>610</sup> Furthermore, Ana Catarina Mendonça (PS) cited as one of the merits of the Lisbon Treaty the extension of the decision-making powers of the European Parliament.<sup>611</sup> Developing the same argument, Mário Santos David (PSD) argued that the increased legitimacy of the European Parliament raised the profile of European elections and that "it is indispensable that our nations get used to regarding them as equally important for the shaping of their future as legislative elections in each state".<sup>612</sup>

Dissent among the opposition camps was not particularly vocal. For instance, Francisco Madeira Lopes (Greens) underscored that it is of fundamental importance for EU democracy to tighten the bond between MEPs and MPs and reprimanded the Government, which was to assume the Presidency of the Council in a few days, for not envisaging the meetings and discussions of the Presidency agenda between MPs and representatives of all political groups of the European Parliament, whose visit to Portugal for that purpose had already been planned.<sup>613</sup>

## **6. CONCLUDING REMARKS**

The reflections on interparliamentary cooperation in the phases leading to the Lisbon Treaty have begun to crystallise the conclusion that the European Parliament and national parliaments are partners in the same area of business but that each of them conducts their operations from their own headquarters. Formalised meetings between parliamentarians across levels do not appear to be of paramount importance for EU policy scrutiny. It flows both from the European Parliament's resolutions and from the national parliaments' statements that cooperation is perhaps most feasible if organised informally and if focused on substantial political issues.

With an embellished set of rights enshrined in the founding treaties, the national parliaments' constitutional position in the Union seems affirmed. Though not far-reaching, these rights are 'material evidence' that national parliaments have been co-opted into the European constitutional order as autonomous players.<sup>614</sup> The most promising avenue of their direct participation in EU decision making lies in

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<sup>610</sup> See the speech by José Socrates (PS), Prime Minister of Portugal: "As far as European citizenship and democracy is concerned, a central objective of the reform was also to reduce the distance between European institutions and European citizens. The Treaty of Lisbon gives many answers to this preoccupation: it increases the role of the European Parliament and national parliaments; it consecrates the right of citizens to submit to the European Commission proposals for legislative initiatives and enshrines participatory democracy. A second key characteristic of the Treaty of Lisbon is the improvement of the decision-making process within the Union". *Diário da Assembleia da República, I Série, No. 75*, 24 April 2008, p. 6.

<sup>611</sup> *Diário da Assembleia da República, I Série, No. 75*, 24 April 2008, p. 22.

<sup>612</sup> *Diário da Assembleia da República, I Série, No. 75*, 24 April 2008, p. 28.

<sup>613</sup> *Diário da Assembleia da República, I Série, No. 99*, 28 June 2007, pp. 32-33.

<sup>614</sup> Yet they might act within this order without explicit regard to these rights. Such action can be based on the interdependent behaviour of parliaments at the national and EU levels by reacting strategically to each other's activities. This will be tested empirically in Part III of the book.

sustaining the *ex ante* accountability of the relevant decision-making actors. Overall, the parliaments examined seem to accept this role.

In France, the linkage between subsidiarity monitoring and EU legitimacy is especially underscored. This is understandable given the negative outcome of the 2005 referendum on the Constitutional Treaty. Both the *Assemblée nationale* and the *Sénat* are, thus, fully aware of the need to immerse themselves more deeply into the 'mission' of democratic legitimisation of EU activities. In coherence with this, the French Parliament viewed the good functioning of the Union particularly from the standpoint of the necessity of a further politicisation of the EU policy-shaping process, because national parliaments, as the best intermediaries with the citizens, are the most disposed forum for this task.<sup>615</sup> For the majority of the parliamentarians, the Lisbon Treaty is the affirmation that their status of popular representatives is relevant for a cause that is broader than their own Member State. Similarly, with the exception of isolated voices of dissent, the extension of codecision was cheered as essential to the Union's democratic development. Finally, the French parliamentary approval of the Lisbon Treaty is well encapsulated in the *Assemblée nationale*'s caveat that: "The quality of the contribution of a Member State to the building of the policy of the Union is very significantly linked to the strength of its Parliament's involvement in European affairs".<sup>616</sup>

In Britain, the usefulness of the early warning mechanism, otherwise not winning the hearts of MPs and peers, was closely related to the possibility of acting autonomously from the Government. The Barroso initiative, though not a radical innovation for the British, was accepted as a more worthwhile procedure, since it allows for dialogue on political issues and the substance of EU policies. These standpoints are indicative of Westminster's positive attitude towards acting within the European constitutional order, despite the view generally held by the political parties that the Government is the main addressee of scrutiny. The good functioning of the Union was resolutely outlawed as a legal obligation and endorsed only as a political obligation. This means that even though the British Parliament does not oppose contributing to the Union's development, it does oppose any possible intrusion by the Union in national constitutional matters. The European Parliament's rise to prominence divided political parties into two camps, with the Labour and Liberal Democrats welcoming it and the Conservatives and UK Independence Party rejecting it. Hence, Westminster's partnership with the European Parliament was contested.

In Portugal, the Assembly not only saw itself as a guardian of subsidiarity, it decided to focus its scrutiny on subsidiarity assessment. The enthusiasm towards performing this task can be explained by the lack of an established culture of scrutiny. In this respect, the principle of subsidiarity provides an incentive for MPs

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<sup>615</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport no. 562 sur le traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 108-109.

<sup>616</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport no. 562 sur le traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 107.

regularly to engage in the examination of European policies. Such practice might in turn serve as a gangplank towards a fuller, more substantive analysis of EU affairs. Then, the Assembly wholeheartedly embraced its contribution to the good functioning of the Union. Importantly, this is to be accomplished in alliance with its 'sister institution', the European Parliament, whose coming of age was very positively regarded. In retrospect, one is bound to observe that the Assembly's approach to the ratification of the Lisbon Treaty differed from that in Britain and, to a lesser extent, France. Rather than critically scrutinising every nook and cranny of it, the method used was one of dissemination of information about the Treaty and of familiarising the citizenry with it.<sup>617</sup> This is hardly surprising for two main reasons. On the one hand, things European are, except by a few opposition factions, not disputed. There is a large consensus in the political milieu that European integration is highly beneficial for Portugal. During the Assembly plenary debate commemorating 50 years of the Treaty of Rome, Armando França (PS) illustrated how deeply the European project penetrated the pores of Portuguese society and why, therefore, the EU is considered the key determinant of Portuguese prosperity:

[A]fter Portugal's accession to the Community, our country consolidated its political institutions and stabilised its democracy, the Portuguese freed themselves from ancestral and inhibitory isolation and the country could make great leaps in the fields of basic infrastructure, road and railroad, modernisation of the production apparatus, new technologies, combating inflation, health, life expectancy, child mortality rate, schooling rate, the fight against the stigmatising fester of illiteracy, mobility and development in general. These are the results of the integration of Portugal and the Portuguese in the economic, social and political space of Europe. These are the results that help fortify our conviction that the European project is a political project [...]"<sup>618</sup>

On the other hand, the fledgling scrutiny apparatus of the Assembly, inaugurated as recently as 2006, has not attained the level of detail found in the parliamentary chambers with longer traditions of scrutiny. In the end, approving the founding treaty bearing the name of the country's capital is also a matter of national pride and the symbol of what the Portuguese understand as their "enormous contribution to the

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<sup>617</sup> This approach to ratification was captured well by Ana Catarina Mendonça (PS) in one of her plenary interventions: "[T]he choice is very simple: a Europe with a new deadlock, stagnating, tied to outdated rules; or a Europe that is debated, participatory, with a greater scrutiny and discussion in national parliaments, closer to the citizens, with *parliaments and MPs responsible for explaining this Treaty to the citizens, who are eager to know about it*". *Diário da Assembleia da República, I Série, No. 45*, 8 February 2008, p. 33 (emphasis added).

<sup>618</sup> *Diário da Assembleia da República, I Série, No. 65*, 29 March 2007, p. 18.

## Chapter 5

termination of the institutional impasse" occasioned by the demise of the Constitutional Treaty.<sup>619</sup>

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<sup>619</sup> *Assembleia da República, Comissão de Assuntos Europeus, "Parecer sobre a Proposta de Resolução no. 68/X – Aprova o Tratado de Lisboa"*, rapporteurs Ana Catarina Mendes (PS) and Mário David (PSD), p. 66.

## **Part II**

# ***COMPETENCES***

**\*\*\***

***EUROPEAN SCRUTINY AFTER LISBON:  
LOCKED AND LOADED***



## 1. OBJECTIVES

As shown in the previous chapter, the Treaty of Lisbon envisages certain scrutiny roles for national parliaments. It highlights, too, the constitutional autonomy of the Member States, recognising that "the way in which national parliaments scrutinise their governments in relation to the activities of the European Union is a matter for the particular constitutional organisation and practice of each Member State".<sup>620</sup> In the following three chapters, we examine how these roles have been internalised. To this end, we conduct a detailed analysis of the competences of European scrutiny of the French, British and Portuguese parliaments. This will permit us to assess in how far these competences have Europeanised. Based on the existing definitions, we define the Europeanisation of national parliaments as a process of domestic adaptation to pressures derived from the EU level in which national parliaments redefine their interests and scrutiny powers according to the norms, challenges and logic of EU membership.<sup>621</sup> Yet we go beyond the powers that parliaments have crafted in response to European integration and ask who the addressees of scrutiny are.

EU primary law, which was the theme of Part I, is not the only source and engine of the Europeanisation of national parliaments. The latter's European scrutiny is inextricable from and to a considerable extent shaped by the constitutional context in which they exist and function. It is vital to understand this context in some degree of detail, because the meaning of parliamentary rights and duties with regard to EU decision making is deeply embedded within it.<sup>622</sup> As Legrand reminds us, "interpretation is the result of a particular understanding of the rule that is influenced by a series of factors [...] which would differ if the interpretation had occurred in another place or in another area".<sup>623</sup> Given our focus on the relationship and interaction between institutions pertaining to the national and European juridico-political orders, Tushnet's caveat about contextualism appears highly relevant. As he rightly observes, though contextualism tends to place excessive emphasis on the

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<sup>620</sup> Recital 1 of Protocol no. 1 on the role of national parliaments in the European Union attached to the Lisbon Treaty. It has been argued, therefore, that it would be unfair only to blame the Union for the relative efficiency of national parliamentary scrutiny of EU affairs. Pech, Laurent. *The European Union and its constitution: from Rome to Lisbon*, Dublin: Clarus Press, 2008: 101 and 105-106.

<sup>621</sup> Auel, Katrin. "Introduction: the Europeanisation of parliamentary democracy," *Journal of Legislative Studies*, Vol. 11, No. 3, 2005: 304-305. See also: Auel, Katrin and Benz, Arthur. "The politics of adaptation: The Europeanisation of national parliamentary systems," *Journal of Legislative Studies*, Vol. 11, No. 3, 2005: 372-393.

<sup>622</sup> For example, addressing constitutionalism, Walker has rightly argued that "we cannot understand particular concepts in isolation, but must look at the overall constitutional scheme and indeed the deeper context of political opportunity, constraint and motivation in which it is embedded". Walker, Neil. "Postnational constitutionalism and the problem of translation," in *European constitutionalism beyond the state*, by Joseph H.H. Weiler and Marlene Wind (eds), Cambridge: Cambridge University Press, 2003: 38.

<sup>623</sup> Legrand, Pierre. "What "legal transplants"?", in *Adapting legal cultures*, by David Nelken and Johannes Feest (eds), Oxford: Hart Publishing, 2001: 58.

idiosyncrasies of the legal orders studied, doctrines and institutions underlying constitutional designs are elastic categories. A nation, he maintains, is capable of harbouring more than a single self-understanding, since "'[w]ho we are' is often – perhaps always – contestable and actively contested".<sup>624</sup> Since a nation's political will is chiefly represented in parliament, the latter is supposedly also able to have more self-understandings. One of them might be that parliament is called upon to act not only pursuant to its congenital, domestically engendered constitutional code but also within the contexts to which its political community belongs, such as the EU context.

The importance of national constitutional contexts also stems from the fact that the heterogeneity of national parliaments and the differences between the constitutional traditions and political cultures of the Member States have posed an obstacle to many forms of cross-level interparliamentary cooperation, such as COSAC, the Conference of Speakers and even bilateral committee meetings with the European Parliament.<sup>625</sup>

Each chapter of this part of the book, therefore, begins with a thorough analysis of the position of the parliament concerned in the national constitutional order, with an emphasis on the relations with the executive branch.

## 2. METHOD

In order to grasp the constraints and possibilities of national parliaments within the European constitutional order, we inquire about four key elements of European scrutiny. First, we ask what *information* a given parliament can access and what the sources of information are. Second, once information is obtained, the parliament may decide to make a pronouncement by means of scrutiny *instruments* and we inquire into the types, nature and *modus operandi* of these instruments. Third, the utility of these instruments can vary according to the subject-matter. We thus analyse the *scope* of scrutiny and examine the attitude of the parliament towards different decision-making contexts. Fourth, once a scrutiny instrument is employed, it can be aimed at both national and European levels. We zoom in on the *addressees* of scrutiny, wishing to establish whether there are instances when the addressees are EU institutions.

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<sup>624</sup> Tushnet, Mark. "Some reflections on method in comparative constitutional law," in *The migration of constitutional ideas*, by Sujit Choudhry (ed.), Cambridge: Cambridge University Press, 2006: 83.

<sup>625</sup> The national divisions that hinder interparliamentary cooperation include the attitude towards European integration, the relations between parliament and government, the concept of sovereignty, specific national interests, etc. Costa, Olivier and Latek, Marta. "Paradoxes et limites de la coopération interparlementaire dans l'Union européenne," *Journal of European Integration*, Vol. 23, No. 2, 2001: 147 and 150. What is more, these two authors have argued that mistrust and caution towards interparliamentary cooperation are the only points of agreement between national and European parliamentarians (p. 151). See similar arguments in: Latek, Marta. "Le poids des traditions parlementaires nationales dans le développement de la coopération interparlementaire. La participation française et britannique à la COSAC," *Politique Européenne*, No. 9, 2003/1: 143-163; Kiiver, Philipp. *National parliaments in the European Union: a critical view on EU constitution-building*, The Hague: Kluwer Law International, 2006: 132.

For all of the four elements, the following chapters refer to the national parliaments' treatment of Community decision making. In order to account for differences that non-Community fields exhibit, special sections are added, on the one hand, for the Area of Freedom, Security and Justice and, on the other, for Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP). These are followed by a somewhat more detailed discussion of the implications for national parliamentary scrutiny of the processes of an open method of coordination and comitology. These two types of EU decision making are not dealt with empirically due to the absence of parliamentary scrutiny.

## **2.1. Area of Freedom, Security and Justice**

Unlike the other three elements, the scope of national parliamentary scrutiny of EU decision making necessitates a few preliminary explanations. As we sought to provide more than a panoramic overview of EU-related competences of national parliaments, out of a myriad of Community and non-Community policy fields we singled out the Area of Freedom, Security and Justice for closer inspection as a policy cluster that could yield the most comprehensive insight along several lines.

First, this Area has been the most turbulent policy-making region of the Union since its inception in 1992. Chiefly, the decisional powers of the actors involved have undergone important changes.<sup>626</sup> Through the gradual extension of codecision, the European Parliament has won a co-equal say with the Council. Concomitantly, the move to qualified majority voting in the Council has divested national parliaments of a chance to exert decisive influence on EU decisions through their governments, because the Member States no longer possess the right of veto. In turn, national parliaments reacted strategically. They requested their governments to stop treating justice and home affairs as purely foreign affairs and, thus, as the exclusive prerogative of the executive.<sup>627</sup> The position of parliaments is succinctly summed up by Peers: "The JHA arrangements before the Treaty of Lisbon were problematic because in most cases they did not ensure sufficient democratic input from either the European Parliament or national parliaments or efficient or coherent decision making".<sup>628</sup>

Second, relations between the European and national parliaments in this Area are still insufficiently coordinated. As reported by Emilio de Capitani, an official from the European Parliament's Committee for Civil Liberties, Justice and Home Affairs,

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<sup>626</sup> See an overview of the institutional changes in this area in: Monar, Jörg. *The institutional dimension of the European Union's Area of Freedom, Security and Justice*, Brussels: P.I.E. Peter Lang, 2010; Peers, Steve. "Legislative update: EU immigration and asylum competence and decision-making in the Treaty of Lisbon," *European Journal of Migration and Law*, Vol. 10, No. 2, 2008: 219-247.

<sup>627</sup> Weber-Panariello, Philippe A. "The integration of matters of justice and home affairs into Title VI of the Treaty on European Union: a step towards more democracy," *EUI Working Paper RSC no. 95/32*, 1995: 54.

<sup>628</sup> Peers, Steve. "Mission accomplished? EU justice and home affairs law after the Treaty of Lisbon," *Common Market Law Review*, Vol. 48, No. 3, 2011: 664.

MEPs are in most cases unaware of the reservations of their national counterparts and find out about them by sheer accident or at the initiative of the latter.<sup>629</sup> To ameliorate this state of affairs, a sort of interparliamentary diplomacy across levels appears indispensable.<sup>630</sup> Remedying the lacunas that persist in the collaboration of parliaments at the EU and national levels is all the more important, since decisions adopted in the Area of Freedom, Security and Justice are perhaps susceptible of affecting the fundamental rights of ordinary citizens more directly and more profoundly than in other fields of EU action.

Third, competence delimitation has been controversial throughout the Area's evolution with frequent disputes over the matter between the Member States and the Commission. This Area, therefore, provides ample ground to test how national parliaments in practice reacted to these changes that potentially affected their exercise of scrutiny competences. To do so, in the next three chapters we take as small-scale case studies the issue of the Union's recourse to the passerelles envisaged in the former EC and EU Treaties, the extension of EU criminal law competence and the conversion of Europol into an EU agency. We introduce them below in more general terms to provide background information.

### 2.1.1. Passerelles

At the time, the uncertain future of the Constitutional Treaty sparked discussions on the institutional improvements that can be effected without changing the founding treaties, among which the use of the existing passerelles featured prominently.

Although the Third Pillar came under the Community umbrella in its entirety in 2009, the EU policies on visas, asylum, immigration and other policies related to the free movement of persons had already been transferred to the Community pillar, by means of the Amsterdam Treaty, in 1999.<sup>631</sup> However, the passage to codecision and qualified majority voting in the Council in the transferred fields was, with certain exceptions, deferred for five years. After the expiry of this period, the Council was, under the passerelle laid down in the former Article 67(2) TEC, obliged to enact a decision to effect this change in the decision-making rules.<sup>632</sup> This it did on 22 December 2004.<sup>633</sup>

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<sup>629</sup> Capitani, Emilio de. "Le Parlement européen et les parlements nationaux face à la réalisation de l'espace de liberté, de sécurité et de justice," *Revue Française d'Administration Publique*, No. 129, 2009/1: 37.

<sup>630</sup> Capitani, Emilio de. "Le Parlement européen et les parlements nationaux face à la réalisation de l'espace de liberté, de sécurité et de justice," *Revue Française d'Administration Publique*, No. 129, 2009/1: 40.

<sup>631</sup> See: Peers, Steve. "Transforming decision making on EC immigration and asylum law," *European Law Review*, Vol. 30, No. 2, 2005: 285-296.

<sup>632</sup> The former Article 67(2) TEC used to read: "After this period of five years: – the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council, – the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the

Another passerelle, laid down in former Article 42 TEU, permitted the Council to transfer certain Third Pillar fields to the First Pillar as well as to decide the applicable decision-making procedure and voting method.<sup>634</sup>

The activation of these two passerelles would and, in the case of the former, did modify the EU decision-making rules in the fields concerned. An analysis of the scrutiny of the passerelles, where it was conducted, can unveil the attitude of national parliaments towards the legitimacy that the European Parliament furnishes to the Union.

### **2.1.2. The Environmental Crimes case**

In September 2005, the Court of Justice, acting upon the Commission's action for the annulment of the Council framework decision on criminal penalties in the field of the environment, handed down what has become known as the *Environmental Crimes* judgment, which elicited a vast academic reaction.<sup>635</sup> The Court of Justice ruled in

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powers of the Court of Justice." Article 67 TEC was introduced by the Amsterdam Treaty as 73o and was deleted by the Lisbon Treaty.

<sup>634</sup> Article 1 of the Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (*OJ L396/45* of 31.12.2004). As a consequence of the activation of the passerelle, the Council, acting by a qualified majority and jointly with the European Parliament, was to decide the following measures: ensuring the absence of any controls on persons when crossing internal borders; establishing standards and procedures of checks to be carried out by the Member States on persons at the Union's external borders; setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months; promoting a balance of effort between the Member States in receiving and bearing the consequences of receiving refugees and displaced persons; and regulating illegal immigration, illegal residence and the repatriation of illegal residents.

<sup>634</sup> The former Article 42 TEU was introduced by the Amsterdam Treaty and used to read: "The Council, acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, may decide that action in areas referred to in Article 29 shall fall under Title IV of the Treaty establishing the European Community, and at the same time determine the relevant voting conditions relating to it. It shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements".

<sup>635</sup> Case C-176/03, *Commission v. Council*, 13 September 2005, paras 47-48. The Commission sought the annulment of the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (*OJ L29/55* of 5.2.2003) on the ground that the Council's choice of a framework decision was erroneous. The Commission had previously proposed a directive in this regard, but it failed because it could not garner support for it within the Council. After that, the Council decided to change the legal basis and proceed with a third-pillar instrument instead. See case notes and analyses in: Tobler, Christa. "Case C-176/03, Commission v. Council," *Common Market Law Review*, Vol. 43, No. 3, 2006: 835-854; Herlin-Karnell, Ester. "Commission v. Council: some reflections on criminal law in the First Pillar," *European Public Law*, Vol. 13, No. 1, 2007: 47-67; White, Simone. "Harmonisation of criminal law under the First Pillar," *European Law Review*, Vol. 31, No. 1, 2006: 81-92; Labayle, Henri. "L'ouverture de la jarre de Pandore, réflexions sur la compétence de la Communauté en matière pénale," *Cahiers de Droit Européen*, Vo. 42, No. 1-2, 2006: 379-428; Haguenu-Moizard, Catherine. "Arrêt du 13 septembre 2005, Commission des Communautés européennes c/ Conseil de l'Union européenne," *Revue Trimestrielle de Droit Européen*, Vol. 42, No. 2, 2006: 369-388; Chaltiel, Florence. "Arrêt CJCE Commission c./Conseil, du 13 septembre 2005 - Une nouvelle avancée de l'idée de souveraineté

favour of the Commission affirming that the Community possessed the competence to oblige the Member States to lay down penal sanctions for the purpose of environmental protection, notwithstanding the otherwise applicable general rule that neither criminal law nor the rules of criminal procedure fall within the Community's competence. The penal sanctions would, however, need to be essential for combating serious environmental offences and necessary to ensure fully effective protection of the environment. The matter, thus, fell under the First Pillar instead of under the Third Pillar.<sup>636</sup>

Oil was added to the fire when the Commission presented a rather extensive interpretation of the judgment, arguing: (a) that the reasoning of the Court of Justice was not restricted to the field of the environment but that it could be applied to all Community policies as well as the four freedoms of movement (of persons, goods, services and capital); (b) that the Community's penal competence was limited only by the tests of necessity and consistency, leaving out the test of essentiality; (c) that the Community, apart from imposing the enactment of sanctions, could also define the constitutive elements of the offences as well as the nature and level of the sanctions to be applied; and (d) that, consequently, a whole list of other framework decisions were entirely or partly adopted on the wrong legal basis.<sup>637</sup>

This case carries a crucial interpretation of competence delimitation between the Union and the Member States and, thus, represents an excellent testing ground for whether and, if so, how national parliaments scrutinise the Court of Justice as a judicial branch.

### 2.1.3. Europol

The political accountability of European agencies is precarious, as neither the European Parliament nor national parliaments have formal or factual powers to hold them to account.<sup>638</sup> As regards Europol, the picture is equally bleak. This agency was established by a Council Decision some six months before the entry into force of the

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européenne: la souveraineté pénale en devenir," *Revue du Marché Commun et de l'Union Européenne*, No. 494, 2006: 24-28; Dawes, Anthony and Lynskey, Orla. "The ever-longer arm of EC law: the extension of Community competence into the field of criminal law," *Common Market Law Review*, Vol. 45, No. 1, 2008: 131-158; Faure, Michael G. "Effective, proportional and dissuasive penalties in the implementation of the environmental crime and ship-source pollution directives: questions and challenges," *European Energy and Environmental Law Review*, Vol. 19, No. 6, 2010: 256-278.

<sup>636</sup> Immediate corollaries thereof were that the Commission would no longer share the right of initiative with the Member States, that the Council would act together with the European Parliament by qualified majority, that the legal instruments thus adopted would or could be directly applicable, that the Commission could initiate infringement proceedings, and that the Court of Justice could fully exercise its jurisdiction without the need for the Member States to declare their acceptance of its jurisdiction.

<sup>637</sup> European Commission, Communication on the implications of the Court's judgment of 13 September 2005, COM(2005) 583, 24.11.2005, particularly paras 5, 6, 11 and 14.

<sup>638</sup> Bovens, Mark. "New forms of accountability and EU-governance," *Comparative European Politics*, Vol. 5, No. 1, 2007: 114.

Lisbon Treaty.<sup>639</sup> With regard to political accountability, however, this decision only obligates the Presidency of the Council, the Director of Europol and the Chairperson of Europol's Management Board to appear before the European Parliament at its request to discuss matters relating to Europol.<sup>640</sup> It has been argued, therefore, that the European Parliament's powers of sanctioning Europol are, except in budgetary matters, "practically non-existent".<sup>641</sup> If one bears in mind that Europol of late qualifies as an independent European law enforcement agency,<sup>642</sup> the question of its accountability rises in prominence.

Once in force, however, the Lisbon Treaty charged national parliaments with the political monitoring and scrutiny of Europol.<sup>643</sup> In December 2010, the Commission published a communication on the procedures for the parliamentary scrutiny of Europol. Its main proposal was to set up an interparliamentary forum composed of representatives of committees in charge of police matters from both national and European parliaments, before which the Director and Chairman of the Management Board of Europol would be invited to appear. The forum would facilitate the exchange of information between national parliaments and the European Parliament as well as coordinate their scrutiny activities.<sup>644</sup>

Other initiatives for the monitoring of Europol have also spawned, such as to organise Parpol, a forum for the exchange of views between parliamentarians in charge of police and judicial affairs, which first met in The Hague in October 2001.<sup>645</sup> Yet one should bear in mind that, quite apart from institutionalising the democratic accountability of Europol, one of the principal challenges remains, according to a former Deputy Director of Europol, to strike the right balance between

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<sup>639</sup> Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), (OJ L121/37 of 15.5.2009). See more in: Genson, Roland and Buyssens, Erwin. "La transformation d'Europol en agence de l'Union - regards sur un nouveau cadre juridique," *Revue du marché Commun et de l'Union Européenne*, No. 525, 2009: 83-87.

<sup>640</sup> Article 48 of the Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office.

<sup>641</sup> Busuioc, Madalina. *The accountability of European agencies: legal provisions and ongoing practices*, Delft: Eburon, 2010: 117-118. See further: Peers, Steve. "Governance and the Third Pillar: the accountability of Europol," in *Good governance and the European Union: reflections on concepts, institutions and substance*, by Deirdre Curtin and Ramses Wessel (eds), Antwerp: Intersentia, 2005: 253-276.

<sup>642</sup> Groenleer, Martijn. *The autonomy of European Union agencies: a comparative study of institutional development*, Delft: Eburon, 2009: 301.

<sup>643</sup> Articles 12(c) TEU and 88(2)(2) TFEU.

<sup>644</sup> European Commission, Communication to the European Parliament and the Council on the procedures for the scrutiny of Europol's activities by the European Parliament, together with national parliaments, COM(2010) 776, 17.12.2010, p. 15.

<sup>645</sup> Dutch Parliament. *From Europol to Parpol: interparliamentary conference on democratic control of Europol*, Amsterdam: Boom, 2002.

parliamentary control and the need for confidentiality and discretion of a police body dealing with such highly sensitive areas as organised crime and terrorism.<sup>646</sup>

We take a closer look at how national parliaments scrutinised the establishment of Europol, since this dossier is allegedly one of the best examples of their contribution to the transparency and openness of the Union.<sup>647</sup> It also reveals how national parliaments scrutinise EU agencies and whether the arrangements agreed for their democratic oversight are suitable.

## 2.2. Common Foreign and Security Policy and Common Security and Defence Policy

As the only remaining 'pillar' after the Lisbon Treaty, CFSP, together with its integral part CSDP, remains intergovernmental and decisions are made by the Council acting unanimously.<sup>648</sup> The European Parliament's involvement in this area is limited to three rights: (a) to be consulted by the High Representative on the main aspects and basic choices of the CFSP and CSDP and to be informed of how those policies evolve; (b) to put questions to the Council and make recommendations to it and to the High Representative; and (c) to hold debates on progress in implementing these policies twice a year.<sup>649</sup> The European Parliament is, hence, excluded from decision making and its access to information is severely prejudiced by the very nature of the questions dealt with and the urgency required of the Union to assume its responsibilities in global affairs.<sup>650</sup> The resolutions and recommendations that it may adopt on EU military operations are in most cases a "dead letter".<sup>651</sup> While the European Parliament might be described as a marginal player, it strives to exploit Treaty provisions to the maximum by using its budgetary authority in a strategic

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<sup>646</sup> Bruggeman, Willy. "Policing in a European context," in *Justice and Home Affairs in the EU: liberty and security issues after enlargement*, by Joanna Apap (ed.), Cheltenham: Edward Elgar Publishing, 2004: 159.

<sup>647</sup> Kerse, Christopher. "Parliamentary scrutiny in the United Kingdom Parliament and the changing role of national parliaments in European Union affairs," in *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other member state legislatures*, by Gavin Barrett (ed.), Dublin: Clarus Press, 2008: 366.

<sup>648</sup> By way of exceptions laid down in Article 31(2) TEU, the Council acts by qualified majority: (a) when adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives; (b) when adopting a decision defining a Union action or position, on a proposal which the High Representative has presented following a specific request from the European Council; (c) when adopting any decision implementing a decision defining a Union action or position; and (d) when appointing a special representative.

<sup>649</sup> Article 36 TEU.

<sup>650</sup> See to this effect: Stie, Anne Elizabeth. "Decision-making void of democratic qualities? An evaluation of the EU's Second Pillar decision-making procedure," *European Integration online Papers*, Vol. 14, Special No. 1, 2010.

<sup>651</sup> Deschaux-Beaume, Delphine. "La politique européenne de sécurité et de défense et les parlementaires nationaux: une comparaison franco-allemande," *Revue du Marché Commun et de l'Union Européenne*, No. 536, 2010: 183.

manner, by establishing close interinstitutional contacts and by actively seeking information on CFSP and CSDP.<sup>652</sup>

Although the democratic deficit in CFSP has been the topic of all Treaty reforms so far, national governments continue to oppose the empowerment of the European Parliament for many reasons, among which because parliamentary involvement might harm the efficiency and coherence of the policies pursued and because they fear that the European Parliament would be a more agile controller of their activities than national parliaments.<sup>653</sup> However, there is also a view that the very creation of CFSP is an instance of "collusive delegation", whereby governments that enjoy less autonomy from their national parliament in foreign and security policies are expected to be more willing to delegate powers to supranational institutions than governments with a higher degree of autonomy.<sup>654</sup>

In any event, ensuring the democratic control of CFSP and CSDP decision making through national parliaments is critical and interparliamentary cooperation is welcome. Especially in the environment of multilevel governance, the individual action of national parliaments faces multiple constraints, which can be alleviated to a certain extent by various forms of interparliamentary cooperation.<sup>655</sup> As Barber has argued, "even the loose association between the two parliamentary levels acts as a check on extreme positions and as a spur to those which are too passive".<sup>656</sup> While Thym agrees, he warns that the combined influence of national and European parliaments cannot transcend their respective powers under the founding treaties and national constitutions,<sup>657</sup> which continue to curb rather than encourage parliamentary oversight. Where hurdles for cross-level collaboration become difficult to surmount, horizontal interparliamentary collaboration springs to the fore. As Mittag submits, it

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<sup>652</sup> Diedrichs, Udo. "The European Parliament in CFSP: more than a marginal player?," *The International Spectator*, Vol. 39, No. 2, 2004: 45-46. See also: Kietz, Daniela et al. "Interinstitutional agreements in the CFSP: parliamentarisation through the back door?," *European Foreign Affairs Review*, Vol. 10, No. 2, 2005: 175-195.

<sup>653</sup> Barbé, Esther. "The evolution of CFSP institutions: where does democratic accountability stand?," *The International Spectator*, Vol. 39, No. 2, 2004: 54-55.

<sup>654</sup> Koenig-Archibugi, Mathias. "The democratic deficit of EU foreign and security policy," *The International Spectator*, Vol. 37, No. 4, 2002: 66.

<sup>655</sup> Zanon, Flavia. "EU foreign policy cooperation: a challenge for national parliaments?," *European Foreign Affairs Review*, Vol. 15, No. 1, 2010: 37-38.

<sup>656</sup> Bieber, Roland. "Democratic control of European foreign policy," *European Journal of International Law*, Vol. 1, 1990: 155.

<sup>657</sup> Thym, Daniel. "Beyond Parliament's reach? The role of the European Parliament in the CFSP," *European Foreign Affairs Review*, Vol. 11, No. 1, 2006: 123. He also argued that the weak position of the European Parliament in CFSP and CSDP should not necessarily be viewed as an "atypical deviation from the orthodoxy of the Community method", since it is comparable to constitutional arrangements in the Member States, where the powers of national parliaments in foreign policy making are inferior to those of the executive branch (pp. 123-124).

is paramount that contacts between specialised committees of national parliaments be policy-oriented.<sup>658</sup>

While the joint effort by parliaments at the national and EU levels is still rudimentary, parliamentary supervision of CSDP is perhaps the most acutely deficient.<sup>659</sup> As an empirical analysis demonstrated on the examples of the Artemis mission in the Democratic Republic of Congo and the Concordia mission in the Former Yugoslav Republic of Macedonia, the British and French parliaments' *ex ante* accountability was emphatically absent. Neither of the relevant parliamentary committees – such as those in charge of defence, foreign and European affairs – were consulted or given access to the final drafts of the Council decision prior to the launching of these missions.<sup>660</sup> Urgency and secrecy dominate the process. It is an uphill struggle for parliamentary institutions to permeate it and get a grip on the policies shaped secludedly by executive institutions. The Assembly of the Western European Union (WEU) has itself observed, in a resolution adopted in 2001, that parliaments were being sidelined in government decisions on the deployment of national military contingents abroad and that the EU has assumed responsibility for Petersberg tasks<sup>661</sup> without having developed suitable mechanisms of democratic accountability.<sup>662</sup> Bearing in mind the limited supervisory powers of both the European and national parliaments, one could indeed speak of a double democratic

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<sup>658</sup> Mittag, Jürgen et al. *The parliamentary dimension of CFSP/ESDP: options for the European Convention*, TEPSA Brussels & University of Cologne: External Report, 2002: 38.

<sup>659</sup> Bono, Giovanna. "Challenges of democratic oversight of EU security policies," *European Security*, Vol. 15, No. 4, 2006: 440-441; See also: Wagner, Wolfgang. "The democratic control of military power Europe," *Journal of European Public Policy*, Vol. 13, No. 2, 2006: 200-216; Wagner, Wolfgang. "The democratic deficit in the EU's security and defense policy – why bother?," *RECON Online Working Paper 2007/10*; Gourlay, Catriona. "Parliamentary oversight of ESDP: the role of the European Parliament and national parliaments," *Paper presented at the 4<sup>th</sup> Workshop of the Geneva Centre for the Democratic Control of Armed Forces, "Strengthening parliamentary oversight of international military cooperation and institutions", Brussels, 12-14 July 2002*; Peters, Dirk et al. "Parliaments and European Security Policy: mapping the parliamentary field," *European Integration online Papers*, Vol. 14, Special Issue 1, 2010.

<sup>660</sup> Bono, Giovanna. "National parliaments and EU external military operations: is there any parliamentary control?," *European Security*, Vol. 14, No. 2, 2005: 207-208, 211, 215 and 218.

<sup>661</sup> The so-called *Petersberg tasks* were set out in the Declaration adopted on 19 June 1992 by the WEU Ministerial Council held in Hotel Petersberg, which is located on a mountain near Bonn in Germany. The WEU Member States then undertook to make a wide range of their military units available to the WEU, NATO and the EU. These tasks included: (a) humanitarian and rescue tasks; (b) peacekeeping tasks; and (c) crisis management including peacemaking. The Petersberg tasks were incorporated into CFSP by the Amsterdam Treaty in 1999. The Lisbon Treaty expanded the list of tasks to the strengthening of international security, joint disarmament operations, military advice and assistance tasks, conflict prevention and post-conflict stabilisation. See: Articles 42(1) and 43(1) TEU. See also: Western European Union, "Petersberg Declaration", points II.2 and II.4, p. 6, available at: <http://www.weu.int/documents/920619peten.pdf>, accessed on 19 December 2010.

<sup>662</sup> WEU Assembly, Resolution no. 108 on the national parliamentary scrutiny of intervention abroad by armed forces engaged in international missions: the current position in law of 4 December 2001, recitals (ii) and (iii), available at: [http://www.assembly-weu.org/en/documents/sessions\\_ordinaires/rpt/2001/1762.php](http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2001/1762.php), accessed on 19 December 2010.

deficit.<sup>663</sup> As one comprehensive empirical analysis shows, the deficit concerning civilian EU missions is even more patent:

Participation in civilian missions frequently escapes parliamentary attention because of the small number of personnel deployed. For such operations, deployment decisions are often taken at a lower executive level than would be applied to a military mission, with no obligation to report the decision to parliament.<sup>664</sup>

For all these reasons, the accent in the following chapters will be placed on the national parliamentary competences related to CSDP and committing national military forces abroad.

### **2.3. Experimental and comitology decision making**

#### **2.3.1. Open method of coordination**

Rooted in the broad economic policy guidelines introduced by the Maastricht Treaty in 1992 and in the European Employment Strategy introduced by the Amsterdam Treaty in 1997, the open method of coordination (OMC), as a means of shaping EU policies, was born in 2000 at the Lisbon European Council meeting. It was envisaged as a device for achieving the Union's strategic goal of becoming "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion".<sup>665</sup>

The implementation of the OMC is carried out by: (a) fixing *guidelines and timetables* for achieving short, medium and long-term goals; (b) establishing quantitative and qualitative *indicators and benchmarks*; (c) setting specific policy *targets* and adopting *measures* on the basis of these guidelines; and (d) periodic *monitoring, evaluation and peer review*.<sup>666</sup> This mechanism is operationalised through national action plans, which outline the policies that each Member State intends to put in place according to the Union's recommendations, as well as through subsequent joint reports by EU institutions on the adequacy of these plans for the attainment of the pre-set objectives. Community lawmaking instruments are thus not used. No legal sanctions exist for disciplining non-compliant Member States, so

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<sup>663</sup> Delcamp, Alain. "Les parlements nationaux et l'Union européenne: de la reconnaissance à l'engagement," *Revue du Marché Commun et de l'Union Européenne*, No. 544, 2011: 11-12; Deschaux-Beaume, Delphine. "La politique européenne de sécurité et de défense et les parlementaires nationaux: une comparaison franco-allemande," *Revue du Marché Commun et de l'Union Européenne*, No. 536, 2010: 182. See further essays in: Born, Hans and Hänggi, Heiner (eds). *The 'double democratic deficit': parliamentary accountability and the use of force under international auspices*, Aldershot: Ashgate Publishing, 2004.

<sup>664</sup> Anghel, Suzana et al. "National parliamentary oversight of ESDP missions," in *The parliamentary control of European security policy*, by Dirk Peters et al. (eds), Oslo: ARENA Report No. 7/08, 2008: 59.

<sup>665</sup> Presidency Conclusions, Lisbon European Council, 23-24 March 2000, paras 5 and 7.

<sup>666</sup> Presidency Conclusions, Lisbon European Council, 23-24 March 2000, para. 37.

courts have no jurisdiction to decide on OMC matters. No 'hierarchy' exists in the relations between the actors involved either. Hence, the OMC is an experimental decision-making territory,<sup>667</sup> whose creation was inspired by the need for the Union, on the one hand, to respect the limits of powers conferred upon it by the Treaties and, on the other, to act in areas that demand policy convergence but which are sensitive enough for Member States to refuse to pool their national sovereignty.<sup>668</sup>

This soft law approach, it has been argued, is disadvantageous to national parliamentary scrutiny.<sup>669</sup> The intergovernmental nature of the OMC flies in the face of good governance principles such as transparency, accountability and democratic input.<sup>670</sup> This jeopardises the provision of information to national parliaments. Even where information is made available, it is mainly done after national action plans are sent to Brussels.<sup>671</sup> As Benz has emphasised, even though the challenge for national parliaments does not lie in a lack of power but in a lack of information, "the OMC cannot solve the problems of accountability in multilevel governance as long as it is regarded as a deliberative mode of collective policy learning".<sup>672</sup> To the contrary:

[T]he 'soft' coordination via inter-jurisdictional lesson drawing and multilevel deliberation increases information asymmetries, facilitates the blame game due to

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<sup>667</sup> Yet this type of governance is not present exclusively in the European Union. See the American experience in: Dorf, Michael C. and Sabel, Charles F. "A constitution of democratic experimentalism," *Columbia Law Review*, Vol. 98, No. 2, 1998: 267-473.

<sup>668</sup> Szyszczak, Erika. "Experimental governance: the open method of coordination," *European Law Journal*, Vol. 12, No. 4, 2006: 489 and 491. See further in: Sabel, Charles F. and Zeitlin, Jonathan. "Learning from difference: the new architecture of experimentalist governance in the EU," *European Law Journal*, Vol. 14, No. 3, 2008: 271-327; Porte, Caroline de la. "Is the open method of coordination appropriate for organising activities at European level in sensitive policy areas?," *European Law Journal*, Vol. 8, No. 1, 2002: 38-58; Trubek, David M. and Trubek, Louise G. "Hard and soft law in the construction of social Europe: the role of the open method of co-ordination," *European Law Journal*, Vol. 11, No. 3, 2005: 343-364; Hodson, Dermot and Maher, Imelda. "The open method as a new mode of governance: the case of soft economic policy co-ordination," *Journal of Common Market Studies*, Vol. 39, No. 4, 2001: 719-746; Regent, Sabrina. "The open method of coordination: a new supranational form of governance?," *European Law Journal*, Vol. 9, No. 2, 2003: 190-214.

<sup>669</sup> Mörrth, Ulrika. *Soft law in governance and regulation: an interdisciplinary analysis*, Cheltenham: Edward Elgar Publishing, 2004: 88; Borrás, Susana and Jacobsson, Kerstin. "The open method of co-ordination and new governance patterns in the EU," *Journal of European Public Policy*, Vol. 11, No. 2, 2004: 199; Porte, Caroline de la and Nanz, Patrizia. "The OMC - a deliberative-democratic mode of governance? The cases of employment and pensions," *Journal of European Public Policy*, Vol. 11, No. 2, 2004: 278; Borrás, Susana and Greve, Bent. "Concluding remarks: new method or just cheap talk?," *Journal of European Public Policy*, Vol. 11, No. 2, 2004: 334.

<sup>670</sup> Szyszczak, Erika. "Experimental governance: the open method of coordination," *European Law Journal*, Vol. 12, No. 4, 2006: 495.

<sup>671</sup> O'Brennan, John and Raunio, Tapio. "Conclusion: national parliaments gradually learning to play the European game?," in *National parliaments within the enlarged European Union: from victims of integration to competitive actors?*, by John O'Brennan and Tapio Raunio (eds), Abingdon: Routledge, 2007: 281.

<sup>672</sup> Benz, Arthur. "Accountable multilevel governance by the open method of coordination?," *European Law Journal*, Vol. 13, No. 4, 2007: 516.

fragmented responsibility and does not avoid the confrontation of diverging demands and expectations between governments and their parliaments.<sup>673</sup>

Not all scholars consider the OMC to be detrimental to national parliamentary involvement, however. Duina and Raunio, for instance, argue that while national parliaments remain marginalised on the input side of the OMC, their benefit on the output side of it is twofold. First, while traditional EU law severely reduces the scope for national parliamentary intervention, the OMC provides guidance that can facilitate the enactment of more cohesive and efficient domestic laws. Second, since the OMC furnishes the "public report card on the policy performance" of each participating Member State, opposition parties have "exceptional munitions for attacking the executive branch". Faced with policy alternatives espoused by other Member States, governments would not be able to dismiss their parliaments' criticism as light-heartedly but would instead be practically enticed to explain the policy choices they thought best suited for meeting the OMC objectives.<sup>674</sup> Another factor favourable to national parliaments resides in the fact that OMC instruments are as a rule adopted by unanimity, which, supposedly, allows for tighter national parliamentary control of the governments.<sup>675</sup> All these considerations may be conducive to viewing a given national parliament as "the regulatory institution of society".<sup>676</sup> Nevertheless, this all refers to *ex post* dynamics of parliamentary participation.

As regards *ex ante* scrutiny of the OMC, national parliaments remain largely bypassed. Reasons can be found in the modest outcomes of the OMC, the intergovernmental nature of the framework within which it develops, the fluidity of the process and its non-binding character.<sup>677</sup> This does not qualify the fact that most

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<sup>673</sup> Benz, Arthur. "Accountable multilevel governance by the open method of coordination?," *European Law Journal*, Vol. 13, No. 4, 2007: 516-517.

<sup>674</sup> Duina, Francesco and Raunio, Tapio. "The open method of co-ordination and national parliaments: further marginalisation or new opportunities?," *Journal of European Public Policy*, Vol. 14, No. 4, 2007: 496.

<sup>675</sup> O'Brennan, John and Raunio, Tapio. "Conclusion: national parliaments gradually learning to play the European game?," in *National parliaments within the enlarged European Union: from victims of integration to competitive actors?*, by John O'Brennan and Tapio Raunio (eds), Abingdon: Routledge, 2007: 280; Duina, Francesco and Raunio, Tapio. "The open method of co-ordination and national parliaments: further marginalisation or new opportunities?," *Journal of European Public Policy*, Vol. 14, No. 4, 2007: 497.

<sup>676</sup> Duina, Francesco and Oliver, Michael J. "National parliaments in the European Union: are there any benefits to integration?," *European Law Journal*, Vol. 11, No. 2, 2005: 184.

<sup>677</sup> O'Brennan, John and Raunio, Tapio. "Conclusion: national parliaments gradually learning to play the European game?," in *National parliaments within the enlarged European Union: from victims of integration to competitive actors?*, by John O'Brennan and Tapio Raunio (eds), Abingdon: Routledge, 2007: 281; Raunio, Tapio. "Does OMC really benefit national parliaments?," *European Law Journal*, Vol. 12, No. 1, 2006: 131.

national parliaments debate or are consulted on the Lisbon Strategy itself.<sup>678</sup> Regular joint parliamentary meetings held in this field help to narrow the perceived *ex ante* accountability gap.<sup>679</sup> Yet it is the actual implementation of the OMC that escapes parliamentary attention. Indeed, of the parliaments studied in this book, only the House of Lords seems to scrutinise the OMC proper. Neither the French nor the Portuguese parliaments engage in this type of scrutiny.<sup>680</sup>

### 2.3.2. Comitology

When the EU legislature decides to entrust the concretisation of a given legislative act to a committee of national policy experts, comitology is at work. Some 250 such committees formally exist and their job is to work out the technical details of EU legislation.<sup>681</sup> More often than not this requires expertise that MEPs and national ministers acting in the Council do not possess. The impact of comitology decisions is far from being negligible, however. In fact, the reason why comitology committees were established lies partly in the Member States' recognition of the fact that policy implementation confers considerable powers on the Commission.<sup>682</sup> In order to keep a watch on it, the Member States decided to install comitology committees. As the time passed, the comitology participants acquired a degree of autonomy, thereby raising the question of their own accountability.<sup>683</sup>

By virtue of the 2011 Comitology Regulation, the European Parliament's prerogatives in this respect are restricted to basic acts adopted pursuant to the ordinary legislative procedure and consist merely in providing the Commission with a non-binding indication that an implementing act exceeds the implementing powers.<sup>684</sup> As an antidote to the fallacies in the accountability of comitology committees, it has been proposed that civil servants participating therein should

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<sup>678</sup> Tsakatika, Myrto. "A parliamentary dimension for EU soft governance," *Journal of European Integration*, Vol. 29, No. 5, 2007: 552.

<sup>679</sup> Tsakatika, Myrto. "A parliamentary dimension for EU soft governance," *Journal of European Integration*, Vol. 29, No. 5, 2007: 560.

<sup>680</sup> COSAC Secretariat, *Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire*, prepared for XXXVIII COSAC held in Estoril from 14-16 October 2007, pp. 46, 51 and 115.

<sup>681</sup> The list of comitology committees is available at: <http://ec.europa.eu/transparency/regcomitology/index.cfm?clx=en>.

<sup>682</sup> See another view in: Blom-Hansen, Jens. "The origins of the EU comitology system: a case of informal agenda-setting by the Commission," *Journal of European Public Policy*, Vol. 15, No. 2, 2008: 208-226.

<sup>683</sup> Dehousse, Renaud. "Comitology: who watches the watchmen?," *Journal of European Public Policy*, Vol. 10, No. 5, 2003: 798-813.

<sup>684</sup> Article 11 of Regulation 182/2011 of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (*OJL 55/13* of 28.2.2011). See also Article 291(2)-(3) TFEU. See more on comitology after the Lisbon Treaty in: Hofmann, Herwig. "Legislation, delegation and implementation under the Treaty of Lisbon: typology meets reality," *European Law Journal*, Vol. 15, No. 4, 2009: 482-505.

render account to their superiors from national governments.<sup>685</sup> This is certainly desirable. Yet this solution is not a form of political accountability, which requires the forum to be a parliament. In other words, the lack of accountability *to a parliament* would be counterbalanced with accountability *to a government*. But it is precisely the governments, and their ability to profit from the loopholes of the Union's multilevel governance, which are the source of the notorious democratic deficit. Governments as accountability forums of final instance can only mitigate the problem somewhat.

The question then arises of the possible contribution of national parliaments to accountable comitology decision making by holding ministers to account for their Member State's input.<sup>686</sup> As with the OMC, however, parliaments are in principle withdrawn from this type of scrutiny. Unlike Westminster, neither the French nor the Portuguese parliaments scrutinise comitology decisions.<sup>687</sup> This is why Dehousse argued that parliaments should not be the only venue for an increased legitimacy of comitology decisions. Instead, a process-oriented approach to legitimisation should supplement but not substitute the input-oriented one by giving interested citizens a voice in the post-legislative phase of EU decision making.<sup>688</sup>

In view of this, one may conclude that experimental and comitology EU decision making fall outside the purview of national parliaments. With certain exceptions, one could assume that the absence of scrutiny of OMC and comitology decisions in national parliaments is a chronic diagnosis. A proliferation of these EU decisions is thus susceptible to creating "new democratic deficits".<sup>689</sup> As Curtin correctly observes, there is a "gaping 'black hole'" in the EU executive space since both the European Parliament and national parliaments are unable to hold the Council to account for its executive and administrative activities.<sup>690</sup> National parliaments are not particularly enthusiastic about redressing this shortcoming either. Seemingly, the deficit in the political accountability of the relevant actors for the OMC and comitology decisions is bound to stay with us for the time being.

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<sup>685</sup> Brandsma, Gijs Jan. "Accountable comitology," in *The real world of EU accountability*, by Mark Bovens et al. (eds), Oxford: Oxford University Press, 2010: 156.

<sup>686</sup> Brandsma, Gijs Jan. "Accountable comitology," in *The real world of EU accountability*, by Mark Bovens et al. (eds), Oxford: Oxford University Press, 2010: 171.

<sup>687</sup> COSAC Secretariat, *Annex to the 6<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire*, prepared for XXXVI COSAC held in Helsinki from 19-21 November 2006, pp. 70, 75 and 173.

<sup>688</sup> Dehousse, Renaud. "Beyond representative democracy: constitutionalism in a polycentric polity," in *European constitutionalism beyond the state*, by Joseph H.H. Weiler and Marlene Wind (eds), Cambridge: Cambridge University Press, 2003: 156.

<sup>689</sup> Cygan, Adam. "The EU Constitutional Treaty from the perspective of the Parliament of the United Kingdom: an improved framework for parliamentary scrutiny?," in *National and regional parliaments in the European constitutional order*, by Philipp Kiever (ed.), Groningen: Europa Law Publishing, 2006: 25.

<sup>690</sup> Curtin, Deirdre. "Holding (quasi-)autonomous EU administrative actors to public account," *European Law Journal*, Vol. 13, No. 4, 2007: 541. See also: Wessels, Wolfgang. "Comitology: fusion in action. Politico-administrative trends in the EU system," *Journal of European Public Policy*, Vol. 5, No. 2, 1998: 227.



# Chapter 6

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## France: A Founder with Unabated Zeal

### 1. THE FRENCH PARLIAMENT IN THE CONSTITUTIONAL ORDER OF FRANCE

Writing about the parliament of a country referred to as *musée des constitutions*<sup>691</sup> is a delicate affair. Before we give a perspective on the EU, it is indispensable to understand the juridico-political context within which the French Parliament functions. The legacy of the centuries-old constitutional evolution, as Giscard d'Estaing put it, was that "since 1789 France has oscillated between excesses marked with opposite indices",<sup>692</sup> whereby each oscillation marked an institutional rupture. In the following sections, we focus on the last such rupture – the foundation of the Fifth Republic. We analyse the position of Parliament in the constitutional order of France as restructured by the constitutional amendment of 23 July 2008, which was prepared by a committee presided over by Edouard Balladur, a former Prime Minister, and which was adopted, due to its saliency, by a single vote above the required threshold.<sup>693</sup>

#### 1.1. Parliament

##### 1.1.1. Composition

The French Parliament is bicameral.<sup>694</sup> The Lower House, the *Assemblée nationale*, seated in the *Palais Bourbon*, is directly elected by universal suffrage<sup>695</sup> for a period of five years.<sup>696</sup> Under the constituency system (*circonscription*), a maximum of 577 deputies are elected in two rounds.<sup>697</sup> In the first round, a candidate must obtain an absolute majority of the votes cast that represents a quarter of the total number of the voters registered. In the second round, a relative majority suffices.<sup>698</sup> The Upper

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<sup>691</sup> Kortmann, Constantijn. "The French Republic." In *Constitutional law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), The Hague: Kluwer Law International, 2004: 239.

<sup>692</sup> Giscard d'Estaing, Valéry. "Témoignage – Un exécutif stable avec des majorités de législature." *Revue Politique et Parlementaire*, Vol. 110, No. 1048, 2008: 30.

<sup>693</sup> Of the 896 recorded votes, the required threshold of 538 votes was reached by a vote of 539 in favour and 357 against. Available at: <http://www.assemblee-nationale.fr/13/scrutins/jo9001.asp>, accessed on 2 July 2009.

<sup>694</sup> Article 24(2) of the Constitution.

<sup>695</sup> Articles 24(3) of the Constitution and L1 of the *Code électoral*.

<sup>696</sup> Article LO121 of the *Code électoral*, which was amended to this effect by the *Loi organique no. 2001-419 du 15 mai 2001 modifiant la date d'expiration des pouvoirs de l'Assemblée nationale*.

<sup>697</sup> Articles 24(3) of the Constitution and LO119, L123 and L124 of the *Code électoral*.

<sup>698</sup> Article L126 of the *Code électoral*.

House, the *Sénat*, seated in the *Palais du Luxembourg*, is indirectly elected for a period of six years<sup>699</sup> to ensure the representation of territorial communities.<sup>700</sup> As of 2011, there is a total of 348 senators. They are elected by departmental electoral colleges, 95% of which consist of delegates of the municipal councils, while the remaining 5% comprise MPs and members of regional and municipal councils.<sup>701</sup> As of 2010, half of the senators leave office every third year.<sup>702</sup> The representative legitimacy of the *Assemblée nationale* is, therefore, higher than that of the *Sénat*, albeit that the Houses represent different interests.

As Ardant and Mathieu emphasise, the Fifth Republic's bicameralism is inequalitarian in favour of the *Assemblée nationale*, which disposes of prerogatives denied to the *Sénat*, most importantly in the legislative sphere. Conversely, the *Sénat* enjoys a more eminent position than the *Conseil de la République* of the Fourth Republic, because: (a) it cannot be dissolved; (b) the senators' mandate is a year longer than that of MPs; (c) it can block constitutional revision; (d) its assent is requisite for the implementation of the right of non-French EU citizens to vote in municipal elections; (e) it is the first House to act on government bills dealing with the organisation of territorial communities; and (f) its President may, in certain cases, substitute the President of the Republic.<sup>703</sup>

### 1.1.2. Legislative process

The legislative power is vested in Parliament: "*Le Parlement vote la loi*", declares the Constitution solemnly.<sup>704</sup> The legislative initiative belongs concurrently to the Prime Minister and to the members of both Houses of Parliament.<sup>705</sup> There are two types of legislative proposals: (a) government bills called *projets de loi*; and (b) private members' bills called *propositions de loi*.

Government bills are obligatorily submitted to the *Conseil d'État* for a preliminary non-binding opinion on regularity, i.e., on whether the bill examined contains only provisions of a legislative nature.<sup>706</sup> While private members' bills have so far not been the object of preliminary control by the *Conseil d'État*, the constitutional amendment of 2008 permits the President of the House before which a private member's bill is tabled to refer it to the *Conseil d'État* for an opinion before the bill is considered in committee, unless the member who tabled it objects.<sup>707</sup>

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<sup>699</sup> Article LO275 of the *Code électoral*.

<sup>700</sup> Article 24(4) of the Constitution.

<sup>701</sup> Article L280 of the *Code électoral*.

<sup>702</sup> Article LO276 of the *Code électoral* in conjunction with Article 2(I) and (III) of the *Loi organique no. 2003-696 du 30 juillet 2003 portant réforme de la durée du mandat et de l'âge d'éligibilité des sénateurs ainsi que de la composition du Sénat*.

<sup>703</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*, Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 528-529.

<sup>704</sup> Article 24(1) of the Constitution.

<sup>705</sup> Article 39 of the Constitution.

<sup>706</sup> Article 39(2) of the Constitution.

<sup>707</sup> Article 39(5) of the Constitution.

Furthermore, private members' bills are inadmissible if they aim to reduce public revenue or create or increase any public expenditure.<sup>708</sup> Also, if it appears that a private member's bill encroaches on the Government's lawmaking competence, both the Government and the President of the relevant House may oppose its adoption. In case of a disagreement between them, the matter can be referred to the *Conseil Constitutionnel*.<sup>709</sup> After a deliberation in the Council of Ministers, bills are transmitted to the Government and then to the relevant House of Parliament.

A bulk of Parliament's legislative and scrutiny work is done in committees, which are typically presided over by members of the parliamentary majority.<sup>710</sup> There are two types of committees: (a) *permanent ones*, established as a constitutional requirement; and (b) *special ones*, established by exception at the request of the Government or a House of Parliament. The 2008 amendment raised the number of permanent committees from six to eight.<sup>711</sup> While ministers as a rule do not participate in the work of the committees, they can request and, if so, must be granted the right to speak before a given committee or they can be invited by the committee itself.<sup>712</sup>

After the committee phase, the bill needs to be put on the agenda for debate in the plenary. Another novelty adopted in 2008 is that the text to be debated in the plenary is no longer the one drafted by the Government, but the one elaborated in the competent parliamentary committee.<sup>713</sup> This favours Parliament, inasmuch as the amendments proposed by the committee may be directly discussed in the plenary, without having to discuss the Government's text first.

Until 2008, Parliament's agenda was fixed by each House's Conference of Presidents.<sup>714</sup> There are two types of this agenda: (a) the *priority* agenda, encompassing government bills and the private members' bills accepted by the Government; and (b) the *complementary* agenda, featuring the remaining business, which is only examined if the time allows it. Since the Government can count on the support of the majority, it is normally able to fix Parliament's agenda entirely, including the texts to be debated, the order in which that is to be performed and the

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<sup>708</sup> Article 40 of the Constitution.

<sup>709</sup> Article 41 of the Constitution.

<sup>710</sup> Cahoua, Paul. "Les commissions, lieu du travail législatif." *Pouvoirs*, No. 34, 1985: 37-49.

<sup>711</sup> Article 43 of the Constitution.

<sup>712</sup> Article 86(6) of the Rules of Procedure (*Règlement*) of the *Assemblée nationale* of 21 July 1959, as amended on 27 May 2009, and Article 18(1) of the Rules of Procedure (*Règlement*) of the *Sénat* of 14 December 1960, as amended on 7 October 2009.

<sup>713</sup> Article 42(1) of the Constitution. Para. 2 thereof contains an exception to this rule. Namely, bills referring to constitutional revision, public finances and the financing of social security are discussed in the form adopted by the Government, but only at first reading.

<sup>714</sup> This body gathers the President and Vice-Presidents of the House, chairmen of permanent committees, the chairman of the European Affairs Committee, the general rapporteur of the finance committee and the minister for the relations with Parliament.

sessions to be devoted to it.<sup>715</sup> The changes introduced in 2008, however, seek to mitigate this state of affairs by making Parliament the master of its agenda and by granting the opposition parties the right to express their criticisms and proposals.<sup>716</sup> From now on, each House of Parliament fixes its own agenda.<sup>717</sup> The Government's say on the contents of the agenda has been moderated. During two weeks of parliamentary sittings out of four, priority is given to the agenda fixed by the Government.<sup>718</sup> The opposition and minority groups won the right to set the agenda for one day of sitting a month.<sup>719</sup> Each House shall, furthermore, recognise in its Rules of Procedure that opposition and minority groups have specific rights.<sup>720</sup>

In order to rectify the deficiencies of legislation perceived over the previous decades, the 2008 amendment laid down that a period of six weeks needs to elapse before the relevant House may proceed to the examination of the bill. The period is four weeks for the examination by the other House to which the bill is transmitted.<sup>721</sup> These delays apply only if the Government does not declare urgency.

Bills are adopted according to the so-called "*navette*" or shuttle procedure, whereby a bill is sent back and forth between the Houses of Parliament with a view to adopting the text in identical terms.<sup>722</sup> During this procedure, both Parliament and the Government have the right of amendment.<sup>723</sup> Although this is Parliament's principal means of participation in the creation of legislation, it has been estimated that only less than 1% of the adopted amendments come from the opposition.<sup>724</sup> There is no limit on the number of readings, unless the Government – after one reading without a joint opposition by the Conferences of Presidents or otherwise after two readings – declares urgency. In this case, a joint committee called "*commission mixte paritaire*" is convened to discuss the contentious provisions of the bill.<sup>725</sup> This

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<sup>715</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 546-548. See more in: Camby, Jean-Pierre. "La fixation de l'ordre du jour des assemblées parlementaires," *Revue du Droit Public*, Vol. 120, No. 2, 2004: 295-300; Le Mirre, Pierre. "L'ordre du jour des assemblées parlementaires sous la V République." *Revue Française de Droit Constitutionnel*, No. 6, 1991: 195-232.

<sup>716</sup> Dord, Olivier. "Vers un rééquilibrage des pouvoirs publics en faveur du Parlement." *Revue Française de Droit Constitutionnel*, No. 77, 2009/1: 100-101.

<sup>717</sup> Article 48(1) of the Constitution.

<sup>718</sup> Article 48(2) of the Constitution.

<sup>719</sup> Article 48(5) of the Constitution.

<sup>720</sup> Article 51-1 of the Constitution.

<sup>721</sup> Article 42(3) of the Constitution.

<sup>722</sup> Article 45 of the Constitution. See also: Avril, Pierre and Gicquel, Jean. *Droit parlementaire*. Paris: Montchrestien, 2004: 194; Kortmann, Constantijn. "The French Republic." In: *Constitutional law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), The Hague: Kluwer Law International, 2004: 271.

<sup>723</sup> Article 44(1) of the Constitution. See more in: Baufumé, Bruno. *Le droit d'amendement et la Constitution sous la Cinquième République*. Paris: Librairie Générale de Droit et de Jurisprudence, 1993.

<sup>724</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 568.

<sup>725</sup> Bernard, Sébastien. "La commission mixte paritaire." *Revue Française de Droit Constitutionnel*, No. 47, 2001/3: 451-478.

joint committee is composed of an equal number of members from each House. After deliberation in the joint committee, two paths are possible. *If the joint committee does not reach an agreement*, the Government may either let the shuttle procedure continue or ask the *Assemblée nationale* to decide definitively, after a new reading has been held in both Houses. *If the joint committee reaches an agreement*, the Government may submit it to the Houses for final adoption. If the Houses fail to adopt the proposal, the Government may ask the *Assemblée nationale* to decide after a new reading in both Houses. Yet if the agreement does not suit the Government, it may allow the shuttle procedure to continue.

The Houses of Parliament have two procedural motions at their disposal to interrupt the discussion of a proposal. On the one hand, they may adopt an objection of inadmissibility (*exception d'irrecevabilité*), which is of a juridical nature and is geared towards tackling a provision that is deemed unconstitutional.<sup>726</sup> On the other hand, they may adopt an objection of preliminary question (*question préalable*), which is of a political nature and is aimed at deciding that there is no reason to deliberate.<sup>727</sup> As Kortmann states, both motions, if successful, are equivalent to rejecting the bill.<sup>728</sup>

The Government, too, has a number of instruments at its disposal that allow it to pursue its legislative agenda. First, some amendments are inadmissible and some may be challenged before the *Conseil constitutionnel*. Second, the Government may oppose the consideration of any amendment that has previously not been referred to a committee.<sup>729</sup> Third, it may request a *vote bloqué*, whereby the House concerned is obliged to proceed to a single vote on all or a part of the bill on the sole basis of the amendments proposed or accepted by the Government.<sup>730</sup> Fourth, and most controversially, the Government can have a bill adopted without a vote by the Houses if it makes the vote an issue of confidence before the *Assemblée nationale*, in which case the bill is considered adopted if a motion of confidence is not tabled within 24 hours. In 2008, this last procedure was considerably limited. It now applies only to bills dealing with finance and the financing of social security, as well as to one other government or private member's bill per session.<sup>731</sup> Therefore, while primarily aimed at having a bill adopted, this is also an instrument of control of the Government.

Finally, the President of the Republic has the right of a suspensive veto, whereby he or she may ask Parliament to reopen the debate on the whole or a part of the

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<sup>726</sup> Barré-Aivazzadeh, Sylvaine. *L'exception d'irrecevabilité pour inconstitutionnalité devant les assemblées parlementaires françaises*. Doctoral dissertation, Université de Bourgogne, 1994.

<sup>727</sup> Article 91(5) of the Rules of Procedure of the *Assemblée nationale* and Article 44(3) of the Rules of Procedure of the *Sénat*.

<sup>728</sup> Kortmann, Constantijn. "The French Republic." In *Constitutional law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), The Hague: Kluwer Law International, 2004: 270.

<sup>729</sup> Article 44(2) of the Constitution.

<sup>730</sup> Article 44(3) of the Constitution.

<sup>731</sup> Article 49(3) of the Constitution.

statute concerned within fifteen days of its adoption, which is the period left for promulgation.<sup>732</sup> Parliament must grant this request. This procedure has been used very rarely.<sup>733</sup>

## 1.2. The Government

### 1.2.1. Composition

One of the cornerstones of the French constitutional system is that the President of the Republic shall: (a) appoint the Prime Minister and terminate such an appointment upon the Prime Minister's resignation; and (b) appoint ministers and terminate such appointments on the recommendation of the Prime Minister.<sup>734</sup> Since this is the President's personal power, there are no legal constraints on his or her choice of a Prime Minister. As cohabitations demonstrate, the President's liberty is in practice limited by the will of the parliamentary majority.<sup>735</sup> The investiture of the Government by the *Assemblée nationale* is not necessary. The Government lawfully exists from the moment of appointment by the President.<sup>736</sup> This does not preclude the Prime Minister from appearing before the *Assemblée nationale* upon appointment and present the Government's programme or even engage the Government's responsibility.<sup>737</sup> Once in office, the Government's central competence is to determine and conduct the policy of the nation.<sup>738</sup>

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<sup>732</sup> Article 10 of the Constitution. See more in: Plouvin, Jean-Yves. "Le droit présidentiel de demander une nouvelle délibération de la loi." *Revue du Droit Public*, No. 6, 1980: 1563-1592.

<sup>733</sup> In the period 1958-2004 there were only three such presidential requests. Avril, Pierre and Gicquel, Jean. *Droit parlementaire*. Paris: Montchrestien, 2004: 207.

<sup>734</sup> Article 8 of the Constitution.

<sup>735</sup> See *infra* the text accompanying note 856 of this Chapter.

<sup>736</sup> See more in: Couzinet, Jean-François. *L'investiture des gouvernements sous la Vème République*. Toulouse: Annales de la Faculté de droit de Toulouse, 1975.

<sup>737</sup> Whereas the first two Prime Ministers (Debré and Pompidou), sought a vote of confidence before the *Assemblée nationale* immediately upon appointment, such a practice did not exist from 1962-1973. In 1973, Prime Minister Messmer returned to such practice, after which prime ministers have either presented their programmes or sought a vote of confidence. From 1988-1993, the three Prime Ministers (Rocard, Cresson and Bérégovoy) satisfied themselves with presenting their programmes. Since 1993 to date, all Prime Ministers (Balladur, Juppé, Jospin, Raffarin, Villepin and Fillon) have sought a vote of confidence on their political programmes. Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 494.

<sup>738</sup> Article 20(1) of the Constitution. The Balladur Committee attempted to reconcile the Constitution with the well-known fact that it is rather the President of the Republic who determines this policy outside cohabitations. It proposed to separate the two functions by placing the determination of the policy in the President's portfolio and its conduct in the Government's, but Parliament did not heed this.

### 1.2.2. Ministerial responsibility

The Government is politically responsible to both Houses of Parliament, but it may be dismissed only by the *Assemblée nationale*.<sup>739</sup> The definition of political responsibility offered by Ségur appears suitable for the present purposes:

[P]olitical responsibility is a legal mechanism of the evaluation of governmental conduct. It implies the obligation for the Government to answer before Parliament for the acts carried out in the exercise of its functions according to the procedure determined by the Constitution. This procedure can lead to a positive sanction, an expression of confidence; or a negative sanction, a manifestation of defiance, the latter causing the loss of political power.<sup>740</sup>

In 2008 the Balladur Committee succeeded in inserting into the Constitution a provision explicitly obliging Parliament to monitor the Government's action and to assess public policies.<sup>741</sup> Parliamentary instruments for the supervision of the Government can be classified into two groups: (a) those seeking information from the Government; and (b) those seeking resignation from the Government.

#### A. Information instruments

There are five key instruments that Parliament may use to request information from the Government.

First, during one week of parliamentary sittings out of four, *priority* shall be given to the monitoring of the Government's action and the assessment of public policies, in which Parliament is assisted by a Court of Auditors.<sup>742</sup>

Second, both MPs and senators can put oral and written *questions* to the Government, which may, but need not, be followed by a debate. Of these, the most important oral questions are the so-called 'questions to the Government',<sup>743</sup> for which ministers' attendance is in principle obligatory. In 1993, the procedure was made stricter so that the ministers would not know the questions in advance and would have limited time to reply. The constitutional amendment of 1995 devoted at least one parliamentary sitting per week to questions from MPs and to answers from the Government.<sup>744</sup>

Third, *committees of inquiry* may be established in both Houses to gather information "either on determined facts or on the performance of public services or

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<sup>739</sup> Article 20(3) of the Constitution.

<sup>740</sup> Ségur, Philippe. *La responsabilité politique*. Paris: Presses Universitaires de France, 1998: 17-18.

<sup>741</sup> Article 24(1) of the Constitution.

<sup>742</sup> Articles 48(4) and 47-2(1) of the Constitution.

<sup>743</sup> For example, during the 11<sup>th</sup> legislature (1997-2002) in the *Assemblée nationale* there was a total of 1,719 oral questions without a debate, 11 oral questions with a debate, 3,365 questions to the Government, 75,577 written questions (62,565 replies from the Government), and 15 committees of inquiry. *Assemblée nationale. Statistiques de la XI<sup>e</sup> législature – Contrôle parlementaire*, available at: [http://www.assemblee-nationale.fr/12/seance/Contrôle\\_11e\\_leg.pdf](http://www.assemblee-nationale.fr/12/seance/Contrôle_11e_leg.pdf), accessed on 16 July 2009.

<sup>744</sup> Article 48(6) of the Constitution.

national enterprises, with a view to submitting their conclusions to the House that created it".<sup>745</sup> These committees serve not to establish guilt but to satisfy the nation's appeal for transparency.<sup>746</sup> Despite the proportional representation of political groups in these committees, a convention was agreed in 1988 allowing every political group to have one request for a committee of inquiry placed on the agenda per year. Since 2003, the opposition has been permitted to hold the post of chairman or rapporteur of a committee of inquiry.<sup>747</sup>

Fourth, permanent parliamentary committees may create *missions d'information* to follow the execution of a particular statute.<sup>748</sup>

Fifth, the 2008 amendment introduced a new procedure whereby the Government, on its own initiative or upon the request of a political group, may make a declaration on a given subject before either House. This declaration leads to a debate and, if the Government so desires, it may give rise to a vote, though not of confidence.<sup>749</sup>

## B. Resignation instruments

Parliament can utilise four different instruments to effectuate the Government's resignation.

First, after a deliberation in the Council of Ministers, the Prime Minister may submit the Government's programme or general policy statement to a *vote of confidence* before the *Assemblée nationale*.<sup>750</sup> A relative majority of the votes suffices for the motion to pass, which is why governments do not resort to this instrument with immense enthusiasm. Similarly, the Prime Minister may ask the *Sénat* to approve the Government's general policy statement, but without engaging the latter's responsibility.<sup>751</sup>

Second, one tenth of the MPs may initiate a motion of censure. As the only instrument activated at the initiative of MPs, it is referred to as a *motion de censure spontanée*. Its vital characteristic is that "confidence is presumed, it is the defiance that needs to be proved".<sup>752</sup> Yet in order to prevent parliamentary guerilla actions, no MP may sign more than three such motions during a single ordinary parliamentary session and no more than one during a single extraordinary session. An absolute

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<sup>745</sup> Article 51-2 of the Constitution in conjunction with Article 6 1(2) of *Ordonnance no. 58-1100 du 17 novembre 1958 relative au fonctionnement des assemblées parlementaires*.

<sup>746</sup> Vallet, Elisabeth. "Les commissions d'enquête parlementaires sous la Cinquième République." *Revue Française de Droit Constitutionnel*, No. 54, 2003/2: 278.

<sup>747</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 579.

<sup>748</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 580.

<sup>749</sup> Article 50-1 of the Constitution.

<sup>750</sup> Article 49(1) of the Constitution.

<sup>751</sup> Article 49(4) of the Constitution.

<sup>752</sup> Parodi, Jean-Luc. *Les rapports entre le législatif et l'exécutif sous la Cinquième République*. Paris: Armand Colin, 1972: 40.

majority of the votes is required for the adoption of the motion.<sup>753</sup> During the Fifth Republic, only one such motion was successful, namely in 1962 when Prime Minister Georges Pompidou was thrown out of office.<sup>754</sup> A modality of this instrument is the procedure of *interpellations*, which requires a motion of censure to be deposited.<sup>755</sup> Interpellations have become largely symbolic, however, because of strict party discipline.<sup>756</sup>

Third, as mentioned above, the Government may use the so-called *motion de censure provoquée*, whereby it may make the adoption of a statute an issue of confidence.<sup>757</sup> This is a hybrid instrument, because it is aimed at both legislating and engaging governmental responsibility. It is also the most radical one, since a statute may be passed without Parliament having the opportunity to vote on it: either it adopts a motion of censure, and thus provokes a governmental crisis and possibly also dissolution by the President of the Republic, or the statute is considered adopted.

The political accountability of the Government to Parliament is *collective*, which means that no minister may individually be ousted by the *Assemblée nationale*.<sup>758</sup> It should be underscored that while the President of the Republic may dismiss an individual minister upon the Prime Minister's recommendation,<sup>759</sup> individual ministerial accountability to Parliament does not exist in France.

Views on the practical functioning of ministerial responsibility diverge. On the one hand, Bigaut and Chantebout have assessed that the political responsibility of ministers is nowadays more effective than under the previous regimes and that the sanction has become more severe as it can lead to exclusion from political life.<sup>760</sup> They have also argued that the Prime Minister during cohabitation periods is not politically responsible to anyone but the citizenry, because the President of the Republic cannot dismiss him and the parliamentary majority supports him.<sup>761</sup>

On the other hand, Carcassonne has held that "political responsibility is conceptually admirable, democratically fit, collectively and individually just, in short, it has all the qualities. Its only flaw is that it does not function any more".<sup>762</sup> Beaud has put forth two reasons why political responsibility has declined in the last

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<sup>753</sup> Article 49(2) of the Constitution.

<sup>754</sup> See *infra* note 841 of this Chapter.

<sup>755</sup> Article 156 of the Rules of Procedure of the *Assemblée nationale*.

<sup>756</sup> Avril, Pierre and Gicquel, Jean. *Droit parlementaire*. Paris: Montchrestien, 2004: 258.

<sup>757</sup> Article 49(3) of the Constitution. See *supra* note 731 of this Chapter.

<sup>758</sup> Ségur, Philippe. *La responsabilité politique*. Paris: Presses Universitaires de France, 1998: 68.

<sup>759</sup> Article 8(2) of the Constitution.

<sup>760</sup> Bigaut, Christian and Chantebout, Bernard. "De l'irresponsabilité prétendue des ministres sous la Ve République." *Pouvoirs*, No. 92, 2000: 77 and 79.

<sup>761</sup> Bigaut, Christian and Chantebout, Bernard. "De l'irresponsabilité prétendue des ministres sous la Ve République." *Pouvoirs*, No. 92, 2000: 79.

<sup>762</sup> Carcassonne, Guy. "Rationaliser la responsabilité politique." In: *Mélanges en l'honneur de Pierre Pactet: l'esprit des institutions, l'équilibre des pouvoirs*, Paris: Dalloz, 2003: 543.

couple of decades: (a) the substitution of political with penal responsibility;<sup>763</sup> and (b) the transfer of ministerial responsibility towards their close cooperatives and high officials.<sup>764</sup>

### 1.3. The President of the Republic

Three principal constitutional duties of the President of the Republic are those of: (a) a "guardian", ensuring due respect for the Constitution;<sup>765</sup> (b) an "arbiter", ensuring the proper functioning of the public authorities and the continuity of the state; and (c) a "guarantor" of national independence, territorial integrity and due respect for international treaties.<sup>766</sup>

The President's most powerful instrument as regards Parliament is the right to *dissolve* the *Assemblée nationale*. It is the President's personal power, subject only to a non-binding opinion of the Prime Minister and the Presidents of both Houses of Parliament.<sup>767</sup> It has been used five times since 1958,<sup>768</sup> chiefly to resolve conflicts between the Government and the *Assemblée nationale*, or to amass or consolidate parliamentary majority during cohabitation.<sup>769</sup>

One of the key constitutional characteristics of the President of the Republic is that he or she is *not politically responsible* to Parliament.<sup>770</sup> Parliament may not judge the President's work, except when both Houses, united in High Court, find that the President has committed high treason, which occurs when a breach of the

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<sup>763</sup> See more in: Degoffé, Michel. "Responsabilité pénale et responsabilité politique du ministre." *Revue Française de Droit Constitutionnel*, No. 26, 1996: 385-402. It has been stressed, in the same vein, that the fact that political responsibility is "dangerously rivalled by penal responsibility" may affect the separation of powers and weaken French political institutions. Pujas, Véronique. "Carences et nouvelles dimensions de la responsabilité politique: éléments de politiques comparées." *Pouvoirs*, No. 92, 2000: 180. It has further been maintained that the intervention of ordinary courts does not suffice to decide outstanding political questions. Bidégaray, Christian. "Le principe de responsabilité fondement de la démocratie. Petite promenade dans les allées du "jardin des délices démocratiques"." *Pouvoirs*, No. 92, 2000: 16.

<sup>764</sup> Beaud, Olivier. "La responsabilité politique face à d'autres formes de responsabilité des gouvernants." *Pouvoirs*, No. 92, 2000: 18. See the essays in: Beaud, Olivier and Blanquer, Jean-Michel (eds). *La responsabilité des gouvernants*. Paris: Descartes & Cie, 1999.

<sup>765</sup> When the *Conseil constitutionnel* is not competent, the interpretation of the Constitution by the President of the Republic is binding on any other institution. For example, the President of the Republic may refuse to sign decrees effecting the promulgation of statutes that he or she deems unconstitutional and may require a new reading in Parliament. Equally, the President may refer the matter to the *Conseil constitutionnel*, refuse to convoke an extraordinary session of Parliament or refuse to insert a government bill on the agenda of the Council of Ministers. Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 458.

<sup>766</sup> Article 5 of the Constitution.

<sup>767</sup> Article 12 of the Constitution.

<sup>768</sup> In 1962 and 1968 by Charles De Gaulle, then in 1981 and 1988 by François Mitterrand and in 1997 by Jacques Chirac.

<sup>769</sup> See the historical development of the institution of dissolution in: Cabanis, André and Martin, Michel Louis. *La dissolution parlementaire à la française*. Paris: Presses de Sciences Po, 2001.

<sup>770</sup> Emeri, Claude. "De l'irresponsabilité présidentielle." *Pouvoirs*, No. 41, 1987: 133-151.

President's duties was patently incompatible with his or her continuing in office.<sup>771</sup> In practice, the President is politically subordinated only to the citizens' political judgment rendered at presidential elections.<sup>772</sup> For that reason, the President's personal powers have been deemed to be in contradiction with the absence of his or her political responsibility.<sup>773</sup> This has been described as "a major paradox" of the French institutional system.<sup>774</sup>

One of the controversial changes made in 2008 was the introduction of the President's right to address Parliament directly and not only by means of messages. The President of the Republic may henceforth take the floor before Parliament has convened in Congress. The President's speech may give rise, in his or her absence, to a debate without a vote.<sup>775</sup> This controversial measure, pressed for by President Sarkozy, has earned him the title of "*Roi de Versailles*".<sup>776</sup> This novelty incurred a hail of criticism by the opposition, which described it as a "retraction of Parliament" and a "travesty of democracy".<sup>777</sup> The first such address took place on 22 June 2009 and was defied by the opposition parties.<sup>778</sup>

In the field of international relations, the President's prerogative to negotiate and ratify *treaties* is limited by the fact that Parliament is the only institution competent to ratify or approve treaties or agreements that deal with peace, trade, international organisation, state finances and the status of persons, as well as those modifying provisions of a legislative nature and those altering the territory of the French state.<sup>779</sup> As the Chief Commander of the Armed Forces, the President's decision to declare war is subject to Parliament's authorisation, which is elaborated later in this Chapter.<sup>780</sup>

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<sup>771</sup> Article 68(1) of the Constitution.

<sup>772</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 457. As Mitterrand declared after his first election, "the President's duty is to implement the programme regarding which he or she has concluded a contract with the nation". *Ibid.*, 464. However, referendums and parliamentary elections may also be considered an opportunity for citizens to pass a judgment on the work of the President of the Republic.

<sup>773</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 473.

<sup>774</sup> Ponthoreau, Marie-Claire. "Le président de la République. Une fonction à la croisée des chemins," *Pouvoirs*, No. 99, 2001/4: 34.

<sup>775</sup> Article 18 of the Constitution.

<sup>776</sup> *Libération*, "Le Président, roi de Versailles", 12 June 2009.

<sup>777</sup> *Le Monde*, "Les parlementaires PS assisteront au Congrès de Versailles", 16 June 2009.

<sup>778</sup> The Communists and the Greens boycotted the event entirely and the Socialists attended it without taking part in the debate. The apex was the tabling of a motion of censure by the Socialists, which was not passed, however. *Le Monde*, "L'Assemblée nationale rejette la motion de censure du PS", 8 July 2009. The last direct address to Parliament by a President of the Republic was made by Napoleon's nephew, Charles-Louis Napoleon Bonaparte, during the Second Republic in 1848. *EUobserver*, "Sarkozy in historic address to French parliament", 22 June 2009, available at: <http://euobserver.com/9/28348>, accessed on 23 June 2009.

<sup>779</sup> Articles 52(1) and 53(1) of the Constitution.

<sup>780</sup> See *infra* the text accompanying note 1017 of this Chapter.

## 2. THE CONCEPT OF *PARLEMENTARISME RATIONALISÉ*: THE BRIDLING OF PARLIAMENT

### 2.1. Origins and definition

The adoption of the Constitution of the Fifth Republic on 4 October 1958 was the realisation of Charles de Gaulle's dream of a strong executive,<sup>781</sup> which came true as a direct corollary of a protracted period of deadlocks caused by Parliament's sovereign rule under the Fourth Republic. Thence came the 'rationalisation' of Parliament, a move towards subordinating it to the executive branch. Namely, the drafters of the Constitution, wishing to stem the "government of the parties"<sup>782</sup> and remove Parliament from the centre of national politics, deliberately downgraded it to an institution at the service of the President of the Republic. As Michel Debré, the first Prime Minister, pointed out on 27 August 1958 in his speech on the constitutional draft before the *Conseil d'État*:

[I]n France, governmental stability cannot result primarily from electoral law, it should result at least partially from constitutional regulation [...] through four types of measures: (a) a strict regime of sessions; (b) an effort to define the legislative domain; (c) a profound reorganisation of the legislative procedure; and (d) an adjustment of the legal mechanisms indispensable for the balance and good operation of the political offices".<sup>783</sup>

The subsequent enactment of these rules had a twofold consequence: the Government was supplied with the means to dominate the legislative process, whereas Parliament was deprived of those to control the Government effectively. The Constitution was, therefore, dubbed an "anthology of anti-parliamentarism"<sup>784</sup> and its decision-making apparatus described as "aparliamentary".<sup>785</sup> Many analysts were prompted to announce Parliament's "decline", "weakening", "lowering", "harnessing", "humiliation",<sup>786</sup> or "excessive deletion".<sup>787</sup> Parliament was also

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<sup>781</sup> In his speech in Bayeux on 16 June 1946, General De Gaulle emphasised the necessity of separating the powers of the executive from those of Parliament asking rhetorically, "how could this unity, cohesion and discipline be upheld in the long term if the executive power emanated from the other source of power, which it is supposed to counterbalance, and if each member of the government, who is collectively responsible before the representatives of the entire nation, held his post merely as an agent of a party? The executive power must therefore flow from the Head of State, standing above the parties, elected by a college that encompasses Parliament, but which is far vaster [...]. Available at: [http://www.charles-de-gaulle.org/article.php3?id\\_article=516](http://www.charles-de-gaulle.org/article.php3?id_article=516), accessed on 5 June 2009.

<sup>782</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 410.

<sup>783</sup> Avril, Pierre and Gicquel, Jean. *Droit parlementaire*. Paris: Montchrestien, 2004: 5.

<sup>784</sup> Chantebout, Bernard. *Droit constitutionnel*. Paris: Sirey, 2008: 396. See also: Guichard-Ayoub, Éliane et al. *Études sur le parlement de la Ve République*, Paris: Presses Universitaires de France, 1965: 121-129.

<sup>785</sup> Chandernagor, André. *Un parlement, pour quoi faire?* Paris: Gallimard, 1967: 41 and 44.

<sup>786</sup> Vandendriessche, Xavier. "Le Parlement entre déclin et modernité." *Pouvoirs*, No. 99, 2001/4: 59.

described as "declassed"<sup>788</sup> or even "emasculated".<sup>789</sup> There is, indeed, a broad consensus in the literature that the defeat of Parliament and the triumph of the executive are the defining traits of the Fifth Republic.

The phrase *parlementarisme rationalisé* was coined by Boris Mirkine-Guetzévitch in his analysis of the constitutions that emerged in Europe after the First World War.<sup>790</sup> In line with his perceptions, the phrase is nowadays used to denote the diminution of Parliament's powers under the Fifth Republic through a "set of legal rules aimed at preserving the stability and authority of the government *in the absence of a constant parliamentary majority*".<sup>791</sup> But, as we will discuss later, the operation of strict partisan politics arguably marred the practical significance of this concept.

## 2.2. Two tenets against Parliament's resurrection to its mighty past

Parliament's decline was not envisioned solely through the instruments available to the Government in the course of the legislative procedure and those that hinder the effective realisation of ministerial responsibility, but also by denying Parliament the legislative monopoly and sovereignty.<sup>792</sup> Parliament is thus not the only creator of law and the law that it does create is subject to control.

### 2.2.1. Parliament's loss of the monopoly of law

#### A. Parliament as the legislature

The Fifth Republic makes a remarkable departure from the previous constitutional regimes. Opting for a material definition of the legislative domain, the Constitution enumerates in Article 34 the fields reserved for legislation, i.e., for Parliament's regulation in the form of statutes.<sup>793</sup> This poses a twofold limitation for Parliament's legislative power.<sup>794</sup> On the one hand, it distinguishes between the fields that are open to parliamentary intervention from those that are not. On the other hand, it

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<sup>787</sup> Chandernagor, André. *Un parlement, pour quoi faire?* Paris: Gallimard, 1967: 46.

<sup>788</sup> Chagnollaude, Dominique and Quermonne, Jean-Louis. *Le gouvernement de la France sous la Ve République*. Paris: Fayard, 1996: 366.

<sup>789</sup> Cole, Alistair. *French politics and society*. Harlow: Pearson, 2005: 90.

<sup>790</sup> Mirkine-Guetzévitch, Boris. *Les constitutions de l'Europe nouvelle, avec les textes constitutionnels*. Paris: Delagrave, 1938.

<sup>791</sup> Duhamel Olivier and Mény, Yves (eds). *Dictionnaire constitutionnel*. Paris: Presses Universitaires de France, 1992: 696 (emphasis added).

<sup>792</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 419.

<sup>793</sup> See for example: Drago, Roland (ed.). *La confection de la loi*. Paris: Presses Universitaires de France, 2005; Haguenuau, Catherine. "Le domaine de la loi en droit français et en droit anglais." *Revue Française de Droit Constitutionnel*, No. 22, 1995: 247-285; Trémeau, Jérôme. *La réserve de loi: compétence législative et constitution*. Paris: Economica, 1997.

<sup>794</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 553.

distinguishes the fields in which Parliament adopts detailed rules<sup>795</sup> from those in which it adopts only basic principles for further implementation by the Government.<sup>796</sup> The list in Article 34 of the Constitution is not definitive, because it may be specified or completed by means of an organic law.<sup>797</sup> The emergence of a "new legal order" in France has been touted as a corollary of separating Parliament's lawmaking domain from that of the Government.<sup>798</sup> Yet, in Mathieu's eyes, the fine line of separation intended is blurred, vague and inoperative in practice.<sup>799</sup> Neither does Parliament strictly adhere to the said boundaries nor does the Government oppose it. The reason why the Government rarely challenges Parliament's legislative outreach, in the words of Jean Foyer, a former Gaullist MP and one of the architects of the 1958 Constitution, is of a political nature and is rather simple: "[B]etter a parliamentary debate even on details than demonstrations or more serious incidents on the streets".<sup>800</sup> Parliament is, therefore, practically free to legislate and it is up to the Government to seek the protection of its regulatory domain. This de facto *carte blanche* led to the inflation of legislation,<sup>801</sup> which decreased its quality and jeopardised its authority.<sup>802</sup> A consequence thereof has been that the question is no longer that of separation of powers between the legislature and the executive, but that of balancing legal security with the quality of law, whereby protection needs to be lent to the citizens and not to Parliament.<sup>803</sup>

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<sup>795</sup> These fields include: the civic rights and fundamental guarantees of citizens; the media; obligations imposed for the purposes of national defence; nationality; the status and capacity of persons; matrimonial property systems; inheritance and gifts; the determination of serious crimes and penalties; criminal procedure; amnesty; the court system; taxation; issuing of currency; parliamentary and local elections; establishment of public legal entities; the armed forces; and the nationalisation of companies.

<sup>796</sup> This applies in the following areas: the general organisation of national defence; self-government of territorial communities; education; preservation of the environment; system of ownership; employment law; trade union law; and social security. In addition to these, there are also acts referring to financing and programming.

<sup>797</sup> Article 34 of the Constitution *in fine*. For example, the *Loi constitutionnelle no. 2005-205 du 1<sup>er</sup> mars 2005 relative à la Charte de l'environnement* extended Parliament's legislative domain to the field of the environment. However, this was a constitutional and not an organic law.

<sup>798</sup> Simonian-Gineste, Hélène. "Les articles 34 et 37 de la Constitution: un nouvel ordre juridique." *Annales de l'Université des sciences sociales de Toulouse, Tome 46*, 1998: 259-269.

<sup>799</sup> Mathieu, Bertrand. "La part de la loi, la part du règlement. De la limitation de la compétence réglementaire à la limitation de la compétence législative." *Pouvoirs, No. 114*, 2005/3: 81.

<sup>800</sup> Foyer, Jean. "L'application des articles 34 et 37 par l'Assemblée nationale." In *Le domaine de la loi et du règlement: l'application des articles 34 et 37 de la Constitution depuis 1958: bilan et perspectives*, by Louis Favoreu (ed.), Presses Universitaires d'Aix-Marseille, 1978: 91.

<sup>801</sup> Baynast de Septfontaines, Geoffroy. *L'inflation législative et les articles 34 et 37 de la Constitution*. Doctoral dissertation, Université Paris 2 Panthéon-Assas, 1997.

<sup>802</sup> Carcassonne, Guy. "Penser la loi." *Pouvoirs, No. 114*, 2005/3: 39-52.

<sup>803</sup> Mathieu, Bertrand. "La part de la loi, la part du règlement. De la limitation de la compétence réglementaire à la limitation de la compétence législative." *Pouvoirs, No. 114*, 2005/3: 74, 80. See a more extensive analysis in: Mathieu, Bertrand. *La loi*. Paris: Dalloz, 2004.

## B. Government as the legislature

Although Parliament is the primary legislator, the Government holds significant powers that limit the scope of Parliament's legislative action. The Government's lawmaking powers are residual and of a regulatory nature.<sup>804</sup> The acts adopted by the Government take the form of: (a) *autonomous decrees*, which are adopted very rarely and amount to no more than 1% of the decrees adopted by the Government;<sup>805</sup> (b) *derivative decrees*, aimed at implementing legislation;<sup>806</sup> and (c) *ordinances*, which are adopted in the fields reserved for statutory regulation during a limited period of time upon Parliament's authorisation in the form of an enabling act (*loi d'habilitation*) and which lapse if Parliament does not expressly ratify them before this period expires. According to the *Conseil d'État*, ordinances have become the most important type of legislation.<sup>807</sup>

Many analysts are indeed keen to highlight the Government's dominance in lawmaking. Chandernagor, for instance, claims that the system "makes the Government the legislature as a rule and the Parliament by exception or by attribution".<sup>808</sup> Gicquel submits that "Parliament no longer elaborates legislation but limits itself essentially to approving the Government's will".<sup>809</sup> He also adds that "legislation today presents itself as an invariable fact of the executive power".<sup>810</sup> By the same token, Mopin holds that "the legislative power is a fiction".<sup>811</sup> Acknowledging the impact of *parlementarisme rationalisé* and of partisan politics, Avril states that "legislation is an instrument of privilege of the Government"<sup>812</sup> but concedes that "the Government does not always have the final word".<sup>813</sup>

As Carré de Malberg reminds us in his classic, the most significant consequence of separating the respective lawmaking domains of Parliament and of the Government resides in the hierarchy of norms and the correlative principle of legality. With the exception of autonomous decrees, the law made by Parliament enjoys higher legal force than the law made by the Government.<sup>814</sup>

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<sup>804</sup> Article 37 of the Constitution.

<sup>805</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 555. See also: Favoreu, Louis. "Les règlements autonomes n'existent pas." *Revue Française de Droit Administratif*, No. 6, 1987: 871-884.

<sup>806</sup> Article 21(1) of the Constitution.

<sup>807</sup> Gicquel, Jean. "La reparlementarisation: une perspective d'évolution." *Pouvoirs*, No. 126, 2008/3: 50.

<sup>808</sup> Chandernagor, André. *Un parlement, pour quoi faire?* Paris: Gallimard, 1967: 52.

<sup>809</sup> Gicquel, Jean. "La reparlementarisation: une perspective d'évolution." *Pouvoirs*, No. 126, 2008/3: 49.

<sup>810</sup> Gicquel, Jean and Gicquel, Jean-Éric. *Droit constitutionnel et institutions politiques*. Paris: Montchrestien, 2008: 707-708.

<sup>811</sup> Mopin, Michel. "Diriger le Parlement." *Pouvoirs*, No. 83, 1997: 58.

<sup>812</sup> Avril, Pierre. "Qui fait la loi?" *Pouvoirs*, No. 114, 2005/3: 91.

<sup>813</sup> Avril, Pierre. "Le Parlement législateur." *Revue Française de Science Politique*, Vol. 31, No. 1, 1981: 31.

<sup>814</sup> Carré de Malberg, Raymond. *Contribution à la théorie générale de l'Etat: spécialement d'après les données fournies par le droit constitutionnel français – Vol. 1*. Paris: Sirey, 1920: 336-337.

### C. People as the legislature

Besides through Parliament, the French people may be deemed to legislate also by virtue of referendums.<sup>815</sup> Namely, the President of the Republic may, on a recommendation from the Government or on a joint motion of the two Houses, submit to a referendum any government bill dealing with: (a) the organisation of the public authorities; (b) reforms of the economic, social or environmental policy and the public services contributing thereto; and (c) the authorisation to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions.<sup>816</sup>

The constitutional amendment of 2008 extends the right to initiate a referendum on these matters to Parliament and voters acting jointly.<sup>817</sup> An initiative by one fifth of the members of Parliament,<sup>818</sup> supported by one tenth of the voters, is considered a private member's bill for the purpose of such a referendum. Yet before being submitted to a referendum, such a private member's bill is subject to compulsory control by the *Conseil constitutionnel*, which also supervises the regularity of the operation of such a referendum.<sup>819</sup> It has been suggested that the many lacunas of this new procedure render its application "aleatory".<sup>820</sup>

#### 2.2.2. Parliament's loss of sovereignty

Reanimating the Fourth Republic's feeble *Comité constitutionnel*, the Fifth Republic was endowed with a *Conseil constitutionnel*.<sup>821</sup> One of its central tasks is the preliminary control of the constitutionality of statutes after they are adopted but before they are promulgated.<sup>822</sup> Another constraint on Parliament is the preliminary review of constitutionality of the rules of procedure (*règlements*) of both Houses of

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<sup>815</sup> Yet it has been argued that, due to the inexperience of the people and their conservative attitudes, legislating by means of popular referendums is illusory and hypocritical. Nuss, Pierre. "Référendum et initiative populaire en France: de l'illusion en général et de l'hypocrisie en particulier." *Revue du Droit Public*, Vol. 116, No. 5, 2000: 1441-1493.

<sup>816</sup> Article 11 of the Constitution.

<sup>817</sup> Article 4 of the *Loi constitutionnelle no. 2008-724 du 23 juillet 2008 de modernization des institutions de la V<sup>e</sup> République*.

<sup>818</sup> In this author's view, the phrase "*membres du Parlement*" used in the Constitution should be understood as referring to both MPs and senators, because in certain other provisions the Constitution differentiates between "*députés*" (MPs) and "*sénateurs*" (senators). Furthermore, Article 24(2) of the Constitution unequivocally lays down that Parliament consists of the *Assemblée nationale* and the *Sénat* – hence, of both MPs and senators.

<sup>819</sup> Article 61(1) of the Constitution as amended by Article 28 of the *Loi constitutionnelle no. 2008-724 du 23 juillet 2008 de modernization des institutions de la V<sup>e</sup> République* in conjunction with Article 60 of the Constitution.

<sup>820</sup> Diémert, Stéphane. "Le référendum législatif d'initiative minoritaire dans l'article 11, révisé, de la Constitution." *Revue Française de Droit Constitutionnel*, No. 77, 2009/1: 55-97.

<sup>821</sup> See more generally on this institution in: Avril, Pierre and Gicquel, Jean. *Le Conseil constitutionnel*. Paris: Montchrestien, 2005; Favoreu, Louis. *Le Conseil constitutionnel*. Paris: Presses Universitaires de France, 2005.

<sup>822</sup> Article 61(2) of the Constitution.

Parliament.<sup>823</sup> The *Conseil constitutionnel's* review remained preliminary until the constitutional amendment of 2008, when the *Conseil d'État* and the *Cour de cassation* were given the right to refer to the *Conseil constitutionnel* a legislative provision that has been claimed, during proceedings before a court of law, to be contrary to the rights and freedoms guaranteed by the Constitution.<sup>824</sup>

In the initial period, however, the principal task of the *Conseil constitutionnel* was to control Parliament's respect for the procedures of *parlementarisme rationalisé*, so as to prevent Parliament from encroaching on the powers of the executive.<sup>825</sup> The *Conseil constitutionnel* made a major pronouncement in this respect already in 1959, when it examined the constitutionality of the rules of procedure of both Houses of Parliament.<sup>826</sup> It then decided that neither of the Houses may adopt resolutions that seek to direct or control the action of the Government or to participate in the legislative process. Parliament was only allowed to adopt resolutions on matters falling under its exclusive legislative competence, such as those on the functioning and discipline of the Houses.<sup>827</sup> As we will see later, this situation has changed due to European integration.<sup>828</sup>

It was only in 1971 that the *Conseil constitutionnel* truly assumed the prerogative of administering constitutional justice by extending the so-called *bloc de constitutionnalité* beyond the Constitution itself to the freedoms and liberties enshrined in the documents referred to in the Preamble.<sup>829</sup> This marked a complete overhaul, because "the invalidation of an act of Parliament on the ground that it infringes constitutionally protected rights of the citizen is alien to French constitutional tradition".<sup>830</sup> This "audacious piece of judicial activism"<sup>831</sup> has made some authors wonder whether it was the French *Marbury v. Madison*.<sup>832</sup> Yet it has

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<sup>823</sup> Article 61(1) of the Constitution.

<sup>824</sup> Article 61-1(1) of the Constitution.

<sup>825</sup> Avril, Pierre. "Enchantement et désenchantement constitutionnels sous la V<sup>e</sup> République." *Pouvoirs*, No. 126, 2008/3: 14.

<sup>826</sup> *Conseil constitutionnel, Décision no. 59-2 DC du 24 juin 1959 "Règlement de l'Assemblée nationale" and Décision no. 59-3 DC du 25 juin 1959 "Règlement du Sénat"*.

<sup>827</sup> See numerous other limitations imposed by the *Conseil constitutionnel* and how they were bypassed through the customary practices of both Parliament and Government in: Delcamp, Alain. "Le Conseil constitutionnel et le Parlement," *Revue Française de Droit Constitutionnel*, No. 57, 2004/1: 37-83.

<sup>828</sup> See *infra* the text accompanying note 944 of this Chapter.

<sup>829</sup> *Conseil constitutionnel, Décision no. 71-44 DC du 16 juillet 1971 "Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association"*, para. 2. These documents are the Declaration of the Rights of Man and of the Citizen of 1789, the Preamble to the Constitution of 1946 and the Environmental Charter of 2004.

<sup>830</sup> Beardsley, James E. "The Constitutional Council and constitutional liberties in France." *American Journal of Comparative Law*, Vol. 20, 1972: 431.

<sup>831</sup> Remy-Granger, Dominique. "The ambiguities of the state based on the rule of law: a unitary system à la française." In *Ambiguity in the rule of law: the interface between national and international legal systems*, by T.A.J.A. Vandamme and Jan-Herman Reestman (eds), Groningen: Europa Law Publishing, 2001: 60.

<sup>832</sup> Haimbaugh, George D. "Was it France's *Marbury v. Madison*?" *Ohio State Law Journal*, 1974, Vol. 35, 1974: 910-926; Avril, Pierre. "Enchantement et désenchantement constitutionnels sous la Ve

rightly been appraised that if the *Conseil constitutionnel* can impede Parliament's liberty to act, it cannot affect the latter's competence to act.<sup>833</sup>

Three years after this decision, the constitutional amendment of 30 October 1974<sup>834</sup> permitted the Presidents of both Houses of Parliament, sixty MPs and sixty senators to refer statutes to the *Conseil constitutionnel* for a preliminary review of their constitutionality, a right thereto reserved only for the President of the Republic and the Prime Minister.<sup>835</sup> This procedure has since been utilised frequently, because it enables the opposition to tackle government bills.<sup>836</sup>

A year later, in 1975, the *Conseil constitutionnel* further restricted Parliament's legislative prerogative by extending preliminary review to the "rules of constitutional value related to the legislative procedure".<sup>837</sup> Henceforth, the whole of the legislative procedure may be the object of review by the *Conseil constitutionnel*.

### 2.3. Five decades after: *parliamentarisme rationalisé* in peril?

The constitutional order established in 1958 has evolved through the agency of both external and internal challenges.

First, the *rationalisation of Parliament is double*. It originates from both the French and European constitutional orders.<sup>838</sup> Crucially, whereas the limitations on Parliament's powers derived from the Constitution were put in place explicitly and intentionally, those derived from the EU's material constitution were unnoticed in France for decades after the Coal and Steel Community was established. It was the Maastricht Treaty and, thereafter, the Constitutional Treaty that "raised awareness among the French of an evolution of such a nature to put the sovereignty of the state in jeopardy and, therefore, also the French identity".<sup>839</sup>

Second, the *rationalisation of Parliament is imperfect*. Two major practical developments since the establishment of the Fifth Republic qualify it: on the one hand, the praxis of partisan politics and, on the other, the incidence of cohabitations. These two 'aberrations' being unpredictable at the time of the founding of the Fifth

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République." *Pouvoirs*, No. 126, 2008/3: 13; Chantebout, Bernard. *Droit constitutionnel*. Paris: Sirey, 2008: 400.

<sup>833</sup> Galletti, Florence. "Existe-t-il une obligation de bien légiférer?. Propos sur «l'incompétence négative du législateur» dans la jurisprudence du Conseil constitutionnel." *Revue Française de Droit Constitutionnel*, No. 58, 2004/2: 388.

<sup>834</sup> *Loi constitutionnelle no. 74-904 du 29 octobre 1974 portant revision de l'article 61 de la Constitution*.

<sup>835</sup> Article 61(2) of the Constitution.

<sup>836</sup> As an illustration, until 31 December 2003 the *Conseil constitutionnel* handed down 319 decisions pursuant to this Article, of which 302 were sought by parliamentarians. Avril, Pierre and Gicquel, Jean. *Droit parlementaire*. Paris: Montchrestien, 2004: 149.

<sup>837</sup> *Conseil constitutionnel, Décision no. 75-57 DC du 23 juillet 1975, "Loi supprimant la patente et instituant une taxe professionnelle"*, para. 1.

<sup>838</sup> Fuchs-Cessot, Alice. *Le Parlement à l'épreuve de l'Europe et de la V<sup>e</sup> République*. Paris: Librairie Générale de Droit et de Jurisprudence, 2004: 67; Montebourg, Arnaud. "Ce que sera la VI<sup>e</sup> République en 2007." *Revue Politique et Parlementaire*, Vol. 107, No. 1034, 2005: 112.

<sup>839</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 429.

Republic spurred the reinforcement of Parliament. This process culminated in the 2008 constitutional amendment, which has rightly been described as a "softening of *parlementarisme rationalisé*"<sup>840</sup>.

### 2.3.1. The emergence of partisan politics

As one of the most important political features of the Fifth Republic, the genesis of the so-called "*fait majoritaire*", i.e., the majority rule or partisan politics, led to a political landscape in which the President of the Republic enjoys absolute majority in Parliament, which then infallibly supports the Government. This monumental transformation of the system of political parties was facilitated by three events: (a) direct elections of the President of the Republic,<sup>841</sup> (b) the organisation of both presidential and parliamentary elections in two rounds,<sup>842</sup> and (c) the temporal concordance between presidential and parliamentary elections.<sup>843</sup>

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<sup>840</sup> Dord, Olivier. "Vers un rééquilibrage des pouvoirs publics en faveur du Parlement." *Revue Française de Droit Constitutionnel*, No. 77, 2009/1: 100.

<sup>841</sup> Driven by the powerful reflexes of the Fourth Republic, the drafters of the Constitution of 1958 did not envision a fundamental reform of the political sphere. This resulted in scores of safeguards of *parlementarisme rationalisé*. The fragile political climate led De Gaulle to initiate, by means of a referendum to circumvent Parliament's opposition, a constitutional amendment that would introduce direct elections for the President of the Republic. The *Assemblée nationale*, disgruntled that it was being sidestepped, reacted by toppling Prime Minister Pompidou, the only such occurrence in the Fifth Republic. In retaliation, De Gaulle dissolved the House. The aftermath was historic. The massive success of the referendum of 6 November 1962 (62.29% in favour) and the victory of the pro-referendum campaigners in the ensuing parliamentary elections of 18 and 25 November 1962 marked the turning point in French constitutional law and practice. The President's legitimacy and his leverage over Parliament were bolstered. Duhamel, Olivier. *Le pouvoir politique en France*. Paris: Éditions du Seuil, 2003: 35; Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 424. See also: Williams, Philip M. "The French referendum and election of October-November 1962." *Parliamentary Affairs*, Vol. 16, No. 2, 1962: 165-173.

<sup>842</sup> Some authors consider this the most original feature of the Fifth Republic, as the whole country is divided into two camps and the parliamentary majority is decided by the voters rather than by political parties. Bipolar multipartism or simply bipolarism was thus ushered in. As François put it, "Parliament is no longer the place where consensus is reached through deliberation; it becomes the place of partisan dichotomy between the majority and the opposition". François, Bastien. "La question de la majorité parlementaire sous la V<sup>e</sup> République." In *Mélanges en l'honneur de Pierre Avril: la République*, Paris: Montchrestien, 2001: 319-320; Blais, André and Loewen, Peter John. "The French electoral system and its effects." *West European Politics*, Vol. 32, No. 2, 2009: 345; Bidégaray, Christian. "Du confessionnal et du diable. Réflexions sur le statut des partis politiques quarante ans après la fondation de la V<sup>e</sup> République." *Revue du Droit Public*, Vol. 114, No. 5-6, 1998: 1811.

<sup>843</sup> At the heart of holding presidential elections shortly before parliamentary elections lay the endeavour to revitalise the legitimacy of the office of Presidency by allowing the electorate to pass its judgment on the work of the President more frequently and to avoid cohabitations. This was accomplished by shortening the duration of the term of office of the President of the Republic and by reversing parliamentary and presidential electoral calendars. Rouvillois, Frédéric. "La cohabitation et l'accélération de l'histoire." In *La cohabitation, fin de la République?*, by Frédéric Rouvillois (ed.), Paris: Éditions François-Xavier de Guibert, 2001: 13; Chantebout, Bernard. *Droit constitutionnel*. Paris: Sirey, 2008: 482.

The flawless congruence of presidential and parliamentary majorities produces what Duhamel termed "*présidentialisme absolu*"<sup>844</sup> and turns Parliament into a "docile chamber for the rubber-stamping of the decisions of the executive", thereby warding off the opposition.<sup>845</sup> In these periods, executive bicephalism<sup>846</sup> sways towards the preponderance of the President of the Republic. As Maus stressed, the President of the Republic is then the Head of State, the Head of the Executive, and the Head of the Majority, which represents a "genuine constitutional exception", because "France is the only European state where the national political life continues to be organised around the presidential election".<sup>847</sup>

It has been widely observed in the literature that the anchorage of the majoritarian style of politics pre-empted the logic of a curbed Parliament. In the words of Ardant and Mathieu, there is "generally no need to force MPs to adopt a text, no risk of invoking responsibility, the Government is carefree regarding Parliament for the duration of the legislature, it has the time, it can realise its programme".<sup>848</sup> In similar terms, Pezant stressed that "governmental stability exists independently of *parlementarisme rationalisé*; the latter thus only serves to hold Parliament under restraint, as it is not useful any more as a method of its majoritarian functioning".<sup>849</sup> Many constitutionalists, consequently, acknowledge the profound impact of this phenomenon on the French Constitution. For Avril, it was the moment of the genuine birth of the Fifth Republic, whose constitutional text has thereby become "an archaic superstructure".<sup>850</sup>

Yet Carcassonne is cautious. He emphasises that strict party discipline is but a political aspect of the decision-making process. It is the parliamentarians who have the power and the Government cannot force Parliament to follow it, but merely force it to reach a decision. Since the majority rule is not necessarily achieved forever, as shown by occasional frictions between the Government and the parliamentary majority, the disappearance of the instruments of Parliament's rationalisation is not justified.<sup>851</sup> Similarly, Huber rejected exclusive reliance on political arguments, because France has seldom witnessed coherent parliamentary majorities. There is,

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<sup>844</sup> Duhamel, Olivier. *Le pouvoir politique en France*. Paris: Éditions du Seuil, 2003: 36.

<sup>845</sup> Chandernagor, André. *Un parlement, pour quoi faire?* Paris: Gallimard, 1967: 12 and 59.

<sup>846</sup> Duhamel, Olivier. *Le pouvoir politique en France*. Paris: Éditions du Seuil, 2003: 189; Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 418 and 441.

<sup>847</sup> Maus, Didier. "La fin de l'exception constitutionnelle française." *Revue Politique et Parlementaire*, Vol. 107, No. 1034, 2005: 104.

<sup>848</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 427.

<sup>849</sup> Pezant, Jean-Louis. "Parlementarisme rationalisé et système majoritaire." In: *Mélanges en l'honneur de Pierre Avril: la République*, Paris: Montchrestien, 2001: 466.

<sup>850</sup> Avril, Pierre. "Enchantement et désenchantement constitutionnels sous la V<sup>e</sup> République." *Pouvoirs*, No. 126, 2008/3: 7.

<sup>851</sup> Carcassonne, Guy. "Rationaliser la responsabilité politique." In: *Mélanges en l'honneur de Pierre Pactet: l'esprit des institutions, l'équilibre des pouvoirs*, Paris: Dalloz, 2003: 545.

instead, a history of coalition governments, which often enjoy the support of narrow majorities and are generally composed of parties that disagree on policy and compete with each other in the electoral arena.<sup>852</sup> Admitting that "the job of the parliamentary majority is to support rather than to overthrow",<sup>853</sup> Belorgey similarly warned that "supporting the government is [...] not the same thing as protecting it. The best form of support is often also preventing it from trapping itself in error".<sup>854</sup> Confirming these arguments, an empirical study of the *Assemblée nationale* has shown that, despite the Government's dominance in the legislative process thanks to the *parlementarisme rationalisé*, MPs retain a certain room for manoeuvre.<sup>855</sup>

### 2.3.2. Cohabitations

There are two important limitations on the *fait majoritaire* that can produce a more assertive Parliament: (a) quasi-cohabitations, when neither the President of the Republic nor the opposition enjoy an absolute majority of the seats in the *Assemblée nationale*; and (b) cohabitations, when the party or parties hostile to the President of the Republic win an absolute majority of the seats in the *Assemblée nationale*.<sup>856</sup> These occurrences are critical because, as Duhamel explains, "the political articulation of majorities determines the institutional articulation of powers".<sup>857</sup> In effect, quasi-cohabitations give rise to *présidentialisme rationalisé*<sup>858</sup> and cohabitations to *présidentialisme neutralisé*.<sup>859</sup>

During cohabitations the President of the Republic is compelled politically, though not juridically, to appoint a Prime Minister from the political party that wins parliamentary elections. This transforms executive bicephalism into "diarchy".<sup>860</sup> Some authors have held that the President of the Republic thereby becomes a mere "*Résident de la République*"<sup>861</sup> with a mostly ceremonial status.<sup>862</sup> The key

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<sup>852</sup> Huber, John D. *Rationalising parliament: legislative institutions and party politics in France*. Cambridge: Cambridge University Press, 1996: 36.

<sup>853</sup> Belorgey, Jean-Michel. *Le parlement à refaire*. Paris: Gallimard, 1991: 37.

<sup>854</sup> Belorgey, Jean-Michel. *Le parlement à refaire*. Paris: Gallimard, 1991: 116.

<sup>855</sup> Kerrouche, Eric. "The French Assemblée nationale: the case of a weak legislature?," *Journal of Legislative Studies*, Vol. 12, No. 3, 2006: 336-365.

<sup>856</sup> See for instance: Azat-Thierree, Agnès. *La cohabitation en France*. Doctoral dissertation, Université Paris 2 Panthéon-Assas, 2004; Cohendet, Marie-Anne. *La cohabitation: leçons d'une expérience*. Paris: Presses Universitaires de France, 1993; Cohendet, Marie-Anne. "Cohabitation et constitution." *Pouvoirs*, No. 91, 1999: 33-57; Gouaud, Christiane. *La cohabitation*. Paris: Ellipses, 1996; Massot, Jean. "La cohabitation, quelles conséquences pour les institutions?" *Cahiers français*, No. 300, 2001: 28-32; Vedel, Georges. "Variations et cohabitations." *Pouvoirs*, No. 83, 1997: 101-129.

<sup>857</sup> Duhamel, Olivier. *Le pouvoir politique en France*. Paris: Éditions du Seuil, 2003: 31.

<sup>858</sup> Duhamel, Olivier. *Le pouvoir politique en France*. Paris: Éditions du Seuil, 2003: 39.

<sup>859</sup> Duhamel, Olivier. *Le pouvoir politique en France*. Paris: Éditions du Seuil, 2003: 41.

<sup>860</sup> Ardant, Philippe and Duhamel, Olivier. "La dyarchie." *Pouvoirs*, No. 91, 1999: 5-24; Massot, Jean. *Chef de l'état et chef du gouvernement: la dyarchie hiérarchisée*. Paris: La Documentation Française, 2008; Rouvillois, Frédéric. "La cohabitation et l'accélération de l'histoire." In *La cohabitation, fin de la République?*, by Frédéric Rouvillois (ed.), Paris: Éditions François-Xavier de Guibert, 2001: 16.

<sup>861</sup> Colombani, Jean-Marie. *Le résident de la République*. Paris: Stock, 1998.

consequence of cohabitation is, therefore, that it provokes considerable shifts in power from the President of the Republic towards the Prime Minister and Parliament.<sup>863</sup> This is why during these periods France resembles a parliamentary government.<sup>864</sup> One might, indeed, speak of "reparliamentarisation".<sup>865</sup>

The question arises of whether and, if so, how cohabitations affect Parliament's constitutional position. Apart from a somewhat more frequent use of the instruments of *parlementarisme rationalisé*, many authors argue that cohabitations do not specifically affect Parliament. In Gicquel's opinion, Parliament remains dominated by the Government.<sup>866</sup> Maus argues that there are no quantitative and qualitative indicators of essential alterations in Parliament's operation, although there is a certain balance within the *Assemblée nationale* and between the two Houses.<sup>867</sup> Carcassonne goes further to assert that the same indicators actually demonstrate intense legislative activity during cohabitations, thus making cohabitations the engine of legislation.<sup>868</sup>

Furthermore, foreign and European affairs have flourished during cohabitations.<sup>869</sup> Contrary to what one might expect, an analysis of the French constitutional and Community norms reveals that "the distribution of competences between the President of the Republic and the Prime Minister is such that the risk of confrontation over European dossiers appears minimal, not to say inexistent".<sup>870</sup> Even during cohabitations, the President of the Republic remains dominant, as "behind the guise of competition between the *Élysée* and *Matignon* regarding European issues, there is in reality a hidden entente".<sup>871</sup> According to an empirical analysis, there is indeed no "radicalisation of positions" but rather a tendency towards preserving the *status quo*.<sup>872</sup>

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<sup>862</sup> Ardant, Philippe and Duhamel, Olivier. "La dyarchie." *Pouvoirs*, No. 91, 1999: 19.

<sup>863</sup> Fournier, Antonin-Xavier. *La dynamique du pouvoir sous la V<sup>e</sup> République: cohabitation et avenir des institutions*. Québec: Presses de l'Université du Québec, 2008: 61.

<sup>864</sup> Peyrefitte, Alain. "Les trois cohabitations." *Pouvoirs*, No. 91, 1999: 28.

<sup>865</sup> Avril, Pierre. "Le parlementarisme rationalisé." *Revue du Droit Public*, Vol. 114, No. 5-6, 1998: 1515.

<sup>866</sup> Gicquel, Jean. "Une redéfinition des rapports entre l'exécutif et le législatif." *Cahiers français*, No. 300, 2001: 13.

<sup>867</sup> Maus, Didier. "Le Parlement et les cohabitations." *Pouvoirs*, No. 91, 1999: 81.

<sup>868</sup> In the sessions immediately following the occurrence of cohabitations, there was no sign of lethargy in the legislative activity (105 statutes were adopted in the session 1986-1987 and 159 laws in that of 1993-1994), except for the third cohabitation (63 statutes in the session 1997-1998), which can be attributed to the dissolution of the *Assemblée nationale*. Carcassonne, Guy. "Frein ou moteur?" *Pouvoirs*, No. 91, 1999: 98.

<sup>869</sup> Carcassonne, Guy. "Frein ou moteur?" *Pouvoirs*, No. 91, 1999: 100.

<sup>870</sup> Longuet, Patrick. "La Cinquième République entre l'enclume de la cohabitation et le marteau communautaire." In *La cohabitation, fin de la République?*, by Frédérique Rouvillois (ed.), 91-114. Paris: Éditions François-Xavier de Guibert, 2001: 104.

<sup>871</sup> Longuet, Patrick. "La Cinquième République entre l'enclume de la cohabitation et le marteau communautaire." In *La cohabitation, fin de la République?*, by Frédérique Rouvillois (ed.), 91-114. Paris: Éditions François-Xavier de Guibert, 2001: 93.

<sup>872</sup> Leuffen, Dirk. "Does cohabitation matter? French European policy-making in the context of divided government," *West European Politics*, Vol. 32, No. 6, 2009: 1156.

Cohabitations also seem conducive to Parliament's enhanced control over the Government, because of the practical, though not juridical, shift of power from the politically irresponsible President of the Republic to the politically responsible Government. Contrarily, Bourmaud finds that cohabitations only confirm the subordination of Parliament, because the Prime Ministers' inherent inclination towards their emancipation from the President of the Republic leads to the "presidentialisation of the Prime Minister".<sup>873</sup> It is therefore difficult to equalise cohabitations with the outright enhancement of Parliament, which remains indirect and dependent on constitutional practice.

### 3. THE FRENCH PARLIAMENT... STILL OF THE FIFTH REPUBLIC

The hallmark of the French Fifth Republic is executive dominance over Parliament. A blend of deliberately enshrined procedures of *parlementarisme rationalisé* and of the spontaneous emergence of uncluttered party discipline within the parliamentary majority nurtured the culture of Parliament's submission to the executive and the latter's sheer liberty to realise its political programme. The constitutional amendments of 2008 divided analysts as to Parliament's current constitutional status. For instance, while for Mény "the weakness of Parliament" is an "unreformable custom" of the Fifth Republic,<sup>874</sup> for Gicquel "Parliament is back: neither sovereign nor submitted".<sup>875</sup>

Though still largely uncontested, Parliament's submission is not exclusively juridical but tangibly political. In constitutional terms, Parliament retains remarkable powers to legislate and to control the executive. It adopts statutes in virtually all fields of public life, it amends them, it questions the Government, and it may even prevent some presidential appointments. It appears that Parliament's occasional struggles to fortify its position were not futile.<sup>876</sup>

Yet the rejuvenation of Parliament effected in 2008 was moderate and insufficient to shatter the constitutional equilibrium industriously forged since 1958. The fundamental axes on which the Fifth Republic rests remain intact, only the style varies. The Fifth Republic is "immutable", Carcassonne argues.<sup>877</sup> In contrast, Maus pointed out that "it is difficult, if not impossible to return to the equilibrium of 1958"<sup>878</sup> and that "the Constitution of the Fifth Republic is no longer an immutable text", because, with more than a third of its provisions changed, it has been the most

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<sup>873</sup> Bourmaud, Daniel. "Les V<sup>es</sup> Républiques. Monarchie, dyarchie, polyarchie. Variations autour du pouvoir sous la V<sup>e</sup> République." *Pouvoirs*, No. 99, 2001: 11-12.

<sup>874</sup> Mény, Yves. "Des moeurs irréfomables?" *Pouvoirs*, No. 126, 2008/3: 42.

<sup>875</sup> Gicquel, Jean. "La reparlementarisation: une perspective d'évolution." *Pouvoirs*, No. 126, 2008/3: 48.

<sup>876</sup> Carcassonne, Guy. "La résistance de l'Assemblée nationale à l'abaissement de son rôle." *Revue Française de Science Politique*, Vol. 34, No. 4, 1984: 910-921; Beaugendre, Charles. "Droit parlementaire. La défense par l'Assemblée nationale de ses prérogatives de délibération, à propos de l'ajournement d'un projet de loi." *Revue Française de Droit Constitutionnel*, No. 61, 2005/1: 189-201.

<sup>877</sup> Carcassonne, Guy. "Immuable V<sup>e</sup> République." *Pouvoirs*, No. 126, 2008/3: 35.

<sup>878</sup> Maus, Didier. "V<sup>e</sup> République: regards sur les révisions de la Constitution." *Revue Politique et Parlementaire*, Vol. 109, No. 1045, 2007: 16.

amended constitution since 1789, which means that it is undergoing perpetual evolution.<sup>879</sup> Ardant and Mathieu agree and underline that the system has overcome a host of conjunctures without paralysing the institutions.<sup>880</sup> They accept, nevertheless, that strict partisan politics sheds a new light on the separation of powers in France, because if the same party controls both the legislature and the executive then the distinction between these two branches becomes "illusory".<sup>881</sup>

Pertinently, the evolution aided by the 2008 amendment lured a number of observers to herald the metamorphosis of the French Parliament towards a pronounced control of the executive. To that effect, Gicquel holds that "the limited legislature [...] aspires to become an informed controller",<sup>882</sup> just as Lazardoux advocates a long-term shift "from Parliament Legislature to Parliament Overseer".<sup>883</sup> France today is neither "*hyperrationalisé*"<sup>884</sup> nor "*hyperprésidentialisé*",<sup>885</sup> even though President Sarkozy's agility and ubiquity, which earned him the nicknames of 'Starkozy' and 'Tsarkozy', due to his stretching of the presidentialist logic to the extreme, are, according to Chevallier, Carcassonne and Duhamel, an "apparent innovation" worthy of inquiring whether it affects the system of government.<sup>886</sup> The debate on the Sixth Republic provoked by Duverger in 1961 remains relevant indeed.<sup>887</sup> Politicians and academics alike entertained the idea of a Sixth Republic whose system of government would be either presidential or parliamentary, both of which would affect Parliament.<sup>888</sup>

<sup>879</sup> Maus, Didier. "V<sup>e</sup> République: regards sur les révisions de la Constitution." *Revue Politique et Parlementaire*, Vol. 109, No. 1045, 2007: 12.

<sup>880</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 413.

<sup>881</sup> Ardant, Philippe and Mathieu, Bertrand. *Institutions politiques et droit constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence, 2008: 428.

<sup>882</sup> Gicquel, Jean. "La reparlementarisation: une perspective d'évolution." *Pouvoirs*, No. 126, 2008/3: 49.

<sup>883</sup> Lazardoux, Sébastien G. "The French National Assembly's oversight of the executive: changing role, partisanship and intra-majority conflict." *West European Politics*, Vol. 32, No. 2, 2009: 289. See *contra*: Frears, John. "The French Parliament: loyal workhorse, poor watchdog," in *Parliaments in Western Europe*, by Philip Norton (ed.), London: Frank Cass: 32-51.

<sup>884</sup> Chantebout, Bernard. *Droit constitutionnel*. Paris: Sirey, 2008: 397.

<sup>885</sup> Ghevontian, Richard. "La révision de la Constitution et le Président de la République: l'hyperprésidentialisation n'a pas eu lieu," *Revue Française de Droit Constitutionnel*, No. 77, 2009/01: 119-133.

<sup>886</sup> Chevallier, Jean-Jacques et al. *Histoire de la V<sup>e</sup> république: 1958-2007*. Paris: Dalloz, 2007: 539 and 550-551.

<sup>887</sup> Duverger, Maurice. *La VI<sup>e</sup> République et le régime présidentiel*. Paris: Fayard, 1961.

<sup>888</sup> See for instance: Baumont, Stéphane. *Un président pour une VI<sup>e</sup> République?* Lectoure: Le Capucin, 2002; Duhamel, Olivier. *Vive la VI<sup>e</sup> République!* Paris: Éditions du Seuil, 2002; Hollande, François et al. *Quelle VI<sup>e</sup> République?* Pantin: Le Temps des Cerises, 2007. See also the essays in the following journal issues: "6<sup>e</sup> République?" *Après-Demain*, No. 454, 2003/5; "La 6<sup>e</sup> République?" *Revue du Droit Public*, Vol. 118, No. 1-2, 2002; "Réformes: les institutions d'abord." *Revue Politique et Parlementaire*, Vol. 109, No. 1045, 2007; Roussillon, Henry. "Le mythe de la 'VI<sup>e</sup> République'," *Revue Française de Droit Constitutionnel*, No. 52, 2002/4: 707- 719. There have been concrete suggestions in this respect. On the one hand, in April 2001 the Convention for the Sixth Republic was established by Arnaud Montebourg, a Socialist MP, and Professor Bastien François to advocate a parliamentary regime with the preponderance

The French system of government, often billed as semi-presidential, has been preserved, however. Direct universal suffrage equips two constitutional actors with the legitimacy necessary for the exercise of public power: Parliament and the President of the Republic. The intermediary between them is the Government. Nonetheless, the French originality does not lie in the fact that the President appoints the Government and that such a Government is responsible to the *Assemblée nationale*, but rather in the President's extraordinary powers, conferred upon him by the Constitution and moulded by practice. Cohabitations only underscore the specificity of the French system of government. They do not occur in other European semi-presidential systems, because the true head of the executive there is the Prime Minister despite direct presidential elections. In France, this is the case only during cohabitations, which Carcassonne describes as ephemeral parentheses lasting until the next election.<sup>889</sup> The system of government continues to exhibit a degree of specificity. The "*exception française*" lives on. And so does Parliament with all its idiosyncrasies, themselves increasingly imbued with EU influence, as another channel of the 'rationalisation' of Parliament, to which we turn in the sections that follow.

#### 4. LIMITED TRANSFER AS THE CENTREPIECE OF FRANCE'S RELATIONS WITH THE EU

Article 88-1 of the Constitution enshrines the following three principles that guide France's membership of the European Union.<sup>890</sup>

First, the *pouvoir constituant* strictly limits the transfer of competences to the EU to each given founding treaty.<sup>891</sup> Under the terms of the Constitution, France only

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of the Prime Minister. See also: Montebourg, Arnaud and François, Bastien. *La Constitution de la 6<sup>e</sup> République: réconcilier les Français avec la démocratie*. Paris: Odile Jacob, 2005. See also: <http://www.c6r.org>, accessed on 22 July 2009. On the other hand, the idea of a presidential France was, for instance, contemplated by the Balladur Committee: "[T]he Committee did not prohibit itself, in its discussions, to envisage the hypothesis of an evolution towards a purely presidential regime, in which there is no room for governmental responsibility before Parliament. [...] [This] corresponds to the wish of several members of the Committee, who [...] did note that it would then be necessary to abolish the right of dissolution of the *Assemblée nationale* by the President of the Republic, to recognise to the latter the right of veto over the laws adopted by Parliament, and to develop a culture of compromise, which is not always in conformity with the political traditions of our country. They have also stressed that none of the principal political forces is favourable to such a regime, which itself is no guarantee against the risk of conflict between the legislative and executive powers". *Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la V<sup>e</sup> République*, "Une V<sup>e</sup> République plus démocratique", pp. 4, 8 and 11, available at: <http://www.comite-constitutionnel.fr/actualites/?mode=details&id=48>, accessed on 17 June 2009.

<sup>889</sup> Carcassonne, Guy. "Immuable V<sup>e</sup> République." *Pouvoirs*, No. 126, 2008/3: 31 and 33.

<sup>890</sup> Article 88-1 of the Constitution reads: "The Republic shall participate in the European Union constituted by states which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December 2007".

<sup>891</sup> Boyron, Sophie. "The 'new' French Constitution and the European Union," *Cambridge Journal of European Legal Studies*, Vol. 11, 2008-2009: 334.

participates in the Union founded by the Treaty of Lisbon. Any future founding treaty and the corresponding transfer of competences, therefore, fall outside this constitutional prescription and would require a new consent by the *pouvoir constituant*. As has been argued by Jean-Luc Warsmann (UMP), the Chairman of the Committee of Laws of the *Assemblée nationale*, this legal solution "does not represent a general delegation let alone an integral, eternal and irreparable transfer of sovereignty".<sup>892</sup> The absence of a general constitutional clause on the EU, which would permit a broader transfer of competences, is motivated by the reluctance to give the Union a free hand in determining the margins of its own powers. This method of constitutionalising France's European commitments has been criticised, not least because constitutional revisions regularly ordered by the *Conseil constitutionnel* often appear as mere formalities.<sup>893</sup>

Second, with respect to the European Union, the Constitution mentions neither transfer nor sovereignty. Constitutionally permitted is nothing more than a joint exercise of some of the national powers. In France, sovereignty belongs to and derives from the nation, which exercises it through its representatives and by means of a referendum.<sup>894</sup>

Third, France's EU membership depends on the free choice of France. This means that, irrespective of the Lisbon Treaty's exit clause,<sup>895</sup> France could withdraw from the Union unilaterally.<sup>896</sup> As Pierre Mazeaud, the former President of the *Conseil constitutionnel* held, "European integration commits us not only conventionally but also constitutionally [...], it was not imposed on us externally, but results from a revocable national constitutional consent".<sup>897</sup>

None of these provisions, however, should portray France as a Eurosceptic Member State. To the contrary, France was the engine of the post-Second World War integration of Western Europe and, as will be shown below, its Parliament has, particularly since the Maastricht Treaty, undertaken to upgrade its position in EU affairs and find innovative modes of inter-institutional dialogue not only with the Government but also with EU institutions.

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<sup>892</sup> *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 24.

<sup>893</sup> Guilloud, Laetitia. "Révision constitutionnelle et intégration européenne, l'insoutenable légèreté de la Constitution," *Revue du Droit Public, Vol. 125, No. 2*, 2009: 400-401.

<sup>894</sup> Article 3(1) of the Constitution and Article 3 of the Declaration of the Rights of Man and of the Citizen.

<sup>895</sup> The Lisbon Treaty is the first founding treaty to foresee a legal procedure for the withdrawal of a Member State from the Union. Article 50(1) TEU provides that "[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements".

<sup>896</sup> It has convincingly been argued that the right of withdrawal from the Union is inherent in the democratic nature of the Union and that its inscription in EU primary law is declaratory of a pre-existing right. Vahlas, Alexis. "Souveraineté et droit de retrait au sein de l'Union européenne," *Revue du Droit Public, Vol. 121, No. 6*, 2005: 1595-1597.

<sup>897</sup> Cited in: Maïa, Jean, "La contrainte européenne sur la loi," *Pouvoirs, No. 114*, 2005/3: 63.

## 5. THE FRENCH PARLIAMENT'S COMPETENCE OF EUROPEAN SCRUTINY

### 5.1. Adapting to Europe

The fifth republican incarnation coincided, with a delay of nine months, with the establishment of the European Economic Community. For decades, the French institutional and constitutional setup was oblivious to the Community project on which it had embarked with great leadership. The key reason for this indifference lay precisely in the logic of *parliamentarisme rationalisé*, whose sanctity neither the Government nor Parliament wished to impugn.<sup>898</sup>

The awakening to the fact that Parliament's powers were rapidly being pre-empted by supranational developments began in April 1970, when the budgetary provisions of the founding treaties were amended to increase the Community's power of the purse and when the Council, in the same vain, decided to replace contributions by the Member States with the Community's own resources.<sup>899</sup> This episode triggered a strong reaction among parliamentarians, particularly among the Gaullists and Communists, who held that Parliament was being divested of important financial powers and that this created a dangerous precedent that eroded national sovereignty.<sup>900</sup>

Several academic analyses conducted in 1975 also detected the adverse effect of progressive 'Communitarisation' on Parliament. However, while some authors signalled that Parliament was being weakened<sup>901</sup> or even "discredited" or "ridiculed",<sup>902</sup> others paint a brighter picture. According to Burban, Parliament at that time still did not suffer an enormous loss of powers for three main reasons: (a) the Community competence touched on Parliament's legislative domains only exceptionally; (b) when it did, it left Parliament a certain margin of manoeuvre; and (c) governments did not hesitate to affirm the competence of their national parliaments when they deemed it opportune.<sup>903</sup>

It was on 30 November 1978 that the *Assemblée nationale*, by a majority of more than two thirds of the members, adopted the *exception d'irrecevabilité* regarding the

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<sup>898</sup> Saulnier, Emmanuelle. *La participation des parlements français et britannique aux Communautés et à l'Union européenne*, Paris: Librairie Générale de Droit et de Jurisprudence, 2002: 359 and 472.

<sup>899</sup> Council Decision 70/243/EEC, Euratom on the replacement of financial contributions from Member States by the Communities' own resources of 21 April 1970, (OJ L 94/19 of 28.7.1970).

<sup>900</sup> Emeri, Claude and Gautron, Jean-Claude. "La construction européenne et les pouvoirs des assemblées parlementaires. Le mandat parlementaire," *Revue du Droit Public*, Vol. 87, 1971: 166-172.

<sup>901</sup> Gerbet, Pierre. "L'élaboration des politiques communautaires au niveau national français," in *La France et les Communautés européennes*, by Joël Rideau et al. (eds), Paris: Librairie Générale de Droit et de Jurisprudence, 1975: 394-396.

<sup>902</sup> Rainaud, Jean-Marie. "L'incidence du droit communautaire sur le droit public français," in *La France et les Communautés européennes*, by Joël Rideau et al. (eds), Paris: Librairie Générale de Droit et de Jurisprudence, 1975: 845.

<sup>903</sup> Burban, Jean-Louis. "Le parlement français a-t-il perdu des pouvoirs avec l'application du droit communautaire?," *Cahiers de Droit Européen*, Vol. 11, No. 5-6, 1975: 557-558.

law transposing the Sixth VAT Directive.<sup>904</sup> Parliament's mounted dissatisfaction was thereby tipped into action. On 6 July 1979, the *Assemblée nationale* and the *Sénat* were each endowed with an 18-member delegation<sup>905</sup> for the European Communities constituted on the basis of proportional representation of political groups.<sup>906</sup> As Dubois argued, their creation derived from a "double distrust" of both the Government and the European Parliament.<sup>907</sup> The number of members of the Delegations was doubled in 1990.<sup>908</sup> Nowadays, while the *Sénat's* European Affairs Committee still counts 36 members,<sup>909</sup> their number in the *Assemblée nationale* counterpart has risen to 48.<sup>910</sup>

The scope of competence of the delegations in the early days was very limited and its only task was to inform their respective Houses of Community affairs. This was no easy task, however. As Jean Laporte, the Head of the European Affairs Department of the *Sénat*, observed, "the French executive could act with complete

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<sup>904</sup> Marre, Béatrice. "L'interférence de l'Europe," *Pouvoirs*, No. 99, 2001/4: 138. See on the *exception d'irrecevabilité supra* note 726 of this Chapter. The transposition was carried out a week later, however, but the Government had to engage its responsibility to achieve it. Foyer, Jean. "Le contrôle des parlements nationaux sur la fonction normative des institutions communautaire," *Revue du Marché Commun*, No. 226, 1979: 161-168.

<sup>905</sup> They were called 'delegations' rather than 'committees' because the former Article 43 of the Constitution limited the number of committees permitted in each House of Parliament to six, so any new administrative structure in Parliament had to bear a different name. Pursuant to the constitutional amendment of 23 July 2008, Article 88-4 was amended to require that a committee for European affairs be established in each House of Parliament. The Delegations for European affairs, which had existed for almost 30 years, were then renamed and continued to operate as committees. It should be noted that the differentiation was not merely one of nomenclature, because the delegations' powers were considerably fewer than those enjoyed by permanent committees.

<sup>906</sup> *Loi no. 79-564 du 6 juillet 1979 adjonction d'un art. 6 bis à l'ordonnance 58-1100 du 17 novembre 1958 relative au fonctionnement des assemblées parlementaires en vue de la création de délégations parlementaires pour les communautés européennes (Loi Foyer)*. See further in: Paillet, Michel. "L'adaptation du droit parlementaire français à la construction européenne (Commentaire de la loi no. 79-564 du 6 juillet 1979 créant les délégations parlementaires pour les Communautés européennes)," *Revue Trimestrielle de Droit Européen*, Vol. 17, 1981: 301-324; Cotterau, Gilles. "Les délégations parlementaires pour les Communautés européennes," *Revue du Droit Public*, Vol. 98, 1982: 35-63; Laporte, Jean. "Un nouveau mode de contrôle. Les délégations parlementaires," *Revue Française de Science Politique*, Vol. 31, No. 1, 1981: 131-136; Groud, Hervé. "Les délégations parlementaires pour les Communautés européennes, adaptations des assemblées au processus de construction européenne," *Revue du Droit Public*, Vol. 107, 1991: 1309-1349.

<sup>907</sup> Dubois, Louis. "The European Union: an opportunity for the French parliament to recover powers?," in *National parliaments as cornerstones of European integration*, by Eivind Smith (ed.), London: Kluwer Law International, 1996: 53.

<sup>908</sup> *Loi no. 90-385 du 10 mai 1990 modifiant l'article 6 bis de l'ordonnance no 58-1100 du 17 novembre 1958 relative au fonctionnement des assemblées parlementaires (Loi Josselin)*. See more in: Roy, Maurice-Pierre. "La réforme des délégations parlementaires pour les Communautés européennes. La loi du 10 mai 1990," *Revue de la Recherche Juridique*, Vol. 16, No. 44, 1991: 13-44; Pierré-Caps, Stéphane. "L'adaptation du parlement français au système communautaire," *Revue Française de Droit Constitutionnel*, Vol. 6, 1991: 233-273.

<sup>909</sup> Article 73 bis(1) of the Rules of Procedure of the *Sénat*.

<sup>910</sup> Article 151-1(2) of the Rules of Procedure of the *Assemblée nationale*.

freedom within the Community without even having to inform the legislature. In fact the latter did not have any means of real control, apart from the possibility of overthrowing the Government".<sup>911</sup> So much was Parliament constrained that its position was compared to a straitjacket: the Government did not feel obliged to reveal its views and negotiating positions even in response to parliamentary questions.<sup>912</sup> For that reason, the Delegations for the European Communities tended to gather more information directly from Community institutions, and especially from French MEPs, than from their own Government.<sup>913</sup>

The leash was loosened only in 1990, when Parliament was given the rights to organise hearings, disseminate their reports to specialist parliamentary committees and receive Government information no longer on the eve of Council negotiations but from the moment of their transmission to the Council.<sup>914</sup> It has been argued, nonetheless, that the Government, due to its "extremely favourable institutional and political position", was able to neutralise Parliament's aspirations and frustrate its participation in EU policy making.<sup>915</sup> As Fuchs-Cessot commented, it is striking that while constitutional practice has caused *parlementarisme rationalisé* to fade regarding national matters, it has been reactivated in European matters.<sup>916</sup> The institutional disequilibrium created by the Fifth Republic was, hence, not only confirmed but also aggravated by European integration.<sup>917</sup>

The situation improved in 1992, when Article 88-4 was inserted into the Constitution.<sup>918</sup> According to the Committee of Laws of the *Assemblée nationale*,

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<sup>911</sup> Laporte, Jean. "The balance between executive power and legislative power in the relations of France with the European Union," in *The changing role of parliaments in the European Union*, by Finn Laursen and Spyros A. Pappas (eds), Maastricht: European Institute of Public Administration, 1995: 21.

<sup>912</sup> Rizzuto, Franco. "The French Parliament and the EU: loosening the constitutional straitjacket," in *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 47.

<sup>913</sup> Rizzuto, Franco. "The French Parliament and the EU: loosening the constitutional straitjacket," in *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 49; Laporte, Jean. "The balance between executive power and legislative power in the relations of France with the European Union," in *The changing role of parliaments in the European Union*, by Finn Laursen and Spyros A. Pappas (eds), Maastricht: European Institute of Public Administration, 1995: 21-22.

<sup>914</sup> Boyron, Sophie. "The 'new' French Constitution and the European Union," *Cambridge Journal of European Legal Studies*, Vol. 11, 2008-2009: 326.

<sup>915</sup> Grossman, Emiliano. "La résistance comme opportunité: les stratégies des institutions politiques françaises face à l'Europe," *Revue Internationale de Politique Comparée*, Vol. 154, 2008/4: 669 and 675. See also: Oberdorff, Henri. "Les incidences de l'Union européenne sur les institutions françaises," *Pouvoirs*, No. 69, 1994: 101.

<sup>916</sup> Fuchs-Cessot, Alice. *Le Parlement à l'épreuve de l'Europe et de la V<sup>e</sup> République*, Paris: Librairie Générale de Droit et de Jurisprudence, 2004: 103.

<sup>917</sup> Fuchs-Cessot, Alice. *Le Parlement à l'épreuve de l'Europe et de la V<sup>e</sup> République*, Paris: Librairie Générale de Droit et de Jurisprudence, 2004: 136.

<sup>918</sup> *Loi constitutionnelle no. 92-554 du 25 juin 1992*. See further in: Verdier, Marie-France. "La révision constitutionnelle du 25 juin 1992 nécessaire à la ratification du Traité de Maastricht et l'extension des pouvoirs des assemblées parlementaires françaises," *Revue du Droit Public*, Vol. 110, 1994: 1137-1163; Luchaire François. "L'Union européenne et la Constitution: commentaire de la loi constitutionnelle du 25 juin 1992," *Revue du Droit Public*, Vol. 108, No. 4, 1992: 956-981; Grewe, Constance. "La révision

this amendment "marks the wish to maintain national sovereignty incarnated by the representatives of the nation, a sovereignty that is not merely nominal, since it offers specific means for it to be exercised within the framework of the European integration process".<sup>919</sup> As the single most important legal provision of the French parliamentary scrutiny of EU affairs, Article 88-4 has provoked a plethora of academic reactions.<sup>920</sup>

Following a series of constitutional and structural modifications, Parliament refurbished its scrutiny arsenal to reflect the changed politico-legal environment of the post-Lisbon period. The paradigm shift commenced in 1992 with a view to altering the institutional balance between Parliament and the Government, not only in European matters but also within a larger constitutional spectrum, was arguably accomplished in 2008. Significantly, the Government's pre-eminence in EU decision making has fed the impression among the members of the European Affairs Committees that their opinions and resolutions have the most visible impact not on the Government but on the EU legislative process itself, of which the scrutiny of the Services Directive was cited as a notable example.<sup>921</sup> The awareness among the rest of the MPs about EU affairs, in contrast, has been evaluated as meagre.<sup>922</sup> Noting

constitutionnelle en vue de la ratification du traité de Maastricht," *Revue Française de Droit Constitutionnel*, No. 11, 1992: 413-438; Avril, Pierre and Gicquel, Jean. "L'apport de la révision à la procédure parlementaire," *Revue Française de Droit Constitutionnel*, No. 11, 1992: 439-455; Ladrech, Robert. "Europeanisation of domestic politics and institutions: the case of France," *Journal of Common Market Studies*, Vol. 32, No. 1, 1994: 69-88.

<sup>919</sup> *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 26.

<sup>920</sup> Roussillon, Henry (ed.). *L'article 88-4 de la Constitution française: le rôle du parlement dans l'élaboration de la norme européenne*, Toulouse: Presses de l'Université des Sciences Sociales de Toulouse, 1995; Nuttens, Jean-Dominique. *Le Parlement français et l'Europe: l'article 88-4 de la Constitution*, Paris: Librairie Générale de Droit et de Jurisprudence, 2001; Blanc, Didier. *Les parlements européen et français face à la fonction législative communautaire: aspects du déficit démocratique*, Paris: L'Harmattan, 2004; Meyer, Dorothee. *Le contrôle du parlement français sur la politique communautaire sous la V<sup>e</sup> République*, Doctoral dissertation, Université Aix-Marseille 3, 1993; Bigaut, Christian. "L'association du Parlement français au processus d'élaboration des normes communautaires: l'application de l'article 88 al. 4 de la Constitution issue de la réforme constitutionnelle de 1992," *Revue Administrative*, Vol. 47, No. 277, 1994: 29-39; See also contributions by Bernard Rullier on the application of Article 88-4 in *Revue Française de Droit Constitutionnel* from 1994-2000 and in *Revue du Droit Public* in 1994.

<sup>921</sup> Grossman, Emiliano. "La résistance comme opportunité: les stratégies des institutions politiques françaises face à l'Europe," *Revue Internationale de Politique Comparée*, Vol. 154, 2008/4: 674. See Chapter 9 for the scrutiny of the Service Directive.

<sup>922</sup> Saulnier, Emmanuelle. *La participation des parlements français et britannique aux Communautés et à l'Union européenne*, Paris: Librairie Générale de Droit et de Jurisprudence, 2002: 271. See a comprehensive politico-sociological analysis of the neglect by the majority of the French parliamentarians of their European role in: Rozenberg, Olivier. *Le Parlement français et l'Union européenne (1993-2005): l'Europe saisie par les rôles parlementaires*, Doctoral dissertation, Institut d'études politiques de Paris, 2005. See similarly: Rozenberg, Olivier. "Du non-usage de l'Europe par les parlementaires nationaux: la ratification des traités européens à l'Assemblée nationale," in *Les usages de l'Europe: acteurs et transformations européennes*, by Sophie Jacquot and Cornelia Woll (eds), Paris:

equally that it was unclear that Parliament's European resolutions were successful in steering the Government's action in the Council, Boyron remarked, however, that in upgrading its position in EU matters "[t]he European strategy of the French Parliament had succeeded beyond its wildest dreams".<sup>923</sup> These observations mean that the Government, thanks to its proactive attitude in practice and the legal developments, is no longer an insurmountable obstacle to Parliament's meaningful input in the Union's decision-making processes.

The current legal regulation of the French Parliament's EU competence is contained in the Constitution, an ordinance and the Rules of Procedure of the Houses of Parliament. The constitutional provisions are concretised or supplemented by several unilateral Government undertakings in the form of circular letters addressed to the ministries as well as other informal arrangements.

## 5.2. Information for scrutiny

Article 88-4(1) of the Constitution obliges the Government to lay before the *Assemblée nationale* and the *Sénat* draft legislative, non-legislative and other acts of the European Union as soon as they have been transmitted to the Council. This is a significant improvement on the constitutional amendment of 1992, which limited Parliament's competence of EU scrutiny and its pronouncement in the form of resolutions to those draft European acts that contained provisions of a *legislative nature* as laid down in Article 34 of the Constitution.<sup>924</sup> Whether an EU initiative domestically qualifies as legislation was the competence of the *Conseil d'État*.<sup>925</sup> All EU acts that did not qualify as such fell outside the scrutiny remit. This limitation on Parliament's right to information has been appraised as ill-conceived, because the delegations in charge of Community and later EU affairs were not acting as legislators but rather as information collectors and controllers, which means that the differentiation between the European and French legislative domains were not relevant.<sup>926</sup>

In order to boost the unity and coherence of the French position represented in the Council, Prime Minister Edouard Balladur decided in March 1994 that Parliament should be supplied with "all complementary information that it considers necessary for the exercise of its competences" and its positions should be the object of inter-ministerial consultation on ways to take them into account in Council

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L'Harmattan, 2004: 261-292; Rozenberg, Olivier. "Présider par plaisir: l'examen des affaires européennes à l'Assemblée nationale et à la Chambre des Communes depuis Maastricht," *Revue Française de Science Politique*, Vol. 59, No. 3, 2009: 401-427.

<sup>923</sup> Boyron, Sophie. "The 'new' French Constitution and the European Union," *Cambridge Journal of European Legal Studies*, Vol. 11, 2008-2009: 332 and 336.

<sup>924</sup> See *supra* notes 795 and 796 of this Chapter.

<sup>925</sup> Aguila, Yann. "Le rôle du Conseil d'État," in *L'article 88-4 de la Constitution française: le rôle du parlement dans l'élaboration de la norme européenne*, by Henry Roussillon (ed.), Toulouse: Presses de l'Université des Sciences Sociales de Toulouse, 1994: 161-171.

<sup>926</sup> Boyron, Sophie. "The 'new' French Constitution and the European Union," *Cambridge Journal of European Legal Studies*, Vol. 11, 2008-2009: 328.

negotiations.<sup>927</sup> Less than two months later, a statute was passed that allowed the Delegations for the European Union to receive information from the Government on draft Second and Third Pillar measures but not to adopt resolutions thereon.<sup>928</sup>

A minor upgrade in Parliament's access to EU-related information was performed by the constitutional amendment of 1999,<sup>929</sup> when the Government was given the *option* to send Parliament all other drafts, initiatives or documents emanating from EU institutions. This is the so-called optional clause (*la clause facultative*). The scope of information was again rephrased by the constitutional amendment of February 2008<sup>930</sup> to refer to draft EU legislative and other acts that contain provisions that in France are *matters for statutory regulation*. Some six months later, the constitutional amendment of July 2008,<sup>931</sup> which was aimed at the modernisation and balancing of the institutions of the Fifth Republic, deleted the limitation to matters for statutory regulation.

Parliament's right to information on EU affairs was further fortified in June 2009 by means of an ordinance, which lays down that the Government can provide, on its own initiative or upon the request of the Chairman of the European Affairs Committee of either of the Houses of Parliament, "any necessary document", such as the Commission's communications, Green and White Papers and legislative and work programmes.<sup>932</sup> Apart from these documents, this provision can also refer, for instance, to the Government's impact assessments of draft acts pending before EU institutions. Namely, Prime Minister Jean-Pierre Raffarin, in an effort made in September 2004 to step up the process of the transposition of directives and framework decisions, requested competent ministries to produce simplified impact assessment notes (*fiche d'impact simplifiée*). These notes should analyse the legal, budgetary, technical and administrative impact of all draft EU acts within three weeks of the transmission of these acts to Parliament. They should also furnish information on the French law that needs to be enacted or amended for a successful transposition of EU law.<sup>933</sup> Although impact assessment notes were chiefly meant for

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<sup>927</sup> *Circulaire relative aux relations entre les administrations françaises et les institutions de l'Union européenne* of 21 March 1994.

<sup>928</sup> *Loi no. 94-476 du 10 juin 1994 modifiant l'article 6 bis de l'ordonnance no. 58-1100 du 17 novembre 1958 relative au fonctionnement des assemblées parlementaires (Loi Pandraud)*.

<sup>929</sup> *Loi constitutionnelle no. 99-49 du 25 janvier 1999*. See more in: Chaltiel, Florence. "La Constitution française et l'Union européenne: a propos de la révision constitutionnelle du 25 janvier 1999," *Revue du Marché Commun et de l'Union Européenne*, No. 427, 1999: 228-237; Sauron, Jean-Luc. "Le contrôle parlementaire de l'activité gouvernementale en matière communautaire en France," *Revue Trimestrielle de Droit Européen*, Vol. 35, No. 2, 1999: 171-201.

<sup>930</sup> *Loi constitutionnelle no. 2008-103 du 4 février 2008*.

<sup>931</sup> *Loi constitutionnelle no. 2008-724 du 23 juillet 2008*.

<sup>932</sup> Article 6 bis of *Ordonnance no. 58-1100 relative au fonctionnement des assemblées parlementaires du 17 novembre 1958*, as amended on 15 June 2009.

<sup>933</sup> *Circulaire du 27 septembre 2004 relative à la procédure de transposition en droit interne des directives et décisions-cadres négociées dans le cadre des institutions européennes*, annex I, point II. An early recognition of the necessity for the Government to produce impact assessments, which would include an analysis of subsidiarity, was made by Prime Minister Edouard Balladur some 10 years

internal Government use, Prime Minister François Fillon explicitly requested in June 2010 that they be transmitted to Parliament.<sup>934</sup>

Yet the provision of information by the Government should not be overstated, because most of the documents, except for the impact assessment notes, have since 2006 also been provided directly by the Commission through the Barroso initiative as well as by the parliamentary representatives based in Brussels.<sup>935</sup> To these should be added the European Affairs Committees' daily contacts with the French administrative authorities in charge of Europe such as the Permanent Representation in Brussels, experts in all ministries of the Government and the Secretariat-General for European Affairs, which ensures interministerial coordination on European matters under the authority of the Prime Minister. Both the *Assemblée nationale* and the *Sénat* regard all of the aforesaid information channels as fully satisfying the needs of effective and continuous scrutiny of EU decision making.<sup>936</sup> What is more, both Houses also confirm that no problems arise even where EU documents are labelled "restricted" or "confidential", because all information necessary for the conduct of scrutiny could always be obtained.<sup>937</sup>

### 5.3. Instruments of scrutiny

The Houses of Parliament are autonomous both in their appreciation of Union affairs and in their utilisation of scrutiny instruments. There is no coordination between them.<sup>938</sup> The instruments available to Parliament for the scrutiny of EU initiatives are analysed below.

1. *Approval of EU accession treaties (autorisation).*<sup>939</sup> The Constitution requires the President of the Republic to call for a referendum for the approval of the ratification of any given EU accession treaty. However, if both Houses of Parliament pass a motion in identical terms by a three-fifths majority, the approval of ratification may instead proceed in accordance with the *Congrès* procedure for constitutional amendment. To wit, this procedure empowers the President of the Republic and not

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previously. See: *Circulaire du 21 mars 1994 relative aux relations entre les administrations françaises et les institutions de l'Union européenne*, annex IV, point I.

<sup>934</sup> *Circulaire du 21 juin 2010 relative à la participation du Parlement national au processus décisionnel européen*, annex, point III.1.

<sup>935</sup> See *infra* text accompanying note 1052 of this Chapter.

<sup>936</sup> COSAC Secretariat, Annex to the 12<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLII COSAC meeting held in Stockholm, 5-6 October 2009, pp. 40 and 43-44.

<sup>937</sup> COSAC Secretariat, Annex to the 5<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXV COSAC meeting held in Vienna, 22-23 May 2006, pp. 50 and 55.

<sup>938</sup> COSAC Secretariat, Annex to the 13<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLIII COSAC meeting held in Madrid from 31 May – 1 June 2010, pp. 149 and 164.

<sup>939</sup> Article 88-5 of the Constitution.

Parliament to decide whether to convene the *Congrès*.<sup>940</sup> It is therefore unclear whether the decision to set aside the requirement of a referendum for the EU accession of an applicant state is the prerogative of Parliament or of the President of the Republic.

The *Sénat* regulates this procedure further. The motion on the approval of a statute ratifying an accession treaty may neither be subject to conditions nor be amended. It is submitted to the Foreign Affairs Committee for examination and the European Affairs Committee can issue an opinion. The motion is then discussed within the ensuing three months. The same procedure applies also if the *Assemblée nationale* initiates the motion.<sup>941</sup>

2. *Report (rapport)*. The European Affairs Committee can adopt reports on any EU document or subject that it deems salient. As a very common instrument of involvement, reports on EU matters perform in-depth analyses of a given topic and may contain draft European resolutions.<sup>942</sup> In order to inform the debate on Europe, reports are sent not only to the Government but also to EU institutions, such as the European Parliament and the Commission.<sup>943</sup>

3. *European resolution (résolution européenne)*.<sup>944</sup> Introduced by the constitutional amendment of 1992,<sup>945</sup> the right of both Houses of Parliament to adopt European resolutions was extended to all documents emanating from EU institutions by the constitutional amendment of July 2008.<sup>946</sup> Although European resolutions are not legally binding for the Government,<sup>947</sup> they carry political weight. As Dominique Perben, Minister of Justice, explained in 2005:

Even though they [...] are not binding, one should admit that [...] they have indisputable political weight likely to hamper the Government, or, without a doubt, to interfere with its action in the area of international relations.<sup>948</sup>

While European resolutions may be used to question the Government's position, in practice they more frequently corroborate it or even add weight to it.<sup>949</sup> Indeed, it was

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<sup>940</sup> Article 89(3) of the Constitution.

<sup>941</sup> Article 73 septies of the Rules of Procedure of the *Sénat*.

<sup>942</sup> Article 151-2(3) of the Rules of Procedure of the *Assemblée nationale*.

<sup>943</sup> Blanc, Didier. *Les parlements européen et français face à la fonction législative communautaire: aspects du déficit démocratique*, Paris: L'Harmattan, 2004: 358-359.

<sup>944</sup> Article 88-4(2) of the Constitution.

<sup>945</sup> Gaillard, Maurice. "Le retour des résolutions parlementaires. La mise en oeuvre de l'article 88-4 de la Constitution," *Revue Française de Droit Constitutionnel*, Vol. 16, 1993: 707-740; Baufumé, Bruno. "La réhabilitation des résolutions: une nécessité constitutionnelle," *Revue du Droit Public*, Vol. 110, No. 5, 1994: 1399-1440. See also *supra* note 918 of this Chapter.

<sup>946</sup> *Loi constitutionnelle no. 2008-724 du 23 juillet 2008*.

<sup>947</sup> Boudet, François. "La force juridique des résolutions," *Revue du Droit Public*, Vol 74, No. 2, 1958: 271-289.

<sup>948</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du jeudi 27 janvier 2005, 128<sup>e</sup> séance de la session ordinaire de 2004-2005, JORF [2005] A.N. (C.R.) 6[2], 28.01.2005, p. 453.*

back in 1994 that Prime Minister Edouard Balladur instructed his ministers not only to take Parliament's European resolutions into account in Council deliberations, but also to take advantage of them, where possible, to strengthen France's negotiating prospects.<sup>950</sup> Hence, as "virtually all" resolutions adopted by the *Assemblée nationale* and the *Sénat* are supportive of the Government's negotiating position, the Government keenly utilises them as a "diplomatic bargaining tool", whereas it tends to ignore them in the rare cases when its views diverge from those of Parliament.<sup>951</sup> This is why it is somewhat paradoxical that there needs to exist a considerable degree of political cohesion between Parliament and the Government for resolutions to be a viable and practicable instrument of influence.<sup>952</sup> An important corollary of this has been that the criticism potentially expressed in European resolutions tends to be targeted not at the Government but at the Union's political process and its protagonists.<sup>953</sup>

In 1999, Prime Minister Lionel Jospin, in an attempt to streamline the Government's communication with Parliament, pledged that when EU institutions finally adopt an act that the Government has previously transmitted to Parliament, the competent minister or the minister in charge of EU affairs would inform the Houses of Parliament of the manner in which their European resolutions have been taken into account during the negotiations on that act.<sup>954</sup>

The constitutional amendment of July 2008 also empowered Parliament to adopt resolutions of general scope.<sup>955</sup> The Constitution explicitly foresees, however, that such resolutions are inadmissible if the Government estimates that their adoption or rejection would affect its political responsibility or that they contain injunctions in that regard. This was laid down in order to maintain the Government's predominance

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<sup>949</sup> *Assemblée nationale*, "The National Assembly in the French institutions", available at [http://www.assemblee-nationale.fr/english/synthetic\\_files/file\\_53.asp](http://www.assemblee-nationale.fr/english/synthetic_files/file_53.asp), accessed on 25 November 2010; See also: COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 44.

<sup>950</sup> *Circulaire du 19 juillet 1994 relative à la prise en compte de la position du Parlement français dans l'élaboration des actes communautaires*.

<sup>951</sup> Rizzuto, Francesco. "European integration and the French Parliament: from ineffectual watchdog to constitutional rehabilitation and an enhanced political role," *Journal of Legislative Studies*, Vol. 10, No. 1, 2004: 142 and 148.

<sup>952</sup> Alberton, Ghislaine. "L'article 88-4 de la Constitution ou l'avènement d'un nouveau Janus constitutionnel," *Revue du Droit Public*, Vol. 111, 1995: 935 and 942; Nuttens, Jean-Dominique. *Le Parlement français et l'Europe: l'article 88-4 de la Constitution*, Paris: Librairie Générale de Droit et de Jurisprudence, 2001: 149 and 278.

<sup>953</sup> Sprungk, Carina. "The French *Assemblée nationale* and the German *Bundestag* in the European Union: towards convergence in the 'old' Europe?," in *National parliaments within the enlarged European Union: from victims of integration to competitive actors?*, by John O'Brennan and Tapio Raunio (eds), Abingdon: Routledge, 2007: 155.

<sup>954</sup> *Circulaire du 13 décembre 1999 relative à l'application de l'article 88-4 de la Constitution*, annex, point VII. In 2005, Prime Minister Dominique de Villepin substituted this circular letter with a new one, but the pledge remained intact. See *Circulaire du 22 novembre 2005 relative à l'application de l'article 88-4 de la Constitution*, annex, point VII.

<sup>955</sup> Article 34-1 of the Constitution.

over Parliament and, therefore, to shield the Gaullist postulate of *parlementarisme rationalisé*. Given the lack of legal effect of both types of parliamentary resolutions, it may be concluded that European resolutions differ from those of general scope only with respect to the area in which they are adopted.

The procedures for adopting European resolutions are very similar in both Houses of Parliament and are crafted to allow them to skip the convocation of a plenary session whenever the Conference of Presidents does not deem it possible, necessary or worthwhile. This facilitates European scrutiny, because the final stages of it are not made hostage to sometimes overburdened parliamentary agendas or of the willingness of the parliamentary majority to place draft resolutions on the agenda of a given House. A lion's share of the scrutiny work is, thus, carried out in committees.

In the *Assemblée nationale*, the European Affairs Committee shall examine all draft EU acts received from the Government or from the Commission. If these acts are of minor importance, the Committee only takes note of them (agenda point A matters). Concerning all other acts, the Committee can, upon an oral or written presentation by the Chairman or rapporteur, approve them, publish a report, adopt conclusions or table a resolution (agenda point B matters).<sup>956</sup> Each deputy may table a resolution, too.<sup>957</sup> When a draft resolution is tabled, it is sent to the competent specialised committee, which as a rule has one month to adopt, amend or reject it. The deadline is 15 clear days where the draft resolution contains a reasoned opinion or subsidiarity action. If the specialised committee remains silent within the applicable timeframe, the text of the European Affairs Committee shall be deemed adopted by the specialised committee.<sup>958</sup> In case of divergence, the opinion of the specialised committee prevails.<sup>959</sup> If, within the ensuing 15 clear days, the Conference of Presidents does not request the inclusion of the draft resolution on the agenda of the House, the resolution shall be considered to have been finally adopted by the House.<sup>960</sup> Beyond European resolutions, the *Assemblée nationale* may also make observations on government and private members' bills with a European dimension.<sup>961</sup>

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<sup>956</sup> The difference between conclusions and draft resolutions is that the former express the opinion of the European Affairs Committee only, while the latter express the opinion of the entire House. Article 151-2(2)-(3) of the Rules of Procedure of the *Assemblée nationale*. See also: *Assemblée nationale, Commission des affaires européennes*, [http://www.assemblee-nationale.fr/europe/plaquette\\_octobre-2010.pdf](http://www.assemblee-nationale.fr/europe/plaquette_octobre-2010.pdf), accessed on 24 November 2010.

<sup>957</sup> *Assemblée nationale, Commission des affaires européennes*, [http://www.assemblee-nationale.fr/europe/plaquette\\_octobre-2010.pdf](http://www.assemblee-nationale.fr/europe/plaquette_octobre-2010.pdf), accessed on 24 November 2010.

<sup>958</sup> Article 151-6(2) of the Rules of Procedure of the *Assemblée nationale*.

<sup>959</sup> COSAC Secretariat, Annex to the 7<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVII COSAC meeting held in Berlin, 13-15 May 2007, p. 41.

<sup>960</sup> Article 151-7(1) of the Rules of Procedure of the *Assemblée nationale*. A request for the inclusion of a draft resolution on the House's agenda can be made by the Government, a chairman of a political group, the chairman of the specialised committee or the chairman of the European Affairs Committee.

<sup>961</sup> Article 151-1-1 of the Rules of Procedure of the *Assemblée nationale*.

The procedure in the *Sénat* almost mirrors that in the *Assemblée nationale*. Like in the *Assemblée nationale*, each senator, competent specialised committee or the European Affairs Committee may table a resolution.<sup>962</sup> This is then forwarded to the specialised committee if it has commenced scrutiny or otherwise to the European Affairs Committee. In the latter situation, the European Affairs Committee, after having examined the text, sends it to the specialised committee, which, if silent during a month, will cause the draft resolution of the European Affairs Committee to be deemed adopted in committee. The draft resolution then becomes the resolution of the *Sénat* within three clear days unless a plenary examination is requested. If within the following seven clear days, the request is refused or not decided upon, the draft resolution is considered to have been adopted by the House. The only major difference from the procedure in the *Assemblée nationale* seems to be that senators who are not members either of the committee competent for the matter at hand or of the European Affairs Committee enjoy an additional right of participation in the process of the adoption of European resolutions. Namely, each senator may table amendments to draft European resolutions before the specialised committee without the need for a plenary session to be convened.<sup>963</sup>

It has been the practice since 2005 that where the Council intends to adopt an act within a short period of time, the competent minister or the minister in charge of European affairs will invite the Houses of Parliament to scrutinise such an act in accordance with the urgent procedure, for which purpose he or she will present the particular circumstances that justify urgency and provide the necessary information about the act to be scrutinised and about the position that France intends to defend in the Council.<sup>964</sup> In practice, the Government's requests for the urgent procedure are quite frequent and Parliament normally accedes to them.<sup>965</sup>

Finally, what aids the scrutiny process in both Houses is the principle that members of the European Affairs Committee are concomitantly members of specialised committees, which need to be represented evenly.<sup>966</sup> This ensures a constant flow of sector-specific expertise towards and within the European Affairs Committee. In addition, specialised committees designate so-called 'European correspondents' from among their members to follow EU affairs falling within the ambit of their committee.<sup>967</sup> Moreover, the European Affairs Committee of the

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<sup>962</sup> Article 73 quinquies(3) of the Rules of Procedure of the *Sénat*.

<sup>963</sup> Article 73 quinquies(2) of the Rules of Procedure of the *Sénat*.

<sup>964</sup> *Circulaire du 22 novembre 2005 relative à l'application de l'article 88-4 de la Constitution*, annex, point III.2 and *Circulaire du 21 juin 2010 relative à la participation du Parlement national au processus décisionnel européen*, annex point III.4.

<sup>965</sup> Szukala, Andrea and Rozenberg, Olivier. "The French Parliament and the EU: progressive assertion and strategic investment," in *National parliaments on their ways to Europe: losers or latecomers?*, by Andreas Maurer and Wolfgang Wessels (eds), Baden-Baden: Nomos Verlagsgesellschaft, 2001: 237.

<sup>966</sup> Articles 151-1(2) of the Rules of Procedure of the *Assemblée nationale* and 73 bis(2) of the Rules of Procedure of the *Sénat*.

<sup>967</sup> Boyron, Sophie. "The 'new' French Constitution and the European Union," *Cambridge Journal of European Legal Studies*, Vol. 11, 2008-2009: 335. See also: *Assemblée nationale, Commission des*

*Assemblée nationale* has since 2007 appointed rapporteurs charged with following, over the long term, the principal items on the Union's agenda in a given policy area and not only with regard to a given EU initiative. These arrangements encourage small-scale specialisation of the members of the European Affairs Committee, assisting them in accumulating expert knowledge of EU affairs.<sup>968</sup>

4. *Reasoned opinion (avis motivé) and subsidiarity action (recours)*.<sup>969</sup> Transposing the relevant Lisbon Treaty provisions, the Constitution empowers both Houses of Parliament to adopt reasoned opinions on the conformity of draft EU legislative acts with the principle of subsidiarity. The reasoned opinions are sent to the Presidents of the European Parliament, Council and the Commission by the President of the House concerned and the Government is informed thereof. It is with respect to subsidiarity control that the distinction between the French and European notions of legislative acts retains its relevance. Since France determines the scope of legislation according to the substance of acts and the Union according to their form, Parliament might be denied the right to scrutinise the subsidiarity compliance of acts that the Union deems administrative but which are legislative in France and, *vice versa*, of acts that are considered legislative in the Union but are administrative in France.<sup>970</sup> An administrator from the *Assemblée nationale*'s European Affairs Committee has assessed that this discrepancy is now greatly diminished, because Parliament receives all types of EU documents regardless of their European or national classification.<sup>971</sup>

Each House of Parliament may also institute proceedings before the Court of Justice against EU legislative acts that infringe the principle of subsidiarity and the Government is obliged to transmit Parliament's action. Since the constitutional amendment of July 2008, subsidiarity actions require the support of at least 60 MPs or 60 senators for their adoption. Reasoned opinions and subsidiarity actions take the form of resolutions.<sup>972</sup> Both Houses of Parliament hold that the Government cannot

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*affaires européennes*, [http://www.assemblee-nationale.fr/europe/plaquette\\_octobre-2010.pdf](http://www.assemblee-nationale.fr/europe/plaquette_octobre-2010.pdf), accessed on 24 November 2010. See also Article 73 quater(2) of the Rules of Procedure of the *Sénat*.

<sup>968</sup> *Assemblée nationale, Commission des affaires européennes*, [http://www.assemblee-nationale.fr/europe/plaquette\\_octobre-2010.pdf](http://www.assemblee-nationale.fr/europe/plaquette_octobre-2010.pdf), accessed on 24 November 2010.

<sup>969</sup> Article 88-6 of the Constitution. This provision was introduced by *Loi constitutionnelle no. 2008-103 du 4 février 2008*.

<sup>970</sup> *Sénat, Commission des lois, Rapport no. 175 sur le projet de loi constitutionnelle, adopté par l'Assemblée nationale, modifiant le titre XV de la Constitution* of 23 January 2008, rapporteur Patrice Gélard (UMP), p. 51.

<sup>971</sup> Siritzky, David. "Ensuring democratic control of national government in European affairs: the French model," in *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other Member State legislatures*, by Gavin Barrett (ed.), Dublin: Clarus Press, 2008: 450.

<sup>972</sup> It should be noted that resolutions adopted under Article 88-4 are addressed to the Government, whereas resolutions adopted under Article 88-6 are addressed to EU institutions. *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 91.

refuse or thwart Parliament's decision to have recourse to the Court of Justice.<sup>973</sup> The Government does not contest this position. Instead, it directs the Legal Service of the Foreign Affairs Ministry to send subsidiarity actions to the registry of the Court of Justice. The letter of transmission shall include the name and address of the attorney or agent of the House that initiated the action, so that all further correspondence with the Court of Justice is maintained directly with him or her.<sup>974</sup> The Government's intervention is, therefore, merely technical.

It should also be underlined that the *Assemblée nationale* in particular does not conceive of its role of a subsidiarity watchdog formalistically but rather as being to ensure the legal and operational added value of European legislation and to inform the public opinion on EU affairs.<sup>975</sup> As we will see, the *Sénat* is less enamoured of the latter idea.<sup>976</sup>

Moreover, both Houses agree that the examination of subsidiarity is distinct, albeit hardly separable, from the analysis of the legal basis of EU initiatives. Yet while the *Assemblée nationale* scrutinises the legal basis regularly, the *Sénat* emphasises that this type of scrutiny should not be accentuated for two reasons: (a) national parliaments should concentrate on monitoring adherence to the principles of subsidiarity and proportionality, because EU institutions do not pay sufficient attention to this; and (b) the issues of legal basis are generally closely examined by the Council. Rather than that, the *Sénat* focuses on the question of whether or not the Union possesses the exclusive competence to act and this, as will be shown, has been a salient issue in the Barroso initiative.<sup>977</sup>

5. *Passerelle motion*. By means of a motion passed in identical terms by both Houses, Parliament has the constitutional right to oppose the modification of EU decision-making rules permitted by the simplified Treaty amendment procedure and by the passerelle in the field of judicial cooperation in civil matters.<sup>978</sup>

In the *Assemblée nationale*, only one motion to this effect may be tabled and no amendments are admissible. The motion must be signed by at least one tenth of the MPs. The motion is then referred to the competent specialised committee, which has one month to decide to adopt or reject the motion. If adopted, the motion is

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<sup>973</sup> COSAC Secretariat, Annex to the 13<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLIII COSAC meeting held in Madrid from 31 May – 1 June 2010, pp. 152 and 168.

<sup>974</sup> *Circulaire du 21 juin 2010 relative à la participation du Parlement national au processus décisionnel européen*, annex, point VIII.

<sup>975</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 46.

<sup>976</sup> See *infra* note 1060 of this Chapter.

<sup>977</sup> COSAC Secretariat, Annex to the 7<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVII COSAC meeting held in Berlin, 13-15 May 2007, pp. 42 and 46. See *infra* note 1070 of this Chapter.

<sup>978</sup> Article 88-7 of the Constitution. This provision was introduced by *Loi constitutionnelle no. 2008-103 du 4 février 2008*.

immediately transmitted to the *Sénat*. The same procedure applies where the motion originates in the *Sénat*.<sup>979</sup>

As Avril noted, the passerelle motion procedure transforms Parliament's positive right to approve the ratification of a change in primary EU law *by a statute* into the negative right to oppose such a change *by a motion*. The regular legislative procedure is therefore set aside. This results in the inversion of the Fifth Republic's inegalitarian bicameralism, because in the case of the passerelle motion, the *Assemblée nationale* may not ultimately decide the matter despite the *Sénat's* opposition. Instead, the *Sénat's* right to veto the adoption of the passerelle motion makes it the key player in this procedure at the expense of the *Assemblée nationale*.<sup>980</sup>

6. *Scrutiny reserve (réserve d'examen parlementaire)*. In the wake of the entry into force of the Maastricht Treaty, Prime Minister Balladur recognised that decisions at the EU level can be finalised before Parliament makes a pronouncement, which would render the latter's then new competence of adopting European resolutions immaterial.<sup>981</sup> To redress this shortcoming, he decided in July 1994 to involve Parliament in EU decision making more closely. This proactive attitude of the Government meant that the ministries were placed under a duty to verify whether any House of Parliament has clearly expressed an intention to examine a certain draft European act. Such intention would exist where a draft European resolution was tabled within a month of the transmission of the draft European act but was still not adopted. If that were to occur, the Permanent Representation of France in Brussels would either oppose the placing of the draft European act on the Council's agenda, request the postponement of the decision to a subsequent Council meeting or, ultimately, make France's vote subject to the issuance of Parliament's position.<sup>982</sup> The French representative would not, however, be precluded from participating in Council negotiations, but only from casting the vote. While the same scrutiny procedure has been applied since,<sup>983</sup> in June 2010 the maximum duration of the scrutiny reserve concerning draft European legislative acts was, in order to conform to the Lisbon Treaty, extended to eight weeks, whereas the period of four weeks was retained for all other draft European acts.<sup>984</sup>

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<sup>979</sup> Article 151-12 of the Rules of Procedure of the *Assemblée nationale*.

<sup>980</sup> Avril, Pierre. "Le bicamérisme inversé: à propos du veto de l'article 88-6 de la Constitution," *Revue du Droit Public*, Vol. 121, No. 3, 2005: 584-585.

<sup>981</sup> *Circulaire du 21 avril 1993 relative à l'application de l'article 88-4 de la Constitution: information du Parlement sur les propositions d'actes communautaires comportant des dispositions de nature législative*, point IV.

<sup>982</sup> *Circulaire du 19 juillet 1994 relative à la prise en compte de la position du Parlement français dans l'élaboration des actes communautaires*, points I and II.

<sup>983</sup> Prime Minister Dominique de Villepin kept the same procedure of the scrutiny reserve. *Circulaire du 22 novembre 2005 relative à l'application de l'article 88-4 de la Constitution*, annex, points III and IV.1. So did Prime Minister François Fillon. *Circulaire du 21 juin 2010 relative à la participation du Parlement national au processus décisionnel européen*, annex, point IV.1.

<sup>984</sup> *Circulaire du 21 juin 2010 relative à la participation du Parlement national au processus décisionnel européen*, annex, point III.3.

7. *Questions and hearings.* As general instruments of political control over the Government, the Houses of Parliament resort mainly to oral or written questions and hearings. Since January 2003, the first four of the questions put to the Government (*questions d'actualité*) during the *Assemblée nationale*'s sitting on the first Wednesday of each month are reserved for European affairs.<sup>985</sup> By way of a custom, this House also receives the competent minister before and after the most important meetings of the Council of Ministers. A plenary debate without a vote is also held before each European Council meeting, after which the Secretary of State for European Affairs appears before the European Affairs Committee.<sup>986</sup> The *Sénat* expressly envisages oral questions with a debate on European matters, which are to be addressed to the competent minister.<sup>987</sup> Occasionally, hearings and meetings are held with European officials, MEPs, MPs from other Member States or other eminent figures.<sup>988</sup>

#### 5.4. Scope of scrutiny

While the French parliamentary scrutiny of EU affairs extends to all policy areas of the Union, the scrutiny procedures are not specifically tailored to them.<sup>989</sup>

##### 5.4.1. Area of Freedom, Security and Justice

###### A. Passerelles and EU criminal law competence

The 2004 Council Decision on the move to codecision and qualified majority voting in the fields transferred in 1999 from the Third to the First Pillar was scrutinised by the *Assemblée nationale*.<sup>990</sup> Its Delegation for the European Union reached two key conclusions.

On the one hand, it firmly supported the recourse to the passerelle as indispensable for a more ambitious immigration policy, a more effective fight against clandestine immigration and strengthened external border control. The requirement

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<sup>985</sup> *Assemblée nationale*, "The National Assembly in the French institutions", available at [http://www.assemblee-nationale.fr/english/synthetic\\_files/file\\_52.asp](http://www.assemblee-nationale.fr/english/synthetic_files/file_52.asp), accessed on 25 November 2010.

<sup>986</sup> COSAC Secretariat, Annex to the 9<sup>th</sup> bi-annual report by COSAC: replies to the questionnaire by the national parliaments and the European Parliament, prepared for XXXIX COSAC meeting held in Bled-Brdo pri Kranju, 7-8 May 2008, p. 65; COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 45.

<sup>987</sup> Article 73 *sexies* of the Rules of Procedure of the *Sénat*.

<sup>988</sup> Blanc, Didier. *Les parlements européen et français face à la fonction législative communautaire: aspects du déficit démocratique*, Paris: L'Harmattan, 2004: 329.

<sup>989</sup> COSAC Secretariat, Annex to the 5<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXV COSAC meeting held in Vienna, 22-23 May 2006, pp. 48 and 53.

<sup>990</sup> *Assemblée nationale*, Document E2788 "Projet de décision du Conseil en vue de rendre la procédure visée à l'article 251 du traité instituant la Communauté européenne applicable à certains domaines couverts par le titre IV de la troisième partie dudit traité", available at [http://www.assemblee-nationale.fr/europe/dossiers\\_e/e2788.asp](http://www.assemblee-nationale.fr/europe/dossiers_e/e2788.asp), accessed on 26 November 2010.

of unanimity had considerably impoverished the contents of the directives in the fields of asylum and immigration. The degree of harmonisation thereby accomplished was very low due to numerous derogations and the diversity of techniques employed in the drafting process to accommodate the interests of the Member States. The power of veto, which the Member States could brandish to safeguard their national interest, had frequently delayed the adoption of these acts. What is more, the Delegation regretted that legal migration was to be excluded from the purview of the passerelle and that it was, thus, to be exempted from codecision and qualified majority. The reinforced position of the European Parliament, and its Committee on Civic Liberties, Justice and Home Affairs in particular, was also duly noted.

On the other hand, the Delegation received the draft Decision more than a week after the Justice and Home Affairs Council had reached a political agreement. The receipt was effected in application of the optional clause, since the *Conseil d'État* had assessed that the draft Decision did not contain provisions of a legislative nature. This was clear evidence that the Constitutional Treaty, which had been signed less than two months before the Delegation's scrutiny, represented a radical change for national parliaments. Instead of being belatedly consulted, the Delegation would have enjoyed the rights to receive the draft Decision six months in advance and to oppose its enactment. Still, the possibility of voicing opposition would have a different purpose:

It is not intended to block the move to qualified majority (the hypothesis of a national parliament opposing a decision taken by its government or head of state in the European Council should be limited), but to buttress the democratic legitimacy of such decisions, whose impact is significant.<sup>991</sup>

In January 2006, the *Assemblée nationale* reiterated this stance. This time, its reaction was prompted by the *Environmental crimes* judgment, which provoked criticism of all the EU institutions involved.

The Delegation for the European Union admonished the Court of Justice for a "creeping Communitarisation" of a part of the Third Pillar.<sup>992</sup> The judgment jeopardises the exclusive competence of the Justice and Home Affairs Council to legislate in penal matters and ushers in legal insecurity, not least due to blurry

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<sup>991</sup> *Assemblée nationale, Document E2788 "Projet de décision du Conseil en vue de rendre la procédure visée à l'article 251 du traité instituant la Communauté européenne applicable à certains domaines couverts par le titre IV de la troisième partie dudit traité"*, available at [http://www.assemblee-nationale.fr/europe/dossiers\\_e/e2788.asp](http://www.assemblee-nationale.fr/europe/dossiers_e/e2788.asp), accessed on 26 November 2010.

<sup>992</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2829 sur les conséquences de l'arrêt de la Cour de justice du 13 septembre 2005 sur les compétences pénales de la Communauté européenne* of 25 January 2006, rapporteur Christian Philip (UMP), p. 17.

competence delimitation tests.<sup>993</sup> Recalling the *Van Gend en Loos* and *Costa v. Enel* case law, the Delegation warned:

This form of 'judicial federalism' allowed the progress of European integration, but it may not lead to a 'government of judges'. Does this judgment not mark a tendency of the Court to establish itself as a constituent in order to mitigate the failure of the Constitutional Treaty?<sup>994</sup>

Even more vigorously, the Commission was reprimanded for an overly excessive interpretation of the judgment.<sup>995</sup> In particular, its intention to convert framework decisions into directives without changing the substance of the texts disregarded the fact that the codecision procedure would have to start afresh and that the European Parliament would then have the opportunity to propose amendments.<sup>996</sup>

The Council did not escape reproach either. In the Delegation's view, the framework decision infringed the Member States' free choice of sanctions inasmuch as it required them to provide for the possibility of imposing, for the gravest environmental offences, the deprivation of liberty that can give rise to extradition.<sup>997</sup>

The Delegation, nevertheless, conceded that the judgment had certain advantages, such as the application of codecision and qualified majority and the enlarged competence of the Court of Justice and the Commission for guarding the Treaties. However, since the Member States are the *Herren der Vertäge* and not EU institutions, the preferred solution to the problem of boundaries between the pillars would have been to activate the passerelle laid down in the former Article 42 TEU, which permitted the Council not only to transfer certain Third Pillar fields to the First Pillar but also to decide the applicable decision-making procedure and the voting method.<sup>998</sup> To this end, the *Assemblée nationale* adopted a European resolution

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<sup>993</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2829 sur les conséquences de l'arrêt de la Cour de justice du 13 septembre 2005 sur les compétences pénales de la Communauté européenne* of 25 January 2006, rapporteur Christian Philip (UMP), pp. 7 and 11. France supported the position of the Council during the proceedings.

<sup>994</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2829 sur les conséquences de l'arrêt de la Cour de justice du 13 septembre 2005 sur les compétences pénales de la Communauté européenne* of 25 January 2006, rapporteur Christian Philip (UMP), p. 23.

<sup>995</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2829 sur les conséquences de l'arrêt de la Cour de justice du 13 septembre 2005 sur les compétences pénales de la Communauté européenne* of 25 January 2006, rapporteur Christian Philip (UMP), p. 17.

<sup>996</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2829 sur les conséquences de l'arrêt de la Cour de justice du 13 septembre 2005 sur les compétences pénales de la Communauté européenne* of 25 January 2006, rapporteur Christian Philip (UMP), p. 15.

<sup>997</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2829 sur les conséquences de l'arrêt de la Cour de justice du 13 septembre 2005 sur les compétences pénales de la Communauté européenne* of 25 January 2006, rapporteur Christian Philip (UMP), p. 11.

<sup>998</sup> The former Article 42 TEU, which was introduced by the Amsterdam Treaty, read: "The Council, acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, may decide that action in areas referred to in Article 29 shall fall under Title IV of the Treaty establishing the European Community, and at the same time determine the relevant voting

reiterating its discord with the Court of Justice and the Commission and, notably, inviting the Government to propose to the other Member States to activate this passerelle in order to clarify the existing legal framework and provide new impetus for the Europe of justice.<sup>999</sup> Yet while this passerelle would not, as the *Assemblée nationale* asserts, in and of itself entail a modification of the mechanisms of national parliamentary control of EU decision making, the application of qualified majority voting in the Council could increase the normative impact of EU decisions and therewith warrant an even more comprehensive policy scrutiny.<sup>1000</sup> It should be underlined that this European resolution drew somewhat on the European Parliament's resolution on the period of reflection occasioned by the failure of the Constitutional Treaty, which was adopted less than three months before. Therein, the European Parliament noted that the democratic reforms that were feasible without a treaty change included, *inter alia*, "full use of the passerelle clauses in the field of justice and home affairs, and the more rigorous scrutiny by each national parliament of its government's conduct of EU affairs".<sup>1001</sup>

The idea of the *Assemblée nationale* echoed in all EU institutions. A month after the adoption of the *Assemblée nationale's* European resolution, the Government, in its contribution on the possible institutional improvements without a Treaty change, proposed to its European partners to have recourse to this passerelle, without further specifying the modalities of doing so.<sup>1002</sup> At its meeting of 15-16 June 2006, the European Council made an indirect reference to the idea of resorting to this passerelle when it called upon the Finnish Presidency "to explore, in close collaboration with the Commission, the possibilities of improving decision making and action in the Area of Freedom, Security and Justice on the basis of existing treaties".<sup>1003</sup> Around a fortnight thereafter, the Commission expressed readiness to take initiatives on the basis of both of the aforesaid passerelles.<sup>1004</sup> The Justice and Home Affairs Council, too, debated the issue at its informal meeting in Tampere on

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conditions relating to it. It shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements".

<sup>999</sup> *Assemblée nationale, Résolution no. 560 sur les conséquences de l'arrêt de la Cour de justice du 13 septembre 2005 sur les compétences pénales de la Communauté européenne* of 29 March 2006.

<sup>1000</sup> COSAC Secretariat, Annex to the 6<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVI COSAC meeting held in Helsinki, 19-21 November 2006, p. 69.

<sup>1001</sup> European Parliament, Resolution on the period of reflection: the structure, subjects and context for an assessment of the debate on the European Union of 19 January 2006, (*OJ C 287E/306* of 24.11.2006), point 9.

<sup>1002</sup> *Gouvernement français, "Améliorations institutionnelles à partir du cadre des traités existants"*, available at: <http://www.diplomatie.gouv.fr/fr/IMG/pdf/contribution-FR.pdf>, accessed on 30 November 2010.

<sup>1003</sup> Presidency Conclusions, Brussels European Council, 15-16 June 2006, para. 10.

<sup>1004</sup> European Commission, Communication from the Commission to the Council and the European Parliament "Implementing the Hague Programme: the way forward", COM(2006) 331, 28.6.2006, p. 15.

21-22 September 2006.<sup>1005</sup> The matter was not settled, however, until the entry into force of the Lisbon Treaty.

Though the *Sénat* did not scrutinise the 2004 Council decision, it did analyse the effects and desirability of applying the passerelles contained in Articles 67(2) TEC and 42 TEU. As regards the former passerelle, the *Sénat* concentrated on the potential impact of its activation on the courts rather than on the consequences thereof for national parliaments. In this sense, its Delegation for the European Union favourably assessed the fact that the Court of Justice would see its preliminary jurisdiction extended and that all national courts, and not only those of the highest instance, would gain the right to seek preliminary rulings at the Court of Justice.<sup>1006</sup> With respect to the latter passerelle, the principal benefit would be the solution to the problem of the delimitation of competences between the First and Third Pillars, which had become acute after the *Environmental crimes* judgment. Yet the democratic legitimacy of the Union was also one of the Delegation's concerns. While the European Parliament's codecision with the Council was "without a doubt a progress", this could slow down the decision-making process. Also, national parliaments would lose the right to approve the ratification of conventions and international agreements concluded under the Third Pillar, without this loss of power being compensated to some extent by gaining the right to participate in the evaluation of Europol and Eurojust, which was then foreseen by the Constitutional Treaty.<sup>1007</sup>

In the *Sénat*, the *Environmental crimes* judgment gave rise to a hearing of Jean-Pierre Puissochet, a judge at the Court of Justice, and Advocate General Philippe Léger during a joint meeting of the Delegation for the European Union and the Committee of Laws. The judge assured the senators that the ruling was founded on the expectation that the threat of criminal penalties could efficiently achieve the goal of environment protection and that it was "strictly limited" to this aspect, while the Commission's interpretation was erroneous.<sup>1008</sup>

## B. Europol

The democratic legitimacy and accountability of Europol was the object of European resolutions in both Houses of Parliament in 2003.

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<sup>1005</sup> European Report, "Justice & Home Affairs: Tampere decision-making deadlock", 25 September 2006; Mir, Miriam. "Note on the Informal Meeting of EU Justice and Home Affairs Ministers in Tampere 21-22 September 2006", 27 September 2006, available at: <http://www.libertysecurity.org/article1116.html>, accessed on 30 November 2010.

<sup>1006</sup> *Sénat, Délégation pour l'Union européenne, Rapport d'information no. 47 sur les «clauses passerelles» et les «coopérations renforcées» en matière de justice et d'affaires intérieures* of 30 October 2006, rapporteur Hubert Haenel (UMP), pp. 18-20.

<sup>1007</sup> *Sénat, Délégation pour l'Union européenne, Rapport d'information no. 47 sur les «clauses passerelles» et les «coopérations renforcées» en matière de justice et d'affaires intérieures* of 30 October 2006, rapporteur Hubert Haenel (UMP), pp. 32-34.

<sup>1008</sup> *Sénat, Réunion de la délégation pour l'Union européenne du mercredi 22 février 2006*, available at: [http://www.senat.fr/europe/r22022006\\_1.html](http://www.senat.fr/europe/r22022006_1.html), accessed on 27 December 2010.

The *Assemblée nationale* assessed that the rise of Europol's powers was not accompanied by appropriate mechanisms of supervision.<sup>1009</sup> In its view, the Council of Ministers, although in charge of a range of key decisions pertaining to Europol, remained at arm's length from the actual operation of this agency.<sup>1010</sup> The *Assemblée nationale*'s resolution therefore advocated the creation of a committee composed of members of both national and European parliaments to exercise democratic control over Europol.<sup>1011</sup> The Delegation for the European Union explained that this would help to avoid the duplication of work in the Member States and prompt specialisation among parliamentarians.<sup>1012</sup>

In April 2011, the *Assemblée nationale* reacted to the Commission's communication on the procedures for the parliamentary scrutiny of Europol. The *Assemblée nationale* adopted a European resolution supporting, once more, the proposal for a mixed committee of competent national and European parliamentarians. The House, nevertheless, warned against the creation of a new organ for the political control of Europol. The MPs estimated, furthermore, that national parliaments should have access to more detailed information on Europol, including documents that the Council and the Joint Supervisory Body send to the European Parliament and any other Europol document that could assist parliamentarians in holding this agency to account.<sup>1013</sup>

For its part, the *Sénat*, in its resolution of 2003, preferred a committee gathering particularly members of national parliaments, before which the director of Europol would appear. Since no such committee was envisaged in the draft protocol modifying the Europol Convention, the senators invited the Government to oppose its adoption for this sole reason.<sup>1014</sup> The *Sénat* reiterated its standpoint in another European resolution in 2007. Recalling that national parliaments must be involved in the control of Europol, the senators requested the Government to support within the Council the inclusion in the draft Europol decision of a provision establishing, this time, a committee composed of both national and European parliamentarians.<sup>1015</sup>

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<sup>1009</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 819 sur l'avenir d'Europol* of 29 April 2003, rapporteur Jacques Floch (PS), p. 23.

<sup>1010</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 819 sur l'avenir d'Europol* of 29 April 2003, rapporteur Jacques Floch (PS), p. 24.

<sup>1011</sup> *Assemblée nationale, Résolution no. 148 sur l'avenir d'Europol* of 15 June 2003, point 6.

<sup>1012</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 819 sur l'avenir d'Europol* of 29 April 2003, rapporteur Jacques Floch (PS), p. 36.

<sup>1013</sup> *Assemblée nationale, Proposition de résolution européenne no. 3236 sur le contrôle parlementaire d'Europol* of 9 March 2009, rapporteur Guy Geoffroy (UMP).

<sup>1014</sup> *Sénat, Résolution Européenne no. 13 sur le projet de protocole modifiant la Convention Europol proposé par le Danemark* of 25 November 2003.

<sup>1015</sup> *Sénat, Résolution européenne no. 96 sur la proposition de décision du Conseil portant création de l'Office européen de police (EUROPOL)* of 27 February 2007.

#### 5.4.2. Common Foreign and Security Policy and Common Security and Defence Policy

Regarding the policies falling under the only non-Community pillar remaining after the Lisbon Treaty, the Common Foreign and Security Policy (CFSP) including the Common Security and Defence Policy (CSDP), the Constitution establishes that the basic principles of the general organisation of national defence is the competence of Parliament.<sup>1016</sup> The constitutional arrangements foreseen reflect France's system of government.

The President of the Republic is the Chief Commander of the Armed Forces and the guarantor of national independence and territorial integrity.<sup>1017</sup> He or she enjoys uncurtailed omnipotence in military matters. As an official from the Ministry of Defence commented: "In France, if the President wants a unit to depart, it is gone the next hour".<sup>1018</sup>

Since the amendment of July 2008, the Constitution obliges the Government to inform Parliament of the decision to engage the Armed Forces abroad at the latest three days after the commencement of military operations as well as to explain the objectives pursued. The Government's provision of this information may be followed by a debate in Parliament, which may not lead to a vote. Any military intervention exceeding the period of four months is subject to the authorisation of both Houses of Parliament, but the Government may ask the *Assemblée nationale* to take a final decision.<sup>1019</sup> As the Constitution places the Armed Forces at the Government's disposal and designates the Prime Minister as responsible for the defence of the nation,<sup>1020</sup> the Government needs to obtain authorisation for the prolongation of France's military engagement abroad.<sup>1021</sup>

The constitutional provision that requires parliamentary approval of a declaration of war is largely superseded by the practice of warfare.<sup>1022</sup> In the era of aggression, terrorist attacks, insurgencies and humanitarian interventions, the legal notion of war has ceded relevance to the factual notion of the existence of armed conflict irrespective of whether war has been declared or not.<sup>1023</sup> The inadequacy of the legal regulation of the use of the French military capabilities was brought to light by the *Assemblée nationale* in 2000, when its Committee of National Defence argued that

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<sup>1016</sup> Article 34 of the Constitution.

<sup>1017</sup> Articles 15 and 5(2) of the Constitution. See on the President's relations with the army in: Cohen, Samy. "Le pouvoir politique et l'armée." *Pouvoirs*, No. 125, 2008/2: 19-28.

<sup>1018</sup> Deschaux-Beaume, Delphine. "La politique européenne de sécurité et de défense et les parlementaires nationaux: une comparaison franco-allemande," *Revue du Marché Commun et de l'Union Européenne*, No. 536, 2010: 182.

<sup>1019</sup> Article 35(2)-(3) of the Constitution.

<sup>1020</sup> Articles 20(2) and 21(1) of the Constitution.

<sup>1021</sup> See a comparative perspective in: Ailincăi, Mikaela. "Le contrôle parlementaire de l'intervention des forces armées à l'étranger. Le droit constitutionnel français à l'épreuve du droit comparé," *Revue du Droit Public*, Vol. 127, No. 1, 2011: 129-154.

<sup>1022</sup> Article 35(1) of the Constitution.

<sup>1023</sup> Boniface, Pascal. "Les opérations militaires extérieures." *Pouvoirs*, No. 125, 2008/2: 55.

the *pouvoir constituant*, by including the provision on the declaration of war, had intended to provide for the consultation of Parliament whenever the Armed Forces are to engage in a conflict.<sup>1024</sup>

Heed also needs to be paid to other deficiencies of the parliamentary control of the executive in this field. Among them, three stand out. First, any parliamentary discussion of the deployment of the Armed Forces in conflict zones, under the present constitutional regulation, depends entirely on the will of the executive, since the Government may but need not submit a general policy statement to a vote of confidence in the *Assemblée nationale* or for approval in the *Sénat*.<sup>1025</sup> In practice, however, the justification of the continuation or withdrawal of the Armed Forces is hardly ever a topic on the parliamentary agenda.<sup>1026</sup> Second, Parliament's *ex ante* appreciation and approval of the budgets of Foreign and Defence ministries is insufficient, because the unpredictable nature of military operations regularly necessitates extra funds, which is typically the moment when Parliament first discovers about the external operations of the Armed Forces.<sup>1027</sup> Third, international treaties on defence and military cooperation need not be approved by a statute, which additionally robs Parliament of an opportunity to express its stance on the engagement of the Armed Forces.<sup>1028</sup>

A point of particular concern in both Houses of Parliament, and one that sheds light on cross-level interparliamentary relations in the Union, is the dissolution of the Western European Union (WEU) and its consultative Assembly, scheduled to take place in June 2011.<sup>1029</sup> In its analysis, the *Sénat* elicited three reasons why the disappearance of the WEU should not result in the diminution of the role of national

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<sup>1024</sup> *Assemblée nationale, Commission de la défense nationale et des forces armées, Rapport d'information no. 2237 sur le contrôle parlementaire des opérations extérieures* of 8 March 2000, rapporteur François Lamy (PS), p. 35.

<sup>1025</sup> Article 49(1) and (4) of the Constitution. See *supra* notes 750 and 751 of this Chapter.

<sup>1026</sup> An exception, for example, was the request made by Prime Minister Michel Rocard on 16 January 1991 in the *Assemblée nationale* seeking the approval, by means of a confidence vote, of the Government's decision to participate in the UN-sponsored intervention of the coalition forces aimed at repelling Iraq's invasion of Kuwait in August 1990. Conversely, Prime Minister Lionel Jospin did not make a statement in Parliament on the NATO bombing of ex-Yugoslavia until 26 March 1999, two days after the onset of the bombing and the debate did not end with a vote. *Assemblée nationale, Commission de la défense nationale et des forces armées, Rapport d'information no. 2237 sur le contrôle parlementaire des opérations extérieures* of 8 March 2000, rapporteur François Lamy (PS), p. 23.

<sup>1027</sup> *Assemblée nationale, Commission de la défense nationale et des forces armées, Rapport d'information no. 2237 sur le contrôle parlementaire des opérations extérieures* of 8 March 2000, rapporteur François Lamy (PS), pp. 22 and 34.

<sup>1028</sup> Article 53 of the Constitution.

<sup>1029</sup> The formal Statement of the Presidency of the Permanent Council of the WEU issued in Brussels on 31 March 2010 addressed, *inter alia*, the problem of the takeover of the task of democratic oversight over defence policies: "In accordance with the specific nature of CSDP, we encourage as appropriate the enhancement of interparliamentary dialogue in this field including with candidates for EU accession and other interested states. Protocol 1 on the role of national parliaments in the European Union, annexed to the Lisbon Treaty, may provide a basis for it", available at: [http://www.weu.int/Declaration\\_E.pdf](http://www.weu.int/Declaration_E.pdf), accessed on 24 September 2010.

parliaments.<sup>1030</sup> First, the WEU Assembly is the only body at the European level that permits national parliaments to follow and debate the developments in the fields of defence and security.<sup>1031</sup> Second, the European Parliament is "not the best disposed" for the control of the common security and defence policies. Although the European Parliament has established a Security and Defence sub-committee within its Foreign Affairs Committee and has, despite the lack of a legal basis in the Treaties,<sup>1032</sup> demonstrated resolve to scrutinise on its own initiative the Union's external operations and other CSDP policies, the *Sénat* finds that the control of these policies may not be confided only to the European Parliament. The reasons are that: (a) decisions are made by national governments without prior approval of the European Parliament; (b) the European Parliament does not have the power to hold these governments to account whereas national parliaments do; and (c) the military capabilities for and financial costs of the Union's military operations are provided by the Member States.<sup>1033</sup> Third, informal meetings of the chairmen of the defence committees of national parliaments, a forum known by its acronym CODAC, are an insufficient safeguard, because their organisation depends on the will of the parliament of the Member State holding the Presidency of the Council.

Perhaps more pertinent is the *Sénat's* fear that if national parliaments do not react promptly, the European Parliament's assertiveness in CSDP matters could eventually lead to its tacit accretion of powers and appearance as the sole body of democratic representation in this field. This institutional anxiety is far from being abstract. The European Parliament adopted in March 2010 a resolution claiming that it is the "only supranational institution with a legitimate claim to exercise democratic supervision over the EU's security and defence policy" and that the WEU Assembly is "neither politically equipped nor legally entitled to exercise parliamentary supervision over

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<sup>1030</sup> *Sénat, Commission des affaires étrangères, de la défense et des forces armées, Rapport no. 387 sur la proposition de résolution européenne sur le suivi parlementaire de la politique de sécurité et de défense commune* of 7 April 2010, rapporteur Josselin de Rohan (UMP), pp. 18-19.

<sup>1031</sup> The WEU Assembly was established in 1954 on the basis of the modified Treaty of Brussels. Its seat is in Paris. Since the transfer of its operational activities to the European Union, the principal task of this Assembly has been to monitor the security and defence policies of the Union. To reflect this, the Assembly changed its name in May 2008 to European Security and Defence Assembly.

<sup>1032</sup> Declaration no. 14 concerning the common foreign and security policy attached to the Lisbon Treaty clarifies that "the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament".

<sup>1033</sup> Article 42 TEU lays down that the performance of the tasks in the field of CSDP "shall be undertaken using capabilities provided by the Member States" (para. 1, last sentence) and that "Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council" (para. 3, first sentence). The argument that the European Parliament alone does not have the legitimacy to intervene in CSDP was, for the same reasons, also made in: *Sénat, Délégation pour l'Union européenne, Rapport no. 393 les parlements nationaux et l'Union européenne après le traité de Lisbonne* of 12 June 2008, rapporteur Hubert Haenel (UMP), p. 16.

the CSDP".<sup>1034</sup> Although such reasoning seemingly excludes national parliaments from the accountability equation, the European Parliament, nevertheless, called for a closer and more structured cooperation with national parliaments and their competent committees so as to "replace the prerogatives misappropriated by the WEU Assembly".<sup>1035</sup> In addition, the *Sénat* argued that the control over CSDP affairs by individual national parliaments did not suffice:

How can national parliaments, acting separately, each in its own country, control in a fully satisfactory manner the collective action of governments in the European Union? How can they take into account the European dimension of the issues and measure the differences of perception between the Member States? For it to be complete, it must also be possible to carry out parliamentary scrutiny of European defence matters at the European level.<sup>1036</sup>

As a remedy to the vanishing WEU Assembly, the *Sénat*, using the Lisbon Protocol on the role of national parliaments as inspiration,<sup>1037</sup> adopted a European resolution in April 2010 proposing the creation of a body gathering national parliaments that would be modelled after COSAC.<sup>1038</sup>

Similarly, the *Assemblée nationale* deems it paradoxical that the Lisbon Treaty enhances the powers of the Union in these fields and favours the emergence of a global external policy without foreseeing adequate parliamentary control. Endorsing the *Sénat's* findings, the *Assemblée nationale* adopted a European resolution proposing "the organisation of comprehensive and coherent control of European external policy by national parliaments and the European Parliament".<sup>1039</sup> Such interparliamentary cooperation should be organised along three lines. First, cross-level debate between the parliaments at the national and European levels should enable them to adopt "indicative common positions", while concomitantly abiding by their respective competences as laid down in the Treaties and national constitutions. Second, in order to ensure the coherence of EU external policy, interparliamentary

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<sup>1034</sup> European Parliament, Resolution on the implementation of the European Security Strategy and the Common Security and Defence Policy of 10 March 2010, (*OJ C 349E/63* of 22.12.2010), point 91.

<sup>1035</sup> European Parliament, Resolution on the implementation of the European Security Strategy and the Common Security and Defence Policy of 10 March 2010, (*OJ C 349E/63* of 22.12.2010), point 92.

<sup>1036</sup> *Sénat, Commission des affaires étrangères, de la défense et des forces armées, Rapport no. 387 sur la proposition de résolution européenne sur le suivi parlementaire de la politique de sécurité et de défense commune* of 7 April 2010, rapporteur Josselin de Rohan (UMP), p. 21.

<sup>1037</sup> Article 10 thereof provides, *inter alia*, that COSAC "may also organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy".

<sup>1038</sup> *Sénat, Résolution européenne no. 86 sur le suivi parlementaire de la politique de sécurité et de défense commune* of 11 April 2010.

<sup>1039</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 2 November 2010, point 12. See to that effect also the intervention by François Hostalier (UMP) in: *Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance du jeudi 3 février 2011, 112<sup>e</sup> séance de la session ordinaire 2010-2011, JORF [2011] A.N. (C.R.) 11[1], 4.2.2011, p. 771.*

cooperation should reconcile the delimitation of respective competences of political control prescribed by the Treaties with the aim of eliminating policy fragmentation. Third, and what is the most far-sighted proposition, interparliamentary cooperation should be sufficiently flexible so that the European Parliament can debate the defence policies pertaining solely to national parliaments and that national parliaments can debate all aspects of EU external policy, including internal policies with an external dimension. Such reasoning, whereby the scrutiny of initiatives originating at the 'other' level is encouraged, is a signpost along the as yet uncharted path of European parliamentary interdependence.

#### 5.4.3. EU international agreements

The French parliamentary scrutiny of the external relations of the Union has undergone a vital modification. Until the constitutional amendment of July 2008, all EU external relations were deemed the prerogative of the executive. This meant that the Government was not under a duty to supply information to Parliament and that the Union's international activity by and large escaped parliamentary scrutiny.<sup>1040</sup> Following this amendment, the purview of scrutiny was widened to cover all documents of EU institutions. This enables both Houses of Parliament to engage more actively, especially in the monitoring of the Union's negotiation mandates, including by means of European resolutions.

That notwithstanding, the *Assemblée nationale* and the *Sénat* mostly intervene *ex post* with regard to the outcomes of negotiations on international agreements and in the phase of their ratification.<sup>1041</sup> Yet, as will be attested to in Chapter 10, Parliament does in practice make an effort to scrutinise salient international agreements of the Union.

Finally, it should be reiterated that a special constitutional procedure of approval applies to EU accession treaties.<sup>1042</sup>

#### 5.5. Addressee of scrutiny

The primary addressee of the French Parliament's EU scrutiny is the Government. The European Affairs Committee of the *Assemblée nationale* explains this in the following words:

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<sup>1040</sup> For example, concerning treaties in the field of common commercial policy, Parliament is asked for an opinion in accordance with Article 88-4 of the Constitution. Yet, due to short periods of deliberation in the Council, the *Assemblée nationale* adopted a procedure of tacit approval for anti-dumping measures, according to which a measure is considered approved if the European Affairs Committee does not request a detailed scrutiny to be carried out within 72 hours. COSAC Secretariat, Annex no. 1 to the 10<sup>th</sup> bi-annual report by COSAC: replies to the questionnaire by the national parliaments and the European Parliament, prepared for XL COSAC meeting held in Paris, 3-4 November 2008, p. 52.

<sup>1041</sup> COSAC Secretariat, Annex no. 1 to the 10<sup>th</sup> bi-annual report by COSAC: replies to the questionnaire by the national parliaments and the European Parliament, prepared for XL COSAC meeting held in Paris, 3-4 November 2008, pp. 53 and 58.

<sup>1042</sup> See *supra* the text accompanying note 939 of this Chapter.

The key issue in the eyes of the Delegation is to try to 'politicise' European texts sufficiently early so as to clearly show the Government what the position of the nation's representation is on major European issues and thus to be able to influence its negotiating position from the very start.<sup>1043</sup>

To that end, this House strives to alarm the deputies as early as possible about draft European decisions that are likely to pose political problems, which itself is less a question of access to information than of timely reaction and selective treatment of the issue at hand.<sup>1044</sup> The centrality of Parliament's link with the Government has indeed been viewed as the only channel through which the former can influence EU decision making.<sup>1045</sup>

It is nonetheless tenable that EU institutions are Parliament's secondary addressee. In relation to this, Robert Pandraud (UMP), the former Chairman of the Delegation for the European Union of the *Assemblée nationale*, affirmed in 1995 that while it was

difficult to make a quantitative assessment of the points regarding which our House was followed or not by the Government, *and by Community institutions*, it remains that the dialogue between the Government and the House is fruitful and that concerns of the national representation can henceforth have *repercussions on the Council and the European Commission*.<sup>1046</sup>

Moreover, the *Assemblée nationale* engages in direct communication with EU institutions. In fact, as we will show, it is at the very forefront of innovative approaches to EU scrutiny, both towards the European Parliament and the Commission.

### 5.5.1. Relations with the European Parliament

To facilitate cross-level interparliamentary dialogue, the Rules of Procedure of the *Assemblée nationale*, unlike those of the *Sénat*, lay down that the European Affairs Committee may invite French MEPs to partake in its proceedings in a consultative capacity.<sup>1047</sup> This possibility was first introduced by *Loi Josselin* in 1990.<sup>1048</sup> This

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<sup>1043</sup> COSAC Secretariat, Annex to the 9<sup>th</sup> bi-annual report by COSAC: replies to the questionnaire by the national parliaments and the European Parliament, prepared for XXXIX COSAC meeting held in Bled-Brdo pri Kranju, 7-8 May 2008, p. 60.

<sup>1044</sup> COSAC Secretariat, Annex to the 12<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLII COSAC meeting held in Stockholm, 5-6 October 2009, p. 41.

<sup>1045</sup> Saulnier, Emmanuelle. *La participation des parlements français et britannique aux Communautés et à l'Union européenne*, Paris: Librairie Générale de Droit et de Jurisprudence, 2002: 854.

<sup>1046</sup> Cited in: Saulnier, Emmanuelle. *La participation des parlements français et britannique aux Communautés et à l'Union européenne*, Paris: Librairie Générale de Droit et de Jurisprudence, 2002: 579 (emphasis added).

<sup>1047</sup> Article 151-1(6) of the Rules of Procedure of the *Assemblée nationale*.

<sup>1048</sup> See *supra* note 908 of this Chapter.

statute went as far as to foresee that former Delegations for the European Communities could request to hear not only ministers but also representatives of the Communities.<sup>1049</sup> This is no longer expressly provided for in legislation or parliamentary by-laws but continues to apply as a custom in both Houses. Hearings and meetings with MEPs have indeed been the key form of cooperation with the European Parliament.<sup>1050</sup> Yet even though MEPs receive regular invitations to attend meetings of the European Affairs Committees, these contacts have on the whole been scarce.<sup>1051</sup>

As an important channel of information exchange with EU institutions, the *Assemblée nationale* has had a permanent representative in Brussels since March 2003 and the *Sénat* since May 1999.<sup>1052</sup> The main tasks of the representatives in Brussels, also known as 'parliamentary antennas', include a wide range of activities: organisation and support for parliamentary relations with European institutions; early provision of information on different stages of the European legislative process, on plenary sessions and committee meetings of the European Parliament, on interparliamentary meetings and on the work of think tanks; alerting EU institutions of the French citizens' concerns; dissemination of scrutiny-related publications among EU institutions; and coordination with representatives of other national parliaments in light of the new powers flowing from the Lisbon Treaty. Since July 2007, the representative of the *Assemblée nationale* sends information not only to the European Affairs Committee but also to specialised committees. The representatives of the *Assemblée nationale* and the *Sénat* exchange information informally on a daily basis. Parliamentary representatives are not political officials but clerks. The representative of the *Assemblée nationale* works under the authority of the Director-General for European, International and Defence Matters and in close cooperation with the Director of the European Affairs Service of the relevant House. He or she renders account to the Director-General and submits an annual report to the Secretary-General and President of the House in question. The *Sénat's* representative is placed under the authority of the Director of the European Affairs Service and renders account at least once a year both to the Director and to the Secretary-General of the *Sénat*.

Furthermore, the *Assemblée nationale* sees COSAC as a forum for broad exchange on the Union's evolution but also as an "opportunity for direct

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<sup>1049</sup> Article 5 of *Loi Josselin* of 1990.

<sup>1050</sup> Saulnier, Emmanuelle. *La participation des parlements français et britannique aux Communautés et à l'Union européenne*, Paris: Librairie Générale de Droit et de Jurisprudence, 2002: 819.

<sup>1051</sup> Siritzky, David. "Ensuring democratic control over national government in European affairs: the French model," in *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other Member State legislatures*, by Gavin Barrett (ed.), Dublin: Clarus Press, 2008: 444.

<sup>1052</sup> COSAC Secretariat, Annex to the 11<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLI COSAC meeting held in Prague, 10-12 May 2009, pp. 75-77 and 85-87.

'practitioners' of European legislation to confront their views in order to make it clearer to European institutions what immediate problems flow from the decision they intend to take".<sup>1053</sup> Reaching early consensus among national parliaments on political issues is of particular significance since it can ease the process of the transposition of directives.

Another important route for cross-level influence lies in the fact that before each European Parliament session, the representatives in Brussels provide French MEPs with a 'sessional dossier' containing all documents prepared by the *Assemblée nationale* and the *Sénat* that bear relevance for the issues on the European Parliament's agenda.<sup>1054</sup>

The most recent token of the *Assemblée nationale*'s institutional ingenuity was its initiative to organise the first cross-level interparliamentary videoconference in Europe. It was realised on 26 January 2010 between its European Affairs Committee and the European Parliament's Committee for Internal Market and Consumer Protection in order to discuss the draft Directive on consumer rights.<sup>1055</sup>

These considerations show that cooperation with the European Parliament seems to be of slightly greater importance to the *Assemblée nationale* than to the *Sénat*. This could be understood in light of the fact that the mandates of MPs and MEPs are of the same nature: both are direct electoral representatives of the citizens.

## 5.5.2. Relations with the Commission

### A. Informal contacts

The *Assemblée nationale* also maintains informal contact with Commission officials. The effect of such contacts was described by the former Chairman Pandraud in 1995 as follows:

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<sup>1053</sup> COSAC Secretariat, Annex to the 13<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLIII COSAC meeting held in Madrid from 31 May – 1 June 2010, pp. 155 and 157.

<sup>1054</sup> Rizzuto, Franco. "The French Parliament and the EU: loosening the constitutional straitjacket," in *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 58. See also *supra* note 1052 of this Chapter.

<sup>1055</sup> COSAC Secretariat, Annex to the 14<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLVI COSAC meeting held in Brussels, 25-26 October 2010, p. 80. Silvana Koch-Mehrin (ALDE), one of 14 Vice-Presidents of the European Parliament welcomed videoconferencing and stressed the importance of closer committee collaboration since that is where legislative work is done. *EurActiv*, "MEP: European Parliament needs to be hub for national MPs", 4 October 2010, available at: <http://www.euractiv.com/en/future-eu/mep-european-parliament-needs-be-hub-national-mps-interview-498147>, accessed on 20 October 2010.

The numerous exchanges that we have with European Commissioners show that, through the intermediary of the Delegation, our House is beginning to be, if not listened to, then at least heard by Community institutions.<sup>1056</sup>

A notable recent example of direct personal dialogue with the Commission happened on 24 January 2006, when the *Assemblée nationale* hosted Commission President José Durão Barroso.<sup>1057</sup> What one might have expected to be a ceremonial, protocolary reception turned into a heated plenary debate with the representatives of the French nation. The atmosphere was so lively that the Speaker of the House, Jean Louis Debré (UMP), remarked briefly that it was more agitated than during questions to the Government. Of the four political groups that posed questions to Barroso, three of them – the Socialists, Centrists and Communists – requested the Commission to withdraw the Services Directive and the Directive on market access to port services emphasising that the European Parliament had rejected both of these drafts. Primarily due to the European Parliament's unwavering opposition, the Commission later agreed to water down the former and withdraw the latter proposal.<sup>1058</sup> Only the UMP group spared the Commission President from uncomfortable questions and inquired about the Commission's future initiatives concerning energy security, institutional revival and the Erasmus programme. The Commission President's appearance before the *Assemblée nationale* demonstrated, on the one hand, that 'mercy' is a scant political commodity also with regard to officials representing institutions extraneous to the national legal order, and on the other, that where parliaments at the European and national levels, deliberately or unconsciously, join forces against an EU executive act, the political pressure thus mounted can be a powerful tool for fostering the Union's evolution as a legitimate and accountable entity.

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<sup>1056</sup> Cited in: Saulnier, Emmanuelle. *La participation des parlements français et britannique aux Communautés et à l'Union européenne*, Paris: Librairie Générale de Droit et de Jurisprudence, 2002: 519, note 3.

<sup>1057</sup> *Assemblée nationale, Réception de M. José Manuel Barroso*, available at: [http://www.assemblee-nationale.fr/international/20060910.asp#P21\\_642](http://www.assemblee-nationale.fr/international/20060910.asp#P21_642), accessed on 23 November 2010.

<sup>1058</sup> The Commission withdrew its Proposal for a Directive on market access to port services (COM(2004) 654) following the European Parliament's resounding rejection at first reading on 18 January 2006 with 512 votes against, 120 in favour and 25 abstentions. See: *OJ C64/3* of 17.3.2006. The European Parliament's rejection came a week before Barroso's appearance before the *Assemblée nationale* and the Commission's withdrawal less than two months after the appearance. This was the second time the European Parliament had frustrated the Commission's intention to open port services to competition from providers of services like piloting, loading and unloading ships. The first Commission proposal was initiated in 2001 and rejected at third reading by the European Parliament in November 2003. One could only speculate about the extent to which the *Assemblée nationale's* pressure on the Commission contributed to the latter's withdrawal of this proposal. It was certainly not judicious for the Commission to press forward with a proposal that had run into stark opposition at various parliamentary levels.

In the *Sénat*, the supervision of EU activities operates chiefly through the monitoring of subsidiarity and of the Union's possible use of the passerelles.<sup>1059</sup> Yet this House is resolute that "it is not the task of the *Sénat* to inform the citizen of the development of the discussions at the level of European institutions" and that "except for those on which it decides to take a position, it is not the task of the *Sénat* to publicise European documents".<sup>1060</sup> This can be explained by the fact that the *Sénat*, unlike the *Assemblée nationale*, represents territorial communities and is indirectly elected.<sup>1061</sup> Furthermore, the *Sénat*, addressing the totality of the Lisbon powers, argued that they primarily enhance the collective influence of national parliaments and that "a single chamber of a single Member State cannot affect the complex institutional mechanism of the European Union".<sup>1062</sup>

### **B. Scrutiny of the Commission's legislative planning**

The French Parliament does not display particular interest in the Commission's instruments of legislative planning, such as annual policy strategies and legislative and work programmes.<sup>1063</sup> Instead, both Houses focus on the scrutiny of individual EU initiatives. The *Sénat* explains why this is so:

Discussing the annual policy strategy allows an overview of the European policies, but it does not replace the in-depth examination of each proposal of the European Commission. Also, there could be discrepancies between the intentions expressed in the work programme and the concrete results. Finally, the work programme is often a catalogue that does not permit to distinguish the essence from the secondary elements.<sup>1064</sup>

Above all, the *Sénat* finds it problematic to take a position on the Commission's instruments of legislative planning because concrete provisions are not known

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<sup>1059</sup> COSAC Secretariat, Annex to the 13<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLIII COSAC meeting held in Madrid from 31 May – 1 June 2010, p. 163.

<sup>1060</sup> COSAC Secretariat, Annex to the 12<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLII COSAC meeting held in Stockholm, 5-6 October 2009, pp. 43-44.

<sup>1061</sup> Article 24(4) of the Constitution.

<sup>1062</sup> COSAC Secretariat, Annex to the 9<sup>th</sup> bi-annual report by COSAC: replies to the questionnaire by the national parliaments and the European Parliament, prepared for XXXIX COSAC meeting held in Bled-Brdo pri Kranju, 7-8 May 2008, p. 69.

<sup>1063</sup> Annual policy strategies lay out the Commission's policy-making strategy, legislative priorities and political agenda, whereas legislative and work programmes develop these strategies into concrete decision-making plans and legislative proposals.

<sup>1064</sup> COSAC Secretariat, Annex to the 6<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVI COSAC meeting held in Helsinki, 19-21 November 2006, p. 74. See also *infra* note 1065 of this Chapter.

with certainty. Green Papers, by contrast, are especially conducive to subsidiarity assessment, because they represent the origins of legislative texts.<sup>1065</sup>

### C. The Barroso initiative

While one might consider the *Assemblée nationale* a laggard in the Barroso initiative, the *Sénat* can take pride in its prominent participation. As it declares, this House "seeks to obtain justifications from the Commission with respect to the necessity and extent of Union action".<sup>1066</sup> According to the Commission's data, the *Sénat* sent a total of 71 observations in the period from 2006-2010, whereas the *Assemblée nationale* sent only four.<sup>1067</sup> We therefore concentrate below on the *Sénat's* participation in this political dialogue.

During the first year of the operation of the Barroso initiative, the *Sénat* selected for closer scrutiny only 8% of the documents received from the Commission. On this basis, 31 observations were sent back to the Commission and 24 replies were received in return. On five occasions the Commission's reply was found unsatisfactory, either because it did not quite respond to the observations, because it made new statements that appeared arguable or ambiguous, or because it raised new questions of principle. This allowed the dialogue to extend beyond a single exchange, which did indeed occur.<sup>1068</sup>

The *Sénat's* key conclusions from its involvement in the Barroso initiative are threefold.

First, subsidiarity monitoring escapes straightforward definition. It is a multifaceted task. It is almost impossible to dissociate the concept of subsidiarity from that of proportionality as well as to find a clear boundary between subsidiarity and proportionality, on the one hand, and legal basis or substance of initiatives, on the other. For example, on what ground should a directive that is too detailed be criticised? Does the problem lie in the choice of the legal instrument (subsidiarity) or

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<sup>1065</sup> *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), pp. 31 and 48-49.

<sup>1066</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 49.

<sup>1067</sup> European Commission, Annual report 2008 on relations between the European Commission and national parliaments, COM(2009) 343, 7.7.2009, p. 9; European Commission, Annual report 2009 on relations between the European Commission and national parliaments, COM(2010) 291, 2.6.2010, p. 10; European Commission, Annual report 2010 on relations between the European Commission and national parliaments, COM(2011) 345, 10.6.2011., p. 12.

<sup>1068</sup> Out of a total of 787 documents received in the period from 1<sup>st</sup> September 2006 to 31<sup>st</sup> August 2007, 727 were excluded from scrutiny. These are: (a) documents with no regulatory implications that are not the precursor to legislative proposals (348 or 44%); (b) documents not likely to raise comments on the ground on subsidiarity or proportionality because of their subject-matter (302 or 39%); (c) documents occurring at an advanced stage of the decision-making process (50 or 6%); and (d) codifying documents (27 or 3%). *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), pp. 10-13.

in its excessive legal solutions (proportionality)?<sup>1069</sup> Similarly, distinguishing between the shared and exclusive competences surfaced as problematic on several occasions when the Commission failed to justify its initiative on the ground that it had the exclusive competence to act. On the intervention of the *Sénat*, the Commission stepped back in all instances, admitting that it had used the concept of exclusive competence injudiciously and providing clarifications of the meaning it attached to it.<sup>1070</sup> Yet the Commission did not always furnish satisfactory explanations. Particularly worrying for the *Sénat* were those justifying action on the mere basis that the measures taken by the Member States vary widely or that the Union co-finances certain projects through structural or cohesion funds. These arguments were, for example, used in the draft directive on the safety of road infrastructure.<sup>1071</sup> The compliance with subsidiarity of this and some other Commission proposals was also debated in the Council and the European Parliament. Based on this experience, the *Sénat* makes the case that the Union legislature now takes subsidiarity more seriously and that an increased number of debates on subsidiarity issues in EU institutions should incentivise the Commission to engage more deeply in the political dialogue with national parliaments at the earliest possible stages of policy and decision making.<sup>1072</sup>

Second, as France is a centralised state to which the concept of subsidiarity is with one exception foreign,<sup>1073</sup> it does not come as natural, so the *Sénat* argues, to challenge an EU initiative whose contents are satisfactory or compatible with French interests merely because the Union may not be the best level at which to act. In such a constellation, questions of substance of EU initiatives are discussed with the Government and those of subsidiarity and proportionality directly with the Commission.<sup>1074</sup>

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<sup>1069</sup> *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), p. 19.

<sup>1070</sup> For example, with respect to the harmonisation of rules in the field of civil aviation, the Commission explained that its invocation of exclusive competence did not refer to transport policy, but to the competence to implement inter-institutional procedures on comitology. Also, regarding the draft directive on the VAT regime applicable to television and broadcasting services, the Commission was forced to concede that its reference to exclusive competence was only based on the fact that the proposal's aim was to extend the period of application of a Community act. The Commission was reminded of the duty to provide explanatory notes also concerning the regulation reforming the common market organisation for fruits and vegetables. *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), pp. 24-25.

<sup>1071</sup> *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), pp. 53-56.

<sup>1072</sup> *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), pp. 26-27.

<sup>1073</sup> This exception is Article 72(2) of the Constitution, which allows territorial communities to take decisions in all matters that can best be implemented at their level.

<sup>1074</sup> *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), p. 21.

Third, the *Sénat* takes a proactive approach to subsidiarity control. Even where the Commission is not under a duty to justify its initiative, such as concerning Green Papers, which the *Sénat* fully accepts, it nonetheless alerts the Commission of the solutions that would respect subsidiarity the most. The senators also intend to ascertain whether their observations are taken into account.<sup>1075</sup>

The mission of the political dialogue with the Commission is accomplished once the latter provides further clarifications of its reasoning or intentions and answers Parliament's preoccupations.<sup>1076</sup>

## 6. CONCLUDING REMARKS

The present analysis demonstrates that the French Parliament has Europeanised in virtually all respects. Most of the key parameters of parliamentary scrutiny are influenced by or adjusted to the challenges posed by European integration.

With regard to information, all previously existing limitations have been withdrawn. Parliament receives all necessary information both from the Government and through links with EU institutions. As a consequence, both Houses are generally satisfied with the current arrangements of information provision.

As far as scrutiny instruments are concerned, they have been adapted to the Union's post-Lisbon decision-making rules. The instruments that produce the most thrust are European resolutions, which mostly support the Government's standpoints. Where they are critical of the proposed course of action at the EU level, it is the EU institutions that are to blame. This fits the two cardinal premises of the French political order: the majority rule and *parlementarisme rationalisé*. Of note is that the *Assemblée nationale* performs European scrutiny not only with a view to exerting the political accountability of the executive but also with a view to informing the citizenry and creating a public opinion on EU issues. Such is not the case with the *Sénat*. This could be explained by MPs' electoral proximity to the citizens, which senators do not enjoy. In this respect, the *Assemblée nationale* makes a greater contribution to the democratic legitimacy of EU action than the *Sénat*.

The scope of scrutiny extends to all policy areas, except for decisions made by comitology procedures and through the open method of coordination. Similarly, although Parliament possesses full scrutiny rights regarding EU international

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<sup>1075</sup> *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), p. 31. See also the intervention by Christian Cointat (UMP) during the discussion of this report in Delegation for the European Union: "Subsidiarity should not be invoked just to put the brakes on. Institutions have to be able to function. In this regard, let us avoid laying all the blame at the Commission's door. It comes more from the Council, which plays the dual role of executive and legislature. Often it allows national egoism and *raison d'État* to triumph, which is a long way from democratic considerations. We have to take a political approach. Subsidiarity must be handled with intelligence and good judgement". *Ibid.*, p. 39.

<sup>1076</sup> *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), p. 23.

agreements, those that are not highly salient are often not scrutinised in depth during the negotiations.

In the Area of Freedom, Security and Justice, several important insights have been gained. The *Assemblée nationale's* scrutiny of the former passerelles shatters the hypothesis that national parliaments necessarily prefer to maintain unanimity. This conclusion also flows from this House's caveat regarding the *Environmental crimes* judgment, when it emphasised that former framework decisions could not simply be converted into directives, because the European Parliament might be successful in inserting amendments. In the opinion of both Houses of Parliament, the conversion had the advantage that codecision and qualified majority would have applied. With regard to the political control of Europol, both Houses threw their weight behind the proposal for a committee gathering both national and European parliamentarians. The French Parliament was, hence, supportive of the European Parliament's legislative role in EU decision making.

Regarding CFSP and CSDP, both Houses were alert to the dissolution of the WEU Assembly and the resulting erosion of the democratic basis of this decision-making area. A substitute solution was pressed for. However, whereas the *Sénat* preferred the establishment of a supranational committee of national parliamentarians, the *Assemblée nationale* showed greater openness and advocated the involvement of MEPs, too. Similarly, while the *Sénat* was somewhat mistrustful of the European Parliament, the *Assemblée nationale* strongly backed it.

The primary addressee of Parliament's scrutiny is the Government. However, it transpires from the arrangements and practices analysed that EU institutions could be understood as secondary addressees. While the *Assemblée nationale* takes a proactive approach both with regard to informal contacts with the European Parliament and the Commission, the *Sénat* takes the lead in a more institutionalised procedure, the Barroso initiative. Yet the *Sénat's* active participation in the political dialogue with the Commission should not mask the rather active approach of the *Assemblée nationale* in many other respects. Their combined action is perhaps the intended formula of the French parliamentary scrutiny of EU affairs.

In conclusion, the French Parliament is fully equipped to participate in EU decision making and to contribute to the Union's legitimacy and accountability, should it decide to act in this regard.

# Chapter 7

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## The United Kingdom: A Vigilant and Assiduous Scrutineer

### 1. WESTMINSTER IN THE CONSTITUTIONAL ORDER OF THE UNITED KINGDOM

The Parliament of the United Kingdom,<sup>1077</sup> commonly referred to as Westminster after the Palace of Westminster, which hosts the Houses of Parliament, is a product of centuries of evolution dating back to 1215, when the *Magna Carta Libertatum* was adopted. Due to the British Parliament's longevity, many other countries took it as a model for organising their own parliament, which is why England is sometimes called 'the mother of parliaments'.<sup>1078</sup> This section describes the parliamentary system of government of the United Kingdom to set the background for the analysis of Parliament's competences in EU affairs.

#### 1.1. The British constitution

A document entitled "Constitution" does not exist in the United Kingdom. This does not mean that Britain does not possess a constitution, but merely that it is not codified into a single text. The principal reason for this is that, unlike many other democracies such as the United States, France or Germany, there was no clear constitutional starting point in Britain, a moment that would have been sparked by the attainment of independence or the installment of a new regime.<sup>1079</sup> The British constitution is material rather than formal and is contained in a multitude of written and unwritten sources. The rules of the British constitution are to be found in: (a) Acts of Parliament, i.e., statutes or primary legislation; (b) statutory instruments, i.e., delegated or secondary legislation, such as orders, rules and regulations; (c) common law, i.e., case law; and (d) customary rules, such as the 'law and custom of Parliament'<sup>1080</sup> (*lex et consuetudo parlamenti*) or the formalities to be observed in the performance of legal acts by the Crown.

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<sup>1077</sup> The full name of this country is the United Kingdom of Great Britain and Northern Ireland. Its short name is Britain. Britain is a broader term than Great Britain, because Great Britain consists only of England, Scotland and Wales, whereas Britain encompasses Northern Ireland as well.

<sup>1078</sup> One French author summarised this in the following words: "In a majority of free countries, a striking feature is the transplantation of fundamental principles of the British constitution. [...] All European states (except Switzerland and Cyprus) have adopted the principle of a responsible executive in the 19<sup>th</sup> and 20<sup>th</sup> centuries. They are all, in this sense, epigones of Westminster". Le Divellec, Armel. "Cabinet as the leading part of Parliament: the Westminster model in Europe," in *Constitutionalism and the role of parliaments*, by Katja Ziegler et al. (eds), Oxford: Hart Publishing, 2007: 99.

<sup>1079</sup> Bogdanor, Vernon. *The new British constitution*, Oxford: Hart Publishing, 2009: 215.

<sup>1080</sup> This phrase is somewhat metaphorical, because the 'laws' of Parliament are not Acts of Parliament and the 'customs' of Parliament do not, as the phrase indicates, regulate relations occurring outside

The British constitution contains not only legal rules but also those born out of political practice. Crucial among them are constitutional conventions.<sup>1081</sup> They regulate the conduct of public officials at the central level, but are not rules of law enforceable by the courts.<sup>1082</sup> There is, therefore, no legal sanction for disregarding them. Their observance is, instead, assured in Parliament through the political process. Should constitutional conventions be ignored by their addressees, questions might be raised about it in Parliament or there might be a public revolt, both of which can be as effective as the sanctions secured in courtrooms. Conventions are, thus, binding because of the threat of these political sanctions. Conventions regulate an array of vital matters related to the operation of offices of public power in Britain,<sup>1083</sup> such as ministerial responsibility to Parliament, the rule that the monarch acts on and in accordance with ministerial advice, the existence and position of the Cabinet and of the prime minister, and so on.

The institution of royal assent is a good example of the intertwined constitutional regulation in Britain. Namely, it is a rule of common law that bills passed by both Houses of Parliament must receive royal assent to become law. The manner in which royal assent is to be given is laid down by the Royal Assent Act of 1967. However, this Act has been superseded by a convention that the monarch may not independently refuse to give royal assent.<sup>1084</sup> One problem with constitutional conventions, however, is that "it is never quite certain at what point practice becomes or ceases to be convention".<sup>1085</sup>

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Parliament. Both address the internal life of Parliament and predominantly deal with the parliamentary functions of and relations between the Government and the Opposition, some of which are laid down in parliamentary resolutions, standing orders of the Houses and decisions of the Speaker. Whereas the 'laws' of Parliament are, therefore, recorded in Journals of the Houses, the 'customs' of Parliament are mechanisms operating "through the usual channels" or "behind the Speaker's Chair" and can, despite being unwritten, be ascertained from these Journals or from the books of precedents compiled by the competent clerks. Contrary to the laws and customs of Parliament, parliamentary conventions are solely a matter of practice, albeit recognised as obligatory, and enshrined as such "in the hearts of members [of Parliament] and party officials". Jennings, Ivor. *The law and the constitution*, London: University of London Press, 1959: 115-116.

<sup>1081</sup> Marshall, Geoffrey. *Constitutional conventions: the rules and forms of political accountability*, Oxford: Clarendon Press, 1984.

<sup>1082</sup> Munro, Colin. "Laws and conventions distinguished," *Law Quarterly Review*, Vol. 91, No. 2, 1975: 218-235.

<sup>1083</sup> Not all regularity in the conduct of actors in the process of governing necessarily qualifies as constitutional convention. Jaconelli, Joseph. "The nature of constitutional convention," *Legal Studies*, Vol. 19, No. 1, 1999: 30 and 35.

<sup>1084</sup> Prakke, Lucas. "United Kingdom of Great Britain and Northern Ireland," in *Constitutional Law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 873.

<sup>1085</sup> Jennings, Ivor. *The law and the constitution*, London: University of London Press, 1959: 133. This author offered three criteria for establishing whether a constitutional convention exists. One needs to ask: (a) what the precedents are; (b) whether the actors believed that they were bound to a rule; and (c) whether there is a reason for the rule. *Ibid.*, p. 136. From this point of view, it is simplistic to conclude, as did Leyland, that the only way to know with certainty the contents of an established convention is to look

## 1.2. Parliament

### 1.2.1. Composition

The Parliament of the United Kingdom is bicameral and, in law, it must meet at least once in three years,<sup>1086</sup> although in practice it meets every year. The maximum life of each Parliament is five years after it was first convened.<sup>1087</sup>

The Lower House is the House of Commons, composed of 650 members of Parliament (MPs) directly elected in single-member constituencies under the 'first-past-the-post' electoral system.<sup>1088</sup> The electoral candidate who wins the most votes wins the seat of the constituency regardless of its size. A simple majority of the votes cast suffices for electoral victory, so obtaining an absolute majority of the votes cast is not necessary. Two key consequences ensue: (a) it is common for a political party to hold an absolute majority of the seats in the House of Commons without representing more than 50% of the population;<sup>1089</sup> and (b) the party with the most seats in the House of Commons need not be the party that had won the most votes in elections. Majorities thus created in the House of Commons are very strong. They are conducive to effective party discipline and the Government's dominance over Parliament. The two largest political parties represented in the House of Commons, the Conservatives and Labour, are designated as Her Majesty's Government and Her Majesty's Opposition. The opposition is the largest non-government party, whose leaders are referred to as the Shadow Cabinet. Government ministers and the Shadow Cabinet are frontbenchers, whereas all other MPs are backbenchers, i.e., private members.

The Upper House is the House of Lords, composed of unelected peers, whose number is not fixed and currently amounts to 741.<sup>1090</sup> There are two types of peers. Lords Spiritual are 25 senior bishops of the Church of England, who have a seat in

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at the behaviour of the sovereign, politicians or other responsible officials. Leyland, Peter. *The constitution of the United Kingdom*, Oxford: Hart Publishing, 2007: 27-28. This, however, does not mean that analysing such behaviour, whether conventional or not, is not worth analysing for other purposes, such as to advance knowledge of legal and political developments.

<sup>1086</sup> Section 1 of the Meeting of Parliament Act 1694. This Act was intended to clarify Article 13 of the Bill of Rights of 1689, which provided that "for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliament ought to be held frequently". Bradley, Anthony W. and Ewing, Keith D. *Constitutional and administrative law*, Harlow: Pearson Longman, 2007: 187.

<sup>1087</sup> Section 7 of the Parliament Act of 1911.

<sup>1088</sup> For this and other aspects of the British electoral system see: Curtice, John. "The electoral system," in *The British constitution in the twentieth century*, by Vernon Bogdanor (ed.), Oxford: Oxford University Press, 2004: 483-520.

<sup>1089</sup> In the 20<sup>th</sup> century, an absolute majority of the votes cast was obtained only three times and all three times by the Conservatives. It happened in 1900 (51.1%), 1931 (55.2%) and 1935 (53.7%). Prakke, Lucas. "United Kingdom of Great Britain and Northern Ireland," in *Constitutional Law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 902.

<sup>1090</sup> See <http://www.parliament.uk/mps-lords-and-offices/lords/lords-by-type-and-party>, accessed on 10 January 2011.

the House of Lords thanks to their ecclesiastical status, which means that they must leave the House once their episcopal office ends. All other peers are Lords Temporal. Among them are 90 hereditary peers<sup>1091</sup> and life peers, appointed for life in the rank of baron by the monarch on the advice of the Prime Minister.<sup>1092</sup> While peers are members of political parties, there are many crossbenchers who are not affiliated to any party but vote according to their personal inclinations.

### 1.2.2. Legislative process

Legislation can be initiated in any House both by the Government and by private members or peers. However, tax and budget bills must be introduced in the House of Commons and by the Government. The legislative procedure goes through several stages. The first reading is a formality and is exhausted in the mere reading of the title of the bill in the plenary without a discussion. The second reading serves to debate the general principles of the bill without amending it. The bill is then sent to a standing committee for detailed analysis and amendments, which may not address the spirit of the bill, because this was agreed in the second reading. In this phase, the opposition has ample room to delay the procedure, but the Government can resort to several instruments to counter it. The committee chairman can select amendments to be debated, committee members may move closure of the debate, and, as the most radical measure, the Government may rein in its members in the House of Commons to apply the 'guillotine', i.e., to allocate a maximum time to each remaining stage of the legislative procedure, after whose expiry a vote must be taken. It is important to note that the bulk of the parliamentary work is done in committees. Standing committees are temporary and are formed for the examination of bills. For each new bill, standing committees are established anew according to party representation in Parliament. Select committees are permanent and scrutinise the work of Government departments. The bill as adopted during the committee stage is thereupon discussed in the plenary as part of the so-called report stage, during which amendment is still possible. This stage extends to the third reading, when the final vote is carried out. The bill is then sent to the other House. Pursuant to the Parliament Acts 1911 and 1941, the House of Lords' unlimited right to reject bills was transformed into that of a suspensory veto. This means that a bill persistently opposed by the Lords cannot be adopted in the given legislative session, but can be adopted in the next session without the Lords' consent by the Commons' submission of the bill for royal assent. The House of Commons thus enjoys legislative supremacy. The most important characteristic of Westminster is the doctrine of parliamentary sovereignty, which is analysed under a separate section.

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<sup>1091</sup> Sections 1 and 2 of the House of Lords Act of 1999 abolished hereditary peerage, but made an exception from this rule for 90 peers, the Earl Marshal and the Lord Great Chamberlain. Standing Order 9 of the House of Lords of 2010 specifies that the remaining hereditary peers are to be chosen in elections organised in this House by the Clerk of the Parliaments.

<sup>1092</sup> Life Peerages Act of 1958.

As regards the ratification of international treaties, Parliament's right is enshrined in the Constitutional Reform and Governance Act of 2010 and is negatively formulated.<sup>1093</sup> Unless Parliament voices its opposition, the Government is free to ratify a negotiated treaty after (a) publishing it in a manner that the competent minister thinks appropriate and after (b) laying it before Parliament for 21 sitting days. The latter requirement formalises what was known as the Ponsonby rule.<sup>1094</sup> Since it hinges not on Parliament's approval but on the absence of its opposition, ratification is as a rule by tacit approval. Parliament's inaction, therefore, leads to ratification. If the Commons objects within this period, regardless of whether the Lords object too, the Government can still proceed with ratification if they lay a statement explaining why the ratification is necessary and another 21 sitting days pass without objection. The Commons may, however, object again and the Government may lay another statement of reasons. Theoretically, this can continue until either of them gives in. Practically, the Government is unlikely to insist on the ratification if it encounters strong objection. If the Lords alone object, the Government may still proceed with ratification if it submits a statement of reasons for this, after which the Lords may not object again. So long as neither of the Houses has objected, the Government, exceptionally, need not meet the two said requirements if, before or as soon as practicable after ratification, it lays before Parliament a statement of reasons for having done so. Once a treaty is ratified, it does not apply in Britain until it is brought into the British legal order by an Act of Parliament. This is the dualist approach to international law, which stems in part from the doctrine of parliamentary sovereignty.<sup>1095</sup>

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<sup>1093</sup> Sections 20-25 thereof. See also: Thorp, Arabella. "Parliamentary scrutiny of treaties," *House of Commons Library, Standard Note no. SN/LA/4693* of 25 September 2009.

<sup>1094</sup> The Ponsonby Rule developed out of a practice announced in the Houses of Commons on 1 April 1924 by Arthur Ponsonby, the then Under Secretary of State for Foreign Affairs. He then stated: "It is the intention of His Majesty's Government to lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty will be ratified [...] In the case of important treaties, the Government will, of course, take an opportunity of submitting them to the House for discussion within this period. But, as the Government cannot take upon itself to decide what may be considered important or unimportant, if there is a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for the discussion of the treaty in question" (para 4). What catalysed the formation of this rule was "the generally held view that secret treaties and secret clauses within treaties had been made before and during the First World War" (para 28). House of Commons, Procedure Committee, "Parliamentary scrutiny of treaties", *HC 210, 2<sup>nd</sup> Report of Session 1999-2000* of 26 July 2000. Although generally followed, the Ponsonby Rule has "on various occasions" been set aside or disclaimed as binding by ministers. Turpin, Colin and Tomkins, Adam. *British government and the constitution*, Cambridge: Cambridge University Press, 2007: 164. The value of enshrining the Ponsonby Rule in a statute thus becomes obvious. The Government may no longer avoid the laying of a treaty before Parliament without breaking the law.

<sup>1095</sup> Bradley, Anthony W. and Ewing, Keith D. *Constitutional and administrative law*, Harlow: Pearson Longman, 2007: 324-325.

### 1.3. The Government

#### 1.3.1. Composition

The Government comprises the Prime Minister and ministers, whose number might exceed one hundred. By convention, the Prime Minister is appointed when the monarch orally invites the leader of the party that has gained the most votes in the election to form a Government. If the Government party wins the election, the Government simply stays in office and need not tender its resignation. Still, the monarch is not legally obliged to appoint the leader of the winning party or anyone else at all, but may appoint literally anyone as Prime Minister without breaching the law. If the monarch were to do so, he or she would be acting improperly, but not illegally. The monarch most likely acts conventionally "simply because she considers it to be appropriate".<sup>1096</sup> What is more, there is no legal requirement for the existence of a Prime Minister at all. Rather, this office emerged out of political convenience in the early 18<sup>th</sup> century and persisted ever since by virtue of convention.<sup>1097</sup>

Ministers are appointed by the monarch on the advice of the Prime Minister.<sup>1098</sup> It is a convention that all ministers must be members of either of the Houses of Parliament. Three quarters of them are typically members of the House of Commons. No more than 95 ministers are allowed to sit and vote in the Commons at any time.<sup>1099</sup> It is also a convention that the Prime Minister must be a member of the House of Commons. This fusion between ministers and Parliament is among the central elements of the claim that there is no sophisticated separation of powers in Britain.<sup>1100</sup> In fact, Bagehot famously stated that the constitution's "efficient secret" was the "nearly complete fusion" or "singular approximation" of the executive and legislative powers in the form of a Cabinet.<sup>1101</sup> For its existence, the Government must enjoy the confidence of the House of Commons, which is partly secured by this large presence of Government ministers in this House. The House of Lords does not have the power to topple the Government.

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<sup>1096</sup> Tomkins, Adam. *Public Law*, Oxford: Oxford University Press, 2003: 11.

<sup>1097</sup> Tomkins, Adam. "The struggle to delimit executive power in Britain," in *The executive and public law: power and accountability in comparative perspective*, by Paul Craig and Adam Tomkins (eds), New York, 2006: 17.

<sup>1098</sup> Prakke, Lucas. "United Kingdom of Great Britain and Northern Ireland," in *Constitutional Law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 880 and 901.

<sup>1099</sup> Section 2(1) of the Disqualification Act of 1975.

<sup>1100</sup> For instance, Lord Steyn observed in the *Anderson* case decided in 2003 that the British constitution has "never embraced a rigid doctrine of separation of powers [...] on the other hand, the separation of powers between the judiciary and the legislative and executive branches of government is a strong principle of our system of government". Tomkins, Adam. "The struggle to delimit executive power in Britain," in *The executive and public law: power and accountability in comparative perspective*, by Paul Craig and Adam Tomkins (eds), New York, 2006: 35.

<sup>1101</sup> Bagehot, Walter. *The English constitution*, London: Watts, 1964: 65-66.

The Government is led by the Prime Minister and the Cabinet. While the Prime Minister has a small staff of his own at 10 Downing Street, the Cabinet gathers some 20 to 25 important ministers in its office in Whitehall.<sup>1102</sup> Particularly Prime Ministers Margaret Thatcher and Tony Blair ruled with few constraints and reduced the Cabinet to a rubber-stamping rather than a decision-making body. Yet the swaying of executive power towards the Prime Minister at the expense of the Cabinet should not be regarded as a zero-sum game, as these two executive entities are not polar alternatives.<sup>1103</sup> Most Cabinet ministers are Secretaries of State, who head Government departments. However, there are also Cabinet ministers without portfolio, to whom the Prime Minister entrusts various tasks. By convention, all Cabinet ministers are made Privy Councillors, to which posts they are appointed for life by the monarch on the Prime Minister's advice.<sup>1104</sup> Membership of this body entails but formal duties and is principally a matter of honour. The ministers who are most senior in rank are Secretaries of State. Under them are Ministers of State, whose chief task is to defend the Government's policy in Parliament. Less senior still are Parliamentary Under Secretaries, who focus on parliamentary work. Another category of ministers is Government Whips, whose primary role is to mobilise support for the passage of Government bills in Parliament and to inform the Government of backbenchers' concerns.

### **1.3.2. Ministerial responsibility**

The principle of ministerial responsibility is a constitutional convention that guarantees responsible government, which is all the more essential in a system like the British one, where legal checks are not provided by a constitutional court.<sup>1105</sup> The core rule of ministerial responsibility is that the government of the day may only stay in office so long as it enjoys the support of a majority in the House of Commons. In Tomkins' eyes, the 'beauty' of this rule lies in the use of politics as the vehicle for achieving the purpose of the constitution, which is to provide a check on the Government and prevent it from abusing its authority. The constitutional acknowledgment of the reality of government, under which the Government will try to do whatever it thinks it can politically get away with, is the chief reason why Britain should keep its political constitution. Politics, in his opinion, is more suitable

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<sup>1102</sup> See more in: Rhodes, R.A.W. and Dunleavy, Patrick (eds). *Prime Minister, cabinet and core executive*, Basingstoke: Palgrave Macmillan, 1995.

<sup>1103</sup> Weller, Patrick. "Cabinet government: an elusive ideal?," *Public Administration*, Vol. 81, No. 4, 2003: 703.

<sup>1104</sup> Prakke, Lucas. "United Kingdom of Great Britain and Northern Ireland," in *Constitutional Law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 884.

<sup>1105</sup> Woodhouse, Diana. *Ministers and Parliament: accountability and practice*, Oxford: Clarendon Press, 1994: 3.

than courts democratically and effectively to limit the exercise of the executive power and hold it to account.<sup>1106</sup>

Ministerial responsibility in Britain is both individual and collective. Ministers are individually responsible to Parliament for their own conduct, policies, decisions and actions as well as those of their departments and officials working there.<sup>1107</sup> In accordance with the principles of confidentiality, solidarity and unanimity in reaching Government decisions,<sup>1108</sup> ministers, including those of lower rank than Secretaries of State,<sup>1109</sup> are also collectively responsible for the overall Government policy, even where they did not participate in the making of a decision and where they disagree with it.<sup>1110</sup>

Woodhouse has usefully categorised the responsibility of ministers according to the degree of supervisory authority exercised by the minister. Ministerial responsibility can be: (a) *redirectory*, where the minister's responsibility is indirect and restricted to forwarding parliamentary questions to non-departmental bodies, agencies or nationalised industries; (b) *reporting or informatory*, requiring the minister simply to report on the events happening in one of the areas of his or her responsibility; (c) *explanatory*, obliging the minister to justify and account for his own or his department's actions beyond the provision of information; (d) *amendatory*, which requires the minister to redress the shortcomings caused by him or her personally or by his or her department by apologising in Parliament, undertaking corrective action, holding an internal inquiry, installing procedures preventing the repetition of the incident, or disciplining the official responsible; and (e) *sacrificial*, forcing the minister to resign.<sup>1111</sup>

The most important tool for holding the Government to account is the *select committees*, which focus on explanatory ministerial responsibility.<sup>1112</sup> Since the reform of 1979, there has been one select committee per Government department.

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<sup>1106</sup> Tomkins, Adam. *Our republican constitution*, Oxford: Hart Publishing, 2005: 3, 10 and 115.

<sup>1107</sup> In the entire 20<sup>th</sup> century, only four ministerial resignations were due to departmental rather than a minister's personal fault. Those resignations were by ministers Wydham in 1905, Dugdale in 1954, Carrington in 1982 and Brittan in 1986. Woodhouse, Diana. "UK ministerial responsibility in 2002: the tale of two resignations," *Public Administration*, Vol. 82 No. 1, 2004: 2 and 7.

<sup>1108</sup> The Ministerial Code of 2010 lays down that collective ministerial responsibility requires that "ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and ministerial committees, including in correspondence, should be maintained" (point 2.1). See also *infra* note 1123 of this Chapter.

<sup>1109</sup> Brazier, Rodney. *Ministers of the Crown*, Oxford: Clarendon Press, 1997: 266-267.

<sup>1110</sup> Ellis, David L. "Collective ministerial responsibility and collective solidarity," in *Ministerial responsibility*, by Geoffrey Marshall (ed.), Oxford: Oxford University Press, 1989: 49; Tomkins, Adam. "The struggle to delimit executive power in Britain," in *The executive and public law: power and accountability in comparative perspective*, by Paul Craig and Adam Tomkins (eds), New York, 2006: 19.

<sup>1111</sup> Woodhouse, Diana. *Ministers and Parliament: accountability and practice*, Oxford: Clarendon Press, 1994: 28-33.

<sup>1112</sup> Le Sueur, Andrew. "The nature, powers, and accountability of central government," in *English public law*, by David Feldman (ed.), Oxford: Oxford University Press, 2009: 197.

Though these committees reflect the political complexion of the House of Commons, their reports are as a rule unanimously adopted and hardly ever give rise to divisions along party lines. As ministers may not serve as members, select committees are "the unique preserve of backbench MP" and are "sufficiently powerful, prestigious and effective to be taken seriously by the Government and its whips".<sup>1113</sup> The Government can also be attacked in plenary *debates* or by means of oral and written *questions*, to which ministers can reply orally or, more frequently, in writing.<sup>1114</sup> Apart from these instruments, the Government can also be challenged in emergency debates, daily adjournment debates, debates initiated by early day motions, debates on the Queen's speech, a debate on the Chancellor of the Exchequer's budget speech, as well as during the so-called opposition days.<sup>1115</sup>

The main consequence of individual ministerial responsibility is that "any minister who *misleads* Parliament must apologise and must set the record straight at the earliest opportunity. Any minister who *deliberately misleads* Parliament (that is, who lies) will be expected to resign".<sup>1116</sup> If, however, the House of Commons, but not the House of Lords, passes a vote of no confidence in the entire Government, the latter must, by convention, either resign or dissolve Parliament. These votes are extremely rare in practice, because strict party discipline and the practice of whipping the parliamentary majority permit the Government to maintain an "iron

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<sup>1113</sup> Tomkins, Adam. "Political accountability in the United Kingdom," in *Political accountability in Europe: which way forward? A traditional concept of parliamentary democracy in an EU context*, by Luc Verhey et al. (eds), Groningen: Europa Law Publishing, 2008: 263.

<sup>1114</sup> The value of parliamentary questions has been questioned. On the one hand, for example, Harold Wilson, himself a two-time Labour Prime Minister, once said that "if Britain ever had a Prime Minister who did not fear questions, our parliamentary democracy would be in danger". He also reported that Harold Macmillan, his Conservative prime ministerial colleague serving before him, occasionally pretended to be sick to avoid Question Time, despite being a highly successful performer at it. Wilson, Harold. "Prime ministerial answerability," in *Ministerial responsibility*, by Geoffrey Marshall (ed.), Oxford: Oxford University Press, 1989: 95. On the other hand, some consider questions an ineffective instrument of control, because they are often prearranged by the minister and serve to promote rather than criticise Government policy. It has even been argued that parliamentary questions are "part of the show business of Westminster". Prakke, Lucas. "United Kingdom of Great Britain and Northern Ireland," in *Constitutional Law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 910. Prime Minister's Question Time has also been referred to as the most dramatic and deceptive tip of the constitutional iceberg. Tomkins, Adam. *Public Law*, Oxford: Oxford University Press, 2003: 49.

<sup>1115</sup> Barnett, Hilaire. *Constitutional and administrative law*, London: Routledge, 2011: 418-419; Prakke, Lucas. "United Kingdom of Great Britain and Northern Ireland," in *Constitutional Law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 909.

<sup>1116</sup> Tomkins, Adam. "The struggle to delimit executive power in Britain," in *The executive and public law: power and accountability in comparative perspective*, by Paul Craig and Adam Tomkins (eds), New York, 2006: 38 (emphasis added).

grip" on the House of Commons.<sup>1117</sup> This trend is not new. Writing in 1904, Low argued that:

The House of Commons no longer controls the Executive; on the contrary, the Executive controls the House of Commons. [...] [I]n our modern practice the Cabinet is scarcely ever turned out of office by Parliament *whatever it does*. [...] The real check upon a too gross and salient misuse of ministerial power is, no doubt, the salutary fear of public opinion; but this is a restraint that would be pretty nearly as operative without the assistance of the House of Commons which does not respond to it except after a general election. For the control of Parliament, which was supposed to be regular, steady, and constant, is exchanged the control of the electorate, which is powerful but intermittent.<sup>1118</sup>

The Government, nevertheless, is at times defeated on whipped votes. An overwhelming majority of these defeats refer to items of secondary importance to Government policy, such as amendments to bills or procedural motions. For that reason, the question of confidence or resignation does not arise.<sup>1119</sup> Where it does, ministerial resignations are by no means unconditional. In Finer's words, they are the "haphazard consequence of a fortuitous concomitance of personal, party, and political temper".<sup>1120</sup>

However, it has been argued that ministerial responsibility became a parliamentary rule, after, in March 1997, the Houses of Parliament each adopted structurally different but identically worded resolutions laying down the crucial elements of individual ministerial responsibility.<sup>1121</sup> These prescribe that: (a) ministers are obliged not only to account but also to be held to account to Parliament for the policies, decisions and actions of their departments and agencies; (b) ministers should give accurate and truthful information to Parliament, be as open as possible with Parliament, and refuse to provide information only where disclosure would harm the public interest; (c) ministers should correct any inadvertent error at the earliest opportunity; and (d) ministers who knowingly mislead Parliament are expected to resign.<sup>1122</sup> That the Government takes these resolutions seriously is

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<sup>1117</sup> Prakke, Lucas. "United Kingdom of Great Britain and Northern Ireland," in *Constitutional Law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 864.

<sup>1118</sup> Low, Sidney. "The House of Commons and the executive," in *Ministerial responsibility*, by Geoffrey Marshall (ed.), Oxford: Oxford University Press, 1989: 20, (emphasis in original).

<sup>1119</sup> Norton, Philip. "Government defeats in the House of Commons: myth and reality," in *Ministerial responsibility*, by Geoffrey Marshall (ed.), Oxford: Oxford University Press, 1989: 42.

<sup>1120</sup> Finer, S.E. "Individual responsibility of ministers," in *Ministerial responsibility*, by Geoffrey Marshall (ed.), Oxford: Oxford University Press, 1989: 125.

<sup>1121</sup> Tomkins, Adam. *The constitution after Scott: government unwrapped*, Oxford: Clarendon Press, 1998: 62. See more about the resolutions in: Woodhouse, Diana. "Ministerial responsibility: something old, something new," *Public Law*, Summer 1997: 262-282.

<sup>1122</sup> House of Commons, Debate of 19 March 1997, Vol. 292, cols. 1046-1047; House of Lords, Debate of 20 March 1997, Vol. 579, col. 1057.

attested by the fact that all Prime Ministers after the general election of 1997 – Tony Blair, Gordon Brown and David Cameron – have incorporated verbatim these principles into their Ministerial Codes.<sup>1123</sup> The latest Ministerial Code, adopted by Prime Minister Cameron on 21 May 2010, also includes the convention that "[w]hen Parliament is in session, the most important announcements of Government policy should be made in the first instance in Parliament".<sup>1124</sup>

These parliamentary resolutions originated in three attempts during the Conservative Government of Prime Minister John Major (1991-1997) to limit the scope of its responsibility to Parliament. The first attempt was by Sir Robin Butler, then Cabinet Secretary, who, in his evidence to the Scott inquiry and to Parliament, drew a distinction between ministerial accountability and responsibility. While a minister was ultimately and unavoidably accountable to and challengeable by Parliament for the actions of his or her department and civil service, the minister was to be held responsible only where he or she was personally involved in a contested action or decision. The second attempt was by Home Secretary Michael Howard, who, in the aftermath of high profile prison escapes, refused to resign and instead sacked the Chief Executive of the Prison Service on the pretext that ministers are only responsible for Government policy and not operational matters. The third attempt derives from the 1992 judicial inquiry by Lord Justice Scott into the Government's implication in the Arms-to-Iraq affair, when it covertly facilitated the export by British companies of defence *matériel* to Saddam Hussein's Iraq prior to the First Gulf War of 1991. The outcome of the inquiry, the so-called Scott Report, came four years later, when only one of the ministers involved in the affair, William Waldegrave, was still in office. The Report found that the statements and replies to parliamentary questions by a number of ministers were "inaccurate and misleading", "designedly uninformative", and that their failure to inform Parliament of the current state of Government policy was "deliberate". The Report nonetheless conceded that ministers had acted without "duplicitous intent".<sup>1125</sup> As a result, Waldegrave was exonerated of any guilt for deceiving Parliament and, like Howard before him, kept his post.

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<sup>1123</sup> The Ministerial Code is a document issued by convention by the Prime Minister at the beginning of a new administration. It lays down the rules of conduct of ministers. The first Ministerial Code was published by Prime Minister John Major in May 1992 and was called Questions of Procedure for Ministers until 1997. However, this document had existed in the form of a confidential internal circular at least since the Second World War. See: Tomkins, Adam. "Political accountability in the United Kingdom," in *Political accountability in Europe: which way forward? A traditional concept of parliamentary democracy in an EU context*, by Luc Verhey et al. (eds), Groningen: Europa Law Publishing, 2008: 257 and 261; Gay, Oonagh. "The Ministerial Code," *House of Commons Library, Standard Note SN/PC/03750* of 13 September 2010.

<sup>1124</sup> Point 9.1 thereof.

<sup>1125</sup> Tomkins, Adam. "Political accountability in the United Kingdom," in *Political accountability in Europe: which way forward? A traditional concept of parliamentary democracy in an EU context*, by Luc Verhey et al. (eds), Groningen: Europa Law Publishing, 2008: 254-257.

These events carry two significant corollaries for the parliamentary control of the executive. First, the Government's duty to give account by providing full information and explaining its policies and actions in Parliament is now coupled with the liability to be held to account by responding to concerns and criticism raised in Parliament.<sup>1126</sup> Second, Parliament's focus of attention has shifted from rare high-octane occurrences, such as resignations and scandals, towards the quality of account furnished by the Government on a daily basis.<sup>1127</sup> This turn towards routine scrutiny is constitutionally more important, because it forces the Government into a more frequent dialogue with Parliament, and, as will be demonstrated later, particularly benefits Parliament's scrutiny of EU decision making. However, the effectiveness of the convention of ministerial responsibility, in national and European matters alike, is "frequently frustrated" by the Government's monopoly of information and is ultimately contingent on the Government's cooperation and the personal integrity of ministers.<sup>1128</sup>

#### 1.4. The monarch

Queen Elizabeth II is the Head of State of the United Kingdom as well as of 15 other sovereign states called Commonwealth realms, including Canada, Australia, New Zealand and Jamaica. By virtue of convention, the monarch exercises most of his or her powers on the advice of ministers. In fact, it is the ministers who decide, and whose decisions, i.e., 'advice', the monarch must follow and enact.<sup>1129</sup> It was after the Glorious Revolution of 1688 and the subsequent adoption of the Bill of Rights in 1689 that the monarch's absolute power was abolished and that the monarchy became 'limited' or 'constitutional'. Yet the monarch had not lost personal decision-making powers until the convention of ministerial responsibility fully developed in the 19<sup>th</sup> century.

The royal prerogative is a rule of common law and represents the power inherent in the Crown that courts recognise as possessing legal force. Since they are a creation of the courts, powers derived from the royal prerogative can be altered or abolished by Parliament through legislation. The most important of the prerogative powers include the summoning and dissolution of Parliament, the opening and closure of parliamentary sessions, the conduct of diplomacy, the making and ratification of treaties, the declaration of war, the deployment of British Armed Forces abroad, the governing of British overseas territories, the granting and revocation of passports, the

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<sup>1126</sup> Excerpt from the committee's report reproduced in: Tomkins, Adam. "Political accountability in the United Kingdom," in *Political accountability in Europe: which way forward? A traditional concept of parliamentary democracy in an EU context*, by Luc Verhey et al. (eds), Groningen: Europa Law Publishing, 2008: 259.

<sup>1127</sup> Tomkins, Adam. *The constitution after Scott: government unwrapped*, Oxford: Clarendon Press, 1998: 65.

<sup>1128</sup> Woodhouse, Diana. "Ministerial responsibility," in *The British constitution in the twentieth century*, by Vernon Bogdanor (ed.), Oxford: Oxford University Press, 2004: 325-326.

<sup>1129</sup> Tomkins, Adam. *Public Law*, Oxford: Oxford University Press, 2003: 71.

creation of peerages, the appointment of a Prime Minister, the dismissal of Government, the appointment of judges and military officers, the granting of royal assent to bills, etc.<sup>1130</sup> These are not all personal powers of the monarch, however. Most of them pertain to and are exercised by or on the advice of the Government. There are four key prerogative powers that only the monarch can exercise *personally*, albeit not perforce independently: the appointment of a Prime Minister, the dissolution of Parliament, the dismissal of Government, and the granting of royal assent.<sup>1131</sup> Besides these four powers, situations might arise where the monarch could and should act *independently*. For example, the monarch would be called upon to appoint a person to form a government where, after a general election, it remains unclear who the leader of the winning political party is or where no single party has won an absolute majority of the seats in the House of Commons. The monarch should also dismiss the Government that refuses to resign despite losing a vote of no confidence in Parliament.<sup>1132</sup> Bagehot's formula, created in 1867, that the monarch possesses three rights – to be consulted, to encourage and to warn – is, except for extreme situations, probably still an accurate abbreviation of the Crown's constitutional power.<sup>1133</sup>

## **2. PARLIAMENTARY SOVEREIGNTY AS KEY TO BRITAIN'S RELATIONS WITH THE EU**

Just as its constitution extracts its substance from a miscellany of sources, so does the United Kingdom's relationship with the European Union. Case law, statutes and doctrinal discussions have all contributed to the analysis of the key, yet intractable, question of whether Westminster is still sovereign and what it should nowadays mean. Grasping parliamentary sovereignty is a prerequisite for an understanding of the British Parliament's position in scrutinising EU affairs, because this doctrine prefigures much of the operational parameters of scrutiny. Yet there is no conclusive answer both as to the source of parliamentary sovereignty and, once the source is agreed upon, as to whether such a source is of a legal or political nature. This should not avert us from sketching the contours of this controversial feature of Westminster.

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<sup>1130</sup> See essays in: Sunkin, Maurice and Payne, Sebastian (eds). *The nature of the Crown: a legal and political analysis*, Oxford: Oxford University Press, 1999.

<sup>1131</sup> The last time a monarch refused royal assent was in 1708, when Queen Anne refused to assent to the Scottish Militia Bill and the last time a government was dismissed was in 1834, when William IV dismissed a Whig administration led by Prime Minister Melbourne. Though both of these powers still exist, the monarch is expected not to exercise them. Tomkins, Adam. *Public Law*, Oxford: Oxford University Press, 2003: 62-63.

<sup>1132</sup> Prakke, Lucas. "United Kingdom of Great Britain and Northern Ireland," in *Constitutional Law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 876.

<sup>1133</sup> Bagehot, Walter. *The English constitution*, London: Watts, 1964: 111.

## 2.1. Defining the concept

In his classic account, written originally in 1885, Dicey defined parliamentary sovereignty through three basic tenets. First, Parliament can make and unmake any law whatever.<sup>1134</sup> It may bind its successors neither as to the substance nor as to manner and form of future legislation. From this flows the doctrine of implied repeal, which is grounded in the maxim *lex posterior derogat legi priori*. Where an Act of Parliament clearly conflicts with another Act of Parliament that deals with the same subject matter and that has not been expressly repealed, the later Act is implied to repeal and prevail over the earlier one. If that were not so, the earlier Parliament would bind the later one and, thereby, impugn parliamentary sovereignty.<sup>1135</sup> Second, there is no legal distinction between constitutional and ordinary laws. Parliament makes them according to the same procedure. Third, no person or body may override or set aside any Act of Parliament. There is no judicial or any other kind of review of the constitutionality of Acts of Parliament, because Parliament cannot exceed its powers, i.e., it cannot act *ultra vires*.<sup>1136</sup> The only limitation Parliament cannot lift is its own sovereignty. It is inalienable and Parliament cannot detract from it by any act.

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<sup>1134</sup> To further depict how formidable Parliament's sovereignty was, Dicey invoked Blackstone's descriptions that Parliament's power and jurisdiction is "so transcendent and absolute, that it cannot be confined, either for causes or reasons, within any bounds", that it is an "uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal", that it can "do everything that is not naturally impossible", and that "no authority on earth can undo" it. He also quoted De Lolme's saying that Parliament "can do everything but make a woman a man, and a man a woman". Dicey, Albert Venn. *Introduction to the study of the law of the constitution*, London: Macmillan, 1968: 40-43. For Jennings, however, De Lolme is wrong "[f]or if Parliament enacted that all men should be women, they would be women so far as the law is concerned [...] The supremacy of Parliament is a legal fiction, and legal fiction can assume anything". He then gave his own example of Parliament being able to legislate for all persons and all places: "If it enacts that smoking in the streets of Paris is an offence, then it *is* an offence. Naturally, it is an offence by English law and not by French law. [...] The Paris police would not at once begin arresting all smokers, nor would French criminal courts begin inflicting punishments upon them. But if any Frenchman came into any place where attention is paid to English law, proceedings might be taken against him". Jennings, Ivor. *The law and the constitution*, London: University of London Press, 1959: 170-171. See also: Doe, Norman. "The problem of abhorrent law and the judicial idea of legislative supremacy," *Liverpool Law Review*, Vol. 10, No. 2, 1988: 113-127.

<sup>1135</sup> There are two authoritative cases for these propositions. In *Vauxhall Estates Ltd. v. Liverpool Corporation* [1932] 1 K.B. 733, Justice Avory stated that, until the contrary were decided, "no Act of Parliament can effectively provide that no future Act shall interfere with its provisions". In *Ellen Street Estates Ltd. v. Minister of Health* [1934] 1 K.B. 590, Lord Justice Maugham said that: "The legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature".

<sup>1136</sup> Dicey, Albert Venn. *Introduction to the study of the law of the constitution*, London: Macmillan, 1968: 88-91.

In short, these parliamentary traits largely make the British constitution indistinct, indeterminate and unentrenched.<sup>1137</sup>

The most flamboyant display of Parliament's legislative omnipotence, in Dicey's view, was the enactment of the Septennial Act in 1716. In order to counter the electoral prospects that were unfavourable to the parliamentary majority, this Act extended the life of Parliament from three to seven years. Unprecedented in this was not the enactment itself, but the fact that Parliament remained in power without new elections being held. Since, therefore, Parliament single-handedly prolonged its legal existence beyond the mandate conferred on it by the electorate, it could be submitted that "Parliament is neither the agent of the electors nor in any sense a trustee for its constituents".<sup>1138</sup>

The reason why British primary legislation, enacted by the Queen-in-Parliament, has a legal status higher than any other legal norm is that an Act of Parliament represents the legal moment when the two sovereign authorities, Parliament and the Crown, unite and agree. It is the embodiment of British dual sovereignty.<sup>1139</sup> Parliamentary sovereignty is, hence, the legislative supremacy of Acts of the Queen-in-Parliament.<sup>1140</sup>

## 2.2. Foundations of parliamentary sovereignty

There are two basic views about the source of parliamentary sovereignty, which diverge as to whether Parliament can relinquish its sovereignty.<sup>1141</sup>

The first view holds that parliamentary sovereignty is a *legal principle* that resides in the legal sphere. It is a rule of the common law created by the courts, which, as the authors of the principle, can change it or dispense with it altogether. Yet since the principle is of a legal nature, and since statutes trump the common law, Parliament can change the common law by legislation and thereby abolish its sovereignty.<sup>1142</sup>

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<sup>1137</sup> Finer, S.E. et al. *Comparing constitutions*, Oxford: Clarendon Press, 1995: 41-43.

<sup>1138</sup> Dicey, Albert Venn. *Introduction to the study of the law of the constitution*, London: Macmillan, 1968: 48.

<sup>1139</sup> Tomkins, Adam. *Public Law*, Oxford: Oxford University Press, 2003: 48. From a larger constitutional perspective, this dual sovereignty comprises the Queen-in-Parliament and the Queen's courts, thus combining the law-making function with that of interpreting and applying law. Bradley, Anthony. "The sovereignty of Parliament – form or substance?," in *The changing constitution*, by Jeffrey Jowell and Dawn Oliver (eds), Oxford: Oxford University Press, 2007: 27.

<sup>1140</sup> Tomkins, Adam. *Public Law*, Oxford: Oxford University Press, 2003: 93.

<sup>1141</sup> The conundrum is in the following. If Parliament cannot use its authority to limit itself, then its sovereignty is already limited in this one respect. This is the so-called 'continuing' parliamentary sovereignty. But if it can, then it only retains its sovereignty until a future Parliament extinguishes it. This is the 'self-embracing' parliamentary sovereignty. Goldsworthy, Jeffrey. *Parliamentary sovereignty: contemporary debates*, Cambridge: Cambridge University Press, 2010: 106.

<sup>1142</sup> An unambiguous statement of this is that "the 'legal sovereign' may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself". Jennings, Ivor. *The law and the constitution*, London: University of London Press, 1959: 153. Variations of this stance have also been furthered in: Barendt, Eric. *An introduction to constitutional law*, Oxford:

The second view posits that Westminster's untrammelled law-making authority is a *political principle*. It is not judge-made, but rests outside the realm of law and it can be changed neither by Parliament nor by the courts. Instead, it could only be affected by a revolution, whether peaceful or violent, tacit or express. Thus, while the courts did not create the principle, they assess the political reality and decide where to place their allegiance in enforcing the law.<sup>1143</sup> If Parliament legislated to abolish its sovereignty, the courts, when solving a concrete dispute, would be free to decide whether to follow such an instruction or not, because sovereignty would be outside Parliament's reach.<sup>1144</sup>

It has been convincingly argued that parliamentary sovereignty is rooted in the absence of a legal authority that would rank higher than Acts of Parliament.<sup>1145</sup> Such would be a codified constitution, which could, for instance, be adopted by the

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Oxford University Press, 1998: 91-92 and 99; Bradley, Anthony. "The sovereignty of Parliament – form or substance?," in *The changing constitution*, by Jeffrey Jowell and Dawn Oliver (eds), Oxford: Oxford University Press, 2007: 38.

<sup>1143</sup> Inspired by Dworkin, Allan argued that legal questions that challenge the nature of a constitutional order can only be answered in terms of the political morality on which that order is based (p. 266). On this platform, he stated: "The legal doctrine of legislative supremacy expresses the courts' commitment to British parliamentary democracy. [...] If Parliament ceased to be a representative assembly, in any genuine sense of that idea, of if it proceeded to enact legislation undermining the democratic basis of our institutions, political morality might direct judicial resistance rather than obedience". Allan, T.R.S. *Law, liberty, and justice: the legal foundations of British constitutionalism*, Oxford: Clarendon Press, 1993: 282-283.

<sup>1144</sup> This is reflected in the following argument: "The rule of judicial obedience is in one sense a rule of common law, but in another sense – which applies to no other rule of common law – it is the ultimate *political* fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation. To say that Parliament can change the rule, merely because it can change any other rule, is to put the cart before the horse. For the relationship between the courts of law and Parliament is first and foremost a political reality". Wade, H.W.R. "The basis of legal sovereignty," *Cambridge Law Journal*, No. 2, 1955: 172-197 (emphasis in original). Some have taken this position to the extreme claiming that "laws are merely statements of a power relationship and nothing more [...] the constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened, that would be constitutional also". Griffith, J.A.G. "The political constitution," *Modern Law Review*, Vol. 42, No. 1, 1979: 19.

<sup>1145</sup> In his extensive analysis of the theories of limiting Parliament's sovereignty, Goldworthy acknowledged that the doctrine of parliamentary sovereignty does not reside in Parliament itself: "It is deeper and more enduring than both statute law and ordinary common law. Since it is the source of Parliament's authority, it is *prima facie* superior to Parliament [...]"]. He therefore also accepts the notion of hierarchy. However, his pivotal argument is that, apparently for want of a codified constitution, the doctrine is "a creature of consensus among the senior legal officials of all branches of government". This is worrisome because it fails to take cognizance of the role of the electorate as a *pouvoir constituant*, which is certainly more democratically legitimate to settle the matter of Parliament's powers than any body or person that directly or indirectly derives its own legitimacy from it. This is perhaps even more puzzling because he uses the very concept of democratic legitimacy to dismiss the possibility of both Parliament and the courts unilaterally changing the doctrine. Goldworthy, Jeffrey. *Parliamentary sovereignty: contemporary debates*, Cambridge: Cambridge University Press, 2010: 115.

electorate in a referendum.<sup>1146</sup> Since there is no legal rule that establishes Parliament and its legislative power, there is also no legal rule that limits it.<sup>1147</sup> This is because one cannot legally limit what legally does not exist.<sup>1148</sup> No clear legal authority exists that would decide the matter of the bounds of Parliament's powers.<sup>1149</sup> It springs not from law but from political fact.<sup>1150</sup> In other words, parliamentary sovereignty could be a consequence of the absence of its legal source. As will be shown hereunder, Britain's accession to the EU placed the doctrine under some strain.<sup>1151</sup>

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<sup>1146</sup> This position is not at all alien to British constitutionalists. For instance, Bogdanor maintained that a constitution adopted by referendum would be the clearest possible signal that Parliament would no longer be sovereign. Actually, a codified constitution "would finally register and give legal effect to the proposition that Parliament had abdicated its sovereignty". Bogdanor, Vernon. *The new British constitution*, Oxford: Hart Publishing, 2009: 229-230. Such a position is also consonant with the assertion that subjecting Parliament's legislative power to the requirement of a referendum "plainly limits its substantive authority". Goldsworthy, Jeffrey. *Parliamentary sovereignty: contemporary debates*, Cambridge: Cambridge University Press, 2010: 138. By the same token, "in the absence of a written constitution which asserts the sovereignty of the people and the sovereignty of the constitution – as interpreted by the judiciary – over the legislature and executive, the vacuum is filled by the doctrine of parliamentary sovereignty, or supremacy". Barnett, Hilaire. *Constitutional and administrative law*, London: Routledge, 2011: 157. See the view dismissing the written constitution for Britain in: Barber, N.W. "Against a written constitution," *Public Law*, Spring 2008: 11-18.

<sup>1147</sup> Parliament's existence is a product of the exercise of the royal prerogative. May, Thomas Erskine. *Erskine May's treatise on the law, privileges, proceedings, and usage of Parliament*, London: LexisNexis, 2004: 15. However, one should not conclude that Parliament can equally be abolished by the exercise of the royal prerogative, since power has effectively shifted from the monarch towards Parliament and the Government.

<sup>1148</sup> This qualifies Craig's argument that "there is no *a priori* inexorable reason why Parliament, merely because of its very existence, must be regarded as legally omnipotent". Craig, Paul. "Britain in the European Union," in *The changing constitution*, by Jeffrey Jowell and Dawn Oliver (eds), Oxford: Oxford University Press, 2007: 98.

<sup>1149</sup> Prudence commands that we keep in mind that "parliamentary sovereignty denotes only the absence of legal limitations, not the absence of *all* limitations" (emphasis in original). Political limitations include, for instance, the fact that Parliament is unlikely to enact utterly abhorrent legislation, that governments' legislative initiative is influenced by political considerations, and that international law and the obligations derived therefrom affect domestic legislation. Munro, Colin. *Studies in constitutional law*, Oxford: Oxford University Press, 2005: 135.

<sup>1150</sup> It has been emphasised that "the constitution as it exists *de facto* underlies of necessity the constitution as it exists *de jure*". Even where there is a codified constitution, such as for example in the United States, "constitutional law followed hard upon the heels of constitutional fact". The 'ultimate legal principle' of a political community is, hence, historical and underived from law. Salmond, John. *Jurisprudence*, London: Sweet and Maxwell, 1924: 154-155 and 169.

<sup>1151</sup> For some authors, "membership of the Community has not only involved a substantial limitation on competence [of Parliament] in a practical sense, but has also affected the rules of judicial obedience to statutes". Munro, Colin. *Studies in constitutional law*, Oxford: Oxford University Press, 2005: 170. Parliamentary sovereignty is, therefore, becoming "essentially notional", preserving no more than its formal veneer. Elliott, Mark. "United Kingdom: Parliamentary sovereignty under pressure," *International Journal of Constitutional Law*, Vol. 2, No. 3, 2004: 551. For others, the doctrine is "plainly inconsistent" with the Community legal order, because British law does now recognise, in virtue of the European Communities Act, the power of Community organs to make decisions that may override Parliament's legislation. Bradley, Anthony. "The sovereignty of Parliament – form or substance?," in *The changing constitution*, by Jeffrey Jowell and Dawn Oliver (eds), Oxford: Oxford University Press, 2007: 27. Yet

### 2.3. The European Communities Act

In 1972, the year before the accession, Parliament passed the European Communities Act. This statute gives legal force to and requires the enforcement of all directly applicable and directly effective rights and duties arising from the EU founding treaties in the British legal order.<sup>1152</sup> The Act empowers the monarch and the Government to pass secondary legislation for the implementation of Community obligations.<sup>1153</sup> It also obliges British courts to construe Acts of Parliament in harmony and not at variance with Community law.<sup>1154</sup> They are to treat Community law as a question of law, which means that they shall adjudicate on disputes involving the application of Community law.<sup>1155</sup>

One could hold that these provisions represent Parliament's acknowledgment of the precedence of Community law over British law, inasmuch as Parliament is to refrain from legislating contrary to Community law and courts are to refrain from interpreting British law contrary to Community law. It is, hence, by Parliament's will that Community law is to apply in Britain and that courts are to give effect to it.<sup>1156</sup> This contrasts with the Human Rights Act of 1998, which only allows courts to make

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others go even further to argue that "[t]he *political* constitution that traditionally underpinned the British State has been markedly juridified into a *law-based* constitution". Drewry, Gavin. "The jurisprudence of British Euroscepticism: a strange banquet of fish and vegetables," *Utrecht Law Review*, Vol. 3, No. 2, 2007: 102 (emphasis in original).

<sup>1152</sup> Section 2(1) of the European Communities Act of 1972 reads: "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies".

<sup>1153</sup> Section 2(2) of the European Communities Act of 1972.

<sup>1154</sup> Section 2(4) of the European Communities Act of 1972. This principle was affirmed in *Macarthy v Ltd v. Smith* [1979] 3 AER 325. Lord Denning then held that "our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of the courts to follow the statute of our Parliament". This judicial pronouncement, according to one view, is tantamount to a partial entrenchment of the European Communities Act insofar as a future Parliament could legislate contrary to Community law only by using express wording to that effect. Allan, T. R. S. "Parliamentary sovereignty: Lord Denning's dexterous revolution," *Oxford Journal of Legal Studies*, Vol. 3, No. 1, 1983: 25.

<sup>1155</sup> Section 3(1) of the European Communities Act of 1972 reads: "For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law [...]"

<sup>1156</sup> It is instructive to recall a view expressed by one commentator that "in strict law, any repeal of the European Communities Act would be immaterial. The rights, to which it draws attention, continue, nevertheless, so long as the United Kingdom remains a Member State of the Communities [...] whatever binding effect there be flows not from the European Communities Act, but from entering the new legal order". This reasoning is completely erroneous, for what makes Britain an EU member and what allows it to enter a new legal order is precisely the European Communities Act. This is commanded by the dualist approach to international law. See *supra* text accompanying note 1095 of this Chapter.

a non-binding declaration of incompatibility but not to disapply an Act of Parliament.<sup>1157</sup> Briefly, the European Communities Act incorporates the Community legal system into the British one and ranks it above British law. In the following, we adumbrate merely the essential bits of the British case law that are relevant for the determination of the current status of the doctrine of parliamentary sovereignty.

#### **2.4. Parliamentary sovereignty in the courtrooms**

In the well-known *Factortame* cases,<sup>1158</sup> the dispute was caused by Parliament's enactment in 1988 of the Merchant Shipping Act, which, contrary to Community law, abolished the hitherto existing right of foreign nationals to register fishing vessels in Britain and, thereby, legally forbade them to fish in British waters. Upon receiving a preliminary ruling from the Court of Justice, the House of Lords, acting as the court of highest instance, granted interim relief to the applicants, which had the effect of suspending the Merchant Shipping Act, which is an Act of Parliament. The doctrinal question was whether this affected the sovereignty of Parliament, given that no body, including the courts, may set aside an Act of Parliament. But, as we have seen, when Parliament passed the European Communities Act, it ordered the courts to enforce Community law, and this is precisely what the House of Lords did. So, as Ellis submitted, far from being impliedly repealed, the European Communities Act was actually being applied.<sup>1159</sup> The situation can be loosely likened to inviting guests to your house for dinner. You ask them to feel at home and act as if your house were theirs. You allow them to eat your food and use your furniture, cutlery and bathroom. You may also allow them to keep their shoes on, smoke or sleep over, all of which you may not otherwise tolerate. Yet their presence at your house does not entitle them to sell your house, because that touches on what is fundamental to your own existence and is, luckily for you, prohibited by law. What this illustrates is that while Parliament remains sovereign in British law, British law is for the time being not the only law that applies in Britain.<sup>1160</sup>

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<sup>1157</sup> Section 4(6) of the Human Rights Act of 1998 specifies that such a declaration "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given" and that it "is not binding on the parties to the proceedings in which it is made".

<sup>1158</sup> Out of a series of *Factortame* cases, of interest for British constitutional law are particularly *R v. Secretary of State for Transport, ex parte Factortame* [1990] 2 AC 85, (*Factortame I*); and *R v. Secretary of State for Transport, ex parte Factortame (No. 2)* [1991] 1 AC 603, (*Factortame II*). See the view that *Factortame* caused a legal revolution in: Wade, H.W.R. "What has happened to the sovereignty of Parliament?," *Law Quarterly Review*, Vol. 107, 1991: 1-4; Wade, H.W.R. "Sovereignty – revolution or evolution?," *Law Quarterly Review*, Vol. 112, 1996: 568-575. For less drastic views see: Craig, Paul. "Sovereignty of the United Kingdom after *Factortame*," *Yearbook of European Law*, Vol. 11, 1991: 221-256; Laws, John. "Law and democracy," *Public Law*, Spring 1995: 72-93; Loveland, Ian. "Parliamentary sovereignty and the European Community: the unfinished revolution?," *Parliamentary Affairs*, Vol. 49, No. 4, 1996: 517-535; Allan, T.R.S. "Parliamentary sovereignty: law, politics and revolution," *Law Quarterly Review*, Vol. 113, 1997: 443-452.

<sup>1159</sup> Ellis, Evelyn. "C. The legislative supremacy of Parliament and its limits," in *English public law*, by David Feldman (ed.), Oxford: Oxford University Press, 2009: 153.

<sup>1160</sup> Tomkins, Adam. *Public Law*, Oxford: Oxford University Press, 2003: 118.

The *Metric Martyrs* case,<sup>1161</sup> decided by the Divisional Court in 2002, was brought by several traders prosecuted for using imperial measures of weight contrary to the Government legislation that transposed into British law the Community directives prohibiting this. Prior to the transposition, parallel use of both imperial and metric measures was permitted under the Weights and Measures Act of 1985. The traders argued that this Act impliedly repealed the provision of the European Communities Act that enabled the Government to effect the transposition. The court rejected the implied repeal argument and confirmed the orthodox interpretation of parliamentary sovereignty outlined above:

[T]here is nothing in the ECA [European Communities Act] which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself.<sup>1162</sup>

Nevertheless, Lord Justice Laws did qualify parliamentary sovereignty by fashioning the hierarchy of statutes through the notion of 'constitutional statute'. As opposed to ordinary statutes, the constitutional ones, such as prominently the European Communities Act, may not be impliedly repealed. Two alternative criteria distinguish constitutional statutes from the ordinary ones: they either condition the legal relationship between the citizen and the state in a general, overarching manner; or they enlarge or diminish the scope of fundamental constitutional rights.<sup>1163</sup>

What is baffling, however, is the Justice's submission that a newly created differentiation between statutes "preserves the sovereignty of the legislature and the flexibility of our uncodified constitution".<sup>1164</sup> From the Diceyan point of view, this is doubtful. How can one plausibly consider that Parliament retains its sovereignty where the courts force it to obey a certain predetermined procedure of legislating? So long as this judgment is not overturned by the Court of Appeal or the Supreme Court, and so long as one accepts that the common law has the power to shape the nature of

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<sup>1161</sup> *Thoburn v. Sunderland City Council* [2002] 3 WLR 247, (*Metric Martyrs*). See more detailed discussions in: Campbell, David and Young, James. "The metric martyrs and the entrenchment jurisprudence of Lord Justice Laws," *Public Law*, Autumn 2002: 399-406; Marshall, Geoffrey. "Metric martyrs and martyrdom by Henry VIII clause," *Law Quarterly Review*, Vol. 118, 2002: 493-502; Boyron, Sophie. "In the name of European law: the metric martyrs case," *European Law Review*, Vol. 27, No. 6, 2002: 771-779.

<sup>1162</sup> *Metric Martyrs*, para. 59.

<sup>1163</sup> *Metric Martyrs*, paras 62 and 63.

<sup>1164</sup> *Metric Martyrs*, para. 64.

parliamentary sovereignty, it is tenable that Parliament may not make any law whatever because courts would invalidate those Acts of Parliament that do not respect the express repeal requirement for a certain class of important statutes. The legal effect of this judgment might, therefore, be to withdraw from Parliament its legislative unlimitedness and its ultimate sovereignty, even if only in its procedural aspect.<sup>1165</sup>

The latest judicial revision of the status of Westminster's sovereignty was in 2005 in the *Jackson* case, which concerned the validity of the Parliament Act of 1949 and of the Hunting Act of 2004.<sup>1166</sup> While their validity was upheld, the *obiter dicta* of three justices portrayed parliamentary sovereignty as an outmoded concept.<sup>1167</sup> Lord Hope most elaborately described the challenge that EU law poses to the British constitution's keystone:

Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled [...] It is no longer right to say that its freedom to legislate admits of no qualification whatever. [...] For the most part these qualifications are themselves the product of measures enacted by Parliament. Part I of the European Communities Act 1972 is perhaps the prime example. Although Parliament was careful not to say in terms that it could not enact legislation which was in conflict with Community law, that in practice is the effect [...] of that Act. [...] Parliament] concedes the last word in this matter to the courts. The doctrine of the supremacy of Community law restricts the absolute authority of Parliament to legislate as it wants in this area.<sup>1168</sup>

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<sup>1165</sup> See to that effect the discussion in: Winterton, George. "The British Grundnorm: parliamentary supremacy re-examined," *Law Quarterly Review*, Vol. 92, No. 4, 1976: 591-617.

<sup>1166</sup> *Jackson v. Attorney General* [2006] 1 AC 262 (*Jackson*). See analyses in: Plaxton, Michael. "The concept of legislation: *Jackson v. Her Majesty's Attorney General*," *Modern Law Review*, Vol. 69, No. 2, 2006: 249-261; Jowell, Jeffrey. "Parliamentary sovereignty under the new constitutional hypothesis," *Public Law*, Autumn 2006: 562-579; Mullen, Tom. "Reflections on *Jackson v Attorney General*: questioning sovereignty." *Legal Studies*, Vol. 27, No. 1, 2007: 1-25; Elliott, Mark. "The sovereignty of Parliament, the hunting ban, and the Parliament Acts," *Cambridge Law Journal*, Vol. 65, No. 1, 2006: 1-4; Elliott, Mark. "United Kingdom bicameralism, sovereignty, and the unwritten constitution," *International Journal of Constitutional Law*, Vol. 5, No. 2, 2007: 370-379.

<sup>1167</sup> This judgment led an author to designate legality as the foundational principle of the British constitutional theory and practice. So much so that there now exists a "*normative reason* to erase the concept of sovereignty from our constitutional landscape" (emphasis in original). Lakin, Stuart. "Debunking the idea of parliamentary sovereignty: the controlling factor of legality in the British constitution," *Oxford Journal of Legal Studies*, Vol. 28, No. 4, 2008: 731.

<sup>1168</sup> *Jackson*, paras 104-105. Lady Hale agreed claiming that "Parliament has also, for the time being at least, limited its own powers by the European Communities Act 1972 [...]", but added that in general "the constraints upon what Parliament can do are political and diplomatic rather than constitutional" (para 159). Similarly, Lord Steyn argued that the Diceyan doctrine "pure and absolute as it was, can now be seen out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. It that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism" (para 102).

Lord Bingham disagreed, however. Assessing the impact of Britain's membership of the EU, he claimed: "Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution".<sup>1169</sup>

These examples from the case law unearth the chameleonic nature of parliamentary sovereignty.<sup>1170</sup> Depending on the viewpoint, it can appear either partially forsaken or entirely intact. For the present purpose, it suffices to appreciate the fact that European integration has caused parliamentary sovereignty to reflect different lights shone upon it. The nub of the argument is that whereas the premises of the doctrine remain unchanged,<sup>1171</sup> they are observed and set in motion in a changed legal setting,<sup>1172</sup> constitutionally richer for a European dimension,<sup>1173</sup> wilfully ushered in the British legal system by Westminster itself.<sup>1174</sup>

The House of Commons' European Scrutiny Committee, in its examination of the 2010 EU Bill,<sup>1175</sup> asseverated its status as a sovereign legislature. It jettisoned the thesis that parliamentary sovereignty is a common law edifice and asserted that:

should an Act of Parliament instruct the courts to disapply an aspect of EU law, the courts should do so [...] if it is the will of a democratically-elected Parliament, even if it were to lead to infringement proceedings in the Court of Justice. [...] If Parliament wills it may legislate to override the European Communities Act 1972 or the EU Treaties by repealing them, amending them or any provisions in them, or by

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<sup>1169</sup> *Jackson*, para. 9.

<sup>1170</sup> As Birkinshaw observed, the answer to the crucial question of whether EU membership has abridged parliamentary sovereignty is "both 'yes' and 'no' – a sort of schizophrenia". Birkinshaw, Patrick. "European integration and United Kingdom constitutional law," *European Public Law*, Vol. 3, No. 1, 1997: 60.

<sup>1171</sup> Hartley has underlined that the contrary could only be argued "in some mysterious and inexplicable way". But his argument that there is no legal reason why Community Treaties should be seen as producing any different effect on parliamentary sovereignty than other international treaties denies the gulf of dissimilarities that exist between the legal regimes of these two types of treaties. Hartley, Trevor. *Constitutional problems of the European Union*, Oxford: Hart Publishing, 1999: 177-178.

<sup>1172</sup> Turpin, Colin and Tomkins, Adam. *British government and the constitution*, Cambridge: Cambridge University Press, 2007: 61.

<sup>1173</sup> The weighing out of the constitutional powers of organs established under British law and under EU law in a situation of a legal conflict between them must, if it is to be legitimately resolved, take into account all perspectives from which this conflict can be approached. As Feldman explained, a broader underlying postulate is that "constitutional arrangements at any one time are the result of a clash between competing visions, each of which has normative weight and is concerned with the legitimacy and authority of constitutional rules, not merely the accuracy of a description of an allocation of power. There can be no one source of authority for constitutional rules: authority and legitimacy stem from the process of argument about and justification for the rules [...] And in any constitution, even that authoritative answer will only ever be contingent and mutable, open to change through further argument, legislative repeal, reinterpretation, or constitutional amendment." Feldman, David. "None, one or several? Perspectives on the UK's constitution(s)." *Cambridge Law Journal*, Vol. 64, No. 2, 2005: 346.

<sup>1174</sup> See also the statements by Lord Denning in *Macarthys*: "Community law is part of our law by our own statute" and by Lord Bridge in *Factortame II*: "[w]hatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary" (para 4).

<sup>1175</sup> See *infra* text accompanying note 1261 of this Chapter.

clearly and expressly legislating inconsistently with them in respect of EU legislation or generally.<sup>1176</sup>

In a sense, irrespective of Parliament's outwardly hard stance, it indirectly seems to subscribe to the *Metric Martyrs* principle that legislating in violation of EU law may not be done implicitly. Were Westminster indeed expressly to legislate notwithstanding the European Communities Act, as a group of Eurosceptic MPs unsuccessfully ventured in 2005, the Commission would surely bring infringement proceedings before the Court of Justice. If Britain chose to ignore the judgment, it would face the imposition of a lump sum or penalty payment.<sup>1177</sup> If Britain refused to pay it, which no Member State has ever done in the history of the EU, the solution could not be sought only within the province of law but, to a yet greater extent, those of diplomacy, politics and international relations.<sup>1178</sup>

The analysed developments concerning parliamentary sovereignty collaterally bear upon Parliament's European scrutiny. The EU's juridico-political progress, conjugated with the institutional enhancement of the European Parliament and the unremitting expansion of qualified majority voting,<sup>1179</sup> could factually incite Parliament to scrutinise draft European initiatives more earnestly than hitherto,<sup>1180</sup> for "the ulterior purpose of pre-legislative scrutiny is to seek to influence decision making in the Council of Ministers".<sup>1181</sup> In so doing, Parliament could be hypothesised to underpin, intentionally or not, the Union's democratic legitimacy.<sup>1182</sup>

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<sup>1176</sup> House of Commons, European Scrutiny Committee, "The EU Bill and parliamentary sovereignty", *HC 633-I, 10<sup>th</sup> Report of Session 2010-11* of 7 December 2010, paras 76, 78 and 85, pp. 28-29 and 31.

<sup>1177</sup> Article 260(2)(2) TFEU.

<sup>1178</sup> Turpin, Colin and Tomkins, Adam. *British government and the constitution*, Cambridge: Cambridge University Press, 2007: 335.

<sup>1179</sup> Craig, Paul. "Britain in the European Union," in *The changing constitution*, by Jeffrey Jowell and Dawn Oliver (eds), Oxford: Oxford University Press, 2007: 91; Birkinshaw, Patrick. *European public law*, Cambridge: Cambridge University Press, 2003: 297-298 and 314.

<sup>1180</sup> As a matter of fact, Foreign Secretary James Callaghan said in 1974: "I had not fully realised that in some ways we are encompassing the Government with a greater degree of control by Parliament as a result of the transfer of these [national] powers than would otherwise have been the case". Taylor, John. "British membership of the European Communities: the question of parliamentary sovereignty," *Government and Opposition*, Vol. 10, No. 3, 1975: 291.

<sup>1181</sup> Munro, Colin. *Studies in constitutional law*, Oxford: Oxford University Press, 2005: 212. A former Counsel to the European Communities Committee of the House of Lords and a former Legal Adviser in the Foreign and Commonwealth Office confirmed that "[a]lthough formally the reports are primarily for the information of the House, in reality their principal objective is to influence the Community legislative process". Denza, Eileen. "Parliamentary scrutiny of Community legislation," *Statute Law Review*, Vol. 14, No. 1, 1993: 61.

<sup>1182</sup> See the view that Parliament's role is "counterbalancing" and that "it is only through the accountability of ministers attending the Council to national parliaments that democratic influence can be directly brought to bear on the Council's deliberations". Pratt, Timothy. "The role of national parliaments in the making of European Law," *Cambridge Yearbook of European Legal Studies*, Vol. 1, 1998: 218. It would be more correct to say that national ministers acting within the Council are not the only channel of influence, but the only one where parliaments possess the power of sanction. Nothing, except perhaps for the lack of this 'constitutional proximity', bars Parliament from finding other ways of influencing the EU

### 3. THE BRITISH PARLIAMENT'S COMPETENCE OF EUROPEAN SCRUTINY

#### 3.1. Adapting to Europe

Upon Britain's accession to the EU on 1 January 1973, both Houses of Parliament reacted promptly and established committees for the scrutiny of Community affairs in 1974. These committees are known by the names of their chairmen – John Foster in the Commons and Lord Maybray-King in the Lords.<sup>1183</sup> Even though their treatment of Community matters was far more effective than in some other Member States, the performance of Parliament and its committees in the first two decades of their existence was evaluated as peripheral or marginal.<sup>1184</sup> The difficulties regarding the volume of Community legislation, the scarcity of the time available for scrutiny, the complexity of Community decision making and the legal rules that kept national parliaments aloof from it were identified in the late 1970s.<sup>1185</sup> Nonetheless, as one empirical analysis showed, Parliament exerted some indirect influence on the Government's policy-making process through informal communication with Government departments.<sup>1186</sup>

Even in this early period, both Houses established certain links with Community institutions, with the House of Lords taking the lead. Although, as Norton recounts, Parliament's impact on the Community was "relatively slight", its reports "also

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legislative process even where the threat of sanctions does not exist. Parliament is, for instance, free to join forces with the relevant political groups in the European Parliament in its effort to influence the Council. For example, Christopher Prout, when he was the Chairman of the European Democratic Group in the European Parliament, stated in an evidence session to the Lords' EU Committee that a report of one of its sub-committees certainly influenced the relevant committee of the European Parliament and that the resulting EU legislation was "almost a carbon copy of what the European Parliament, influenced by you, recommended". Shell, Donald. "The House of Lords and the European Community 1990-91," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 185.

<sup>1183</sup> See more on the establishment of these committees and their struggles in adapting to the new kind of scrutiny and in fashioning adequate procedures in: Ryan, Michael and Isaacson, Paul. "Parliament and the European Communities," *Parliamentary Affairs*, Vol. 28, 1974: 199-215; Kolinsky, Martin. "Parliamentary scrutiny of European legislation," *Government and Opposition*, Vol. 10, No. 1, 1975: 46-69; Denza, Eileen. "Parliamentary scrutiny of Community legislation," *Statute Law Review*, Vol. 14, No. 1, 1993: 56-63; Baines, Priscilla. "The evolution of the scrutiny system in the House of Commons," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 49-89; Shell, Donald. "The House of Lords and the European Community: the evolution of arrangements of scrutiny," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 91-110.

<sup>1184</sup> Giddings, Philip and Drewry, Gavin. "Scrutiny without power: the impact of the European Community on the Westminster Parliament," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 314.

<sup>1185</sup> Bradley, Anthony W. and Ewing, Keith D. *Constitutional and administrative law*, Harlow: Pearson Longman, 2007: 142-143.

<sup>1186</sup> Miller, Harris N. "The influence of British parliamentary committees on European Communities legislation," *Legislative Studies Quarterly*, Vol. 2, No. 1, 1977: 66.

served on occasion to influence the Commission and the European Parliament, most notably on internal practices but also on some substantive policies".<sup>1187</sup> Though visits to Community institutions were "more or less regular" since the late 1970s, it is only from the mid-1980s onwards that such visits became more frequent.<sup>1188</sup>

Westminster's *ex ante* scrutiny of European legislation and of the ministers participating in its adoption has over time evolved into "one of the most highly developed systems in the European Union".<sup>1189</sup> Hereunder we analyse how it functions.

### **3.2. Information for scrutiny**

The House of Commons' European Scrutiny Committee is appointed and its terms of reference defined under Standing Order no. 143. The Committee's central task is to examine EU documents and report its opinion on the legal and political importance of each such document. The political importance of an EU document stems from the sensitivity of the subject matter, the financial implications and the likely impact on Britain, whereas the legal importance arises from a contested legal base of EU initiatives, the Commission's unexpected assertion of powers, the impact on British law, etc.<sup>1190</sup> Where appropriate, the Committee will provide reasons for the opinion and make an assessment of the effect on the British law and policy of the document examined. Pursuant to this, the Committee makes recommendations for further consideration of any such document in committee or on the Floor of the House, i.e., in plenary. The remit of European scrutiny is termed widely, allowing the Committee to consider any issue arising upon any EU document or related matters. The documents that fall under the Committee's purview encompass not only EU

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<sup>1187</sup> Norton, Philip. *Does Parliament matter?*, New York: Harvester Wheatsheaf, 1993: 125-126. Another commentator made a similar observation: "The reports of the two committees are influential in Whitehall and, in the case of the House of Lords Committee, there is evidence to suggest that it is also influential in Brussels". Bates, T. St. J. N. "The drafting of European Community legislation," *Statute Law Review*, Vol. 4, No. 1, 1983: 34. Also, peers have been described as being "eager to explore the practical consequences of policy proposals, to find solutions to problems, and to influence decision makers wherever they happen to be located". Shell, Donald. "The House of Lords and the European Community: the evolution of arrangements of scrutiny," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 92. However, even the relations with the Government were for long not fully satisfactory. It was reported in 1998 that "departments' handling of scrutiny business falls some way short of the requirements to which the executive has committed itself, testifying to a more general neglect of parliamentary relations on the part of departments over the last twenty years". Daintith, Terence and Page, Alan. *The executive in the constitution: structure, autonomy, and internal control*, Oxford: Oxford University Press, 1999: 265.

<sup>1188</sup> Giddings, Philip and Baines, Priscilla. "The House of Commons and the EC 1990-91," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 142.

<sup>1189</sup> Oliver, Dawn. "B. The powers and privileges of Parliament," in *English public law*, by David Feldman (ed.), Oxford: Oxford University Press, 2009: 106.

<sup>1190</sup> House of Commons, European Scrutiny Committee, "European scrutiny in the Commons", *HC 152-xxx*, 30<sup>th</sup> Report of Session 2001-02 of 11 June 2002, para. 12, p. 11.

proposals in all policy areas but also any document published by one EU institution for or with a view to submission to another EU institution or deposited in the House. Scrutiny is aided, among other things, by the Committee's rights to appoint specialist advisers, send for persons, papers and records, and seek opinions from any specialist committee within a specified time limit. The Committee may also request from select committees their opinion on any EU document.<sup>1191</sup> Although the European Scrutiny Committee may establish sub-committees, this has not been done.<sup>1192</sup> Instead, there are three standing committees named European Committees, which consider documents referred to them by the European Scrutiny Committee.<sup>1193</sup>

The House of Lords' EU Committee currently operates under the terms of reference agreed on 22 June 2010.<sup>1194</sup> Thereunder, the EU Committee's task is to consider EU documents deposited by a minister and other matters relating to the Union. The definition of EU documents is very wide and includes any document whatsoever, and particularly: documents submitted by an EU institution to another and put by either into the public domain; draft legislative acts and proposals for their amendment; draft CFSP decisions. Their Lordships can also scrutinise matters on which no document is available.<sup>1195</sup> An important means of catalysing the scrutiny process is the provision allowing the EU Committee, in agreement with the House of Commons' European Scrutiny Committee, to waive the requirement of depositing a document or a class of documents.<sup>1196</sup> The collection of relevant information is assisted, as in the Commons, by the possibility to appoint specialist advisers, send for persons, papers or records.

Whereas both Houses have since 2002 received and scrutinised the Commission's instruments of legislative planning, such as annual policy strategies and legislative and work programmes, they do not seem to attach equal significance to these documents. For the House of Commons, their generality and lack of justification for EU initiatives provides insufficient information for an accurate judgment about their juridico-political importance. In their view, the Commission's annual work programmes are of "little value" for scrutiny, although they are gradually becoming a more helpful document. More thorough scrutiny at the European level, including the questioning of Commissioners, would be worthwhile.<sup>1197</sup> The House of Lords, to the contrary, deems the examination of the

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<sup>1191</sup> Section 11 of the Standing Order no. 143 of the House of Commons of 8 April 2010.

<sup>1192</sup> Section 7 of the Standing Order no. 143 of the House of Commons of 8 April 2010.

<sup>1193</sup> Standing Order no. 119 of the House of Commons of 8 April 2010.

<sup>1194</sup> House of Lords, Debate of 22 June 2010, Vol. 719, cols. 1285-1286.

<sup>1195</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15, 1<sup>st</sup> Report of Session 2002-03* of 18 December 2002, para. 18, p. 11.

<sup>1196</sup> Section (1)(3) of the terms of reference of the EU Committee of the House of Lords of 2010.

<sup>1197</sup> House of Commons, European Scrutiny Committee, "Democracy and accountability in the EU and the role of national parliaments" – Vol. 1, *HC 152-xxxiii-I, 33<sup>rd</sup> Report of Session 2001-02* of 21 June 2002, paras 137-138, p. 55; See more on this report in: Cygan, Adam. "Democracy and accountability in the European Union – the view from the House of Commons," *Modern Law Review, Vo. 66, No. 3*, 2003: 384-401. See also: COSAC Secretariat, Annex to the 14<sup>th</sup> bi-annual report on developments in European

Commission's annual work programmes a useful method of upstream scrutiny of planned European legislation.<sup>1198</sup> In its very first appraisal of a Commission work programme, the Lords concluded that the most effective way for national parliaments to contribute to scrutiny of this type of document was to address their concerns directly to the Commission and if the Commission did not subscribe to them, these concerns should be annexed to the final programme submitted to the European Parliament and the Council.<sup>1199</sup> They also designated COSAC as a suitable forum for this type of scrutiny, so that national parliaments across the Union can "exchange best practice on holding the Commission and their Governments to account [...]".<sup>1200</sup>

Neither of the Houses receives draft European Council or Council conclusions, because the Government considers itself prohibited from making these documents publicly available due to their '*limité*' marking.<sup>1201</sup> The Council, however, does not oppose the sending of '*limité*' documents to national parliaments and neither do the governments of some other Member States, such as France. It is, therefore, the British Government's own interpretation that hampers Westminster's access to certain of the internal or preparatory documents of the European Council and Council.<sup>1202</sup>

EU documents are deposited in Parliament by the Government within two working days of their arrival in the Foreign and Commonwealth Office. Within the ensuing ten days, the competent Government department submits an explanatory memorandum on each EU document setting out their legal, political and financial implications together with the procedure and timetable for their adoption.<sup>1203</sup> Explanatory memorandums are essential to the scrutiny of EU affairs because they

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Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLVI COSAC meeting held in Brussels, 25-26 October 2010, p. 249.

<sup>1198</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15, 1<sup>st</sup> Report of Session 2002-03* of 18 December 2002, para. 30, p. 13.

<sup>1199</sup> House of Lords, EU Committee, "The scrutiny of European Union business: the Commission's annual work programme", *HL Paper 141, 25<sup>th</sup> Report of Session 2001-02* of 2 July 2002, paras 19 and 24, p. 9.

<sup>1200</sup> House of Lords, EU Committee, "The scrutiny of European Union business: the Commission's annual work programme", *HL Paper 141, 25<sup>th</sup> Report of Session 2001-02* of 2 July 2002, para. 31, p. 10.

<sup>1201</sup> The "*limité*" mark is applied to documents by the Council's administration not as a security classification but in order to limit the distribution of a given document. The legal basis for applying the "*limité*" mark is Article 4 of Regulation (EC) no. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, (*OJ L145/43* of 31.5.2001). One of the grounds for refusing access to an EU document exists where "disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure".

<sup>1202</sup> House of Commons, European Scrutiny Committee, "The work of the Committee in 2008", *HC 156, 4<sup>th</sup> Report of Session 2008-09* of 20 January 2009, para. 24, p. 8; House of Lords, EU Committee, "Codecision and national parliamentary scrutiny", *HL Paper 125, 17<sup>th</sup> Report of Session 2008-09* of 21 July 2009, paras 95-99, pp. 28-29.

<sup>1203</sup> See more on the details of explanatory memorandums in a publication intended for Government officials dealing with European scrutiny: Cabinet Office, *Parliamentary scrutiny of European Union documents: guidance for departments* of 20 April 2009, available at: <http://europeanmemorandum.cabinetoffice.gov.uk/files/parliamentary-scrutiny-departments.pdf>, accessed on 8 February 2011.

are the main source of information for Parliament. Even where the Commission has already sent the document, the Houses will postpone scrutiny activities until the Government's evidence has been received.<sup>1204</sup> As the EU legislative procedure advances, Parliament may request the Government to give oral evidence or furnish supplementary explanatory memorandums on the amendments or other alterations regarding the given EU document. Scrutiny is considered completed once the relevant House clears the document from scrutiny or adopts a resolution where the document was referred for debate on the Floor.

The main differences between the scrutiny processes in the Houses of Parliament are threefold.<sup>1205</sup> First, unlike the House of Lords' EU Committee, the House of Commons' European Scrutiny Committee does not ostensibly examine the merits of EU documents but their legal and political importance and, thus, their worthiness of a debate. This is so because it would be "difficult or impossible" for a cross-party committee to agree on issues that raise party political controversy.<sup>1206</sup> Second, while the Chairman of the Lords' EU Committee sifts documents that are to undergo closer inspection by its sub-committees, there exists neither a sifting procedure nor sub-committees in the Commons' European Scrutiny Committee. Third, the Commons' Committee produces few reports on the basis of oral or written evidence, whereas these are the lynchpin of the Lords' scrutiny.

Besides regular channels, information on EU affairs is also supplied to Westminster directly from Brussels from the UK National Parliament Office.<sup>1207</sup>

### 3.3. Instruments of scrutiny

Enacted in anticipation of the entry into force of the Lisbon Treaty, the European Union (Amendment) Act of 2008 established new powers of the British Parliament regarding rules affecting primary EU law.<sup>1208</sup> The existing instruments of scrutiny of secondary EU law were further honed and yet others created to suit the needs of the reformed EU decision-making environment. Despite the scrutiny processes of the Houses of Parliament being independent of each other, there is much informal contact between the officials of their European scrutiny committees. This nurtures

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<sup>1204</sup> COSAC Secretariat, Annex to the 13<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLIII COSAC meeting held in Madrid from 31 May – 1 June 2010, p. 490.

<sup>1205</sup> House of Commons, European Scrutiny Committee, "European scrutiny in the Commons", *HC 152-xxx, 30<sup>th</sup> Report of Session 2001-02* of 11 June 2002, paras 33 and 36, p. 16; House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15, 1<sup>st</sup> Report of Session 2002-03* of 18 December 2002, paras 20 and 117-118, pp. 11 and 29.

<sup>1206</sup> House of Commons, European Scrutiny Committee, "European scrutiny in the Commons", *HC 152-xxx, 30<sup>th</sup> Report of Session 2001-02* of 11 June 2002, para. 34, p. 16.

<sup>1207</sup> See *infra* text accompanying notes 1424-1429 of this Chapter.

<sup>1208</sup> It received Royal Assent on 19 June 2008.

the synthesis of scrutiny based on legislation and scrutiny based on policy and renders the Houses' scrutiny mechanisms mutually complementary.<sup>1209</sup>

1. *Approval of the ordinary treaty revision.*<sup>1210</sup> Where a new EU Treaty seeks to amend the Treaty on the European Union, the Treaty on the Functioning of the European Union or the Euratom Treaty in accordance with the ordinary revision procedure, ratification must be approved by an Act of Parliament. By virtue of the European Parliamentary Elections Act of 2002, approval by an Act of Parliament is also needed for the ratification of any treaty that increases the powers of the European Parliament.<sup>1211</sup>

2. *Approval of the simplified treaty revision and passerelle clauses.*<sup>1212</sup> Where the European Union decides to apply the simplified treaty revision procedure, the general bridging clauses or the special bridging clauses in the fields of CFSP, cross-border family law, social policy, the environment, EU finance and enhanced cooperation, the minister in charge may not vote in favour or otherwise support such a decision unless parliamentary approval has been obtained. The approval does not require the form of an Act of Parliament, but is considered given when the competent minister moves a motion to that effect in both Houses of Parliament and both Houses adopt the motion without amendment. The motion may contain a 'disapplication provision', which sets aside the requirement of approval for any subsequent EU decision that amends a previously approved decision whenever previous approval was given without amendment.<sup>1213</sup>

3. *Reports.* Both Houses of Parliament regularly produce reports on EU matters of political salience for information or further debate. There are two main types of

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<sup>1209</sup> House of Lords, EU Committee, "Codecision and national parliamentary scrutiny", *HL Paper 125, 17<sup>th</sup> Report of Session 2008–09* of 21 July 2009, para. 127, p. 30; COSAC Secretariat, Annex to the 13<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLIII COSAC meeting held in Madrid from 31 May – 1 June 2010, pp. 491 and 506.

<sup>1210</sup> Article 5 of the European Union (Amendment) Act of 2008. The ordinary revision procedure is laid down in Article 48(2)-(5) TEU and envisages the convening of a convention composed of national parliaments, the Heads of State or Government of the Member States, the European Parliament and the Commission. The convention examines proposals for amendments and submits a recommendation on this to a conference of representatives of the governments of the Member States for the final adoption of treaty amendments by common accord.

<sup>1211</sup> Section 12 thereof. This Act of Parliament divides Britain into electoral regions for the purpose of elections to the European Parliament and lays down other related rules, such as the voting system, date of elections, method of filling vacant seats, etc. This Act consolidates the three acts previously regulating these matters, which were adopted in 1978, 1993 and 1999.

<sup>1212</sup> Article 6 of the European Union (Amendment) Act of 2008.

<sup>1213</sup> The disapplication clause was criticised by the House of Commons' Foreign Affairs Committee, because there was nothing to suggest that an amended decision could not contain further transfers from unanimity to qualified majority voting. This Committee has indeed argued that all Treaty amendments, beyond decision-making rules, should be done by primary legislation and not simply by a vote of the House. The criticism was not taken on board, however. House of Commons, Foreign Affairs Committee, "Foreign policy aspects of the Lisbon Treaty", *HC 120-I, 3<sup>rd</sup> Report of Session 2007–08* of 20 January 2008, para. 88, pp. 35-36. See also *ibid.*, para. 112, p. 43.

such parliamentary reports: (a) scrutiny progress reports, which the House of Commons prepares on a weekly basis and the House of Lords on a fortnightly basis; and (b) in-depth inquiry reports, which delve into the intricacies of selected EU initiatives.

The latter reports are the trademark of the House of Lords. Their preparation is facilitated by several factors. Namely, the Lords select a smaller number of EU documents for analysis than do the Commons, which permits it to devote more attention to the detail of EU initiatives. However, this would not of itself make a significant difference had the Lords not had massive expertise and more time at their disposal. Further, in addition to regular members of the Lords' EU Committee, other members of the House are also co-opted, so that some 70 peers in total, i.e., approximately 10% of the membership of the entire House, are actively involved in the work of the EU Committee or its sub-committees.<sup>1214</sup>

Their Lordships' in-depth inquiries are widely acclaimed for high quality and thorough analysis and are said to be well regarded both in the other Member States and in EU institutions.<sup>1215</sup> It has been argued that the House of Lords has been "a centre of thorough and serious analysis of Community affairs" since Britain's accession.<sup>1216</sup> This corresponds to the observation of Lord Williams, then Leader of the House, that the Lords' reports are more influential in Europe than in Westminster itself.<sup>1217</sup> As one author commented, this might be so because "fatherly advice from the elderly who have more or less retired from active play in the Westminster theatre

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<sup>1214</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15, 1<sup>st</sup> Report of Session 2002-03* of 18 December 2002, para. 134, p. 31.

<sup>1215</sup> Oliver, Dawn. *Constitutional reform in the UK*, Oxford: Oxford University Press, 2003: 86. For example, during an evidence session in the House of Lords in 2005, Franco Frattini, then Commissioner for Freedom, Security and Justice, assessed their Lordships' report on the Hague Programme in the following words: "I greatly welcomed your report as it constitutes an excellent and extensive analysis examining all aspects of the problem and expressing views on each subject. The report has indeed appeared at a timely moment given the fact that the Commission is, as you know, in the process of developing an action plan implementing the Hague Programme which will be presented in May. In this context I can reassure you that the Commission is fully committed to fulfilling its responsibilities". The Commissioner then praised the British commitment to democracy and its pragmatic approach, but remarked that British attitudes to Europe were sometimes too defensive. To these comments the Committee's Chairman, Lord Grenfell, replied *inter alia*: "I will take it as read that you understand our own enthusiasm for monitoring very carefully what is done by the Commission in the field of justice and home affairs and you can count on us to be constructive in our support and, if necessary, our criticism of what the Commission is doing". House of Lords, EU Committee, "Evidence by Commissioner Franco Frattini, Commissioner for Justice, Freedom and Security on Justice and Home Affairs matters", *HL Paper 5, 1<sup>st</sup> Report of Session 2005-06* of 13 June 2005, *Minutes of Evidence of 4 April 2005*, Q1, pp. 1 and 3.

<sup>1216</sup> Best, Edward. "The United Kingdom and the ratification of the Maastricht Treaty," in *The ratification of the Maastricht Treaty: issues, debates and future implications*, by Finn Laursen and Sophie Vanhoonacker (eds), Maastricht: European Institute of Public Administration, 1994: 252.

<sup>1217</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15, 1<sup>st</sup> Report of Session 2002-03* of 18 December 2002, paras 136-137, p. 33.

may be considered worth listening to".<sup>1218</sup> According to the Lords, a key way of having an impact on EU legislation is by "contributing to a climate of opinion forming" through crisp analysis on the basis of evidence and presentation of conclusions drawn therefrom.<sup>1219</sup> Their EU Committee is of opinion that they have influence at both European and national levels. Though the influence on the Government might appear more direct,<sup>1220</sup> the Lords cite many examples where their report recommendations were taken up by the EU institutions.<sup>1221</sup> Yet while for most analysts the Lords' influence is palpable or even "unquestionable", some are less optimistic. For Caroline Jackson MEP, for instance, they have "an ephemeral impact and little long-term effect" and for Lord Stoddard of Swindon, an independent Labour peer, they are "at best a weak advisory body".<sup>1222</sup> As mentioned, the EU Committee does not share the latter views.

4. *Reasoned opinions.* A specific type of parliamentary reports is those that incorporate reasoned opinions on the compliance with subsidiarity of draft EU legislative acts.<sup>1223</sup> Generally, the benefit of this type of parliamentary involvement is

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<sup>1218</sup> Shell, Donald. "The House of Lords and the European Community 1990-91," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 188.

<sup>1219</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15, 1<sup>st</sup> Report of Session 2002-03* of 18 December 2002, para. 140, p. 33.

<sup>1220</sup> For instance, when asked in 2007 to confirm that in general terms the influence of the House of Lords' EU Committee on the Government was significant and that the Government had accepted the bulk of the various committees' recommendations, which in turn influenced the Government's position in Brussels, Baroness Amos, the Leader of the House of Lords, stated: "I confirm that the committee has a great deal of influence. The Government always look very carefully at its proposals and recommendations because of the experience and expertise of its members". House of Lords, Debate of 18 June 2007, Vol. 693, col. 6. But see the reservation in *infra* note 1398 of this Chapter.

<sup>1221</sup> Some recent examples include recommendations regarding OLAF, national statement of assurance on the spending of EU funds, the Court of Auditors, the funding of CAP, the Fundamental Rights Agency and the Consumer Credit Directive. The recommendations from these reports were taken up, mentioned or invoked by MEPs in committee or plenary meetings, in European Parliament resolutions or by Commissioners. COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 150.

<sup>1222</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15, 1<sup>st</sup> Report of Session 2002-03* of 18 December 2002, paras 136-137, p. 33.

<sup>1223</sup> At the COSAC Chairpersons' meeting held in Madrid in 2010, the House of Commons expressed concern that certain draft legal acts would escape the early warning mechanism. The European Scrutiny Committee of this House had spotted that a series of provisions in the Lisbon Treaty require the Council to adopt decisions with the participation (i.e. consultation or consent) of the European Parliament without stating in the text of the provision that this procedure is a special legislative procedure. Given the existence of provisions that explicitly refer to a special legislative procedure, the Committee feared that this ambiguity would, as the British Government had held, deny the former group of legal acts the status of legislative acts and would, therefore, exclude these acts from the possibility of being the object of reasoned opinions. The Committee rightly argued in favour of a teleological rather than a literal interpretation of the contested provisions so as to render them eligible for reasoned opinions. House of Commons, European Scrutiny Committee, "Note on the definition of legislative acts under the EU

that it "could go a long way to meet public unease about the erosion of national sovereignty".<sup>1224</sup> Reasoned opinions are confined to the issue of subsidiarity and are typically based on less evidence.<sup>1225</sup> The right to propose the adoption of a reasoned opinion does not rest exclusively with committees and sub-committees specialising in EU affairs, but is granted to any MP or peer.<sup>1226</sup> The tests applied during a subsidiarity check include principally the necessity test and a greater benefits test.<sup>1227</sup>

The first post-Lisbon reasoned opinion, adopted by the Lords on the Commission proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, demonstrates that the practical operation of subsidiarity policing involves the analysis of the substance of EU initiatives.<sup>1228</sup> Based on the assessment carried out by the EU Sub-Committee on Home Affairs, the Lords gave many reasons why the Commission's justification of the necessity of legislative action was unconvincing: (a) immigration is a shared competence; (b) there are differences between the Member States as to the need for seasonal workers; (c) the Directive would not curb distortions in migratory flows; (d) it is not obvious how common rules for seasonal workers would accomplish the targeted reduction in the risk of overstaying and illegal entries; (e) an EU measure is not necessary to overcome the exploitation and sub-standard working conditions of seasonal workers, because measures of national law are equally binding and enforceable and at least as effective as EU measures; and (f) it is not obvious why this Directive should be, as the Commission held, "crucial for effective cooperation with third countries and for further deepening of the global approach". Scrutiny reserve was maintained for the substance of the proposal. This reasoned opinion fell three days short of meeting the Treaty deadline of eight weeks.<sup>1229</sup>

The adoption of a reasoned opinion by the House of Lords triggers the informal undertaking assumed on behalf of the Government by Chris Bryant, Minister for Europe, to the effect that the proposal that has been the object of a reasoned opinion

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Treaties", available at: <http://www.cosac.eu/en/meetings/Madrid2010/chaipersons.doc/noteuk.pdf/>, accessed on 8 December 2010.

<sup>1224</sup> Williams, Shirley. "Britain in the European Union: a way forward," *Political Quarterly*, Vol. 66, No. 1, 1995: 18.

<sup>1225</sup> House of Lords, "How will the Lords EU Committee operate these new powers?", available at: <http://www.parliament.uk/documents/lords-committees/eu-select/subsidiarity/use-new-powers.pdf>, accessed on 24 October 2010.

<sup>1226</sup> House of Lords, Procedure Committee, "The Lisbon Treaty: procedural implications; Standing Order 19; Private notice questions; Guidance on motions and questions", *HL Paper 51*, 2<sup>nd</sup> Report of Session 2009–10 of 2 February 2010, para. 8, p. 4.

<sup>1227</sup> House of Lords, "Subsidiarity: assessing an EU proposal", available at: <http://www.parliament.uk/documents/lords-committees/eu-select/subsidiarity/apply-subsidiarity.pdf>, accessed on 24 October 2010.

<sup>1228</sup> House of Lords, EU Committee, "Subsidiarity assessment: admission of third-country nationals as seasonal workers", *HL Paper 35*, 1<sup>st</sup> Report of Session 2010–11 of 13 October 2010.

<sup>1229</sup> House of Lords, EU Committee, "Annual Report 2010", *HL Paper 70*, 3<sup>rd</sup> Report of Session 2010–11 of 20 December 2010, para. 77, p. 20.

will not be supported in the Council without first communicating to Parliament the reasons for doing so.<sup>1230</sup>

5. *Scrutiny reserves.* There are two types of scrutiny reserve. The general one refers to any EU document, while the special one exists only in the House of Lords and applies to British opt-in decisions in the Area of Freedom, Security and Justice.

Private correspondence with the European Scrutiny Committee revealed that the general scrutiny reserve currently applicable in the House of Commons is undergoing amendment in order to suit the needs of the Lisbon Treaty and that the new one will greatly resemble that of the House of Lords, which has already been amended. The changes are aimed to take place at the earliest in July 2011.<sup>1231</sup> For that reason, we focus below on the Lords' general scrutiny reserve.

A. *General scrutiny reserve.* On 30 March 2010, the House of Lords amended the Scrutiny Reserve Resolution.<sup>1232</sup> The Resolution imposes the following requirement:

[N]o Minister of the Crown shall give agreement in the Council or the European Council in relation to any document subject to the scrutiny of the European Union Committee in accordance with its terms of reference, while the document remains subject to scrutiny.<sup>1233</sup>

This prohibition is, therefore, not limited in time and applies whenever the EU Committee has referred a report for debate on the Floor of the House but the debate has not yet taken place, or where the Committee has not indicated that it has completed its scrutiny.<sup>1234</sup>

The scrutiny reserve is not linked to the voting of a certain EU document, but refers to the minister's expression of agreement in any form. As such, the reserve refers to a wide range of pre-legislative and legislative decisions made by EU institutions and encompasses agreement to a programme, plan or recommendation for European Union legislation; political agreement; agreement to a general approach; and agreements at all stages of the ordinary and special legislative procedures. Abstention by a minister from decisions regarding which the Council acts by unanimity is treated as giving agreement, which makes it a breach of the scrutiny reserve.<sup>1235</sup>

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<sup>1230</sup> House of Lords, Procedure Committee, "The Lisbon Treaty: procedural implications; Standing Order 19; Private notice questions; Guidance on motions and questions", *HL Paper 51, 2<sup>nd</sup> Report of Session 2009–10* of 2 February 2010, para. 10, p. 5.

<sup>1231</sup> Personal and e-mail correspondence with Paul Hardy, Legal Adviser of the European Scrutiny Committee of 5 November 2010 and 24–25 January 2011 as well as e-mail correspondence with Alistair Doherty, clerk of the European Scrutiny Committee of 16 December 2010.

<sup>1232</sup> House of Lords, Debate of 30 March 2010, Vol. 718, cols. 1292–1293.

<sup>1233</sup> General Scrutiny Reserve Resolution, para. 1.

<sup>1234</sup> General Scrutiny Reserve Resolution, para. 2.

<sup>1235</sup> General Scrutiny Reserve Resolution, paras 3 and 4.

Overrides of the scrutiny reserve are permissible in three situations: (a) where the minister concerned considers that the document remaining under scrutiny is confidential, routine, trivial or substantially the same as a proposal on which scrutiny has been completed; (b) where the EU Committee has waived the scrutiny reserve despite the scrutiny not being completed; and (c) where the minister decides that there are special reasons to give agreement.<sup>1236</sup> Only in the last case is the minister obliged to explain, at the earliest opportunity, the reasons for the scrutiny override. The Government's usual excuse for overriding the scrutiny reserve is that it was due to administrative error.<sup>1237</sup> Nevertheless, no specific sanction is foreseen where the override does occur.<sup>1238</sup> The most effective punishment for the Government is, in fact, public embarrassment,<sup>1239</sup> which ministers are increasingly eager to avoid.<sup>1240</sup> To reduce the number of overrides, the Lords intend to table a Question for Written Answer on each individual override that the Lords assess could have been avoided and on six-monthly Government reports on scrutiny overrides.<sup>1241</sup> A recent review of these Government reports concluded that there appeared to be no instances of scrutiny reserves causing the Government to change its position.<sup>1242</sup>

Compared to the previous Scrutiny Reserve Resolution of 6 December 1999,<sup>1243</sup> the current one contains two key changes. First, the scrutiny reserve is no longer advisory but obligatory for the minister, who *shall* rather than *should* observe Parliament's scrutiny.<sup>1244</sup> Yet although their Lordships do not conceal their fondness of the Danish mandating system, this change in wording should not be overestimated. In 2002, they proposed that where "significant outstanding policy concerns" existed, the Government should secure a positive resolution from the House as a whole

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<sup>1236</sup> Already in 1984, the Government sought to define the situations that fell under these "special reasons". As such, it identified the need to avoid a legal vacuum, the desirability of permitting a measure of benefit to Britain to come into force as soon as possible, and the difficulty of invoking a late reserve on a measure that would either have little effect on Britain or would be likely to benefit Britain. Bates, T. St. J. N. "European Community Legislation before the House of Commons," *Statute Law Review*, Vol. 12, No. 2, 1991: 120.

<sup>1237</sup> See House of Lords, Debates of 8 December 2009, Vol. 715, col. WA110; of 6 April 2010, Vol. 718, col. WA412; and of 7 April 2010, Vol. 718, col. WA434.

<sup>1238</sup> General Scrutiny Reserve Resolution, para. 5.

<sup>1239</sup> Carter, Caitriona A. "The Parliament of the United Kingdom: from supportive scrutiny to unleashed control?," in *National parliaments on their ways to Europe: losers or latecomers?*, by Andreas Maurer and Wolfgang Wessels (eds), Baden-Baden: Nomos Verlagsgesellschaft, 2001: 412.

<sup>1240</sup> Jones, Digby. *UK parliamentary scrutiny of EU legislation*, London: Foreign Policy Centre, 2005: 5.

<sup>1241</sup> House of Lords, EU Committee, "Annual Report 2009", *HL Paper 167, 23<sup>rd</sup> Report of Session 2008-09*, para. 69, p. 20.

<sup>1242</sup> Hazell, Robert and Paun, Akash. "Parliamentary scrutiny of multi-level governance," in *Legislatures in federal systems and multi-level governance*, by Rudolf Hrbek (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 2010: 163.

<sup>1243</sup> House of Lords, Debate of 6 December 1999, Vol. 607, cols. 1019-1020.

<sup>1244</sup> There is no consensus as to whether Parliament's resolutions on EU proposals are binding on the Government. The opinions vary from those that the Government's failure to comply would be a "serious breach of ministerial responsibility" to those that it is "simply a matter of practical politics". Birkinshaw, Patrick. *European public law*, Cambridge: Cambridge University Press, 2003: 303.

before the scrutiny reserve can be lifted.<sup>1245</sup> This would be tantamount to approving the Government's negotiating mandate. The Government flatly refused it, however, invoking in its defence the Lords' own statement that "our system does not require the Government to agree with our views before the reserve is lifted: the requirement is merely that the process of scrutiny is complete".<sup>1246</sup> The Government then restated the purpose of the scrutiny reserve as being nothing more than to "give the Committee enough time to do its work", so that any significant outstanding policy concerns should be expressed in reports and not by maintaining the reserve.<sup>1247</sup> The Lords' attempt to inch closer to the Danish system had thus fallen on barren ground. It is worth mentioning that the Commons had expressly ruled out the possibility of elevating the scrutiny reserve to statutory status, because it would set in motion an inflexible mechanism that could contradict British interests in a decision-making context where qualified majority voting could not guarantee its full utility.<sup>1248</sup>

Second, the scope of the scrutiny reserve is extended in a twofold manner. On the one hand, the Resolution has ceased to enumerate the EU proposals to which the scrutiny reserve used to apply under the former pillar structure and refers, henceforth, to any document under scrutiny irrespective of its nature. On the other hand, the scrutiny reserve now covers agreements on general approach, which was previously not the case.<sup>1249</sup> This has been applied informally since 1 July 2008, when Jim Murphy, the then Minister for Europe, in written correspondence to the House of Lords, committed the Government not to agree to general approaches in the Council before the Lords complete their scrutiny.<sup>1250</sup> This is of significance because, albeit not a legislative act in itself, a general approach is a formal Council agenda item that prepares the Council's negotiating mandate for first reading negotiations. Together with Commission proposals, Council general approaches are the only documents available for scrutiny where EU decisions are made at first reading. The Lords have

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<sup>1245</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15*, 1<sup>st</sup> Report of Session 2002-03 of 18 December 2002, para. 71, pp. 19-20.

<sup>1246</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15*, 1<sup>st</sup> Report of Session 2002-03 of 18 December 2002, para. 19, p. 11.

<sup>1247</sup> House of Lords, EU Committee, "Government responses", *HL Paper 99*, 20<sup>th</sup> Report of Session 2002-03 of 29 April 2003, para. 184, p. 10.

<sup>1248</sup> House of Commons, European Scrutiny Committee, "European scrutiny in the Commons", *HC 152-xxx*, 30<sup>th</sup> Report of Session 2001-02 of 11 June 2002, para. 54, p. 21.

<sup>1249</sup> A general approach is the first public expression of the views of the Council on a legislative proposal from the Commission and it usually lists the changes that the Council is likely to make to the proposal. In most cases, the Council adopts a general approach before the end of the European Parliament's first reading, due to the latter's time-consuming processes of deciding the lead committee and appointing rapporteurs. House of Lords, EU Committee, "Codecision and national parliamentary scrutiny", *HL Paper 125*, 17<sup>th</sup> Report of Session 2008-09 of 21 July 2009, pp. 8-9.

<sup>1250</sup> House of Lords, EU Committee, "Codecision and national parliamentary scrutiny", *HL Paper 125*, 17<sup>th</sup> Report of Session 2008-09 of 21 July 2009, para. 66, p. 21. The Lords signalled the problem years before this, however. See House of Lords, EU Committee, "The scrutiny of European Union business - provisional agreement in the Council of Ministers", *HL Paper 135*, 23<sup>rd</sup> Report of Session 2001-2002 of 21 June 2002.

already expressed concern that the increased number of first-reading deals and the consequent reduction in the number of readings and versions of texts discussed in the Union legislature "have an impact on the ability of national parliaments to scrutinise changes made to proposals during negotiations".<sup>1251</sup> The same was argued by the Commons.<sup>1252</sup>

*B. Special scrutiny reserve.* On 30 March 2010, the House of Lords established, for the first time, a scrutiny reserve with respect to the Government's decision to notify the Council of Britain's wish to take part in the adoption and application of measures in the Area of Freedom, Security and Justice.<sup>1253</sup> Accordingly, no minister may authorise such notification within eight weeks of the presentation of the proposal or initiative to the Council.<sup>1254</sup> Given that the special scrutiny reserve is, as opposed to the general one, subjected to a limited timeframe, the EU Committee may decide to scrutinise the question of the notification independently of the substance of the proposal. In this case, the general scrutiny reserve continues to govern the substance of the proposal.<sup>1255</sup>

Where the minister concerned decides that there are special reasons why the notification is essential, the authorisation may be given before the expiry of the period left for parliamentary scrutiny. The minister should explain the reasons for the scrutiny override at the earliest opportunity.<sup>1256</sup> Whereas the provision of explanations for the scrutiny override is not, unlike in the case of the general scrutiny reserve, formulated as a legal obligation, one should refrain from placing too much emphasis on this difference, for Westminster's mechanism of EU scrutiny is cast in consensual much more than in conflictual relations with Whitehall.

An indication of such a nature of the government-parliament relationship in the European scrutiny business is the fact that the special scrutiny reserve is in fact a codification of the same assurance given to the House of Lords on behalf of the Government by Baroness Catherine Ashton, then Leader of the House, on 9 June 2008 and, in slightly different terms, by Jacqui Smith, the Home Secretary, on 20 January 2009.<sup>1257</sup>

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<sup>1251</sup> House of Lords, EU Committee, "Codecision and national parliamentary scrutiny", *HL Paper 125*, 17<sup>th</sup> Report of Session 2008–09 of 21 July 2009, para. 49, p. 17.

<sup>1252</sup> House of Commons, European Scrutiny Committee, "The work of the Committee in 2008–09", *HC 267*, 6<sup>th</sup> Report of Session 2009–10 of 18 January 2010, paras 20–22, p. 8.

<sup>1253</sup> House of Lords, Debate of 30 March 2010, Vol. 718, col. 1293. See *infra* the text accompanying note 1273 of this Chapter.

<sup>1254</sup> Special Scrutiny Reserve Resolution, para. 1.

<sup>1255</sup> Special Scrutiny Reserve Resolution, para. 3.

<sup>1256</sup> Special Scrutiny Reserve Resolution, para. 2.

<sup>1257</sup> House of Lords, EU Committee, "Enhanced scrutiny of EU legislation with a United Kingdom opt-in", *HL Paper 25*, 2<sup>nd</sup> Report of Session 2008–09 of 6 February 2009, Appendices 1 and 2. See also: House of Lords, Debate of 9 June 2008, Vol. 702, cols. 374–377; Miller, Vaughne. "Parliamentary scrutiny of opt-in decisions to the EU Area of Freedom, Security and Justice," *House of Commons Library*, Standard Note no. SN/IA5660 of 27 July 2010.

6. *Hearings and debates.* An EU document can be cleared from scrutiny with a report to the House, kept under scrutiny pending further explanations from the competent minister or recommended for debate in committee or on the Floor of the House. Plenary debates on EU matters in both Houses are comparatively rare, although they occur more frequently in the House of Lords than in the House of Commons. As they usually do not arouse lively confrontations of views of the political parties represented in Parliament, these debates do not attract much media attention. They are, therefore, a fairly diluted mode of parliamentary participation in EU decision making.

There are several types of plenary debates on EU issues. First, Government representatives appear in Parliament to give statements before and after Council meetings and after major European Council meetings. Second, plenary debates often originate in an in-depth inquiry report or another politically important EU matter. Third, referral to the plenary is henceforth also required for the adoption of reasoned opinions on subsidiarity. Fourth, a plenary debate with a vote will be held regarding the Government's decision on whether or not to subscribe to the new regime that applies to the enforcement and adjudication of pre-Lisbon Justice and Home Affairs measures.<sup>1258</sup>

Hearings and evidence sessions carried out in committee are powerful means of the British Parliament's European scrutiny. They are the precursor of the House of Lords' incisive and detailed inquiries. It is established practice for major inquiries that evidence is taken not only from Government representatives, but also from officials or members of the Commission and the European Parliament as well as from the ambassador of the Member State holding the Presidency.<sup>1259</sup> The choice of witnesses is far from whimsical. To the contrary, it is a matter of careful consideration, because it represents, particularly for the Lords' EU Committee, an alley through which to disseminate the work of scrutiny committees and, possibly, because it influences the shaping of European policy. Witnesses normally take notice of the committee's report and, in the words of one sub-committee chairman, "they then go and talk about it with their friends, who are often the very kind of people we want to get to read our reports".<sup>1260</sup>

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<sup>1258</sup> See *infra* note 1281 of this Chapter.

<sup>1259</sup> COSAC Secretariat, Annex to the 13<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLIII COSAC meeting held in Madrid from 31 May – 1 June 2010, pp. 508 and 514.

<sup>1260</sup> Shell, Donald. "The House of Lords and the European Community 1990-91," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 171.

7. *European Union Bill*. On 11 November 2010, the Government initiated the European Union Bill in accordance with the coalition agreement.<sup>1261</sup> The Bill serves two key purposes.

First, it introduces the requirements of a referendum and a ministerial statement for the ratification of both ordinary treaty amendments and those simplified treaty amendments that must be ratified by the Member States, but only where they seek to extend the objectives, competences or powers of the Union or facilitate the decision-making procedures by removing Britain's veto right in the Council or the European Council. The latter type of treaty amendment may be exempted from the referendum requirement if it confers on the EU the power to impose on Britain a requirement, obligation or sanction that is not significant. The requirement of approval by an Act of Parliament is retained for both types of treaty amendment, however. Accession treaties are exempted from the referendum requirement, unless they contain provisions augmenting the Union's powers. A large number of EU decisions are also subject to conditions before the Government may consent to them on behalf of Britain. For instance, the general bridging clauses listed in the Bill, the special bridging clauses, the adoption of the euro, the abolition of border controls and participation in the European Public Prosecutors Office would be subject to approval both by Act of Parliament and by referendum, without the possibility of exemption. Other EU decisions, such as those strengthening the rights of EU citizens, providing for the election of members of the European Parliament, those based on the 'enabling clause' or those in the Area of Freedom, Security and Justice that are specifically stated in the Bill, require only parliamentary approval, which, depending on the decision at hand, is to be given either by Act of Parliament or by the adoption of an identical motion by both Houses.

Second, the Bill declares that directly applicable or directly effective EU law is recognised and applied in Britain "only by virtue of an Act of Parliament". This provision puts on a statutory footing Britain's dualist approach to the status of international law in the British legal order.<sup>1262</sup> In the Government's words, its aim is "to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law which has become an integral part of the UK's legal order".<sup>1263</sup> Being declaratory, this provision intends neither to alter the rights and duties that Britain assumed by acceding to the Union nor to affect the

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<sup>1261</sup> See "The coalition: our programme for government", p. 19, available at: [http://www.direct.gov.uk/prod\\_consum\\_dg/groups/dg\\_digitalassets/@dg/@en/documents/digitalasset/dg\\_187876.pdf](http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf), accessed on 28 December 2010.

<sup>1262</sup> The dualist approach was reiterated in *McWhirter v. Attorney General* [1972] CMLR 882, which was decided before the enactment of the European Communities Act. Lord Denning then stated: "Even though the Treaty of Rome has been signed, it has no effect, so far as these courts are concerned, until it is made an Act of Parliament. Once it is implemented by an Act of Parliament, these courts must go by the Act of Parliament. Until that day comes, we take no notice of it" (para 6).

<sup>1263</sup> Explanatory Notes, "European Union Bill", para. 106, pp. 24-25, available at: <http://www.publications.parliament.uk/pa/cm201011/cmbills/106/en/2011106en.htm>, accessed on 28 December 2010.

principle of primacy of EU law, both of which would continue to apply unscathed.<sup>1264</sup>

Finally, notwithstanding the plethora of instruments in Westminster's arsenal, it is wise to recall a warning issued by the House of Commons' Procedure Committee in 1989:

Whilst the House may, by changes in its own internal procedures, find ways of bringing to bear more efficiently such authority as it retains over European legislation, it cannot by such means increase that authority nor seek to claw back powers which have been ceded by Treaty. For example, the recent extension of qualified majority voting in the Council of Ministers [...] has placed constraints on the House's ability to scrutinise European legislation which can only be alleviated but not removed by changes in the practice of the House.<sup>1265</sup>

### **3.4. Scope of scrutiny**

#### **3.4.1. Area of Freedom, Security and Justice**

As early as 1993, the British Parliament recognised that national parliamentary supervision over Third Pillar matters was essential because the European Parliament had no formal legislative role.<sup>1266</sup> In an assessment of its system of scrutiny of this pillar four years later, the Lords urged that:

[T]here must be parliamentary oversight of common position texts. This is particularly important because of their exclusion from the documents to be transmitted to the European Parliament for consultation. National parliaments will have to fill this vacuum and ensure that their parliamentary scrutiny arrangements are broad enough to catch these documents.<sup>1267</sup>

Yet, in unravelling the complex web of rules currently applicable to Britain in the Area of Freedom, Security and Justice, it will be shown that Britain's concern for EU democracy did not prevail over the national interest of having the ultimate right of decision in the fields covered by the Area of Freedom, Security and Justice.

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<sup>1264</sup> See more *supra* the text accompanying note 1176 of this Chapter.

<sup>1265</sup> Birkinshaw, Patrick and Ashiagbor, Diamond. "National participation in Community affairs: democracy, the UK Parliament and the EU," *Common Market Law Review*, Vol. 33, No. 3, 1996: 509.

<sup>1266</sup> House of Lords, EU Committee, "Enhancing parliamentary scrutiny of the Third Pillar", *HL Paper 25, 6<sup>th</sup> Report of Session 1997-98* of 31 July 1997, paras 13-14. See also the intervention by Lord Boston, a Labour peer, in the plenary: "[I]t is absolutely essential that work under the pillars should be scrutinised by national parliaments. After all, the European Parliament's powers concerning the pillars are distinctly limited, and we see national parliaments as being the central players in this respect". House of Lords, Debate of 12 April 1994, Vol. 553, col. 1471.

<sup>1267</sup> House of Lords, EU Committee, "Enhancing parliamentary scrutiny of the Third Pillar", *HL Paper 25, 6<sup>th</sup> Report of Session 1997-98* of 31 July 1997, para. 127.

## A. Opt-ins

Just as at Amsterdam, the United Kingdom secured at Lisbon, by virtue of two protocols, opt-in arrangements for EU decisions adopted in the Area of Freedom, Security and Justice and those building on the Schengen *acquis*.<sup>1268</sup> It has been argued that these derogations, inspired solely by the wish to safeguard the national interest,<sup>1269</sup> led to a full-scale *Europe à la carte* and sound a "death-knell for all the major principles that until [then] have formed the essential foundation of the Community legal order: the unitary nature of Community law, the uniform interpretation and application of its rules, the maintenance of the *acquis communautaire*, the duty of solidarity and mutual assistance between the Member States, and the like".<sup>1270</sup> For another analyst, the British reluctance to participate in the Schengen *acquis* has contributed to "forging flexibility as a governing principle" in European politics.<sup>1271</sup> In the following passages, we first describe the operation of the British opt-ins and then analyse whether and in how far they affect British parliamentary scrutiny of the Area of Freedom, Security and Justice.<sup>1272</sup>

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<sup>1268</sup> The Schengen *acquis* is a body of law encompassing: (a) the Agreement, signed near the town of Schengen in Luxembourg on 14 June 1985, between the Benelux Economic Union (Belgium, the Netherlands, Luxembourg), Germany and France on the gradual abolition of checks at their common borders; (b) the Convention, signed at Schengen on 19 June 1990, between the same states, implementing the Agreement; (c) the Accession Protocols; (d) decisions and declarations of the Executive Committee and acts adopted for the implementation of the Convention by the organs on which the Executive Committee has conferred decision-making power. See further in: Eckart, Wagner. "The integration of Schengen into the framework of the European Union," *Legal Issues of European integration*, Vol. 25, No. 2, 1998: 1-60; Boer, Monica den. *Schengen's final days? The incorporation of Schengen into the new TEU, external borders and information systems*, Maastricht: European Institute of Public Administration, 1998; Corrado, Laura. "L'intégration de Schengen dans l'Union européenne: problèmes et perspectives," *Revue du Marché Commun et de l'Union Européenne*, No. 428, 1999: 342-349; Peers, Steve. "Caveat emptor? Integrating the Schengen *acquis* into the European legal order," *Cambridge Yearbook of European Legal Studies*, Vol. 2, 1999: 87-123; Kuijper, P.J. "Some legal problems associated with the communitarisation of policy on visas, asylum and immigration under the Amsterdam Treaty and incorporation of the Schengen *acquis*," *Common Market Law Review*, Vol. 37, No. 2, 2000: 345-366.

<sup>1269</sup> It has been submitted, for instance, that "the idea of the British Isles being an impregnable fortress of civility is sentimentality in excess of facts: the smuggling of drugs, arms and other illicit goods into Ireland or the United Kingdom, and exposure to international terrorism, does not appear to be significantly less than in Continental Europe". Duff, Andrew (ed.). *The Treaty of Amsterdam: text and commentary*, London: Federal Trust and Sweet & Maxwell, 1997: 24.

<sup>1270</sup> Toth, A.G. "The legal effects of the protocols relating to the United Kingdom, Ireland and Denmark," in *The European Union after Amsterdam: a legal analysis*, by Teunis Heukels et al. (eds), The Hague: Kluwer Law International, 1998: 244-245 and 251.

<sup>1271</sup> Wiener, Antje. "Forging flexibility – the British 'no' to Schengen," *European Journal of Migration and Law*, Vol. 1, No. 4, 1999: 459.

<sup>1272</sup> See generally about the British derogations in: Fletcher, Maria, "Schengen, the European Court of Justice and flexibility under the Lisbon Treaty: balancing the United Kingdom's 'ins' and 'outs'," *European Constitutional Law Review*, Vol. 5, No. 1, 2009: 71-98; Peers, Steve. "In a world of their own? Justice and Home Affairs opt-outs and the Treaty of Lisbon," *Cambridge Yearbook of European Legal Studies*, Vol. 10, 2007-2008: 383-412.

1. *Freedom, Security and Justice opt-in.*<sup>1273</sup> Wishing to counter the loss of the veto power that began looming once it was agreed that the Amsterdam Treaty would transfer certain Third Pillar matters to the First Pillar, Britain opted out and negotiated an opt-in arrangement for these policies. When, subsequently, the Lisbon Treaty moved virtually all of the remaining Third Pillar to the First Pillar, Britain, for the same reason as at Amsterdam, opted out of these policy fields too, and negotiated the parallel extension of the opt-in arrangement.<sup>1274</sup> From the entry into force of the Lisbon Treaty, Britain, therefore, by default does not take part in the adoption of decisions in the now wider Area of Freedom, Security and Justice.

The legal effect of this derogation is that no provision, measure, international agreement concluded by the Union or decision handed down by the Court of Justice is binding upon or applicable in Britain. However, a mere written notification by Britain to the Council will entitle it to participate in the adoption or application of any measure in this area. There is no authorisation procedure. Nor is there a provision to rescind an opt-in. Yet if a measure cannot be adopted with Britain participating within a reasonable period of time, the Council may proceed and adopt it without Britain, thereby rendering the measure inapplicable to Britain. The same opt-in regime applies to proposals for the amendment of existing measures. Nevertheless, if British non-participation in the amended version of the existing measure makes it inoperable for the other Member States or the Union, the Council may urge Britain to submit a notification and opt-in. If Britain does not opt into the amended version of measure, the existing measure will cease to be binding for and applicable to Britain and, as a corollary, the Council may make Britain bear the direct financial consequences of its non-participation that were necessarily and unavoidably incurred. The House of Lords was of the view that the same legal uncertainty would also arise where an existing measure was to be bundled with one or more other existing measures for the purpose of codification, because the consequence thereof would be that the measures undergoing codification would cease to apply.<sup>1275</sup> Oddly, both the Lords and the Commission, in its direct response to the Lords' report, reached the conclusion that if Britain did not accede to the amended measure the existing one could continue to apply in Britain in its unamended version, despite the express Protocol provision to the contrary.<sup>1276</sup> The Government rightly disagreed with this interpretation.<sup>1277</sup>

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<sup>1273</sup> Protocol no. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice attached to the Lisbon Treaty.

<sup>1274</sup> House of Lords, EU Committee, "Enhanced scrutiny of EU legislation with a United Kingdom opt-in", *HL Paper 25, 2<sup>nd</sup> Report of Session 2008-09* of 6 February 2009, para. 4, p. 5.

<sup>1275</sup> House of Lords, EU Committee, "The United Kingdom opt-in: problems with amendment and codification", *HL Paper 55, 7<sup>th</sup> Report of Session 2008-09* of 24 March 2009, paras 5 and 28, p. 5-6 and 11.

<sup>1276</sup> House of Lords, EU Committee, "Asylum directives: scrutiny of the opt-in decisions", *HL Paper 6, 1<sup>st</sup> Report of Session 2009-10* of 4 December 2009, p. 16. The view that Britain's decision not to opt into the amended measure could shield it from the repeal of the existing measure, because by not opting in Britain would avoid being affected by the provision of the amended measure repealing the existing

The opt-in in this area is accompanied by several formal Government undertakings. To begin with, the Government has undertaken to report each year on its approach in the forthcoming year to Justice and Home Affairs and on the exercise of the opt-in during the previous year.<sup>1278</sup> In January 2011, David Lidington, the Minister for Europe, gave three more undertakings.<sup>1279</sup> First, the Government will make a written statement to Parliament on each opt-in decision explaining why the Government believes it to be in the British national interest. Second, the Government urges the parliamentary committees to take full advantage of their right to call a debate on any opt-in decision and expresses its willingness to participate in them. Third, the Government will set aside time for a debate in both Houses whenever there is "particularly strong parliamentary interest" in the Government's opt-in decision, which may be when an EU measure has a substantial impact on UK criminal or civil law, national security, civil liberties or immigration policy. This undertaking also applies to Government decisions to opt into EU measures after their adoption.<sup>1280</sup>

Crucial for Britain are also the rules agreed in the Protocol on transitional provisions concerning the status of the acts in the field of police and judicial cooperation in criminal matters that were adopted before the entry into force of the Lisbon Treaty.<sup>1281</sup> These acts are exempted from the Commission's enforcement powers and the Court of Justice's compulsory interpretative jurisdiction until 1 December 2014. Britain has the right to notify the Council at the latest six months before this date that it does not accept the described powers of these EU institutions, in which case all these acts cease to apply to Britain. Again, Britain could be forced to bear the financial cost of its decision. As the Houses of Parliament have warned, Britain's decisions not to opt into new measures in the Area of Freedom, Security and

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measure, is untenable. The Treaty text provides a very clear and unequivocal answer to this dilemma: no notification, no measure. This must be the only correct interpretation since the existing measure cannot remain in force in Britain precisely because British non-participation in the amended measure has made its application in the other Member States inoperable. That is the very logic behind this 'kick-out' procedure.

<sup>1277</sup> House of Lords, EU Committee, "Government and Commission responses Session 2008-09", *HL Paper 102, 11<sup>th</sup> Report of Session 2009-10* of 13 April 2010, p. 11-13. The only way in which a piece of EU legislation could continue to apply in Britain is if the Union has adopted it in the form of a directive and if Britain has implemented it by transposing its contents into the national implementing act. In this way, the legal destinies of the directive and the national implementing act become separate, thereby immunising the national implementing act from future alterations of the legal status of the directive.

<sup>1278</sup> COSAC Secretariat, Annex to the 13<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLIII COSAC meeting held in Madrid from 31 May – 1 June 2010, p. 506.

<sup>1279</sup> House of Commons, Debate of 20 January 2011, Vol. 521, cols. 51-52WS.

<sup>1280</sup> House of Commons, European Scrutiny Committee, "Opting into international agreements and enhanced parliamentary scrutiny of opt-in decisions", *HC 955-I, 30<sup>th</sup> Report of Session 2010-12* of 25 May 2011, para. 29, p. 10.

<sup>1281</sup> Article 10 of Protocol no. 36 on transitional provisions attached to the Lisbon Treaty.

Justice as well as to opt out of the existing measures put Britain at some degree of financial risk. The latter decision also strips Britain of the benefits of continuing to participate in the existing measures. It is, therefore, paramount that any decision whether or not to opt in or out of measures in this field be subject to the closest parliamentary scrutiny and ministerial accountability.<sup>1282</sup> This was most probably the reason why the special scrutiny reserve was established.<sup>1283</sup> The Government pledged that all these potential risks and benefits would be factored in the discussion that would be held with the Commission and the Member States prior to deciding whether to opt into a measure.<sup>1284</sup> In January 2011, the Government formally undertook that, before it reaches a decision on whether Britain should accept the Commission's infringement powers and the jurisdiction of the Court of Justice over all pre-Lisbon Justice and Home Affairs measures, it would hold a plenary vote on it in both Houses of Parliament.<sup>1285</sup>

2. *Schengen opt-in.*<sup>1286</sup> Under the Schengen Protocol attached to the Amsterdam Treaty, which entered into force on 1 May 1999, signatories to the Schengen agreements were authorised to establish closer cooperation among themselves within the institutional and legal framework of the EU. The Council of Ministers substituted the Schengen Executive Committee and was charged with allocating a legal basis for each of the provisions or decisions that constituted the Schengen *acquis*. The Council did this on 20 May 1999 and some Schengen provisions came under the First and some under the Third Pillar.<sup>1287</sup> In broad terms, Schengen matters relating to immigration and asylum came under the First Pillar and police cooperation under the Third Pillar.<sup>1288</sup> The effect of the integration of the Schengen *acquis* into the Union system was to submit the opaque and inaccessible Schengen decision-making apparatus to the procedures of legislation and judicial review existing in the

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<sup>1282</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference: follow-up report", *HC 16-iii, 3<sup>rd</sup> Report of Session 2007-08* of 27 November 2007, paras 59, 67 and 70, pp. 17 and 19; House of Lords, Constitution Committee, "European Union (Amendment) Bill and the Lisbon Treaty", *HL Paper 84, 6<sup>th</sup> Report of Session 2007-08* of 28 March 2008, paras 109 and 113, pp. 30-31; House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. I: Report", *HL Paper 62-I, 10<sup>th</sup> Report of Session 2007-08* of 13 March 2008, para. 6.275, pp. 164-165.

<sup>1283</sup> See *supra* the text accompanying note 1253 of this Chapter.

<sup>1284</sup> House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference: Government responses", *HC 179, 1<sup>st</sup> Special Report of Session 2007-08* of 17 December 2007, pp. 18-19 and 22.

<sup>1285</sup> House of Commons, Debate of 20 January 2011, Vol. 521, cols. 51WS.

<sup>1286</sup> Protocol no. 19 on the Schengen *acquis* integrated into the framework of the European Union attached to the Lisbon Treaty.

<sup>1287</sup> The Council carried out its task of assigning Schengen provisions a legal basis under the EU founding treaties by adopting decisions 1999/435/EC (*OJ L 176/17* of 10.7.1999) and 1999/436/EC (*OJ L 176/1* of 10.7.1999).

<sup>1288</sup> House of Lords, European Union Committee, "Defining the 'Schengen *acquis*'", *HL Paper 87, 21<sup>st</sup> Report of Session 1997-1998* of 27 March 1998, para. 6.

Union.<sup>1289</sup> EU decisions building on the Schengen *acquis* were thus subjected to a measure of democratic supervision by the European Parliament, which was to be consulted in both pillars immediately after the *acquis* integration but which would begin to codecide with the Council in the First Pillar after the expiry of the transitional period of five years of the entry into force of the Amsterdam Treaty. The Court of Justice, too, assumed jurisdiction over these decisions according to the Treaty rules applicable to the two pillars.

Britain was not a signatory to the Schengen Agreement and did not, therefore, participate in the development of the Schengen *acquis*. Just as at Amsterdam, Britain secured the right at Lisbon to request, at any time, to take part in some or all of the provisions of the Schengen *acquis*. As opposed to the Freedom, Security and Justice opt-in, Britain's Schengen opt-in is subject to approval by the Council. Britain may, however, withdraw its notification before the Council gives its approval, in which case a new EU measure that belongs to the Schengen *acquis*, when adopted, will cease to apply to Britain to the extent and under the conditions decided by the Council. The adoption of the measure is suspended during the process of preparation of the Council decision on Britain's partial or full exclusion from it. This decision must reconcile Britain's widest possible participation in the measure without seriously affecting the practical operability and coherence of the Schengen *acquis*. Britain requested partial participation in the Schengen *acquis* in 1999,<sup>1290</sup> which the Council endorsed on 29 May 2000.<sup>1291</sup> The Schengen provisions left out of the request, which remain solely for Britain to regulate, refer to the crossing of internal and external borders,<sup>1292</sup> visas, residence permits, movement of aliens, asylum applications, etc. After an evaluation, the Council consented in 2004 that the Schengen provisions on police and judicial cooperation in criminal matters, including the prevention of drug trafficking, the transfer of execution of criminal judgments and extradition, come into effect for Britain on 1 January 2005.<sup>1293</sup> As the Lords observed, if Britain were to continue to adhere to the policy of opting out of the legal evolution of the Schengen *acquis* after Amsterdam, it was necessary to distinguish

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<sup>1289</sup> As the Lords remarked, "[n]ational parliaments, working in isolation and with varying degrees of access to information, have been unable to bring much influence to bear on the work of the Executive Committee". House of Lords, EU Committee, "Incorporating the Schengen *acquis* into the European Union", *HL Paper 139, 31<sup>st</sup> Report of Session 1997-98* of 8 September 1998, para. 49.

<sup>1290</sup> House of Lords, EU Committee, "UK participation in the Schengen *acquis*", *HL Paper 34, 5<sup>th</sup> Report of Session 1999-2000* of 9 March 2000, paras 16-20.

<sup>1291</sup> Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom or Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*, (*OJ L 131/43* of 1.6.2000).

<sup>1292</sup> This is consonant with Protocol no. 20 on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and Ireland, which permits Britain to exercise controls on persons seeking to enter its territory.

<sup>1293</sup> Council Decision 2004/926/EC of 22 December 2004 on the putting into effect of parts of the Schengen *acquis* by the United Kingdom of Great Britain and Northern Ireland, (*OJ L 395/70* of 31.12.2004).

Title IV measures that build on the Schengen *acquis* from those Title IV measures that would not, because acceding to the two groups of measures triggers, as we have seen, different opt-in procedures.

Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, is an excellent example of the operation of the Schengen opt-in and of its implications for Westminster's scrutiny. First, the Frontex Regulation episode showed that the requirement of authorisation for participating in measures building on the Schengen *acquis* is not a mere formality. Namely, Britain applied to take part in the adoption of this Regulation without previously requesting to opt into this area of cooperation. The Council refused its application on the ground that Britain had not been authorised to participate in this measure. Britain then took the Council to the Court of Justice, but lost the case due to the fact that Britain cannot be allowed to participate in the adoption of a measure building on the Schengen *acquis* without first having been authorised by the Council to accept the area of the Schengen *acquis* on which that measure is based.<sup>1294</sup> For that reason, Britain only has an observer status in the Frontex Management Board. Second, British non-participation in no way thwarted parliamentary scrutiny of this measure. To the contrary, not only has this agency been evaluated, the House of Lords even made recommendations as to how to enhance its accountability. In their Lordships' view, Frontex should be more accountable to the European Parliament through appearances by its Executive Director and Chairman of the Management Board before the European Parliament or its committees to discuss the agency's activities.<sup>1295</sup>

There are two key reasons why EU measures that do not apply to Britain are scrutinised nonetheless. On the one hand, should Britain ever decide to join the Schengen *acquis* regulating external border crossing, the sound functioning of Frontex would be crucial to the security of its borders. On the other hand, Parliament wishes to inform the debate and share its experience in the policing of borders with other Member States and thereby to exert a degree of influence on the direction this agency should take in future.

## **B. Passerelles and EU criminal law competence**

The activation in 2004 of the passerelle laid down in Article 67(2) TEC was not specifically discussed at Westminster, most probably because the shift to codecision and qualified majority voting were already covered by the opt-in mechanism. Both Houses of Parliament did, however, analyse the possible application of the passerelle envisaged in Article 42 TEU, which allowed the transfer of certain or all Third Pillar matters to the First Pillar and which attracted much media attention in Britain.

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<sup>1294</sup> ECJ, Case C-77/05, *United Kingdom v. Council*, Judgment of 18 December 2007, para. 63.

<sup>1295</sup> House of Lords, EU Committee, "FRONTEX: the EU external borders agency", *HL Paper 60*, 9<sup>th</sup> Report of Session 2007-08 of 5 March 2008, para. 91, p. 31.

The House of Commons found the use of the passerelle constitutionally important, because decisions on what constitutes a crime, how to sanction offences and what procedural rights the offenders are to enjoy lie at the core of national sovereignty. They agreed with the Government that any recourse to the passerelle would impinge on the British external competences and national security and would, for that reason, necessitate a safeguard, possibly in the form of an emergency brake. In particular, the Commons noted "with alarm" that Britain might not be able, for instance, to conclude bilateral agreements with third countries for the extradition of terrorists.<sup>1296</sup> Both Houses thought, nevertheless, that the existing opt-in would continue to apply and would provide protection for British interests, albeit not from amendments to measures already opted into, since they could be adopted by qualified majority.<sup>1297</sup>

Regarding the gains in democratic legitimacy from the passerelle, the Commons made a curious observation. It questioned the acceptability of the European Parliament codeciding on measures related to police and judicial cooperation in criminal matters because "most of its Members do not represent and are not answerable to the electorate of the UK".<sup>1298</sup> This view assumes that only British MEPs represent the British electorate, whereas all MEPs, at least in theory, represent all EU citizens.<sup>1299</sup> More significantly still, the House of Commons appears to undervalue the democratic credentials of the only European institution that is directly elected. The MPs preferred not to trade the certainty of the national veto for the uncertainty and potential risks arising from the passerelle.<sup>1300</sup> The peers were less sceptical insofar as they ascertained that the Commission's concerns about delays and difficulties caused by unanimity decision making were genuine.<sup>1301</sup>

Furthermore, the Lords examined the *Environmental Crimes* judgment of the Court of Justice. The Court's reasoning about the extent of Community competence in criminal matters was found wanting:

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<sup>1296</sup> House of Commons, European Scrutiny Committee, "Implementing the Hague Programme on justice and home affairs", *HC 34-xli incorporating HC 1614-I, 41<sup>st</sup> Report of Session 2005–06* of 17 November 2006, paras 31 and 49, pp. 11 and 14.

<sup>1297</sup> House of Commons, European Scrutiny Committee, "Implementing the Hague Programme on justice and home affairs", *HC 34-xli incorporating HC 1614-I, 41<sup>st</sup> Report of Session 2005–06* of 17 November 2006, para. 51, p. 14; House of Lords, EU Committee, "The criminal law competence of the European Community", *HL Paper 227, 42<sup>nd</sup> Report of Session 2005-06* of 28 July 2006, paras 152 and 178, pp. 44 and 49.

<sup>1298</sup> House of Commons, European Scrutiny Committee, "Implementing the Hague Programme on justice and home affairs", *HC 34-xli incorporating HC 1614-I, 41<sup>st</sup> Report of Session 2005–06* of 17 November 2006, para. 50, p. 14.

<sup>1299</sup> Article 14(2) TFEU begins with: "The European Parliament shall be composed of representatives of the Union's citizens".

<sup>1300</sup> House of Commons, European Scrutiny Committee, "Implementing the Hague Programme on justice and home affairs", *HC 34-xli incorporating HC 1614-I, 41<sup>st</sup> Report of Session 2005–06* of 17 November 2006, para. 56, p. 15.

<sup>1301</sup> House of Lords, EU Committee, "The criminal law competence of the European Community", *HL Paper 227, 42<sup>nd</sup> Report of Session 2005-06* of 28 July 2006, para. 169, p. 47.

[T]he Court did not seem to pay any great regard to the history and scheme set out in the Treaties. It is, we believe, significant that the EC Treaty contains no express power for the Community to adopt measures of criminal law or procedure and indeed contains provisions [...] which expressly exclude the possibility of Community legislation concerning "the application of criminal law". [...] The Court makes no reference to and apparently draws no inference from the fact that law-making powers and detailed rules for policing and criminal law, with special institutional consequences, have been set out within the TEU as a result of the agreements reached between Member States at Maastricht and at Amsterdam.<sup>1302</sup>

Moreover, the Court's test of a policy being one of the essential objectives of the Community, in the eyes of their Lordships, was not expressly limited to environmental protection. Any policy satisfying this criterion would entitle the Community to pass legislation on criminal offences and penalties.<sup>1303</sup> In relation to these considerations, the passerelle in Article 42 TEU was "most relevant" because it provided a means to communitarise European action in criminal law "expressly subject to national constitutional safeguards".<sup>1304</sup> Implicit in this submission is the Lords' message that the European Union, as a creation of its Member States, should abide by the intergovernmentally agreed boundaries of EU competences, in which national parliaments had a say during ratification procedures. In taking a cautious approach to the Commission's extensive interpretation of the *Environmental Crimes* case, the Lords concurred with the Government that the Commission should refrain from any hasty conversion of Third Pillar instruments into First Pillar instruments.<sup>1305</sup>

Given the deficiencies of the reasoning underlying the judgment, the Lords invited the Court of Justice to elucidate its position as soon as possible in the *Ship-Source Pollution* case,<sup>1306</sup> in which the Commission applied for the annulment of a Council framework decision obliging the Member States to prescribe criminal penalties for pollution caused by intentional, reckless or seriously negligent discharges of polluting substances by ships.<sup>1307</sup> The Commission's main argument was that the Community competence had been affected by virtue of the legal basis chosen. The Court ruled in favour of the Commission and annulled the framework decision on the ground that the Community legislature was competent to enact

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<sup>1302</sup> House of Lords, EU Committee, "The criminal law competence of the European Community", *HL Paper 227, 42<sup>nd</sup> Report of Session 2005-06* of 28 July 2006, paras 32-33, p. 16.

<sup>1303</sup> House of Lords, EU Committee, "The criminal law competence of the European Community", *HL Paper 227, 42<sup>nd</sup> Report of Session 2005-06* of 28 July 2006, para. 39, p. 18.

<sup>1304</sup> House of Lords, EU Committee, "The criminal law competence of the European Community", *HL Paper 227, 42<sup>nd</sup> Report of Session 2005-06* of 28 July 2006, para. 33, p. 16.

<sup>1305</sup> House of Lords, EU Committee, "The criminal law competence of the European Community", *HL Paper 227, 42<sup>nd</sup> Report of Session 2005-06* of 28 July 2006, paras 67, 90 and 94, pp. 25 and 30-31.

<sup>1306</sup> Case C-440/05, *Commission v. Council*, Judgment of 23 October 2007.

<sup>1307</sup> Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (*OJ L 255/164* of 30.9.2005).

measures to improve maritime transport safety. It was a Pyrrhic victory for the Commission, however, because the Court explicitly stated that "contrary to the submission of the Commission, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence".<sup>1308</sup>

### C. Europol

As regards the accountability of Europol, the House of Commons was concerned with the provision of the Lisbon Treaty calling on EU institutions to adopt regulations that would lay down the arrangements for national parliamentary scrutiny of Europol.<sup>1309</sup> Namely, if these regulations were binding on national parliaments and if the Court of Justice had jurisdiction over the compliance of national parliaments with these regulations, then Westminster's sovereignty would be in jeopardy.<sup>1310</sup>

The Commons' Home Affairs Committee, scrutinising the Commission's draft Europol Decision, demanded, a week before the first discussions in the Council, from the Government not to approve any changes in the status of Europol unless national parliaments were given a scrutiny role alongside the European Parliament.<sup>1311</sup> The demand fell on deaf ears. The Government replied that the existing provisions and those contained in the draft Decision "already provide for a significant amount of regulation at varying levels", under which, *inter alia*, the European Parliament had a voice on the Europol's budget, on new Europol systems of processing personal data, on implementing rules on storing additional personal details and on the establishment of relations with third bodies for the exchange of information.<sup>1312</sup>

In this House, the draft Europol Decision gave rise to a number of scrutiny reserve overrides. Reproaching the Government's agreement in the Council to a general approach on several chapters of the Decision contrary to the spirit of the Scrutiny Reserve Resolution, the House of Commons declared that the Government had failed to explain why the scrutiny reserve was breached. The Government had also not responded to a previous report of the European Scrutiny Committee and had not deposited a copy of the revised draft Decision in due time.<sup>1313</sup> When later asked

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<sup>1308</sup> Case C-440/05, *Commission v. Council*, Judgment of 23 October 2007, para. 70.

<sup>1309</sup> Articles 85(1)(3) and 88(2)(2) TFEU.

<sup>1310</sup> House of Commons, European Scrutiny Committee, "Subsidiarity, national parliaments and the Lisbon Treaty", *HC 563, 33<sup>rd</sup> Report of Session 2007-08* of 21 October 2008, para. 54, p. 16.

<sup>1311</sup> House of Commons, Home Affairs Committee, "Justice and Home Affairs issues at European Union level" – Vol. 1, *HC 76-I, 3<sup>rd</sup> Report of Session 2006-07* of 5 June 2007, paras 101 and 357, pp. 34 and 89.

<sup>1312</sup> House of Commons, Home Affairs Committee, "Government response to the Committee's third report: Justice and Home Affairs issues at European Union level", *HC 1021, 1<sup>st</sup> Special Report of Session 2006-07* of 23 October 2007, para. 8, pp. 3-4.

<sup>1313</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 5 December 2007", *HC 16-v, 5<sup>th</sup> Report of Session 2007-08* of 18 December 2007, paras 5.24, 5.26 and 5.27, pp. 28-29. See also: House of Commons, European Scrutiny Committee, "Documents considered

by a member of the European Scrutiny Committee why the Government claimed to have maintained the scrutiny reserve while concomitantly agreeing to a general approach in the Council, Tony McNulty, the Minister of State for Security, Counter-terrorism, Crime and Policing, replied:

[A]ll Member States would broadly agree the thrust, direction and some of the text of a document, and the reserve is about the fine detail and some of the amendments to those documents. [...] So I think you can agree the broad general thrust and political thrust of a document and maintain the reserve for the level of detail.<sup>1314</sup>

This confrontation with the Government exemplifies the hurdles that national parliaments frequently encounter in their scrutiny of EU decision making, which is all the more accentuated where dependence on the Government is excessive.

Furthermore, rather than Europol's accountability, the House of Commons was "much concerned" that serious crimes falling within the ambit of Europol's competence are listed without clearly defining their meaning and scope. The European Scrutiny Committee considered that the absence of common definitions of these crimes could, just as the European Arrest Warrant Framework Decision did, have adverse consequences in terms of legal certainty both for individuals and the Member States. Individuals might not know whether Europol was entitled to hold personal data about them and the Member States might not know whether they are obliged to provide Europol with such data.<sup>1315</sup>

Finally, reacting to the Commission's communication on the procedures for the scrutiny of Europol, the Government, the European Scrutiny Committee and the Home Affairs Committee rejected the proposal for a new interparliamentary committee at the EU level. The Government saw no added value in it and considered that the existing procedures were appropriate and permitted the stringent parliamentary scrutiny of Europol.<sup>1316</sup> The European Scrutiny Committee's view was that it was not for the Commission and the Council to decide how to organise interparliamentary cooperation but for national parliaments and the European

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by the Committee on 20 February 2008", *HC 16-xii, 14<sup>th</sup> Report of Session 2007–08* of 29 February 2008, para. 3.17, p. 28.

<sup>1314</sup> House of Commons, European Scrutiny Committee, "Draft Council Decision establishing the European Police Office (EUROPOL)", *HC 247-I, Minutes of Evidence of 16 January 2008*, Q7.

<sup>1315</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 7 February 2007", *HC 41-ix, 9<sup>th</sup> Report of Session 2006–07* of 15 February 2007, paras 6.17-6.18, p. 30. The Committee reiterated this concern several times. See House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 18 April 2007", *HC 41-xvii, 17<sup>th</sup> Report of Session 2006–07* of 1 May 2007, para. 5.22, p. 30; House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 9 May 2007", *HC 41-xxi, 21<sup>st</sup> Report of Session 2006–07* of 22 May 2007, para. 4.17, pp. 14-15; House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 20 February 2008", *HC 16-xii, 14<sup>th</sup> Report of Session 2007–08* of 29 February 2008, para. 3.18, p. 28.

<sup>1316</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 9 February 2011", *HC 428-xvi, 18<sup>th</sup> Report of Session 2010–11* of 23 February 2011, para. 10.14, p. 57.

Parliament.<sup>1317</sup> By contrast, rather than unifying parliamentary control at the EU level, national parliaments must preserve the freedom to express their opinions, decide how to act and how to be represented in such forums.<sup>1318</sup> The Home Affairs Committee emphasised that it already carried out regular scrutiny of Europol's activities through oral evidence sessions with the agency's Director, through visits to The Hague and through informal discussions with various Europol officers and police and customs bodies.<sup>1319</sup> Importantly, this Committee noted Europol's willingness to cooperate fully with it. The European Scrutiny Committee and the Home Affairs Committee then agreed that a new interparliamentary forum would be neither necessary, nor feasible nor desirable.<sup>1320</sup> Instead, the existing mechanisms of cooperation – such as joint committee meetings and *ad hoc* meetings organised by the European Parliament's Committee for Civil Liberties, Justice and Home Affairs (LIBE) – could be stepped up.<sup>1321</sup>

The House of Lords shared many of the concerns expressed by the House of Commons. Yet they put accent on a broader question of Europol's good governance as paramount to its proper functioning, in which respect they identified several shortcomings. Their Lordships were disenchanted enough to declare: "If the aim of those negotiating was to produce the best possible system of governance for Europol, we can only say that they have signally failed".<sup>1322</sup> The provisions of both the Europol Convention and the Europol Decision providing that the Director of Europol is appointed and dismissed by the Council were deemed unfortunate,<sup>1323</sup> because they allow for the involvement of political factors in these procedures.<sup>1324</sup> The Lords further criticised both the rule of the former Europol Convention that the Chairman of the Management Board was to be appointed by the Member State holding the Presidency and the rule of the revised draft Europol Decision that the Chairman was to be appointed by and from within the three Member States that have jointly

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<sup>1317</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 9 February 2011", *HC 428-xvi, 18<sup>th</sup> Report of Session 2010–11* of 23 February 2011, para. 10.18, p. 58.

<sup>1318</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 9 February 2011", *HC 428-xvi, 18<sup>th</sup> Report of Session 2010–11* of 23 February 2011, para. 10.19, p. 58.

<sup>1319</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 27 April 2011", *HC 428-xxiv, 26<sup>th</sup> Report of Session 2010–12* of 27 April 2011, para. 15.10, p. 72.

<sup>1320</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 27 April 2011", *HC 428-xxiv, 26<sup>th</sup> Report of Session 2010–12* of 27 April 2011, paras 15.8 and 15.11, pp. 71 and 72.

<sup>1321</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 9 February 2011", *HC 428-xvi, 18<sup>th</sup> Report of Session 2010–11* of 23 February 2011, para. 10.20, p. 58;

House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 27 April 2011", *HC 428-xxiv, 26<sup>th</sup> Report of Session 2010–12* of 27 April 2011, para. 15.11, p. 72.

<sup>1322</sup> House of Lords, EU Committee, "EUROPOL: coordinating the fight against serious and organised crime", *HL Paper 183, 29<sup>th</sup> Report of Session 2007–08* of 12 November 2008, para. 134, p. 41.

<sup>1323</sup> Articles 29(1) of the Europol Convention of 1995, as amended, and 38(1) and (7) of the Europol Decision of 2009.

<sup>1324</sup> House of Lords, EU Committee, "EUROPOL: coordinating the fight against serious and organised crime", *HL Paper 183, 29<sup>th</sup> Report of Session 2007–08* of 12 November 2008, para. 127, p. 39.

prepared the Council's 18-month programme.<sup>1325</sup> In their view, there was neither a logical connection between the nationality of the person best qualified to be Chairman and the three Presidency Member States, nor a reason to link the Chairman's term of office to the length of the Presidencies as well as excluding the other members of the Management Board from selecting their Chairman. Prompted by the smooth operation of Frontex's governing bodies,<sup>1326</sup> they recommended that the Europol Decision be amended before its entry into force to require the Chairman of the Management Board to be elected by and from among the members of the Board for a term of two years renewable once.<sup>1327</sup> The Council did not uphold the Lords' recommendation and the draft version was approved.

Another point of contestation in the Lords was the delimitation of the respective competences of the Director and the Management Board of Europol. The draft Europol Decision, as proposed by the Commission, envisaged two very similar provisions: on the one hand, that the Director shall be accountable to the Management Board for the performance of his duties and, on the other, that the Management Board shall "oversee the proper performance of the Director's duties".<sup>1328</sup> After comparing this legal solution to that applying to the Director of Frontex, where oversight by the Management Board is not mentioned, the Lords considered that the mention of oversight in the Europol Decision might have implied the Board's closer supervision over the Director, a solution that they did not favour because Europol's organs should retain a degree of autonomy in order to complement each other's tasks more efficiently.<sup>1329</sup> The Lords then recommended that the provision on the oversight be clarified so that the Director's accountability to the Board is restricted to the performance of his duties.<sup>1330</sup> Not only did the Council ignore this recommendation, it actually did quite the opposite. It extended the provision. The Europol Decision now in force stipulates that the Management Board shall oversee the Director's performance "including the implementation of Management Board decisions".<sup>1331</sup> However, it would have been illusory to expect the Lords to influence the Decision, because their report was published some seven months after the Council had reached a political agreement on the Europol Decision.

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<sup>1325</sup> Article 28(6) of the Europol Convention of 1995, as amended, and Article 37(2) of the Europol Decision of 2009. The provision of the Decision explicitly states that "the Chairperson shall no longer act as a representative of his or her respective Member State in the Management Board".

<sup>1326</sup> See also *supra* note 1295 of this Chapter.

<sup>1327</sup> House of Lords, EU Committee, "EUROPOL: coordinating the fight against serious and organised crime", *HL Paper 183, 29th Report of Session 2007–08* of 12 November 2008, paras 134 and 136, p. 41.

<sup>1328</sup> Articles 37(5) and 36(8)(a) of the Commission's Proposal for a Council Decision establishing the European Police Office (EUROPOL), COM(2006) 817 final of 20.12.2006.

<sup>1329</sup> House of Lords, EU Committee, "EUROPOL: coordinating the fight against serious and organised crime", *HL Paper 183, 29th Report of Session 2007–08* of 12 November 2008, para. 139, pp. 41–42.

<sup>1330</sup> House of Lords, EU Committee, "EUROPOL: coordinating the fight against serious and organised crime", *HL Paper 183, 29th Report of Session 2007–08* of 12 November 2008, para. 148, p. 43.

<sup>1331</sup> Article 37(9)(b) of the Europol Decision of 2009.

The European Parliament, in its opinion given during the consultation procedure leading to the Europol Decision, did not address the Lords' preoccupations either. It did, however, attempt to insert two amendments in the Decision that would have been favourable to national parliaments. First, the European Parliament requested the right not only to be informed of Europol's annual budget, work programme and general annual report, as the Commission and the Council preferred, but also to examine them "where necessary in association with national parliaments".<sup>1332</sup> Second, the European Parliament inserted a new clause that would oblige the Chairman of the Management Board or the Director of Europol to present the agency's priorities for the coming year before a joint committee comprising members of the European and national parliaments "in order to guarantee a democratic debate with civil society and a better control over its activities".<sup>1333</sup> In 2002, the Commission had itself proposed the same solution with a view to remedying the indirect and fragmented nature of parliamentary control over Europol.<sup>1334</sup> The House of Lords, although initially adhering to the Commission's proposal,<sup>1335</sup> changed its stance later and rejected the possibility of a joint committee controlling Europol, because in a Union with 27 Member States any such body would be unwieldy. In the end, the Council retained neither of the European Parliament's amendments, so national parliaments were left entirely outside the final Europol Decision.

For the House of Lords, this is not particularly worrisome, because the change in Europol's status "will not of course in any way affect the ability of this Parliament, through its Select Committees, to continue to hold the Government to account for their part in the activities of Europol".<sup>1336</sup> It must, instead, be for the European Parliament to decide whether and how it wishes to involve national parliaments in the supervision of Europol.<sup>1337</sup> That the Lords support the European Parliament's primary role in controlling Europol can also be deduced from the EU Committee's correspondence with the Government. This Committee acknowledged that were Europol to be funded by the Union instead of by the Member States, the national parliaments' prerogative of budgetary control over this agency would be ceded to the European Parliament. When more information was sought on this issue, the Government confirmed the Committee's interpretation and vowed to supply the competent scrutiny committees with periodical reports and information on any new

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<sup>1332</sup> Amendment 39 of the European Parliament legislative resolution of 17 January 2008 on the proposal for a Council decision establishing the European Police Office (Europol), (*OJ C 41 E/111* of 19.2.2009).

<sup>1333</sup> Amendment 50 of the European Parliament legislative resolution of 17 January 2008 on the proposal for a Council decision establishing the European Police Office (Europol), (*OJ C 41 E/111* of 19.2.2009).

<sup>1334</sup> European Commission, Communication from the Commission to the European Parliament and the Council "Democratic Control over Europol", COM(2002)95 final, 26.2.2002, p. 13.

<sup>1335</sup> House of Lords, EU Committee, "Europol's role in fighting crime", *HL Paper 43, 5<sup>th</sup> Report of Session 2002-03* of 28 January 2003, para. 40, p. 14.

<sup>1336</sup> House of Lords, EU Committee, "EUROPOL: coordinating the fight against serious and organised crime", *HL Paper 183, 29<sup>th</sup> Report of Session 2007-08* of 12 November 2008, para. 175, p. 47.

<sup>1337</sup> House of Lords, EU Committee, "EUROPOL: coordinating the fight against serious and organised crime", *HL Paper 183, 29<sup>th</sup> Report of Session 2007-08* of 12 November 2008, para. 174, p. 47.

developments in this dossier. The Committee then stated that it was "glad" that the Council had foreseen Union financing of Europol and satisfied itself with receiving further information on the progress of negotiations from the Government.<sup>1338</sup> The Lords, thus, accepted that the control over Europol should become the primary task of the European Parliament.

Ultimately, their Lordships refused the Commission's idea of setting up a new interparliamentary forum for the scrutiny of Europol as this would bring no added value. Alternatively, a wide variety of existing joint meetings between the national and European parliaments could be used as suitable formats for continued collaboration. What is more, the peers have always received "very full cooperation" from this agency and its officials, especially its Directors.<sup>1339</sup> Although unfavourable to the Commission's proposal, the Lords were wary of the European Parliament 'occupying' their scrutiny territory:

[W]e would not think it sensible to leave the field free for the European Parliament to move ahead with their own proposed arrangements. To do so would risk the role of national parliaments, highly desirable in a field where national authority remains important, being marginalised.<sup>1340</sup>

Similarly, they vehemently defended the principle of the constitutional autonomy of national parliaments against the possibility of the EU enacting regulations that would determine the modalities of interparliamentary cooperation.<sup>1341</sup>

### **3.4.2. Common Foreign and Security Policy and Common Security and Defence Policy**

The British Parliament recognises the importance of a continued democratic oversight of EU foreign, security and defence policies. The terms of reference and scrutiny reserve resolutions of both Houses cover draft legal instruments adopted under the Second Pillar. Despite this, Parliament's scrutiny of this area is more limited than in the Community area. There are two principal reasons for this.

First, since urgency and secrecy are inherent components of decision making in CFSP, many decisions in this area are not expressed in formal documents and do not, therefore, lend themselves well to document-based scrutiny operated by Westminster.<sup>1342</sup> Both Houses, nonetheless, claim generally to have sufficient time

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<sup>1338</sup> House of Lords, EU Committee, "Correspondence with Ministers: May to October 2007", *HL Paper 92, 11<sup>th</sup> Report of Session 2008-09* of 28 May 2009, pp. 270, 272-273.

<sup>1339</sup> House of Lords, EU Sub-Committee F – Home Affairs, "Correspondence with Ministers – December 2010 to April 2011", p. 6.

<sup>1340</sup> House of Lords, EU Sub-Committee F – Home Affairs, "Correspondence with Ministers – December 2010 to April 2011", p. 6.

<sup>1341</sup> This possibility is envisaged in Article 88(2)(2) TFEU.

<sup>1342</sup> Ware, Richard and Wright, Joanne. "Second Pillar challenges: foreign, security and defence policies," in *Britain in the European Union: law, policy and Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 2004: 179 and 194.

for the scrutiny of CFSP decisions.<sup>1343</sup> The Commons do not even expect the Government to allow it to access operationally sensitive material on CSDP missions and documents marked "restricted" or "confidential".<sup>1344</sup> Scrutiny overrides occur more frequently, too. This does not, however, release the Government from the duty to appear before competent parliamentary committees and explain the reasons for overriding Parliament's right of pronouncement. The dialogue between Parliament and the Government is geared towards obtaining information on CFSP activities and the action to be taken on behalf of Britain rather than towards directing the Government to follow strict guidelines.

Second, a more passive attitude towards the scrutiny of CFSP affairs and, subsequently, greater Government leeway stem from the British constitutional rule that foreign affairs, including the deployment of the Armed Forces, are exercised as part of the royal prerogative. Under it, the Government has full freedom of action, unfettered by Parliament's interference in any circumstance. Parliamentary approval of Britain's engagement in military or civilian operations is not a legal requirement. Nonetheless, there have been a number of developments in this direction.

In response to the public outcry over the legality of the invasion of Iraq in 2003,<sup>1345</sup> the debate was spurred in Westminster and, with Gordon Brown in power, also in Whitehall, on ways to 'de-sanctify' the royal prerogative and subject Government decisions on the deployment of the British Armed Forces abroad to a degree of parliamentary control. Arguing in favour of the statutory regulation of all executive powers enjoyed by ministers under the royal prerogative,<sup>1346</sup> the House of Commons' Public Administration Committee declared in March 2004:

[W]e believe that any decision to engage in armed conflict should be approved by Parliament, if not before military action then as soon as possible afterwards. In these most serious of cases, the decision whether or not to consult Parliament should never be dependent on the generosity or good will of government. A mere convention is not enough when lives are at stake. The increasing frequency of conflict in recent

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<sup>1343</sup> COSAC Secretariat, Annex to the 4<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXIV COSAC meeting held in London, 9-10 October 2005, pp. 133 and 138.

<sup>1344</sup> COSAC Secretariat, Annex to the 4<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXIV COSAC meeting held in London, 9-10 October 2005, p. 139.

<sup>1345</sup> The public outcry gave rise to a call for the strengthening of the accountability of the Government to Parliament through the establishment of a Parliamentary Commission of Inquiry to examine matters of the highest significance and greatest public concern. See House of Commons, Public Administration Committee, "Parliamentary commissions of inquiry", *HC 473, 9<sup>th</sup> Report of Session 2007–08* of 30 May 2008, para. 9, p. 6. See also a previous broader analysis in: House of Commons, Public Administration Committee, "Government by inquiry", *HC 51-I, 1<sup>st</sup> Report of Session 2004–05* of 3 February 2005.

<sup>1346</sup> The royal prerogative was described as follows: "This is unfinished constitutional business. The prerogative has allowed powers to move from monarch to ministers without Parliament having a say in how they are exercised. This should no longer be acceptable to Parliament or the people". House of Commons, Public Administration Committee, "Taming the prerogative: strengthening ministerial accountability to Parliament", *HC 422, 4<sup>th</sup> Report of Session 2003–04* of 16 March 2004, para. 61, p. 17.

years is proof of the importance of ensuring that, when the country takes military action, Parliament supports the government in its decision.<sup>1347</sup>

Illustrative of the Commons' insistence on a firm statute-based guarantee of parliamentary involvement in military decisions is its answer to the Government's concern that "there could be some very serious and undesirable consequences of a failure to gain parliamentary approval for an operation which was underway". For them, this is "the price of democracy, and is a risk that Prime Ministers should have to weigh up before taking the extraordinary step of entering into a conflict without a prior mandate from the House of Commons".<sup>1348</sup>

In July 2006, the House of Lords' Constitution Committee, having weighed the arguments in favour and against parliamentary involvement in waging war,<sup>1349</sup> disagreed with the House of Commons on the need for legislation. Exactly because the Government's exercise of the royal prerogative for the deployment of the Armed Forces is "outdated and should not be allowed to continue as the basis for legitimate war-making in our 21<sup>st</sup> century democracy",<sup>1350</sup> their Lordships preferred the less rigid option of a "parliamentary convention",<sup>1351</sup> whereby the Government would still need the approval of the House of Commons, for instance by means of a resolution laid before it by the Government.<sup>1352</sup>

Informed by Parliament's considerations, the Government, in its White Paper *Governance of Britain* published in March 2008, recommended that parliamentary approval for deploying the Armed Forces should be set out in a detailed resolution of the House of Commons, although it did not rule out the possibility of legislation in the future. Such a resolution would admit exceptions to enable the Government to act swiftly in an emergency or carry out a secret operation, which would be vital to the protection of British national security and the effectiveness and safety of British

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<sup>1347</sup> House of Commons, Public Administration Committee, "Taming the prerogative: strengthening ministerial accountability to Parliament", *HC 422, 4<sup>th</sup> Report of Session 2003–04* of 16 March 2004, para. 57, p. 16.

<sup>1348</sup> House of Commons, Public Administration Committee, "Constitutional renewal: draft Bill and White Paper", *HC 499, 10<sup>th</sup> Report of Session 2007–08* of 4 June 2008, para. 75, p. 25.

<sup>1349</sup> The benefits of increasing parliamentary involvement in decisions on the deployment of troops abroad would include: strengthened legitimacy of the operations; clarifying that the source of sovereign power is Parliament and not the monarch; improved accountability and transparency of decisions; and greater military morale. The drawbacks are: the undermined effectiveness of the operations and working in coalitions with other states; possible effect on the strategic and tactical elements of the operations; the necessity of withholding sensitive security-related information from Parliament would impair its ability to reach an informed opinion; difficulties surrounding the interpretation of language used in legislation on military deployments; reducing military morale for fear of the illegality of operations.

<sup>1350</sup> House of Lords, Constitution Committee, "Waging war: Parliament's role and responsibility", *HL Paper 236-I, 15<sup>th</sup> Report of Session 2005–06* of 27 July 2006, para. 103, p. 41.

<sup>1351</sup> See *supra* note 1080 in *fine* of this Chapter.

<sup>1352</sup> House of Lords, Constitution Committee, "Waging war: Parliament's role and responsibility", *HL Paper 236-I, 15<sup>th</sup> Report of Session 2005–06* of 27 July 2006, para. 108, p. 42.

forces.<sup>1353</sup> Up until 2011, the resolution has not been adopted. Still, this does not gravely impede parliamentary input, because successive Governments have – through statements, questions and debates – "undertaken to keep Parliament informed, both of the decision to use force and of the progress of military campaigns".<sup>1354</sup> Let us now examine how the scrutiny of CFSP and CSDP initiatives is approached in each of the Houses.

Analysing the post-Lisbon CFSP decision making, the Foreign Affairs Committee of the House of Commons welcomed the Commission's loss of the right to make proposals in CFSP "because it represents an important assertion of the intergovernmental nature" of the cooperation in this field.<sup>1355</sup> In line with this reasoning, the Committee was alerted by the introduction in the Lisbon Treaty of the possibility of adopting qualified majority decisions on proposals made by the High Representative.<sup>1356</sup> It lamented the lack of clarity as to whether such decisions would set the policy in CFSP or merely implement a prior European Council strategy decided unanimously. No further query was made after receiving assurances from the Government and Javier Solana, the former High Representative, that qualified majority voting applies only once unanimous agreement has been reached among the Member States to pursue certain action, as well as that the High Representative's power of proposal refers only to the concretisation and not to the definition of CFSP policies.<sup>1357</sup> The Committee concluded that CFSP under the Lisbon Treaty would highly likely remain an intergovernmental area driven by the Member States, which it supported.<sup>1358</sup> This conforms to a statement it made in 2002 that there is "no reason" to engage the European Parliament in scrutinising what has now become CSDP, because it is the governments that decide on the deployment of military capabilities abroad. The democratic supervision of this area should rather be exerted

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<sup>1353</sup> UK Ministry of Justice, "The governance of Britain – Constitutional renewal", Cm 7342-I, paras 215-216, pp. 50-51. See also a previous consultation document in: UK Ministry of Justice, "The governance of Britain – War powers and treaties: limiting executive powers", Cm 7239, Consultation Paper no. CP26/07 of 25 October 2007.

<sup>1354</sup> Taylor, Claire and Kelly, Richard. "Parliamentary approval for deploying the Armed Forces: an introduction to the issues," *House of Commons Library, Research Paper no. 08/88* of 27 November 2008, p. 8.

<sup>1355</sup> House of Commons, Foreign Affairs Committee, "Foreign policy aspects of the Lisbon Treaty", *HC 120-I, 3<sup>rd</sup> Report of Session 2007–08* of 20 January 2008, para. 97, pp. 38-39.

<sup>1356</sup> Article 31(2) TEU lists four exceptions to unanimity voting in CFSP, in respect of which qualified majority voting applies instead. These are: (a) decisions defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives; (b) decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or on that of the High Representative; (c) decisions implementing a decision defining a Union action or position; and (d) appointing a special representative.

<sup>1357</sup> House of Commons, Foreign Affairs Committee, "Foreign policy aspects of the Lisbon Treaty", *HC 120-I, 3<sup>rd</sup> Report of Session 2007–08* of 20 January 2008, paras 102-105, pp. 40-41.

<sup>1358</sup> House of Commons, Foreign Affairs Committee, "Foreign policy aspects of the Lisbon Treaty", *HC 120-I, 3<sup>rd</sup> Report of Session 2007–08* of 20 January 2008, para. 118, p. 45. See also *ibid.*, para. 220, p. 76.

through regular meetings of members of defence, foreign affairs and European affairs committees of national parliaments.<sup>1359</sup>

Reporting in 2000, the House of Lords stressed that defence is the competence of national governments and their accountability a matter for national parliaments. However, the Lords disagreed with the Government that national parliaments were the sole forum of accountability in this field:

[A]ccountability to national parliaments need not, as the Secretary of State seems to imply, exclude scrutiny in some shape from other multinational parliaments such as the WEU Assembly, the North Atlantic Assembly and the European Parliament when their institutions have a role to play. Partnership with democratic bodies at the European level will be important.<sup>1360</sup>

Two years later, they noted the European Parliament's aspiration to take over the scrutiny competence of the WEU Assembly and reaffirmed the inadequacy of the democratic accountability of CSDP and warned that it had to be addressed at both national and European levels if it were to enjoy the widespread support of EU citizens.<sup>1361</sup> Concomitantly, they rejected proposals to create a European defence assembly, because "a number of informed parliamentary assemblies" already existed.<sup>1362</sup>

In 2005, the Lords substantiated their argument about the imperfections of the scrutiny procedures in this field on the example of the European Defence Agency, established in July 2004 to improve European military capabilities and promote Union-wide armament cooperation. They assessed that, while the agency rendered account to the Council and a Steering Board, it was unclear how the Steering Board reported to the Council, which potentially hindered Westminster's scrutiny of Council decisions related to this agency. They directed their criticism at the Government, inviting it to explain how it intended to ensure that parliamentary scrutiny was not sidelined.<sup>1363</sup>

A year later, their Lordships reviewed their scrutiny of CFSP and held that national parliaments had a "pivotal role to play in holding their own executives to account for the EU's foreign policy", because the European Parliament's function was

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<sup>1359</sup> House of Commons, European Scrutiny Committee, "Democracy and accountability in the EU and the role of national parliaments" – Vol. 1, *HC 152-xxxiii-1*, 33<sup>rd</sup> Report of Session 2001-02 of 21 June 2002, para. 147, pp. 57-58.

<sup>1360</sup> House of Lords, EU Committee, "The Common European Policy on Security and Defence", *HL Paper 101*, 15<sup>th</sup> Report of Session 1999-00 of 3 August 2000, paras 92 and 106.

<sup>1361</sup> House of Lords, EU Committee, "The European Policy on Security and Defence" – Vol. 1, *HL Paper 71(I)*, 11<sup>th</sup> Report of Session 2001-02 of 7 February 2002, para. 74.

<sup>1362</sup> House of Lords, EU Committee, "The European Policy on Security and Defence" – Vol. 1, *HL Paper 71(I)*, 11<sup>th</sup> Report of Session 2001-02 of 7 February 2002, para. 74.

<sup>1363</sup> House of Lords, EU Committee, "European Defence Agency", *HL Paper 76*, 9<sup>th</sup> Report of Session 2004-05 of 16 March 2005, paras 18 and 22, pp. 8-9.

principally advisory.<sup>1364</sup> National parliaments, hence, directly legitimise EU action in this field. What came to light as a major barrier to effective scrutiny, however, was the speed of decision making and the fact that many important policy developments were strategic and political rather than legislative in nature.<sup>1365</sup> To mitigate this, the EU Committee usually agrees with the Government informally on ways to rectify these defects of the scrutiny mechanism. Among them are biannual oral evidence sessions with the Minister for Europe on current developments in the Union's foreign and defence policies, which are typically held after the June and December European Council meetings.<sup>1366</sup> There is also a written scrutiny procedure, according to which a note is sent to all members of the Lords' EU Sub-committee C – Foreign Affairs, Defence and Development Policy proposing a course of action, which is taken if there are no objections.<sup>1367</sup>

Furthermore, both the Lords and the Commons see a legitimising role for national parliaments especially in light of the disappearance of the WEU Assembly.<sup>1368</sup> They agree on the desirability of joint meetings with the European Parliament, which would be held under the leadership of national parliaments. These interparliamentary meetings should focus on the substance of the Union's policies and missions and benefit from hearings not only with national government officials but also with the High Representative, EU Special Representatives, staff of the External Action Service, the Commission, the Council, representatives of the Political and Security Committee and other relevant actors. The meetings could adopt conclusions to which the said institutions or officials would be invited to give formal responses. However, neither of the two Houses deems COSAC fit to organise these joint meetings, not least because COSAC membership is drawn from European affairs committees, which do not necessarily harbour expertise in foreign and defence matters. In January 2011, the competent committees of both the Commons and the Lords called for the establishment of an EU Interparliamentary Conference of Foreign Affairs, Defence and Security (COFADS)<sup>1369</sup> on the basis of the Lisbon

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<sup>1364</sup> House of Lords, EU Committee, "Review of scrutiny: Common Foreign & Security Policy", *HL Paper 100, 19<sup>th</sup> Report of Session 2005-06* of 30 January 2006, para. 2, p. 7.

<sup>1365</sup> House of Lords, EU Committee, "Review of scrutiny: Common Foreign & Security Policy", *HL Paper 100, 19<sup>th</sup> Report of Session 2005-06* of 30 January 2006, paras 66 and 84, pp. 21 and 26.

<sup>1366</sup> House of Lords, EU Committee, "Review of scrutiny: Common Foreign & Security Policy", *HL Paper 100, 19<sup>th</sup> Report of Session 2005-06* of 30 January 2006, paras 124-126, p. 35.

<sup>1367</sup> COSAC Secretariat, Annex to the 4<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXIV COSAC meeting held in London, 9-10 October 2005, p. 131.

<sup>1368</sup> House of Commons, European Scrutiny Committee, "Convention on the Future of Europe and the role of national parliaments", *HC 63-xxiv, 24<sup>th</sup> Report of Session 2002-03* of 16 June 2003, para. 43, p. 14; COSAC Secretariat, Annex to the 14<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLVI COSAC meeting held in Brussels, 25-26 October 2010, pp. 253-255.

<sup>1369</sup> House of Commons, Foreign Affairs Committee, "Future interparliamentary scrutiny of EU foreign, defence and security policy", *HC 697, 1<sup>st</sup> Report of Session 2010-11* of 18 January 2011, Annex, p. 8;

Treaty.<sup>1370</sup> This body would be composed of both national and European parliamentarians. It would convene biannually in Brussels and last no more than one and a half days.

### **3.4.3. EU international agreements**

As a rule, whenever an international agreement concluded between the EU and a third country or international organisation requires national ratification Parliament may oppose it under the formalised Ponsonby Rule described above. Apart from this possibility of *ex post* pronouncement, EU international agreements can, in both Houses of Parliament, in principle be the subject of *ex ante* scrutiny in committee or on the Floor of the House.<sup>1371</sup>

Yet Parliament has limited oversight of the Government's activities before the Council authorises the Commission to open negotiations on international agreements, especially in the sphere of exclusive EU competences. The negotiating mandates are virtually 'exempted' from scrutiny due to their confidentiality. Only when negotiations are completed and the Council is invited to approve and sign the agreement does Parliament intervene.

In 2000, as part of the House of Commons' inquiry into Parliament's treaty-making powers, Jimmy Hood, the then Chairman of the European Scrutiny Committee, made a case for Parliament's closer association in the process of negotiating treaties, since they have generally become more technical, detailed and "more analogous to legislation than to the formation of grand alliances" of the kind forged in the 19<sup>th</sup> century. Treaties concluded by the EU are no better. The crux of the problem lies in the following:

[O]ften the first document available for scrutiny is the text of the final agreement, long after Parliament could bring any real influence to bear on the process, and often with very little time available for scrutiny because the parties are anxious to ratify the treaty.<sup>1372</sup>

In practice, though, the Government may reveal the main points of the mandate as long as negotiations are not undermined.<sup>1373</sup>

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House of Lords, EU Committee, "Future interparliamentary scrutiny of EU foreign, defence and security policy", *HL Paper 85, 7<sup>th</sup> Report of Session 2010-11* of 24 January 2011, Appendix 1, p. 8.

<sup>1370</sup> Article 10 of Protocol no. 1 on the role of national parliaments in the European Union permits, *inter alia*, the organisation of "interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy".

<sup>1371</sup> Thorp, Arabella. "Parliamentary scrutiny of treaties," *House of Commons Library, Standard Note no. SN/LA/4693* of 25 September 2009, p. 12.

<sup>1372</sup> House of Commons, Procedure Committee, "Parliamentary scrutiny of treaties", *HC 210, 2<sup>nd</sup> Report of Session 1999-2000* of 26 July 2000, para. 16.

<sup>1373</sup> COSAC Secretariat, Annex no. 1 to the 10<sup>th</sup> bi-annual report by COSAC: replies to the questionnaire by the national parliaments and the European Parliament, prepared for XL COSAC meeting held in Paris, 3-4 November 2008, pp. 144 and 148.

The scrutiny of EU accession treaties is performed by monitoring the progress of the candidate country at each stage prior to accession on the basis of documents drafted by the Commission for the Council. These include progress reports, reports on pre-accession assistance, and decisions on moving from one stage to the next. Post-accession monitoring was carried out, for instance, in the cases of Bulgaria and Romania. As the effect of the ratification of an EU accession treaty is to modify British law, an amendment to the European Communities Act of 1972 must be enacted beforehand. This is done by the regular legislative procedure, which requires no special majorities.<sup>1374</sup>

#### 3.4.4. Open method of coordination

Besides the possibility of questioning the Government, the House of Commons does not scrutinise arrangements made under the open method of coordination, as "the European Council never intended that national parliaments should be directly involved".<sup>1375</sup> However, given the MPs' strong objection to an imperative interpretation of the Lisbon Treaty's provision on national parliamentary contribution to the good functioning of the Union, one should not conclude that the Commons let their agenda be determined either by the European Council or any other EU institution.

Conversely, the House of Lords scrutinises all EU documents pertaining to the Lisbon Agenda and the open method of coordination, such as Commission staff working papers and implementation reports.<sup>1376</sup> Acknowledging in March 2006 that the open method of coordination had thereto had "few successes",<sup>1377</sup> the Lords were "struck" by the lack of parliamentary debates on the Lisbon Agenda. They advised the following:

[P]arliamentary committees should keep a watching brief on the Agenda [...] We consider that parliamentary debates on the Agenda would help to raise its profile and engage citizens in the relative economic performance of the Member States and the urgency and desire for economic reform in Europe. We urge members of both Houses to seek regular debates on the Agenda and ask the Government to consider formally laying the annual Action Plan before Parliament.<sup>1378</sup>

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<sup>1374</sup> COSAC Secretariat, Annex to the 9<sup>th</sup> bi-annual report by COSAC: replies to the questionnaire by the national parliaments and the European Parliament, prepared for XXXIX COSAC meeting held in Bled-Brdo pri Kranju, 7-8 May 2008, pp. 213-214.

<sup>1375</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 146.

<sup>1376</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 152.

<sup>1377</sup> House of Lords, EU Committee, "A European strategy for jobs and growth", *HL Paper 137*, 28<sup>th</sup> Report of Session 2005–06 of 16 March 2006, para. 49, p. 21.

<sup>1378</sup> House of Lords, EU Committee, "A European strategy for jobs and growth", *HL Paper 137*, 28<sup>th</sup> Report of Session 2005–06 of 16 March 2006, para. 79, p. 28-29.

### 3.4.5. Comitology

For both Houses of Parliament, the main point of focus is the adequacy of the delegation of power in comitology procedures. The Commons have concluded that the 2006 reform of comitology does not infringe the Treaty basis for comitology as long as it does not confer on the European Parliament the power to adopt implementing measures.<sup>1379</sup> Particular decisions adopted by comitology, however, are not the subject of specific reports.<sup>1380</sup>

The House of Lords was arguably more favourable to the European Parliament. It commented in 1999 that:

[T]he role of the European Parliament in bringing the Council and Commission to account is an important democratic safeguard. We have always been sympathetic to the Parliament's wish to be more involved in the comitology process. The ability of the Parliament to scrutinise legislation is an important feature of the Community's democratic structure. There is a case for a greater involvement on the part of the Parliament in relation to delegated legislation, so long as this is consistent with maintaining the institutional balance and does not jeopardise speedy and effective law-making where this is necessary. We remain, however, of the view that oversight of implementing legislation is primarily a matter for the Member States. [...] We do not believe that it would be practicable for the European Parliament to be able to halt the process in relation to *any* proposal, nor do we think that this is necessary. The European Parliament does not at the moment have the same expertise and experience to enable it to judge whether a proposal is feasible or whether it is (politically) acceptable at the national level. We see the way forward, at least at the present time, as being to improve the position of the Parliament in the scrutiny of comitology procedure by requiring timely provision of information to it and giving it the right to be consulted.<sup>1381</sup>

The Lords do not demand the systematic deposit and scrutiny of all comitology decisions, but only of those that are likely to require a decision by the Council or those that are of "such political or practical significance that they might cause the Minister to be concerned if he or she were to learn of them first from the newspapers".<sup>1382</sup>

In their later analyses, their Lordships unequivocally welcomed a stronger European Parliament role in comitology and criticised the provision permitting the Commission to bypass objections by the Council and the European Parliament, because that was inconsistent with the ubiquitous strife to rectify the democratic

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<sup>1379</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 12 July 2006", *HC 34-xxxv*, *35<sup>th</sup> Report of Session 2005–06* of 19 July 2006, para. 10.10, p. 40.

<sup>1380</sup> COSAC Secretariat, Annex to the 6<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVI COSAC meeting held in Helsinki, 19-21 November 2006, p. 201.

<sup>1381</sup> House of Lords, EU Committee, "Delegation of powers to the Commission: reforming comitology", *HL Paper 23*, *3<sup>rd</sup> Report of Session 1998-99* of 18 February 1999, paras 145-147 (emphasis in original).

<sup>1382</sup> House of Lords, EU Committee, "Delegation of powers to the Commission: reforming comitology", *HL Paper 23*, *3<sup>rd</sup> Report of Session 1998-99* of 18 February 1999, paras 181 and 183.

deficit.<sup>1383</sup> In practice, the Lords scrutinise individual comitology decisions only exceptionally, mostly to ensure that legislative power is delegated appropriately as well as to monitor those referred back to the Council.<sup>1384</sup> Eventually, having called upon the Convention of the Future of Europe to consider enhancing the European Parliament's role in scrutinising comitology decision making, the peers seem to invite their European counterparts to take the lead in the supervision of comitology.<sup>1385</sup>

### 3.5. Addressee of scrutiny

The primary addressee of the European scrutiny of both Houses of Parliament is the British Government. This is not only understandable but also constitutionally necessary since, as the Commons rightly observed, "individual Council members acting collectively and doing so largely in secret cannot effectively be held to account by another organisation".<sup>1386</sup> What is more, the Commons thought that the Council of Ministers' secretive style of decision making was an affront to democracy comparable to the North Korean legislature, allegedly the only other institution in the world to legislate in private.<sup>1387</sup>

The House of Commons describes the goals and influence of its scrutiny system in the following terms:

The purpose of this system is to ensure proper accountability by ministers for the policy they have formulated in response to each European document and the line they intend to follow in negotiations in the Council. The relevant Government department, when preparing its negotiating line on a document to come before Council, will have to have regard to the likely views of the European Scrutiny Committee and its requests for information, as well as to the views of the House on the Government's position, and ministers will have to be prepared to defend their position under close questioning and in debate. The views of the Committee and the House are therefore influential in shaping the Government's policy on each European document. The system is designed to concentrate on the accountability of UK ministers. Though ministers are required to give accounts [*sic*] of the agenda before

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<sup>1383</sup> House of Lords, EU Committee, "Reforming Comitology", *HL Paper 135, 31<sup>st</sup> Report of Session 2002-03* of 8 July 2003, paras 24 and 26, p. 11.

<sup>1384</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15, 1<sup>st</sup> Report of Session 2002-03* of 18 December 2002, paras 87 and 89, p. 22.

<sup>1385</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15, 1<sup>st</sup> Report of Session 2002-03* of 18 December 2002, para. 91, p. 23.

<sup>1386</sup> House of Commons, European Scrutiny Committee, "Democracy and accountability in the EU and the role of national parliaments" – Vol. 1, *HC 152-xxxiii-I, 33<sup>rd</sup> Report of Session 2001-02* of 21 June 2002, para. 14, p. 16.

<sup>1387</sup> House of Commons, European Scrutiny Committee, "Democracy and accountability in the EU and the role of national parliaments" – Vol. 1, *HC 152-xxxiii-I, 33<sup>rd</sup> Report of Session 2001-02* of 21 June 2002, para. 18, p. 17.

each Council meeting and a report of the outcomes, *the system does not seek to exert direct influence over decisions at EU level in the relevant institutions.*<sup>1388</sup>

The Commons did, however, recognise in June 2002 that their scrutiny "may have much wider influence" through the dissemination of information and analyses of EU proposals. They are also aware that they "may have an informal influence" on EU institutions, including the Commission, but warn that this should not deflect from their main role of influencing British ministers.<sup>1389</sup>

That respective functions of the European Parliament and Westminster are separate is also vindicated in the Commons' explanation that the aim of joint parliamentary meetings is "to increase the ability of national parliaments and the European Parliament to carry out their own tasks rather than for one to interfere in the work of the other".<sup>1390</sup> For example, the Commons saw no added value in COSAC subsidiarity checks, since the proposals would have been examined for compliance with subsidiarity and proportionality as part of the regular scrutiny process anyway.<sup>1391</sup> Similarly, in the Lords' eyes, interparliamentary meetings "can be useful but their usefulness is ephemeral" due to a lack of dialogue in between these meetings.<sup>1392</sup>

In the House of Lords, already in 1974, Lord Maybray-King, the Chairman of the then newly created European Communities Committee, was led by the thought that Britain's membership of the Community presupposed the transfer of a measure of national sovereignty and that the chief purpose of parliamentary scrutiny was, hence, to influence British ministers prior to Council discussions and examine their action "in their Community legislative function".<sup>1393</sup> This idea of restoring or even substituting sovereignty through scrutiny has since lain at the heart of Westminster's dealing with EU matters.<sup>1394</sup> Importantly, another purpose of scrutiny was to inform

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<sup>1388</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 144 (emphasis added).

<sup>1389</sup> House of Commons, European Scrutiny Committee, "European scrutiny in the Commons", *HC 152-xxx, 30<sup>th</sup> Report of Session 2001-02* of 11 June 2002, paras 7 and 110, pp. 10 and 38.

<sup>1390</sup> House of Commons, European Scrutiny Committee, "Convention on the Future of Europe and the role of national parliaments", *HC 63-xxiv, 24<sup>th</sup> Report of Session 2002-03* of 16 June 2003, para. 36, p. 13.

<sup>1391</sup> COSAC Secretariat, Annex to the 7<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVII COSAC meeting held in Berlin, 13-15 May 2007, p. 128.

<sup>1392</sup> COSAC Secretariat, Annex to the 6<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVI COSAC meeting held in Helsinki, 19-21 November 2006, p. 211.

<sup>1393</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15, 1<sup>st</sup> Report of Session 2002-03* of 18 December 2002, Appendix 3, p. 46.

<sup>1394</sup> Baines, Priscilla. "The evolution of the scrutiny system in the House of Commons," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 54 and 57; Cygan, Adam. "The EU Constitutional Treaty from the perspective of the Parliament of the United Kingdom: an improved framework for parliamentary scrutiny?," in *National and regional parliaments in the European constitutional order*, by

British MEPs of the views of their counterparts in London before the Council consults the European Parliament.<sup>1395</sup> The notion of cross-level influence was, thus, not absent.

In December 2002, the House of Lords carried out a thorough review of its scrutiny of EU legislation and affirmed that the latter is an "inevitable and desirable" consequence of the principle of separation of powers, because legislation is a constitutional province of the legislature and not the executive. Since, accordingly, national parliamentary scrutiny has a "clear constitutional purpose", it is aimed at the British Government's action in Brussels. Yet the Lords' European scrutiny, so they stated, also includes drawing the attention of EU institutions to significant matters arising from draft European legislation; making recommendations on it in order to focus the debate; contributing to the law-making process by exposing difficulties and proposing amendments; and examining the Commission and the policies that it formulates.<sup>1396</sup> In a 2006 self-assessment, the Lords' EU Committee expressed its awareness of the Council's 'double-hatted' nature:

It is for national governments to explain and present the positions they take in the Council, *and the decisions the Council collectively reaches*. [...] Our job is to add value to the legislative process through scrutiny and analysis and to do so in as transparent a way as possible.<sup>1397</sup>

Therefore, the scrutiny remit is broad, if only conceptually. This does not mean, as the Lords rightly perceived, that where EU legislation has been changed in accordance with their recommendations or comments that it was necessarily them who caused the change. Influence is, after all, an elusive category that is hard to measure.<sup>1398</sup>

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Philipp Kiiver (ed.), Groningen: Europa Law Publishing, 2006: 25; Cygan, Adam. "EU affairs before the United Kingdom parliament: a case of scrutiny as substitute sovereignty?," in *National parliaments and European democracy: a bottom-up approach to European constitutionalism*, by Olaf Tans et al. (eds), Groningen: Europa Law Publishing, 2008: 75-96; Kerse, Christopher. "Parliamentary scrutiny in the United Kingdom Parliament and the changing role of national parliaments in European Union affairs," in *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other member state legislatures*, by Gavin Barrett (ed.), Dublin: Clarus Press, 2008: 352.

<sup>1395</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15*, 1<sup>st</sup> Report of Session 2002-03 of 18 December 2002, Appendix 3, p. 46.

<sup>1396</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15*, 1<sup>st</sup> Report of Session 2002-03 of 18 December 2002, para. 13, p. 10.

<sup>1397</sup> House of Lords, EU Committee, "EU legislation – public awareness of the scrutiny role of the House of Lords", *HL Paper 179*, 32<sup>nd</sup> Report of Session 2005-06 of 25 May 2006, para. 53, p. 17 (emphasis added).

<sup>1398</sup> An empirical analysis exposed the obstacles in determining the degree of parliamentary influence on the Government in the following words: "When appearing before the Europe committees and in debates, ministers praise the contributions of parliamentarians to EC policy formation. [...] But, not surprisingly, the appearance and the reality differ. With few exceptions, ministers and their officials privately scoff at the possibility of parliamentarians making a substantive contribution to policy making". Miller, Harris N.

However, when their Lordships urged the Convention on the Future of Europe to revise the codecision procedure and allow a greater opportunity for the national parliaments' scrutiny by sending them relevant documents pertaining to the conciliation phase, they also declared that they "do not intend that the procedures are delayed or that national parliaments play a direct role in the passage of legislation which is being negotiated by others".<sup>1399</sup> The author's personal interviews with Brussels-based parliamentary representatives of both Houses of Parliament, which were held in May 2008, corroborate the assertion that Westminster does not aspire to have a direct voice in EU decision making.

Similarly, the Lords opposed the idea of establishing a second chamber at the European level that would be composed of national parliamentarians, principally because reintroducing a dual mandate would be too onerous for MPs in terms of time and could bring national parliaments into conflict with the European Parliament without properly tackling the democratic deficit.<sup>1400</sup>

### **3.5.1. Factors conducive to 'scrutiny beyond borders'**

There exist circumstances inherent in the British constitutional order that may lead the Houses of Parliament to extend the outreach of their scrutiny activities to the European level. Three main such circumstances refer to the focus, process and depth of scrutiny.

*1. Focus of scrutiny.* The key determinant of Westminster's approach to European scrutiny lies in the British constitution itself. On the one hand, while the Government is accountable to both Houses of Parliament, only the House of Commons has the power to oust the Government. The House of Lords does not possess this power and it cannot therefore directly affect the existence of the Government of the day. On the other hand, both hereditary and life peers are unelected parliamentarians. As they do not need to engage in electoral campaigns, they are much less swayed by the currents of everyday politics.<sup>1401</sup> The MPs' efforts to win or stay in power reduces the time, interest and other resources that they can invest in a thorough reflection on the policies to be pursued. It has been argued that

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"The influence of British parliamentary committees on European Communities legislation," *Legislative Studies Quarterly*, Vol. 2, No. 1, 1977: 60.

<sup>1399</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15, 1<sup>st</sup> Report of Session 2002-03* of 18 December 2002, para. 35, p. 14.

<sup>1400</sup> House of Lords, EU Committee, "A second parliamentary chamber for Europe: an unreal solution to some real problems", *HL Paper 48, 7<sup>th</sup> Report of Session 2001-02* of 27 November 2001, paras 30 and 38. Rather than institutionalisation, the Lords give preference to informal interparliamentary cooperation because "[m]any citizens are ignorant about many of the political institutions that already represent them and an element of ignorance will always remain. Whether people are satisfied with their institutions will to a great extent depend on the quality of those institutions" (para 58).

<sup>1401</sup> See also: Shell, Donald. "The House of Lords and the European Community: the evolution of arrangements of scrutiny," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 92.

the House of Lords' scrutiny can only be effective if it actually remains unelected.<sup>1402</sup> These considerations are prone to affect the degree to which the Houses' European scrutiny is focused exclusively on the Government's action. Peers have a looser relationship with the Government and are thus in a unique position to take a broader approach and assess Union affairs from a more holistic perspective, which, as will be demonstrated below, they do.

2. *Process of scrutiny.* The Houses of Parliament rely on specialist committees to varying degrees. The House of Lords' EU Committee has established seven specialist sub-committees to assist its scrutiny of different European policy areas and this organisation guarantees the presence of expertise within the Committee itself.<sup>1403</sup> The system in the House of Commons is less effective in this regard, because the European Scrutiny Committee, despite not having sub-committees, very sparingly uses its right to seek the opinion of specialist committees on EU documents.<sup>1404</sup> For instance, during the 2008-09 parliamentary session, the European Scrutiny Committee sought only one such opinion, namely from the Treasury Committee on the Commission's proposals for financial regulation and supervision.<sup>1405</sup> What is still worse, in the period from 2002-2007, the Home Affairs Committee was asked for an opinion only once.<sup>1406</sup> As a possible consequence thereof, this Committee took a series of initiatives to streamline its scrutiny by engaging in communication with the European Commission, the European Parliament and other national parliaments.<sup>1407</sup> Confining European scrutiny to the Standing Orders or terms of reference might, therefore, cause Parliament to transcend these limitations by conversing with EU institutions in a more direct fashion.

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<sup>1402</sup> Cygan, Adam. *The United Kingdom Parliament and European Union legislation*, The Hague: Kluwer Law International, 1998: 209.

<sup>1403</sup> The sub-committees of the EU Committee are the following: (1) Sub-Committee A – Economic and Financial Affairs, and International Trade; (2) Sub-Committee B – Internal Market, Energy and Transport; (3) Sub-Committee C – Foreign Affairs, Defence and Development Policy; (4) Sub-Committee D – Agriculture, Fisheries and Environment; (5) Sub-Committee E – Justice and Institutions; (6) Sub-Committee F – Home Affairs; and (7) Sub-Committee G – Social Policy and Consumer Protection.

<sup>1404</sup> COSAC Secretariat, Annex to the 12<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLII COSAC meeting held in Stockholm, 5-6 October 2009, p. 133.

<sup>1405</sup> House of Commons, European Scrutiny Committee, "The work of the Committee in 2008-09", *HC 267, 6<sup>th</sup> Report of Session 2009-10* of 18 January 2010, para. 32, p. 11.

<sup>1406</sup> House of Commons, Home Affairs Committee, "Justice and Home Affairs issues at European Union level" – Vol. 1, *HC 76-I, 3<sup>rd</sup> Report of Session 2006-07* of 5 June 2007, para. 351, p. 88.

<sup>1407</sup> These initiatives included: hosting a conference on terrorism and Community relations attended by representatives of equivalent committees in the national parliaments of other Member States and of the European Parliament and by Franco Frattini, the European Commissioner for Justice at the time; paying numerous visits to its 'sister committee' in the European Parliament, the Committee on Civil Liberties, Justice and Home Affairs; attending a Joint Parliamentary Meeting on the Future of Europe; and taking evidence from the Commission and British MEPs. House of Commons, Home Affairs Committee, "Justice and Home Affairs issues at European Union level" – Vol. 1, *HC 76-I, 3<sup>rd</sup> Report of Session 2006-07* of 5 June 2007, paras 359-360, 363, pp. 89-90.

3. *Depth of scrutiny.* The House of Lords' in-depth analyses of European initiatives normally provide suggestions or recommendations for EU action or restraint, to which the Commission and the European Parliament frequently react. The House of Commons does that only by exception. It could then be argued that for the Lords the Government is not the single point of reference, which might be a corollary of their acknowledgment of the fact that EU law is not a product of a single institution, the Council of Ministers.

### **3.5.2. Relations with the European Parliament**

In formal terms, Westminster does not warmly embrace collaboration with their colleagues from the European Parliament.<sup>1408</sup> British MEPs have no formal status at Westminster, i.e., there is no provision for them to sit or vote in either House of Parliament or any of their committees.<sup>1409</sup>

In the House of Commons, meetings between the European Scrutiny Committee and British MEPs are "only occasional", since most contacts between MPs and MEPs are on a party basis.<sup>1410</sup> That notwithstanding, the Commons are favourably disposed to the organisation of joint meetings, especially at the level of specialist committees, and have even advocated their formalisation.<sup>1411</sup> Yet, in the words of a clerk of the

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<sup>1408</sup> Ryan, Michael and Isaacson, Paul. "Parliament and the European Communities," *Parliamentary Affairs*, Vol. 28, 1974: 204-205.

<sup>1409</sup> Hardy, Paul. "United Kingdom," in *The role of national parliaments in the European Union: proceedings of the FIDE XXIV Congress Madrid 2010 – Vol. 1*, by Gil Carlos Rodriguez Iglesias and Luis Ortiz Blanco (eds), Madrid: Universidad Complutense de Madrid, 2010: 520; Norton, Philip. "The United Kingdom: political conflict, parliamentary scrutiny," in *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 99 and 102; Cygan, Adam. *The United Kingdom Parliament and European Union legislation*, The Hague: Kluwer Law International, 1998: 23 and 25. Nevertheless, MEPs enjoyed the right of privileged access to the precincts of the House of Commons from 30 January 1989 until 20 October 2009, when this right was rescinded. This means that they now must apply for permission or be escorted by an MP. See: House of Commons, Debates of 30 January 1989, Vol. 146, col. 139; 6 December 1991, Vol. 200, col. 582; and 20 October 2009, Vol. 497, col. 884. The same right has existed for the House of Lords since 31 March 1980 and continues to apply. House of Lords, House Committee, "Parliamentary passes for UK members of the European Parliament", *HL Paper 170*, 4<sup>th</sup> Report of Session 2008-09 of 27 October 2009, para. 2, p. 3; House of Commons, Administration Committee, "Parliamentary passes for UK MEPs", Note from the Clerk of 22 July 2010.

<sup>1410</sup> House of Commons, European Scrutiny Committee, "European scrutiny in the Commons", *HC 152-xxx*, 30<sup>th</sup> Report of Session 2001-02 of 11 June 2002, para. 107, p. 37. Though the formal involvement of MEPs was rejected outright early in the process, there has been steady enthusiasm for the cultivation of informal contacts. Baines, Priscilla. "The evolution of the scrutiny system in the House of Commons," in *Westminster and Europe: the impact of the European Union on the Westminster Parliament*, by Philip Giddings and Gavin Drewry (eds), Basingstoke: Macmillan, 1996: 76; Kolinsky, Martin. "Parliamentary scrutiny of European legislation," *Government and Opposition*, Vol. 10, No. 1, 1975: 66; Brew, David. "National parliamentary scrutiny of European Community legislation: the case of the United Kingdom Parliament," in *The European Parliament and the national parliaments*, by Valentine Herman and Rinus van Schendelen (eds), Westmead: Saxon House, 1979: 244.

<sup>1411</sup> House of Commons, European Scrutiny Committee, "Democracy and accountability in the EU and the role of national parliaments" – Vol. 1, *HC 152-xxxiii-I*, 33<sup>rd</sup> Report of Session 2001-02 of 21 June 2002, paras 141 and 143, pp. 56-57.

European Scrutiny Committee, institutionalising these interparliamentary contacts is "an example of tempting structural change that may be a practical nightmare", due to problems of coordination, capacity, timetables, lack of rapporteurship, etc.<sup>1412</sup>

In the House of Lords, life peers who have been elected MEPs have since 15 July 2008 been expressly disqualified, during their term of office as MEPs, from sitting or voting in this House, any of its committees or a joint committee of both Houses.<sup>1413</sup> The outreach of this provision is negligible, because only one life peer, Baroness Ludford, was elected in the 2009 European Parliament election.<sup>1414</sup> These formal obstacles by no means fundamentally frustrate dialogue with MEPs. The Lords, more frequently than the Commons, invite MEPs to London and visit them in Brussels to collect evidence on a wide variety of subjects.<sup>1415</sup> Cooperation with the European Parliament sometimes takes the form of tripartite meetings gathering the Commons' European Scrutiny Committee, the Lords' EU Committee and British MEPs.<sup>1416</sup> Besides COSAC, contact with MEPs is predominantly informal and represents a rich additional source of information for Westminster.<sup>1417</sup>

A proposal was made in March 2005 by the Modernisation Committee of the House of Commons to establish a Parliamentary European Committee, which would gather not only the interested members of both Houses, but also Commissioners and British MEPs. While Commissioners would be questioned, they "would not be subject to scrutiny by the Committee or by either House; they would be there to share information, to inform the debate and to foster dialogue between the Commission and Parliament".<sup>1418</sup> MEPs would have the right both to attend and speak in the meetings of the Committee.<sup>1419</sup> However, the proposal failed.

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<sup>1412</sup> Rogers, Robert. "Parliamentary scrutiny of European Union affairs: the case of the United Kingdom House of Commons," in *The changing role of parliaments in the European Union*, by Finn Laursen and Spyros A. Pappas (eds), Maastricht: European Institute of Public Administration, 1995: 107.

<sup>1413</sup> Section 4 of the European Parliament (House of Lords Disqualification) Regulations of 20 June 2008.

<sup>1414</sup> House of Lords, House Committee, "Facilities for peers who are MEPs or judges", *HL Paper 143*, 2<sup>nd</sup> Report of Session 2008-09 of 15 July 2009, para. 2, p. 3.

<sup>1415</sup> House of Lords, EU Committee, "Review of scrutiny of European legislation", *HL Paper 15*, 1<sup>st</sup> Report of Session 2002-03 of 18 December 2002, para. 132, p. 31.

<sup>1416</sup> House of Commons, European Scrutiny Committee, "The work of the Committee in 2008-09", *HC 267*, 6<sup>th</sup> Report of Session 2009-10 of 18 January 2010, para. 42, p. 13; House of Lords, EU Committee, "Annual Report 2009", *HL Paper 167*, 23<sup>rd</sup> Report of Session 2008-09, para. 60, p. 18.

<sup>1417</sup> In 2010, the Lords adopted guidelines on the strengthening of the links with MEPs, which include: (a) holding more evidence sessions, where necessary via video conference; (b) calling on MEPs during every visit to Brussels; (c) arranging bilateral meetings with MEPs during interparliamentary meetings; (d) building long-term relations with chairmen of relevant committees and sub-committees of the European Parliament; and (e) maximising the flow of written information from Westminster to MEPs. House of Lords, EU Committee, "Annual Report 2010", *HL Paper 70*, 3<sup>rd</sup> Report of Session 2010-11 of 20 December 2010, para. 102, pp. 26-27.

<sup>1418</sup> House of Commons, Modernisation Committee, "Scrutiny of European business", *HC 465-I*, 2<sup>nd</sup> Report of Session 2004-05 of 22 March 2005, para. 68, p. 30.

<sup>1419</sup> House of Commons, Modernisation Committee, "Scrutiny of European business", *HC 465-I*, 2<sup>nd</sup> Report of Session 2004-05 of 22 March 2005, para. 72, p. 32.

That there was no need to formalise the joint scrutiny endeavour of British national and European members of parliament, but that instead a high level of informal dialogue should be maintained among them through the UK National Parliament Office in Brussels was one of the conclusions of the House of Commons' Home Affairs Committee's first ever wide-ranging examination of the Union's influence on justice and home affairs matters conducted in November 2006.<sup>1420</sup> The Committee hosted several British MEPs and asked them to explain how effective they consider themselves to be in scrutinising EU initiatives on behalf of the United Kingdom rather than from the perspective of their European political groupings. The MEPs' opinions differed. For instance, Jean Lambert, an MEP for the Greens-European Free Alliance, held that:

To scrutinise it from a British perspective, whatever we may mean by that, is the job of the national parliament. Our job is to look at how this works not just for the UK but also for elsewhere.<sup>1421</sup>

Timothy Kirkhope, an MEP for the European People's Party, disagreed:

We do work in an extra dimension to national parliaments and that dimension is in our national interests [...] I can think of a whole lot of instances where my colleagues and I have worked with other major political parties in the UK on something that is patently in the interests of Britain and we do it, so we obviously are in our groupings on the left or the right [...] but then there are definitely matters [...] where we will work in the British interests as one of our priorities, our party interest and the national interest. [...] After all, we are elected from a particular country rather than just in an amorphous European way.<sup>1422</sup>

So did Michael Cashman, an MEP for the Party of European Socialists, who was resolute that "[o]f course there has to be a British perspective; otherwise there is no common interest".<sup>1423</sup> These statements fortify the hypothesis that Westminster, just as any other national parliament, can influence EU decision making through activism and dialogue, regardless of the existence of formal links. The power of arguments can be a potent weapon of participation in the Union's political process, especially where they are constructive, well formulated and convincingly argued.

There is, however, one important institutionalised channel of liaison between Westminster and the European Parliament – the Brussels-based UK National

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<sup>1420</sup> House of Commons, Home Affairs Committee, "Justice and Home Affairs issues at European Union level" – Vol. 1, *HC 76-I, 3<sup>rd</sup> Report of Session 2006–07* of 5 June 2007, para. 368, p. 91.

<sup>1421</sup> House of Commons, Home Affairs Committee, "Justice and Home Affairs issues at European Union level" – Vol. 2, *HC 76-II, Oral evidence of 28 November 2006*, Q109, p. Ev. 33.

<sup>1422</sup> House of Commons, Home Affairs Committee, "Justice and Home Affairs issues at European Union level" – Vol. 2, *HC 76-II, Oral evidence of 28 November 2006*, Q109, p. Ev. 33.

<sup>1423</sup> House of Commons, Home Affairs Committee, "Justice and Home Affairs issues at European Union level" – Vol. 2, *HC 76-II, Written evidence*, p. Ev. 172.

Parliament Office. The House of Commons has had a representative at the EU since October 1999, when, following the advice of the Modernisation Committee, this Office was established. In the words of this Committee, the prime purpose of the Office is to act as a "forward observation post" and "the eyes and ears" of the House.<sup>1424</sup> Apart from providing information about EU activities, the parliamentary representatives attend plenary and committee meetings of the European Parliament; participate in COSAC; attend joint parliamentary and committee meetings; send briefing papers to London; and prepare a weekly guide called *Commons European Business*, which outlines EU-related activity in the House of Commons.<sup>1425</sup> The representative of the House of Commons acts under the authority of the Principal Clerk of Delegated Legislation and in close cooperation with the Clerk of the European Scrutiny Committee. The representative sends them regular written reports on his or her activities.<sup>1426</sup> For the Commons, the Brussels Office is a "successful innovation" that "contributes significantly" to their scrutiny effectiveness.<sup>1427</sup> The House of Lords sent its first representative only in January 2005. His or her responsibilities include, *inter alia*, "ensuring that Lords' work on EU affairs is well known in the EU".<sup>1428</sup> Reports are not sent regularly but when the representative, in consultation with London-based staff, deems it relevant or useful.<sup>1429</sup>

### 3.5.3. Relations with the Commission

#### A. Informal contacts

The British Parliament, particularly the House of Lords, maintains informal contact with representatives of the Commission on a fairly regular basis. The most frequent form in which this occurs is evidence-taking sessions in London and Brussels. In 1987, a Legal Adviser to the House of Lords' European Select Committee noted that "in the early days the Commission was reluctant to give testimony, but a relationship

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<sup>1424</sup> House of Commons, Modernisation Committee, "The scrutiny of European business", *HC 791*, 7<sup>th</sup> Report of Session 1997-98 of 17 June 1998, para. 42.

<sup>1425</sup> House of Commons, European Scrutiny Committee, "The work of the Committee in 2008-09", *HC 267*, 6<sup>th</sup> Report of Session 2009-10 of 18 January 2010, paras 34 and 38-39, pp. 11-12.

<sup>1426</sup> COSAC Secretariat, Annex to the 11<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLI COSAC meeting held in Prague, 10-12 May 2009, p. 249.

<sup>1427</sup> House of Commons, European Scrutiny Committee, "European scrutiny in the Commons", *HC 152-xxx*, 30<sup>th</sup> Report of Session 2001-02 of 11 June 2002, para. 109, p. 37.

<sup>1428</sup> COSAC Secretariat, Annex to the 11<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLI COSAC meeting held in Prague, 10-12 May 2009, p. 255.

<sup>1429</sup> COSAC Secretariat, Annex to the 11<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLI COSAC meeting held in Prague, 10-12 May 2009, p. 256.

of trust has been built over the years which has overcome the earlier misgivings".<sup>1430</sup> Assessing the exchanges with the Commission as "most valuable", he described their purpose as follows:

They give the Committee an insight into the motivation and reasoning of the Commission beyond the explanation usually given in the explanatory notes which accompany draft proposals. More significant still, they often enable the Committee to appreciate the position in other countries and the likely attitudes of the Governments of the other Member States, matters on which reliable information is not otherwise readily available to them.<sup>1431</sup>

The aim of this informal correspondence with Commission officials, therefore, is not to exert direct influence on EU processes but to collect information and seek clarifications about forthcoming EU policies, institutional matters or appointments of EU functionaries.<sup>1432</sup> It should be borne in mind that, despite the informal nature of this correspondence, it can contribute to opinion shaping within the Commission.

## **B. Scrutiny of the Commission's legislative planning**

One might ponder whether the Government is the only addressee of the British Parliament, irrespective of the immediate objectives that European scrutiny is intended to fulfil. Indeed, there is some awareness at Westminster of the need to exert more effective influence on EU institutions, especially the Commission.<sup>1433</sup> Several examples of the Lords' scrutiny testify to such an approach.

When their Lordships scrutinise the Commission's annual policy strategies, they examine "whether the Commission's proposed action is appropriate and achievable, with the aim of influencing the Commission's Annual Legislative and Work Programme".<sup>1434</sup> In this context, they have recurrently sought more thorough justification of the Commission's use of legislative initiative:

The Commission should provide a clear justification for its key proposals, explaining why the European Union should act in these areas and setting out the limits on such

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<sup>1430</sup> Newman, Karl M. "The impact of national parliaments on the development of Community law," in *Du droit international au droit de l'intégration: liber amicorum Pierre Pescatore*, by Francesco Capotorti et al. (eds), Baden-Baden: Nomos Verlagsgesellschaft, 1987: 492.

<sup>1431</sup> Newman, Karl M. "The impact of national parliaments on the development of Community law," in *Du droit international au droit de l'intégration: liber amicorum Pierre Pescatore*, by Francesco Capotorti et al. (eds), Baden-Baden: Nomos Verlagsgesellschaft, 1987: 492.

<sup>1432</sup> Interviews with Lord Roper, Chairman of the EU Committee of the House of Lords and James Whittle, Second Clerk to the EU Committee, London, 24 November 2009.

<sup>1433</sup> Munro, Colin. "The UK Parliament and EU institutions – partners or rivals?," in *National parliaments as cornerstones of European integration*, by Eivind Smith (ed.), London: Kluwer Law International, 1996: 96.

<sup>1434</sup> House of Lords, EU Committee, "The Commission's Annual Policy Strategy for 2009", *HL Paper 151, 23<sup>rd</sup> Report of Session 2007–08* of 23 July 2008, para. 2, p. 7.

action. [...] The Commission should therefore explain the 'added value' it envisages in its key proposals [...]<sup>1435</sup>

Similar reasoning underlies the Lords' scrutiny of proposed EU legislation. For instance, the EU Sub-Committee on the Internal Market conducted an inquiry into the Commission's proposed recast of the First Railway Package "before the Commission had published its proposals for the recast, with the aim of influencing the proposals at the earliest possible stage in the legislative cycle".<sup>1436</sup>

An area of transversal importance for their Lordships is the Commission's method of impact assessment and subsidiarity justification.<sup>1437</sup> In their in-depth inquiry of March 2010, the Lords praised the success of the Impact Assessment Board<sup>1438</sup> and the inclusion in impact assessments of a section on administrative burdens.<sup>1439</sup> Yet they made a whole set of recommendations for the improvement of the impact assessment process. A host of them were endorsed by the Commission in its Smart Regulation Communication of October 2010,<sup>1440</sup> such as those referring to: (a) the extension of the consultation period to twelve weeks; (b) the development of *ex post* evaluation; (c) further use of impact assessment in the Council and the European Parliament; (d) the use of Member State impact assessments as *de facto* assessment of proposed Council amendments; and (e) more transparent use of impact assessments for delegated and implementing legislation.<sup>1441</sup> Aside from examining the Commission, the Lords lauded the European Parliament committees for commissioning their own impact assessments where the Commission's were considered inadequate, because that "would constitute a 'political' holding to

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<sup>1435</sup> House of Lords, EU Committee, "The Commission's Annual Policy Strategy for 2008", *HL Paper 123, 23<sup>rd</sup> Report of Session 2006–07* of 4 July 2007, paras 32 and 34, p. 15. The Lords repeated their request the following year. House of Lords, EU Committee, "The Commission's Annual Policy Strategy for 2009", *HL Paper 151, 23<sup>rd</sup> Report of Session 2007–08* of 23 July 2008, para. 70, p. 30.

<sup>1436</sup> House of Lords, EU Committee, "Annual Report 2009", *HL Paper 167, 23<sup>rd</sup> Report of Session 2008–09*, para. 31, p. 12.

<sup>1437</sup> See: European Commission, "Better regulation for growth and jobs in the European Union", COM(2005) 97 final, 16.3.2005 and "Inter-institutional common approach to impact assessment" of November 2005, available at [http://ec.europa.eu/governance/better\\_regulation/documents/ii\\_common\\_approach\\_to\\_ia\\_en.pdf](http://ec.europa.eu/governance/better_regulation/documents/ii_common_approach_to_ia_en.pdf), accessed on 30 September 2010. See a more comprehensive analysis in: Meuwese, Anne C. M. *Impact assessment in EU lawmaking*, Alphen aan den Rijn: Kluwer Law International, 2008.

<sup>1438</sup> The Impact Assessment Board was set up in 2006 as an independent in-house Commission service under the authority of the Commission President for the purpose of monitoring the process of production of impact assessments, which encompasses the Commission's own analysis of subsidiarity compliance. The Board has been operational since 2007.

<sup>1439</sup> House of Lords, EU Committee, "Impact assessments in the EU: room for improvement?", *HL Paper 61, 4<sup>th</sup> Report of Session 2009–10* of 9 March 2010, paras 18 and 61, pp. 12 and 19.

<sup>1440</sup> European Commission, Communication "Smart Regulation in the European Union", COM(2010) 543 final, 8.10.2010.

<sup>1441</sup> House of Lords, EU Committee, "Annual Report 2010", *HL Paper 70, 3<sup>rd</sup> Report of Session 2010–11* of 20 December 2010, para. 43, p. 13.

account".<sup>1442</sup> Impact assessments produced by the British Government remain, however, "a vital part of the process of parliamentary scrutiny".<sup>1443</sup> In addition, the Lords encouraged national parliaments to exchange best practice in this regard and invited COSAC to facilitate the process.<sup>1444</sup> Reacting to this, the COSAC meeting held a month afterwards echoed the Lords' recommendations that impact assessments be drafted for all major initiatives included in the Commission's legislative and work programmes and that they be supplemented whenever these initiatives are substantially amended by the European Parliament or the Council.<sup>1445</sup> This inchoate trend towards developing parliamentary acquaintance with the Commission's methods of justification of its legislative initiative is of significant relevance for national parliaments' scrutiny of EU decision making, especially given that the Lisbon Treaty's Subsidiarity Protocol *obliges* the Commission to justify its draft legislative acts in the form of detailed statements.<sup>1446</sup>

### **C. The Barroso initiative**

For the House of Commons, the Commission's undertaking to consider national parliaments' opinions in formulating European policies is only "potentially of interest", since the European Scrutiny Committee has, even before the onset of the Barroso initiative, addressed comments on legislative proposals and other documents directly to the Commission, where that was deemed appropriate.<sup>1447</sup> But the Commons' record in the political dialogue has been poor. The analysis of the Commission's data shows that this House has until the beginning of 2011 sent a total of only nine reactions: one each in 2006, 2007 and 2008, none in 2009 and six in 2010. That can be explained by the specific constitutional relationship with the Government and a particular focus on its accountability and less so on that of EU institutions.

Quite the opposite has been the record of the House of Lords, which has been an active participant with a fairly steady track record. In the same period, their Lordships sent 58 reactions, of which there were 4 in 2006, 14 in 2007, 12 in 2008, 14 in 2009 and 14 in 2010. Compared to other national parliaments, the Lords were placed sixth in 2009 and ninth in 2010. As their colleagues in the Commons, the

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<sup>1442</sup> House of Lords, EU Committee, "Impact assessments in the EU: room for improvement?", *HL Paper 61, 4<sup>th</sup> Report of Session 2009–10* of 9 March 2010, para. 87, p. 25.

<sup>1443</sup> House of Lords, EU Committee, "Impact assessments in the EU: room for improvement?", *HL Paper 61, 4<sup>th</sup> Report of Session 2009–10* of 9 March 2010, para. 67, p. 21.

<sup>1444</sup> House of Lords, EU Committee, "Ensuring effective regulation in the EU", *HL Paper 33, 9<sup>th</sup> Report of Session 2005–06* of 8 September 2005, para. 142, p. 27.

<sup>1445</sup> House of Lords, EU Committee, "Ensuring effective regulation in the EU: follow-up report", *HL Paper 157, 31<sup>st</sup> Report of Session 2005–06* of 18 April 2006, paras 15–16, pp. 6–7.

<sup>1446</sup> Article 5 of Protocol no. 2 on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty.

<sup>1447</sup> House of Commons, European Scrutiny Committee, "The work of the Committee in 2006", *HC 41-xiii, 13<sup>th</sup> Report of Session 2006–07* of 15 March 2007, para. 34, pp. 12–13.

Lords send their in-depth reports to the Commission and receive replies to them beyond the political dialogue itself.<sup>1448</sup>

It ought to be emphasised that the Barroso initiative forms but a small part of the European scrutiny process at Westminster. The major object of appraisal in the House of Commons is the Government's action in the Council to compensate for the takeover of a portion of the British constitutional powers by the Union. The House of Lords earnestly focuses on the European policies as such, along with the Government's and EU institutions' activities in shaping them. Being the mother of parliaments, with the long established but ever evolving tradition of scrutiny, Westminster, unlike for instance the Portuguese Assembly, has been only marginally affected by the Barroso initiative.

#### **3.5.4. Influencing the EU level: far-flung or genuine?**

The Lords' industrious work is far from being completely toothless. On numerous occasions, its reports and recommendations have either had direct influence or have resonated in Brussels.<sup>1449</sup>

For example, the EU Sub-Committee on Home Affairs succeeded in convincing the Commission to abandon its proposal for a Regulation codifying measures on the uniform format of visas. The Committee held that, as Britain had already opted into some of the measures to be consolidated into one EU legal act, it was unclear which measures would have applied to Britain after the consolidation. Having conceded that the Lords' report "would appear to raise a number of legal questions", the Commission dropped the proposal.<sup>1450</sup>

Another example is the Lords' scrutiny of the Consumer Rights Directive. While not opposing the proposal itself, the EU Sub-Committee on Social and Consumer Affairs found that the impact assessment was incomplete. What was missing was "up-to-date statistics on cross-border business-to-consumer trade and more information on the effects of non-regulatory barriers such as culture, language, distance and cost of delivery". In a plenary debate in the European Parliament on 4 May 2009, Meglena Kuneva, then Commissioner for Consumer Protection, in her reply to an oral question on the draft Directive, mentioned that "at least 10 representatives from the House of Lords came to discuss this directive in Brussels", which for her was a very good sign of a rising interest in consumer policy. Malcolm Harbour, a British MEP for the European People's Party and the Chairman of the European Parliament's Committee on Internal Market and Consumer Protection, then

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<sup>1448</sup> House of Lords, EU Committee, "Annual Report 2010", *HL Paper 70, 3<sup>rd</sup> Report of Session 2010-11* of 20 December 2010, para. 95, p. 25.

<sup>1449</sup> It is important to bear in mind the caveat that "creating structures for influence is not the same as creating influence, but finding no *direct* influence does not mean committees have no influence". Miller, Harris N. "The influence of British parliamentary committees on European Communities legislation," *Legislative Studies Quarterly*, Vol. 2, No. 1, 1977: 46.

<sup>1450</sup> House of Lords, EU Committee, "Annual Report 2009", *HL Paper 167, 23<sup>rd</sup> Report of Session 2008-09*, para. 24, p. 10.

stated about the Lords' scrutiny: "We have assured them that their report will be able to have a material contribution on the outcome".<sup>1451</sup> On yet another occasion, the scope of the Regulation on the Bus and Coach Passengers' Rights was deemed too wide, since local bus operators would suffer disproportionate costs. As a result of negotiation between the British and other governments, the final version of the text was reduced in scope, "bringing it much more into line" with the Lords' views.<sup>1452</sup>

The monitoring of the Union's application of the subsidiarity principle was not futile either. For example, the Lords thought that the Directive on Intelligent Transport Systems would violate subsidiarity if the Member States were to be obliged to install these systems where there was no cross-border dimension. Despite the European Parliament's initial insistence to the contrary, the Council removed mandatory installation from the final text. In a similar vein, the Directive on Energy Performance of Buildings was found to be in breach of subsidiarity concerning the method for the evaluation of the performance of buildings and these areas of the proposal were deleted in the Council.<sup>1453</sup>

The foregoing examples show that instances of cross-level exchange do occur. Yet there is no clear consensus within the House of Lords itself on the nature of this exchange. For example, Michael Pownall, the Principal Clerk of the EU Committee, stated more than fifteen years ago that:

[A]lthough the Committee's essential task is to inform the House and influence UK ministers, from time to time it undoubtedly seeks to have a direct influence on the Community institutions.<sup>1454</sup>

In contrast, Lord Roper, the Chairman of the EU Committee, insisted in a personal interview with the author, that their scrutiny focuses exclusively on the Government's action in the Council and the European Council and that any potential influence on EU institutions is but "a side-effect".<sup>1455</sup> If so, a monumental side-effect it is, then. This attitude can be explained by Munro's remark that "British institutions are particularly prone to regarding Community institutions, not as partners in a common enterprise, but as rivals to be carefully watched".<sup>1456</sup>

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<sup>1451</sup> *OJ* [2009] Debates of the European Parliament, 04.05.2009, p. 66.

<sup>1452</sup> House of Lords, EU Committee, "Annual Report 2010", *HL Paper 70, 3<sup>rd</sup> Report of Session 2010-11* of 20 December 2010, para. 17, p. 8.

<sup>1453</sup> House of Lords, EU Committee, "Annual Report 2010", *HL Paper 70, 3<sup>rd</sup> Report of Session 2010-11* of 20 December 2010, paras 18-19, p. 8.

<sup>1454</sup> Pownall, Michael. "Parliamentary scrutiny of European Union affairs: the case of the United Kingdom House of Lords," in *The changing role of parliaments in the European Union*, by Finn Laursen and Spyros A. Pappas (eds), Maastricht: European Institute of Public Administration, 1995: 145.

<sup>1455</sup> Interviews with Lord Roper, Chairman of the EU Committee of the House of Lords and James Whittle, Second Clerk to the EU Committee, London, 24 November 2009.

<sup>1456</sup> Munro, Colin. "The UK Parliament and EU institutions – partners or rivals?," in *National parliaments as cornerstones of European integration*, by Eivind Smith (ed.), London: Kluwer Law International, 1996: 82.

#### 4. CONCLUDING REMARKS

After the Lisbon Treaty, Westminster possesses all necessary legal means adequately to take part in the scrutiny of EU decision making. The Europeanisation of the British Parliament has reached an advanced stage, whereby both Houses have closely followed the developments at the EU level and modified their scrutiny arrangements accordingly. The reforms carried out are a logical continuation of the existing scrutiny traditions that had already taken root in Westminster. Consequently, MPs and peers are now better disposed for the performance of their European roles than ever.

Regarding the availability of information, both Houses operate under rather wide terms of reference, which ensure the receipt of most information necessary for thorough scrutiny. In fact, the trend is taking the opposite direction, since the Houses may now release the Government from the duty to submit certain classes of documents. Even so, the Government still withholds certain EU documents from Parliament, such as conclusions of the Council and the European Council, but Parliament does not find this particularly bothersome.

The most effective scrutiny instruments, from the perspective of input into the EU decision-making processes, are the Lords' in-depth inquiry reports as a constructive means of participation and scrutiny reserves as an obstructive one. The addition of a scrutiny reserve specifically tailored to the Area of Freedom, Security and Justice is a clear mark of Europeanisation. Parliament did not stand still, but adapted to the post-Lisbon situation. The same holds true for primary EU law, concerning which Parliament has gained a statutory right of approval.

The scope of scrutiny has been adjusted to the Lisbon Treaty by means of extensions to the opt-ins in the Area of Freedom, Security and Justice and Schengen matters. The scrutiny of the former passerelles, especially in the House of Commons, revealed animosity towards the European Parliament, which was not regarded as a sufficiently democratic institution. The House of Lords, in its analysis of the *Environmental Crimes case*, objected to the extension of Community competence beyond the intergovernmentally agreed limits, in part because an automatic transfer of matters across pillars would preclude national parliaments from having a say therein. The scrutiny of the Europol Decision showed great interest on the part of both Houses of Parliament in the delimitation of competences of this agency. Both the Commons and the Lords focused on the Government's accountability. The European Parliament, which proposed amendments to involve national parliaments in exerting Europol's accountability, was regarded as an extraneous institution. Neither the Commons nor the Lords demonstrated any sensitivity towards the European Parliament's efforts. They were in fact content for Europol to be the European Parliament's portfolio. In CFSP and CSDP, the scrutiny is impaired to a certain extent by the urgency and secrecy of EU decision making, even though Parliament does not find this problematic. The Houses are in agreement that the deployment of the Armed Forces should receive some form of approval by the Commons. Like in

France and Portugal, the prospect of the WEU Assembly's dissolution prompted parliamentary reactions. While the Commons were first in favour of a solution involving national parliamentarians only, they later agreed with the Lords on the importance of associating the European Parliament, too, under the format of an interparliamentary conference. As regards EU international agreements, scrutiny tends to be restricted to the stage of signature by the Council with the Commons being the preponderant House when it comes to the approval of ratification. By contrast, only the Lords monitor the open method of coordination. Neither of the Houses exercises systematic scrutiny of comitology.

So far as addressees of scrutiny are concerned, both the Commons and the Lords expend most of their institutional energy upon holding the Government to account for the positions defended in the Council and the European Council. Officially, the Government is the only addressee of their scrutiny activities. Informally, however, neither House rejects the idea that its recommendations or remarks might influence EU decision making. Peers are particularly well-disposed for this type of action due to their status in the politico-constitutional order of the United Kingdom. Contacts with EU institutions are regularly maintained and have, as a rule, an informal character. Accordingly, both COSAC and the Barroso initiative are not of paramount importance for either of the Houses. The reason for this is that Britain can boast a long tradition of scrutiny practice, to which these two initiatives have little to add.

On the basis of the above analysis, we conclude that Westminster has become greatly Europeanised. The Houses of Parliament complement each other's scrutiny work so as to combine high-voltage politics with low-voltage reflection. Yet both the Commons and the Lords remain selectively open to cross-level cooperation. It appears as if MPs and, less so, peers wish to shield their prerogatives from possible adverse external influence. The point of view from which European scrutiny is performed is predominantly national. This attitude is not so pronounced in the French Parliament and, as we will see in the following chapter, the Portuguese Assembly. However, the depth and quality of the British Parliament's policy scrutiny of EU affairs is laudable and remains unmatched in many parliamentary corners of the Union.



# Chapter 8

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## Portugal: A Propitious Newcomer

### 1. TAKING EUROPE'S SOUTH SERIOUSLY

Being part of the European Union is probably the greatest historical moment of Portuguese history since the Age of Discoveries.<sup>1457</sup>

Having spent a long time with its back turned to the continent of Europe, and not having been quick enough to interpret the historic destiny of its colonial period, Portugal let itself be left on the fringe of the European family and fell into a position that placed it politically and economically on the periphery [...but...] Europe is seen by us today as another name for freedom.<sup>1458</sup>

*Francisco Seixas da Costa*, Secretary of State for European Affairs, 30 June 2000

Within the literature on national parliaments in the EU, separate country studies have progressed unevenly. The focus has primarily been on western and northern Member States, whereas southern European parliaments have more often than not been treated jointly as a group without further inquiring into the intricacies of their scrutiny arrangements.<sup>1459</sup> Specific attention needs to be devoted to individual parliaments as case studies because:

One cannot, without twisting the facts, find uniformity, unity or meaning in the changes noted since Greece and Portugal joined Europe: Europeanness is, to some degree, devoid of meaning, in that European integration cannot be boiled down to a project, that the evolutions that have occurred cannot be assessed normatively and

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<sup>1457</sup> Magone, José. "The Europeanisation of Portugal (1986-2006). A critical view," *Nação e Defesa*, No. 115, 2006: 11.

<sup>1458</sup> Costa, Francisco Seixas da. "A European Vocation." in *Portugal: a European story*, by Álvaro de Vasconcelos and Maria João Seabra (eds), Cascais: Principia, 2000: 7 and 9.

<sup>1459</sup> See for example: Magone, José. "South European national parliaments and the European Union: an inconsistent reactive revival," in *National parliaments within the enlarged European Union: from victims of integration to competitive actors?*, by John O'Brennan and Tapio Raunio (eds), London: Routledge, 2007: 116-132; Magone, José. "The southern European pattern of parliamentary scrutiny of EU legislation: emulating the French model," in *Democratic governance and European integration: linking societal and state processes of democracy*, Cheltenham: Edward Elgar Publishing, 2007: 229-248; Bandeira, Cristina Leston. "Southern European parliaments in democracy," *The Journal of Legislative Studies*, Vol. 9, No. 2, 2003: 1-7.

that Europe cannot determine social practices on its own and give an overall meaning to the events underway. Belonging to Europe, for Greece and Portugal, like for all the other Member States, should be taken to be the contingent result of multiple processes that doubtless are the product of a technocratic project, itself multidimensional, but also of complex historical trajectories involving both innovation and disintegration.<sup>1460</sup>

This chapter seeks to redress this shortcoming in respect of the Portuguese Parliament,<sup>1461</sup> the analysis of which has slowly moved away from the virtually ubiquitous focus on the consolidation of Portuguese democracy<sup>1462</sup> towards its Europeanisation<sup>1463</sup>. In the following sections we furnish an in-depth insight into the constitutional, statutory and informal arrangements for the Assembly's participation in EU decision making. Special emphasis is laid on the 2006 European Scrutiny Act, the 2010 reform of scrutiny procedures and the Assembly's participation in the Barroso initiative. To provide a background, we first adumbrate the historico-political context that led to the establishment of the Third Portuguese Republic and then present the Assembly's position in the national constitutional order.

## 2. THE ASSEMBLY OF THE REPUBLIC IN THE CONSTITUTIONAL ORDER OF PORTUGAL

### 2.1. The thorny road to democracy

Portuguese constitutional history of the twentieth century is marked by struggles in establishing a democratic regime. Democracy only arrived in Portugal after the

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<sup>1460</sup> Hibou, Béatrice. "Greece and Portugal: convergent or divergent Europeanisation?," in *The Member States of the European Union*, by Simon Bulmer and Christian Lequesne (eds), New York: Oxford University Press, 2005: 251.

<sup>1461</sup> It has recently been reiterated that "good studies on the Portuguese parliament are still quite rare". Magone, José. "The Europeanisation of Portugal (1986-2006). A critical view," *Nação e Defesa*, No. 115, 2006: 17.

<sup>1462</sup> The academic literature on this topic is vast. See as examples and that only in the English language: Bandeira, Cristina Leston. *From legislation to legitimization: the role of the Portuguese parliament*, London: Routledge, 2004; Corkill, David. "The political system and the consolidation of democracy in Portugal," *Parliamentary Affairs*, Vol. 46, No. 4, 1993: 517-533; Manuel, Paul Christopher. *The challenges of democratic consolidation in Portugal: political, economic, and military issues, 1974-1991*, Westport: Praeger Publishers, 1996; Maxwell, Kenneth R. and Monje, Scott C. (eds). *Portugal: the constitution and the consolidation of democracy, 1976-1989*, New York: Columbia University Center, 1991; Maxwell, Kenneth. *The making of Portuguese democracy*, Cambridge: Cambridge University Press, 1995; Morlino, Leonardo. *Democracy between consolidation and crisis: parties, groups, and citizens in southern Europe*, Oxford: Oxford University Press, 1998.

<sup>1463</sup> See: Paulo, Maria Teresa and Bandeira, Cristina Leston. "O impacto da europeização no parlamento," *Instituto Português de Relações Internacionais, Universidade Nova de Lisboa, Working Paper 21*, 2006, available at: [http://www.ipri.pt/publicacoes/working\\_paper/pdf/Parlamento.pdf](http://www.ipri.pt/publicacoes/working_paper/pdf/Parlamento.pdf), accessed on 23 February 2008; Pardal, Alves. "A Assembleia da República no processo de integração europeia," *Instituto de estudos estratégicos e internacionais, Background Paper*, [http://www.ieei.pt/files/Background\\_paper\\_Alves\\_Pardal.pdf](http://www.ieei.pt/files/Background_paper_Alves_Pardal.pdf), accessed on 23 February 2008.

unstable First Republic (1910-1926), the National Dictatorship (1926-1933) and the autocratic Second Republic (1933-1976) led by Prime Minister António Salazar, a former economics professor at Coimbra University and finance minister. Salazar's regime, which he dubbed the New State (*Estado Novo*), was a negation of democratic participation. All power was effectively centralised in his hands. In practice, Salazar exercised both the executive and legislative powers and controlled the police and local administration.<sup>1464</sup> By means of a "constitutional custom *contra legem*", all political parties except for Salazar's own National Union were banned.<sup>1465</sup> Elections were held without opposition and the Assembly was composed of members of Salazar's party. This is why Miranda described the system of government as "militantly antiparliamentary".<sup>1466</sup> Despite modest reforms, Salazar's successor Marcelo Caetano, a former law professor at the University of Lisbon, was unable to halt the regime's downfall.

The mounting resentment, caused by the repression of basic civil and political freedoms and fuelled by the colonial wars against Angola, Mozambique and Guinea, culminated on 25 April 1974, when the Armed Forces Movement carried out a peaceful *coup d'état* known as the Revolution of Carnations (*Revolução dos Cravos*).<sup>1467</sup> The decades-long personal dictatorship ended with the adoption in 1976 of the currently applicable constitution. The Third Republic was born. A crucial product of the protracted political contest was the resurrection of the representative body – the Assembly of the Republic (*Assembleia da República* or the Assembly).<sup>1468</sup>

## 2.2. The Portuguese Constitution

The Constitution of 1976 is the embodiment of popular indignation over Salazar's regime. The Preamble describes this regime as "fascist" and celebrates the freeing of Portugal from "dictatorship, oppression and colonialism" as a "historic turning point for Portuguese society".<sup>1469</sup> As a corollary, the Constitution contains a catalogue of fundamental rights and is replete with democratic symbols. The Third Portuguese Republic is a "democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and organisation, respect for and the guarantee of the effective implementation of fundamental rights and freedoms, and the

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<sup>1464</sup> Campinos, Jorge. *O presidencialismo do Estado Novo*, Lisbon: Perspectivas & Realidades, 1978: 139 *et seq.*

<sup>1465</sup> Miranda, Jorge. *Manual de direito constitucional – Tomo I*, Coimbra: Coimbra Editora, 1997: 303.

<sup>1466</sup> Miranda, Jorge. *Manual de direito constitucional – Tomo I*, Coimbra: Coimbra Editora, 1997: 310.

<sup>1467</sup> See an excellent online database for further reference at: <http://www.25abril.org/a25abril/>. See also: Lucena, Manuel de. "Reflexões sobre a queda do regime salazarista e o que se lhe seguiu," *Análise Social*, Vol. 37, No. 162, 2002: 7-46; Miranda, Jorge. *A revolução de 25 de Abril e o direito constitucional*, Lisbon: Faculdade de Direito da Universidade de Lisboa, 1975; Rezola, Maria Inácia. *25 de Abril: mitos de uma revolução*, Lisbon: Esfera dos Livros, 2007.

<sup>1468</sup> See: Opello, Walter C. Jr. "The new Parliament in Portugal," *Legislative Studies Quarterly*, Vol. 3, No. 2, 1978: 309-334.

<sup>1469</sup> Recitals 1 and 2 of the Preamble to the Constitution.

separation and interdependence of powers, all with a view to achieving economic, social and cultural democracy and deepening participatory democracy".<sup>1470</sup> As immutable the Constitution designates, *inter alia*, the unity of the state, the republican form of government, the system of proportional electoral representation and the separation and interdependence of powers.<sup>1471</sup>

The system of government flowing from the Constitution has been described most typically as semi-presidential,<sup>1472</sup> but also as premier-presidential,<sup>1473</sup> parliamentary-presidential,<sup>1474</sup> mixed parliamentary-presidential,<sup>1475</sup> presidentialism of the Prime Minister,<sup>1476</sup> or, imbued with French symbolism, rationalised parliamentarism (*parlamentarismo racionalizado* or *parlamentarismo mitigado*)<sup>1477</sup>. This system of government derived from the desire to avoid the drawbacks of the parliamentarism of the Constitution of 1911 and of the concentration of power in the Constitution of 1933.<sup>1478</sup> The fact that each of the academic appellations for the Portuguese system of government tends to accentuate one element of the system over others represents both their merit and their fallacy. As the system of government of any political community is implicit in the formal relations between the offices of public power, we proceed with a description of these relations in order to understand the constitutional position of the Assembly. The state bodies exercising national sovereignty are the President of the Republic, the Assembly of the Republic, the

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<sup>1470</sup> Article 2 of the Constitution. See also Articles 1 and 3 thereof. Furthermore, Article 9(c) lays down that one of the fundamental tasks of the Portuguese state is to "defend political democracy and safeguard and encourage citizens' democratic participation in the resolution of national problems". Also, Article 108 requires that "political power shall lie with the people [...]". Article 111 enshrines the separation and interdependence of powers.

<sup>1471</sup> Article 288 of the Constitution.

<sup>1472</sup> See among many publications on this topic: Martins, Ana. "The Portuguese semi-presidential system: about law in the books and law in action," *European Constitutional Law Review*, Vol. 2, No. 1, 2006: 81-100; Vitorino, António. "O sistema de governo na Constituição portuguesa de 1976 e na Constituição espanhola de 1978," *Revista Jurídica*, No. 3, 1984: 49; Pereira, André Gonçalves. *Semipresidencialismo em Portugal*, Lisbon: Ática, 1984; Sousa, Marcelo Rebelo de. "Sistema semipresidencial: definição e perspectivas," *Nação e Defesa*, No. 3, 1977: 5-15; Sousa, Marcelo Rebelo de. *O sistema de governo português*, Lisbon: Associação Académica da Faculdade de Direito de Lisboa, 1992: 8 and 104; Pires, Francisco Lucas. "O sistema de governo: sua dinâmica," in *Portugal: o sistema político e constitucional 1974-1987*, by Mário Baptista Coelho (ed.), Lisbon: Instituto de Ciências Sociais da Universidade de Lisboa, 1989: 295.

<sup>1473</sup> Roper, Steven D. "Are all semipresidential regimes the same? A comparison of premier-presidential regimes," *Comparative Politics*, Vol. 34, No. 3, 2002: 253-272.

<sup>1474</sup> Lunshof, Hans. "The Portuguese Republic," in *Constitutional law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 668.

<sup>1475</sup> Canotilho, Gomes. *Direito constitucional e teoria da constituição*, Coimbra: Almedina, 2002: 594.

<sup>1476</sup> Moreira, Adriano. "O regime: presidencialismo do Primeiro-Ministro," in *Portugal: o sistema político e constitucional 1974-1987*, by Mário Baptista Coelho (ed.), Lisbon: Instituto de Ciências Sociais da Universidade de Lisboa, 1989: 31-39.

<sup>1477</sup> Miranda, Jorge. *Manual de direito constitucional, Tomo I*, Coimbra: Coimbra Editora, 1997: 361.

<sup>1478</sup> Miranda, Jorge and Medeiros, Rui. *Constituição portuguesa anotada - Tomo I*, Coimbra: Coimbra Editora, 2005: 18.

Government and the courts.<sup>1479</sup> With the exception of the courts, we examine them in turn.

## 2.3. The Assembly of the Republic

### 2.3.1. Composition

The Assembly is the unicameral parliament of Portugal representing all Portuguese citizens. It consists of a minimum of 180 and a maximum of 230 members directly elected for a period of four years according to the proportional electoral system.<sup>1480</sup> Enacting thresholds for the conversion of votes obtained in elections into seats in the Assembly is constitutionally prohibited.<sup>1481</sup> MPs may not concomitantly be members of the Government.<sup>1482</sup>

### 2.3.2. Legislative process

The legislative initiative rests with individual MPs, parliamentary groups, the Government and, under certain conditions, groups of 35,000 registered voters.<sup>1483</sup> Legislative competence is shared between the Assembly and the Government. The areas falling under the Assembly's exclusive legislative competence, where legislative power may not be delegated to the Government, and those falling under its partially exclusive legislative competence, where legislative power may be delegated to the Government by means of an authorising statute, are exhaustively enumerated in the Constitution.<sup>1484</sup> The only area of exclusive legislative competence of the Government is that related to its own organisation and functioning.<sup>1485</sup> The remaining areas are the Assembly's and the Government's concurrent competence, in which the Government does not require the Assembly's authorisation to adopt decree-laws.<sup>1486</sup> The legislative procedure comprises the debating and the voting phase. The debate on a bill concerns the general principles and the details of the bill, the latter of which may be carried out in committee. The bill may be subjected to a final vote after the vote has been taken on its general principles and details.<sup>1487</sup>

There are three types of legislation: (a) the *lei* or statute; (b) the *decreto-lei* or decree-law; and (c) the *decretos legislativos regionais* or regional legislative decrees. Statutes are always initiated by the Assembly and are classified into several

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<sup>1479</sup> Article 110(1) of the Constitution.

<sup>1480</sup> Articles 147, 148, 113(5), 114(1) and 149(1) of the Constitution.

<sup>1481</sup> Article 152(1) of the Constitution.

<sup>1482</sup> Article 154(1) of the Constitution.

<sup>1483</sup> Article 167(1) of the Constitution in conjunction with Article 6(1) of the *Lei no. 17/2003* of 4 June 2003 regulating the citizens' legislative initiative.

<sup>1484</sup> Articles 164 and 165 of the Constitution.

<sup>1485</sup> Article 198(2) of the Constitution. See more on the Government's legislative power in: Valle, Jaime Rui Drummond Leitão do. *A participação do governo no exercício da função legislativa*, Coimbra: Coimbra Editora, 2004.

<sup>1486</sup> Article 198(1)(a) of the Constitution.

<sup>1487</sup> Article 168(1)-(3) of the Constitution.

categories: ordinary, constitutional, organic, framework or general.<sup>1488</sup> Decree-laws are always initiated by the Government and have the same legal force as statutes. That notwithstanding, decree-laws are hierarchically subordinate to statutes because they may, upon their publication and by means of a motion adopted by ten MPs, be subjected to parliamentary consideration aimed at their amendment or nullification.<sup>1489</sup>

## 2.4. The Government

### 2.4.1. Composition

The Government, which conducts the state's general policy, is headed by a Prime Minister. It consists of a Council of Ministers, secretaries of state and under secretaries of state. The Council of Ministers is composed of a Prime Minister and ministers, and possibly one or more Vice Prime Ministers. To assume office, the Government, upon being appointed by the President, is subjected to an examination of its programme in Parliament. This programme sets out the main political guidelines and measures that the Government intends to pursue and the Prime Minister presents it before the Assembly in the form of a statement. During the debate on the programme, any parliamentary group may move the rejection of the programme and the Government itself may move a vote of confidence. The programme is rejected if any of these motions is adopted by an absolute majority of the members entitled to vote.<sup>1490</sup> Therefore, the Government need not pass a vote of approval in the Assembly, unless the Government or the Assembly moves initiatives to the contrary.<sup>1491</sup> Before the Assembly considers the programme, the Government may only undertake acts that are strictly necessary for the management of public affairs.<sup>1492</sup> Once in office, the Government may move a vote of confidence regarding its statement of general policy as well as any important matter of national interest.<sup>1493</sup> Similarly, a quarter of the MPs entitled to vote and any parliamentary group may move a vote of no confidence regarding the Government's implementation of the programme or any other important matter of national interest.<sup>1494</sup> Whenever a motion of confidence is rejected or a motion of no confidence is adopted, the Government must resign.<sup>1495</sup>

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<sup>1488</sup> See also: Lunshof, Hans. "The Portuguese Republic," in *Constitutional law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 687.

<sup>1489</sup> Article 169 of the Constitution.

<sup>1490</sup> Article 192 of the Constitution.

<sup>1491</sup> See also: Lunshof, Hans. "The Portuguese Republic," in *Constitutional law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 669.

<sup>1492</sup> Article 186(5) of the Constitution.

<sup>1493</sup> Article 193 of the Constitution.

<sup>1494</sup> Article 194 of the Constitution.

<sup>1495</sup> Article 195(1)(d)-(f) of the Constitution.

#### 2.4.2. Ministerial responsibility

It is the Assembly's constitutional competence to scrutinise the programme and actions of the Government and public administration.<sup>1496</sup> Government members comprising the Council of Ministers are *responsible* both to the President and to the Assembly, which is a consequence of the principles of representative democracy and interdependence of powers.<sup>1497</sup> However, they are *politically responsible* only to the Assembly.<sup>1498</sup>

As regards the instruments for effecting the Government's accountability, MPs have the following rights: (a) to question the Government about any of the acts of its own or those of the public administration as well as to obtain answers within a reasonable period of time; (b) to request and receive from the Government any information or document deemed useful for the exercise of their electoral mandate; (c) to form committees of inquiry;<sup>1499</sup> and (d) to vote on motions of confidence and censure.<sup>1500</sup> For the purposes of political accountability, ministers shall attend parliamentary sittings that are specially convened for the purposes of scrutiny. When asked, ministers are obliged to appear before parliamentary committees, although they may also ask to participate in committee proceedings on their initiative. In addition, ministers have the right to attend and speak during plenary sessions.<sup>1501</sup> A bulk of the parliamentary competences regarding the Government's accountability are exercised by the Assembly's Standing Committee.<sup>1502</sup>

The Government's responsibility to the President, i.e., the political responsibility *lato sensu*, refers to what Miranda and Medeiros called "judgment of merit", whereas the Government's responsibility towards the Assembly, i.e., political responsibility *stricto sensu*, would be a "political judgment".<sup>1503</sup> In turn, while the President, the Assembly and the Government are all jointly responsible for the preservation of the institutions, the Assembly and the Government alone are jointly responsible for the policies pursued by the Government. Furthermore, the President may neither give ministers any guidelines nor seek account from them.<sup>1504</sup> This does not, however,

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<sup>1496</sup> Article 163(d) and 162(a) of the Constitution.

<sup>1497</sup> Article 190 of the Constitution. Miranda, Jorge and Medeiros, Rui. *Constituição portuguesa anotada – Tomo II*, Coimbra: Coimbra Editora, 2006: 657.

<sup>1498</sup> Article 191(1)-(2) of the Constitution.

<sup>1499</sup> *Lei no. 5/93* of 1 March 1993. See more in: Miranda, Jorge. "Sobre as comissões parlamentares de inquérito," *Direito e Justiça – Revista da Faculdade de Direito da Universidade Católica Portuguesa*, Vol. 14, No. 1, 2000: 33-41.

<sup>1500</sup> Articles 156(d)-(f), 163(e) and 178(1) of the Constitution. See also: Valle, Jaime. *A participação do governo no exercício da função legislativa*, Coimbra: Coimbra Editora, 2004: 75.

<sup>1501</sup> Article 177 of the Constitution.

<sup>1502</sup> Under Article 179 of the Constitution, the Standing Committee is chaired by the President of the Assembly and, besides him or her, gathers the Vice Presidents of the Assembly and members nominated by each parliamentary party in proportion to the number of seats.

<sup>1503</sup> Miranda, Jorge and Medeiros, Rui. *Constituição portuguesa anotada – Tomo II*, Coimbra: Coimbra Editora, 2006: 659.

<sup>1504</sup> Miranda, Jorge and Medeiros, Rui. *Constituição portuguesa anotada – Tomo II*, Coimbra: Coimbra Editora, 2006: 661.

prevent ministers from maintaining contact with the President in light of their constitutional duty to ensure general relations between the Government and other state bodies within the scope of competence of their ministries.<sup>1505</sup> The differentiation between 'responsibility' and 'political responsibility', introduced by the constitutional amendment of 1982, also means that although the President may remove the Government at any time, he or she may only do so in the event of a conflict between the Government and the Assembly and not where the Government has not followed the President's policies.<sup>1506</sup>

The Government's political responsibility towards the Assembly is collective, as there is no procedure to oust an individual minister.<sup>1507</sup> Instead, the entire Government is "solidarily responsible" for the actions and omissions of any minister, secretary of state or under secretary of state.<sup>1508</sup> Amaral and Otero have argued, on the one hand, that the Assembly could also hold the Government politically responsible for refusing to countersign the President's acts, except where the Government's countersignatures are obligatory,<sup>1509</sup> and, on the other, that, through assessing the Government's use of countersignatures, the Assembly can also indirectly appraise the acts of the President.<sup>1510</sup> Finally, secretaries of state and under secretaries of state are responsible to their minister and to the Prime Minister.<sup>1511</sup>

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<sup>1505</sup> Article 201(2)(b) of the Constitution.

<sup>1506</sup> Falacho, Laurent. "Les rapports entre le président de la République et le premier ministre au Portugal: le régime politique portugais, l'avenir du régime français," *O Direito*, Vol. 132, No. 3-4, 2000: 436-437 and 441.

<sup>1507</sup> Article 189 of the Constitution reads: "Members of Government shall be bound by the Government's programme and by decisions taken by the Council of Ministers". The Constitution places this provision under the title "*solidariedade governamental*" in its Portuguese version or "collective responsibility" in its English version. An analysis of the legal doctrine shows that this provision is taken as the legal basis for collective ministerial responsibility. Although the text itself does not mention responsibility but regulates the internal relations between members of the Government rather than those between the Government and the Assembly, it is nonetheless held that it implies automatism between the ministers' duty to observe the Government programme and the responsibility of the entire Government for the actions of individual ministers. See for instance: Lunshof, Hans. "The Portuguese Republic," in *Constitutional law of 15 EU Member States*, by Lucas Prakke and Constantijn Kortmann (eds), Deventer: Kluwer Law International, 2004: 668 and 685; Valle, Jaime. *A participação do governo no exercício da função legislativa*, Coimbra: Coimbra Editora, 2004: 77.

<sup>1508</sup> Miranda, Jorge and Medeiros, Rui. *Constituição portuguesa anotada – Tomo II*, Coimbra: Coimbra Editora, 2006: 661.

<sup>1509</sup> The Government is, for example, obliged to countersign the acts whose aim is to promulgate statutes amending the Constitution or statutes adopted by the Assembly's override of the President's veto.

<sup>1510</sup> Amaral, Diogo Freitas do and Otero, Paulo. *O valor jurídico-político da referenda ministerial: estudo de direito constitucional e ciência política*, Lisbon: Lex, 1997: 72-73.

<sup>1511</sup> Article 191(3) of the Constitution.

## 2.5. The President of the Republic

The President is elected by direct universal suffrage<sup>1512</sup> for a period of five years<sup>1513</sup> and guarantees the proper functioning of the democratic institutions.<sup>1514</sup> The President appoints the Prime Minister after consulting the parties represented in the Assembly and after taking account of the results of parliamentary elections.<sup>1515</sup> The President appoints other ministers upon the Prime Minister's proposal.<sup>1516</sup> The constitutional value of the President's power to appoint the Prime Minister should be evaluated in light of the provision that obliges the Government to resign upon the beginning of a new legislature.<sup>1517</sup> In other words, even if the political parties forming the Government win parliamentary elections, the Government must still resign and be reappointed by the President. This provision was inspired by the wish to emphasise that each Government emanates from Parliament and that it is, therefore, Parliament which decides about the composition of the Government and not the President. Due to these limitations, it has been argued that the President's power to appoint the Prime Minister is a "notarial act" rather than a full-blown prerogative.<sup>1518</sup>

The President's power to remove the Government is tightly linked to the President's function as a guarantor of the proper functioning of Portuguese democracy. Namely, since the constitutional amendment of 1982,<sup>1519</sup> the President may only accept the Prime Minister's resignation if, upon consulting the Council of State,<sup>1520</sup> such a removal appears necessary in order to ensure the proper functioning of the democratic institutions.<sup>1521</sup> Yet since the President enjoys full discretion in

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<sup>1512</sup> Article 121(1) of the Constitution.

<sup>1513</sup> Article 128(1) of the Constitution.

<sup>1514</sup> Article 120 of the Constitution.

<sup>1515</sup> Articles 133(f) and (h) and 187 of the Constitution.

<sup>1516</sup> Article 133(h) of the Constitution.

<sup>1517</sup> Article 195(1)(a) of the Constitution.

<sup>1518</sup> Falacho, Laurent. "Les rapports entre le président de la République et le premier ministre au Portugal: le régime politique portugais, l'avenir du régime français," *O Direito*, Vol. 132, No. 3-4, 2000: 436-437 and 439.

<sup>1519</sup> *Lei constitucional no. 1/82* of 30 September 1982.

<sup>1520</sup> The Council of State is the political body that advises the President. It is chaired by the President, and besides him or her, gathers the President of the Assembly, the Prime Minister, the President of the Constitutional Court, the Ombudsman, the presidents of the regional governments, the former Presidents of the Republic who were elected under the Constitution of 1976 and were not removed from office, then five citizens appointed by the President and, finally, five citizens elected by the Assembly. The main responsibility of the Council of State is to give opinions to the President on a variety of issues foreseen by the Constitution. See Articles 141 *et seq.* of the Constitution.

<sup>1521</sup> Article 195(1)(b) and (2) of the Constitution. Circumstances that infringe the "proper functioning of democratic institutions" include those of a *politico-constitutional nature* (such as, for instance, where the Government does not present its political programme to the Assembly within the constitutionally prescribed period; where it continuously refuses to answer questions and requests from MPs or refuses to provide information to political parties and groups; or where it fails to attend the parliamentary debates that it is obliged to attend, etc.) and those of a *purely political nature* (such as, for example, a serious institutional conflict with the President or a serious politico-social crisis that disturbs the public order and

assessing whether such a necessity exists, this formal limitation might not suffice to prevent a *de facto* expansion of this right of the President.<sup>1522</sup> It should be added that the President's function as a 'democracy guarantor' does not extend to the rule of law, because it is the Government's administrative responsibility to "defend the democratic rule of law".<sup>1523</sup>

In the legislative sphere, the President enjoys the right to veto both draft legislation and decrees and he or she must provide reasons for the decision to use the veto. Only the Assembly may override it. If the Assembly approves the vetoed bill by an absolute majority of the votes of all the MPs entitled to vote, the President must enact it.<sup>1524</sup> Yet by refusing to enact or sign them, the President may block a wide array of draft legislative acts, such as laws, decree-laws, regulatory decrees, Assembly resolutions approving international agreements and Government decrees.<sup>1525</sup> Moreover, the President is obliged to use his veto where the Constitutional Court has found an act or international treaty unconstitutional.<sup>1526</sup>

Moreover, upon consulting the Council of State and the parties represented in the Assembly, the President may dissolve the Assembly, except during the period of six months following parliamentary elections, six months prior to the end of the President's term of office, or during the state of siege or emergency.<sup>1527</sup>

With regard to international treaties, it is the President's competence to ratify them once they have been duly approved.<sup>1528</sup> The Assembly, however, enjoys the exclusive power to approve, in the form of a resolution,<sup>1529</sup> treaties dealing with Portugal's participation in international organisations, treaties on friendship, peace, defence, the modification of borders and military affairs, treaties on matters that fall under the Assembly's exclusive legislative competence as well as those that the Government intends to submit to the Assembly for consideration.<sup>1530</sup> The Government is competent to approve all other international treaties.<sup>1531</sup> Since the constitutional amendment of 2005,<sup>1532</sup> the Constitution guarantees the possibility of holding a referendum with respect to treaties aimed at constructing or deepening the European Union.<sup>1533</sup>

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economic life of the state). Miranda, Jorge and Medeiros, Rui. *Constituição portuguesa anotada – Tomo II*, Coimbra: Coimbra Editora, 2006: 674.

<sup>1522</sup> Falacho, Laurent. "Les rapports entre le président de la République et le premier ministre au Portugal: le régime politique portugais, l'avenir du régime français," *O Direito*, Vol. 132, No. 3-4, 2000: 441.

<sup>1523</sup> Article 199(f) of the Constitution.

<sup>1524</sup> Article 136(1)-(2) of the Constitution.

<sup>1525</sup> Article 137 in conjunction with Article 134(b) of the Constitution.

<sup>1526</sup> Article 279(1) of the Constitution.

<sup>1527</sup> Articles 133(e) and 187 of the Constitution.

<sup>1528</sup> Article 135(b) of the Constitution.

<sup>1529</sup> Article 166(5) of the Constitution.

<sup>1530</sup> Article 161(i) of the Constitution.

<sup>1531</sup> Article 197(1)(c) of the Constitution.

<sup>1532</sup> *Lei constitucional no. 1/2005* of 12 August 2005.

<sup>1533</sup> Article 295 of the Constitution.

### 3. DEMOCRACY AS THE CRUX OF PORTUGAL'S RELATIONS WITH THE EU

The Constitution contains several provisions on Portugal's relations with the European Union.<sup>1534</sup> In international relations, since the constitutional amendment of 1989,<sup>1535</sup> "Portugal shall make every effort to reinforce the European identity and to strengthen the European states' actions in favour of democracy, peace, economic progress and justice in the relations between peoples".<sup>1536</sup> The Constitution explicitly permits Portugal's entry into "agreements for the exercise jointly, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union".<sup>1537</sup> Any transfer of sovereignty is not mentioned, which is consonant with the constitutional principle that sovereignty is single and indivisible, vested in the people and exercised by them in the forms foreseen by the Constitution.<sup>1538</sup> The constitutionalisation of joint exercise rather than the transfer of powers in Portugal, according to Pires, creates a particularly interactive and dynamic relationship between the legal orders of Portugal and the EU. As such, this relationship favours "interdependent cooperation" and "normative and institutional dialogism" between the two legal spheres.<sup>1539</sup>

Portugal's membership of the EU is subject to respect for the following three conditions: (a) reciprocity, (b) respect for the fundamental principles of a democratic state based on the rule of law and (c) respect for the principle of subsidiarity.<sup>1540</sup> Pursuant to the amendment of 2004,<sup>1541</sup> the Constitution establishes that primary and secondary EU law apply in Portugal in accordance with EU law subject to the condition that the fundamental principles of a democratic state based on the rule of law are respected.<sup>1542</sup> The principle of democracy, therefore, occupies a central place in the legal regulation of Portugal's membership of the European Union.

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<sup>1534</sup> See one of the most recent analysis of all seven constitutional revisions in Portugal to date in: Guedes, Armando Marques and Coutinho, Francisco Pereira. "O processo de integração europeia e a Constituição portuguesa," *Nação e Defesa*, No. 115, 2006: 83-112. See also: Miranda, Jorge. "O direito constitucional português da integração europeia alguns aspectos," in *Nos 25 anos da Constituição da República Portuguesa de 1976: evolução constitucional e perspectivas futuras*, Lisbon: Associação Académica da Faculdade de Direito de Lisboa, 2001: 15-62.

<sup>1535</sup> *Lei constitucional no. 1/89* of 8 July 1989.

<sup>1536</sup> Article 7(5) of the Constitution.

<sup>1537</sup> Article 7(6) of the Constitution. The aims of entering into agreements with the EU are to achieve economic, social and territorial cohesion of an area of freedom, security and justice and to define and implement a common external, security and defence policy.

<sup>1538</sup> Article 3(1) of the Constitution.

<sup>1539</sup> Pires, Francisco Lucas. "A experiência comunitária do sistema de governo da Constituição portuguesa," in *Perspectivas constitucionais: nos 20 anos da Constituição de 1976 – Volume II*, by Jorge Miranda (ed.), Coimbra: Coimbra Editora, 1997: 837-838.

<sup>1540</sup> Article 7(6) of the Constitution. This provision was first introduced by *Lei constitucional no. 1/92* of 25 November 1992 as a consequence of the Maastricht Treaty. See more in: Miranda, Jorge. "La Constitution portugaise et le traité de Maastricht," *Revue Française de Droit Constitutionnel*, No. 12, 1992: 679-688.

<sup>1541</sup> *Lei constitucional no. 1/2004* of 24 July 2004.

<sup>1542</sup> Article 8(4) of the Constitution.

## 4. THE PORTUGUESE PARLIAMENT'S COMPETENCE OF EUROPEAN SCRUTINY

### 4.1. Adapting to Europe

When Portugal joined the European Communities on 1 January 1986,<sup>1543</sup> the Assembly had already had a Committee for European Integration for six years. This Committee, now renamed the European Affairs Committee (*Comissão de Assuntos Europeus*) is the central body for the scrutiny of EU decision making in the Assembly and is composed of MPs in proportion to the number of seats held by parliamentary groups.<sup>1544</sup> While the accession arguably did not affect the essential lines of the Portuguese semi-presidential system of government,<sup>1545</sup> the institutional preponderance did swing towards the Government at the expense of the President and the Assembly.<sup>1546</sup> The significance of parliamentary involvement in EU affairs thus becomes tangible.

A befitting point of departure for the present analysis is an argument advanced around a decade ago regarding the impact of European integration on the Portuguese Parliament and system of government. It was then argued that the accelerated process of integration had had a profound and adverse effect on national parliaments in four main respects: (a) a loss of legislative competence; (b) the governmentalisation of the political decision to revise the Constitution; (c) the growing importance of compromises agreed by the Government at the EU level that are presented to Parliament as *fait accompli*; and (d) the absence of relations between national parliaments and EU institutions.<sup>1547</sup>

Indeed, such considerations have led to the orthodox descriptions of the Portuguese Parliament as a "slow adapter"<sup>1548</sup> or "loyal scrutineer"<sup>1549</sup>. Appraisals

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<sup>1543</sup> The Government's decision to apply for EU membership was supported by the three largest Portuguese parliamentary parties (Socialists, Social Democrats and Centrists) without overt opposition from the Communists. One of the major political factors for EU accession was "the desire to strengthen pluralist democratic institutions". Cunha, Paulo Pitta e. "Portugal and the European Economic Community," in *In search of modern Portugal: the Revolution and its consequences*, by Lawrence S. Graham and Douglas L. Wheeler (eds), Wisconsin: The University of Wisconsin Press, 1983: 322. See an excellent recent account of Portugal's EU accession in: Cunha, Alice Monteiro Pita Brito da. *A descoberta da Europa: a adesão de Portugal às Comunidades Europeias*, Lisbon: Ministério dos Negócios Estrangeiros, 2007. See also: Ferreira, José Medeiros. "A estratégia para a adesão às instituições europeias," in *Portugal e a construção europeia*, by Maria Manuela Tavares Riberio et al. (eds), Coimbra: Almedina, 2003: 137-166.

<sup>1544</sup> Article 1(2) of the Standing Orders of the European Affairs Committee (*Regulamento*) in conjunction with Article 29(1) of the Rules of Procedure of the Assembly (*Regimento*).

<sup>1545</sup> Sousa, Marcelo Rebelo de. "Aspectos institucionais da adesão de Portugal às Comunidades Europeias," in *Portugal e o alargamento das Comunidades Europeias, International Conference, 24-26 January 1980, Lisbon*, Lisbon: Inteuropa, 1981: 152.

<sup>1546</sup> See *infra* note 1571 of this Chapter.

<sup>1547</sup> Miranda, João. *O papel da Assembleia da República na construção europeia*, Coimbra: Coimbra Editora, 2000: 16.

<sup>1548</sup> Maurer, Andreas and Wessels, Wolfgang. "National parliaments after Amsterdam: from slow adapters to national players?," in *National parliaments on their ways to Europe: losers of latecomers?*, by Andreas Maurer and Wolfgang Wessels (eds), Baden-Baden: Nomos Verlagsgesellschaft, 2001: 463.

that the Assembly's European scrutiny is ineffective are virtually ubiquitous.<sup>1550</sup> Such somber appraisals are not unjustified, as in the two decades following Portugal's EU accession, spanning the period from IV to IX Portuguese legislature (1985-2005), only 70 out of a total of 1866 plenary debates addressed the European Union, which is less than 5%.<sup>1551</sup> The unpropitious position of the Assembly in EU affairs derived from the "system of informal influence"<sup>1552</sup> or the "system of information"<sup>1553</sup> that it used to operate until 2006. This system implied that there was no systematic scrutiny of EU matters but only limited supervision through meetings with the Government. This situation was embedded in the consensus among the major political parties on the positive impact of European integration on Portugal. As a consequence, EU affairs were not politicised, divisions did not occur and Europe was largely left outside the Assembly's debate.<sup>1554</sup> For these reasons, the Assembly excessively depended on the Government for information and could not exert any decisive influence even in the fields of exclusive legislative competence.<sup>1555</sup> The irregular

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<sup>1549</sup> Fraga, Ana. "The Parliament of Portugal: loyal scrutiny and informal influence," in *National parliaments on their ways to Europe: losers or latecomers?*, by Andreas Maurer and Wolfgang Wessels (eds), Baden-Baden: Nomos Verlagsgesellschaft, 2001: 359-375.

<sup>1550</sup> Guedes, Armando Marques and Coutinho, Francisco Pereira. "O processo de integração europeia e a Constituição portuguesa," *Nação e Defesa*, No. 115, 2006: 101; Magone, José. "The Europeanisation of Portugal (1986-2006). A critical view," *Nação e Defesa*, No. 115, 2006: 18; Miranda, Jorge. *Direito constitucional III: integração europeia, direito eleitoral, direito parlamentar*, Lisbon: Associação Académica da Faculdade de Direito de Lisboa, 2001: 38; Miranda, Jorge and Medeiros, Rui. *Constituição portuguesa anotada – Tomo II*, Coimbra: Coimbra Editora, 2006: 513; Ramos, Rui Moura. "O Parlamento Português no processo de criação da União Europeia," *Legislação: Cadernos de Ciência de Legislação*, No. 13-14, 1995: 185; Fraga, Ana. "The Parliament of Portugal: loyal scrutiny and informal influence," in *National parliaments on their ways to Europe: losers or latecomers?*, by Andreas Maurer and Wolfgang Wessels (eds), Baden-Baden: Nomos Verlagsgesellschaft, 2001: 366.

<sup>1551</sup> Cunha, Alice Monteiro Pita Brito da. *A Europa no discurso parlamentar português: discursos parlamentares 1986-2005*, Universidade Nova de Lisboa, Trabalho final de curso do doutoramento em história, 2009: 23.

<sup>1552</sup> Fraga, Ana. "The Parliament of Portugal: loyal scrutiny and informal influence," in *National parliaments on their ways to Europe: losers or latecomers?*, by Andreas Maurer and Wolfgang Wessels (eds), Baden-Baden: Nomos Verlagsgesellschaft, 2001: 359-375; COSAC Secretariat, Annex to the 12<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLII Conference of Community and European Affairs Committees of Parliaments of the European Union held in Stockholm, 5-6 October 2009, p. 106.

<sup>1553</sup> Filipe, António. "A União Europeia e os parlamentos nacionais," *Res Publica: Revista Lusófona de Ciência Política e Relações Internacionais*, No. 1, 2005: 69.

<sup>1554</sup> Paulo, Maria Teresa and Bandeira, Cristina Leston. "O impacto da europeização no parlamento," *Instituto Português de Relações Internacionais, Universidade Nova de Lisboa, Working Paper 21*, 2006: 6, available at: [http://www.ipri.pt/publicacoes/working\\_paper/pdf/Parlamento.pdf](http://www.ipri.pt/publicacoes/working_paper/pdf/Parlamento.pdf), accessed on 23 February 2008; See a broader analysis in: Lobo, Marina Costa. "Portuguese attitudes towards EU membership: social and political perspectives," *South European Society and Politics*, Vol. 8, No. 1, 2003: 97-118.

<sup>1555</sup> Filipe, António. "A União Europeia e os parlamentos nacionais," *Res Publica: Revista Lusófona de Ciência Política e Relações Internacionais*, No. 1, 2005: 71; Magone, José. "The Portuguese Assembleia

nature of scrutiny was also a corollary of the internal process of democratic consolidation, because it facilitated the entrenchment of the Government's preponderance over the Assembly. The two legislatures with absolute majorities mustered by a single political party, the Social Democrats, namely V legislature (1987-1991) and VI legislature (1991-1995), represented a step further in subjugating the Assembly to the Government's dominance.<sup>1556</sup>

Ana Fraga, a former clerk of the Committee for European Affairs, attested, nonetheless, that regarding specific questions of national interest the Assembly can influence or even reinforce the Government's position in the Council of Ministers.<sup>1557</sup> Similarly, a study of the Assembly's involvement in Community affairs during the legislative session 1992/1993 showed that "notwithstanding an emphatic 'deficit' of action by parliamentary committees [...], the European Community's weight is so big that it translates into an intense presence in the debate and parliamentary work".<sup>1558</sup> The increased presence of the Community in the Assembly was principally attributable to the Portuguese Presidency during the first semester of 1992 and the Maastricht negotiations. While Magone agreed that the Assembly can enhance "the influencing ability of its national government",<sup>1559</sup> he also observed that the Assembly's scrutiny is "very sporadic and deferential to the Government".<sup>1560</sup> Yet whereas the Government remains the main addressee of the Assembly's scrutiny and whereas the Assembly's participation in the EU decision making was so far "necessarily intermediated by the Government",<sup>1561</sup> it is no longer true that the "whole process of scrutiny is *ex post*".<sup>1562</sup> The finding that "the European integration

da República: discovering Europe," in *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 153.

<sup>1556</sup> See further: Bandeira, Cristina Leston. "O impacto das maiorias absolutas na actividade e na imagem do parlamento português," *Análise Social*, Vol. 31, No. 1, 1996: 151-181.

<sup>1557</sup> Fraga, Ana. "The Parliament of Portugal: loyal scrutiny and informal influence," in *National parliaments on their ways to Europe: losers or latecomers?*, by Andreas Maurer and Wolfgang Wessels (eds), Baden-Baden: Nomos Verlagsgesellschaft, 2001: 368.

<sup>1558</sup> Sá, Luís. *O lugar da Assembleia da República no sistema político*, Lisbon: Caminho, 1994: 409.

<sup>1559</sup> Magone, José. "The Portuguese Assembleia da República: discovering Europe," in *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 162.

<sup>1560</sup> Magone, José. "South European national parliaments and the European Union: an inconsistent reactive revival," in *National parliaments within the enlarged European Union: from victims of integration to competitive actors?*, by John O'Brennan and Tapio Raunio (eds), London: Routledge, 2007: 122.

<sup>1561</sup> Roseira, Gustavo Gramaxo. "Portugal," in *The role of national parliaments in the European Union: proceedings of the FIDE XXIV Congress Madrid 2010 - Vol. 1*, by Gil Carlos Rodriguez Iglesias and Luis Ortiz Blanco (eds), Madrid: Universidad Complutense de Madrid, 2010: 396.

<sup>1562</sup> Magone, José. "The southern European pattern of parliamentary scrutiny of EU legislation: emulating the French model," in *Democratic governance and European integration: linking societal and state processes of democracy*, by Ronald Holzhaecker and Erik Albaek (eds), Northampton: Edward Elgar Publishing, 2007: 241.

process did not change the pattern of behaviour between the executive and legislative branch"<sup>1563</sup> has become equally untenable.

The image of the Portuguese Assembly as a laggard needs revision, because, as will be shown in the following sections, Portugal has established firm constitutional and statutory guarantees of parliamentary participation in the processes of European integration, which are further developed through a range of internal and informal practices. As a result of the changes implemented from 2006 onwards, the Portuguese scrutiny system has become document-based and, thus, more similar to those of France and Britain.<sup>1564</sup> An important aspect of this transformation is that EU documents are now sifted in the early stages of the decision-making process, so that if an EU initiative is not scrutinised, this is because it was Parliament's and not the Government's decision to do so.

The European Union has proven to be the external link that propelled the reform.<sup>1565</sup> As Magone observes, "the thickening of the institutional networks between the supranational and national levels reinforced even more the prospects of democratic consolidation and institutionalisation".<sup>1566</sup> One of the major political factors for EU accession in the first place was actually "the desire to strengthen pluralist democratic institutions"<sup>1567</sup> The often quoted patrimonial and clientelistic features of Portuguese politics<sup>1568</sup> have been surmounted to the extent that the Assembly now has greater opportunities for input in the shaping of EU decision than hitherto. In fact, it is plausible that precisely these features have contributed to the reform of EU scrutiny through the MPs' relations with their compatriot José Manuel Durão Barroso, the two-time Commission President, who first assumed this office in November 2004, less than two years before the enactment of the European Scrutiny Act. To be sure, contacts with EU institutions are not an entirely new activity, as the Assembly has been reported to receive EU documentation from the Commission and

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<sup>1563</sup> Magone, José. "The Europeanisation of Portugal (1986-2006). A critical view," *Nação e Defesa*, No. 115, 2006: 20.

<sup>1564</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 113.

<sup>1565</sup> Magone, José. "South European national parliaments and the European Union: an inconsistent reactive revival," in *National parliaments within the enlarged European Union: from victims of integration to competitive actors?*, by John O'Brennan and Tapio Raunio (eds), London: Routledge, 2007: 129.

<sup>1566</sup> Magone, José. "The Portuguese Assembleia da República: discovering Europe," in *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 158.

<sup>1567</sup> Cunha, Paulo Pitta e. "Portugal and the European Economic Community," in *In search of modern Portugal: the Revolution and its consequences*, by Lawrence S. Graham and Douglas L. Wheeler (eds), Wisconsin: The University of Wisconsin Press, 1983: 322.

<sup>1568</sup> See for instance: Magone, José. "South European national parliaments and the European Union: an inconsistent reactive revival," in *National parliaments within the enlarged European Union: from victims of integration to competitive actors?*, by John O'Brennan and Tapio Raunio (eds), London: Routledge, 2007: 116.

the European Parliament ever since the Maastricht era.<sup>1569</sup> However, the scope and intensity of these information channels have since gained momentum.

#### 4.2. Constitutional framework of the Assembly's European scrutiny

The Portuguese Assembly derives several EU-related competences from the Constitution.

First, the Constitution entrenches the Assembly's *ex ante* involvement in EU decision making by providing that the Assembly shall make pronouncements on EU initiatives in the sphere of its exclusive legislative competence.<sup>1570</sup> In Otero's opinion, this constitutional provision is a recognition that there had been a "clear erosion of the legislative power reserved for the Parliament in the context of the European Union", because the Government or the persons appointed by it had acquired "exclusive decision-making protagonism" in areas falling within the Assembly's exclusive legislative competence.<sup>1571</sup>

Second, it pertains to the Assembly to supervise and consider Portugal's participation in the process of constructing the European Union.<sup>1572</sup>

Third, for the purposes of fulfilling these two competences, the Government is under a constitutional duty to submit to the Assembly information on the construction of the European Union in good time.<sup>1573</sup>

However, since the amendment of 2005,<sup>1574</sup> the Constitution guarantees the possibility of holding a referendum on the approval of a treaty aimed at constructing or deepening the Union.<sup>1575</sup> This curtails Parliament's competence in approving the ratification of such treaties, because should ratification be by referendum, it would be the Portuguese citizens who would decide on their approval or rejection.

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<sup>1569</sup> Magone, José. "The Portuguese Assembleia da República: discovering Europe," in *National parliaments and the European Union*, by Philip Norton (ed.), London: Frank Cass, 1996: 156.

<sup>1570</sup> Article 161(n) of the Constitution. This provision was first introduced by *Lei constitucional no. 1/97* of 20 September 1997. Under Article 164 of the Constitution, the following 21 areas fall under the Assembly's exclusive legislative competence: national, regional and local elections; referendums; the Constitutional Court; defence and the armed forces; states of siege and emergency; citizenship; territorial waters; political associations and parties; basic elements of the education system; the status and role of holders of offices established under the Constitution; local authorities; restrictions on the exercise of rights by the military, police, and security services; appointment of Portuguese members of EU bodies, with the exception of the European Commission; the intelligence system and state secrets; state, regional, and local budgets; national symbols; finances of the autonomous regions; police forces and security services; autonomy of the President of the Republic's support services.

<sup>1571</sup> Otero, Paulo. "A revisão constitucional de 1997: sistema de actos legislativos: opinião," *Legislação: Cadernos de Ciência de Legislação, No. 19-20, 1997*: 143.

<sup>1572</sup> Article 163(f) of the Constitution. This provision was introduced by the constitutional amendment of 1992.

<sup>1573</sup> Article 197(1)(i) of the Constitution. This provision was introduced by the constitutional amendment of 1992.

<sup>1574</sup> *Lei Constitucional no. 1/2005* of 12 August 2005.

<sup>1575</sup> Article 295 of the Constitution.

#### 4.3. Statutory and informal framework of the Assembly's European scrutiny

The Assembly's EU competence has gradually increased from that of participation in the definition of Community policies in 1987,<sup>1576</sup> via that of monitoring matters related to Portugal's participation in the European Communities in 1988,<sup>1577</sup> to that of monitoring and assessing Portugal's participation in the process of the construction of the European Union in 1994.<sup>1578</sup>

The current statutory regulation of the Assembly's EU competence is the 2006 Act on the monitoring, assessment and pronouncement by the Assembly of the Republic within the scope of the process of constructing the European Union (European Scrutiny Act).<sup>1579</sup> This statute is a concretisation of the relevant constitutional provisions and was prompted by the Portuguese Ombudsman, who in 2005 issued a recommendation calling for statutory implementation of the Assembly's duty to pronounce itself on EU matters that fall under its exclusive legislative competence, because although this has been a constitutional requirement

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<sup>1576</sup> *Lei no. 28/87 participação da Assembleia da República na definição das políticas comunitárias* of 29 June 1987. This statute laid down wide terms of reference for the Assembly's scrutiny of EU affairs. The Government was obliged to send the Assembly not only draft regulations, directives, decisions, resolutions, Council reports and programmes and orientation documents of the Commission, but also all modifications of and deliberations relating to these documents (Article 1(2)). The Government was obliged to consult the Assembly wherever an EU matter referred to the Assembly's competence (Article 2(1)). An interesting institutional novelty was the envisaged Mixed Committee Assembly-European Parliament (*Comissão Mista Assembleia da República-Parlamento Europeu*), which was motivated by the wish to "stimulate the reinforcement of parliamentary institutions in the life of the European Communities, as well as their solidarity, and to contribute to a better monitoring of the participation of Portugal in its activities [...]" (Article 5(1)).

<sup>1577</sup> *Lei no. 111/88 acompanhamento da Assembleia da República em matérias relativas à participação de Portugal nas Comunidades Europeias* of 15 December 1988. This statute widened the scope of information that the Government was obliged to provide to the Assembly, chiefly adding to the existing list draft treaties and conventions to be concluded by the Community within the ambit of its external relations, decisions of representatives of the governments of the Member States and draft non-binding acts (Article 1(2)(a)(b) and (d)). The Mixed Committee, which had been foreseen a year before, was substituted with the format of regular meetings between the European Affairs Committee and Portuguese MEPs (Article 5).

<sup>1578</sup> *Lei no. 20/94 acompanhamento e apreciação pela Assembleia da República da participação de Portugal no processo de construção da União Europeia* of 15 June 1994. This statute further widened the scope of the Assembly's right to obtain information from the Government to include "broad lines of economic, social as well as sectoral orientation" (Article 2(1)(e)). It established a regular process of consultation and exchange of information between the Government and the Assembly (Article 1(2)). Reference to joint meetings with the European Parliament was dropped and, instead, the European Affairs Committee was charged with intensifying the exchange with the European Parliament, along with the possibility of creating mutual facilities (Article 4(2)(c)). Most importantly, this statute introduced a scrutiny procedure whereby the European Affairs Committee would forward draft EU initiatives to competent specialist committees for information or the adoption of a reasoned opinion (*parecer fundamentado*). These reasoned opinions did not, however, refer to the principle of subsidiarity. Upon receipt of the specialist committee's reaction, the European Affairs Committee could adopt a report (*relatório*) for the Government's consideration or a draft resolution for the plenary (Article 5).

<sup>1579</sup> *Lei no. 43/2006 acompanhamento, apreciação e pronúncia pela Assembleia da República no âmbito do processo de construção da União Europeia* of 25 August 2006 (European Scrutiny Act).

since the amendment of 1997,<sup>1580</sup> it was still not implemented in legislation. In the Ombudsman's opinion, the silence of the legislature amounted to unconstitutionality by omission.<sup>1581</sup> The Assembly followed the Ombudsman's view and enacted the European Scrutiny Act the following year.

The European Scrutiny Act foresees both *ex ante* and *ex post* instruments to scrutinise secondary EU decision making. For this purpose, there shall be a regular consultation process between the Assembly and the Government.<sup>1582</sup> It is notable that the Assembly, acting on the Government's or its own initiative, is *obliged* to make an *ex ante* pronouncement not only regarding draft EU legislation that falls within the ambit of the Assembly's exclusive legislative competence but also on documents that contain guidelines for EU policies and measures.<sup>1583</sup> This is a wide-ranging competence, because it encompasses both legislative and non-legislative EU initiatives in all policy fields, including the former Second and Third Pillars.<sup>1584</sup> The importance of this development can hardly be overstated. Witness the witty statement to this effect by António Vitorino (PS), the former Chairman of the European Affairs Committee:

Green, white, yellow, blue, red or striped papers are, in most cases, instruments of political orientation that affect the application of the principle of subsidiarity and it is often only subsequently, when these political orientations are translated into normative acts, that the question of subsidiarity is debated. But the question of subsidiarity arises much earlier; it arises at the level of choices that structure sectoral policies. It would, therefore, be wrong to think that all the work of political control of the Assembly of the Republic, even in defence of its sphere of exclusive legislative powers, should focus on concrete legal norms. Instead, it must, from the beginning, focus on the primary phase, which is the phase of defining structural political choices. [...] [T]he democratic deficit begins at home and it is at the level of each national parliament that this deficit needs to be overcome.<sup>1585</sup>

Such a scrutiny orientation, furthermore, fulfils the very purpose of debating Europe, which Luís Pais Antunes (PSD) defined as being "to make Europeans, and especially the Portuguese, [...] discuss the correctness of its policies and options and the paths that we are taking".<sup>1586</sup>

The goals pursued by the European Scrutiny Act were subsequently fortified under a broader parliamentary reform carried out in 2007, which sought to transform

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<sup>1580</sup> *Lei constitucional no. 1/97* of 20 September 1997.

<sup>1581</sup> *Provedor de justiça* (Ombudsman), *Recomendação no. 6/B/2005* of 22 June 2005.

<sup>1582</sup> Article 1(2) of the European Scrutiny Act and Article 261(2) of the Rules of Procedure of the Assembly no. 1/2007 of 1 September 2007.

<sup>1583</sup> Article 4(2) of the European Scrutiny Act.

<sup>1584</sup> Assembly of the Republic. "*European Affairs Committee – Assembleia da República – Portugal*", 2007: 5 and 17.

<sup>1585</sup> *Diário da Assembleia da República, I Série, No. 131*, 3 June 2006, p. 6039.

<sup>1586</sup> *Diário da Assembleia da República, I Série, No. 29*, 21 December 2007, p. 41.

the Assembly into "a Parliament that is accountable to and close to the citizens, a more transparent Parliament that sets an example, and a Parliament that plays a more active role in the construction of Europe and the world".<sup>1587</sup>

#### 4.4. The 2010 scrutiny reform: reinforcing *ex ante* involvement

On 20 January 2010, the European Affairs Committee approved a new mechanism for the scrutiny of EU initiatives.<sup>1588</sup> It envisages three types of scrutiny procedures: enhanced, normal and urgent scrutiny. Importantly, all of these procedures refer to the initiatives of the Commission. If an initiative does not originate from the Commission, the European Affairs Committee decides whether to conduct scrutiny at all and, if it decides to do so, whether to involve the competent specialist committee.

1. *Enhanced scrutiny.* This procedure is a product of the Assembly's positive experience with the Barroso initiative and centres on the Commission's legislative and work programme.<sup>1589</sup> Enhanced scrutiny begins with a pre-selection process using the criterion of the political relevance of an EU initiative for Portugal. Each parliamentary committee prepares a report on the Commission's legislative and work programme and notifies the European Affairs Committee whether it intends to submit any Commission initiative, whether legislative or not, to enhanced scrutiny. Upon receiving these notices, the European Affairs Committee chooses from among the initiatives pre-selected by specialist committees a maximum of six initiatives per year for enhanced scrutiny. The European Affairs Committee will then, in cooperation with the competent specialist committee, draft a broader work programme for each of the selected initiatives. Enhanced scrutiny proceeds on the basis of this individual tailor-made scrutiny programme. This programme should reflect the need to comply with the eight-week deadline for submitting reasoned opinions on subsidiarity. If pre-selection does not yield any initiative or yields less than six initiatives, the European Affairs Committee decides on which six or which remaining initiatives will be closely monitored. All other initiatives, which the

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<sup>1587</sup> COSAC Secretariat, Annex to the 12<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLII Conference of Community and European Affairs Committees of Parliaments of the European Union held in Stockholm, 5-6 October 2009, p. 104.

<sup>1588</sup> COSAC Secretariat, Annex to the 13<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLIII COSAC meeting held in Madrid from 31 May - 1 June 2010, pp. 394-396. See also: Assembly of the Republic. "O acompanhamento dos assuntos europeus na Assembleia da República e a entrada em vigor do Tratado de Lisboa", available at: [http://www.parlamento.pt/europa/Documents/Roadshow\\_altar\\_Parlamento.pdf](http://www.parlamento.pt/europa/Documents/Roadshow_altar_Parlamento.pdf), accessed on 10 June 2010.

<sup>1589</sup> The application of the enhanced scrutiny procedure was first tested regarding the Commission's Legislative and Work Programme for 2008. See: *Comissão de Assuntos Europeus, "Parecer sobre o Programa Legislativo e de Trabalho da Comissão Europeia para 2008, bem como os pareceres das diversas comissões parlamentares"* of 18 December 2007, rapporteur Ana Catarina Mendes (PS), p. 6.

European Affairs Committee decides not to scrutinise according to the enhanced procedure, are dealt with according to the normal procedure.

Scrutiny under the enhanced procedure includes a wide array of activities: requesting clarifications from the Government; obtaining information from EU institutions; exchanging information with other national parliaments; organising hearings with the competent Commissioner, the Presidency of the Council and the MEP acting as rapporteur for the EU dossier in question; holding public hearings; gathering views from stakeholders; and producing studies.

2. *Normal scrutiny.* Upon receiving draft legislative and non-legislative initiatives from the Commission, the European Affairs Committee forwards them to the competent parliamentary committees for information or the adoption of a report with or without a formal written opinion. If it decides to draw up a report, the competent committee must do so within six weeks from the date of receiving the Portuguese language version of the EU initiative. The report may examine issues of substance, subsidiarity or proportionality. It is then sent back to the European Affairs Committee, which drafts its own opinion within the ensuing two weeks. Any MP sitting on the European Affairs Committee may require the competent specialist committee to issue a report.

3. *Urgent scrutiny.* This procedure applies where the European Affairs Committee finds out, through IPEX<sup>1590</sup> or through its permanent representative in Brussels, that a certain Commission initiative has caused other national parliaments to have doubts about compliance with the principle of subsidiarity. In these cases, the European Affairs Committee will prepare its opinion and request, if it so wishes, the opinion of the competent specialist committee.

#### **4.5. Information for scrutiny**

To aid the parliamentary scrutiny of EU matters, the Government is obliged to send relevant information to the Assembly. The Government shall keep the Assembly duly informed about the issues and positions to be discussed by EU institutions, proposals under discussion and ongoing negotiations. It shall submit all relevant documents as soon as they reach the Council. The documents listed *exempli causa* in the European Scrutiny Act are: draft treaties to be concluded by the Union or between the Member States within the framework of the Union; proposals for binding and non-binding acts; other draft legal acts, particularly decisions by representatives of the governments of the Member States meeting in the Council; the Commission's annual policy strategies, legislative and working programmes and other instruments of legislative planning; the European Parliament's legislative resolutions on common

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<sup>1590</sup> IPEX stands for Interparliamentary EU Information Exchange and is an online database established in July 2006. It contains a complete catalogue of Commission documents from 2006 and parliamentary documents pertaining to the national scrutiny of decisions taken at the EU level. Each national parliament uploads the information and documents that it wishes to share with other national parliaments. See: <http://www.ipex.eu>.

positions adopted by the Council; *passerelle* authorisations granted to the Council; agendas and results of Council sessions, including minutes of the sessions at which the Council takes decisions on legislative proposals; reports on the application of the principle of subsidiarity; the Commission's consultation documents, such as communications, Green and White Papers; major economic, social and other guidelines; and the annual reports of the European Court of Auditors.<sup>1591</sup> Virtually all of these documents are also provided to the Assembly directly by the Commission.

Additionally, the Rules of Procedure of the Assembly envisage that, whenever possible, the technical note (*nota técnica*) that must be supplied along with each bill should include information about the legal and doctrinal background not only from the national point of view but also from the perspective of EU and international affairs. A list of other pending national and Community initiatives on the same subject matter should also be enclosed.<sup>1592</sup>

The European Affairs Committee distributes draft EU proposals and consultation documents both among its own members and among specialist committees. Unless the European Affairs Committee specifically requests their opinion, specialist committees are free to decide whether to act or not. Where they have decided to act, for instance by drafting a report, the European Affairs Committee, despite its umbrella competence,<sup>1593</sup> has the right ultimately to decide on the effect to be given to the document adopted by the specialist committee and on the action to be pursued. In reaching these decisions, the European Affairs Committee may accept, modify or reject any document or recommendation by the specialist committee.<sup>1594</sup>

It should be underlined that the Rules of Procedure assign relative, as opposed to absolute, priority to the scrutiny of Portugal's participation in the construction of the EU.<sup>1595</sup>

#### 4.6. Instruments of scrutiny

The Assembly's main scrutiny instruments are: reports, formal written opinions, reasoned opinions on subsidiarity, resolutions, debates and meetings on EU issues. We will analyse them in turn.

*1. Report (relatório).* Reports are prepared both by specialist parliamentary committees and by the European Affairs Committee. They examine the contents of EU initiatives under scrutiny and provide a summary of and conclusions on a given proposal.<sup>1596</sup> For the drafting of a report, the European Affairs Committee may

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<sup>1591</sup> Article 5(1) of the European Scrutiny Act.

<sup>1592</sup> Article 131(2)(b)-(c) of the Rules of Procedure of the Assembly.

<sup>1593</sup> Article 6(1) of the European Scrutiny Act and Article 2 of the Standing Orders of the European Affairs Committee.

<sup>1594</sup> Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee of the Portuguese Assembly, Lisbon, 8 June 2010.

<sup>1595</sup> Article 62(3)(c) of the Rules of Procedure of the Assembly.

<sup>1596</sup> Article 16(5) of Standing Orders of the European Affairs Committee.

designate, among its members, one or more rapporteurs (*deputado relator*).<sup>1597</sup> Once adopted, reports are sent to the President of the Assembly and the Government. Reports typically provide a basis for the adoption of formal written opinions.

2. *Formal written opinion (parecer)*. As mentioned above, the Assembly is statutorily obliged to issue a formal written opinion whenever an EU proposal pending before the EU legislature falls within the ambit of its exclusive legislative competence.<sup>1598</sup> Correspondingly, the Government is under a statutory duty to inform the Assembly of the existence of such proposals, to invite it to adopt a written opinion and to provide it in good time together with a summary of the proposal, an analysis of the proposal's implications and, if available, the position that it has taken thereon. Written opinions are prepared by the European Affairs Committee in consultation with the competent specialist committees. Once formulated, written opinions can be sent to the plenary for debate and voting. The Assembly may prepare new written opinions at any other subsequent phase of EU decision making. With respect to non-legislative, non-binding or consultative EU documents that do not fall within the ambit of its exclusive legislative competence, the Assembly may but need not formulate formal written opinions and the Government need not inform the Assembly of such EU initiatives.

The European Scrutiny Act prescribes that in cases of urgency the adoption of the opinion by the European Affairs Committee suffices. Beyond this, due to insuperable time constraints experienced in the context of COSAC subsidiarity checks, the Assembly reached a political consensus that any scrutiny document issued by the European Affairs Committee should, regardless of the existence of circumstances of urgency, be regarded as representing the view of the entire Assembly.<sup>1599</sup>

It should be stressed that although there is formally no scrutiny reserve, the Government's obligation to obtain the Assembly's formal written opinion on a given EU initiative sometimes practically functions as a scrutiny reserve. For example, during Council negotiations on the PNR Framework Decision, the Government gave its informal agreement to this proposal, but it withheld its formal agreement pending receipt of the Assembly's opinion. This caused disenchantment among MPs, because the Government had thereby frustrated the Assembly's meaningful pronouncement.<sup>1600</sup>

3. *Reasoned opinion (parecer fundamentado)*. In accordance with the Lisbon Treaty and the Protocol on the application of the principles of subsidiarity and proportionality appended thereto, the Assembly may send the Presidents of the European Parliament, the Council and the Commission reasoned opinions stating

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<sup>1597</sup> Article 16(1) of the Standing Orders of the European Affairs Committee.

<sup>1598</sup> Articles 1(1), 2 and 6(2)(b) of the European Scrutiny Act.

<sup>1599</sup> Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee of the Portuguese Assembly, Lisbon, 8 June 2010.

<sup>1600</sup> Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee of the Portuguese Assembly, Lisbon, 8 June 2010.

why a draft EU initiative, or any subsequent amendment thereof, fails to comply with the principle of subsidiarity. Reasoned opinions are only adopted regarding EU documents that fall within the ambit of the shared competences of the Union. Reasoned opinions take the form of resolutions, except in cases of urgency, when a written opinion of the European Affairs Committee suffices.<sup>1601</sup> The caveat related to the urgency of formal written opinions applies *mutatis mutandis*.

4. *Resolution.* The European Affairs Committee may decide to adopt a motion for a resolution of the Assembly and send it to the plenary for debate and voting.<sup>1602</sup> The Assembly may adopt resolutions regarding both proposals falling within its exclusive legislative competence and other documents emanating from EU institutions, such as Green and White Papers, strategic guidelines, communications, etc.<sup>1603</sup> As expressions of opinion of the entire Assembly, resolutions are the most effective scrutiny instrument.

Resolutions are also adopted on the Government's annual reports on Portugal's participation in the process of constructing the European Union, which the Government must lay before the Assembly in the first calendar quarter of the year.<sup>1604</sup> These annual reports are prepared by the Directorate General for European Affairs of the Ministry of Foreign Affairs and contain comprehensive (500-600 pages) summaries of key EU events, developments and decisions that had the greatest impact on Portugal in the previous year along with the measures that the Government took pursuant to these decisions.<sup>1605</sup> As underscored in the Assembly's resolution on the Government's annual report for 2008, these reports have "an essentially political character or, at least, seek to give a political interpretation of the various components" of the Government's EU policy.<sup>1606</sup> The resolution further stated that the Government's report revealed "the effort, contribution and large consensus among the political forces represented in the Assembly of the Republic regarding the integration of Portugal in the European Union, without prejudice to different assessments of the priorities and guidelines followed in this process".<sup>1607</sup>

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<sup>1601</sup> Article 3 of the European Scrutiny Act.

<sup>1602</sup> Article 7 of the European Scrutiny Act and Article 15 of the Standing Orders of the European Affairs Committee.

<sup>1603</sup> Articles 6(2)(e) and 7(5)-(6) of the European Scrutiny Act.

<sup>1604</sup> Article 5(3) of the European Scrutiny Act.

<sup>1605</sup> See an excellent study of the Europeanisation of this Ministry in: Correia, José de Matos. "A integração na União Europeia e o papel do Ministério dos Negócios Estrangeiros," *Nação e Defesa*, No. 115, 2006: 29-81.

<sup>1606</sup> Para. 2 of the *Resolução da Assembleia da República no. 51/2009 "Relatório de participação de Portugal no processo de construção da União Europeia – 23.º ano – 2008"*, *Diário da Assembleia da República, I Série*, No. 138, 20 July 2009, p. 4541. See also para. 2 of the *Resolução da Assembleia da República no. 21/2008 "Relatório de participação de Portugal no processo de construção da União Europeia – 22.º ano – 2007"*, *Diário da Assembleia da República, I Série*, No. 109, 6 June 2008.

<sup>1607</sup> Para. 6 of the *Resolução da Assembleia da República no. 51/2009, "Relatório de participação de Portugal no processo de construção da União Europeia – 23.º ano – 2008"*, *Diário da Assembleia da República, I Série*, No. 138, 20 July 2009, p. 4541.

The resolution also supported the preparations for the entry into force of the Lisbon Treaty and welcomed the promotion of an EU-wide debate on the future of Europe, arguing that "this debate is a sign of the democratic culture and could constitute a source of affirmation of a 'European spirit' and contribute to the deepening of the European integration process".<sup>1608</sup> Therefore, the resolutions appraising the Government's annual reports are chiefly intended as a form of *ex post* accountability. Yet since the Government often distributes its annual reports at the last moment, some MPs have referred to the whole process as a "fairy tale"<sup>1609</sup> or "ritual account"<sup>1610</sup>. Fraga shares this view, noting that these annual reports are not particularly useful for *ex post* control of the Government not only because of the complexity of the process of transposing EU acts but also because of Parliament's inability to analyse these reports rigorously.<sup>1611</sup>

5. *Debates*. A number of Assembly debates concern EU issues.<sup>1612</sup>

First, a plenary debate is held with the Government following the last European Council meeting of each EU Presidency.

Second, as an increasingly important tool of *ex ante* involvement, the debate in the first half of the year may analyse the Commission's annual policy strategy and that in the second half of the year the Commission's legislative and work programme.

Third, after each COSAC meeting, including both plenary COSAC and the meeting of COSAC chairpersons, the Chairman of the European Affairs Committee presents a report. This report, together with any contributions or conclusions reached during the COSAC meeting, is debated among the members of the European Affairs Committee and the issues arising therefrom are duly taken into account in the work of the Assembly. As particularly useful aspects of COSAC meetings, the Assembly singles out the exchange of best practices, such as subsidiarity checks, then the exchange of views with Commissioners and Council members, but also debates issues other than subsidiarity, such as political aspects of EU initiatives.<sup>1613</sup>

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<sup>1608</sup> Para. 3 of the *Resolução da Assembleia da República no. 51/2009, "Relatório de participação de Portugal no processo de construção da União Europeia – 23.º ano – 2008"*, *Diário da Assembleia da República, I Série, No. 138*, 20 July 2009, p. 4541.

<sup>1609</sup> See the intervention by Honório Novo (PCP) in: *Diário da Assembleia da República, I Série, No. 96*, 26 June 2009, p. 11.

<sup>1610</sup> See the intervention by Fernando Rosas (BE) in: *Diário da Assembleia da República, I Série, No. 96*, 26 June 2009, p. 12.

<sup>1611</sup> Fraga, Ana. "O controlo parlamentar dos actos do governo na execução do direito comunitário," *Revista Jurídica, No. 24* Associação Académica da Faculdade de Direito de Lisboa, 2001: 610.

<sup>1612</sup> Article 4(1)(a)-(b) of the European Scrutiny Act.

<sup>1613</sup> COSAC Secretariat, Annex to the 13<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLIII COSAC meeting held in Madrid from 31 May – 1 June 2010, p. 404.

Fourth, the Assembly and the Government may instigate debates on all other subjects under discussion in EU institutions that fall within their areas of responsibility.<sup>1614</sup>

6. *Meetings.* In the weeks before and after European Council meetings, the European Affairs Committee holds meetings with the Government. Similarly, in the week before or after meetings of the Council of Ministers in its different configurations, there will be joint meetings between the European Affairs Committee, the competent specialist committee and the member of the Government in charge of the dossier.<sup>1615</sup>

The effects of all of these scrutiny instruments remain within the political sphere. There are no legal sanctions for cases when the Government disregards the Assembly's views. The described scrutiny instruments are not futile, however. As the Assembly explains, where the Government fails to comply with its formal written opinions or resolutions, where it fails to request their issuance or where it fails to provide the required information, the Assembly may resort to the *ex post* political sanctions. Two of them stand out. On the one hand, on the Government is placed "a political onus to provide sufficient grounds so as not to be subject to widespread criticism, which in the last instance could undermine the majority supporting it and trigger the more drastic forms of supervision such as a motion of censure".<sup>1616</sup> The Assembly may also refuse to transpose directives that fall under the Assembly's transposing competence or request an assessment of the Government's decree-laws transposing directives.<sup>1617</sup> With regard to primary EU law, the Assembly may refuse to approve a treaty negotiated by the Government.<sup>1618</sup> On the other hand, the Assembly's influence on the Commission is limited to the importance that the Commission decides to attach to the Assembly's reports, formal written opinions or resolutions. The Assembly also ascertains that its influence on the Council of Ministers and the European Parliament always remains indirect and is commensurate to the influence that it is able to exert on the Government and Portuguese MEPs.<sup>1619</sup>

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<sup>1614</sup> Article (4)(4) of the European Scrutiny Act.

<sup>1615</sup> Article 4(1)(c)-(d) of the European Scrutiny Act.

<sup>1616</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 112.

<sup>1617</sup> See more on the transposition of directives in Portugal in: Sousa, Marcelo Rebelo de. "A transposição das directivas comunitárias para a ordem jurídica nacional," *Legislação: Cadernos de Ciência de Legislação*, No. 4-5, 1992: 69-94.

<sup>1618</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 112.

<sup>1619</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, pp. 112-113.

## 4.7. Scope of scrutiny

### 4.7.1. Area of Freedom, Security and Justice

For the Assembly, the transfer of Third Pillar matters to the First Pillar affects its scrutiny insofar as new proposals falling under these areas come within the terms of the Barroso initiative and are directly transmitted by the Commission. This assists the Assembly in having a say both in accordance with the European Scrutiny Act and in the framework of the political dialogue with the Commission.<sup>1620</sup> No differentiation in scrutinising the substance of such proposals is envisaged, however. Consequently, not only will the Assembly not resign on its scrutiny competence because the European Parliament will gain competence in the transferred policy areas, its scrutiny potential will be enhanced.

#### A. Passerelles and EU criminal law competence

Neither the passerelles laid down in the former Articles 67(2) TEC and 42 TEU nor the polemic revolving around the *Environmental Crimes* case elicited a reaction among MPs.<sup>1621</sup> The main reason for the absence of parliamentary pronouncement was that the Assembly was not conducting European scrutiny with any degree of regularity. An examination of these two matters was, furthermore, precluded by the fact that there was no formal mechanism to inform national parliaments of a possible recourse to passerelles as well as that the extension of the EU's criminal law competence did not cause political controversy in Portugal.<sup>1622</sup>

#### B. Europol

The Assembly did not scrutinise the 2009 Council decision establishing Europol, because the legislature had ended. Scrutiny was, therefore, deemed to have been completed without further analysis.<sup>1623</sup>

However, the Assembly did scrutinise the 2010 Commission communication on the procedures for the parliamentary scrutiny of Europol. The matter was delegated to the Committee for Constitutional Affairs, Rights, Liberties and Guarantees, which issued a report in March 2011. Estimating that the political control of Europol would be of "vital importance" for national parliaments in the ensuing period, rapporteur João Serrano (PS) suggested the creation for this purpose of a working group within the Assembly that would be composed of members of both the Constitutional Affairs

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<sup>1620</sup> COSAC Secretariat, Annex to the 6<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVI COSAC meeting held in Helsinki, 19-21 November 2006, p. 173.

<sup>1621</sup> Personal correspondence with Maria João Costa, clerk of the European Affairs Committee, March-May 2011.

<sup>1622</sup> Personal correspondence with Maria João Costa, clerk of the European Affairs Committee, March-May 2011.

<sup>1623</sup> See: [http://www.ipex.eu/ipex/cms/home/Documents/dossier\\_CNS20060310/pid/9861](http://www.ipex.eu/ipex/cms/home/Documents/dossier_CNS20060310/pid/9861), accessed on 10 April 2011.

Committee and the European Affairs Committee.<sup>1624</sup> As a forum specially tasked with discussing Europol's activities, held the rapporteur, the working group would enable the Assembly to make a "constructive and effective intervention at the EU level".<sup>1625</sup> The Commission's proposal for the establishment of an interparliamentary committee of national and European parliamentarians was supported. Building on this, the report recommended that the structure of this interparliamentary committee resemble that of COSAC and underscored the importance of pluripartism, according to which national delegations should comprise at least two representatives of different political parties. The preparation of this report, which was later also signed by the European Affairs Committee, was informed by informal contacts with Portuguese MEPs.<sup>1626</sup> Yet since the legislature ended a fortnight thereafter, following the resignation of Prime Minister José Socrates, no further consideration could be given to the dossier and the aforesaid report became the standpoint of the entire Assembly.

#### 4.7.2. Common Foreign and Security Policy and Common Security and Defence Policy

As regards the CFSP and CSDP, the Constitution charges the Armed Forces with "fulfilling the Portuguese state's commitments in the military field and taking part in humanitarian and peace missions undertaken by international organisations to which Portugal belongs"<sup>1627</sup> and the Assembly with "supervising the involvement of military contingents and security forces abroad".<sup>1628</sup>

In 2003, the Assembly passed the Act regulating the assessment by the Assembly of the Republic of the involvement of Portuguese military contingents abroad.<sup>1629</sup> Under this statute, the Government shall, prior to deploying Portuguese military troops abroad, communicate its decision to do so to the Assembly for the purposes of *ex ante* assessment and *ex post* monitoring. The Government shall submit two types

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<sup>1624</sup> *Comissão de Assuntos Constitucionais, Direitos, Liberdades e Garantias, Relatório* of 9 March 2011, rapporteur João Serrano (PS), p. 3.

<sup>1625</sup> *Comissão de Assuntos Constitucionais, Direitos, Liberdades e Garantias, Relatório* of 9 March 2011, rapporteur João Serrano (PS), p. 3.

<sup>1626</sup> Personal correspondence with Maria João Costa, clerk of the European Affairs Committee, March-May 2011.

<sup>1627</sup> Article 275(5) of the Constitution. In the reading of Jorge Miranda, Portugal's international commitments in the military field only flow from the UN Charter, whose Article 52 permits "the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action [...]". Thus, the involvement of Portuguese Armed Forces in EU military or humanitarian missions is not directly based on the Portuguese Constitution. Miranda, Jorge and Medeiros, Rui. *Constituição Portuguesa anotada – Tomo III*, Coimbra: Coimbra Editora, 2007: 692.

<sup>1628</sup> Article 163(i) of the Constitution.

<sup>1629</sup> *Lei no. 46/2003 Lei que regula o acompanhamento, pela Assembleia da República, do envolvimento de contingentes militares portugueses no estrangeiro* of 22 August 2003.

of reports to the Assembly: a semester report on the involvement of the Portuguese military abroad and a final report within 60 days of the termination of a mission.

Within the Assembly, scrutiny of these reports is the competence of the National Defence Committee. The Standing Orders of this Committee expressly envisage a duty to monitor and assess Portugal's participation in the construction of the European Union in areas falling under its portfolio and to take part in periodic meetings with counterpart parliamentary committees from other Member States.<sup>1630</sup> The Assembly scrutinises initiatives in CFSP and CSDP by way of "overall assessment".<sup>1631</sup> Although no specific arrangements exist in the Assembly for scrutinising civilian or military CSDP missions,<sup>1632</sup> regular meetings that the National Defence Committee holds with the National Defence Ministry also address questions related to these missions.<sup>1633</sup>

The National Defence Committee affirms, furthermore, that the area of CSDP remains the object of intergovernmental cooperation and it is, therefore, a matter of national competence.<sup>1634</sup> Depicting a more tempestuous relationship towards the Union, Mendes Bota (PSD) warned that the dismantlement of the WEU Assembly necessitated an urgent search for practical solutions between national parliaments in the field of defence, because these parliaments "cannot allow to be outstripped in this competence by the hegemonic will of the European Parliament".<sup>1635</sup> In a joint written declaration of a vote on a resolution formalising Portugal's dissociation from the WEU, the members of the former Portuguese delegation to the WEU Assembly urged the establishment of a permanent conference of representatives of national parliamentary committees for foreign affairs and defence, before which officials of the Council of Ministers and the High Representative of the Union would "regularly render account and be questioned".<sup>1636</sup> In their opinion, this is the only way to safeguard the role of national parliaments in the process of European integration and to curtail a further worsening of the Union's democratic deficit. Their wish was granted in March 2011, when the Assembly adopted a resolution on the

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<sup>1630</sup> Articles 3(e) and 4(j) of the Standing Orders of the National Defence Committee of 17 November 2009.

<sup>1631</sup> COSAC Secretariat, Annex to the 4<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXIV COSAC meeting held in London, 9-10 October 2005, p. 107.

<sup>1632</sup> COSAC Secretariat, Annex to the 4<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXIV COSAC meeting held in London, 9-10 October 2005, p. 108.

<sup>1633</sup> COSAC Secretariat, Annex to the 5<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXV COSAC meeting held in Vienna, 22-23 May 2006, p. 57.

<sup>1634</sup> *Assembleia da República, Comissão de Defesa Nacional, Relatório*, rapporteur José Lamego (PS), in: *Assembleia da República, Comissão de Assuntos Europeus, "Parecer sobre a Proposta de Resolução no. 68/X – Aprova o Tratado de Lisboa"*, rapporteurs Ana Catarina Mendes (PS) and Mário David (PSD), p. 57.

<sup>1635</sup> *Diário da Assembleia da República, I Série, No. 70*, 19 June 2010, p. 49.

<sup>1636</sup> This joint declaration was signed by five MPs representing the position of three major political parties in Portugal: José Vera Jardim (PS), Manuela Melo (PS), Mendes Bota (PSD), Mota Amaral (PSD) and Telmo Correia (CDS-PP). *Diário da Assembleia da República, I Série, No. 70*, 19 June 2010, p. 72.

interparliamentary scrutiny of EU external policy, common security and CSDP.<sup>1637</sup> Similar to the solutions suggested by the French and British parliaments, this resolution, in accordance with the Lisbon Treaty Protocol on the role of national parliaments, calls for the establishment of an interparliamentary conference modelled after COSAC. It would be able to issue opinions and the High Representative would be invited to attend its meetings.

#### 4.7.3. EU international agreements

With respect to the treaties concluded by the Union, the Assembly does not hold the Government to account for its negotiations within the competent EU institutions. It scrutinises neither international agreements falling under the exclusive competence of the EU, such as common commercial policy, nor those falling under the shared competence. However, at any time during the negotiations, the Committee for Foreign Affairs and Portuguese Communities may resort to regular mechanisms of holding the Government politically accountable.<sup>1638</sup>

As regards EU accession treaties, there is no systematic practice of scrutiny, which means that the Assembly's intervention occurs at the phase of the approval of a given accession treaty and follows the same approval procedure as all other treaties.<sup>1639</sup>

#### 4.7.4. Open method of coordination and comitology

The Assembly is "not directly involved" in the processes of an open method of cooperation, but recognises that they allow both access to comparative statistics for different Member States as well as the monitoring of what their respective governments are planning in the fields of employment, growth, training, new technologies, the knowledge society, cutting red tape, etc.<sup>1640</sup> By the same token, recent changes in comitology procedures have not yet been followed.<sup>1641</sup>

### 4.8. Addressee of scrutiny

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<sup>1637</sup> *Resolução no. 85/2011 - Posição da Assembleia da República sobre o acompanhamento interparlamentar da política externa e de segurança comum e da política comum de segurança e defesa* of 25 March 2011. (*Diário da Assembleia da República, I Série, No. 71*, 11 April 2011, pp. 2177-2178).

<sup>1638</sup> COSAC Secretariat, Annex No. 1 to the 10<sup>th</sup> bi-annual report by COSAC: replies to the questionnaire by the national parliaments and the European Parliament, prepared for XL COSAC meeting held in Paris, 3-4 November 2008, p. 114.

<sup>1639</sup> COSAC Secretariat, Annex to the 9<sup>th</sup> bi-annual report by COSAC: replies to the questionnaire by the national parliaments and the European Parliament, prepared for XXXIX COSAC meeting held in Bled-Brdo pri Kranju, 7-8 May 2008, pp. 178-179.

<sup>1640</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 115.

<sup>1641</sup> COSAC Secretariat, Annex to the 6<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVI COSAC meeting held in Helsinki, 19-21 November 2006, p. 173.

The main addressee of the Assembly's European scrutiny is the Portuguese Government, which is held politically to account for the positions adopted in the Council. Like in France and in Britain, there is neither an intention of nor a procedure for mandating the ministers.

Yet formal opportunities for establishing contacts with EU institutions are ample. The European Scrutiny Act contains progressive provisions in this regard, which can be found neither in France nor in Britain. To wit, the European Affairs Committee is charged with developing relations with EU institutions by: (a) intensifying exchanges with the European Parliament through regular meetings with interested MEPs, particularly those elected in Portugal; (b) promoting meetings or hearings with EU institutions, bodies and agencies on matters important to Portugal; (c) promoting interparliamentary cooperation within the EU; and (d) appointing Portuguese representatives to COSAC and assessing the results of COSAC meetings.<sup>1642</sup>

Maintaining contact with EU institutions is, indeed, a "complementary" way of participating in EU affairs,<sup>1643</sup> since "Parliament's monitoring can include the activities of all EU institutions that it deems relevant for the scrutiny procedure and can refer both to legislative and non-legislative proposals".<sup>1644</sup> In fact, since the Government's negotiation position is typically not yet defined or is otherwise unavailable by the time parliamentary scrutiny commences, "parliamentary scrutiny is in practice directed primarily at documents from European institutions, and especially those dealing with European Commission initiatives".<sup>1645</sup> That notwithstanding, while most of the scrutinised documents do originate from the Commission, the Government is the primary addressee of scrutiny in terms of steps taken or positions adopted. Neither the Commission nor the Government should, therefore, be regarded as the prevalent addressee of parliamentary scrutiny.<sup>1646</sup>

Another noteworthy aspect of the European Affairs Committee's work that is missing in France and Britain is the organisation of public debates, hearings and conferences on European topics with representatives of civil society. The aim of these events is to create wider public forums for the discussion of EU issues at the national level.<sup>1647</sup>

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<sup>1642</sup> Article 6(2)(g)-(j) of the European Scrutiny Act.

<sup>1643</sup> Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee of the Portuguese Assembly, Lisbon, 8 June 2010.

<sup>1644</sup> COSAC Secretariat, Annex to the 13<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLIII COSAC meeting held in Madrid from 31 May - 1 June 2010, p. 394.

<sup>1645</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 111.

<sup>1646</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 111.

<sup>1647</sup> Article 6(2)(m) of the European Scrutiny Act.

#### 4.8.1. Relations with the European Parliament

The right of the European Affairs Committee to invite Portuguese MEPs to participate in its work is specifically foreseen in its Standing Orders.<sup>1648</sup> Also, MEPs are often invited to attend public hearings and conferences that the Assembly organises on European topics.

Further, the Assembly has had a permanent representation in Brussels since 1 January 2007 in the form of a representative to the COSAC Secretariat and as of 24 June 2008 in the form of a permanent representative to the EU. The main task of the Assembly's representative in Brussels is to relay information about the EU decision-making process as "qualitative support" for the Assembly's EU scrutiny. In this respect, since September 2008 the representative has regularly forwarded to the Assembly reports on relevant European Parliament debates.<sup>1649</sup> Other tasks of the representative include: setting up a network of contacts with EU institutions, in particular with the European Parliament, then with the COSAC Secretariat and permanent representatives of other national parliaments; gathering comparative information on parliamentary practices; preparing reports at the request of the Assembly's organs and offices; and assisting Portuguese MPs who visit Brussels. The permanent representative acts under the supervision and direction of the Secretary General of the Assembly and shall, for this purpose, prepare a report on his or her work prior to the end of each legislative session.<sup>1650</sup>

#### 4.8.2. Relations with the Commission

##### A. Informal contacts

The Assembly occasionally maintains informal contacts with Commission representatives both in Lisbon and in Brussels. The working visit to Brussels by a seven-member delegation of the European Affairs Committee realised on 26-27 October 2010 is a good example thereof.<sup>1651</sup> The purpose of this visit was to establish contacts and exchange information with EU institutions and Portugal's Permanent Representation. Among other persons, the MPs met with Maroš Šefčovič, the Commission Vice-President. They seized the opportunity to present to him with the dossiers that the Assembly selected for enhanced scrutiny. They also underlined that although sufficient information on EU initiatives is received in advance of the actual

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<sup>1648</sup> Article 4(2) of the Standing Orders of the European Affairs Committee of 18 November 2009.

<sup>1649</sup> *Assembleia da República, "O acompanhamento dos assuntos europeus na Assembleia da República e a entrada em vigor do Tratado de Lisboa"*, available at:

[http://www.parlamento.pt/europa/Documents/Roadshow\\_altar\\_Parlamento.pdf](http://www.parlamento.pt/europa/Documents/Roadshow_altar_Parlamento.pdf), accessed on 10 June 2010.

<sup>1650</sup> COSAC Secretariat, Annex to the 11<sup>th</sup> bi-annual report on developments in European Union procedures and practices relevant to parliamentary scrutiny: replies of national parliaments and the European Parliament, prepared for XLI COSAC meeting held in Prague, 10-12 May 2009, pp. 213-215.

<sup>1651</sup> *Comissão de Assuntos Europeus, Relatório da visita de uma delegação de deputados da Comissão de Assuntos Europeus às instituições da União Europeia e à representação permanente de Portugal junto da União Europeia* of 3 November 2010.

negotiations in EU institutions, more information needs to be made available when the negotiations start. The most important question was posed by Alberto Costa (PS), who inquired whether the Commission attaches greater importance to the national parliaments' subsidiarity assessments or to their political appraisal of the contents of EU initiatives. This is crucial for the Assembly, because it concentrates almost exclusively on subsidiarity. Commissioner Šeřčovič stressed that the Commission analyses the opinions of national parliaments from a political perspective and that, therefore, subsidiarity is not approached legalistically.

### **B. Scrutiny of the Commission's legislative planning**

Unlike in France, for instance, the Commission's annual policy strategies and legislative and work programmes are considered not solely as useful guidelines on forthcoming EU legislation; these instruments decisively determine the course of the Assembly's scrutiny for a given year. This means that MPs gear their scrutiny specifically towards the Commission's agenda. These Commission documents are scrutinised by both specialist committees and the European Affairs Committee in the form of reports with formal written opinions, which are debated and adopted in the plenary. The reports and opinions on legislative and work programmes are often sent to the Commission, too. The European Affairs Committee also notes the Assembly's "manifest intention" of continued scrutiny whenever the Commission submits to it the initiatives implementing the legislative and work programme.<sup>1652</sup>

An analysis of the Assembly's scrutiny of the Commission's legislative planning instruments for 2008, 2009 and 2010 exhibits several defining traits of this process.

First, prior to adopting its reports, the European Affairs Committee in principle holds a public hearing not only with the Government, but also with Portuguese MEPs and Commission officials. For example, the public hearing on the Annual Policy Strategy for 2008 hosted the Permanent Representative of the Commission in Portugal,<sup>1653</sup> while the one on the Legislative and Work Programme for the same year received the person in charge of this document in the Commission President's Cabinet.<sup>1654</sup>

Second, an important byproduct of the Assembly's involvement in *ex ante* monitoring of the Commission's legislative planning is the awakening of specialist committees. As the European Affairs Committee emphasised in its reports on the Legislative and Work Programmes for 2008 and 2009, the participation of specialised committees was "ample and growing".<sup>1655</sup> As rapporteur Ana Catarina

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<sup>1652</sup> *Comissão de Assuntos Europeus, Relatório sobre o Programa Legislativo e de Trabalho da Comissão Europeia para 2008* of 18 December 2007, rapporteur Ana Catarina Mendes (PS), p. 13.

<sup>1653</sup> *Comissão de Assuntos Europeus, Relatório e parecer sobre a Estratégia Política Anual da Comissão Europeia para 2008* of 17 June 2007, rapporteur Armando França (PS), p. 1.

<sup>1654</sup> *Comissão de Assuntos Europeus, Relatório sobre o Programa Legislativo e de Trabalho da Comissão Europeia para 2008* of 18 December 2007, rapporteur Ana Catarina Mendes (PS), pp. 13-14.

<sup>1655</sup> *Comissão de Assuntos Europeus, Relatório sobre o Programa Legislativo e de Trabalho da Comissão Europeia para 2008* of 18 December 2007, rapporteur Ana Catarina Mendes (PS), p. 8;

Mendes (PS) observed, the Assembly's scrutiny is becoming "more meaningful and of higher quality".<sup>1656</sup> But the European Affairs Committee prudently warns that the scrutiny process needs to be further concretised, incentivised and deepened.

Third, the scrutiny of the Commission's legislative planning is an occasion for MPs to pass judgment on the Commission's intentions. In most cases, the Commission is positively assessed and its endeavours saluted. Criticism is also expressed but to a lesser extent. A few examples illustrate this state of affairs. For example, the European Affairs Committee's report on the Annual Policy Strategy for 2008 stated that the Commission's plans were coherent with the strategic objectives that it had foreseen and that explanations of the grounds for action were adequate and well defined. However, the degree of detail offered for the justification of the allocation of financial resources for the execution of the programme was lower.<sup>1657</sup> The report also raised doubts as to whether the strategies that the Commission had developed for the key areas of EU action – such as the economy, research and social policy – were the best suited and most adequate ones given the rapid changes that these fields were undergoing.<sup>1658</sup> The Annual Policy Strategy for 2009 was appraised by rapporteur Regina Bastos (PSD) as balanced, rational, coherent with the Commission's mandate and efficient in confronting the present and future challenges of the Union.<sup>1659</sup> The public hearing held on the Legislative and Work Programme for 2009 evaluated this document as "moderate, realistic and objective".<sup>1660</sup>

Fourth, although both types of the Commission's legislative planning instruments are often on the agenda for debate in the plenary, they are only sporadically referred to by MPs. The reason for this is that in principle these Commission documents are debated together with the conclusions of European Council meetings or the Government's annual reports. The result of this is that MPs focus almost exclusively on the Government's performance. Comments specifically addressing the EU level are rare, but do occur nonetheless. Positive judgments about the Commission come not only from the ruling Socialists, but also from the largest opposition party, the Social Democrats, and to some extent from the Centrists. Negative judgments are principally voiced by smaller opposition parties: the Communists, Greens and the Left Block. Several examples corroborate this. Referring to the Legislative and Work

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*Comissão de Assuntos Europeus, Relatório sobre o Programa Legislativo e de Trabalho da Comissão para 2009* of 27 January 2009, rapporteur Mário David (PSD), p. 10. Namely, the European Affairs Committee's report on the Legislative and Work Programme for 2008 was based on nine reports by specialist committees and that on the Legislative and Work Programme for 2009 on ten such reports.

<sup>1656</sup> *Diário da Assembleia da República, I Série, No. 29*, 21 December 2007, p. 20.

<sup>1657</sup> *Comissão de Assuntos Europeus, Relatório e parecer sobre a Estratégia Política Anual da Comissão Europeia para 2008* of 17 June 2007, rapporteur Armando França (PS), pp. 2-3.

<sup>1658</sup> *Comissão de Assuntos Europeus, Relatório e parecer sobre a Estratégia Política Anual da Comissão Europeia para 2008* of 17 June 2007, rapporteur Armando França (PS), p. 2.

<sup>1659</sup> *Comissão de Assuntos Europeus, Parecer sobre a Estratégia Política Anual para 2009* of 7 July 2008, rapporteur Regina Bastos (PSD), p. 10.

<sup>1660</sup> *Comissão de Assuntos Europeus, Relatório sobre o Programa Legislativo e de Trabalho da Comissão para 2009* of 27 January 2009, rapporteur Mário David (PSD), p. 9.

Programme for 2008, Jacinto Serrão (PS) supported the Commission's efforts in striving towards better legislation and added that the Assembly can contribute to this process because:

We are in Parliament, which is the best place, the place *par excellence* to do this job, or rather, to assess this initiative of the European Union, so that we can improve the legislative output in the European space.<sup>1661</sup>

It also happens that the Commission's approach is favoured over that of the Government. In this vein, Regina Bastos (PSD) reprimanded the Government for not following the call for supporting micro, small and medium-sized enterprises that the Commission issued in its Annual Policy Strategy for 2010:

I would like to say that this document of the Commission [...] is completely contrary to what has been the position of the current Socialist government in Portugal, which, instead of following this superior example of the European Commission, systematically and stubbornly insists on the megalomaniac projects of major public work projects of dubious profitability.<sup>1662</sup>

With respect to the same Commission document, negative voices could also be heard. For instance, Fernando Rosas (BE) declared that:

The whole process of the Lisbon Treaty is a demonstration of the serious democratic deficit that characterises the institutions of the European Union and, inevitably, separates them from the citizens. Nor is a matter of great astonishment the manifest lack of EU structural policies to combat the crisis and unemployment. [...] What should we expect from a Commission that, in essence, prepared and facilitated the impact of the crisis through a political bet on the destruction of public services, the promotion of unemployment and job insecurity, [and] an aggravated exploitation of labour [...]?<sup>1663</sup>

Even more explicit was the reaction by Francisco Madeira Lopes (Greens), who carped on about the neo-liberal policies of what he dubbed "barrosismo". For him, Barroso was directly responsible for the deregulation of the financial and capital markets, for the diminution of workers' rights, for the support for nuclear energy, for the implementation of genetically modified organisms and for the Returns Directive.<sup>1664</sup>

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<sup>1661</sup> *Diário da Assembleia da República, I Série, No. 29*, 21 December 2007, p. 42.

<sup>1662</sup> *Diário da Assembleia da República, I Série, No. 96*, 26 June 2009, p. 19.

<sup>1663</sup> *Diário da Assembleia da República, I Série, No. 96*, 26 June 2009, p. 13.

<sup>1664</sup> *Diário da Assembleia da República, I Série, No. 96*, 26 June 2009, p. 17.

### C. The Barroso initiative

Since September 2006, the Assembly has received draft EU proposals and consultation documents directly from the Commission as part of the Barroso initiative. For the Portuguese Assembly, this direct link did not merely represent a new source of information or a new tool for the amelioration of the daily operation of its EU scrutiny. In the words of a clerk of the European Affairs Committee, "it raised the profile of Parliament vis-à-vis the Government".<sup>1665</sup> But how and why is this so?

In the wake of the adoption of the European Scrutiny Act, which coincided with the start of the Barroso initiative, the European Affairs Committee decided to pay special attention to the political dialogue with the Commission. The reason for tailoring its scrutiny procedures to the purposes of the Barroso initiative was that it would allow the Assembly to pronounce itself beyond subsidiarity, which, in the opinion of this Committee, "is not even the most important aspect of EU legislation".<sup>1666</sup> In turn, direct receipt of information on the Commission's legislative activity reduces the Assembly's dependence on the Government. Exchanging views with the Commission and receiving feedback from it before the onset of the legislative procedure at the EU level eviscerates the Government's inherent privilege of timely possession of all relevant information and pre-empts the latter's occasional recourse to scapegoating practices, otherwise nurtured by the Union's multilevel decision-making system.<sup>1667</sup>

Three key repercussions flow from the Assembly's closer ties with the Commission.

First, since it is highly probable that the MPs will or can receive relevant information from the Commission, or sometimes from the European Parliament, the Government can no longer prevent them from acting by withholding information from it.

Second, the Government also cannot present negotiations in the Council as *fait accompli*, because the MPs will be in direct dialogue with the Commission and will, thus, have the data on the ongoing EU legislative process, albeit only of those data that the Commission wishes to share.

Third, the Commission itself will be able to counter the Government whenever the latter, during Council negotiations, abstractly uses the Assembly as an excuse for staunch adherence to its position. In these situations, the Commission can invoke the

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<sup>1665</sup> Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee of the Portuguese Assembly, Lisbon, 8 June 2010.

<sup>1666</sup> Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee of the Portuguese Assembly, Lisbon, 8 June 2010.

<sup>1667</sup> Accusations that the Government plays multilevel games could be heard, for instance, during the plenary debate on the Commission's Annual Policy Strategy for 2009, when Mário Santos David (PSD) stated that "we cannot but note [...] the dual standards of the Portuguese Government and the Socialist majority that supports it, which, in Portugal, criticises, attacks and rejects the proposals of PSD and in Brussels, the following day, applauds, defends and approves these same measures". *Diário da Assembleia da República, 1 Série, No. 28*, 19 December 2008, p. 44.

Assembly's position obtained through the political dialogue and therewith reduce the Government's room for manoeuvre.<sup>1668</sup>

The Assembly's newly enthusiastic approach to EU affairs is borne out by the Commission's reports on the political dialogue with national parliaments. The Portuguese Parliament has so far sent most reasoned opinions to the Commission. As a "particularly active chamber" and one with a "particular interest in subsidiarity questions",<sup>1669</sup> the Assembly, while remaining silent in 2006, sent 19 opinions in 2007, 65 in 2008, 47 in 2009 and 106 in 2010, amounting to a total of 237 opinions in the period 2006-2010. It, thus, left the French and British parliaments far behind.

However, an analysis of the contents of the opinions demonstrates that, as a matter of principle, they contain a description of the EU initiative scrutinised, possibly accompanied with a report by the competent specialist committee, and a very short verdict on whether subsidiarity was breached or not.<sup>1670</sup> No justification or any further commentary is provided. The Assembly's opinions, hence, are not quite the 'reasoned' opinions foreseen by the Subsidiarity Protocol. On occasion, the Assembly does offer substantive remarks. Only in these cases is the Commission likely to respond to the MPs' concerns. For example, examining Iceland's accession process, the Assembly *inter alia* found that this country's policy of permitting whale hunting was at variance with the *acquis*. In reply to the Assembly, the Commission stated that the next progress report on Iceland would address this topic together with the recommendations raised in the Assembly's opinion. In other replies, the Commission typically notes the Assembly's stance on EU initiatives and gives more information on the dossier in question. Conversely, the Commission almost always replies to the opinions by the parliaments of France<sup>1671</sup> and the United Kingdom,<sup>1672</sup> which have more developed scrutiny systems. Since the Commission tends to send replies where parliamentary opinions address the contents of EU policies and where these provide substantive observations, this comparative insight means that the Portuguese scrutiny of EU affairs is still evolving.

Yet the upsurge in the number of the opinions sent to the Commission should be assessed from a different viewpoint. In contrast to the previous situation, it signifies the Assembly's proactive attitude to scrutiny. If one recalls the standpoint of the European Affairs Committee that subsidiarity is not the most significant element of its involvement in EU decision making, then Portugal's record in the political

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<sup>1668</sup> Interviews with Bruno Dias Pinheiro held in Brussels on 27 May 2008 in his capacity as permanent representative of the Assembly to the COSAC Secretariat as well as in Lisbon on 8 June 2010 in his capacity as clerk of the European Affairs Committee.

<sup>1669</sup> European Commission, Annual report 2009 on relations between the European Commission and national parliaments, COM(2010) 291, 2 June 2010, pp. 2, 4 and 10.

<sup>1670</sup> See: [http://ec.europa.eu/dgs/secretariat\\_general/rerelations/rerelations\\_other/npa/portugal/2010\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npa/portugal/2010_en.htm).

<sup>1671</sup> See: [http://ec.europa.eu/dgs/secretariat\\_general/rerelations/rerelations\\_other/npa/france/2009\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npa/france/2009_en.htm), accessed on 2 June 2011.

<sup>1672</sup> See:

[http://ec.europa.eu/dgs/secretariat\\_general/rerelations/rerelations\\_other/npa/united\\_kingdom/2009\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npa/united_kingdom/2009_en.htm), accessed on 2 June 2011.

dialogue might be a ramification of a more comprehensive metamorphosis in its approach to European scrutiny. Interestingly, the European Affairs Committee has itself perceived that its shift towards more frequent relations with EU institutions has actually resulted in "the neglect of its scrutiny of the Government", which, as a pivotal element of the Assembly's function of political accountability, will need to be bolstered.<sup>1673</sup>

The Assembly's prominent participation in the Barroso initiative reflects a more general intensification of the scrutiny activity in the post-2006 period. The Assembly's statistical data show that in the period between October 2006 and mid-February 2009 the Assembly scrutinised a total of 204 EU initiatives (131 legislative and 73 non-legislative) and that specialist committees adopted 156 reports, of which 126 were definitively adopted by the European Affairs Committee.<sup>1674</sup> In the first legislative session of XI legislature only, lasting from October 2009 to July 2010, the number of EU initiatives scrutinised was 192, with 83 reports adopted by specialised committees and 55 by the European Affairs Committee.<sup>1675</sup> None were adopted before 2006. Barroso's political dialogue was, thus, an excellent testing ground for the new powers endowed on the MPs by the European Scrutiny Act.

Since 2006 there has also been a degree of stabilisation and regularity in the scrutiny activities (meetings, hearings and appearances) of the European Affairs Committee as shown in the table and graph below. This could be interpreted as meaning that the scrutiny of EU affairs is becoming a routine business rather than an *ad hoc* activity. It remains to be seen whether MPs will build on these successful first steps in utilising their European scrutiny powers.

Table 3. *Share of the scrutiny activities of the European Affairs Committee as an absolute number of the total number of committee activities in the Assembly*

<b>European Affairs Committee</b>	<b>Meetings (ordinary)</b>	<b>Hearings</b>	<b>Appearances*</b>
XI Legislature, 1 <sup>st</sup> Session 15.10.2009. – 22.07.2010.	38 of 645	18 of 370	9 of 226
X Legislature, 4 <sup>th</sup> Session 15.09.2008. – 14.10.2009.	29 of 659	11 of 340	13 of 152
X Legislature, 3 <sup>rd</sup> Session 15.09.2007. – 14.09.2008.	51 of 646	39 of 388	11 of 178
X Legislature, 2 <sup>nd</sup> Session 15.09.2006. – 14.09.2007.	57 of 669	34 of 328	12 of 174

<sup>1673</sup> Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee of the Portuguese Assembly, Lisbon, 8 June 2010.

<sup>1674</sup> *Comissão de Assuntos Europeus, Síntese da Actividade de Escrutínio Concluído*, 27 February 2009.

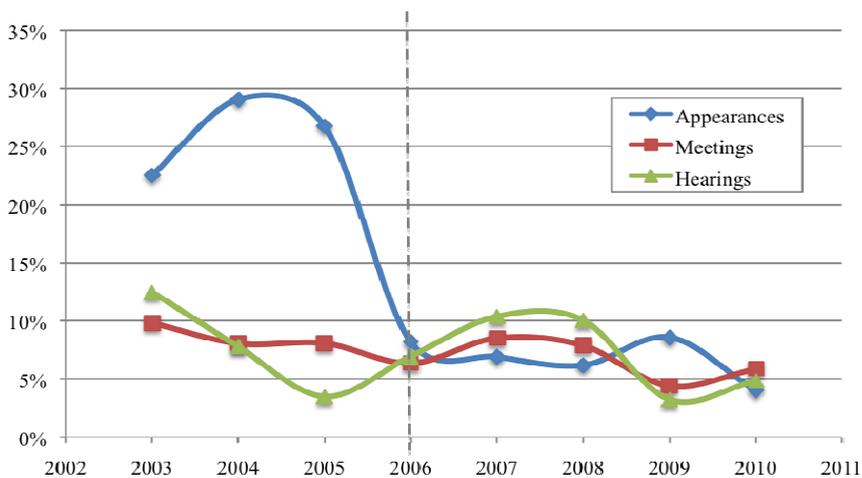
<sup>1675</sup> *Comissão de Assuntos Europeus, Relatório de Actividades 1<sup>a</sup> Sessão Legislativa XI Legislatura*, 21 September 2010.

European Affairs Committee	Meetings (ordinary)	Hearings	Appearances*
X Legislature, 1 <sup>st</sup> Session 10.03.2005. – 14.09.2006.	54 of 844	31 of 444	17 of 208
IX Legislature, 3 <sup>rd</sup> Session 15.09.2004. – 09.03.2005	16 of 198	3 of 86	15 of 56
IX Legislature, 2 <sup>nd</sup> Session 15.09.2003. – 14.09.2004	50 of 620	24 of 307	59 of 203
IX Legislature, 1 <sup>st</sup> Session 05.04.2002. – 14.09.2003.	80 of 815 9.81%	64 of 513 12.47%	85 of 377 22.54%

Source: *Assembleia da República, Divisão de Informação Legislativa e Parlamentar*

\*Although there is no clear-cut criterion to differentiate between a hearing and an appearance, they are categorised separately in the activity reports of the European Affairs Committee. However, it seems that hearings are mostly organised with Government representatives, whereas officials from other national parliaments, EU institutions or ambassadors of EU Member States are mostly invited for appearances.

Figure 2. *Share of the scrutiny activities of the European Affairs Committee as a percentage of the total number of committee activities in the Assembly*



The data presented above represent a nascent scrutiny trend in the Assembly. They can be interpreted in a threefold fashion.

First, the rising number of adopted reports means that EU initiatives are no longer adopted at arm's length from the MPs. The scrutiny of EU affairs is becoming

a daily activity of the Assembly. EU documents are penetrating not only the European Affairs Committee but also the specialised committees. This transversal involvement is significant for the sustained performance of Parliament's controlling and legitimating functions.

Second, the stabilisation of the number of meetings, hearings and appearances reflects the fact that the Assembly's information sources have become more diversified and that its opportunity for a more informed scrutiny of EU policies has increased.

Third, and from a broader perspective, these findings, taken together with those relating to the Assembly's participation in the Barroso initiative, allow us to conclude that Portugal is gradually joining the group of active parliaments, albeit that qualitative differences from other Member States remain salient. One wonders whether Portuguese MPs will build on these successful first steps in utilising their European scrutiny powers.

## **5. CONCLUDING REMARKS**

The foregoing analysis shows that the Portuguese Assembly of the Republic has undergone a quiet renaissance in its engagement in the Union's processes of policy and decision making. This is a direct consequence of two factors: scrutiny reforms and the Barroso initiative. That these two factors occurred almost contemporaneously only catalysed the dynamic of Europeanisation.

The major added value of the establishment in 2006 of the system of systematic scrutiny of EU affairs was that both the Assembly and the Government assumed duties in the scrutiny process. The parliamentary scrutiny of EU affairs in Portugal has, therefore, ceased to be a matter of the Government's willingness to involve the Assembly. The Assembly has taken full advantage of the Barroso initiative and emerged as a leader on the scoreboard. Direct links with the Commission were supplemented with joint meetings and practices of exchanging documents with the European Parliament. These developments in turn sparked a proactive and reformative attitude in the Assembly.

The significance of the burgeoning of new practices of cross-level and cross-branch cooperation within the Union is nicely illustrated by the fact that the principal innovation is no longer, as it used to be some fifteen years ago,<sup>1676</sup> a regular exchange of information with the Government but with the European Commission, the European Parliament and other national parliaments. While the Government has been and remains an important provider of information, the Assembly has successfully commenced an emancipation from the Government in this respect. It no longer relies only on the information obtained from the Government, but also on that obtained from EU institutions.

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<sup>1676</sup> Ramos, Rui Moura. "O Parlamento Português no processo de criação da União Europeia," *Leislação: Cadernos de Ciência de Legislação*, No. 13-14, 1995: 182.

The Assembly possesses a rich instrumentarium for the scrutiny of EU affairs. The most widely utilised are formal written opinions, which are very often sent to EU institutions as opinions of the Assembly in the framework of subsidiarity monitoring but also beyond it. Unlike in France, resolutions on EU issues do not play a major role.

The scope of scrutiny is slightly narrower than in the French and British parliaments, since the Portuguese parliamentary scrutiny, especially after the 2010 reform, seems to concentrate specifically on Commission initiatives. While, thus, the Area of Freedom, Security and Justice is subjected to full scrutiny, the areas of CFSP and CSDP as well as EU international agreements are not scrutinised in great depth. Besides, like in France, comitology and the open method of coordination are not scrutinised in practice, even though no formal impediments exist that would prevent the Assembly from doing so.

Whereas the main addressee of scrutiny is the Government, there are good reasons why EU institutions should also be deemed the addressees of MPs. First, an idiosyncrasy of the Portuguese Parliament is that the development of links with EU institutions is explicitly fostered in legislation. Second, this formal requirement is coupled with the actual establishment of these links, predominantly for information purposes. Third, the process of scrutiny is tailored to the Commission's agenda and timetable, in which respect the scrutiny of annual policy strategies and legislative and work programmes is central.

On a larger scale, one is advised to revisit the thesis that the national parliaments' competences of European scrutiny derive only from "a wide range of factors of the internal order".<sup>1677</sup> Instead, as Paulo and Bandeira rightly argue, the EU has been "a factor of change in the Portuguese Parliament and in the interinstitutional power relations".<sup>1678</sup> The case of Portugal breaks the myth that national parliaments are unable to adapt to Europe and that they have irretrievably lost their powers. It shows that exogenous factors, such as collaboration with EU institutions, increasingly shape national parliamentary scrutiny. The European nature of the national parliaments' new role also echoes from Roseira's observation that the aim of the Lisbon Treaty provisions on national parliaments is "to elevate national parliaments to the status of full participants in the European legislative process, not to create new avenues and instruments of domestic parliamentary control over the government".<sup>1679</sup> The direct links with the EU level do not, however, diminish the foremost importance of what

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<sup>1677</sup> See: Filipe, António. "A União Europeia e os parlamentos nacionais," *Res Publica: Revista Lusófona de Ciência Política e Relações Internacionais*, No. 1, 2005: 65.

<sup>1678</sup> Paulo, Maria Teresa and Bandeira, Cristina Leston. "O impacto da europeização no parlamento," *Instituto Português de Relações Internacionais, Universidade Nova de Lisboa, Working Paper no. 21*, p. 19, available at: [http://www.ipri.pt/publicacoes/working\\_paper/pdf/Parlamento.pdf](http://www.ipri.pt/publicacoes/working_paper/pdf/Parlamento.pdf), accessed on 23 February 2008.

<sup>1679</sup> Roseira, Gustavo Gramaxo. "Portugal," in *The role of national parliaments in the European Union: proceedings of the FIDE XXIV Congress Madrid 2010 - Vol. 1*, by Gil Carlos Rodriguez Iglesias and Luis Ortiz Blanco (eds), Madrid: Universidad Complutense de Madrid, 2010: 392.

continues to be the inextricable constitutional tie between the Assembly and the Government. This tie is merely becoming enriched with another facet that is extraneous to the Portuguese constitutional order. It appears, after all, that the Assembly has subscribed to the argument made in 1996 by Jorge Braga de Macedo, a former Chairman of the European Affairs Committee, that national parliaments bring plurality to the Union's system of popular representation.<sup>1680</sup>

Yet one should not overestimate these accomplishments. The Assembly has itself assessed that "more important than what the text of the Treaty may guarantee to national parliaments is what the new Treaty may offer the citizens [...]".<sup>1681</sup> The Assembly, thus, understands itself merely as one element of the Union's democracy, as part of a larger constitutional construct also borne by EU institutions, national organs of sovereignty, and citizens. On a similar note, Quadros has argued that "the participation of national parliaments can reinforce the democratic legitimacy of the Union, but it is not an essential condition to achieve the Union's approximation to the citizens of the Member States [...]".<sup>1682</sup> Miranda also correctly held that the Assembly's rights in EU processes are not those of decision but of supervision, that they fall within the political function *stricto sensu* and that the Government is not obliged to follow the Assembly's opinion. Going even further, he remarked that the Assembly's scrutiny is "not very effective"<sup>1683</sup> and that it yields "acts without external effectiveness".<sup>1684</sup> As Magone correctly observes, the Portuguese Parliament's scrutiny of EU affairs has not reached the levels of institutionalisation and professionalisation found in France and Britain.<sup>1685</sup> The opinions issued within the framework of the Barroso initiative, indeed, lack analytical potency. Policy scrutiny of the British type is missing. Politicisation of the French type is absent, too.

Moreover, the reduction of the Assembly's constitutional prerogatives due to European integration has not vanished either. By approving the founding treaties, the Assembly has, on the one hand, voluntarily agreed that the legislative power in certain fields of its exclusive legislative competence be exercised by the Union and,

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<sup>1680</sup> Macedo, Jorge Braga de. "Acompanhamento e apreciação parlamentar dos assuntos europeus," *Legislação: Cadernos de Ciência de Legislação*, No. 13-14, 1995: 172.

<sup>1681</sup> COSAC Secretariat, Annex to the 8<sup>th</sup> biannual report of COSAC: national parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 114.

<sup>1682</sup> Quadros, Fausto de. *Direito da União Europeia*. Coimbra: Almedina, 2004: 313. This author has also advocated against the creation of new decision-making organs in the Union in which national parliaments would participate because it is unnecessary and because it would destabilise the existing institutional equilibrium.

<sup>1683</sup> Miranda, Jorge and Medeiros, Rui. *Constituição portuguesa anotada – Tomo II*, Coimbra: Coimbra Editora, 2006: 513.

<sup>1684</sup> Miranda, Jorge. *Direito constitucional III: integração europeia, direito eleitoral, direito parlamentar*, Lisbon: Associação Académica da Faculdade de Direito de Lisboa, 2001: 38.

<sup>1685</sup> Magone, José. "The southern European pattern of parliamentary scrutiny of EU legislation: emulating the French model," in *Democratic governance and European integration: linking societal and state processes of democracy*, by Ronald Holzhaecker and Erik Albaek (eds), Northampton: Edward Elgar Publishing, 2007: 230.

on the other, it has lost the power to request the consideration of the Government's decree-laws in matters of the Assembly's partially exclusive and concurrent legislative competences.<sup>1686</sup> To some extent, these drawbacks have been counterbalanced by the Assembly's espousal of *ex ante* involvement. This is all the more significant since, as Fraga has rightly underlined, governmental accountability concerns the Government's conduct in negotiations at the Union level much more than the Government's participation in the transposition of EU acts.<sup>1687</sup>

To conclude, the Portuguese Parliament deserves to be commended for its overall enthusiasm for European scrutiny, which hitherto did not exist. Its mission of "discovering Europe"<sup>1688</sup> is partially accomplished. Despite the erosion of its competences due to the rapid progress of EU integration, the Assembly was able to regain ground in EU decision making by refurbishing its scrutiny powers and redirecting them to a considerable extent towards EU institutions. The Assembly has become aware of the multifarious identity of the Union's democracy. The Portuguese Parliament has significantly Europeanised. The instalment of a host of EU-oriented rather than Government-oriented scrutiny procedures is an essential testament thereto. A long way lies ahead, however, if the Assembly's scrutiny is to attain the maturity of its French and British counterparts.

From a broader perspective, the Portuguese case indicates that national parliaments possess the capacity to adapt to European integration. If accrued, even slow and piecemeal adaptations can lead to more overarching parliamentary reforms. These findings are potentially replicable. The analysis of the Portuguese Parliament provides good reasons to believe that other domestic legislatures, described as latecomers or slow adapters, could follow the same path.

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<sup>1686</sup> Guedes, Armando Marques and Coutinho, Francisco Pereira. "O processo de integração europeia e a Constituição portuguesa," *Nação e Defesa*, No. 115, 2006: 100 and 109; Sá, Luís. *O lugar da Assembleia da República no sistema político*, Lisbon: Caminho, 1994: 410. These powers of the Assembly are laid down in Articles 162(c) and 169 of the Constitution.

<sup>1687</sup> Fraga, Ana. "O controlo parlamentar dos actos do governo na execução do direito comunitário," *Revista Jurídica*, No. 24 Associação Académica da Faculdade de Direito de Lisboa, 2001: 604 and 609.

<sup>1688</sup> Magone, José. "The Portuguese Assembleia da República: discovering Europe," *Journal of Legislative Studies*, Vol. 1, No. 3, 1995: 151-165.

## **Part III**

# ***CLAIMS***

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***NATIONAL PARLIAMENTS AND EU INSTITUTIONS:  
DETACHMENT OR RAPPROCHEMENT?***



## **1. OBJECTIVES**

The extent to which national parliaments form part of the European constitutional order or to which they are merely actors at the national level can best be ascertained by probing into their actual scrutiny. As Choudhry argued, a detailed study of constitutional practice is paramount for a recasting of the existing theories of comparative constitutional law.<sup>1689</sup> This chapter is a qualitative empirical analysis of the *ex ante* scrutiny of several dossiers of secondary EU decision making by the national parliaments of France, the United Kingdom and Portugal. It queries whether and, if so, how national parliaments use their scrutiny competences in practice and whether European integration, effected primarily by transfers of powers by the Member States, has pushed national parliaments into cooperation with or isolation from EU institutions. Insights thereby gained illuminate one of the core questions of Europe's parliamentary democracy: whether the Union's progressive legal integration is accompanied by the political integration of its directly elected institutions.

## **2. METHOD**

To determine the potential for national parliaments to contribute to the legitimacy and accountability of the Union, parliamentary interdependence is employed as a methodological and heuristic device for an in-depth examination of the pre-selected case studies. The analysis focuses on documents produced by national parliaments in the course of the scrutiny of EU initiatives, such as reports, resolutions, records of committee and plenary debates, written and oral questions, minutes of evidence, etc. The data available in these documents are processed with a view to extracting the national parliaments' role perceptions with respect to EU decision making rather than measuring their direct influence therein. Interviews and personal correspondence with relevant persons were used as a supplementary mode of acquiring information where data in the documentary evidence was scarce or non-existent.

### **2.1. Case study selection**

Due to the limited timeframe and other means available, a number of hard choices regarding the scope of the research project had to be made, which could have been made differently. A workable cut-off point for selecting the dossiers to be studied was recognised in the post-Constitutional Treaty period, as one which propelled the idea of associating national parliaments more closely with EU policy shaping and which provided momentum for the Commission to approach national parliaments directly. The concrete dossiers were chosen according to the criteria of political salience and the representativeness of the sample. These are further explained hereunder.

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<sup>1689</sup> Choudhry, Sujit. "Migration as a new metaphor in comparative constitutional law," in *The migration of constitutional ideas*, by Sujit Choudhry (ed.), Cambridge: Cambridge University Press, 2006: 25.

### 2.1.1. Political salience

The selection of the dossiers followed a preliminary consideration of EU decisions that were amenable to the research goals. Political salience was recognised as an appropriate, if not the pivotal, criterion for case study selection in parliamentary analyses, because it is a necessary ingredient for the mobilisation of national political forces and for a possible consequent politicisation of EU decision making. Such an instrumentalised conception of political salience dovetails with varied academic scenarios about upgrading the Union's democratic legitimacy.<sup>1690</sup> To put it succinctly, where the Union's intended action is not salient, national parliaments will merely take note of it and will not engage in any kind of advocacy.

All the selected dossiers fall under the competences shared between the Union and the Member States. There are two reasons why this is so.

First, subsidiarity, as a matter of a potential clash between the Union and the Member States as to which of the two is called upon to act, does not apply to the competences that pertain exclusively to the Union, where this type of clash normally does not arise. The Barroso initiative indeed indicates that parliamentary opinions tend to be submitted on draft legislative proposals in the fields of shared competence.<sup>1691</sup> This means that while subsidiarity is only one segment of the parliamentary scrutiny of EU affairs, it is prone to underpin the scrutiny of substantive policy issues as a first alert. However, it must be conceded that national parliamentary activity as regards the Unions' exclusive competences would also be a highly meaningful contribution.

Second, the measures whereby the Union supports, coordinates or complements the action undertaken by the Member States lack the binding thrust of the measures adopted in the fields of exclusive and shared competences. Their impact could, therefore, be deemed to be comparatively smaller and their contentiousness potentially limited. Yet, as shown previously in the case of Britain and particularly the House of Lords, the lack of binding character of EU measures, such as those

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<sup>1690</sup> See for instance: Kiiver, Philipp. "Europe in Parliament: towards targeted politisation," *Wetenschappelijke Raad voor het Regeringsbeleid (Dutch Scientific Council for Government Policy), Webpublicaties no. 23, 2007*, available at: <http://www.wrr.nl/content.jsp?objectid=4040>, accessed on 16 February 2011; Miklin, Eric. "Visibility of choices and better scrutiny? The effects of a politicisation of EU decision-making on national parliaments," *Paper prepared for the 5<sup>th</sup> ECPR General Conference, Potsdam, 10-12 September 2009*. See also the more general approaches to politicisation as a means of democratising the Union in: Hix, Simon. *What's wrong with the European Union and how to fix it*, Cambridge: Polity Press, 2008; Hix, Simon and Bartolini, Stefano. "Politics: the right or the wrong sort of medicine for the EU?," *Notre Europe, Policy paper no. 19*, 2006; Papadopoulos, Yannis and Maignette, Paul. "On the politicisation of the European Union: lessons from consociational national polities," *West European Politics, Vol. 33, No. 4*, 2010: 711-729; Schmidt, Vivien A. *Democracy in Europe: the EU and national polities*, Oxford: Oxford University Press, 2006.

<sup>1691</sup> For example, in 2009, out of a total of 250 opinions received, the Commission's DG Justice, Freedom and Security received 83, whereas DG Taxation and Customs Union received only 4, DG Economic and Financial Affairs 2, and DG Competition none at all. European Commission, Annual report 2009 on relations between the European Commission and national parliaments, COM(2010) 291, 2.6.2010, p. 11.

adopted under the open method of coordination, is not always a sufficient reason not to engage in scrutiny.

### **2.1.2. Representativeness**

The case studies are selected to provide a representative sample that spans different fields of EU action formerly called pillars, then different types of legal acts, different decision-making procedures and different voting requirements as outlined in the table below.

Table 4. *Selection of in-depth case studies*

Dossier	Act	Field (pillar)			Procedure			Voting	
		EC	CFSP	JHA	Cod	Ass	Cons	QMV	Unan
Services in the Internal Market	Dir	x			x			x	
SWIFT Agreements	Agr			x		x			
European External Action Service	Dec		x				x		x

This choice has been made to test the national parliaments' response to EU decision-making processes in which the European Parliament: (a) possessed the right of participation (the Services Directive and the SWIFT Agreement) and (b) lacked the right of participation (the European External Action Service Decision).

The role of the European Parliament in EU decision making is used as a criterion for delimiting the case studies for two reasons: on the one hand, because besides the Council, whose individual members are held to account by national parliaments, the European Parliament is the remaining part of the Union legislature; and, on the other, because the European Parliament is the national parliaments' counterpart, enjoying similar representative and legislative credentials at the EU level as do national parliaments at the national level. Hence, the national and European parliaments' action, albeit independent on paper, could hypothetically be observed from the point of view of mutual dependence, i.e., interdependence as charted in Chapter 2. The test is performed in accordance with the questions and hypotheses laid out below.

### **2.2. Questions and hypotheses**

The analysis focuses on the claims, i.e., political and legal arguments, made by political groups represented in parliament regarding the participation of national governments and EU institutions in the process of EU decision making. Three main elements for investigation in each dossier refer to the performance, substantive outcome and accountability process of scrutiny. The central questions posed are classified in the following categories:

- (A) *Scrutiny*: was a given dossier scrutinised and, if not, what caused the lack of scrutiny?
- (B) *Controversy*: did a politically contentious issue arise and, if so, what was it and why?
- (C) *Information*: what were the sources of information for scrutiny, i.e., did a given parliament rely only on the information furnished by the government or did it also seek information from relevant EU institutions and with what goal?
- (D) *Outcome*: were any recommendations or suggestions made for EU institutions to amend the dossier and, accordingly, was the government or an EU institution held responsible for the solutions proposed or adopted in a given dossier?
- (E) *Parliamentary interdependence*: was the participation or exclusion of the European Parliament from decision making a relevant factor in the scrutiny process and, if so, what position did a given national parliament adopt towards the European Parliament and what was the rationale behind such a position?

These questions draw a relatively complete image of the European scrutiny process in a national parliament. The descriptive part on the existence and contents of the scrutiny activities (questions A and B) lays the ground for the analytical part (questions C, D and E) on the constitutional context within which scrutiny unfolded.

Whereas the first two questions are fairly self-evident and serve to collect data on the dossier, the question of information gathering tells us about the attitude of a given parliament to the scrutiny of EU initiatives. If information from EU institutions was sought, this means that a broader context of the dossier was examined. This may be because government-provided information was incomplete, insufficient or simply not the only relevant information for scrutiny. However, seeking information at the EU level does not immediately mean that the parliament acted as a counterpart of EU institutions, because EU-provided information can be used both for holding the government to account more stringently and for sharpening the scrutiny claims towards the Union. If the latter should appear to be the case, the parliament could be argued to have acted within a broader European constitutional context. Yet ascertaining this will depend on the circumstances of the case, which need to be assessed *in concreto*.

Whether a parliament acted beyond its national scrutiny remit is also visible from the perceived target of its scrutiny claims. If recommendations, suggestions or observations are aimed at the EU level, the parliament will inevitably have acted within the Union's decision-making sphere, irrespective of the influence that any such activity might have, which is a separate though closely related question. An indicator that the addressee of the scrutiny claims were EU institutions lies in establishing whether the parliament subsequently verified how its claims or requests were taken into account and, where this was the case, whether the parliament performed such a verification as a matter of the government's compliance with its accountability duties or as a matter of the Union's achievement of certain policy

objectives. It has been observed, for example, that in the 1990s the British and French parliaments struggled and, to some extent succeeded, in performing these verifications.<sup>1692</sup> The Union's attempts at improving the transparency of decision making by publishing the results and explanations of votes cast in the Council could have permitted national parliaments to follow the fate of their recommendations independently of the government's will to cooperate. Yet this is frustrated in practice by the fact that most Council decisions are adopted as points A without a debate.<sup>1693</sup> As a consequence, the process of *ex post* accountability of the national government is hamstrung. However, the parliament may still inspect, through other information channels, whether and, if so, how relevant EU institutions have dealt with its concerns. Should such a course of action be pursued, it would be plausible to conclude that parliamentary action had been taken beyond the constraints of the national constitutional order.

With regard to the question of the participation of the European Parliament in the making of EU decisions, national parliaments are hypothesised either to ignore the developments at the EU level and proceed with usual scrutiny activities, or, on the contrary, to react strategically and project their preferences onto the EU level within the constitutionally available means. If the former proves to be true, then it could be argued that a given parliament acted in isolation from EU institutions, that its democratic prerogatives were restricted to its own Member State, and that it was thus not an actor within a polycentric Union. If, however, national parliamentary reaction was correlative, or interdependent, with the actions and interests of EU institutions in the decision-making process, then it is plausible to hold that the parliament acted in cooperation with EU institutions, that it was a source of legitimacy and accountability of the Union, and that it was an actor within a polycentric Union.

The analysis takes full account of the existence of formal constraints on the national parliamentary scrutiny of EU matters, which are, as shown in the previous chapters, inherent in the Treaties and national legal and conventional rules. Much of the parliaments' communication will, expectedly, be carried out with their national governments. Yet depending on the circumstances of the case, the addressee need not always be solely the government. This subtle differentiation furnishes fertile ground in which to embed this empirical exercise.

In order to provide background information for the analysis of the national scrutiny, each selected dossier is preceded with a synopsis sketching its purpose, contents and the highlights of the decision-making procedure.<sup>1694</sup> It should be

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<sup>1692</sup> Saulnier, Emmanuelle. *La participation des parlements français et britannique aux Communautés et à l'Union européenne*, Paris: Librairie Générale de Droit et de Jurisprudence, 2002: 574 and 580. It should be underlined that in both of these parliaments, the national government's willingness to cooperate was of paramount importance for the materialisation of these verifications.

<sup>1693</sup> Fuchs-Cessot, Alice. *Le Parlement à l'épreuve de l'Europe et de la Ve République*, Paris: Librairie Générale de Droit et de Jurisprudence, 2004: 367.

<sup>1694</sup> The PreLex webportal was utilised as the key tool for this. See: <http://ec.europa.eu/prelex/apcnet.cfm?CL=en>.

*Part III – Claims*

underlined that many details of the dossiers and of their scrutiny by national parliaments that are not of immediate relevance to the objective of this chapter are omitted. Each parliamentary chamber examined is divided into two parts: one devoted to the scrutiny claims and the other to their analysis according to the questions posed above.

# Chapter 9

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## The Services Directive: A Polarised Response to Market Liberalisation

### 1. BACKGROUND

The purpose of the Services Directive,<sup>1695</sup> also known as the 'Bolkestein Directive' after Frits Bolkestein, the Commissioner for Internal Market and Services at the time,

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<sup>1695</sup> Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market of 12 December 2006, (*OJ L 376/36* of 27.12.2006). See more detailed analyses of different aspects of the Directive in: Gronden, Johan van de and Waele, Henri de. "All's well that bends well? The constitutional dimension to the Services Directive," *European Constitutional Law Review*, Vol. 6, No. 3, 2010: 397–429; Miklin, Eric. "Government positions on the EU Services Directive in the Council: national interests or individual ideological preferences?," *West European Politics*, Vol. 32, No. 5, 2009: 943–962; Barnard, Catherine. "Unravelling the Services Directive," *Common Market Law Review*, Vol. 45, No. 2, 2008: 323–394; Flower, Joanna. "Negotiating European legislation: the Services Directive," *Cambridge Yearbook of European Legal Studies*, Vol. 9, 2006–2007: 217–238; Peglow, Kerstin. "La libre prestation de services dans la directive no 2006/123/CE - Réflexion sur l'insertion de la directive dans le droit communautaire existant," *Revue Trimestrielle de Droit Européen*, Vol. 44, No. 1, 2008: 67–118; Prieto, Catherine. "Liberté d'établissement et de prestation de services," *Revue Trimestrielle de Droit Européen*, Vol. 43, No. 1, 2007: 75–110; Hatzopoulos, Vassilis. "Que reste-t-il de la directive sur les services?," *Cahiers de Droit Européen*, Vol. 43, No. 3–4, 2007: 299–358; Hatzopoulos, Vassilis. "Assessing the Services Directive (2006/123/EC)," *Cambridge Yearbook of European Legal Studies*, Vol. 10, 2007–2008: 215–261; Pellegrino, Patrick. "Directive sur les "services dans le marché intérieur" – Un accouchement dans la douleur," *Revue du Marché Commun et de l'Union européenne*, No. 504, 2007: 14–21; Fallon, Marc and Simon, Anne-Claire. "La directive «services»: quelle contribution au marché intérieur?," *Journal de Tribunaux Droit Européen*, Vol. 15, No. 136, 2007: 33–43; Derruine, Olivier. "De la proposition Bolkestein à la directive services," *Courrier Hebdomadaire*, No. 1962–1963, 2007: 5–63; Garabiol-Furet and Marie-Dominique. "La directive Bolkestein, bouc émissaire d'une Europe incertaine," *Revue du Marché Commun et de l'Union européenne*, No. 488, 2005: 295–302; Witte, Bruno de. "Setting the scene: how did services get to Bolkestein and why?," *EUI Working Papers LAW no. 2007/20*; Timmerman, Peter. "Legislating amidst public controversy: the Services Directive," *Egmont - the Royal Institute for International Relations, Egmont Paper no. 32*, 2009; Jennar, Raoul Marc. "La proposition de directive Bolkestein," *Courrier Hebdomadaire*, No. 1890–1891, 2005: 5–68; Lindberg, Björn. "Are political parties controlling legislative decision-making in the European Parliament? The case of the Services Directive," *Journal of European Public Policy*, Vol. 15, No. 8, 2008: 1184–1204; Crespy, Amandine and Gajewska, Katarzyna. "New Parliament, new cleavages after the eastern enlargement? The conflict over the Services Directive as an opposition between the liberals and the regulators," *Journal of Common Market Studies*, Vol. 48, No. 5, 2010: 1185–1208. The articles that specifically analyse the role of national parliaments in the adoption of the Services Directive are: Crum, Ben and Miklin, Eric. "Reconstructing parliamentary sovereignty in multilevel polities: the case of the EU Services Directive," *Paper presented at the ECPR Joint Sessions, Münster, 22–27 March 2010*; Miklin, Eric. "Visibility of choices and better scrutiny? The effects of a politicisation of EU decision-making on national parliaments," *Paper prepared for the 5<sup>th</sup> ECPR General Conference, Potsdam, 10–12 September 2009*. These two contributions, however, focus on different research questions and different Member States (Austria, Germany, Sweden and the Netherlands) than those examined in this Chapter.

is to stimulate the development of the internal market in services beyond the relevant Treaty articles,<sup>1696</sup> because their direct application and adjudication by the Court of Justice on a case-by-case basis would be inefficient and unmanageable due to large numbers and the duration of the anticipated proceedings.<sup>1697</sup> Harmonisation was thus to be achieved by means of a Community measure that would remove national barriers to the freedom of establishment and to the freedom to provide services.<sup>1698</sup> The importance of this initiative is apparent from the fact that services account for 53.6% of the gross domestic product and 67.2% of employment in the Union.<sup>1699</sup>

To facilitate the exercise of the *freedom of establishment for service providers*, the Commission's proposal of 13 January 2004 sought to simplify administrative procedures and formalities applicable to access to and the exercise of service activities, among other things, by the establishment in the Member States of so-called points of single contact, at which all of the procedures could be completed by electronic means. National authorisation schemes were to be prohibited unless they were non-discriminatory with respect to the provider, necessary to safeguard the public interest and unattainable by less restrictive means. In the absence of a response to an authorisation request, the authorisation was to be deemed to have been granted. Equally prohibited were to be the national legal requirements that make access to or the exercise of a service activity conditional upon: the provider's nationality; the provider not having been established in more than one Member State; the existence of reciprocity with the provider's Member State; a prior economic test proving the need for the provision of a given service; etc. A host of other national requirements – such as those obliging the provider to comply with quantitative or territorial restrictions, to take a specific legal form or to respect the national rules fixing tariffs or a minimum number of employees – were to be permitted only on condition that they were non-discriminatory, necessary and proportionate.

At the heart of the Commission's solution to the *free movement of services* lay the country of origin principle. Under this principle, providers offering services in a Member State other than that in which they were established (the host Member State), except for a large number of derogations, were only to be subject to the service activity rules of the Member State in which they were established (the

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<sup>1696</sup> Article 26(2) TFEU [the former Article 14(2) TEC] defines the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Article 49 TFEU [the former Article 43 TEC] prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Similarly, Article 56 TFEU [the former Article 49 TEC] prohibits restrictions on freedom to provide services in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

<sup>1697</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2, 13.1.2004, p. 18.

<sup>1698</sup> See a detailed inventory of these barriers in: European Commission, Report to the Council and the European Parliament "The state of the internal market for services", COM(2002) 441, 30.07.2002.

<sup>1699</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2, 13.1.2004, p. 77.

Member State of origin), such as those regulating the provider's behaviour and liability, the quality and content of the service, advertising and contracts. The Member State of origin was to be responsible for the supervision of the provider's service activity. Furthermore, the provider was not to be placed under a duty, *inter alia*, to have an establishment or address in the host Member State, to possess an identity document issued by the host Member State or to complete any prior administrative procedure, such as to obtain authorisation or make a declaration. In a similar vein, recipients of services were to enjoy the rights to extensive information on the providers and services as well as not to be made subject to measures restricting the use of a service and discriminatory requirements based on nationality or residence.

The scope of the Commission's proposal was very wide, as it encompassed any self-employed economic activity performed for consideration, i.e., remuneration. The services in the fields of finance, electronic communications, transport, taxation and those connected with the exercise of official authority were to be excluded. Economic services of general interest – such as postal services, water supply, electricity, gas distribution and waste management – were to be excluded from the application of the country of origin principle, but not from that of the freedom of establishment.

Following mass public protests against the draft Directive in various Member States, such as France, Belgium, Denmark and Sweden as well as in Brussels in March 2005 and in Strasbourg in February 2006, the European Parliament, on the basis of a report by rapporteur Evelyne Gebhardt, a German member of the Party of European Socialists, substantially amended the Commission's text at first reading on 16 February 2006.<sup>1700</sup> Among the many amendments made, three groups stand out.

First, the country of origin principle was replaced by the freedom of providers to provide a service in a Member State other than that in which they are established.<sup>1701</sup> Accordingly, the Member States were to guarantee providers free access to and free exercise of a service activity within their territories. The host Member State was to be entitled to impose two types of requirements: (a) those that are non-discriminatory, necessary and proportionate; and (b) those that are justified for reasons of public policy, public security, environmental protection and public health. The host Member State's rules on employment, including those laid down in collective agreements, were to continue to apply. Importantly, the European

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<sup>1700</sup> European Parliament, Legislative resolution on the proposal for a directive of the European Parliament and of the Council on services in the internal market, P6\_TA(2006)0061, 16.2.2006.

<sup>1701</sup> This represents a crucial policy U-turn, because three years before, the previous composition of the European Parliament explicitly endorsed the country of origin principle. In a resolution of February 2003, it stated that it "insists that the Competitiveness Council reaffirm Member States' commitment to the country of origin and mutual recognition principles, as the essential basis for completing the internal market in goods and services" (point 35). European Parliament, Resolution on the Communication from the Commission "2002 review of the internal market strategy" (COM(2002) 171), A5-0026/2003, 13.02.2003.

Parliament, as part of the compromise, opted not to specify the law applicable to the service provider. The matter is left for the Court of Justice to adjudicate *in concreto* where disputes arise.

Second, the scope of the Directive was reduced considerably. In addition to the services excluded by the Commission, the following were also to be left out: non-economic services of general interest; port services; healthcare services; legal services; social services; audiovisual services; temporary work agencies; security services; and gambling activities.

Third, the European Parliament specified that the Directive was neither to liberalise economic services of general interest nor to abolish state monopolies providing services. The Member States were to remain free to define what services of general economic interest should constitute and how they should function. The Directive was also not to affect the Member States' criminal and labour law, public healthcare, social welfare services, the promotion of cultural and linguistic diversity and the exercise of fundamental rights.

In a revised proposal adopted on 4 April 2006, the Commission accepted a vast majority of the European Parliament's amendments and so did the Council in its common position of 24 July 2006. They made minor modifications to the European Parliament's version of the Directive. Both, for example, supported the inclusion of legal services in the Directive, which the European Parliament accepted. After a smooth second reading, the Union legislature finally approved a common text on 12 December 2006.

## 2. FRANCE

### 2.1. Assemblée nationale

#### 2.1.1. Scrutiny claims

The scrutiny of the Services Directive in the *Assemblée nationale* began with the adoption by the Delegation for the European Union of a report on 2 February 2005. Whereas the pursuit of a more complete internal market in services was cheered as a legitimate and desirable goal for the Union, the Commission incurred a flurry of criticisms for the legislative solutions proposed.

First, the impact assessment was assessed as insufficient, because it failed to take account of the facts, on the one hand, that many services, due to the nature of the activity or the type of enterprise concerned, were not conducive to cross-border trade; and, on the other, that very dynamic economic sectors, such as finance and transport, were to be excluded from the scope of the Directive.<sup>1702</sup>

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<sup>1702</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2053 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 2 February 2005, rapporteur Anne-Marie Comparini (UDF), pp. 13-14.

Second, the country of origin principle was fiercely opposed for carrying a number of serious risks, such as social and legal dumping, which could lead to unfair competition, the lowering of the quality of the services offered and the diminution of the level of consumer protection. The risk of legal uncertainty was especially pronounced. In the field of penal law, the prohibition for the French judiciary to apply French penal law to a service provider from another Member State which engages in an activity that is legal in the Member State of origin but illegal in France, would violate the French principles of the territoriality of law and equality before the law, which fall under the essential conditions for the exercise of national sovereignty. A similar problem would arise in the field of private international law. While French law would apply to a French service provider offering services in another Member State, the divergences in the jurisprudence between France and the host Member State would make it unlikely that French law would be interpreted in the same fashion in the host Member State as it would in France. Moreover, the country of origin principle was judged incompatible with the existing disparities between the Member States and any sweeping regulation of services had to be preceded by the harmonisation of relevant national sectors.<sup>1703</sup>

Third, the scope of the Directive needed to be limited by excluding the economic services of general interest from the application of the freedom of establishment, certain services provided by persons whose provision is only allowed upon being appointed by an official act of government (such as notaries and bailiffs), audiovisual and cultural services, healthcare services, social services and gambling.<sup>1704</sup>

The draft Services Directive also gave rise to a more general appraisal of the Commission as such. While the Commission presided over by Romani Prodi displayed elements of "malfunctioning", that presided over by José Barroso was praised for the introduction of new working methods. These methods include: the placement of all commissioners in the Berlaymont building; their organisation in workgroups to spur exchanges of views of a more political nature as opposed to technical consultations between directorates-general favoured previously; the holding of regular internal political debates; the focusing of the Commission's weekly meetings on crucial matters so as to allow more thorough discussion; and a more systematic recourse to impact analyses and public consultations.<sup>1705</sup>

Finally, it was underlined that French MEPs of all political affiliations were mobilised to defend numerous amendments to the proposal and that the codecision

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<sup>1703</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2053 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 2 February 2005, rapporteur Anne-Marie Comparini (UDF), pp. 33-36.

<sup>1704</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2053 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 2 February 2005, rapporteur Anne-Marie Comparini (UDF), pp. 37-39.

<sup>1705</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2053 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 2 February 2005, rapporteur Anne-Marie Comparini (UDF), p. 31.

procedure, in conjunction with the increased political weight of the European Parliament after the 2004 election, gave hope that the Directive would be profoundly amended. The report concluded with a recognition of the importance of national parliamentary scrutiny for the Union:

This strong mobilisation of our colleagues from all the Member States, triggered by the Delegation for the European Union of the *Assemblée nationale*, could indeed foreshadow a lasting reinforcement of the control exercised by national parliaments over European affairs, thanks to the new impetus that the future Constitutional Treaty will bring to Europe.<sup>1706</sup>

A further confirmation of this statement came from Christian Philip (UMP) during the meeting of the Delegation for the European Union at which the report was examined in the presence of several French MEPs:

The mobilisation around the Services Directive is not symptomatic of Europe's malfunctioning; *it is indeed the role of the European Parliament and national parliaments to say 'no' to the Commission when it gets astray.*<sup>1707</sup>

The central argument at the meeting, advanced by both MPs and MEPs, was that the Commission's proposal infringed subsidiarity.<sup>1708</sup> The Committee for Economic Affairs came to the same conclusion.<sup>1709</sup>

Based on the Delegation's report, the *Assemblée nationale* adopted a European resolution on 15 March 2005. The resolution endorsed most of the recommendations from the report, such as those on the desirability of creating an internal market in services, on the need for prior harmonisation, the exclusion of certain sectors from the scope of the Directive and the preservation of national penal and social law. Significantly, it assessed the draft Directive as "unacceptable" and "resolutely demanded" its reconsideration, the abandonment of the country of origin principle and the retention of the requirement of declaration for posted workers to enable the host Member State to maintain control over their service activities.<sup>1710</sup> Another resolution, tabled mainly by Socialist MPs, which requested the Commission to

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<sup>1706</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2053 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 2 February 2005, rapporteur Anne-Marie Comparini (UDF), p. 52.

<sup>1707</sup> *Assemblée nationale, Délégation pour l'Union européenne, Compte rendu no. 112, Réunion du mercredi 2 février 2005 à 16h 15*, p. 5 (emphasis added).

<sup>1708</sup> This was invoked by Jérôme Lambert (PS), Christian Philip (UMP), Pierre Lequiller (UMP), Jean-Marc Ayrault (PS) and Jacques Toubon (UMP, EPP). *Assemblée nationale, Délégation pour l'Union européenne, Compte rendu no. 112, Réunion du mercredi 2 février 2005 à 16h 15*, pp. 4-8.

<sup>1709</sup> *Assemblée nationale, Commission des affaires économiques, de l'environnement et du territoire, Rapport no. 211 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 1 March 2005, rapporteur Robert Lecou (UMP), p. 16.

<sup>1710</sup> *Assemblée nationale, Résolution no. 402 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 15 March 2005.

withdraw the proposal altogether, to first draft a directive on the public services or the economic services of general interest and to respect the path of sectoral harmonisation, was not adopted.<sup>1711</sup> In questions to the Government, the Socialists and Communists reiterated their stance, but the Government did not go beyond agreeing that the unamended version of the Directive was unacceptable.<sup>1712</sup>

The plenary debate of 15 March 2005, which preceded the adoption of the resolution, revealed a wide political consensus on the fallacies of the Commission's proposal not only among the political parties represented in the House but also among Government ranks. In fact, Claudie Haigneré, the Minister for European Affairs, recalled that European Parliament rapporteur Gebhardt largely shared the same preoccupations and assured the present MPs of the value of their effort:

Joint action by the Government, the European Parliament, but also by the *Assemblée nationale* and the *Sénat*, which have strongly reacted, for which I am grateful, has raised the awareness in the Commission of the numerous difficulties posed by this proposal for a directive.<sup>1713</sup>

As examples of influence, she adduced, on the one hand, the announcement by Commission President Barroso in favour of finding a consensus regarding both the country of origin principle and the scope of application of the Directive; and, on the other, the intention of the Commissioner for Internal Market, Charlie McCreevy, to revise the text upon the European Parliament's pronouncement.

In harmony with Minister Haigneré's statement, Marc Laffineur (UMP) claimed that:

If any lesson is to be drawn from this controversy, it is the enhancement of the role of parliaments [...] The Commission has committed an error of judgment, but representative democracy, through the action of parliaments, has succeeded to make its voice heard.<sup>1714</sup>

That the democratic legitimacy of the Union was a factor in the French Parliament's scrutiny of EU decision-making processes flows from the interventions of several MPs. Pierre Lequiller (UMP), the Chairman of the Delegation for the European Union, explained that the purpose of adopting a European resolution was to place at the Government's disposal the support of the citizens' direct representatives for the

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<sup>1711</sup> *Assemblée nationale, Proposition de résolution no. 2048 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 1 February 2005.

<sup>1712</sup> See *Question au Gouvernement no. 1859* by Pierre Cohen (PS), JORF, 3.2.2005, p. 606 and *Question au Gouvernement no. 2005* by Alain Bocquet (PCF), JORF, 30.3.2005, p. 2501.

<sup>1713</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 mars 2005, 175<sup>e</sup> séance de la session ordinaire de 2004-2005, JORF [2005] A.N. (C.R.) 24[2], 16.3.2005, p. 2021.*

<sup>1714</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 mars 2005, 175<sup>e</sup> séance de la session ordinaire de 2004-2005, JORF [2005] A.N. (C.R.) 24[2], 16.3.2005, p. 2023.*

defence of the interests not only of France but also of Europe.<sup>1715</sup> Pierre Cohen (PS) submitted that it was fundamental for national parliaments to act *ex ante*, since reliance on the national and European parliaments added a democratic dimension to often secretive intergovernmental or technocratic deals.<sup>1716</sup> For Léonce Deprez (UMP), the plenary debate was a sign that the French Parliament could and had to play a role in the European politics of tomorrow, as "it is very important to be known at the European level that the representatives elected by the French nation disagree and consider this Directive unacceptable".<sup>1717</sup> Surely these claims, due to a lack of formal accountability links with EU institutions as such, amount to peer pressure, which, in the circumstances such as those engendered by the Services Directive, can be just as effective.

These references to cross-level interparliamentary cooperation were not empty declarations. The Delegation for the European Union held a meeting in Brussels with French MEPs and rapporteur Gebhardt on 30 November 2005, a week after the vote in the European Parliament's Committee for the Internal Market but before the plenary session. The opportunity was seized to gather first-hand information on the evolution of the dossier and to reiterate the concerns of the French Parliament. It was noted that certain of the requests made by the resolution of the *Assemblée nationale* were beginning to take shape at the European level, among which significant progress was being made towards limiting the scope of the Directive.<sup>1718</sup>

On 2 March 2006, the Communist and Republican MPs, discontent with the substantive outcome of the European Parliament's first reading vote, tabled a draft resolution on the Services Directive. It primarily called for an explicit rejection of the country of origin principle and requested the Commission to withdraw its proposal.<sup>1719</sup> The Committee for Economic Affairs published a report on this draft resolution a week later, concluding, on the basis of an analysis of the amendments adopted and rejected by the European Parliament, that ambiguity remained as to the consequences of refusing to enact the application of the country of destination principle and that the list of sectoral exclusions was still incomplete and lacked clarity especially with regard to services of general interest.<sup>1720</sup> It was, therefore,

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<sup>1715</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 mars 2005, 175<sup>e</sup> séance de la session ordinaire de 2004-2005, JORF [2005] A.N. (C.R.) 24[2], 16.3.2005, p. 2029.*

<sup>1716</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 mars 2005, 175<sup>e</sup> séance de la session ordinaire de 2004-2005, JORF [2005] A.N. (C.R.) 24[2], 16.3.2005, p. 2030.*

<sup>1717</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 mars 2005, 175<sup>e</sup> séance de la session ordinaire de 2004-2005, JORF [2005] A.N. (C.R.) 24[2], 16.3.2005, p. 2036.*

<sup>1718</sup> *Assemblée nationale, Délégation pour l'Union européenne, Compte rendu no. 149, Réunion du mercredi 30 novembre 2005 à 15h au Parlement européen, pp. 4 and 11.*

<sup>1719</sup> *Assemblée nationale, Proposition de résolution no. 2923 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur of 2 March 2006.*

<sup>1720</sup> *Assemblée nationale, Commission des affaires économiques, de l'environnement et du territoire, Rapport no. 2939 sur la proposition de résolution (n° 2923) de M. Alain Bocquet et des membres du groupe député-e-s communistes et républicains sur la proposition de directive du Parlement européen et*

"more necessary than ever to rally against the Services Directive", argued its rapporteur, Alain Bocquet (PCF).<sup>1721</sup> The Committee, nonetheless, refused to support the draft resolution. So did the Delegation for the European Union after its own appraisal, since the dominant view was that the text adopted by the European Parliament was balanced and corresponded well to the concerns of the *Assemblée nationale*. Chairman Lequiller expressed satisfaction about the fruitful collaboration on several occasions with MEPs, praising particularly the accomplishment of Jacques Toubon in lobbying in favour of "the French positions" with numerous MEPs.<sup>1722</sup>

After a plenary debate along the lines of the discussions held in these two committees, the draft resolution was rejected. The opposition tried to infuse the debate with the argument that the French citizens' rejection of the Constitutional Treaty in the referendum of 29 May 2005 should also decide the fate of the Services Directive. In order to fortify its insistence that the country of origin principle could, despite its deletion, still apply by implication, the opposition also invoked the fact that an amendment tabled in the European Parliament by the European United Left/Nordic Green Left group, seeking explicitly to enshrine the country of destination principle, was straightforwardly refused.<sup>1723</sup> However, none of it convinced the majority, which were adamant that the European Parliament's achievement at first reading met the objections of the *Assemblée nationale*. Indeed, rapporteur Anne-Marie Comparini (UDF) claimed that:

The similarity between the recommendations from the report and the amendments adopted by the European Parliament show that the contribution of national parliamentarians is indispensable for the approximation of laws. [...] We are counting on the highest French authorities to defend the proposals of the European Parliament: because the majority of our demands are taken into account therein, but also because the authority acquired by the European Parliament must be supported.

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du Conseil relative aux services dans le marché intérieur of 8 March 2006, rapporteur Alain Bocquet (PCF), pp. 23-24.

<sup>1721</sup> *Assemblée nationale, Commission des affaires économiques, de l'environnement et du territoire, Rapport no. 2939 sur la proposition de résolution (n° 2923) de M. Alain Bocquet et des membres du groupe député-e-s communistes et républicains sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 8 March 2006, rapporteur Alain Bocquet (PCF), p. 38.

<sup>1722</sup> *Assemblée nationale, Délégation pour l'Union européenne, Compte rendu no. 162, Réunion du mercredi 8 mars 2006 à 9h 30*, pp. 11-13. In a plenary session a week later, he informed the members that the discussions with MEPs were of "remarkable quality" and that the French MEPs have made a "major contribution" to the European Parliament's "true counter-proposal". *Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance du mardi 14 mars 2006, 168<sup>e</sup> séance de la session ordinaire de 2005-2006*, JORF [2006] A.N. (C.R.) 23[1], 15.3.2006, pp. 1783 and 1782.

<sup>1723</sup> See the speeches by Marc Dolez (PS) and Alain Bocquet (PCF) in: *Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance du mardi 14 mars 2006, 168<sup>e</sup> séance de la session ordinaire de 2005-2006*, JORF [2006] A.N. (C.R.) 23[1], 15.3.2006, pp. 1783 and 1792.

To affirm and reinforce that authority is to guarantee a Europe in which the voice of the people is heard.<sup>1724</sup>

On 10 May 2006, the Delegation for the European Union held a meeting, which assessed that the Commission accepted some 95% of the European Parliament's amendments and, apart from minor remaining points of contestation, invited the Government to support the Commission's revised proposal.<sup>1725</sup>

### 2.1.2. Analysis

(A) *Scrutiny*. The *Assemblée nationale* carried out detailed substantive, policy scrutiny of the Services Directive, zooming in on the contents of the policy that the Union intended to pursue.

(B) *Controversy*. The controversy broke out regarding the application of the country of origin principle and the wide scope of the Directive. These were vehemently opposed in order to protect French economic interests.

(C) *Information*. To achieve this goal, however, the MPs did not restrict themselves to the information provided by the French Government. They placed great emphasis on establishing close contact with the European Parliament, particularly with the French MEPs but also with the European Parliament rapporteur for the Directive. The reason for this primarily lay in sharpening their scrutiny claims towards the Union.

(D) *Outcome*. The *Assemblée nationale* provided clear and concise suggestions for the modification of the contents of the Directive. The main goal was to change the Commission-sponsored policy of the liberalisation of the services market. The direction that the Union had taken was disapproved of and the Government was but one channel for communicating the House's policy preferences. The main target of criticism was the Commission, whose work was assessed both regarding this particular dossier and, more broadly, regarding its functioning as an EU institution. Since MPs passed judgments about the Commission rather than about the French Government, it could be argued that the Commission was the addressee of the scrutiny.

(E) *Parliamentary interdependence*. The participation of the European Parliament in the moulding of the Services Directive was highly relevant for the *Assemblée nationale*, as it was seen as a suitable medium through which to vent opposition to some of the key elements of the Bolkestein proposal. The MPs joined forces with their counterparts in the European Parliament to strike out the country of origin principle. They actively and, reportedly, successfully lobbied in favour of their

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<sup>1724</sup> *Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance de mardi 14 mars 2006, 168<sup>e</sup> séance de la session ordinaire de 2005-2006, JORF [2006] A.N. (C.R.) 23[1], 15.3.2006, p. 1784.*

<sup>1725</sup> *Assemblée nationale, Délégation pour l'Union européenne, Compte rendu no. 171, Réunion du mercredi 10 mai 2006 à 16h 15, pp. 2 and 5.*

position through French MEPs.<sup>1726</sup> Comments by a number of MPs show that this was indeed an important channel for participating in the decision-making process.

In conclusion, it should be held that the *Assemblée nationale* acted beyond the French constitutional system and understood its role as being an integral part of the Union's decision-making machinery.

## **2.2. Sénat**

### **2.2.1. Scrutiny claims**

In November 2004, a cross-party working group was formed within the Delegation for the European Union to evaluate the Bolkestein proposal. In the course of its work, its members held hearings with, among others, MEPs and officials of the Commission.<sup>1727</sup> Its report, published on 18 February 2005, identified largely the same pitfalls as the *Assemblée nationale* had done concerning the width of the scope of the Directive, the need to abandon the country of origin principle and the threat to the application of the French penal law and the rules of private international law. The Commission was criticised for failing to prepare an adequate impact assessment, as the only study that it did carry out merely summarised the state of affairs in the services market. It was, therefore, impossible to appraise the consequences of the future growth of this market in light of the country of origin principle and the administrative simplification envisaged. Such an appraisal was, above all, frustrated by the absence of any comparative study of the relevant laws and regulations of the Member States, which "the Commission must have undertaken before presenting its proposal for a directive".<sup>1728</sup>

On 3 February 2005, the Socialist senators tabled a draft resolution virtually identical to that tabled by their counterparts in the *Assemblée nationale*, demanding the withdrawal of the Directive.<sup>1729</sup> About a month later, the Communists followed suit with essentially the same request in their own draft resolution.<sup>1730</sup> Yet another

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<sup>1726</sup> It has also been argued that the French negative position on the Bolkestein proposal had an impact on EU politics and the codecision procedure itself. Crespy, Amandine. "When 'Bolkestein' is trapped by the French anti-liberal discourse: a discursive-institutionalist account of preference formation in the realm of European Union multi-level politics," *Journal of European Public Policy*, Vol. 17, No. 8, 2010: 1262 and 1265.

<sup>1727</sup> *Sénat, Délégation pour l'Union européenne, Réunion du jeudi 17 février 2005, Communication du groupe de travail présidé par Denis Badré et composé de Robert Bret, Marie-Thérèse Hermange et Serge Lagache*, available at: <http://www.senat.fr/europe/r17022005.html>, accessed on 1 March 2011.

<sup>1728</sup> *Sénat, Délégation pour l'Union européenne, Rapport d'information no. 206 sur la proposition de directive relative aux services dans le marché intérieur* of 18 February 2005, rapporteurs Denis Badré and others, p. 21-22.

<sup>1729</sup> *Sénat, Proposition de résolution no. 177 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 3 February 2005. See also *supra* note 1711 of this Chapter.

<sup>1730</sup> *Sénat, Proposition de résolution no. 209 relative à la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 1 March 2005.

draft resolution,<sup>1731</sup> tabled by UMP, was withdrawn and re-tabled in an amended form as part of the report of the Committee for Economic Affairs on the three draft resolutions. This Committee urged, *inter alia*, that the gap that indisputably existed in the legal regulation of the internal market in services had to be filled by the texts debated and adopted democratically by political institutions instead of by the piecemeal and sometimes excessively liberal jurisprudence of the Court of Justice.<sup>1732</sup> The rapporteur further stated that his hearings with Commission officials in Brussels allowed him "to fully grasp the evolution" of the position of the Barroso Commission away from the rigid standpoint of its predecessor.<sup>1733</sup>

In its answers to parliamentary questions on the Services Directive in mid-February and early March 2005, the Government concurred that the proposal was unacceptable and expressed its determination to have it modified.<sup>1734</sup>

Building on the said draft resolutions, the *Sénat* adopted a consolidated, more comprehensive resolution on 23 March 2005.<sup>1735</sup> Holding that the Directive was unacceptable as it was, the resolution demanded that the primacy of sectoral Community law be instantly affirmed and that posted workers remain subjected to the requirement of a prior declaration of their service activities. The Directive also needed to be harmonised with the 1980 Rome convention on the law applicable to contractual obligations, the then draft Rome II Regulation on the law applicable to non-contractual obligations and the then draft Directive on the recognition of professional qualifications. Like the *Assemblée nationale*, the *Sénat* requested the exclusion of certain enumerated types of services from the scope of the Directive. While the country of origin principle was generally refuted, its application to the professional activities sanctioned by penal law was sought to be explicitly excluded.

The two plenary sessions leading to the adoption of this resolution, besides the discussions of the merits, provided fodder for several senators to express their understanding of the boundaries of national parliamentary scrutiny of EU matters. In

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<sup>1731</sup> *Sénat, Proposition de résolution no. 182 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 9 February 2005.

<sup>1732</sup> *Sénat, Commission des affaires économiques et du plan, Rapport no. 230 sur les propositions de résolution nos. 177, 182 et 209* of 9 March 2005, rapporteur Jean Bizet (UMP), pp. 29 and 33.

<sup>1733</sup> *Sénat, Commission des affaires économiques et du plan, Rapport no. 230 sur les propositions de résolution nos. 177, 182 et 209* of 9 March 2005, rapporteur Jean Bizet (UMP), p. 32.

<sup>1734</sup> Namely, senator Jean Louis Masson (UMP) put a written question to the Minister for European Affairs, asking whether the Government had opposed the Directive from the very beginning and, if so, how. In her reply, Minister Haigneré assured him that the Directive was unacceptable and that the difficulties had been signalled at the European level ever since the Competitiveness Council of 11 March 2004. See *Question écrite no. 16090* (JO Sénat of 17.2.2005, p. 428) and *Réponse du Ministère délégué aux affaires européennes* (JO Sénat of 21.4.2005, p. 1131). Challenging the Government on its stance on the Directive, Gérard le Cam (PCF) also criticised the Commission claiming that its intention to maintain the Directive was a sign of its "omnipotence that escapes democratic control". See *Question d'actualité au gouvernement no. 0461G* and *Réponse du Ministère délégué aux affaires européennes* (JO Sénat of 4.3.2005, p. 1243).

<sup>1735</sup> *Sénat, Résolution no. 89 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 23 March 2005.

the first plenary debate, which took place on 15 March 2005,<sup>1736</sup> Denis Badré (MoDem), who chaired the aforesaid working group for the Services Directive, described the *Sénat's* role as being not only to send their reading of the Directive to the Government and thereby bolster its negotiating position at the European level, but also:

[T]o elucidate as much as possible the discussion, by allaying the concerns of our fellow citizens when they are not founded and by taking them into account when they are, in order to present them to the Government together with our comments. It should always be remembered [...] that Europe is not an abstraction for Brussels. [...] Europe is [...] also and, above all, the Europeans, who express themselves in a regular way through their national parliaments. Such is the case today with this sensitive topic.

Senator Marie-Thérèse Hermange (UMP), a member of the working group, stressed the proactive dimension of the *Sénat's* European scrutiny:

[T]he role of our House, today and even more so tomorrow, must be [...] to suggest improvements, in collaboration and harmony with all the competent institutions, in the spirit of pragmatism and common sense, and taking into account the aspirations of the national collectivities, while pursuing the path of integration, to which the future Constitution invites us.

Similarly, senator Bernard Murat (UMP) added:

[W]e gathered this morning to acknowledge, take a position and adopt a resolution that, I hope, will feed the work ahead, particularly that of the Commission, and resonate with our colleagues in the European Parliament. [...] It is up to us formally to take charge of this dossier and support the Government's action at the European level [...].

None of these claims, however, runs counter to the fact emphasised by Bruno Retailleau (MPF) that while Parliament votes on resolutions, decisions are taken elsewhere. Yet the *Sénat* does not seem barred from taking action, when the opportunity arises, precisely where decisions are taken. As reported in the second plenary session on the Services Directive, a senatorial delegation attended an interparliamentary meeting in the European Parliament on the Lisbon Strategy on 17 March 2005. The senators took advantage of the presence of Commission President Barroso and asked him whether he was still attached to the idea of re-examining the Services Directive, to which he replied: "The Commission is ready to work with the

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<sup>1736</sup> *Sénat, Compte rendu intégral des débats, Séance du 15 mars 2005*, available at: <http://www.senat.fr/seances/s200503/s20050315/s20050315001.html#SOM5>, accessed on 3 March 2011.

European Parliament in order to make any necessary adjustments to meet the concerns expressed in France".<sup>1737</sup>

On 16 June 2005, an unusual, indirect 'attack' was launched against the Bolkestein proposal. At the last plenary session of the *Sénat's* first reading of the Government bill bolstering the legal position of small and medium-sized enterprises, the Government introduced an amendment completing the transposition of the 1996 Directive on the Posting of Workers by inserting a chapter on the transnational posting of workers into the Labour Code (*Code du travail*).<sup>1738</sup> Unlike the Bolkestein proposal, this Directive commands the application of the law of the country of destination to workers employed in one Member State but posted temporarily to work in another Member State, which safeguards workers in the host Member State from unfair competition. Initially, it was deemed that the existing French legislation fully complied with the contents of the Directive and the deadline for the transposition expired on 16 December 1999.<sup>1739</sup> No action had been taken until 2000, when two Government decrees transposed an article of the Directive.<sup>1740</sup> The amendment of the Labour Code, successfully finalised on 2 August 2005 in the form of the Act in Favour of Small and Medium Enterprises,<sup>1741</sup> was, hence, to a great extent aimed at countering the draft Services Directive. Several parliamentarians in both Houses of Parliament explicitly affirmed this in plenary discussions.<sup>1742</sup>

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<sup>1737</sup> *Sénat, Compte rendu intégral des débats, Séance du 23 mars 2005*, available at:

<http://www.senat.fr/seances/s200503/s20050323/s20050323004.html#SOM5>, accessed on 3 March 2011.

<sup>1738</sup> See amendment no. 436 in: *Sénat, Compte rendu intégral, Séance du jeudi 16 juin 2005, 96<sup>e</sup> séance de la session ordinaire de 2004-2005*, JORF [2005] S. (C.R.) 52, 17.6.2005, pp. 4309-4310.

<sup>1739</sup> Bilous, Alexandre. "Travailleurs détachés et mise en oeuvre de la directive", 28.09.1999, available at: <http://www.eurofound.europa.eu/eiro/1999/09/study/tn9909233s.htm>, accessed on 28 February 2011.

<sup>1740</sup> See Enterprise Europe Network, "Fiche pratique – Détachement des travailleurs: Européens en France", available at: <http://www.entreprise-europe-sud-ouest.fr/sfx/assets/documents/uploaded/general/Detachement%20%20des%20travailleurs%202009.pdf>, accessed on 28 February 2011.

<sup>1741</sup> See Article 89 of *Loi no. 2005-882 en faveur des petites et moyennes entreprises* of 2 August 2005.

<sup>1742</sup> For example, senator Bernard Dussaut (PS) said that "the Government's amendment is manifestly the direct consequence of the mobilisation of the French around the dreadful draft Bolkestein Directive. It permits us at least to establish that the mobilisation of our fellow citizens was not pointless [...]". *Sénat, Compte rendu intégral, Séance du jeudi 16 juin 2005, 96<sup>e</sup> séance de la session ordinaire de 2004-2005*, JORF [2005] S. (C.R.) 52, 17.6.2005, p. 4310. Similarly, Patrick Ollier (UMP), Chairman of the Committee for Economic Affairs of the *Assemblée nationale*, declared that "even if Mr Bolkestein is no longer involved in this matter, it is good to underline, in order to show public opinion, that these amendments testify to the will of the majority and of the Government to reject what Mr Bolkestein had then proposed". *Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance du mardi 14 mars 2006, 168<sup>e</sup> séance de la session ordinaire de 2005-2006*, JORF [2006] A.N. (C.R.) 23[1], 15.3.2006, p. 1779. That such was the objective of this amendment was also maintained in: *Assemblée nationale, Commission des affaires économiques, de l'environnement et du territoire, Rapport no. 2939 sur la proposition de résolution (n° 2923) de M. Alain Bocquet et des membres du groupe député-e-s communistes et républicains sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 8 March 2006, rapporteur Alain Bocquet (PCF), pp. 19 and 31.

The year 2006 witnessed the tabling of two draft resolutions on the Services Directive, neither of which was adopted. The first one was proposed by the Communist senators some fortnight before the European Parliament's first reading. It mirrored their previous request for the withdrawal of the Directive, this time hoping to profit from linking the Directive with the French citizens' rejection of the Constitutional Treaty.<sup>1743</sup> The second one came from UMP more than a month after the Commission revised its proposal. It essentially welcomed the inclusion in the proposal of the majority of the amendments made by the European Parliament, notably the abandonment of the country of origin principle and the respect for sectoral Community legislation, but opposed the regime of tacit authorisation foreseen for service providers' establishment since it was contrary to French law.<sup>1744</sup>

Finally, it is noteworthy that the Delegation for the European Union convened to take stock of the evolution of the dossier at all its critical phases: (a) after the adoption of a report by the European Parliament's Committee for Internal Market and Consumer Protection;<sup>1745</sup> (b) after the European Parliament's first reading;<sup>1746</sup> and (c) after the Commission had revised its proposal.<sup>1747</sup> As the Delegation's Chairman, Hubert Haenel (UMP), pointed out, it was necessary to react to EU initiatives as early as possible, but also to follow their development before their definitive adoption and transposition. The aim of these meetings was to establish the extent to which the *Sénat's* recommendations had been taken into account and, once it was acknowledged that they had been, the scrutiny process was terminated.

### 2.2.2. Analysis

(A) *Scrutiny*. Like the *Assemblée nationale*, the *Sénat* carried out a substantive, policy scrutiny of the Services Directive, concentrating on the contents of the proposal. Scrutiny was carried out through a variety of instruments, including, peculiarly, legislative activity in a different field of law with the aim of countering the essence of the Bolkestein proposal. This is notable because it signifies the *Sénat's* responsiveness to the developments in EU decision making and depicts its proactive attitude to scrutiny.

(B) *Controversy*. The *Sénat*, above all, deplored the method of liberalising the services market. Clashing with the Commission's approach, it argued against horizontal legal regulation and in favour of sectoral harmonisation. Just as the MPs,

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<sup>1743</sup> *Sénat, Proposition de résolution no. 186 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 31 January 2006. See also *supra* note 1730 of this Chapter.

<sup>1744</sup> *Sénat, Proposition de résolution no. 349 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 11 May 2006.

<sup>1745</sup> *Sénat, Délégation pour l'Union européenne, Réunion du mercredi 7 décembre 2005*, available at: <http://www.senat.fr/europe/r07122005.html>, accessed on 3 March 2011.

<sup>1746</sup> *Sénat, Délégation pour l'Union européenne, Réunion du mercredi 8 mars 2006*, available at: <http://www.senat.fr/europe/r08032006.html>, accessed on 3 March 2011.

<sup>1747</sup> *Sénat, Délégation pour l'Union européenne, Réunion du mercredi 12 avril 2006*, available at: <http://www.senat.fr/europe/r12042006.html>, accessed on 3 March 2011.

the senators rejected the country of origin principle and requested the narrowing of the scope of the Directive. These scrutiny claims were predominantly made to safeguard the interests of French economic actors.

(C) *Information*. Information was sought not only from the French Government, but also from MEPs and Commission officials. As in the case of the *Assemblée nationale*, it appears that the *Sénat* made these information contacts to make their scrutiny claims crisper.

(D) *Outcome*. The senators clearly formulated recommendations for policy change. The bulk of their criticism was directed at the EU level, particularly the Commission, which was, like in the *Assemblée nationale*, reprimanded for failing to justify its legislative initiative by means of an appropriate impact assessment. Commission President Barroso was personally made aware of the *Sénat*'s position during an interparliamentary meeting in Brussels. That the addressee of the scrutiny was the Commission is further evidenced by the fact that the decision-making process was followed until it was concluded that the Commission satisfactorily met the *Sénat*'s concerns. The reason for terminating scrutiny was, therefore, not the performance of the French Government in the Council but the Commission's action in the EU legislative process. The senators wished, as they claimed, to feed the work of the Commission and the European Parliament in the spirit of pragmatism, while concomitantly supporting the Government's efforts at the EU level.

(E) *Parliamentary interdependence*. The *Sénat* attached considerable importance to the relationship with the European Parliament, for which purpose a meeting was organised with MEPs. Yet a difference in the degree of cross-level interparliamentary contact is perceptible in comparison to the *Assemblée nationale* insofar as the *Sénat* was more reserved in this respect. Namely, the senators put less effort into asserting their views within the European Parliament than did the MPs.

On the basis of the foregoing, it can be concluded that the *Sénat* took a broader approach in interpreting its role in EU decision making and acted within the European constitutional order.

### 3. THE UNITED KINGDOM

#### 3.1. House of Commons

##### 3.1.1. Scrutiny claims

The House of Commons initiated the scrutiny of the Bolkestein proposal in March 2004, two months after its publication. The European Scrutiny Committee assessed the proposal as politically important and agreed with the Government that it was potentially of significant benefit to British consumers and businesses.<sup>1748</sup> In January 2005, the Committee received a detailed response from the Government, in which the

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<sup>1748</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 10 March 2004", *HC 42-xii*, *12<sup>th</sup> Report of Session 2003-04* of 25 March 2004, para. 4.11, p. 13.

latter strongly supported the objectives of the Directive and the country of origin principle "as critical to delivering liberalisation", but warned that it was "vitaly important" to safeguard the British standards of health and safety and to ensure the protection of workers, consumers, the environment and animals.<sup>1749</sup> The Committee then recommended the proposal for debate in the competent European Standing Committee, suggesting that it should examine the scope of the Directive, the possible pitfalls and the need for the Commission to review its policy three years after the Directive's entry into force.<sup>1750</sup>

The Commission's revision of the proposal did not make the Government waver in its strong support for the Directive. In its correspondence to the European Scrutiny Committee, the Government indeed confirmed that many of its negotiation aims had been met by the amended proposal, with further changes to be sought to uphold British standards in health and safety and sensitive policy areas.<sup>1751</sup> Having obtained a revised Regulatory Impact Assessment from the Government, the European Scrutiny Committee repeated its request for a debate in the European Standing Committee.<sup>1752</sup>

This debate took place on 16 May 2006, a fortnight before the Council reached a political agreement on the common position at first reading. There was a broad consensus across the political spectrum on the support for the Directive and the discussion unwound, for the most part, in a non-partisan tone.<sup>1753</sup> A significant portion of it was devoted to a cost-benefit analysis of the proposal and the financial costs of its implementation, in which respect Ian McCartney, the Minister for Trade, submitted that the United Kingdom would be one of the main beneficiaries of the Directive, whose economy would gain some £5 billion a year.<sup>1754</sup> While not a predominant point of discussion, some divergence surfaced between the Conservatives and Labour as to the desirability of the country of origin principle, whose removal was regretted by the former and greeted by the latter.<sup>1755</sup> For

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<sup>1749</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 12 January 2005", *HC 38-iii, 3<sup>rd</sup> Report of Session 2004-05* of 27 January 2005, para. 1.8, p. 5.

<sup>1750</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 12 January 2005", *HC 38-iii, 3<sup>rd</sup> Report of Session 2004-05* of 27 January 2005, paras 1.11 and 1.12, p. 6.

<sup>1751</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 26 April 2006", *HC 34-xxvi, 26<sup>th</sup> Report of Session 2005-06* of 8 May 2006, paras 3.13 and 3.14, p. 19.

<sup>1752</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 10 May 2006", *HC 34-xxviii, 28<sup>th</sup> Report of Session 2005-06* of 18 May 2006, paras 2.3 and 2.5, p. 8.

<sup>1753</sup> See the speeches to that effect by Graham Brady (Con.) and Jeremy Browne (Lib.Dem.) in: House of Commons, European Standing Committee, Debate of 16 May 2006, col. 7, available at: <http://www.publications.parliament.uk/pa/cm200506/cmstand/euro/st060516/60516s01.htm>, accessed on 4 March 2011.

<sup>1754</sup> House of Commons, European Standing Committee, Debate of 16 May 2006, col. 4, available at: <http://www.publications.parliament.uk/pa/cm200506/cmstand/euro/st060516/60516s01.htm>, accessed on 4 March 2011.

<sup>1755</sup> See the interventions by Graham Brady (Con.) and Michael Connarty (Lab.) in: House of Commons, European Standing Committee, Debate of 16 May 2006, cols. 18 and 19, available at:

example, the Labour participants in the two tripartite meetings of MPs, Lords and MEPs on the Services Directive were reported to have praised British MEPs for their work on the deletion of the country of origin principle and for assisting MPs in grasping the intricacies of the dossier.<sup>1756</sup> These differences were not pronounced, however, and they did not tarnish the overall cross-party acceptance of the Bolkestein proposal. The discussion in the European Standing Committee ended with the adoption of a motion to resolve that the House take note of the amended draft Services Directive and support "the Government's approach to securing practical and proportionate legislation that promotes economic growth, competitiveness and job creation within the context of an internal market for services".<sup>1757</sup>

By means of parliamentary questions, MPs sought account from the Government on several occasions, such as in December 2004 on the outcome of the first Competitiveness Council that addressed the Services Directive,<sup>1758</sup> then in July 2005 on the scope of the Directive and the Government's definitions of the ambiguous terms used therein,<sup>1759</sup> and in January 2006 on the applicable timetable and the Government's view of the Directive as amended by the European Parliament.<sup>1760</sup>

### 3.1.2. Analysis

(A) *Scrutiny*. The House of Commons performed the procedural scrutiny of the Services Directive. MPs did not devote as much attention to examining the contents of the proposal as to enforcing national ministerial accountability.

(B) *Controversy*. The Services Directive was, despite minor differences of opinion, uncontroversial thanks to a large consensus among the political parties from both the Government and the Opposition on the sizeable benefits of the Directive for Britain. The Bolkestein proposal was indeed warmly welcomed.

(C) *Information*. In line with the method of scrutiny employed, the Commons relied on the information received from the Government. Although the MPs did formally gather with MEPs during a tripartite meeting with peers, the purpose was seemingly not to influence the European Parliament's decisions but to become better equipped in holding the Government to account.

(D) *Outcome*. The House of Commons concentrated on receiving information and account on the dossier rather than on offering concrete recommendations for amending the proposal. The main object of the Commons' scrutiny was undoubtedly

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<http://www.publications.parliament.uk/pa/cm200506/cmstand/euro/st060516/60516s01.htm>, accessed on 4 March 2011.

<sup>1756</sup> House of Commons, European Standing Committee, Debate of 16 May 2006, col. 19, available at: <http://www.publications.parliament.uk/pa/cm200506/cmstand/euro/st060516/60516s01.htm>, accessed on 4 March 2011.

<sup>1757</sup> House of Commons, European Standing Committee, Debate of 16 May 2006, col. 22, available at: <http://www.publications.parliament.uk/pa/cm200506/cmstand/euro/st060516/60516s01.htm>, accessed on 4 March 2011.

<sup>1758</sup> House of Commons, Written Answers to Questions, 8 December 2004, Vol. 428, cols. 586W-587W.

<sup>1759</sup> House of Commons, Written Answers to Questions, 7 July 2005, Vol. 436, cols. 592W-594W.

<sup>1760</sup> House of Commons, Oral Answers to Questions, 31 January 2006, Vol. 442, cols. 170-172.

the British Government and its opinion of the merits of the proposal. The motion adopted in the European Standing Committee testifies to this conclusion.

(E) *Parliamentary interdependence*. The aforementioned tripartite meeting revealed the active engagement of some of the British MEPs against the country of origin principle. While this was greeted in Parliament, there is no evidence that the MEPs' actorship was a direct consequence of the MPs' lobbying. It can, for that reason, be argued that the Commons did not place itself in a relation of interdependence with the European Parliament.

These observations point to the conclusion that the House of Commons remained within the bounds of the British constitutional order and did not extend the outreach of its scrutiny claims to the Union's decision-making arena.

## **3.2. House of Lords**

### **3.2.1. Scrutiny claims**

In the House of Lords, the Services Directive was the object of two in-depth inquiries, both of which profited from a wide public consultation of stakeholders and from the written and oral evidence collected from both the Government and certain MEPs and Commission officials. The purpose of gathering with EU representatives was to receive information, clarifications and guidance on the practical operability of the legislative solutions envisaged by the proposal.<sup>1761</sup> Correspondence with the Government was maintained by means of letters throughout the scrutiny process.

The results of the *first inquiry* were published in July 2005, after the competent committee of the European Parliament had adopted a draft report on the Bolkestein proposal. Besides many other aspects, the Lords addressed the method of regulation, the scope of the directive and the repercussions of the country of origin principle. We present them in turn.

The Commission's approach of enacting a horizontal directive was favoured primarily because sector-by-sector harmonisation would take a long time to achieve if it were to meet the targets set in the Lisbon Agenda. Another reason against harmonisation lay in the inherent differences between goods and services, with the latter often involving an idiosyncratic element and escaping straightforward definition.<sup>1762</sup>

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<sup>1761</sup> See the careful language used by Lord Woolmer, the Chairman of the EU Sub-Committee B, when their Lordships visited Commission officials in Brussels to take evidence: "We appreciate that we are meeting you at a sensitive time on these matters, and therefore perhaps the way in which you may feel you are able to respond will be even more measured than usual. You will understand, however, that if we are asking questions, it is to seek clarification and to seek guidance". House of Lords, EU Committee, "Completing the internal market in services", *HL Paper 23, Minutes of Evidence of 15 March 2005*, Q443, p. 119.

<sup>1762</sup> House of Lords, EU Committee, "Completing the internal market in services", *HL Paper 23, 6<sup>th</sup> Report of Session 2005-06 of 21 July 2005*, paras 67, 74-75, pp. 22-24.

The Lords disagreed with the European Parliament that all services of general interest should be explicitly excluded. On the contrary, any blanket exclusion was ill-advised, because it would hinder competition. Instead, the Directive should cover the cases in which national public bodies purchase services from suppliers for remuneration even where they further make them available to recipients for reduced or no charge.<sup>1763</sup>

The country of origin principle was assessed as the essential pillar of the Directive and a realistic legal basis for the temporary cross-border provision of services. Their Lordships discarded as unfounded the arguments that health and safety sectors should be exempted from this principle and that the Directive would threaten employment rights, public healthcare and consumer rights. The benefits for small and medium-sized enterprises of being able to test the markets in other Member States without having to establish themselves there outweighed the fact that British health and safety standards were higher than those prescribed by the EU.<sup>1764</sup> Yet the lack of a clear definition of "temporary" service provision was seen as ushering in uncertainty for small and medium-sized enterprises as to the legal regime applicable to them and, thus, posed a barrier to intra-EU trade in services.<sup>1765</sup>

The Lords concluded with a strong message in favour of the Directive, arguing that the circumstances of high unemployment, the pressures of economic restructuring caused by the accession of ten new Member States and the debate on the Constitutional Treaty made it "all the more important for the European Union to be bold and resolute in its embrace of the single market".<sup>1766</sup>

This report was debated in the plenary and warmly endorsed by all political parties in October 2005. Such was the consensus among the peers that Lord Sainsbury, Parliamentary Under-Secretary of State at the Department of Trade and Industry, commented that "to have complete unanimity on a debate on Europe is unheard of".<sup>1767</sup> Although the discussion centred on the merits of the Directive and mainly rehearsed the points made in the report, several interventions hinted at cross-level cooperation. For example, Lord Roper, arguing in favour of the country of origin principle, expressed hope that "the Labour Members of this House and of another place, including the Minister, will be able to have useful discussions on the issue with the British Labour MEPs before the appropriate votes take place".<sup>1768</sup> Also, Lord Woolmer, the Chairman of EU Sub-Committee B on the Internal Market,

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<sup>1763</sup> House of Lords, EU Committee, "Completing the internal market in services", *HL Paper 23*, 6<sup>th</sup> Report of Session 2005-06 of 21 July 2005, para. 27, p. 14.

<sup>1764</sup> House of Lords, EU Committee, "Completing the internal market in services", *HL Paper 23*, 6<sup>th</sup> Report of Session 2005-06 of 21 July 2005, paras 106-112 and 189, pp. 30-31 and 47.

<sup>1765</sup> House of Lords, EU Committee, "Completing the internal market in services", *HL Paper 23*, 6<sup>th</sup> Report of Session 2005-06 of 21 July 2005, para. 58, p. 20.

<sup>1766</sup> House of Lords, EU Committee, "Completing the internal market in services", *HL Paper 23*, 6<sup>th</sup> Report of Session 2005-06 of 21 July 2005, para. 180, p. 45.

<sup>1767</sup> House of Lords, Debate of 14 October 2005, Vol. 674, col. 519.

<sup>1768</sup> House of Lords, Debate of 14 October 2005, Vol. 674, col. 517.

Energy and Transport, stated in his concluding speech that MEPs "would do well to read today's debate before their considerations in November and January".<sup>1769</sup>

The *second inquiry* into the Services Directive was reported on in July 2006, after the Council had reached the political agreement on the revised proposal. Having examined largely the same witnesses as the year before, the Lords thought it significant that none of them remained opposed to the Directive.<sup>1770</sup> For their Lordships themselves, the revised Directive still constituted a "significant step forward", as it was a "workable compromise" designed to meet "real concerns about issues wider than the single market".<sup>1771</sup>

The Lords considered that the country of origin principle had been abandoned in favour of the country of destination principle. While this change did not coincide with their preference, they were reassured that the right to provide services on a temporary or occasional basis in another Member State was firmly entrenched in the Directive and that sensible safeguards were secured against placing an excessive onus on the realisation of this right.<sup>1772</sup> They further welcomed the keeping of the horizontal approach to the services market regulation and assessed that the lists of exclusions and derogations did not prevent the Directive from covering a substantial part of the market in services and from making a "useful contribution to the growth of cross-border services provision within the EU".<sup>1773</sup> In addition, speedy and full implementation of the Directive across the Member States was pressed for.<sup>1774</sup> The scrutiny reserve had not been breached and was lifted in virtue of this report. It should be noted, however, that the EU Committee had given the green light to the Government to consent to the political agreement in the Council prior to the formal lifting of the scrutiny reserve.<sup>1775</sup>

### **3.2.2. Analysis**

(A) *Scrutiny*. Unlike the House of Commons, the House of Lords carried out an in-depth substantive scrutiny of the Services Directive. Many of the legislative solutions from the proposal were critically assessed against both the British and the Union's interests.

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<sup>1769</sup> House of Lords, Debate of 14 October 2005, Vol. 674, col. 522.

<sup>1770</sup> House of Lords, EU Committee, "The Services Directive revisited", *HL Paper 215, 38<sup>th</sup> Report of Session 2005-06* of 24 July 2006, para. 103, p. 22.

<sup>1771</sup> House of Lords, EU Committee, "The Services Directive revisited", *HL Paper 215, 38<sup>th</sup> Report of Session 2005-06* of 24 July 2006, para. 113, p. 23.

<sup>1772</sup> House of Lords, EU Committee, "The Services Directive revisited", *HL Paper 215, 38<sup>th</sup> Report of Session 2005-06* of 24 July 2006, paras 24-25, 50, 68 and 72, pp. 10, 15 and 17-18.

<sup>1773</sup> House of Lords, EU Committee, "The Services Directive revisited", *HL Paper 215, 38<sup>th</sup> Report of Session 2005-06* of 24 July 2006, paras 43 and 80, pp. 14 and 19.

<sup>1774</sup> House of Lords, EU Committee, "The Services Directive revisited", *HL Paper 215, 38<sup>th</sup> Report of Session 2005-06* of 24 July 2006, para. 102, p. 22.

<sup>1775</sup> House of Lords, EU Committee, "Correspondence with ministers – January 2006 to September 2006", *HL Paper 187, 40<sup>th</sup> Report of Session 2006-07* of 23 October 2007, p. 130.

(B) *Controversy*. Being proponents of a liberal approach to the regulation of the Union's services market, their Lordships strongly defended the Bolkestein proposal, the country of origin principle and the wide scope of the services that were to be encompassed by the Directive. In doing so, they collided with the European Parliament's position. Since their support for the Services Directive was overwhelming across the political spectrum, this EU legislative act was rather uncontroversial.

(C) *Information*. While the Lords gathered information not only from the British Government but also from the Commission and MEPs, through evidence-taking sessions and the said tripartite meetings, the purpose was not to hold the Commission to account but merely to seek clarifications on the proposed text.

(D) *Outcome*. The Lords' two thorough inquiries into the Services Directive recommended certain policy improvements at the EU level. Yet since the peers were already more than content with the original proposal, their recommendations did not touch upon the core of the Directive. The views expressed by the Lords represented an independent piece of expertise on the regulation of services in the internal market. The Lords seem to have wished merely to inform the debate rather than to exert direct influence on the outcome of the negotiations.

(E) *Parliamentary interdependence*. Though their Lordships hinted at cooperation with the European Parliament, this was made *en passant* and was not the objective of the scrutiny. This conclusion is amplified by the fact that the Lords preferred to leave it to the Government to brief British MEPs on the need to prevent the dilution of the market-opening elements of the Service Directive. The Government indeed did so by sending written briefs and making telephone calls to influential MEPs and reporting back to the EU Sub-Committee B on the Internal Market, Energy and Transport.<sup>1776</sup>

Therefore, the context to which their Lordships' scrutiny claims referred was primarily national. Nevertheless, the broad scope of their analysis and their examination of officials from the relevant EU institutions justify the conclusion that the House of Lords partially acted beyond the British constitutional order.

#### 4. PORTUGAL

The Services Directive was not scrutinised by the Assembly. An insight into the IPEX database and the website of the European Affairs Committee confirm this.<sup>1777</sup> This information is further corroborated by interviews and personal correspondence

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<sup>1776</sup> House of Lords, EU Committee, "Correspondence with ministers – January 2006 to September 2006", *HL Paper 187, 40<sup>th</sup> Report of Session 2006-07* of 23 October 2007, pp. 132 and 135; House of Lords, EU Committee, "Correspondence with ministers – October 2006 to April 2007", *HL Paper 184, 30<sup>th</sup> Report of Session 2007-08* of 2 December 2008, p. 130.

<sup>1777</sup> The search was made for the following Commission documents: (a) COM(2004) 2 – Proposal for a Directive of the European Parliament and of the Council on services in the internal market (original proposal); and (b) COM(2006) 160 – Proposal for a Directive of the European Parliament and of the Council on services in the internal market (amended proposal).

with the competent clerks of the European Affairs Committee.<sup>1778</sup> Only very rarely was the Bolkestein proposal referred to in plenary debates. This was chiefly done in a negative context, whereby the Directive was criticised, for instance, by the Communists<sup>1779</sup> and the Left Block.<sup>1780</sup> Yet except for these sporadic invocations of the Directive, this dossier did not give rise to political controversy.<sup>1781</sup>

The main reason why this salient dossier was not dealt with by the Assembly is the lack of a scrutiny mechanism. At the time the Commission initiated the proposal for the Services Directive no system of systematic scrutiny existed.<sup>1782</sup> The European Scrutiny Act was only adopted after the Commission had published both its original and amended proposals. Consequently, the Government was left with ample leeway to conduct negotiations in the Council.

The Portuguese Parliament's treatment of the Services Directive, therefore, proves that national parliamentary activity concerning EU affairs can in great measure depend on the existence of a scrutiny procedure and that this can provide a key impetus for the actual performance of European scrutiny. However, as we have seen in the previous chapter, such a procedure need not originate in the national legal order. It can also come from the EU level, such as in the form of the Barroso initiative, which stimulated the Assembly to scrutinise the Commission's initiatives in the period following the adoption of the European Scrutiny Act in 2006. Finally, these findings affirm the argument that formal scrutiny procedures should continue to be the object of scholarly analyses.

## 5. CONCLUDING REMARKS

The case study on the Services Directive yields several important insights as regards both the research objectives and the methodological premises of the analysis.

The French case demonstrates that national parliaments, despite their general focus on the Government, can and do in certain circumstances take a broader approach to European scrutiny. Both the *Assemblée nationale* and the *Sénat* acted beyond the institutional prescriptions of the French constitutional order. An appreciable amount of their scrutiny claims were directed at the EU level and they

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<sup>1778</sup> Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee, Lisbon, 8 June 2010 and personal correspondence with Maria João Costa, clerk of the European Affairs Committee, March-May 2011.

<sup>1779</sup> See the intervention by Jerónimo de Sousa (PCP) in: *Diário da Assembleia da República, I Série, No. 3*, 22 March 2005, p. 95.

<sup>1780</sup> See the interventions by Luís Fazenda (BE) in: *Diário da Assembleia da República, I Série, No. 3*, 22 March 2005, p. 140. In another plenary debate he hailed the European Parliament's rejection of the country of origin principle saying that "the failure of this norm is a victory for all European workers". See: *Diário da Assembleia da República, I Série, No. 91*, 17 February 2006, p. 4282.

<sup>1781</sup> Personal correspondence with Maria João Costa, clerk of the European Affairs Committee, March-May 2011.

<sup>1782</sup> Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee, Lisbon, 8 June 2010 and personal correspondence with Maria João Costa, clerk of the European Affairs Committee, March-May 2011.

performed verifications of how their policy recommendations fared. The MPs' and senators' role perceptions were located within the European constitutional order. They, therefore, did not act in isolation but in cooperation with EU institutions. It could be held, then, that the French Parliament contributed to the democratic legitimacy and accountability of the Union.

The British case paints a different picture. Westminster's general focus on the Government did not significantly veer towards EU institutions. A difference between the two Houses was detected, however. While the MPs invested all their forces exclusively into holding the Government to account, the peers did take a broader approach. Yet in so doing, they made safeguarding caveats as to the purposes of their contacts with EU institutions. Their reluctance directly to converse with MEPs was strong evidence that the Lords refrained from directly influencing the decision-making process at the EU level. Notwithstanding this, they did endeavour to inform a wider debate on the substantive merits of the dossier. Therefore, whereas the MPs' role perceptions remained within the British constitutional context, those of the peers partially transcended into the EU realm. It should thus be concluded that although the British Parliament cooperated with EU institutions, it only partially contributed to the legitimacy and accountability of the Union.

The Portuguese case showed that political salience is not necessarily the most important parameter for scrutiny, but the existence of an appropriate scrutiny arrangement. Since there was a vacuum in the institutional powers of the Assembly, this House was left outside the decision-making process and was unable to act as a legitimacy agent of the Union.

To conclude, the Services Directive proves that the political discourses taking place during national parliamentary scrutiny processes can legitimise EU decisions directly. The polarised response to the Bolkestein proposal in France and Britain demonstrates that parliamentary interdependence is more likely to occur where powerful sections of a given national parliament oppose the action at the EU level and where the parliament practices the substantive scrutiny of EU policies. Furthermore, the institutional behaviour of the *Assemblée nationale* reveals that lower chambers should not automatically be regarded as less active in EU affairs than upper chambers. Nor should they be deemed as always blindly clinging to their Governments. Lower chambers can indeed play a vital role in EU decision making.

# Chapter 10

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## The SWIFT Agreements: Pitting Privacy against Terrorism Prevention

### 1. BACKGROUND

In the wake of the September 11 terrorist attacks, the US Department of Treasury (Treasury) secretly developed in 2001 the Terrorist Finance Tracking Program (TFTP) with a view to preventing and combating terrorism and terrorist financing.<sup>1783</sup> Under the TFTP, the Treasury forced, by means of compulsory administrative subpoenas,<sup>1784</sup> the American branch of the Society for Worldwide Interbank Financial Telecommunication (SWIFT) to transfer to it certain classes of financial transaction records operated on its servers, the majority of which originated in EU Member States.<sup>1785</sup> This covert data provision mechanism was at variance with the EU's 1995 Data Protection Directive.<sup>1786</sup> After the American press discovered this in 2006, the TFTP came under severe criticism from the European Parliament, which

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<sup>1783</sup> See further in: Shrader, Jeremy S. "Secrets hurt: how SWIFT shook up Congress, the European Union, and the US banking industry," *North Carolina Banking Institute*, Vol. 11, 2007: 397-420; Fuster, Gloria González et al. "SWIFT and the vulnerability of transatlantic data transfers," *International Review of Law, Computers and Technology*, Vol. 22, No. 1&2, 2008: 191-202; Shea, Courtney. "A need for SWIFT change: the struggle between the European Union's desire for privacy in international financial transactions and the United States' need for security from terrorists as evidenced by the SWIFT scandal," *Journal of High Technology Law*, Vol. 8, No. 1, 2008: 143-168; Hert, Paul de and Schutter, Bart de. "International transfers of data in the field of JHA: the lessons of Europol, PNR and Swift," in *Justice, liberty, security: new challenges for EU external relations*, by Bernd Martenczuk and Servaas van Thiel (eds), Brussels: Vrije Universiteit Brussel Press, 2008: 303-340; Ueberecken, Raoul. "Un feuilleton à rebondissement: l'affaire Swift," *Revue du Marché Commun et de l'Union Européenne*, No. 542, 2010: 566-573.

<sup>1784</sup> The legal bases for their issuance were the 1977 International Emergency Economic Powers Act, the 1945 United Nations Participations Act and Executive Order 13224, by which the President, George W. Bush, declared a national emergency to deal with the 9/11 terrorist attacks and authorised the Secretary of the Treasury to employ all powers granted to the President as may be necessary to implement the Order.

<sup>1785</sup> See a study of the US court orders ordering the violation of foreign law in: Connorton, Patrick M. "Tracking terrorist financing through SWIFT: when US subpoenas and foreign privacy law collide," *Fordham Law Review*, Vol. 76, No. 1, 2007: 283-322.

<sup>1786</sup> Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data of 24 October 1995, (OJ L281/31 of 23.11.1995). See more generally: Salbu, Steven R. "The European Union Data Privacy Directive and international relations," *Vanderbilt Journal of Transnational Law*, Vol. 35, No. 2, 2002: 655-696; Busser, Els de. "EU data protection in transatlantic cooperation in criminal matters: will the EU be serving its citizens an American meal?," *Utrecht Law Review*, Vol. 6, No. 1, 2010: 86-100; Busser, Els de. *Data protection in EU and US criminal cooperation: a substantive law approach to the EU internal and transatlantic cooperation in criminal matters between judicial and law enforcement authorities*, Antwerp-Apeldoorn: MAKLU Uitgevers, 2009.

passed a resolution strongly disapproving of any secret operations on EU territory that affect the privacy of EU citizens, expressing deep concern that it had not been informed of them and demanding that the Commission, the Council and the European Central Bank fully explain the extent to which they were aware of these operations.<sup>1787</sup>

To repair the damage, the US provided the EU in June 2007 with the so-called TFTP Representations.<sup>1788</sup> This document contained, on the one hand, a description of the controls and safeguards that the Treasury applied when handling SWIFT-derived data and, on the other, the Treasury's undertakings that EU-originating data would be processed exclusively for counterterrorism purposes and only where a pre-existing terrorism nexus existed, and that the data would be deleted after the expiry of a certain period of time. As a further concession, an "eminent European person" appointed by the Commission was to verify the Treasury's compliance with these commitments. The two verification reports prepared by the eminent person, the French investigating magistrate Jean-Louis Bruguière, indeed confirmed the Treasury's compliance and emphasised the great value of the TFTP for the EU's own investigation of terrorism.

Problems arose in late 2009 when SWIFT decided to overhaul its server system. Since 1 January 2010, the data on intra-EU financial transactions were to be stored only in SWIFT's data centres in Switzerland and the Netherlands and no longer also in the US-based centre. The consequence of this was that the Treasury lost access to some 50% of the financial data that it had been able to access through the TFTP. In order to ensure the continuation of the Treasury's access to the data, the EU signed an interim agreement with the US on the processing and transfer of financial messaging data through SWIFT (SWIFT I Agreement or Interim Agreement).<sup>1789</sup> Pending its entry into force, the Interim Agreement was to apply provisionally as of 1 February 2010 and was in any case to expire on 31 October 2010. A long-term agreement that would substitute it was to be concluded as soon as the Lisbon Treaty entered into force.

Interestingly, the Interim Agreement was signed on 30 November 2009, a day before the entry into force of the Lisbon Treaty, which gave the European Parliament the right of consent with respect to a whole range of international agreements.<sup>1790</sup>

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<sup>1787</sup> European Parliament, Resolution on the interception of bank transfer data from the SWIFT system by the US secret services of 6 July 2006, doc. no. P6\_TA(2006)0317, points 5 and 13.

<sup>1788</sup> See: Letter from United States Department of Treasury regarding SWIFT/Terrorist Finance Tracking Program of 28 June 2007, (*OJ C 166/08* of 20.7.2007) and "Processing of EU originating personal data by United States Treasury Department for counter terrorism purposes – 'SWIFT': Terrorist Finance Tracking Program – Representations of the United States Department of Treasury", (*OJ C 166/09* of 20.7.2007).

<sup>1789</sup> Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, (*OJ L 8/11* of 13.1.2010).

<sup>1790</sup> Article 218(6) TFEU lays down that the Council needs to obtain prior consent from the European Parliament for the conclusion of international agreements on behalf of the EU in the following cases: (a)

Since the Interim Agreement was, therefore, only subject to the consultation of the European Parliament, the Council was legally entitled to proceed with the signature without the European Parliament's consent. Yet, controversially, it did so also despite the latter's opposition.<sup>1791</sup> Namely, in a resolution of 17 September 2009, adopted some two and a half months before the Interim Agreement was signed, the European Parliament published a list of concerns that needed to be taken into account "as a very minimum". It required among other things: (a) that the data be transferred and processed only for the purposes of fighting terrorism; (b) that the processing of the data be proportionate to this objective; (c) that transfer requests be based on specific, targeted cases, limited in time and subject to judicial authorisation; (d) that EU citizens and enterprises be granted in the US the same defence rights, procedural guarantees and judicial redress possibilities as were available in the EU; (e) that the transfer of the data to third parties other than the public authorities charged with combating terrorism be prohibited; and (f) that a reciprocity mechanism be strictly adhered to.<sup>1792</sup> Worth noting, furthermore, is that the European Parliament, in order to put pressure on the Council, warned "that a possible new agreement will be negotiated under the new EU legal framework that fully involves the European Parliament and national parliaments" and "that the European Parliament and all national parliaments will be given full access to the negotiation documents and directives".<sup>1793</sup>

On 11 February 2010, ten days after the start of the provisional application of the Agreement, the European Parliament, acting by a large majority,<sup>1794</sup> withheld its consent and thereby prevented the Interim Agreement from entering into force. As a corollary, SWIFT purportedly discontinued the transfer of data to the US.<sup>1795</sup> Among

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association agreements; (b) the Union's accession to the European Convention on Human Rights; (c) agreements establishing a specific institutional framework by organising cooperation procedures; (d) agreements with important budgetary implications for the Union; (e) agreements in the fields covered by the ordinary legislative procedure or the special legislative procedure where consent from the European Parliament is required. See the situation prior to the Lisbon Treaty in: Monar, Jörg. "The EU as an international actor in the domain of Justice and Home Affairs," *European Foreign Affairs Review*, Vol. 9, No. 3, 2004: 395-415.

<sup>1791</sup> Council Decision 2010/16/CFSP/JHA of 30 November 2009 on the signing, on behalf of the European Union, of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, (OJ L 8/9 of 13.1.2010).

<sup>1792</sup> European Parliament, Resolution on the envisaged international agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing of 17 September 2009, doc. no. P7\_TA(2009)0016, point 7.

<sup>1793</sup> European Parliament, Resolution on the envisaged international agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing of 17 September 2009, doc. no. P7\_TA(2009)0016, points 7(i) and 13.

<sup>1794</sup> There were 378 votes against, 196 in favour and 13 abstentions.

<sup>1795</sup> *Euractiv*, "EU to approve new anti-terror data sharing deal with US", 23 April 2010, available at: <http://www.euractiv.com/en/justice/eu-approve-new-anti-terror-data-sharing-deal-us-news-471389>, accessed on 31 March 2011. However, it was reported that another route to allow the US continued access to the financial data of European citizens was found through a bilateral agreement on legal

the many reasons for the European Parliament's rejection were that: (a) the method of data transfer infringed the basic principles of privacy data protection, in particular those of necessity and proportionality; (b) transfer requests were not subject to judicial authorisation; (c) data retention periods were not specified; (d) data sharing with third countries was not sufficiently defined; (e) EU citizens and companies were not to enjoy the same rights, guarantees and redress mechanisms in the US as they did in the territory of the Union; and (f) reciprocity in data transfers was not adequate.<sup>1796</sup> It has been argued that this European Parliament's vote is historic, one that significantly changes the internal balance of power between EU institutions, one that solidifies the democratic legitimacy of the Union's action in external relations and one that prompts both the Council and the Commission to pay more heed to the European Parliament already at the negotiation stage of the process of concluding international agreements.<sup>1797</sup>

In response, the Commission submitted to the Council a new draft negotiation mandate for a definitive Agreement that incorporated the European Parliament's objections.<sup>1798</sup> The long-term SWIFT Agreement (SWIFT II Agreement or Agreement) was signed on 28 June 2010, approved by the European Parliament on 8 July 2010 and entered into force on 1 August 2010.<sup>1799</sup> It shall apply for five years with automatic extensions for subsequent periods of one year.

Among the key amendments to the Interim Agreement are the following. First, the US Treasury is obliged to submit each data-sharing request to Europol, which shall urgently verify whether the data complies with the prescribed requirements.<sup>1800</sup> Second, independent overseers, together with the eminent person, shall monitor the Treasury's compliance with the strict counter-terrorism purpose limitation and the

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assistance with the Netherlands, which hosts the SWIFT's operational database in the municipality of Zoeterwoude. See: *NRC Handelsblad*, "Gluren in de bankgegevens" ["Peeking at bank data"], *Economie* supplement, 19-20 March 2011, pp. 4-6.

<sup>1796</sup> European Parliament, Legislative resolution on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program of 11 February 2010, doc. no. P7\_TA(2010)0029.

<sup>1797</sup> Monar, Jörg. "Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: a historic vote and its implications," *European Foreign Affairs Review*, Vol. 15, No. 2, 2010: 145 and 147-148.

<sup>1798</sup> European Commission, Recommendation to the Council to authorise opening of negotiations between the EU and the United States of America for a long-term international agreement to make available to the United States Treasury Department financial messaging data from the European Union to prevent and combat terrorism and terrorist financing of 24 March 2010, SEC(2010)315.

<sup>1799</sup> Agreement between the European Union and the United States of America on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, (*OJ L 195/5* of 27.7.2010).

<sup>1800</sup> Article 4(3)-(4) of the SWIFT II Agreement. The requirements, laid down in Article 4(2) thereof, are that: (a) the request must be identified as clearly as possible; (b) the necessity of the data must be clearly substantiated; (c) the request must be tailored as narrowly as possible; and (d) the request must not seek any data relating to the Single Euro Payments Area.

safeguards related to the security, integrity, retention and deletion of data. They may block any searches that appear to violate these requirements, except for those referring to the retention and deletion of data.<sup>1801</sup> Third, onward transfer of the financial data involving a citizen or resident of an EU Member State may only be shared with third countries upon receiving prior consent from the competent authorities of the Member State in question, unless data-sharing is essential for the prevention of an immediate and serious threat to the public security of the US, the EU, a Member State or a third country.<sup>1802</sup> Fourth, the Commission will examine the possibility of establishing a European equivalent of TFTP.<sup>1803</sup>

## **2. FRANCE**

### **2.1. Assemblée nationale**

#### **2.1.1. Scrutiny claims**

On 22 July 2009, the Government asked the European Affairs Committee to scrutinise the opening of the SWIFT negotiations according to the urgent procedure, because it was unable to obtain from the Council an additional period of time for conducting the regular scrutiny procedure.<sup>1804</sup> The Committee later criticised the urgency given the sensitivity of the subject matter.<sup>1805</sup> Nonetheless, in his response two days later, Pierre Lequiller, the Chairman of the European Affairs Committee, accepted the Government's request on behalf of the Committee without convening it.

On 17 November 2009, four days after the Council adopted a draft decision on the signing of the SWIFT I Agreement, the European Affairs Committee accepted the need for rapid negotiations on an international agreement before the US lost access to the data and, accordingly, approved the Council's draft Decision, recognising that the sharing of financial data is a mutual interest in the fight against terrorism.

However, the Committee demanded in its conclusions that the role of the authorities that would receive and process incoming US data transfer requests be clarified, that these transfers be strictly limited, that the sharing of data with third countries be subject to extremely strict conditions in accordance with relevant EU

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<sup>1801</sup> Article 12(1) of the SWIFT II Agreement.

<sup>1802</sup> Article 7(1)(d) of the SWIFT II Agreement.

<sup>1803</sup> Article 11 of the SWIFT II Agreement.

<sup>1804</sup> See the exchange of letters that occurred in the period 22-24 July 2009 between Pierre Lellouche, the Secretary of State for European Affairs, and Pierre Lequiller, the Chairman of the European Affairs Committee, in: [http://www.assemblee-nationale.fr/europe/pdf/lettre\\_e/14551.pdf](http://www.assemblee-nationale.fr/europe/pdf/lettre_e/14551.pdf), accessed on 8 March 2011.

<sup>1805</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2202 sur des textes soumis à l'Assemblée nationale en application de l'article 88-4 de la Constitution du 6 novembre au 18 décembre 2009* of 22 December 2009, p. 78.

rules, that effective possibilities of judicial redress be guaranteed and that the data be kept only for a limited period of time.<sup>1806</sup>

Furthermore, during the committee discussion of this Interim Agreement, rapporteur Guy Geoffroy (UMP), referring to the European Parliament's 2009 Resolution, stated that "the works of the European Parliament must be supported".<sup>1807</sup> Jérôme Lambert (PS) also expressed the wish to include in the conclusions of the report certain proposals previously adopted by the European Parliament.<sup>1808</sup> Consequently, the European Affairs Committee not only took account of the European Parliament's concerns, but it incorporated in its conclusions the substance of the European Parliament's resolution:

The European Affairs Committee requests [...] that the minimum requirements formulated in point 7 of the resolution of the European Parliament of 17 September 2009 on the international agreement with the United States envisaged in this regard be guaranteed in this agreement.<sup>1809</sup>

On 16 December 2009, during a meeting with Commission Vice-President Jacques Barrot on the Stockholm Programme, the question was raised concerning the lack of reciprocity with the US as to the access to financial data in the Interim Agreement. Barrot acknowledged the problem and explained that it was due to the disparities that existed between the US and EU law and added that "we must be able to [...] carry out unheralded controls in order to verify that the Treasury utilises this instrument only for combating terrorism and that it does not retain the data eternally".<sup>1810</sup>

In a communication of 23 March 2010, rapporteur Geoffroy noted the necessity permanently to reconcile the objective of combating terrorism with the protection of public freedoms. He underlined that:

The unilateral demand of the United States, which imposed their rules on us, in particular with the PNR and SWIFT agreements, whereby transfers of information

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<sup>1806</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2202 sur des textes soumis à l'Assemblée nationale en application de l'article 88-4 de la Constitution du 6 novembre au 18 décembre 2009* of 22 December 2009, p. 80.

<sup>1807</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2202 sur des textes soumis à l'Assemblée nationale en application de l'article 88-4 de la Constitution du 6 novembre au 18 décembre 2009* of 22 December 2009, p. 79.

<sup>1808</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2202 sur des textes soumis à l'Assemblée nationale en application de l'article 88-4 de la Constitution du 6 novembre au 18 décembre 2009* of 22 December 2009, p. 79.

<sup>1809</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2202 sur des textes soumis à l'Assemblée nationale en application de l'article 88-4 de la Constitution du 6 novembre au 18 décembre 2009* of 22 December 2009, p. 80.

<sup>1810</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 29, Réunion du mercredi 16 décembre 2009 à 16h 30*, p. 11.

were practically initiated without our knowledge, put the European institutions in a difficult position.<sup>1811</sup>

The rapporteur then recalled the extremely short period of time available to him for a previous report on the Interim Agreement as well as the fact that the European Parliament, which could also not examine the text in a timely fashion, reproached the other EU institutions for the lack of coordination.<sup>1812</sup> Notably, the SWIFT I Agreement was reported to have taken into account the observations of the European Affairs Committee "to a very large extent", including those referring to the legal basis, the public authority charged with authorising transfer requests, the prohibition of data-mining,<sup>1813</sup> the recourse to a court of law by non-US residents and the sharing of data with third countries.<sup>1814</sup> In conclusion, Chairman Lequiller claimed that "the European Parliament used its new powers, but it used them in a limited manner [...] In this respect, it would be useful for our Committee, in its capacity as a national parliament, to make proposals slightly before the European Parliament".<sup>1815</sup>

On 22 May 2010, pursuant to Article 88-4 of the French Constitution, the *Assemblée nationale* adopted a European resolution on the opening of negotiations on a long-term SWIFT agreement.<sup>1816</sup> It welcomed the improvements made in the draft negotiation mandate, since they took into account the views previously expressed on this matter, primarily by the European Parliament. Essential progress was recorded regarding recourse to a court by non-US residents. Yet the resolution found it imperative to establish the Union's own programme for the identification and tracking of terrorist financing in cooperation with the US on the basis of reciprocity. It was further estimated that a periodical review of the agreement by the European Parliament did not constitute a sufficient guarantee, because the latter did not possess the right to denounce the agreement if it was not executed on the basis of reciprocity. As unlimited duration of the agreement was found unacceptable, the resolution requested its limitation to five years.

During the committee debate on this resolution, it was agreed that two points concerning the SWIFT II Agreement remained contentious. On the one hand, the possibility for the US Treasury to access bulk data rather than only specifically targeted data was contrary to the principle of proportionality and the Data Protection

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<sup>1811</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 142, Réunion du mardi 23 mars 2010 à 16h 45*, p. 11.

<sup>1812</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 142, Réunion du mardi 23 mars 2010 à 16h 45*, p. 11.

<sup>1813</sup> This was cemented in the Interim Agreement at the demand of France.

<sup>1814</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 142, Réunion du mardi 23 mars 2010 à 16h 45*, p. 12.

<sup>1815</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 142, Réunion du mardi 23 mars 2010 à 16h 45*, p. 12.

<sup>1816</sup> *Assemblée nationale, Résolution no. 464 sur l'ouverture de nouvelles négociations avec les États-Unis relatives à un accord «Swift»* of 22 May 2010. The draft resolution was tabled by rapporteur Geoffroy on 6 April 2010.

Directive. The risk of economic espionage, whose commission no country would publicly admit, was not negligible. On the other hand, the lack of reciprocity and the absence of a European equivalent of the US TFTP were detrimental to "European sovereignty".<sup>1817</sup>

Finally, on 23 June 2010, the European Affairs Committee assessed that the previous objections had been met and expressed its approval of the Council Decision on the signing of the SWIFT II Agreement subject to two requests. First, after four years the Commission should report on the application of the agreement, whereupon the competent national and European institutions should start a debate on whether to renew it. Second, the control of the data transmitted to the US should be entrusted not to Europol but to magistrates. Significantly, it was recalled that the Government had upheld the recommendation to limit the duration of the Agreement to five years and succeeded in having the Council include it in the negotiation mandate entrusted to the Commission, although tacit renewal remained possible.<sup>1818</sup> After the Agreement had entered into force, one written question was posed to the Government on the modalities of its implementation.<sup>1819</sup>

### 2.1.2. Analysis

(A) *Scrutiny*. Despite the urgency of the scrutiny procedure, the *Assemblée nationale* thoroughly examined the SWIFT Agreements and did so from a substantive point of view.

(B) *Controversy*. The issues that provoked political contention were those elements of the Agreements that insufficiently shielded the EU citizens' financial data against their uncontrolled utilisation for counter-terrorism purposes. The MPs favoured the protection of privacy and related rights over the fight against terrorism.

(C) *Information*. Whereas the main source of information was the French Government, the Interim Agreement was also discussed with the Commission. The European Parliament was formally not one of the *Assemblée nationale's* information channels. This is all the more important since it in no way put fetters on the MPs' action in a spirit of partnership with MEPs in their struggle to defend citizens' rights.

(D) *Outcome*. The *Assemblée nationale* formulated a number of concrete demands for the Union's negotiators, which principally referred to the safeguarding of EU citizens' privacy and rights of judicial redress. The addressees of these demands were the EU institutions in charge of the negotiations, especially the drafter of the negotiating mandates – the Commission. Certainly, the French Government was held to account, too. Yet the chief objective of scrutiny was to effect

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<sup>1817</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2432 sur des textes soumis à l'Assemblée nationale en application de l'article 88-4 de la Constitution du 19 février au 31 mars 2010* of 6 April 2010, pp. 86-87.

<sup>1818</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 157, Réunion du mercredi 23 juin 2010 à 17h*, pp. 20-21.

<sup>1819</sup> *Question écrite no. 85785 (JORF of 3.8.2010, p. 8410) and Réponse du ministre des affaires étrangères et européennes (JORF of 21.9.2010, p. 10223)*.

amendments in the negotiating mandates. That the addressees were indeed the Commission and the Council, as the EU institutions responsible for the negotiation process, flows from the fact that the *Assemblée nationale* regularly verified whether and how its observations were taken into account. In other words, this House acted as a legislator in the matter, judging the adequacy of the solutions proposed, proposing alternatives and following their fate.

(E) *Parliamentary interdependence*. Although no formal contact was made with the European Parliament, the *Assemblée nationale* displayed resourcefulness in associating itself with the decision-making process proper by not only supporting but also explicitly invoking the European Parliament's requests. This indirect route of participating in EU affairs is innovative inasmuch as it transcends the formal boundaries of the national competences without jeopardising the scrutiny system at large. It demonstrates that no formal mechanism was *per se* necessary for the *Assemblée nationale* to act in the form of interdependence with the European Parliament. More generally, it fortifies the argument that formal links with the EU level are but one alley of national parliamentary involvement in EU decision making. At least where the circumstances are highly politically charged, national parliaments can plausibly be argued to be more responsive to the developments at the EU level and more cognisant of the European context of their scrutiny activities.

It can be concluded, therefore, that the *Assemblée nationale* acted as part of the European constitutional order and as a European watchdog of the SWIFT Agreements. The deliberate or accidental mention of "European sovereignty" in one of the reports is yet another indicator that the constitutional framework within which the *Assemblée nationale* scrutinised the SWIFT Agreements was that of the Union as a whole rather than solely that of France as a Member State.

## 2.2. Sénat

### 2.2.1. Scrutiny claims

In an exchange of letters in July 2009 between the *Sénat* and the French Government, the latter requested an urgent scrutiny of the opening of the SWIFT negotiations. At first, Hubert Haenel (UMP), the Chairman of the European Affairs Committee, held that he alone was unable to take responsibility for lifting the scrutiny reserve on behalf of the uninformed senators and requested extra time for scrutiny. As the Government could not grant this, he decided to leave it to the Government to assess what position France should adopt in the Council, thereby implicitly lifting the reserve.<sup>1820</sup>

On 21 November 2009, the *Sénat* adopted a European resolution on the draft SWIFT I Agreement. Besides the preoccupations that mirrored those of the

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<sup>1820</sup> See the exchange of letters between Chairman Haenel and Minister Lallouche from 22-24 July 2009, available at: <http://www.senat.fr/ue/pac/E4551.html>, accessed on 9 March 2011. Parallel correspondence was also carried out with the *Assemblée nationale*, see *supra* note 1804 of this Chapter.

*Assemblée nationale*, one new issue merits attention. To wit, the *Sénat* considered that national parliaments should have access to the results of the supervision and evaluation of the Agreement performed by independent data protection authorities.<sup>1821</sup> The request for such *ex post* accountability is a clear sign of the *Sénat's* proactive attitude and concern for the democratic legitimacy of the EU's international relations. As Chairman Haenel explained:

They assure us that this exchange of information has yielded effective results in the fight against terrorism. That is evidently an essential issue and I believe that we can only acknowledge the assessment made by the European Commission, the Council and the European eminent person. But we must demand that in future access to the evaluations be more widely permitted in order to verify the veracity of this assessment.<sup>1822</sup>

Four days before the SWIFT I Agreement was signed, the European Affairs Committee took stock of the evolution of the negotiations and noted that significant improvements had been made. Chairman Haenel argued that France had played an active part in this process and that the *Sénat* resolution had a "positive impact".<sup>1823</sup> It appeared that many of the demands had been met. However, access to bulk data was not eliminated and EU citizens were not given the same means of judicial recourse as American citizens and residents. Also, no mention was made in the draft Agreement of involving national parliaments in the *ex post* supervision of its operation.

In another debate in the European Affairs Committee in early April 2010, before the negotiations on the SWIFT II Agreement had begun, senator Jean Bizet (UMP) clarified why the *Sénat* must stay vigilant notwithstanding the Lisbon-sponsored empowerment of the European Parliament:

On the one hand, certain questions that had justified the observations in the resolution of the *Sénat* remain unanswered. I mean in particular the transmission of data to third countries, which we [...] wished to exclude. On the other hand, it is the European positions that are expressed in this [Commission's] recommendation. It

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<sup>1821</sup> *Sénat, Résolution européenne no. 25 sur le projet d'accord entre l'Union européenne et les États-Unis d'Amérique portant sur le traitement et le transfert de données de messagerie financière afin de combattre le terrorisme* of 21 November 2009.

<sup>1822</sup> *Sénat, Commission des affaires européennes, Compte rendu, Réunion du mercredi 28 octobre 2009, Communication de M. Hubert Haenel sur l'accord entre l'Union européenne et les États-Unis sur le transfert de données de messagerie financière (Accord Swift)*, p. 5, available at: <http://www.senat.fr/europe/r28102009.pdf>, accessed on 9 March 2011.

<sup>1823</sup> *Sénat, Commission des affaires européennes, Compte rendu, Réunion du jeudi 26 novembre 2009, Communication de M. Hubert Haenel sur le projet de décision du Conseil relative à la signature d'un accord entre l'Union européenne et les États-Unis sur le traitement et le transfert de données de messagerie financière afin de combattre le terrorisme (Accord Swift)*, p. 5, available at: <http://www.senat.fr/europe/r26112009.pdf>, accessed on 9 March 2011.

remains to be seen what the American positions will be and the readiness of the United States to respond to this request for additional guarantees.<sup>1824</sup>

The *Sénat*, therefore, understood itself as an independent defender of the rights of EU citizens. Its reaction is primarily prompted by the substance of the matter under scrutiny.

Finally, on 1 July 2010, a few days after the SWIFT II Agreement had been signed, the European Affairs Committee held yet another meeting on this topic. It deplored the fact that it had been consulted only three days before the Council authorised the signing of the Agreement, on which occasion the Government abstained from a vote because the matter was under the scrutiny reserve. Such a dense timetable deprived the Committee of any chance to influence the decision.<sup>1825</sup>

The most severe criticism concerning the substance of the Agreement was directed at entrusting Europol with the task of monitoring compliance by US authorities with the safeguards prescribed for data transfer requests.<sup>1826</sup> It was argued that Europol was not an independent EU authority but a police agency. As a beneficiary of the data obtained through TFTP, Europol had no interest in restricting the scope of the data to be sent to the US.<sup>1827</sup> Even though the French Government had recommended the creation of an independent European authority that would have been chaired by a magistrate or an eminent person instead, the Commission disagreed and opted for Europol.

The fact that national parliaments were excluded from the policing of the Agreement was offset by a mechanism for a joint review of the functioning of the Agreement by the US and the EU, upon which the Commission would submit a report thereon to the European Parliament and the Council.<sup>1828</sup> In this regard, the *Sénat* secured an undertaking from the Government that these reports would be sent to it.<sup>1829</sup>

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<sup>1824</sup> *Sénat, Commission des affaires européennes, Compte rendu, Réunion du mercredi 7 avril 2010, Communication de M. Jean Bizet sur l'ouverture de négociations en vue d'un accord sur le transfert de données entre l'Union européenne et les États-Unis (Swift)*, p. 16, available at: <http://www.senat.fr/europe/r07042010.pdf>, accessed on 9 March 2011.

<sup>1825</sup> *Sénat, Commission des affaires européennes, Compte rendu, Réunion du jeudi 1 juillet 2010, Communication de M. Robert Badinter sur l'accord sur le transfert de données entre l'Union européenne et les États-Unis (Swift): examen de la proposition de décision relative à la conclusion de l'accord*, p. 1, available at: <http://www.senat.fr/europe/r01072010.pdf>, accessed on 9 March 2011.

<sup>1826</sup> See *supra* note 1800 of this Chapter.

<sup>1827</sup> *Sénat, Commission des affaires européennes, Compte rendu, Réunion du jeudi 1 juillet 2010, Communication de M. Robert Badinter sur l'accord sur le transfert de données entre l'Union européenne et les États-Unis (Swift): examen de la proposition de décision relative à la conclusion de l'accord*, pp. 5-6, available at: <http://www.senat.fr/europe/r01072010.pdf>, accessed on 9 March 2011.

<sup>1828</sup> Article 13 of the SWIFT II Agreement.

<sup>1829</sup> *Sénat, Commission des affaires européennes, Compte rendu, Réunion du jeudi 1 juillet 2010, Communication de M. Robert Badinter sur l'accord sur le transfert de données entre l'Union européenne et les États-Unis (Swift): examen de la proposition de décision relative à la conclusion de l'accord*, p. 8, available at: <http://www.senat.fr/europe/r01072010.pdf>, accessed on 9 March 2011.

### 2.2.2. Analysis

(A) *Scrutiny*. Acting under the same constraint of urgency as the *Assemblée nationale*, the *Sénat* conducted qualitatively similar scrutiny of the SWIFT Agreements and examined their substantive elements.

(B) *Controversy*. The *Sénat* detected largely the same problems as the *Assemblée nationale*, which referred to inadequate safeguards for the citizens.

(C) *Information*. The senators' key source of information on the SWIFT Agreements was the French Government. No formal contact with the Commission or the European Parliament could be traced.

(D) *Outcome*. Like the MPs, the senators made recommendations for Union negotiators to rectify the parts of the negotiation mandate that provided insufficient protection for citizens' rights. They subsequently checked whether and how these were accounted for in the negotiation mandates. Although neither its opposition to Europol's controlling function nor the request for *ex post* accountability to national parliaments were granted, it is nonetheless tenable that these demands were directed at EU institutions. To wit, the senators' scrutiny claims have constantly addressed the contents of the Agreements and not just the Government's performance in realising them at the EU level.

(E) *Parliamentary interdependence*. While no direct link was established with MEPs, the senators highlighted the autonomous role of the House in ensuring the democratic legitimacy of the Agreements. Namely, the *Sénat* argued that its intervention in EU decision making was based on its own scrutiny agenda, separate from that of the European Parliament, because the issues deemed controversial by these two legislatures might differ. This should not be interpreted as meaning that the senators do not take note of the European Parliament's claims. Quite the contrary is more plausible. The *Sénat* reserves for itself the right to emphasise its observations to the Union precisely because it is aware of the state of affairs at the EU level. If the European Parliament fails to spot the flaws in the action of the Commission and the Council, the citizens can rely on the fact that the *Sénat* will provide another check on EU institutions. It is in this argument that the *Sénat's* proclaimed autonomy finds the best explanation. An example illustrates this well. As we have seen, the senators, wishing to secure accountability for the Agreements' practical operation, insisted on installing *ex post* reporting mechanisms that would involve national parliaments. When the right to obtain reports was solely granted to the European Parliament, only then did the *Sénat* turn to the Government for a solution. This means that the senators' request for *ex post* accountability was couched in the idea of receiving account from the Commission and not from the Government. The Government was, hence, a substitute addressee.

These remarks warrant the conclusion that the *Sénat's* frame of reference, despite the absence of any direct links with EU institutions, surpassed the French constitutional order and extended to the Union as such.

### **3. UNITED KINGDOM**

#### **3.1. House of Commons**

##### **3.1.1. Scrutiny claims**

The House of Commons sounded the alarm about the SWIFT affair already in mid-2007. Its Home Affairs Committee did not spare its words in highlighting its importance:

[T]he casual use of data about millions of EU citizens, without adequate safeguards to protect privacy, is an issue of much greater significance than many of the other EU-related matters put to the UK Government and Parliament for consideration. We recommend that the Government and the European Commission should prioritise the question of provision of personal information to countries outside the EU as an issue of greatest practical concern.<sup>1830</sup>

On 25 November 2009, the European Scrutiny Committee scrutinised the draft Council Decision on the signing of the SWIFT I Agreement. On the basis of the Government's explanatory memorandum, this dossier was assessed as legally and politically important. The Committee merely noted the Government's standpoints that the TFTP and the data that Britain and the Union obtain therefrom were valuable counter-terrorist tools as well as that the Interim Agreement would strengthen the safeguards related to the protection of personal data and the reciprocity of their provision. Although the Government warned that the envisaged data transfers carried a clear risk of creating a precedent that would make it more difficult for Britain to refuse US transfer requests, the Committee cleared the dossier from scrutiny.<sup>1831</sup>

In early February 2010, Michael Connarty (Lab.), the Chairman of the European Scrutiny Committee, initiated what turned into a rather heated debate on the Floor of the House. By means of an urgent question, he asked the Exchequer Secretary to the Treasury, Sarah McCarthy-Fry, why the Government intended to breach its undertaking to leave eight weeks to Parliament for the scrutiny of opt-in decisions by consenting to the conclusion of the SWIFT I Agreement without the House having an opportunity to pronounce itself thereon. In the eyes of Jeremy Browne (Lib.Dem.), the problem was all the more accentuated by the fact that the European Parliament had also been circumvented:

Am I right in my understanding that the European Parliament was given only a limited time to undertake scrutiny on this process, and that it was signed off the day

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<sup>1830</sup> House of Commons, Home Affairs Committee, "Justice and Home Affairs issues at the European Union level", *HC 76-I, 3<sup>rd</sup> Report of Session 2006-07* of 5 June 2007, para. 299, pp. 77-78.

<sup>1831</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 25 November 2009", *HC 5-ii, 2<sup>nd</sup> Report of Session 2009-10* of 4 December 2009, paras 16.8, 16.10 and 16.12, pp. 68-69.

before the Lisbon treaty came into effect? Does that not further confirm, in my mind and that of every other hon. Member, that we should be given the full eight weeks to look at this matter rather than one week, which is a reneging on the undertaking given by the Government themselves?<sup>1832</sup>

The Secretary replied that the matter was subject to an expedited timetable in the interests of global and national security and that, as such, it was an exceptional case in which the Government was not allowed the full three months to decide on the opt-in either.<sup>1833</sup> In any event, she continued, the Government's undertaking did not apply in the case of the Interim Agreement, because it was signed before the Lisbon Treaty entered into force. This caused a real furore on both Conservative, Labour and Liberal Democrat benches. As Chairman Connarty observed, "it is clear that someone is treating this Parliament with disdain and contempt".<sup>1834</sup> For David Heathcoat-Amory (Con.), it was "a disgrace".<sup>1835</sup> Promises of an increase of the powers of national parliaments, which was repeatedly made during the Lisbon Treaty process, "have been completely jettisoned in the most ramshackle manner", protested William Cash (Con.).<sup>1836</sup> It was all to little avail, however.

On 9 February 2010, the European Scrutiny Committee scrutinised the draft Council Decision on the conclusion of the SWIFT I Agreement, which was deposited only two days before the scheduled Council discussion. Again, the document was assessed as legally and politically important. Two scrutiny issues were raised. First, the regular timetable for the deposit and scrutiny of documents was ignored, which barred the House from expressing its opinion. Second, the Government was cautioned that its otherwise correct decision not to use the whole three months to exercise the British opt-in did not excuse it for overriding its eight-week commitment to Parliament. The Government failed on these procedural points and the Committee sought explanations. The document was kept under scrutiny merely because the Government had not submitted an explanatory memorandum, which the Committee admitted would have enabled a quick clearance from scrutiny.<sup>1837</sup>

Later that month, the Government submitted both the missing explanatory memorandum and an extensive justification for the shortcomings indicated by the European Scrutiny Committee. Above all, the Government admitted the error and apologised. It explained that it had been uncertain as to the procedure to be followed and that the UK Treasury lacked experience in dealing with justice and home affairs matters. The Government itself acknowledged, however, that this was no excuse and reported that a review of the incident was ordered with a view to implementing an

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<sup>1832</sup> House of Commons, Debate of 4 February 2010, Vol. 505, col. 458.

<sup>1833</sup> House of Commons, Debate of 4 February 2010, Vol. 505, col. 455.

<sup>1834</sup> House of Commons, Debate of 4 February 2010, Vol. 505, col. 456.

<sup>1835</sup> House of Commons, Debate of 4 February 2010, Vol. 505, col. 459.

<sup>1836</sup> House of Commons, Debate of 4 February 2010, Vol. 505, col. 459.

<sup>1837</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 9 February 2010", *HC 5-x, 11<sup>th</sup> Report of Session 2009-10* of 16 February 2010, paras 3.13-3.16, p. 24.

appropriate procedure that would forestall the recurrence of late deposits in the future.<sup>1838</sup> As to the periods applicable to the British opt-in and the parliamentary scrutiny thereof, the Government stated that it had been the Presidency's intention to have the Interim Agreement concluded soon after the European Parliament's vote. It conceded, nonetheless, that it could have asked to be granted the full three months for the opt-in, but that it did not do so because there was no guarantee that this would be obtained and because not opting in during this shorter deadline would have created obstacles to opting in at all.<sup>1839</sup> For its part, the Committee accepted the Government's apology, but commented that:

[T]he Government's handling of the scrutiny of this document has been a sorry affair. We hope that lessons have been learnt and that the Government's commitment to the eight week scrutiny period proves to have more substance than has proved the case in this first test of that undertaking.<sup>1840</sup>

Subsequently, the document, having become redundant due to the European Parliament's negative vote, was cleared from scrutiny.

The EU documents pertaining to the negotiation, signature and conclusion of the SWIFT II Agreement were scrutinised *ex post* on 8 September 2010, more than a month after the Agreement's entry into force. The European Scrutiny Committee appraised that the security benefits of the TFTP were plain and expressed understanding for the Government's timetabling problems. The Committee also assessed that this agreement, due to its political importance and controversy, merited a *post facto* debate in the relevant European Standing Committee.<sup>1841</sup>

This was held precisely five months later. The Financial Secretary to the Treasury, Mark Hoban, was questioned on a host of issues, such as: the appointment, accountability and terms of reference of the EU's independent overseers; the balancing of civil liberties with terrorism prevention; the necessity to thwart the use of the Member States' overseas territories and of the less transparent, small-scale banks as loopholes for unmonitored terrorist financing; and the scrutiny reserve override. The European Committee B then concluded that the TFTP was "an extremely important tool in the global counter-terrorism effort, providing valuable

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<sup>1838</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 24 February 2010", *HC 5-xi, 12<sup>th</sup> Report of Session 2009-10* of 4 March 2010, para. 10.13, pp. 42-43.

<sup>1839</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 24 February 2010", *HC 5-xi, 12<sup>th</sup> Report of Session 2009-10* of 4 March 2010, para. 10.14, p. 43.

<sup>1840</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 24 February 2010", *HC 5-xi, 12<sup>th</sup> Report of Session 2009-10* of 4 March 2010, paras 10.19 and 10.22, pp. 44-45.

<sup>1841</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 8 September 2010", *HC 428-I, 1<sup>st</sup> Report of Session 2010-11* of 22 September 2010, paras 6.24-6.25, p. 57.

contributions to numerous high profile cases" and noted that "the program has achieved an appropriate balance between counter-terrorism and data protection".<sup>1842</sup>

### 3.1.2. Analysis

(A) *Scrutiny*. The House of Commons' inspection of the SWIFT Agreements was manifestly procedural in nature. The accent was not on the substance of the Agreements but on respect for the House's scrutiny competences.

(B) *Controversy*. The most controversial matter, which was raised in the described impassioned plenary debate, revolved around a purely procedural matter – the time available to MPs for the performance of scrutiny. This inward outlook means that the national scrutiny prerogatives of the Commons were lent greater emphasis than the very contents of the European debate of the SWIFT Agreements. This is understandable, however, since these agreements were the first test for the way the Government would apply its commitments to Parliament.

(C) *Information*. The only information provider was the Government. The MPs did not attempt a dialogue with EU institutions.

(D) *Outcome*. No substantive recommendations were made for the EU institutions involved in the negotiations. Instead, the focal point of the scrutiny was exclusively the British Government and its political accountability to Parliament. In this regard, the Commons' scrutiny exhibited the elements of a classic accountability arrangement,<sup>1843</sup> starting with the statement of facts, continuing with the passing of judgments about the Government's conduct and seeking explanations for such behaviour and finishing, once these were provided, with the acceptance of an apology as a means of terminating the accountability cycle in a 'pacific' fashion.

(E) *Parliamentary interdependence*. There is no evidence that the European Parliament's uproar against the Interim Agreement was of any particular relevance for the Commons' scrutiny. Correspondingly, no reference was made to the European Parliament's criticisms. Parliamentary interdependence was, thus, not at play.

These observations lead to the conclusion that the context within which the House of Commons acted was wholly national, fenced off from the Union level. The House of Commons did not act within a broader European constitutional order.

## 3.2. House of Lords

### 3.2.1. Scrutiny claims

The SWIFT Agreements were not the object of in-depth inquiries in the House of Lords. Instead, scrutiny was throughout the process carried out by means of

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<sup>1842</sup> House of Commons, European Committee B, Debate of 8 February 2011, col. 11, available at: <http://www.publications.parliament.uk/pa/cm201011/cmgeneral/euro/110208/110208s01.htm>, accessed on 11 March 2011.

<sup>1843</sup> Bovens, Mark. "Analysing and assessing accountability: a conceptual framework," *European Law Journal*, Vol. 13, No. 2, 2007: 450.

correspondence with ministers in the form of an exchange of letters between the EU Sub-Committee on Home Affairs and the UK Treasury.

An analysis of the reports on the progress of scrutiny reveals that the scrutiny reserve was overridden with respect to all the EU decisions pertaining to the SWIFT Agreements except the draft Council Decision on the signing of the SWIFT II Agreement. The reasons for the overrides varied from Council timetable pressures in the case of the draft Council Decision on the signing of the Interim Agreement,<sup>1844</sup> to the late deposit of the document and the explanatory memorandum in the case of the obsolete draft Council Decision on the conclusion on the Interim Agreement,<sup>1845</sup> to the dissolution of the House in the cases of draft SWIFT II Agreement and the the draft Council Decision on its conclusion.<sup>1846</sup>

The Lords' correspondence with the Government commenced on 26 November 2009, four days before the signing of the Interim Agreement, when the Exchequer Secretary to the Treasury, Sarah McCarthy-Fry, announced the Government's intention to override the scrutiny reserve.<sup>1847</sup> The Lords regretted this and forewarned that any exchange of sensitive personal information was permissible only if it would have a substantial impact on terrorism and if accompanied by rigorous data protection safeguards. In this sense, they criticised the Government's selective reference to the European Parliament's scrutiny:

You refer to the views of the LIBE Committee of the European Parliament welcoming the efforts to secure an agreement with the US, 'in particular in relation to data protection', but you do not mention the serious criticisms by the LIBE Committee of the data protection regime applying until now [...].<sup>1848</sup>

Their Lordships, therefore, sought and obtained assurances from the Government that, in the negotiations on the SWIFT II Agreement, it would insist that data would be transferred strictly for counter-terrorist purposes, that data would not be retained for longer than was essential, and that there would be a strict limitation on the accessing and forwarding of the data.

Another point of great concern was the Union's respect for Britain's entitlement to a three-month period for deciding whether to opt into measures initiated in the Area of Freedom, Security and Justice. Having learned that the Council Legal Service had advised that Britain had to opt in before the expiry of this deadline, the

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<sup>1844</sup> House of Lords, EU Committee, "Progress of scrutiny dated 15 December 2009", *HL 2, 2<sup>nd</sup> Report of Session 2009-10* of 18 December 2009. The reason was later changed into "Lisbon Treaty timetable".

<sup>1845</sup> House of Lords, EU Committee, "Progress of scrutiny dated 26 February 2010", *HL 5, 5<sup>th</sup> Report of Session 2009-10* of 8 March 2010.

<sup>1846</sup> House of Lords, EU Committee, "Progress of scrutiny", *EUC-2, 2<sup>nd</sup> Edition of Session 2010-11* of 12 July 2010.

<sup>1847</sup> House of Lords, EU Sub-Committee F – Home Affairs, "Correspondence with ministers – May 2009 to November 2009", p. 33.

<sup>1848</sup> House of Lords, EU Sub-Committee F – Home Affairs, "Correspondence with ministers – December 2009 to April 2010", p. 34.

Lords requested the Government, when it did opt in, to stress in the Council that "it is doing so quickly because it wishes to do so, and not because of the Council Legal Service's advice, which is plainly wrong".<sup>1849</sup> The Lords also supported the complaints voiced during the Commons plenary debate on the Interim Agreement. For its part, the Government offered the identical apology for the scrutiny reserve overrides as that given to the House of Commons and the peers accepted it.<sup>1850</sup>

In the end, after underscoring their concerns for procedural diligence and citizens' privacy, the Lords exonerated the Government:

The Committee, though conscious of these data protection issues, believe that they are outweighed by the importance of this Agreement in the fight against terrorism. They therefore agree that the Government is right to have opted in to the Decision on signature and to have taken part in its adoption, notwithstanding that this constitutes an override [...].<sup>1851</sup>

The only further request was for the Government to keep the House informed of the European Parliament proceedings on the conclusion and entry into force of the SWIFT II Agreement.

### 3.2.2. Analysis

(A) *Scrutiny*. Like that of the House of Commons, the House Lords' treatment of the SWIFT Agreements was predominantly procedural in character.

(B) *Controversy*. For the Lords, the key point of concern was the exercise of the British opt-in and respect for the three-week period for Parliament's pronouncement, both of which are procedural matters. These were raised for fear that the circumvention or misapplication of Westminster's post-Lisbon scrutiny rights in the Area of Freedom, Security and Justice could create a perilous precedent and, possibly, grow into a custom or even a convention.

(C) *Information*. The sole channel of information was the Government. The Lords did not communicate with and seek commentary from EU institutions.

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<sup>1849</sup> House of Lords, EU Sub-Committee F – Home Affairs, "Correspondence with ministers – December 2009 to April 2010", p. 37. Their Lordships' resoluteness must be contested, however, because the relevant Protocol does lay down an exception to the three-month rule. Namely, Article 3(2) of Protocol no. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice attached to the Lisbon Treaty reads: "If after a reasonable period of time a measure referred to in para. 1 cannot be adopted with the United Kingdom or Ireland taking part, *the Council may adopt such measure in accordance with Article 1 without the participation of the United Kingdom or Ireland.* [...]" (emphasis added). It is plausible that the Council acted on the authority of this provision, assessing that in the event the Interim Agreement could not have been concluded with the participation of Britain, because that would have delayed the process beyond what was then acceptable to the Council.

<sup>1850</sup> House of Lords, EU Sub-Committee F – Home Affairs, "Correspondence with ministers – December 2009 to April 2010", pp. 39-41.

<sup>1851</sup> House of Lords, EU Sub-Committee F – Home Affairs, "Correspondence with ministers – May 2010 to November 2010", p. 32.

(D) *Outcome*. In addition to examining the procedural issues, the Lords made substantive comments about the SWIFT Agreements in favour of enhancing the process of transferring citizens' financial data. These were destined for the British Government and not for EU institutions. Altogether, the peers' scrutiny focused exclusively on the Government, which was held to account for numerous scrutiny reserve overrides, but was ultimately spared any negative consequences.

(E) *Parliamentary interdependence*. Neither direct nor indirect liaison was made with MEPs. The European Parliament was viewed as yet another EU institution that had a say in the Agreements, so no specific advocacy or cross-level lobbying was embarked upon.

These considerations permit us to conclude that, as regards the SWIFT Agreements, the House of Lords remained within the confines of the British constitutional order.

#### **4. PORTUGAL**

The Assembly did not scrutinise the SWIFT Agreements. This observance results from an insight into the IPEX database and the European Affairs Committee's website.<sup>1852</sup> This information was further confirmed through interviews and personal correspondence with the competent clerks of the European Affairs Committee.<sup>1853</sup> The SWIFT Agreements were not referred to in the plenary debates either. The Assembly's only activity regarding this dossier was an irregular provision of information to the European Affairs Committee by Portuguese MEPs.<sup>1854</sup>

The fact that this important dossier was not dealt with confirms that in principle EU international agreements fall outside the ambit of parliamentary scrutiny in Portugal. It also leads to the conclusion that Commission initiatives are not only the central but perhaps the only scrutiny target of the Assembly and that the system of monitoring and assessing EU initiatives engineered in 2006 is still evolving.

#### **5. CONCLUDING REMARKS**

Albeit referring to documents of quite a different nature, the case study of EU-US SWIFT Agreements bears some resemblance with that of the Services Directive. Yet the present case study adds a new layer of findings.

The French case reaffirmed that the parliaments of the Member States can act beyond the national constitutional order. Yet, more importantly still, it also showed

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<sup>1852</sup> The search was made for scrutiny results for the following Commission documents: (a) COM(2009) 703 – Proposal for a Council Decision on the conclusion of the Interim Agreement; (b) COM(2010) 316 – Proposal for a Council Decision on the conclusion of the SWIFT II Agreement; and (c) COM(2010) 317 – Proposal for a Council Decision on the signature of the SWIFT II Agreement.

<sup>1853</sup> Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee, Lisbon, 8 June 2010 and personal correspondence with Maria João Costa, clerk of the European Affairs Committee, March-May 2011.

<sup>1854</sup> Personal correspondence with Maria João Costa, clerk of the European Affairs Committee, March-May 2011.

that this can be done without any direct or personal contact with EU institutions. This is what distinguishes this dossier from the Services Directive. The *Assemblée nationale* and the *Sénat* acted as counterparts of EU institutions without being their counterparts. The MPs' and senators' role perceptions were situated at the EU level, nonetheless. This is a significant finding, since it reveals that national parliaments can legitimise EU action regardless of the existence of formal or physical links with the EU level. This is parliamentary interdependence in its purest form.

The British case exposed the procedural focus of their parliamentary scrutiny. While both Houses expressed awareness of developments at the EU level and of the state of negotiations, they did not transform this awareness into action. The MPs' and peers' role perceptions were linked to the national level. They, therefore, acted merely as observers and not as actors within the European constitutional order. The choice of a procedural type of scrutiny pushed them into isolation from EU institutions. In turn, their contribution to the legitimacy and accountability of EU decision making was restricted to the Government and to national constitutional order.

The Portuguese case demonstrates that salient EU international agreements still escape scrutiny in some parliaments, despite the existence of appropriate scrutiny mechanisms. This is an important realisation since such agreements can sometimes directly impinge on essential citizens' rights, such as the right to privacy.

In the end, the EU-US SWIFT Agreements exhibit different approaches to the scrutiny of EU international agreements and justice and home affairs matters. As with the Services Directive, parliamentary interdependence was sparked when scrutiny zoomed in on the contents of EU policies and where these were judged to be ill-defined or defective. Above all, this dossier affirms that it is possible to conceive of national parliamentary scrutiny of EU affairs as an activity independent both of EU institutions and the national government. Whether in practice a parliament will act as an independent scrutineer greatly depends not on the mercy of other relevant institutions, be they domestic or European, but on the approach that a given parliament chooses to adopt.

# Chapter 11

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## The European External Action Service: Keeping the European Parliament at Bay

### 1. BACKGROUND

As a structural innovation, the Lisbon Treaty mandated the setting up of a European External Action Service (EEAS or the Service) to assist the High Representative of the Union for Foreign Affairs and Security Policy (the High Representative) in fulfilling his or her tasks, which are related to the conduct and mutual consistency of CFSP, CSDP and other elements of EU external relations.<sup>1855</sup> The need for the Service lies in part in the fact that the High Representative is a double-hatted functionary, simultaneously holding the posts of both Chairman of the Foreign Affairs Council and Vice-President of the Commission.<sup>1856</sup> The Treaty text only requires that the EEAS shall work in cooperation with the Member States' diplomatic services and that it shall comprise officials from the General Secretariat of the Council and of the Commission as well as seconded national diplomats.<sup>1857</sup> The organisation and functioning of the EEAS was to be decided by the Council on the proposal of the High Representative, after obtaining the consent of the Commission and after consulting the European Parliament.

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<sup>1855</sup> The creation of the EEAS has attracted vast attention both in academic and policy circles. See for instance: Vooren, Bart van. "A legal-institutional perspective on the European External Action Service," *Common Market Law Review*, Vol. 48, No. 2, 2011: 475–502; Vanhoonacker, Sophie and Reslow, Natasja. "The European External Action Service: living forwards by understanding backwards," *European Foreign Affairs Review*, Vol. 15, No. 1, 2010: 1-18; Duke, Simon. "Providing for European-level diplomacy after Lisbon: the case of the European External Action Service," *The Hague Journal of Diplomacy*, Vol. 4, No. 2, 2009: 211-233; Avery, Graham. "Europe's future foreign service," *The International Spectator*, Vol. 43, No. 1, 2008: 29-41; Maurer, Andreas and Reichel, Sarah. "The European External Action Service: elements of a three phase plan," *Stiftung Wissenschaft und Politik, SWP Paper no. 36*, 2004; Crowe, Brian. "The European External Action Service: roadmap for success," *The Royal Institute for International Affairs, Chatham House Report*, May 2008; Lefebvre, Maxime and Hillion, Christophe. "The European External Action Service: towards a common diplomacy?," *Swedish Institute for European Policy Studies, European Policy Analysis*, No. 6, 2010; Behr, Timo et al. "Rewriting the ground rules of European diplomacy: the European External Action Service in the making," *The Finnish Institute of International Affairs, Briefing Paper no. 57*, 31 March 2010; Weiss, Stefani. "External Action Service: much ado about nothing," *Bertelsmann Stiftung, Spotlight Europe no. 2010/05*; Sola, Natividad Fernández. "The new External Action Service of the EU: a European diplomatic entity in the making?," *Miami-Florida European Union Center of Excellence, European Union Miami Analysis, Special Series*, Vol. 6, No. 8, May 2009.

<sup>1856</sup> Article 18(3)-(4) TEU.

<sup>1857</sup> Article 27(3) TEU.

Aware of its position in decision making, the European Parliament for a long time advocated the bringing of the Service under the Community aegis. In May 2005, it adopted a resolution urging the Commission to preserve and develop the Community model in EU external relations and called for the incorporation of the EEAS into the Commission's administrative structure.<sup>1858</sup> In another resolution of October 2009, the European Parliament reiterated the need to link the EEAS to the Commission, holding that the former was a "logical extension of the *acquis communautaire* in the sphere of the Union's external relations" and a *sui generis* body from an organisational and budgetary point of view.<sup>1859</sup> It was requested that the High Representative should agree that nominees for senior posts in the EEAS be heard by competent European Parliament committees before they take office.<sup>1860</sup> This time, however, the European Parliament, being excluded from decision making, reminded the other EU institutions that an early and substantive dialogue with it was requisite if the EEAS was to receive the financial resources necessary for an effective start-up.<sup>1861</sup> This threat of frustrating the practical operation of the EEAS by vetoing its budget proved to give weight to the European Parliament in the swift but cumbersome negotiations that ensued.<sup>1862</sup>

On 18 March 2010, a week before the High Representative initiated the decision-making procedure, MEPs Elmar Brok (ALDE, Germany) and Guy Verhofstadt (ALDE, Belgium) drafted a non-paper on the EEAS, which became the basis for the European Parliament's negotiations. They reaffirmed all of the above concerns and insisted on the political and budgetary accountability of the EEAS towards the European Parliament. This was to be achieved primarily through: hearings of senior EEAS appointees; the consolidation of the consultation and reporting duties thereto accomplished by the Commission, Council and the Presidency in the field of EU external relations; and the strengthening of the European Parliament's right to scrutinise the strategic programming of the Union's external assistance

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<sup>1858</sup> European Parliament, Resolution on the institutional aspects of setting up the European External Action Service of 26 May 2005, doc. no. P6\_TA(2005)0205, points 1 and 2.

<sup>1859</sup> European Parliament, Resolution on the institutional aspects of setting up the European External Action Service of 22 October 2009, doc. no. P7\_TA(2009)0057, (*OJ C 265 E/9* of 30.09.2010), recital C and points 2 and 7.

<sup>1860</sup> European Parliament, Resolution on the institutional aspects of setting up the European External Action Service of 22 October 2009, doc. no. P7\_TA(2009)0057, (*OJ C 265 E/9* of 30.09.2010), point 12.

<sup>1861</sup> European Parliament, Resolution on the institutional aspects of setting up the European External Action Service of 22 October 2009, doc. no. P7\_TA(2009)0057, (*OJ C 265 E/9* of 30.09.2010), recital N and point 8.

<sup>1862</sup> Other pressures were also employed. For example, before the second Barroso Commission was approved to take office and before the High Representative was appointed, Andrew Duff (ALDE, UK) declared that if Barroso or the future High Representative "fail to give us the guarantees we need on the External Action Service and the budget, we'll fail to appoint him". Tylor, Simon. "MEPs seek more power over diplomatic service," *European Voice*, 15.10.2009, available at: <http://www.europeanvoice.com/article/imported/meps-seek-more-power-over-diplomatic-service/66122.aspx>, accessed on 21 March 2011.

instruments.<sup>1863</sup> In reaction, High Representative Baroness Catherine Ashton, the former Speaker of the House of Lords, appeared before the European Parliament's Foreign Affairs Committee to give assurances on the political accountability and the possibility of holding "informal exchanges of views" with EU Special Representatives and most senior Heads of Delegations once they are appointed.<sup>1864</sup>

High Representative Ashton made her proposal public on 25 March 2010. The European Parliament quickly rejected it and continued the fight against the Member States' predominance in the shaping of the EEAS. The main objections were that a French-style Secretary-General was unacceptable and that civil servants could not represent the EEAS before the European Parliament. Also, the European Parliament would treat the High Representative's deputies as politically accountable to it. As a corollary, the High Representative revised her proposal on 22 April 2010 and the Council reached a 'political orientation' four days later. As the European Parliament remained unappeased, a series of informal discussions followed between the European Parliament, the Commission, the Council and the High Representative. On 2 June 2010, a meeting was held between the European Parliament's Foreign Affairs Committee and representatives of national parliaments, who "overwhelmingly supported" the former's EEAS blueprint. Nevertheless, certain national delegates, notably those from the German Bundestag and the Portuguese Assembly, feared that giving the European Parliament a central role in policing the accountability of the Union's external action could have adverse consequences for national parliamentary scrutiny.<sup>1865</sup>

A compromise between EU institutions was eventually reached by the Spanish Presidency on 21 June 2010. The European Parliament then voted in favour of the amended proposal on 8 July 2010 and expressed its determination to step up its cooperation with national parliaments in the area of EU external action, specifically regarding CFSP and CSDP.<sup>1866</sup> The key concession won by the European Parliament was a declaration by the High Representative on political accountability, whereby most of the former's requests were granted in some form or another.<sup>1867</sup> Notably,

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<sup>1863</sup> European Parliament, Non-paper EEAS of 18 March 2010, available at: [http://www.euractiv.com/sites/all/euractiv/files/Note\\_on\\_EAS\\_Outline%20FINAL.doc](http://www.euractiv.com/sites/all/euractiv/files/Note_on_EAS_Outline%20FINAL.doc), accessed on 20 March 2011.

<sup>1864</sup> Speech by Catherine Ashton to the European Parliament's Foreign Affairs Committee, SPEECH10/120 of 23 March 2010, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/120&format=PDF&aged=1&language=EN&guiLanguage=en>, accessed on 20 March 2011.

<sup>1865</sup> European Parliament, Press release "National parliaments back European diplomatic service" of 2 June 2010, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20100531IPR75301&language=EN>, accessed on 21 March 2011.

<sup>1866</sup> European Parliament, Legislative resolution on the proposal for a Council decision establishing the organisation and functioning of the European External Action Service of 8 July 2010, doc. no. P7\_TA(2010)0280, point 2.

<sup>1867</sup> As regards accountability, the High Representative gave the following commitments: (a) joint consultation meetings with the bureaux of the European Parliament committees in charge of foreign

although there should henceforth be exchanges of views with what will be EU ambassadors, the practice has shown that these will necessarily depend on the High Representative's goodwill.<sup>1868</sup> The Council proceeded to adopt the EEAS decision on 26 July 2010. Ultimately, the European Parliament approved the legislation on the Service's staffing, finances and annual budget in October 2010.

The European External Action Service thus came into existence. With headquarters in Brussels, it is an autonomous body of the Union, functionally separate from both the Council and the Commission. It acts under the authority of the High Representative and consists of a central administration and EU delegations to third countries and international organisations.<sup>1869</sup> The Service is managed by an Executive Secretary-General, who operates under the authority of the High Representative. The delegations are led by Heads of Delegations, who are accountable to the High Representative for the management of their delegations and for the coordination of Union actions. Each delegation is, furthermore, subject to periodical evaluations by the Executive Secretary-General, which include financial and administrative audits. Upon request, EU delegations shall support the Member States in their diplomatic relations and in the provision of consular protection to EU citizens in third countries.<sup>1870</sup> The EEAS staff shall be independent in the

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affairs and budgets will be enhanced; (b) as required by Article 218(10) TFEU, the European Parliament will be fully and immediately informed at all stages of the procedure of concluding agreements between the Union and third countries and international organisations; (c) the practice of holding in-depth dialogue and the provision of all documents on strategic planning phases of the Union's instruments of financial assistance will be continued; (d) confidential information on CSDP missions and operations will continue to be provided; (e) in case the High Representative is unable to attend a plenary debate in the European Parliament, she will be substituted either by a competent commissioner or a member of the Foreign Affairs Council from the rotating Presidency or from the trio Presidencies; and (f) before taking office newly appointed Heads of Delegations and EU Special Representatives whom the European Parliament deems strategically important will appear before the Foreign Affairs Committee for an exchange of views rather than for hearings; and (g) senior EEAS officials will appear in relevant European Parliament committees to give regular briefings. See: European Parliament, Annex to the Legislative resolution on the proposal for a Council decision establishing the organisation and functioning of the European External Action Service of 8 July 2010, doc. no. P7\_TA(2010)0280. See further in: Batora, Jozef. "A democratically accountable European External Action Service: three scenarios," *European Integration online Papers, Vol. 14, Special Issue 1*, 2010: 1-20.

<sup>1868</sup> High Representative Ashton has called off the first planned ambassadorial 'exchange of views', which was to take place with the new EU envoy to Japan, the Austrian diplomat Hans Dietmar Schweisgut. The reason was that MEPs wanted to hold the meeting in public, whereas the High Representative insisted that the doors remain closed. Rettman, Andrew. "Ashton calls off EU ambassador hearings", *EUobserver*, 5 October 2010.

<sup>1869</sup> Article 1 of the Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service of 26 July 2010, (*OJ L 201/30* of 3.8.2010).

<sup>1870</sup> Article 5 of the Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service of 26 July 2010, (*OJ L 201/30* of 3.8.2010). Article 35(3) TEU, in conjunction with Articles 20(2)(c) TFEU and 23 TFEU, provides that diplomatic and consular missions of the Member States and Union delegations shall contribute to implement the right of EU citizens to enjoy, in the territory of a third country in which the Member State of which they are nationals is not

performance of their duties and may only receive instructions from the High Representative.<sup>1871</sup> At least one third of the staff at administrator level shall be composed of national diplomats, whereas at least 60% should be recruited from among permanent officials of the Union.<sup>1872</sup>

## 2. FRANCE

### 2.1. Assemblée nationale

#### 2.1.1. Scrutiny claims

On 26 May 2010, a month after the High Representative published her proposal, the *Assemblée nationale* held a joint meeting on the EEAS with French MEPs and senators. This was an opportunity not only to take stock of the negotiations, but also to discuss the respective roles of the European and national parliaments in EU external relations. In this sense, Jacques Blanc, a UMP senator and the Vice-Chairman of the *Sénat's* Foreign Affairs Committee, claimed that:

The external policy of the European Union remains intergovernmental in nature. We should tell the European Parliament that each of us should stay within our competences and that we must together envisage the establishment of this Service. The Treaty of Lisbon also accentuates the competences of national parliaments. The European Parliament cannot be the sole democratic interlocutor in this debate. [...] I want to say that there is no intention in the *Sénat* to block the European Parliament but to be involved and to participate, since we believe that this is how we will progress towards the necessary coherence in the external policy of the European Union.<sup>1873</sup>

Josselin de Rohan, also a UMP senator and the Chairman of the the *Sénat's* Foreign Affairs Committee, agreed arguing that national parliaments have an essential role to play in the foreign and defence policies because there is as yet no European nationality. As the Union is not going down the path of federalism, he resolutely rejected the Brok-Verhofstadt approach as being in dissonance with reality. In his view, the EEAS also had to render account to national parliaments.<sup>1874</sup>

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represented, diplomatic and consular protection of any Member State on the same conditions as the nationals of that Member State.

<sup>1871</sup> Article 6(4) of the Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service of 26 July 2010, (*OJ L 201/30* of 3.8.2010).

<sup>1872</sup> Article 6(9) of the Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service of 26 July 2010, (*OJ L 201/30* of 3.8.2010).

<sup>1873</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 152, Réunion du mercredi 26 mai 2010 à 16h 30*, p. 16.

<sup>1874</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 152, Réunion du mercredi 26 mai 2010 à 16h 30*, p. 18.

Acknowledging the timeliness of the meeting, Constance Le Grip (EPP, France) further elaborated the European Parliament's position:

National parliaments must understand that the discussion on the institutional architecture of the future Service was an occasion for the European Parliament to engage in a power struggle with other institutions and to put into it all the new weight and responsibilities that the Treaty of Lisbon confers on it. [...] For us, members of the European Parliament, at this stage, the reports and resolutions of national parliaments [...] constitute very precious documents. For beyond the current debates on the intergovernmentalist conception of foreign policy and a more communitarian conception of the European Parliament, the opinion of national parliaments should, regardless of the solution adopted, be heard and taken into account, if not in the texts, then at least in practice. We should always make sure that we are connected with each other. This is why MEPs must listen to national parliaments in this area that largely remains a part of sovereign powers.<sup>1875</sup>

For Arnaud Danjean (EPP, France), the fact that the action of some EU Special Representatives and policies concerning certain regions are no longer directed by the national capitals but by the Council Secretariat indicates that the political control of the EEAS cannot be exercised only by national parliaments.<sup>1876</sup>

On 16 June 2010, the European Affairs Committee adopted a report on the reform of the governance of the Union's external policy, within which it presented its analysis of the EEAS. In the Committee's view, the advantages of establishing an External Action Service lay primarily in centralising the coordination of EU external action and, concomitantly, in reducing the actors in charge of the external and internal representation of the Union.<sup>1877</sup> Nonetheless, the EEAS proposal was assessed as being deceptive, principally because the High Representative was not to enjoy the full scope of powers that the Lisbon Treaty allowed. The reticence, however, was understandable given that the Service represented a "true revolution for all institutions and Member States".<sup>1878</sup> On the basis of this report, a draft resolution was tabled.

The following day, the Foreign Affairs Committee published its own report on the EEAS. The Committee was content that the proposal espoused the French concept of central administration with a strong Secretary-General at the EEAS'

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<sup>1875</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 152, Réunion du mercredi 26 mai 2010 à 16h 30*, p. 17.

<sup>1876</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 152, Réunion du mercredi 26 mai 2010 à 16h 30*, p. 19.

<sup>1877</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2631 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 16 June 2010, rapporteurs Elisabeth Guigou (PS) and Yves Bur (UMP), pp. 38 and 42.

<sup>1878</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2631 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 16 June 2010, rapporteurs Elisabeth Guigou (PS) and Yves Bur (UMP), pp. 71-72.

helm.<sup>1879</sup> Yet while the political orientation reached in the Council was supported, the European Parliament was seen as exceeding its Treaty powers:

It would be fallacious to purport that with the EEAS we are creating a situation in which solely the European Parliament would be competent to exercise democratic control, which national parliaments would no longer exercise at their level: this is not a case of a transfer of competences from the Member States to the European Union.<sup>1880</sup>

Hostility towards the European Parliament could also be registered in discussions in this Committee. Rapporteur Nicole Ameline (UMP) was resolute that "the European Parliament should not feel invested with extra powers".<sup>1881</sup> In a similar vein, Jean-Michel Boucheron (PS) found it absurd to vest foreign policy prerogatives in the European Parliament, whose legitimacy, in his view, was feeble and unrecognised by the citizens.<sup>1882</sup> Not all Committee members, however, were against the European Parliament's primacy in the control of the EEAS. For example, Hervé de Charette (NC) viewed the empowerment of the European Parliament as the only way forward in shaping authentic European diplomacy, with which the EU executive should conform.<sup>1883</sup> The Foreign Affairs Committee then tabled a draft resolution slightly amending that of the European Affairs Committee. In the discussion of this draft resolution, the Chairman of the Foreign Affairs Committee, Axel Poniatowski (UMP), made it plain that the objective of the resolution was to support the Government's negotiating position.<sup>1884</sup> Rapporteur Ameline feared that not reacting would lead to the European Parliament reducing even more the few gains made.<sup>1885</sup> The rapporteur of the European Affairs Committee, Elisabeth Guigou (PS), agreed:

It seems important to me to make our position known to the European Parliament [...], which always wants to increase its power of control. Yet one can understand

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<sup>1879</sup> *Assemblée nationale, Commission des affaires étrangères, Rapport no. 2633 sur la proposition de résolution européenne (no. 2632) sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 17 June 2010, rapporteurs Nicole Ameline (UMP) and Gaëtan Gorce (PS), p. 15.

<sup>1880</sup> *Assemblée nationale, Commission des affaires étrangères, Rapport no. 2633 sur la proposition de résolution européenne (no. 2632) sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 17 June 2010, rapporteurs Nicole Ameline (UMP) and Gaëtan Gorce (PS), pp. 24-25 and 29.

<sup>1881</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 72, Réunion du mardi 15 juin 2010 à 18h*, p. 4.

<sup>1882</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 72, Réunion du mardi 15 juin 2010 à 18h*, p. 7.

<sup>1883</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 75, Réunion du jeudi 17 juin 2010 à 10h 30*, p. 2.

<sup>1884</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 72, Réunion du mardi 15 juin 2010 à 18h*, p. 4.

<sup>1885</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 75, Réunion du jeudi 17 juin 2010 à 10h 30*, p. 4.

this institutional logic. In parallel, the same European Parliament takes undue credit for seeking agreements with national parliaments. If we disagree with certain of its standpoints, for example as regards the High Representative, this resolution can have a real effect in relaying it.<sup>1886</sup>

On 21 July 2010, the Government requested the European Affairs Committee to conduct urgent scrutiny, because a political compromise had just been reached on the EEAS and the House had initiated, but not completed, the scrutiny procedure. The following day, Pierre Lequiller (UMP), the Chairman of the European Affairs Committee, lifted the scrutiny reserve to allow the Government to adopt a position in the Council.<sup>1887</sup>

After the Council's passage of the EEAS Decision, the draft resolutions of the European and Foreign Affairs committees were merged and adopted on 2 November 2010. In it, the *Assemblée nationale* recognised the challenge of unifying the areas of EU external policy governed by intergovernmental and Community decision-making procedures and called for a cessation of the institutional controversies between federalists and intergovernmentalists.<sup>1888</sup> As regards the scope of the Service, preference was given to a model of the EEAS that would permit the High Representative fully to exercise the totality of her powers, which should not be exhausted in the management of crisis but should instead ensure a larger coordination of the Union's external action.<sup>1889</sup> Accordingly, it was regretted that neighbourhood policy, commercial policy, enlargement and development aid were left outside the High Representative's purview.<sup>1890</sup> In fact, the establishment of the Service was seen as an occasion to reflect on the organisation of the Member States' consular networks and to set out a process of converging national foreign and security policies under the annual supervision of the European and national parliaments.<sup>1891</sup> Furthermore, in contrast to the European Parliament's standpoint, the *Assemblée nationale* supported the budgetary and administrative autonomy of the EEAS from the Commission, because the purpose of the Service was precisely to overcome the dichotomy between the CFSP and the Community's external action.<sup>1892</sup> Importantly, the

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<sup>1886</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 75, Réunion du jeudi 17 juin 2010 à 10h 30*, p. 5.

<sup>1887</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2847 sur des textes soumis à l'Assemblée nationale en application de l'article 88-4 de la Constitution du 1<sup>er</sup> juillet au 29 septembre 2010* of 6 October 2010, p. 29.

<sup>1888</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 2 November 2010, recital 1 and point 1.

<sup>1889</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 2 November 2010, points 3 and 6.

<sup>1890</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 2 November 2010, point 5.

<sup>1891</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 2 November 2010, points 10 and 11.

<sup>1892</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 2 November 2010, point 4; *Assemblée nationale, Commission des affaires*

*Assemblée nationale* endorsed the Government's position in the EEAS negotiations, requesting it to lobby for a sufficient representation of France and the French language in the Service.<sup>1893</sup> Finally, the *Assemblée nationale* proposed interparliamentary cooperation in guaranteeing the political monitoring of EU external relations as described in Chapter 6.<sup>1894</sup>

The EEAS arrangements were also debated in the plenary. For example, questions were posed to the Government on the consequences of the new Service for the organisation and functioning of the French Ministry of Foreign Affairs.<sup>1895</sup> Furthermore, in anticipation of the December 2009 European Council meeting, when the Swedish Presidency had already presented a set of guidelines for the Service, information was sought from the Government on its positions and recommendations on the EEAS.<sup>1896</sup>

### 2.1.2. Analysis

(A) *Scrutiny*. The *Assemblée nationale* scrutinised the draft EEAS Decision from both substantive and institutional perspectives. Besides the contents of the Decision, the MPs delved into the implications of the new Service for the institutional balance in the Union.

(B) *Controversy*. The issue of greatest political concern was that of harmonising the institutional prerogatives of the French and European parliaments in the areas of foreign, security and defence policies. As the European Parliament was viewed as trespassing into areas not covered by the Union's constitutional settlement, the *Assemblée nationale* strongly reacted in order to halt this course of action.

(C) *Information*. Apart from Government-provided information, the MPs formally met with MEPs to exchange views on the creation of the Service. This was of particular significance in this dossier, because MPs attempted directly to raise awareness among MEPs of the *Assemblée nationale*'s disapproval of the positions furthered by the European Parliament.

(D) *Outcome*. Although the *Assemblée nationale*'s scrutiny of the EEAS Decision yielded recommendations for substantive changes in the arrangements for the Service's establishment, these seemed to be overshadowed by the institutional

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*européennes, Rapport d'information no. 2631 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 16 June 2010, rapporteurs Elisabeth Guigou (PS) and Yves Bur (UMP), p. 46.

<sup>1893</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of 2 November 2010, points 2 and 8.

<sup>1894</sup> See *supra* note 1039 in Chapter 6.

<sup>1895</sup> See the questions by Dominique Souchet (MPF) in: *Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance du mardi 2 juin 2009, 25<sup>4</sup> séance de la session ordinaire 2008-2009, JORF [2009] A.N. (C.R.) 67[1], 3.6.2009, pp. 4758-4759; Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance du mardi 3 novembre 2009, 41<sup>e</sup> séance de la session ordinaire 2009-2010, JORF [2009] A.N. (C.R.) 127[1], 4.11.2009, p. 8944.*

<sup>1896</sup> See the questions by Michel Delebarre (PS) and Axel Poniatowski (UMP) in: *Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance du mercredi 9 décembre 2009, 81<sup>e</sup> séance de la session ordinaire 2009-2010, JORF [2009] A.N. (C.R.) 148[1], 10.12.2009, pp. 10380 and 10382.*

squabble with the European Parliament. The primary addressee of scrutiny, therefore, appears to be the European Parliament. Crucially, the House's constitutional relationship with the Government was not seen as posing an obstacle to this. Rather, the Government was a means of communicating the MPs' disquiet to the EU level.

(E) *Parliamentary interdependence*. The involvement of the European Parliament in the establishment of the External Action Service was of major relevance for the *Assemblée nationale*. The aforesaid consultation with MEPs was an opportunity for the MPs to claim the 'territory' and to send a signal to the European Parliament that encroachments on the French sovereign powers will not be tolerated. The *Assemblée nationale*, therefore, openly confronted the European Parliament in order to ensure respect for the delimitation of powers envisaged in the founding treaties, which favoured the former's institutional position. This reflected the actorship of the *Assemblée nationale* as a direct counterpart of the European Parliament. Moreover, the cooperation between the national and European parliaments in effecting the accountability of the Union's action in external relations was embraced, which means that this House did not wish to remain compartmentalised at the French level and be excluded from future evaluations of the Service's operation.

With these remarks in mind, it is fair to conclude that, although the projected result of the scrutiny was to materialise in the national constitutional order, the *Assemblée nationale*, nevertheless, acted within the European constitutional framework to accomplish it. It also explicitly accepted the role of the provider of democratic legitimacy and accountability on the Union plane.

## 2.2. Sénat

### 2.2.1. Scrutiny claims

On 5 May 2010, the *Sénat's* Foreign Affairs Committee tabled a draft resolution on the EEAS.<sup>1897</sup> As one of its most significant reactions to the creation of the Service, the Committee condemned the European Parliament's assertion of powers beyond the Treaties, despite an unambiguous Lisbon Treaty declaration to the contrary.<sup>1898</sup>

"There is a tendency within the European Parliament to get involved in all issues and to exclude national parliaments from European matters", observed senator Robert del Picchia (UMP). For senator Jean-Pierre Chevènement (MRC), entrusting the

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<sup>1897</sup> *Sénat, Commission des affaires étrangères, de la défense et des forces armées, Proposition de résolution européenne no. 433 sur le projet de décision du Conseil fixant l'organisation et le fonctionnement du service européen pour l'action extérieure et la proposition de règlement modifiant le règlement (CE, Euratom) no. 1605/2002 portant règlement financier applicable au budget général des Communautés européennes en ce qui concerne le service européen pour l'action extérieure* of 5 May 2010.

<sup>1898</sup> Declaration no. 14 annexed to the Lisbon Treaty states that "the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions *nor do they increase the role of the European Parliament*" (emphasis added).

European Parliament with control over the Service and foreign policy was out of the question, because the latter does not represent a sovereign European people.<sup>1899</sup> As Josselin de Rohan (UMP), the Committee's Chairman, claimed:

This is a very political problem. The European Parliament wishes to increase its political power over the shaping and execution of the common foreign policy through its budgetary power. [...] This would give the European Parliament the right of veto of a political nature over the choice of Heads of Delegations or EU Special Representatives. However, the power of appointment belongs to the High Representative.<sup>1900</sup>

In a subsequent debate in the European Affairs Committee, he held that the European Parliament's demands were abusive and could lead to negative consequences. For instance, the legitimacy and credibility of an appointee to a senior EEAS post would be harmed if he were declared incompetent in the European Parliament hearings but would nonetheless keep the post.<sup>1901</sup> He therefore called for prudence and vigilance:

If national parliaments do not pay attention, they will find themselves one day before a *fait accompli* of a European defence policy crafted in Brussels, on which they would not be able to pronounce themselves.<sup>1902</sup>

On 21 May 2010, the *Sénat* adopted a resolution on the EEAS.<sup>1903</sup> Therein, it argued that the Treaties do not confer on the European Parliament the rights to intervene in the activities of the Service and to participate in the appointment of Heads of Delegation and EU Special Representatives. It was thus essential for national parliaments to maintain close relations with the Service. The resolution further invited the Government to ensure that the Council took into account the principles of the Service's *sui generis* nature, of its complete budgetary and administrative autonomy and of the widest possible scope of competences. The EEAS should also manage security and defence matters and take the lead in the elaboration of the

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<sup>1899</sup> *Sénat, Commission des affaires étrangères, de la défense et des forces armées, Compte rendu, Réunion du mercredi 5 mai 2010*, available at: <http://www.senat.fr/compte-rendu-commissions/20100503/etr.html#toc3>, accessed on 24 March 2010.

<sup>1900</sup> *Sénat, Commission des affaires étrangères, de la défense et des forces armées, Compte rendu, Réunion du mercredi 12 mai 2010*, available at: <http://www.senat.fr/compte-rendu-commissions/20100510/etr.html#toc3>, accessed on 24 March 2010.

<sup>1901</sup> *Sénat, Commission des affaires européennes, Compte rendu, Réunion du mercredi 19 mai 2010*, pp. 6-7, available at: <http://www.senat.fr/europe/r19052010.html>, accessed on 24 March 2011.

<sup>1902</sup> *Sénat, Commission des affaires européennes, Compte rendu, Réunion du mercredi 19 mai 2010*, p. 8, available at: <http://www.senat.fr/europe/r19052010.html>, accessed on 24 March 2011.

<sup>1903</sup> *Sénat, Résolution européenne no. 106 sur le projet de décision du Conseil fixant l'organisation et le fonctionnement du service européen pour l'action extérieure et la proposition de règlement modifiant le règlement (CE, Euratom) no. 1605/2002 portant règlement financier applicable au budget général des Communautés européennes en ce qui concerne le service européen pour l'action extérieure* of 21 May 2010.

strategic guidelines for different financial instruments of the Union. Five days later, as presented above, senators took part in a joint meeting on the EEAS organised by the *Assemblée nationale*.<sup>1904</sup>

The EEAS was discussed in plenary debates mostly prior to relevant European Council meetings. Before the Council adopted the EEAS decisions, the senators queried the Government about the nature, scope and composition of the Service as well as about the repercussions thereof for French embassies worldwide.<sup>1905</sup> Interventions thereafter sought information on the extent to which the results achieved addressed the concerns expressed in France.<sup>1906</sup>

### 2.2.2. Analysis

(A) *Scrutiny*. Just as the *Assemblée nationale*, the *Sénat* carried out a mixture of substantive and institutional scrutiny of draft EEAS Decision.

(B) *Controversy*. The most controversial and politically contentious issue was the European Parliament's excessive assertiveness in striving to extend its powers beyond the Treaties. Most of the senators judged it important to preserve their influence over the political decision making in EU external action.

(C) *Information*. While information mostly came from the French Government, the senators, together with MPs, met with MEPs to exchange their views. The opportunity was also seized to vent their criticism of what they perceived as the European Parliament's unjustified power grabbing.

(D) *Outcome*. Formulating a number of requests for EU institutions, which were similar to those of the *Assemblée nationale*, the *Sénat* intended to guard France's scope of powers in foreign policy making and reaffirm that EU external action is a matter for the Member States' decision. Yet it should be underlined that although the goal was to protect national constitutional powers, the senators held the European Parliament and not the Government responsible for the evolution of the dossier.

(E) *Parliamentary interdependence*. As for the MPs, the European Parliament's action in the decision-making process was evidently of high relevance for the senators. Even more than the *Assemblée nationale*, the *Sénat* assumed the function of a gatekeeper, chiding the European Parliament for usurping the EU constitutional setup. It did so both directly in communication with MEPs and indirectly by means

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<sup>1904</sup> See *supra* the text accompanying notes 1873-1876 of this Chapter.

<sup>1905</sup> See the interventions by Hubert Haenel (UMP), Jacques Blanc (UMP), Yves Pozzo di Borgo (NC), Jean-Pierre Chevènement (MRC) in: *Sénat, Compte rendu intégral, Séance du mardi 27 octobre 2009, 11<sup>e</sup> séance de la session ordinaire 2009-2010, JORF* [2009] S. (C.R.) 107, 28.10.2009, pp. 8967, 8969, 8973 and 8976; and by Richard Yung (PS) and Aymeri de Montesquiou (PR) in: *Sénat, Compte rendu intégral, Séance du mardi 8 décembre 2009, 45<sup>e</sup> séance de la session ordinaire 2009-2010, JORF* [2009] S. (C.R.) 141, 9.12.2009, pp. 12459 and 12461.

<sup>1906</sup> See the inquiry by Robert del Picchia (UMP) in: *Sénat, Compte rendu intégral, Séance du mardi 26 octobre 2010, 18<sup>e</sup> séance de la session ordinaire 2010-2011, JORF* [2010] S. (C.R.) 106, 27.10.2010, p. 9074.

of a resolution. Understanding itself as a counterpart of the European Parliament, the *Sénat* acted interdependently with the EU level.

It ought to be concluded, therefore, that the *Sénat* took a broader approach to scrutinising the creation of the External Action Service and acted beyond the bounds of the French constitutional order.

### **3. UNITED KINGDOM**

#### **3.1. House of Commons**

##### **3.1.1. Scrutiny claims**

The draft EEAS decision being deposited only five days after publication, the European Scrutiny Committee praised the Government's timely provision of information on this politically important EU initiative.

The European Parliament was seen as "the elephant in the room" with "demonstrable leverage". Its proposal that three Deputy Secretaries-General, as political figures broadly reflecting the political balance in the European Parliament, should deputise for the High Representative and be embodied in the Service to perform the functions classifiable as being between those of a permanent under secretary and the High Representative's staff was found to be "a bizarre notion".<sup>1907</sup>

The Committee's other principal concerns were the division of duties between the Service and the Commission in the programming of the Union's external cooperation programmes and the impact of the Service on Britain's capacity to promote its own bilateral interests in global affairs.<sup>1908</sup> As the creation of the EEAS was "likely to be the most significant change in the conduct of British foreign policy in many years", the Committee recommended the proposal for a debate on the Floor of the House.<sup>1909</sup>

The accountability of the EEAS to the British Parliament was subsequently the object of a parliamentary question. The Government replied that Westminster would be able to scrutinise Council decisions and hold the Government to account through evidence sessions and plenary debates.<sup>1910</sup>

The EEAS was indeed debated in the plenary on 14 July 2010, less than a week after the European Parliament had adopted a favourable opinion on the Service but before the Council took the final decision. David Lidington, the Minister for Europe, expressed satisfaction with the outcome of the negotiations on the Service's accountability, which was achieved in cooperation with France and other like-

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<sup>1907</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 7 April 2010", *HC 5-xvii, 18<sup>th</sup> Report of Session 2009-10* of 8 April 2010, para. 1.32, p. 11.

<sup>1908</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 7 April 2010", *HC 5-xvii, 18<sup>th</sup> Report of Session 2009-10* of 8 April 2010, paras 1.33 and 1.34, p. 12.

<sup>1909</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 7 April 2010", *HC 5-xvii, 18<sup>th</sup> Report of Session 2009-10* of 8 April 2010, para. 1.36, p. 12.

<sup>1910</sup> House of Commons, Written Answers to Questions, 12 July 2010, Vo. 513, col. 510W.

minded Member States. He stressed that if the European Parliament's demands had been accepted, they would have represented "a major encroachment by both the European Parliament and the Commission" into policy areas pertaining to the Member States.<sup>1911</sup> In this regard, the intervention by Michael Connarty, the Chairman of the European Scrutiny Committee, exposed the rivalry between Westminster and the European Parliament in the scrutiny of intergovernmental areas of EU decision making:

We now need assurances from the Government that they will defend not just the common foreign and security policy and common security and defence policy, but the right of this Parliament to scrutinise what they do and hold them to account when they go to the Council. That might serve as a small *protection against a European Parliament that might otherwise take complete control* of this policy and this service in the future.<sup>1912</sup>

Other MPs' preoccupations ranged from the financial costs of the establishment of the Service to the consequences thereof for the independence of British foreign policy. The House finally resolved to support the Government's policy to agree to the draft Council Decision on the EEAS.<sup>1913</sup>

On 8 September 2010, the European Scrutiny Committee cleared the document from scrutiny but requested further information from the Government, *inter alia*, on the practical meaning of the High Representative's declaration on accountability, given that it embodies the European Parliament's belief that it would enjoy greater oversight of EU external action.<sup>1914</sup> In a letter sent to the Committee a fortnight later, the Government explained that the declaration, itself a non-binding document,<sup>1915</sup> did not confer additional powers on the European Parliament but was a means of "responding to the European Parliament's concerns without conceding too much on key issues of principle" in the EEAS Decision.<sup>1916</sup>

### 3.1.2. Analysis

(A) *Scrutiny*. Although the House of Commons scrutinised the draft EEAS Decision chiefly from the procedural angle, there were elements of substantive scrutiny. One of the central goals of the scrutiny was to ensure as broad an acquaintance of MPs with the contents of the dossier as possible.

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<sup>1911</sup> House of Commons, Debate of 14 July 2010, Vol. 513, col.1036.

<sup>1912</sup> House of Commons, Debate of 14 July 2010, Vol. 513, col. 1054.

<sup>1913</sup> House of Commons, Debate of 14 July 2010, Vol. 513, col. 1059.

<sup>1914</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 8 September 2010", *HC 428-i, 1<sup>st</sup> Report of Session 2010-11* of 22 September 2010, para. 64.49, p. 436.

<sup>1915</sup> See the consequence of such legal nature of this declaration in *supra* note 1868 of this Chapter.

<sup>1916</sup> House of Commons, European Scrutiny Committee, "Documents considered by the Committee on 20 October 2010", *HC 428-iv, 4<sup>th</sup> Report of Session 2010-11* of 1 November 2010, para. 11.44, p. 52.

(B) *Controversy*. Palpable contention was detected regarding both the European Parliament's involvement in foreign policy making and the arrangements envisaged for the Service's accountability to it through the High Representative's deputies.

(C) *Information*. The central source of information for scrutiny was the British Government. The House liaised neither with the European Parliament nor with the Commission.

(D) *Outcome*. Despite disagreeing with certain solutions adopted in the EEAS Decision, the MPs did not draw up a formal request for EU institutions to consider amending the issues that diverged from their preferences. This is a strong indicator that the framework within which they acted was purely national. The only addressee of the scrutiny was the British Government. Indeed, in the plenary debate on the EEAS, the Government was explicitly required to render account before its representatives departed for Brussels. The reason for this request, however, lay not only in tightening the reins on national executive action but also in staving off the threat of the looming intrusion of the European Parliament into British constitutional waters. Even so, this threat was dealt with using national parameters, namely by addressing the Government. Therefore, while the European Parliament provided the key impulse for the Commons' reaction, at no stage of the scrutiny procedure was this or any other EU institution deemed a relevant target for the MPs' concerns.

(E) *Parliamentary interdependence*. As demonstrated, the European Parliament's bold appearance in the decision-making process was of great relevance for the Commons' scrutiny. Yet even though the MPs did not subscribe to the European Parliament's position, they did not take their arguments any further than stating the fact that their respective views differed. The House of Commons, therefore, was not in a relationship of interdependence with the European Parliament.

All this warrants the conclusion that the House of Commons took a narrow, national approach to EU decision making and did not act within the European constitutional order.

## **3.2. House of Lords**

### **3.2.1. Scrutiny claims**

The Lords' scrutiny of the EEAS Decision took the form of correspondence with ministers and an inquiry through evidence sessions with the Government, the Commission and MEPs.

The correspondence with ministers began on the Government's initiative on 12 February 2010, well before the High Representative drafted the EEAS proposal. The Government confidentially sent the EU Committee the European Parliament's non-paper and other fiches and offered to meet peers informally to allow scrutiny to progress in anticipation of the official proposal.<sup>1917</sup> In its reply of 7 April 2010, the

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<sup>1917</sup> House of Lords, EU Sub-Committee C – Foreign Affairs, Defence and Development Policy, "Correspondence with ministers – December 2009 to April 2010", pp. 26-27.

EU Committee agreed on the main points under negotiation and waived the scrutiny reserve to enable the Government to give agreement in the Council.<sup>1918</sup> The communication continued, however, about the bureaucratic nature of the process of setting up the Service, recruitment and staffing, personnel management, budget, perceptions outside the Union about who represents the Union, development aid programming, the external aspects of internal EU policies, the reporting lines between EEAS officials, crisis management and the position of EU Special Representatives. Among their Lordships' observations was the caveat that:

Following the decision to phase out the WEU Assembly we would reiterate that future mechanisms for oversight of foreign, defence and security policies should be complementary and *should not lead to a marginalisation of national parliaments by the European Parliament*.<sup>1919</sup>

The Government agreed and underscored its opposition to any expansion of the European Parliament's competences in these policy fields.<sup>1920</sup>

On 14 July 2010, a delegation of the EU Sub-Committee C on Foreign Affairs, Defence and Development Policy went to Brussels to examine witnesses from EU institutions. Among them, they met with two British and one French MEP, who were rather satisfied with the compromise on the EEAS. As Andrew Duff (ALDE, UK) put it, "we were in effect in a codecision procedure despite the fact that our formal powers only instigate an *avis*, an opinion".<sup>1921</sup> Charles Tannock (European Conservatives and Reformists, UK) was equally optimistic about the practical value of exchanging views with senior EEAS appointees:

It is not a confirmation hearing; it is an exchange of views, but I am quite sure that the *de facto* reality will be that if we found that they failed abysmally, were not properly briefed, did not know what their mandate would be, particularly the Special Representatives, they would have a problem in sustaining their position. I am not predicting that is going to happen but it could happen. We could write a letter of no

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<sup>1918</sup> House of Lords, EU Sub-Committee C – Foreign Affairs, Defence and Development Policy, "Correspondence with ministers – December 2009 to April 2010", p. 34.

<sup>1919</sup> House of Lords, EU Sub-Committee C – Foreign Affairs, Defence and Development Policy, "Correspondence with ministers – May to November 2010", p. 19 (emphasis added).

<sup>1920</sup> House of Lords, EU Sub-Committee C – Foreign Affairs, Defence and Development Policy, "Correspondence with ministers – May to November 2010", p. 22. See also: House of Lords, EU Sub-Committee C – Foreign Affairs, Defence and Development Policy, Minutes of Evidence of 25 March 2010, p. 17; House of Lords, EU Committee, Minutes of Evidence of 6 April 2010, p. 27; House of Lords, EU Sub-Committee C – Foreign Affairs, Defence and Development Policy, Minutes of Evidence of 7 July 2010, p. 22.

<sup>1921</sup> House of Lords, EU Sub-Committee C – Foreign Affairs, Defence and Development Policy, Minutes of Evidence of 14 July 2010, p. 6.

confidence in this individual to Baroness Ashton and you wonder what the future of that individual would be.<sup>1922</sup>

The examined MEPs then underlined that the accountability of EU external action, including CFSP and CSDP, should necessarily involve the European Parliament and not only national parliaments.<sup>1923</sup>

At the beginning of November 2010, a parliamentary question was put on the means that the Government intended to employ to ensure that the establishment of the EEAS would not replace national diplomatic services and support the Member States' objectives. The Government gave the assurance that the Foreign and Commonwealth Office closely monitored the competence delimitation in this field.<sup>1924</sup>

### **3.2.2. Analysis**

(A) *Scrutiny*. The House of Lords' scrutiny of the EEAS Decision was of a procedural nature, although substantive analysis was also an important trait of the scrutiny procedure.

(B) *Controversy*. Although a range of questions were examined, the establishment of the EEAS was not particularly controversial in the House of Lords. The peers were, hence, able to lift the scrutiny reserve without delay.

(C) *Information*. Apart from Government representatives, the Lords examined MEPs and Commission officials. The goal of establishing contact with EU institutions was to gather information and to better grasp the intricacies of the new Service and not to hold the Commission and the European Parliament accountable for the negotiating lines that they intended to follow. None of the evidence sessions held with EU officials on the EEAS unearthed the Lords' wish to influence the positions adopted by their witnesses.

(D) *Outcome*. Their Lordships' investigation of the establishment of the Union's diplomatic service was conducted with a view to keeping abreast of the development of the dossier rather than with a view to proposing alternatives for EU institutions' attention. What outstanding issues there were, they were settled in correspondence with the British Government, which was the only addressee of the scrutiny.

(E) *Parliamentary interdependence*. The European Parliament's posture in the EEAS negotiations was highly relevant for the Lords. They even thought it worthwhile to travel to Brussels and interview competent MEPs. Yet, as mentioned above, there is no evidence whatsoever that the Lords intended to make an influence or impress their opinions on their interlocutors. The House of Lords' scrutiny activities were, therefore, not interdependent with those of the European Parliament.

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<sup>1922</sup> House of Lords, EU Sub-Committee C – Foreign Affairs, Defence and Development Policy, Minutes of Evidence of 14 July 2010, p. 11.

<sup>1923</sup> House of Lords, EU Sub-Committee C – Foreign Affairs, Defence and Development Policy, Minutes of Evidence of 14 July 2010, pp. 13-14.

<sup>1924</sup> House of Lords, Written Answers to Questions, 2 November 2010, Vol. 721, col. WA384.

It should be concluded, consequently, that while it restricted the outreach of its scrutiny to the British constitutional order, it nonetheless partially acted with the European constitutional order.

## 4. PORTUGAL

### 4.1. Scrutiny claims

While the Portuguese Assembly did scrutinise the creation of the European External Action Service, it did not make any official pronouncement pursuant to the European Scrutiny Act. As a result, no scrutiny claims were made. The following analysis is, therefore, based on personal correspondence with the competent clerk of the European Affairs Committee.<sup>1925</sup>

### 4.2. Analysis

(A) *Scrutiny*. The method of the Assembly's monitoring of the EEAS dossier was that of informal scrutiny. No report, formal written opinion or resolution was adopted.

(B) *Controversy*. The Assembly deemed the EEAS project to be a salient matter, for which reason a seminar was organised to debate its merits. The Service itself did not generate controversy among MPs, however. The discussion in Parliament focused neither on the establishment of the Service as such nor on the role of the European Parliament in its functioning. The main topic of the debate in the European Affairs Committee was the future relationship between the EEAS and the diplomatic services of the Member States.

(C) *Information*. Information and account was sought principally from the Government. In this regard, the Foreign Affairs Minister was questioned in the Committee for Foreign Affairs and Portuguese Communities. Similarly, the European Affairs Committee heard the Secretary of State for European Affairs. On both occasions, the Government representatives gave MPs the clarifications and explanations requested. The Government was also questioned about its position on the EEAS in the plenary.<sup>1926</sup> In parallel to these activities, the Assembly kept itself informed about the developments in the decision-making process through contacts at the EU level. Namely, the Assembly gathered information directly from the European Parliament both through meetings with the latter's Foreign Affairs Committee (AFET) and within the framework of COSAC.

(D) *Outcome*. The Assembly's scrutiny of the EEAS was aimed at collecting relevant information about the dossier. No recommendations or suggestions were

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<sup>1925</sup> Correspondence was maintained with Maria João Costa, clerk of the European Affairs Committee, March-May 2011.

<sup>1926</sup> See the question by Vitalino Canas (PS), Chairman of the European Affairs Committee, about the future structure of the EEAS in: *Diário da Assembleia da República, I Série, No. 19*, 8 January 2010, p. 31. See also the inquiry by Telmo Correia (CDS-PP) about the Government's position regarding the Service in: *Diário da Assembleia da República, I Série, No. 5*, 19 November 2009, p. 34.

made for the attention of EU institutions. The addressee of scrutiny was the Government.

(E) *Parliamentary interdependence*. There is no evidence of interdependent action in relation to the European Parliament. The goal of establishing contact with this EU institution was to maintain information flow about the dossier rather than to contrive strategies as to the possible avenues of joint action to be undertaken at the EU level.

In conclusion, the Portuguese Assembly, despite entering into contact with the European Parliament, acted predominantly within the national constitutional order.

## **5. CONCLUDING REMARKS**

Compared to the Services Directive and the SWIFT Agreements, the European External Action Service introduces a substantially different tone into interparliamentary relations. The still intergovernmental nature of the field in which the decision was to be taken caused national parliaments to assume a defensive stance and act as guardians of the Treaties and the competences delimited therein. National parliamentarians of all political affiliations were nearly unanimous in their antagonism towards the European Parliament's confident posture in the decision-making process. Four out of five parliamentary chambers analysed exhibited such an attitude. Only the Portuguese Assembly appeared to be supportive of the EEAS Decision as it was. However, one distinction crucially separates this case study from the other two. While the French Parliament, for instance, opposed the European Parliament in the Services Directive episode, it did so not with respect to the existence of the latter's powers but merely with regard to the latter's standpoints. In the EEAS episode, what was challenged was precisely the existence and extent of the European Parliament's powers. The objections were, therefore, more fundamental. As in the previous two case studies, the approach taken by the parliaments examined differed.

The French case is exemplary of negative action beyond the national constitutional order, i.e., action aimed not at supporting the position advocated at the EU level but at opposing it. Both the MPs' and the senators' role perceptions seemed to be placed within the European constitutional order. The European Parliament was held directly responsible for attempting to misappropriate its Treaty powers. Despite criticising EU action, therefore, the *Assemblée nationale* and the *Sénat* did not isolate themselves from the decision-making context. Instead, they acted as direct stakeholders therein.

The British case showcases a different approach to the same problem. It demonstrates that even where the positions adopted by EU institutions directly collide with those adopted by national parliaments, the latter may nonetheless decide to restrict themselves to exerting the political accountability of the Government. As was the case with the SWIFT Agreements, both MPs and peers were highly cognisant and attentive of the evolution of the dossier at the EU level. Yet their role

perceptions rested within the British constitutional order. All their scrutiny claims were addressed at the Government. The Lords, for instance, personally met with the Commission and MEPs. But they were careful to point out that they were still acting within the national constitutional perimeter. From that perspective, Westminster was partially isolated from the decision-making arena.

The Portuguese case fortifies the assertion that where a national parliament supports an EU decision, it will not engage in cross-level intervention. It is, instead, likely to remain within the national bounds, because the results expected to be achieved will coincide with its preferences. The MPs' role perceptions indeed stayed within the national constitutional order. Just like the British Parliament, the Portuguese Assembly entered into contact with MEPs, but the objective was not to affect the outcome of the negotiations at the EU level but to gain a more thorough insight into it.

These considerations allow the conclusion that EU decisions in the area of CFSP and CSDP, especially when they are of institutional importance, are highly conducive to exerting national parliamentary reactions. Significantly, they also permit one to argue that parliamentary interdependence can work in both directions, that is not only to legitimise an EU decision but also to delegitimise it.

## **Part IV**

# ***CAPACITIES***

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***NATIONAL PARLIAMENTS AND THE EUROPEAN UNION:  
DEMOCRATIC LEGITIMACY AND ACCOUNTABILITY?***



# Chapter 12

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## Conclusion: National Parliaments as Organs of the European Union

### 1. A SKETCH OF AN ANSWER

Thirty years ago, Joseph Weiler, in his seminal article on the transformation of Europe, observed that the "only formal way in which accountability could be ensured would be by tight *ex ante* control by national parliaments on the activities of ministers in Community fora" and that "for the first time national parliaments are taking a keen interest in the structural process of European integration and are far from enamoured with the idea of solving the democracy deficit by simply enhancing the powers of the European Parliament".<sup>1927</sup> Since then, the EU has indeed transformed and so have national parliaments. In this study, an attempt has been made to link the academic debate on national parliaments with the theory and practice of EU constitutionalism. The objective was to analyse national parliaments not only as scrutineers of the national government but also of the European Union as a whole.

A short answer to the main research question posed in the introduction is that national parliaments are a source of democratic legitimacy and political accountability of the Union to a moderate extent. The law and praxis of the national parliamentary scrutiny of EU decision making accord these institutions a place on the EU power map that is neither arresting nor non-existent. This is valid for all three parliaments analysed. The importance of a contextual analysis was attested. Both the national and EU contexts mattered. They considerably affected the mode, nature and extent of parliamentary pronouncement. A longer answer, however, requires dissecting the findings according to the previous three parts of this book.

### 2. CONDITIONS: NATIONAL PARLIAMENTS AS GATEKEEPERS

In Part I, we investigated the terms under which national parliaments accepted European integration and the consequent rise in power of the European Parliament.

The creation of the Coal and Steel Community taught us that, in the early days, national parliaments found the transfer of sovereignty a hard pill to swallow. They were unwilling to cede the political *Kompetenz-Kompetenz*, since this principle to some extent guaranteed them the final word on the delimitation of competences between the national and European levels. Venturing into the unmapped terrain of a supranational Community caused setbacks in Westminster and, to a lesser extent, in

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<sup>1927</sup> Weiler, Joseph H.H. "The transformation of Europe," *Yale Law Journal*, Vol. 100, 1991: 2430 and 2473.

the French Parliament. Yet these setbacks dwelled on the anxieties of the nation rather than on the fallacies of democracy. Once a portion of sovereignty was parted with and so far as the agreed limits of sovereignty were respected, the national parliaments' relations with their supranational counterpart tended to be harmonious. The national and European parliaments have thrived abreast.

This was affirmed at Maastricht, which laid bare their awareness of mutual complementarity. Except for a cautious *Sénat*, the French, British and Portuguese parliaments hailed the European Parliament's maturation in the EU decision-making process. Even more uncontroversial was the intergovernmental pillarisation of the Union, since it was perceived as safeguarding the orthodox powers of parliamentary control.

The leading idea in the Lisbon Treaty episode was that of parliamentary autonomy. It emerged in various forms. National parliaments acquired specific roles at the EU level. Their scrutiny, while remaining complementary, was seen as distinct from that of the European Parliament. The exercise of scrutiny was also to profit from a degree of autonomy from the Government. *Ex ante* involvement was the route espoused by all three parliaments. Substantive policy scrutiny was also underlined as a path to be followed in the future.

In sum, throughout the integration process the European Parliament was, with more or less enthusiasm, endorsed as a partner in democratising the Union,<sup>1928</sup> albeit one with a separate set of prerogatives.<sup>1929</sup>

### 3. COMPETENCES: NATIONAL PARLIAMENTS EUROPEANISED

In Part II, our goal was to gain a thorough insight into the national context, rights and duties that shape parliamentary participation in secondary EU decision making. Our main findings were as follows.

(A) Information provision has been streamlined and no impediments stand in the way of effective scrutiny. National parliaments have supplemented their information channels by establishing direct links with the European Parliament and the Commission.

(B) As regards scrutiny instruments, the parliaments under review have all closely followed the evolution at the EU level and have refurbished their 'armouries'. Be it French resolutions, British in-depth inquiries or Portuguese formal written

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<sup>1928</sup> See also: Agostini, Maria Valeria. "The role of national parliaments in the future EU," *The International Spectator*, Vol. 36, No. 4, 2001: 38-39.

<sup>1929</sup> A decade and a half ago, however, the notion of cooperation between the parliaments at the national and EU levels was less palatable. In the words of an observer, "the idea of a systematic collaboration between the European Parliament and the national parliaments necessarily conflicts with the structural competitive relationship between the two". Vring, Thomas von der. "On legitimation of the European Union - national parliaments and the European Parliament," in *Sources and categories of European Union law: a comparative and reform perspective*, by Gerd Winter (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 1996: 405.

opinions, national parliaments have strategically reacted and equipped themselves with tools allowing them to have a meaningful say in EU decision making.

(C) The scope of scrutiny has enlarged. However, 'non-conventional' EU decisions – such as those made through comitology, an open method of cooperation and, to a lesser degree, international agreements – continue to eschew parliamentary attention. The case studies of the former passerelle clauses, EU criminal law competence and Europol, as matters susceptible of changing the topography of the Area of Freedom, Security and Justice, returned insightful results. The parliaments' insistence on the paramountcy of the EU abiding by the limits of competences agreed in the founding treaties was once more brought to light. These studies also exposed different attitudes by parliaments towards these changes. Whereas the French Parliament welcomed the prospect of moving to codecision and qualified majority voting, the *Sénat* again less so than the *Assemblée nationale*, the British Parliament was more sceptical and treated the European Parliament as an exogenous factor. Though the Portuguese Assembly did not scrutinise but a part of the Europol dossier, it can be inferred from its approach and claims during the Lisbon Treaty ratification process that the majority of MPs are strongly supportive of a more profoundly integrated Union. Further, while CFSP and CSDP were deemed the preserve of national parliaments, the European Parliament was welcomed on board across the three parliaments.

(D) Concerning the addressees of scrutiny, it is a common characteristic of all three parliaments that the Government is the primary addressee of scrutiny and EU institutions potentially the secondary one.

To conclude, the French, British and Portuguese parliaments have significantly Europeanised their powers of participation in EU decision making. Their adaptation to the ever-evolving European integration process has been comprehensive. The French and British cases also show that the activities of upper chambers seem to complement those of lower chambers. The latter tend to concentrate on EU matters that arouse political partisanship and call for action and the former on those that require expertise and reflection.

#### **4. CLAIMS: NATIONAL PARLIAMENTS AS EUROPEAN ACTORS**

##### **4.1. Interpreting the results**

In Part III, the objective was to test empirically the validity of the findings of the previous two parts. This was carried out through 15 case studies, involving five parliamentary chambers and three dossiers. Specifically, we inquired whether regarding the Services Directive, the EU-US SWIFT Agreements and the European External Action Service Decision, the Houses of Parliament of France, the United Kingdom and Portugal transcended the national constitutional constraints and instead acted within the European constitutional order. The findings about the national parliamentary approaches to European scrutiny were largely confirmed. Leaving

aside the subtleties, the results obtained are schematically presented in the table below.

Table 5. *Actorship of national parliaments within the European constitutional order*

Dossier	France		United Kingdom		Portugal
	Assemblée nationale	Sénat	House of Commons	House of Lords	Assembleia da República
Services in the Internal Market	Yes	Yes	No	Partially	N/A
SWIFT Agreements	Yes	Yes	No	No	N/A
European External Action Service	Yes	Yes	No	Partially	No

In the broadest terms, these case studies confirm the hypothesis about the heterogeneity of national parliaments.<sup>1930</sup> This hypothesis, however, accentuates the *formal, structural* heterogeneity, which is solidified by a number of national constitutional factors, such as the relations between the majority and the opposition, the national electoral mandate, the type of European scrutiny practised and so on.<sup>1931</sup> These factors, important as they are, may curtail the ability of national parliaments to act collectively at the EU level. The present empirical analysis espoused a bottom-up approach, which permitted us to develop the heterogeneity argument. Instead of seeing merely the negative side of the aforesaid constraining factors, the case studies illuminate the *substantive, content-based* heterogeneity of national parliamentary scrutiny of EU affairs. This facet of heterogeneity can carry a positive connotation, as it accounts for national parliaments providing the Union with diverse *ex ante* political feedback on the policies that the latter pursues. It transpires from the empirical evidence that the most effective mode of parliamentary participation in EU decision making is individual policy-oriented action not only towards the national government but also towards EU institutions, primarily the European Parliament and the Commission. Such attitude to the scrutiny of EU initiatives is conducive to national parliamentary actorship within the compound European constitutional order, which reaps the fruits of joining the constitutional and political resources of both the EU and the Member States. In the absence of a Treaty instruction that would 'grant' national parliaments the right of legally binding action in the shaping of EU

<sup>1930</sup> See notably: Kiiver, Philipp. *National parliaments in the European Union: a critical view on EU constitution-building*, The Hague: Kluwer Law International, 2006: 4, 6, 22, 41, 91, 132 and 144.

<sup>1931</sup> See further: Bergman, Torbjörn. "National parliaments and EU affairs committees: notes on empirical variation and competing explanations," *Journal of European Public Policy*, Vol. 4, No. 3, 1997: 373-387; Raunio, Tapio. "Holding governments accountable in European affairs: explaining cross-national variation," *Journal of Legislative Studies*, Vol. 1, No. 3, 2005: 319-342.

decisions,<sup>1932</sup> the interdependent action by national parliaments stays in the shadow of a largely informal, non-binding and voluntary liaison with EU institutions.<sup>1933</sup> Such action does occur at times, nonetheless. Such was the case with the *Assemblée nationale* and the *Sénat* concerning all three dossiers analysed and, to some extent, with the House of Lords concerning the Services Directive and the European External Action Service Decision. Each parliament, acting from the national capital, can individually contribute to opinion forming within EU institutions, often to a greater extent than when acting in concert with other national parliaments.<sup>1934</sup> Dismissing a European role for national parliaments on the ground of their structural heterogeneity is, therefore, an error.

#### 4.2. Contextualism vindicated

A contextualist approach to the topic corroborates the argument that the vicissitudes of national scrutiny systems continue to require close scholarly attention.

On the one hand, the national constitutional context was highly relevant in determining the degree and nature of parliamentary scrutiny. For instance, the Portuguese Assembly was unable to scrutinise the Services Directive due to the lack of explicit scrutiny powers. When it did win these powers, the palpable political consensus in favour of European integration, in conjunction with the existing political culture, inhibited their employment in practice, such as in the case of the SWIFT Agreements. Furthermore, although the French Parliament possesses comparable scrutiny powers as the British Parliament, the former was able to go further in its scrutiny claims than the latter. An explanation for this can be derived from the system of government of these two Member States. The semi-presidential system in France engenders a looser connection between the Government and Parliament, whereas this relationship is considerably tighter in the strict parliamentary system of Britain.

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<sup>1932</sup> As Harlow metaphorically argues, it would be unwise for national parliaments "to be pulled up the spokes of the European Union parliamentary wheel. What they should do instead is to ensure that the rim of the wheel is strong and in good repair". Harlow, Carol. *Accountability in the European Union*, Oxford: Oxford University Press, 2002: 107.

<sup>1933</sup> The predominantly informal nature of the national parliaments' functions in the Union does not of itself mean that they have less influence for that particular reason. For instance, COSAC, an institutionalised form of interparliamentary cooperation, has been assessed as far less influential than various forms of bilateral and multilateral exchanges between committees of national parliaments and the European Parliament. Hrbek, Rudolf. "Parliaments in EU multi-level governance," in *Legislatures in federal systems and multi-level governance*, by Rudolf Hrbek (ed.), Baden-Baden: Nomos Verlagsgesellschaft, 2010: 147.

<sup>1934</sup> See also: Shackleton, Michael. "Interparliamentary cooperation and the 1996 Intergovernmental Conference," in *The changing role of parliaments in the European Union*, by Finn Laursen and Spyros A. Pappas (eds), Maastricht: European Institute of Public Administration, 1995: 166. See *contra* the view that national parliaments will remain 'harmless' so long as their collective role is not effectively organised: Kaczynski, Piotr Maciej. "Paper tigers or sleeping beauties? National parliaments in the post-Lisbon European political system," *Centre for European Policy Studies, Special Report*, February 2011.

On the other hand, the European constitutional context mattered, too. The European Parliament's achievements in the Services Directive and the SWIFT Agreements were a significant facilitating factor for the French Parliament's scrutiny claims. The European Parliament's actorship added teeth to the demands of the French MPs and senators. Conversely, the creation of the External Action Service, auguring an institutional transformation capable of modifying the constitutional compact initially agreed to by national parliaments, revealed that in CFSP and CSDP matters national parliaments and the European Parliament can experience frictions.

### **4.3. The heuristic value of parliamentary interdependence**

Parliamentary interdependence as defined in Chapter 2 proved to be a useful methodological device, since it helped to dissociate the mere occurrence of parliamentary contacts across levels from their actual purpose and nature. This was a crucial distinction to make, because, as the case of the House of Lords illustrates, the establishment of direct links with EU institutions does not of itself alter the role perception of a national parliament and the ideational framework within which European scrutiny is performed.

However, interdependent action by national parliaments, which allows them to act beyond the national constitutional order does not occur as a matter of course. Certain conditions must be fulfilled for parliamentary interdependence to be triggered. These conditions include two pivotal factors: (a) political salience and (b) an amenable national and European context.

Political salience is a *sine qua non* of meaningful parliamentary involvement in EU affairs. Yet the Portuguese Parliament's treatment of the SWIFT Agreements, when scrutiny was not carried out, or of the EEAS Decision, when scrutiny was conducted informally despite the availability of formal powers of scrutiny, militates the conclusion that political salience is not a sufficient ingredient of parliamentary interdependence. Indeed, it has correctly been observed that "it is hard to get Member States' parliaments involved in Europe's governing structure in any other way than incidentally".<sup>1935</sup>

The national and European contexts are also important prerequisites for interdependent parliamentary action. Not too strict terms of reference and a Union that produces bold enough policy claims are recipes for jostling national parliaments into cross-level advocacy.

## **5. EPILOGUE: NATIONAL PARLIAMENTS IN THE EUROPEAN CONSTITUTIONAL ORDER**

The findings of this study warrant the conclusion that the constitutional link between national parliaments and governments remains the central axis of the former's involvement in EU affairs. Yet the exclusive reliance on government-parliament

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<sup>1935</sup> Editorial, "Democracy and the Union: dressing up Cinderella," *European Constitutional Law Review*, Vol. 3, No. 3, 2007: 354.

relations has become a fractured paradigm. It increasingly represents a skewed and reductionist summary of the reality. An important property of the relationship between national parliaments and the European Union is a broadening of the context of democratic legitimacy and political accountability.<sup>1936</sup> This relationship relies on formal and informal avenues of communication and action, which operate both between national parliaments and EU institutions and between national parliaments themselves.<sup>1937</sup>

These developments affirm that the Union's outer legitimation frame, that of ratifying primary EU law and approving European integration, continues to be the province of national parliaments. Under certain circumstances and often surreptitiously,<sup>1938</sup> national parliaments also permeate the Union's inner legitimation frame, that of scrutinising secondary EU laws and policies, as direct stakeholders of the EU decision-making process. The latter, interdependent parliamentary action represents both a scrutiny stratagem and a theoretical explanation.

In strategic terms, national parliaments do not always depend on their governments. They sometimes intentionally evade the latter's grip and liaise with the EU level directly. The Portuguese Parliament is a case in point. Many parliamentary contacts with EU institutions, such as the French Parliament's lobbying of MEPs or their Lordships' meetings with Commission officials, escape immediate government supervision. This accords MPs, senators and peers greater leeway to engage in cross-level interaction and assert their political preferences.

In theoretical terms, national parliaments, to transpose Walker's phraseology, are no longer "isolated, constitutionally self-sufficient monads".<sup>1939</sup> On occasion, they surpass the prescribed constitutional blueprints and coalesce or clinch with EU institutions. As the empirical evidence collected through case studies demonstrates, national parliaments may do so for the purposes of both information-seeking and influence-seeking. Such occurrences are infrequent, however, and are fraught with problems related to their non-binding nature. Cross-level parliamentary cooperation

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<sup>1936</sup> This is not an entirely new phenomenon. Already in 1987, a Legal Adviser of the House of Lords' European Select Committee argued that there was "some evidence that expressions of parliamentary views, more widely disseminated, can make an impact not only on the national government concerned and its actions in the Council, but also on other bodies, including the European Parliament and the Commission and the part they play in the legislative process". Newman, Karl M. "The impact of national parliaments on the development of Community law," in *Du droit international au droit de l'intégration: liber amicorum Pierre Pescatore*, by Francesco Capotorti et al. (eds), Baden-Baden: Nomos Verlagsgesellschaft, 1987: 484.

<sup>1937</sup> In a similar vein, the Commission pointed out in June 2011 that the political dialogue with national parliaments "serves to complement the scrutiny of their own governments with a new dimension of communication and debate at European level". European Commission, Annual report 2010 on relations between the European Commission and national parliaments, COM(2011) 345, 10.6.2011., p. 6.

<sup>1938</sup> It has been correctly noted that national parliamentarians in practice prefer to "exert their influence in private and confidential arenas, where conflicts can be dealt with in informal consultations". Auel, Katrin. "Democratic accountability and national parliaments: redefining the impact of parliamentary scrutiny in EU affairs," *European Law Journal*, Vol. 13, No. 4, 2007: 494.

<sup>1939</sup> Walker, Neil. "The idea of constitutional pluralism," *Modern Law Review*, Vol. 65, No. 3, 2002: 355.

is crude. It has not reached the level of sophistication necessary to allow it to make a more marked imprint on EU decisions. The influence of national parliaments is further undercut by the lack of formal decisional powers.<sup>1940</sup> For this reason, the centre of gravity of the legitimising and accountability activity seems to be in Brussels and Strasbourg.

That notwithstanding, national parliaments ought to be recognised as vectors of an emerging transnational European democracy. They tend to act as EU organs when matters pending before the EU legislature become highly controversial and arouse contestation in important pockets of Europe's socio-political milieu. These are cases when the Union fashions policies that stretch the outer legitimation frame beyond the acceptable margin of political appreciation. One such activity is subsidiarity monitoring. Another, and a much more significant one, is substantive policy scrutiny. Therefore, the Union's legal integration is accompanied only by a modest political integration. EU democracy does encompass national parliaments, but their participation in the constitutional processes of the European Union resembles secondment rather than full-time engagement.

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<sup>1940</sup> As has been rightly underlined, "the possibility of acquiring information about EU politics through exchange with EU institutions or other national parliaments does not necessarily improve the capacity of parliaments to have an impact on EU politics, since these institutions have no decision-making powers in EU legislation". Börzel, Tanja A. and Sprungk, Carina. "Undermining democratic governance in the Member States? The Europeanisation of national decision-making," in *Democratic governance and European integration: linking societal and state processes of democracy*, by Ronald Holzhaacker and Erik Albæk (eds), Cheltenham: Edward Elgar Publishing, 2007: 119.

## List of Tables and Figures

### *Tables:*

Table 1. Selection of countries according to the politico-constitutional parameters	13
Table 2. Exhaustive list of the rights of national parliaments under the Lisbon Treaty	99
Table 3. Share of the scrutiny activities of the European Affairs Committee as an absolute number of the total number of committee activities in the Assembly	337
Table 4. Selection of in-depth case studies	347
Table 5. Actorship of national parliaments within the European constitutional order	420

### *Figures:*

Figure 1. Elements of national parliamentary involvement in EU decision making	12
Figure 2. Share of the scrutiny activities of the European Affairs Committee as a percentage of the total number of committee activities in the Assembly	338



## List of Interviewees

### ***French Parliament:***

Frank Baron

Permanent representative of the *Assemblée nationale* to the EU, Brussels, 27 May 2008

Anne Marquant

Permanent representative of the *Sénat* to the EU, Brussels, 26 May 2008

François Sicard

Deputy Director of the European Affairs Department of the *Sénat*, Paris, 7 July 2009

### ***British Parliament:***

Ed Lock

Permanent representative of the British House of Lords to the EU, Brussels, 26 May 2008

Libby Davidson

Permanent representative of the British House of Commons to the EU, Brussels, 28 May 2008

Lord Roper

Chairman of the European Union Committee of the House of Lords, London, 24 November 2009

James Whittle

Clerk of the European Union Committee of the House of Lords, London, 24 November 2009

### ***Portuguese Parliament:***

Bruno Dias Pinheiro,

Representative to the COSAC Secretariat, Brussels, 27 May 2008

Clerk of the European Affairs Committee, Lisbon, 8 June 2010

João Maria Costa

Clerk of the European Affairs Committee of the Portuguese *Assembleia da República*, telephone and electronic correspondence, March-May 2011

*List of Interviewees*

***Informal discussions:***

Ricardo Passos

Director of the Directorate for Institutional and Parliamentary Affairs of the European Parliament

Paul Hardy

Legal Adviser and Counsel for European Legislation of the European Scrutiny Committee of the British House of Commons, Madrid, 5 November 2010

Fernando Frutuoso de Melo

Director of the Directorate for the Relations with the European Parliament, the European Ombudsman, the European Economic and Social Committee, the Committee of the Regions and the National Parliaments of the European Commission, Brussels, 28 May 2008

Estelle Carrelet de Loisy

Administrator in the Directorate for Relations with National Parliaments of the European Parliament, Brussels, 27 May 2008

Luca Visaggio

Clerk of the Legal Services  
Brussels, 8 February 2008

Guido Ricci

Clerk of the Legal Services  
Brussels, 8 February 2008

Anders Neergaard

Clerk of the Legal Services  
Brussels, 8 February 2008

## **List of Events Observed**

French *Sénat*, hearing in the European Affairs Committee of Commission Vice-President Jacques Barrot, Paris, 7 July 2009

British House of Lords, Europe Day, London, 10 November 2009

Portuguese *Assembleia da República*, plenary debate on the Commission's Legislative and Work Programme for 2010, Lisbon, 16 July 2010

European Parliament, Joint Parliamentary Meeting on the Western Balkans, Brussels, 26-27 May 2008



# Appendix 1

## Questionnaire for interviews with permanent parliamentary representatives in Brussels

### 1) GENERAL

- 1.1. What are the main functions of a permanent representative of a national parliament in Brussels? How is the position of a permanent representative legally regulated?

### 2) LEGITIMACY

- 2.1. **Interparliamentary cooperation.** What is the added value of *joint and bilateral parliamentary meetings* as well as *COSAC* in terms of the legitimacy and accountability of EU decision making? Are there any discussions on the substance of EU legislation or is it merely aimed at information exchange?
- 2.2. **Resolution.** In its Resolution on the relations between the European Parliament and national parliaments (2000), the European Parliament states that it is necessary for national parliaments "to define better and more clearly their power vis-à-vis their respective governments *and the European Union*".
- A. The European Parliament called for "giving parliaments *a new role enabling them to exercise responsibilities in constitutional matters*". What is this new role and how could this be achieved?
- B. The European Parliament "proposed that an *interparliamentary agreement* be drawn up between the national parliaments and the European Parliament as a means of introducing formal cooperation arrangements". Has it been drawn up and what is it aimed at?
- 2.3. **Case studies.** What particular EC/EU proposal provoked a strong opinion of your Parliament, regarding which it did not necessarily follow the Government's position? What particular EU proposals would you suggest for an in-depth analysis of the scrutiny of your Parliament?
- 2.4. **Subsidiarity check.** At the last COSAC meeting, Mr Pierre Lequiller said: "*We need to stop talking about subsidiarity and processes. It is time to really have constructive discussions of substance: how national parliaments can really influence legislation on climate change, energy, defence and the Union for the Mediterranean*".
- A. Does this mean a change in the perception of the role that national parliaments should play? Are national parliaments starting to consider themselves as equal counterparts of EU institutions?

- B. What is the practical outcome of the current informal dialogue on subsidiarity between the European Commission and your Parliament in terms of impact on Commission proposals? Do reasoned opinions differ substantially in different pillars? How are parliamentary reactions processed and taken into account by the Commission in concrete legislative dossiers?
  - C. Does your Parliament seek to voice its opinion *to EU institutions* even after the subsidiarity check, once the codecision procedure starts? Does the fact that most EU decisions are reached during the first reading and early second reading of the codecision procedure jeopardise national parliamentary scrutiny of EU decision making and what can be done about it?
- 2.5. Coreper.** Since the governments have their representatives in Brussels in the form of Coreper I and II, would you think that a more comprehensive parliamentary representation approaching that of Coreper would be beneficial for the legitimacy of EU decision making?

### 3) ACCOUNTABILITY

- 3.1. Beyond Treaty texts.** Has your Parliament already called an EU institution to account and is this possible at all beyond the Treaty text (e.g. Articles 197 and 201 EC)?
- 3.2. Council.** Is it possible to scrutinise the minister not in his or her capacity of national minister, but in his or her capacity of Council member (for the substance of EU decisions that have or have not been adopted in the Council)? If not, what are the obstacles?
- 3.3. Commission.**
- A. Do national parliaments seek to hold the Commission to account (e.g. the visit of Commission President Barroso to the French *Assemblée nationale*)?
  - B. What is the framework within which some national parliaments invite Commission representatives to give evidence (e.g. "an examination of the Commission" in the United Kingdom: 1<sup>st</sup> Report 2002-03 HL Paper 15, para. 13)?
- 3.4. European Court of Justice.** Referring to the ECJ jurisdiction pursuant to Article 8 Protocol on the application of the principles of subsidiarity and proportionality of the Lisbon Treaty, would you think that it is constitutionally possible for your Parliament to file an action in cases other than a breach of the subsidiarity principle (e.g. in case the Union breaches the time limits prescribed for the early warning mechanism or when the Union fails to send a draft proposal in the language of the receiver Member State)?
- 3.5 National courts.** Have there been any judgments by national constitutional courts on these topics?

## Appendix 2

### Discussion points for interviews with members of the House of Lords

The aim of this interview is to gain insight into the meaning of or reasoning behind the conclusions, claims or statements made by the House of Lords in their reports. These discussion points serve to guide the interview.

- **Introduction**

The EU Committee's scrutiny is primarily aimed at influencing the UK representative in the Council prior to his or her agreement to a draft legislative proposal. Some elements of the scrutiny seem to go beyond that objective (see the examples below). *Is it appropriate for your Lordships not to limit yourselves to the issue of the behaviour of the UK representative in the Council? Is your scrutiny aimed at informing the broader debate about EU affairs as such or only the British part in it? To what extent is the scrutiny shaped exclusively by the relationship between the Lords and the Government, and to what extent, if at all, by the input into the European debate (e.g. in EU institutions, such as the Commission, the Council or the European Parliament)? Can the two be distinguished?*

- **'Europe Day', 10 November 2009**

- The legal basis for establishing European Supervisory Authorities was questioned
- Accountability of the High Representative to the UK Parliament?
- Scrutiny reserve and "broad agreement" and "general approach"

- **Annual Report for 2009**

- The EU Sub-Committee on Foreign Affairs commented that the Commission's review of the European Security Strategy emphasised some of the concerns expressed in its report
- The EU Committee takes some pride in influencing the Commission, e.g. when the EU Sub-Committee on Home Affairs "persuaded the Commission to abandon an entire Regulation"
- During a debate on consumer rights in the European Parliament on 4 May 2009, both the competent Commissioner and Malcolm Harbour MEP referred to the EU Sub-Committee's inquiry. The latter went so far as to say, "we have assured them that their report will be able to have a material contribution on the outcome".
- 11 reports sent to the Commission
- 35 overrides of the scrutiny reserve
- 31 subsidiarity issues, of which only one by the EU Sub-Committee on Home Affairs and none by the EU Sub-Committee on Foreign Affairs
- Translations of reports?

- **The Commission's Annual Policy Strategy for 2009 (HL 151, session 2007-08)**

"The Annual Policy Strategy gives us the opportunity to *scrutinise the Commission's* intentions as early in the legislative process as possible" [...] "considering whether the Commission's proposed action is *appropriate and achievable*" [...] "We aim to *influence the Commission's* Legislative and Work Programme" [...] "we express our views on *whether the Government gives sufficient attention* to the Annual Policy Strategy.

- **European Union (Amendment) Act 2008**

- **Initiation of EU Legislation (HL 150, session 2007-08)**

Mr Harley: "It would also appear that the new arrangements under the Lisbon Treaty would permit national parliaments to communicate directly and to benefit from, if they so wish, a direct channel of communication between the national parliaments and the institutions of the European Union without necessarily going through their respective national governments, which is an interesting new development".

"Paul Heardman told us that the reports were well regarded in the European Parliament. As one voice among many seeking to influence legislation, the direct influence of a national parliament should not be exaggerated, but it may be able to influence the Commission to a degree".

- **Working Time and Temporary Agency Workers (HL 170, session 2007-08)**

"We urge the Government to argue energetically the case with MEPs for the merits of the texts agreed in the Council".

- **Europol (HL 183, session 2007-08)**

"It must be for the European Parliament to decide whether it wishes to adopt, in the spirit of the Treaty of Lisbon, a formal procedure for the scrutiny of Europol's activities, and whether, and if so how, to involve the national parliaments" [...] "The change in Europol's status which will be brought about in 2010 will not of course in any way affect the ability of this Parliament, through its Select Committees, to continue to hold the Government to account for their part in the activities of Europol".

- **PNR Framework Directive (HL 106, session 2007-08)**

"We believe that adequate and effective rules on data protection should be contained in the PNR Framework Decision itself, and we urge the Government to support this view in the course of the negotiations".

- **European Arrest Warrant (HL 89, session 2001-02)**

"The Government does not accept the need to make any further amendment to the text of the Decision to safeguard the application of human rights, in particular to avert possible breaches of Article 6 ECHR. We disagree. The Framework Decision should not be adopted without being amended it to make clear that the national judge in the executing

State can hear argument that to accede to a request for transfer might lead to an infringement of the ECHR rights, particularly under Articles 5 and 6, of the individual concerned. It should also be made explicit that the judge in the executing State would be entitled to refuse the request on such grounds".

- **The Services Directive Revisited (HL 215, session 2005-06)**

"This opposition struck a chord in the European Parliament, where the text of the Directive was extensively revised, and the Commission's revised draft Directive appears to accept the bulk of these changes".

- **Telecoms package and the cutting off of internet access without a prior judicial decision**

- **Relations between EU and US (HL 134, session 2002-03)**

"Parliamentarians should consider what more they could do to enhance understanding. We are aware that there are numerous efforts already made in this regard, both from within national parliaments and in the European Parliament, in addition to the work of such institutions as the North Atlantic Assembly; the British-American Parliamentary Group is another example of how Member State parliamentarians can form close relationships with the US Congress. At the same time, we recognise the limitations imposed by the multitude of demands upon parliamentarians. The priority given to the organisation, preparation and coordination of transatlantic parliamentary dialogue requires renewed attention".



## Appendix 3

### Questionnaire for interviews with members of the Portuguese Assembly

1. How can I access the *contents of meetings with Commission representatives* (e.g. that with the Commission Representation in Lisbon on the Commission's Annual Policy Strategy for 2008, then the hearing with Commission President Barroso of 13 April 2007; or the visit of Commissioners on 2-3 July 2007 where priorities of the Portuguese Presidency were debated)?

- Weblink or Diario:

- How many meetings were there so far with Commission representatives?

- Which debates were the most heated ones, if any?

2. How can I evaluate the Assembly's participation in *the Barroso initiative*?

- The Commission's website contains some reasoned opinions sent by the Assembly, but not all. Where can I access these reasoned opinions?

- The Commission's annual reports on relations with national parliaments do not contain the statistics on how many reasoned opinions each national parliament has sent so far, so are there any statistics on how many reasoned opinions Portugal has so far sent?

- Where can I access these reports?

- Which reports would you suggest for closer inspection as being representative of Portugal's active participation in the Barroso initiative?

- Was any proposal particularly politically important or sensitive for Portugal?

3. How can I access the *contents of meetings with the European Parliament representatives* (such as the public audition with MEPs on the Commission's Legislative and Work Programme for 2009 that was held on 6 January 2009, then joint parliamentary meetings, visits of Portuguese and other MEPs to the Assembly, etc.)? Furthermore, the Portuguese MP attending joint meetings with the European Parliament prepares a report about these meetings. Is there any follow-up?

4. How can I best assess the *contents of the Assembly's participation in COSAC*?

- Where can I access the Assembly's reports on COSAC meetings and debates in the European Affairs Committee on these reports?

- Did the Assembly find any EU initiative analysed within COSAC problematic?

- Are there any statistics on Portugal's participation in COSAC?

- How would you, as a member/clerk of the European Affairs Committee, evaluate Portugal's participation in COSAC? What is the added value of COSAC? How do you use information obtained through COSAC?

- Is there any difference in the scrutiny procedures for COSAC, for the Barroso initiative and for regular scrutiny?

*Appendix 3*

5. Does the ***Commission send replies*** to the European Affairs Committee's reports on the Commission's Legislative and Work Programmes (because these are sent to the Commission) and, if it does, how can I access these replies?

7. How can I access ***European resolutions*** of the Assembly (some are available on the website, but some are not)?

8. How can I learn about the ***scrutiny (reports, meetings, resolutions) of specific EU proposals prior to the adoption of the Monitoring Law of 2006*** (e.g. regarding the Services Directive)?

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## Summary

The structure and quality of EU democracy is greatly determined by the status that the European Union accords both to the European Parliament and to national parliaments. The potential that national parliaments carry for providing political accountability and democratic legitimacy to the EU decision-making processes in various fields of action has long been neglected. This study explores the role of national parliaments not only as actors of their own Member States but of the European Union as a larger constitutional compound. The study focuses on the parliaments of France, the United Kingdom and Portugal, which provide a representative sample as regards the system of government, the structure of parliament, the date of accession and so on. The analysis is divided into three parts.

Part I deals with the conditions under which national parliaments consent to the transfer of sovereignty to the Union. As the powers that they formerly enjoyed are to some extent taken over by the European Parliament, it was important to inquire whether national parliaments perceive the European Parliament as a partner or rival in effecting the accountability of EU executive institutions. The examples of the Coal and Steel Community Treaty, Maastricht Treaty and Lisbon Treaty show that a sense of partnership tends to prevail.

Part II delves into the Europeanisation of national parliaments and the correspondent reform of their competences of scrutiny over draft EU initiatives. While the constitutional contexts within which the selected parliaments operate differ, they have successfully adapted their scrutiny systems to the requirements of the post-Lisbon era. In formal terms, this enables them to participate in the scrutiny of EU policies satisfactorily.

Part III adds a qualitative empirical element to the analysis and tests whether and, if so, how national parliaments use their scrutiny powers in practice. We ask what claims they make as a result of their scrutiny. In the in-depth case studies of the Services Directive, the EU-US SWIFT Agreements and the European External Action Service Decision, we examine the attitudes of national parliaments towards different EU policy fields and different types of EU decisions, regarding which the European Parliament possessed different powers of intervention. Applying the method of parliamentary interdependence, we seek to find out whether the actorship of national parliaments is correlative to that of other parliamentary actors existing within the Union. The insight gained is that where an EU dossier is highly politically salient and gives rise to widespread contestation, national parliaments are likely to respond, often with quite specific demands. What is remarkable is that their response is not always addressed at the national government but sometimes also at EU institutions directly.

Part IV is interpretational. It argues that national parliaments occupy an important place on the map of EU democracy and that they at times act as EU

## *Summary*

organs. Their proximity to the electorate makes them an essential link between the citizens and the Union.

## Samenvatting (Summary in Dutch)

De structuur en de kwaliteit van de democratie in de EU worden sterk bepaald door de status die de Europese Unie verleent aan het Europees Parlement en aan de nationale parlementen van de verschillende lidstaten. Lange tijd is weinig aandacht besteed aan de mogelijkheden die nationale parlementen hebben om politieke en democratische legitimatie te geven aan Europese besluitvormingsprocessen op verschillende beleidsterreinen. Dit onderzoek gaat in op de rol die de nationale parlementen spelen, niet alleen in hun eigen Lidstaat, maar ook in de Europese Unie als grotere constitutionele samenstelling. Het onderzoek richt zich op de nationale parlementen van Frankrijk, het Verenigd Koninkrijk en Portugal, die samen redelijk representatief zijn wat betreft hun regeringssysteem, structuur van hun parlement, hun toetredingsjaar, enzovoort. De analyse bestaat uit drie delen.

Deel I behandelt de voorwaarden waarop nationale parlementen instemmen met het overdragen van soevereiniteit aan de Unie. Aangezien hun oude bevoegdheden tot op zekere hoogte zijn overgenomen door het Europees Parlement, was het van belang na te gaan of nationale parlementen het Europees Parlement beschouwen als partner of als rivaal bij het toepassen van hun controlebevoegdheden ten aanzien van de uitvoerende instellingen van de EU. Het Verdrag voor de Gemeenschap voor Kolen en Staal, het Verdrag van Maastricht en het Verdrag van Lissabon zijn voorbeelden waaruit blijkt dat er meestal een idee van partnerschap bestaat.

Deel II gaat in op de Europeanisering van nationale parlementen en de daarmee gepaard gaande hervorming van de bevoegdheden die zij hebben om concept-initiatieven van de EU te beoordelen. Hoewel er verschillen bestaan tussen de constitutionele context waarin de genoemde parlementen functioneren, hebben zij hun controle-instrumenten met succes aangepast aan de eisen van het post-Lissabontijdperk. Formeel gezien geeft dit hen meer dan voldoende mogelijkheden om deel te nemen aan het controleproces met betrekking tot het beleid van de Europese Unie.

Deel III voegt een kwalitatief-empirisch element toe aan de analyse en toetst of, en, zo ja, hoe nationale parlementen hun controlebevoegdheden in het kader van Europese besluitvorming in de praktijk uitoefenen. In dit deel wordt de vraag gesteld welke eisen ze stellen na hun toetsing. In gedetailleerde casestudies van de Dienstenrichtlijn, de SWIFT Overeenkomst tussen de EU en de VS, en het Besluit tot oprichting van de Europese Externe Actiedienst wordt onderzoek gedaan naar het standpunt van de nationale parlementen op het gebied van verschillende beleidsterreinen van de EU en verschillende soorten Europese besluiten, ten aanzien waarvan het Europees Parlement verschillende interventiebevoegdheden bezat. De methode van parlementaire onderlinge afhankelijkheid wordt hier gebruikt om uit te vinden of de rol van nationale parlementen gerelateerd is aan die van andere parlementaire spelers binnen de Europese Unie. Dit levert het inzicht op dat indien

## *Samenvatting*

een EU dossier politiek gezien bijzondere aandacht vergt en aanleiding vormt tot intensieve discussie, de kans groot is dat nationale parlementen zullen reageren met behoorlijk specifieke eisen. Opvallend is dat hun reactie niet altijd aan de eigen regering is gericht, maar soms ook direct aan instellingen van de EU.

Deel IV presenteert een interpretatie van de gegevens. Hierin wordt betoogd dat nationale parlementen een belangrijke rol hebben in het democratische systeem van de Europese Unie en dat zij soms optreden als EU organen. Zij staan dicht bij de kiezers en dit maakt hen een essentiële schakel tussen burgers en de Europese Unie.

## Curriculum Vitae

Davor Jančić was born in 1982 in Novi Sad, Serbia. He graduated *summa cum laude* from the Bachelor's programme in law at the University of Novi Sad as the student of the generation of both the Faculty of Law and the University itself. He continued his education at the University of Amsterdam, where he obtained a *cum laude* Master's degree in International and European Law. From 2007 to 2011, he was a PhD fellow in the field of European Constitutional Law at Utrecht University.

Davor has held research positions at Sciences Po Paris, the London School of Economics and the University of Lisbon. In 2011, he obtained a research fellowship from the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. Apart from this, Davor has published in *Columbia Journal of European Law*, *European Constitutional Law Review*, *Common Market Law Review*, *Interdisciplinary Political Studies* and other law journals. He also presented papers at many international conferences from Harvard, Pittsburgh and Victoria BC to Cambridge, Copenhagen and Leuven.

During his academic career, he was awarded a number of prizes. Among them, in 2011 he won the Europe Award for Junior Academics from the Montesquieu Institute, in 2010 an honourable mention from the Ius Commune Research Network and in 2007 the Plaque Top 10 Young Lawyers of Serbia.

Since the autumn of 2011, Davor has been working as a postdoctoral fellow at the Faculty of Law of Utrecht University.

