

This article is published in a peer-reviewed section of the Utrecht Law Review

## The Parliamentary Legitimacy of the European Union: The Role of the States General within the European Union

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### Introduction

The European Union is founded on the values of respect for freedom, democracy, the rule of law and fundamental rights, which are common to the Member States. This is how the Treaty on European Union says it since its inception in Maastricht.<sup>1</sup> Of these founding principles, democracy is possibly the most problematic within the architecture of the European Union. Due to its complex nature, the issue of democracy does not seem to be exhausted by the establishment of a European Parliament as an EU institution, judging by the continued attention paid to the role of national parliaments in the EU. There are good reasons for this attention. In the classic European understanding of the democratic state under the rule of law, parliaments are the primary sites of representative democracy. Parliaments are the primary representation of the national electorate and thus determine the democratic character of the national political order. Their primary role has been to legitimise governmental action through legislation and – at least in the parliamentary systems of Europe – by scrutinizing executive action.

This is so, notwithstanding the relative decline of parliaments resulting from a number of mutually reinforcing developments, not least of which is the shift of the locus of power from national to European and international arenas, through closely interconnected international and national decision-making complexes which are dominated by governmental executives to the exclusion of parliaments. One can hypothesise that this increases the importance of the national parliamentary scrutiny of such EU (and international) decision-making complexes, precisely in order to compensate for the increased executive dominance.

Yet the question of what the role of national parliaments as the locus of democracy still is, could be or should be in the context of European decision-making has received very different responses in the academic literature. These have gone in opposite directions, veering on the one extreme towards the denial that national parliaments have any role to play because they are not apt to do so neither institutionally

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1 Previously Art. 6 EU; now Art.2 TEU, which includes a reference to human dignity, equality and rights of persons belonging to minorities, as well as to 'a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail', making it too longwinded to memorize.

nor constitutionally,<sup>2</sup> to the hypothesis that parliaments can indeed play a new role within the perspective of a more encompassing constitutional order emerging in the European Union.<sup>3</sup>

This last view has Article 12 of the post-Lisbon Treaty on European Union in its favour. It stipulates that ‘national parliaments contribute actively to the good functioning of the European Union’, and that they do so by communicating constructively with the EU institutions and through their own practices by means of a set of mechanisms spelt out in the same provision. Although some institutional arrangements have been put in place in the EU allowing for a role of national parliaments, for the moment these are potentialities, not necessarily achievements and actual practices of the national parliaments. To that extent, the first view – that national parliaments are not fit for a European role – also has something in its favour.

One explanation of the persistently divergent views of the role of national parliaments within the EU may be caused by the ‘double’ nature which is necessarily attributed to national parliaments as soon as one considers them in the EU context. On the one hand, they are and remain *national* parliaments. They have their genesis in the national constitutional order which has called them into existence. Yet within the EU perspective they acquire a role outside it, as is expressed in Article 12 of the EU Treaty. This *dédoublement fonctionnel* is, however, also apparent in their national function of scrutinising national members of the executive for the action within the EU institutions (mainly: the Council, European Council and ‘comitology’): precisely because the national executive is held to account for what they do *qua* members of EU institutions, the national parliamentary activity is not only a scrutiny of a national agent but also a scrutiny of those institutions’ decision-making.

The implications of this hypothesis are several. One is that any research as to the factual and normative role that national parliaments play, and can play, within the framework of European integration in the European Union must take on board what national parliaments can do and actually do under their own constitutional arrangements and practices. These arrangements and practices show up their degree of openness to the EU and determine the extent to which they can actually participate in the Union’s activity, thus legitimating its output democratically. A comprehensive account of these constitutional arrangements and practices is therefore desirable not so much in the interest of the national parliaments as for fathoming the democratic development of the European constitutional order.

Another implication is that the study of national parliamentary practice must distinguish between parliamentary activity concerning EU decision-making which is geared to the national constitutional context, and the parliamentary activity that is geared to the EU and its institutions.

The first activity concerns the parliamentary *legitimacy of national executive action* regarding the EU. This is of the utmost importance since there can be little doubt that European integration and the institutional set-up of the European Union has significantly increased executive dominance over matters which otherwise would be within the remit of the national parliaments. A central question must therefore be whether parliament’s activity has been able (or not) to offset the increased executive dominance in matters of European integration.

Secondly, there is the aspect of parliaments’ role in the *legitimacy of the EU itself*. Here the emphasis would be on the ‘European instruments’, especially the subsidiarity review, the Barroso initiative and the access of parliaments to the European Court of Justice. The research question is whether these instruments can be and are used, given the national constitutional arrangements and practice.

In this article, we intend to pursue the issues outlined in the form of a case study of the Netherlands’ States General. This article presents the state of play in the Netherlands and thus aims to make a first contribution to a more comprehensive account of the role of national parliaments in the democratic development of the European constitutional order.<sup>4</sup> The contribution is modest and deserves further in-

2 P. Kiiver, *National parliaments in the European Union: a critical view on EU constitution-building*, 2006.

3 L.F.M. Besselink, ‘National Parliaments in the EU’s Composite Constitution: a Plea for a Shift in Paradigm’, in Ph. Kiiver (ed.), *National and Regional Parliaments in the European Constitutional Order*, 2006, pp. 117-131 and L.F.M. Besselink, *A Composite European Constitution*, 2007.

4 Of earlier relevant constitutional accounts of the state of affairs at the time in the Netherlands, we mention L.F.M. Besselink, ‘Parlement en Europese besluitvorming’, in *Parlement en buitenlands beleid* (Publikaties van de Staatsrechtkring nr. 5), 1993, pp. 47-83; N.Y. Del Grosso, *Parlement en Europese Integratie*, 2000.

depth study, in particular empirical studies, which have so far focussed on other research interests than the constitutional ones outlined above.<sup>5</sup> Yet, we believe that the answers outlined in this paper can render first answers to the questions formulated.

## Structure

In order to make this case study intelligible to the foreign reader, we first discuss the historical background to the present constitutional practice with regard to Europe, and provide the briefest possible outline of the most relevant constitutional features that distinguish the Dutch parliamentary system and influence the particular form the scrutiny of EU decision-making has taken (Section I).

The next two sections concern the parliamentary legitimacy of national government action in the EU, and focus on the national context. First we discuss parliamentary practice with regard to the Dutch Government acting in the context of the EU (Section II), while the central question in Section III is whether Parliament's activity has been able (or not) to offset the increased executive dominance in matters of European integration.

The next section takes on board Parliament's role within the EU framework itself, hence it concerns the *parliamentary legitimacy of the EU* (Section IV). We shall see that in practice the States General were anticipating the situation that was to arise under the Lisbon Treaty, paradoxically mainly by dismantling bicameral cooperation with regard to subsidiarity review, and by largely doing away with the most effective power any parliament has ever had within the EU, to wit, the consent requirement in the Area of Freedom, Security and Justice.

Section V takes stock of the somewhat mixed record of the Dutch Parliament in light of the research questions.

## I. THE HISTORICAL AND CONSTITUTIONAL CONTEXT

### 1. Historical background

Ever since the adoption of the EEC Treaty in 1957, democracy and the parliamentary representation of citizens have been matters of great concern within the Dutch Parliament, the States General (*Staten-Generaal*). What was later referred to as the 'democratic deficit' was already identified in the parliamentary debates in the 1950s;<sup>6</sup> that the limitation of democratic representation at the national level was not accompanied by parliamentary representation at the European level was viewed as a major problem for the democratic nature of the new European Communities.<sup>7</sup>

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5 The closest to this comes Davor Jančić, who includes a sample of case studies to support the constitutional analysis for the UK, France and Portugal in: *National Parliaments and European Constitutionalism: Accountability Beyond Borders* (Dissertation Utrecht University), 2011, <<http://igitur-archive.library.uu.nl/dissertations/2011-1004-200607/UUindex.html>>. See also K. Auel, 'Democratic accountability and national parliaments: redefining the impact of parliamentary scrutiny in EU affairs.', 2007 *European Law Journal* 13, no. 4, pp. 487-504; A. Benz, 'Path dependent institutions and strategic veto players: national parliaments in the European Union', 2004 *West European Politics* 27, no. 5, pp. 875-900; T. Bergman, 'National parliaments and EU affairs committees: notes on empirical variation and competing explanations', 1997 *Journal of European Public Policy* 4, no. 3, pp. 373-387; T. Raunio, 'Holding governments accountable in European affairs: explaining cross-national variation', 2005 *The Journal of Legislative Studies* 1, no. 3, pp. 319-342; T. Saalfeld, 'Deliberate delegation or abdication? Government backbenchers, ministers and European Union legislation', 2005 *Journal of Legislative Studies* 11, no. 3-4, pp. 343-371. Mention should be made of an interuniversity research project by political scientists on National Parliaments After Lisbon, which includes an Observatory on Parliaments after the Lisbon Treaty (OPAL); the consortium consists of research teams from the universities of Cambridge (Julie Smith, scientific coordinator), Cologne (Wolfgang Wessels, scientific coordinator), Maastricht (Thomas Christiansen, scientific coordinator).

6 The parliamentary committee preparing the approval of the EEC Treaty in 1956-1957 regretted that it was not discussed in the consultative assembly of the ECSC between the six governments and the parliamentary representatives of the six parliaments, and considered how this affected the position of the national Parliament vis-à-vis the Government, *Kamerstukken II* 1956-1957, 4725, no. 9, p. 2.

7 Similar concerns were expressed in the *Bundestag*. Draft resolutions of the *Bundestag* were included in the parliamentary documents of the States General, see *Bijlagen Handelingen II* 1956-1957, 4725, no. 14: 'Der Bundestag wolle beschließen dass (...) 8. die Stellung der europäischen Versammlung stetig gestärkt und vor allem so entwickelt wird, das alle parlamentarischen Rechte, auf welche die nationalen Parlamente der Mitgliedstaaten durch die Ratifikation der Verträge verzichten, auf das europäische Parlament übergehen, und die Stärkung der Kontrollbefugnisse der Versammlung verbunden wird mit einer Weiterentwicklung der Kompetenzen der Kommissionen' (proposal CDU/CSU of 4 July 1957); the SPD came with a similarly worded proposal.

One lasting particularity of the debate in the Netherlands has been Parliament's focus on its relation to the role of the European Parliament in European decision-making: its *lack* of formal co-decision powers has been a major justification for a role of the national Parliament; its *possession* of co-decisive powers as a justification to tone down that role. Nevertheless, Parliament has always been active in scrutinizing European affairs, at least in certain policy sectors. There are two landmarks in this regard. In the Act on Approval of the EEC and Euratom Treaties of 1957, it was stipulated that the Government was to send to Parliament an annual overview of the development of European integration. Firstly, this is the legal basis for an annual debate on European integration, since 1999 called 'the State of the Union debate' in which Dutch MEPs participate.<sup>8</sup> Secondly, the Dutch Lower House (*Tweede Kamer*) adopted what is the prototype of a scrutiny reserve, the very first ever parliamentary Resolution on 11 January 1967:

'The House, (...) judges that the Dutch Government shall not agree to definitive decisions in the Council on Community measures concerning the size and distribution of the tax burden unless it has previously consulted the Dutch Parliament.'<sup>9</sup>

Important as this precedent may be for the history of European integration, it has largely been forgotten in the Netherlands itself.

## 2. The constitutional framework

The States General's involvement in European decision-making is part and parcel of the general constitutional system of government. In this section we describe those constitutional features no further than is necessary for understanding that involvement correctly.

### 2.1. Constitutional features of the parliamentary system

The Dutch parliamentary system is based on a 'negative' rule of confidence: a government does not need the positive expression of the confidence of Parliament, but shall resign upon the adoption of a motion of censure. Due to the system of proportional representation in a multiparty political culture, Parliament is made up of minority parties. This necessitated coalition cabinets which since World War II until 2010 enjoyed positive political support from a majority in the Lower House. The 2010 elections led to a self-styled 'right-wing' minority coalition of Christian-Democrats and Liberals with the external support of the populist, anti-Islamic and anti-European PVV led by Wilders.

The States General are a bicameral Parliament. The Houses are called *Tweede Kamer* (literally, 'second chamber'), which is the Lower House, and *Eerste Kamer* (literally, 'first chamber'), which is the Upper House. These names may confuse foreign scholars engaged in comparative parliamentary studies, because the *Tweede Kamer*, 'second chamber', comes first in terms of powers and political prominence, and the *Eerste Kamer*, 'first chamber', comes second.

Uniquely among European bicameral systems, there is no mechanism for reaching consensus between the Houses, which jealously guard their independence towards each other. Almost unique is the fact that in legislative matters they decide consecutively, and independently of each other – the Upper House *always* after the Lower House has adopted a bill, with no possibility of referring the bill back from the Upper House to the Lower House.

8 Articles 4 and 5 of the *Wetten* of 5 December 1957, *Staatsblad* 493 and 494, ask the Government 'to report on the effects and application of the [Treaties] from which report it should appear to what extent *the institutions of the Community and the Member States, as well as our Ministers*, do justice to the necessity of a progressive expansion of employment opportunities in the Netherlands, having in view the population density and growth' (emphasis added). Until 1999 the annual reports were discussed in a committee meeting. The reporting duty was a compromise in order to withdraw an amendment which would have forced the Government to make a declaration upon ratification to the effect that the Communities and their institutions would apply the Treaties in such a manner as to take into account the demographic situation of the Netherlands as the most densely populated Member State. It may have been inspired by a similar undated resolution of the French *Assemblée*, reproduced in the Lower House parliamentary documents: 'a. Le Gouvernement devra présenter annuellement au Parlement, en vue de son approbation, un compte rendu de l'application du Traité de Communauté Economique Européenne et des mesures économiques fiscales et sociales intervenues dans la Communauté, en exposant les mesures qu'il a prises ou qu'il entend prendre pour faciliter l'adaptation des activités nationales aux nouvelles conditions du Marché.'

9 *Motie* introduced by the MPs Berg et al. on 11 January 1967. *Bijlagen Handelingen II 1966-1967*, 8556, no. 8. Translation by the authors.

There are only a few exceptions to this mutual independence. One is that the Houses cooperate in a joint committee on delegations to international (inter)parliamentary assemblies, and in the past also on two occasions concerning EU affairs. This was the case at the time of the second EU Convention, which drew up the abortive EU Constitution. As we shall see, this was also temporarily the case with regard to the subsidiarity review of draft EU legislative measures.<sup>10</sup>

A final proviso is that, on the whole, the *Eerste Kamer* (75 members) adheres to its less prominent political role than that of the *Tweede Kamer* (150 members). Politically, the *Tweede Kamer* is stronger than the *Eerste Kamer*: the Upper House is meant to be a *chambre de réflexion*. With regard to EU affairs, this recently led to the articulation by the *Eerste Kamer* of a doctrine of ‘complementariness’ with regard to its role in non-legislative procedures: the *Eerste Kamer* is complementary to the *Tweede Kamer* and should not deal with matters which have already been dealt with by the *Tweede Kamer* if this would result in an overlap.<sup>11</sup>

## **2.2. Constitutional provisions on the role of Parliament regarding the EU**

There is at present no explicit reference to the European Union in the Constitution (*Grondwet*), although some proposals for a constitutional amendment to that effect have been advanced.<sup>12</sup> There is no case law in the Netherlands on the role of the national Parliament or the European Parliament, as there is no specialized constitutional court in the Netherlands providing a judicial guarantee of the role of Parliament. It is left to Parliament to guard against infringements of its constitutional position.

Article 92 of the *Grondwet*, which allows the attribution of powers to international organisations, neither refers to the concept of sovereignty, nor to the European Union.<sup>13</sup> In principle, treaties involving such power attribution – as do all treaties – require the approval of both Houses of Parliament (Article 91 *Grondwet*). Approval may be either tacit or express, i.e. by an Act of Parliament.<sup>14</sup> The European Communities and EU treaties have always been submitted for express approval. A majority of two thirds of the votes is required in each of the Houses of Parliament if the treaty deviates from the Constitution. Though not without controversy,<sup>15</sup> this has so far not been required with regard to the European founding treaties or their amending treaties.

An important event in the recent history of the parliamentary approval of the EU treaties in the Netherlands was the negative outcome of the consultative referendum on the European Constitution in 2005, held at the initiative of the national Parliament, a vast majority of which had actually been in favour of the European Constitution.<sup>16</sup> The approval of the Treaty of Lisbon triggered the referendum discussion once more. The *Raad van State* (Council of State) found that the Lisbon Treaty lacked some important constitutional features of the Constitutional Treaty. The Council of State formulated a set of criteria for holding a referendum, without specifying whether these were actually fulfilled. This was eagerly under-

10 The States General can decide in ‘Joint Session’ specific decisions indicated in the *Grondwet* (e.g. certain bills concerning the King, kingship and declaring the country to be in a state of war), and meet for purposes other than decision-making (e.g. the annual speech from the throne, receiving a foreign head of state or government addressing it).

11 Letter of the Speaker of the *Eerste Kamer* to the Speaker of the *Tweede Kamer*, *Kamerstukken I* 2008-2009, 30953, G; and her speech of 8 September 2009 <[www.europapoort.nl](http://www.europapoort.nl)> (last visited 28 October 2011).

12 A bill to amend the *Grondwet* to require a two-thirds majority for amendments to the EU founding treaties is pending in the Lower House. A first plenary deliberation made clear that there is no majority for this proposal. In 2010, a Royal Committee of experts (*Staatscommissie Grondwet*) proposed to include in the *Grondwet* a duty ‘to promote the development of the European legal order’. Various other options were discussed in L.F.M. Besselink et al., *De Nederlandse Grondwet en de Europese Unie*, 2002.

13 ‘Legislative, executive and judicial powers may be conferred on international organizations under public international law, by or pursuant to a treaty, subject, where necessary, to the [qualified majority of two thirds of the vote in case of deviations from the *Grondwet*].’

14 The Act on the Approval and Publication of Treaties establishes that express approval is by Act of Parliament, while tacit approval takes place unless a House, or one fifth of its members, request express approval within thirty days after the treaty was laid before Parliament. The most important provisions of this Act in English are in L.F.M. Besselink, *Constitutional Law of the Netherlands. An Introduction with Texts, Cases and Materials*, 2004.

15 Recent research by Jieskje den Hollander, *The incoming tide: Dutch reactions to the constitutionalization of Europe* [working title] (dissertation University of Groningen), forthcoming, has shown that in its (confidential) advisory opinion on the approval of the original Treaties of 18 June 1957, pp. 1-2, the *Raad van State* found them to deviate from the *Grondwet* both in spirit and substance. The Council of Ministers (*ministerraad*) was divided on the issue, which led to a vote in favour of those who thought it unwise to apply the two-thirds majority requirement, Minutes of the *ministerraad* 1 July 1957, National Archives of the Netherlands (*Nationaal Archief*), no.2.02.05.02.

16 L.F.M. Besselink, ‘Double Dutch: the Referendum on the European Constitution’, 2006 *European Public Law* 12, no. 3, pp. 345-352; L.F.M. Besselink, ‘The Dutch Constitution, the European Constitution and the Referendum in the Netherlands’, in A. Albi, J. Ziller (eds.), *The European Constitution and the National Constitutions: the Ratification and Beyond*, 2006, pp. 113-123.

stood both by Government and a parliamentary majority to imply a negative opinion as to the need to hold a second referendum. This was crucial in Parliament's decision to refrain from organizing a second referendum.<sup>17</sup>

## II. PARLIAMENTARY PRACTICE WITHIN THE NATIONAL CONTEXT: THE PARLIAMENTARY LEGITIMACY OF GOVERNMENT ACTION WITHIN THE EU

In this section we first discuss the institutional committee structures in European Affairs, and next the instruments at the States General's disposal in order to hold the national Government to account when it acts in the EU context.

### 1. The committee structures in European Affairs

The *Grondwet* assumes the existence of committees without explicitly providing for them.<sup>18</sup> They are regulated in the Rules of Procedure of each of the Houses. Their tasks and powers vary. Most committees are involved in the legislative process and in holding the Government to account.<sup>19</sup> One of two distinctive features is that, traditionally, there were no *rapporteurs* in a committee. Secondly, as a rule committees do not take a stance on a bill or on a position taken by a government representative in a meeting with the committee; they limit themselves to deciding that the bill has been prepared sufficiently for referring it to the plenary, or refers a matter to the plenary if a committee debate with the Government gives rise to this. Committee meetings are public unless decided otherwise.

The scrutiny of EU documents has caused a change on both points. It is often the very purpose of an EU committee to propose a particular point of view to the plenary. Furthermore, the *Tweede Kamer* recently introduced the possibility of committee *rapporteurs*, basically to prepare the committee's work. Two *rapporteurs* were appointed by the EU Affairs Committee to prepare a proposal for a procedure for the parliamentary scrutiny reserve procedure required by the Act of Approval of the Lisbon Treaty, while also in the framework of the subsidiarity check *rapporteurs* have been appointed.<sup>20</sup>

#### 1.1. The Tweede Kamer European Affairs Committee

The *Tweede Kamer* has a Standing Committee for European Affairs (*Commissie EU-zaken*), which we shall refer to as the European Affairs Committee. The European Affairs Committee coordinates the parliamentary oversight of government action during negotiations at the European level. It also alerts and advises the other relevant standing committees about specific European developments in their policy areas, and refers matters to them in its 'gatekeeper' function, as further elucidated below. Ultimate responsibility for parliamentary oversight over government action with respect to specific instances of European decision-making lies with each of the relevant standing committees, but the general government policy regarding broader developments in the EU is scrutinized by the European Affairs Committee.

Every year the European Affairs Committee prepares the parliamentary debate on 'The State of the Union'.

The committee also organizes an annual parliamentary meeting on the European Commission's legislative and work programme. At the request of the European Affairs Committee, the other standing committees give their views on the programme as input for the discussion.<sup>21</sup>

#### 1.2. The Eerste Kamer Committee on European Cooperation Organizations

According to Article 32, paragraph 2 of the Rules of Procedure, the standing committees and the special committees prepare the debates on bills, and promote debate with the Government, also about other is-

17 Further details in B. van Mourik & L.F.M. Besselink, 'The role of the National Parliament and the European Parliament in EU decision-making: The approval of the Lisbon Treaty in the Netherlands', 2009 *European Public Law* 15, no. 3, pp. 307-318.

18 Art. 71 *Grondwet* mentions committees in passing in the context of parliamentary immunity.

19 P.P.T. Bovend'Eert & H.R.B.M. Kummeling, *Het Nederlandse parlement*, 2010, p. 180.

20 The *Eerste Kamer* does not have *rapporteurs*, but allows the forming of sub-committees composed of at least three members.

21 See <[www.tweedekamer.nl](http://www.tweedekamer.nl)> (last visited 28 October 2011).

sues within their remit. On this basis, the committees of the *Eerste Kamer* are involved in scrutinizing European legislative proposals. The Committee on European Cooperation Organizations (*Commissie ESO*) was established on 23 June 1970, long before the *Tweede Kamer* set up a European Affairs Committee. It used to have a 'gatekeeper' function, like that of the Committee of European Affairs in the *Tweede Kamer*. This has recently changed.

In 2009, the *Eerste Kamer* adopted a new working method with respect to the deliberation of European proposals coming directly from Brussels. The Upper House no longer waits for the information sent by the Government (in the form of so-called *fiches*, or notices), but acts independently on the basis of documents sent directly from Brussels. The essence of this new working method is that the standing committees themselves are generally responsible for following European initiatives within their own remit, without intervention from the Committee on European Cooperation Organizations.<sup>22</sup> The standing committees take the EU Commission's legislative and work programme as the basis for selecting documents for their deliberations. The Committee on European Cooperation Organizations plays a coordinating role in this process in that it monitors and evaluates the work of the various standing committees. The Committee on European Cooperation Organizations retains an important role in the general promotion of the involvement of the *Eerste Kamer* in European Affairs.

### ***1.3. The Eerste Kamer Committee for the Justice and Home Affairs Council***

Another highly important Committee involved in European Affairs in the *Eerste Kamer* is the Standing Committee for the Justice and Home Affairs Council. This committee was established to give effect to the parliamentary consent procedure that was introduced in the Act of Approval of the Maastricht Treaty.

Under this consent procedure, the Government was quite dependent on receiving the 'green light' from this Committee. It thus provided it with a great deal of information, including confidential information, at a very early stage of decision-making. This Standing Committee therefore acquired a stronger position in EU affairs than any other committee. Since the Treaty of Lisbon entered into force, the Committee continues its work regarding those very few matters for which the parliamentary consent procedure still exists within the Area of Freedom, Security, and Justice (Title V of the consolidated version of the Treaty on the Functioning of the EU), in which the European Parliament has no co-legislative powers. Although the Committee will remain involved in this policy area, it can be expected gradually to fade into the background with the eclipse of the consent requirement.

The Committee on European Cooperation Organizations and the Committee for the Justice and Home Affairs Council have together played an important role in promoting general parliamentary involvement with respect to EU affairs.

### ***1.4. The Temporary Joint Committee for Subsidiarity Review***

Until September 2009, there was a Temporary Joint Committee for Subsidiarity Review, first established in 2006, which examined whether European legislative proposals comply with the legal basis requirement and the principles of subsidiarity and proportionality.

Parliamentary reports in 2003 (*Op tijd is te laat* [On time is too late]) and 2006 (*Parlement aan zet* [Parliament's turn to make a move]) expressed the view that the States General should reinforce its position in relation to the scrutiny of draft proposals for European legislation. One of the results was the setting up of a mixed committee of the two Houses on subsidiarity in 2005, in 2006 converted into the Temporary Joint Committee for Subsidiarity Review (*Tijdelijke Gemengde Commissie Subsidiariteitstoets* or *TGCS*).

The decision to establish a joint committee was not undisputed. Eyebrows were raised about the composition of the committee, as it was equally composed of members of the two Houses. Some MPs argued that a joint committee would – whatever its composition – conflict with the principle of the primacy of the *Tweede Kamer*.<sup>23</sup> In the end a compromise was struck by giving the joint committee a temporary status.

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<sup>22</sup> See the speech by the Speaker of the *Eerste Kamer* on 8 September 2009, <[www.europapoort.nl](http://www.europapoort.nl)> (last visited 28 October 2011).

<sup>23</sup> *Handelingen II* 2005-2006, 35. See J.J. van Dijk, 'Hoe verging het de Tijdelijke Commissie Subsidiariteitstoets (TCS)?', 2007 *Regelmaat*,

In 2009, the Eerste Kamer evaluated the work of the Temporary Joint Committee for Subsidiarity Review, with the conclusion that the work of the Committee should not be continued.<sup>24</sup> The Eerste Kamer did not see any added value in its continuation, and found that it leads to an unnecessary delay of at least a week. The Eerste Kamer reconsidered its role in the European decision-making process, especially in relation to the Tweede Kamer. The main conclusion of this exercise was that the work of the Eerste Kamer should not overlap but complement the work of the Tweede Kamer. According to the Eerste Kamer, this means that the two chambers should conduct their own separate subsidiarity checks, while preventing an overlap through a mutual exchange of information, and striving for ‘like-mindedness’ in the assessment.

Reading the suggestions for reform, one cannot help thinking of the two Houses as ‘séparés inséparables’. The argument of the ‘complementarity’ of the Eerste Kamer vis-à-vis the Tweede Kamer is not altogether convincing from a constitutional point of view. A better explanation may be that, just as was the case under the consent procedure, most of the ‘dirty’ work was done by the Eerste Kamer, and comparatively little by the Tweede Kamer.

The Tweede Kamer initially created a separate Subsidiarity Committee. This committee was, however, not reinstated when the newly elected Tweede Kamer assembled in June 2010. At the moment the matter is left to the regular standing committees and the European Affairs Committee. The Eerste Kamer decided to entrust the task of subsidiarity review to the respective standing committees for each ministry.<sup>25</sup>

## 2. The parliamentary instruments with regard to EU decision-making

There are seven instruments which have developed over time with regard to EU decision-making, of which four are aimed at holding the national Government to account when it acts in the EU context.

The first two are the *fiches* (written notices) *procedure*, which is document-based, and the *agenda procedure*, which is procedure-based. The third instrument is that of the *consent requirement* which previously existed in the Area of Freedom, Security and Justice, but since the approval of the Lisbon Treaty only exists for decisions on which the European Parliament has no co-decisional powers. It was based on an assessment of documents, but in practice had strong features of the procedure-based model, since the consent in relation to a document frequently depended on how and when it was dealt with in the decision-making procedure in the EU Council. The fourth instrument is the *scrutiny reserve*, introduced when the Lisbon Treaty was approved.

The fifth, sixth and seventh instruments are the *subsidiarity review*, which is mainly document-based, the broader *policy dialogue* with the Commission known as ‘the Barroso initiative’, which is mainly procedural, and finally the *judicial procedure*, which is Parliament’s right to bring an action to the ECJ for an infringement of the subsidiarity principle. These concern the role of the States General within the EU independent from the national Government, and are discussed in Section IV.

The procedures described below operate with Article 68 of the *Grondwet* as a backdrop:

‘Ministers and State Secretaries shall provide, orally or in writing, the Houses either separately or in joint session with any information requested by one or more members, provided that the provision of such information does not conflict with the interests of the State.’

This provision also applies to the information which is requested with regard to EU decision-making. On the basis of this constitutional obligation, some specific instruments have been developed in parlia-

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no. 4, pp. 141-142. The author (an MP) argues that there were no constitutional objections: the opinions of the joint committee would be put to the plenary of the Houses, each of them remaining fully free to take their own view on the matter.

24 *Kamerstukken I* 2008-2009, 30953, F and G (15 June 2009).

25 *Kamerstukken I* 2008-2009, 30953, G (15 June 2009). Report of a meeting of the Committee for European Affairs of 2 September 2009; *Besluitenlijst van de procedurevergadering van woensdag 2 september 2009*, p. 3-4, under point 12 <[www.tweedekamer.nl](http://www.tweedekamer.nl)> (last visited 28 October 2011), establishing a Temporary Committee of the House on Subsidiarity Review consisting of the *Tweede Kamer* members of the previous Joint Committee.



mentary practice in order to scrutinize EU decision-making, mainly on the basis of a set of requests for continuous information from the Government.

## 2.1. Government 'fiches'

First, there is the 'fiches procedure'.<sup>26</sup> Through this procedure both Houses of Parliament are informed on a monthly basis about new European Commission proposals which, in the opinion of the relevant minister(s), have 'substantial consequences for the national legal order'.<sup>27</sup> The European Commission proposals are summarized for the Government by ministries at the request of a committee of civil servants from various ministries, on special forms, called 'fiches'. The *fiche* contains a brief summary and an assessment of the subsidiarity and proportionality of the proposal. It also indicates a negotiating position on the basis of the effects of the proposal for the Dutch legal order, and information on financial consequences of the European Commission proposal. These *fiches* are sent to both Houses of Parliament. In the period 2001 to May 2004, 523 *fiches* were sent;<sup>28</sup> in the period January 2005 to December 2008, 768 *fiches* were sent.

When the *fiches* arrive in the *Tweede Kamer*, the Standing Committee on European Affairs selects those which are of specific interest and forwards them to the relevant standing committee(s). Despite the fact that the *fiches* procedure enables the Lower House to influence the Government with respect to European decision-making at an early stage, most *fiches* are not discussed on a regular basis.<sup>29</sup>

The *Eerste Kamer* used to make a more intensive use of the *fiches*. On the basis of the *fiches*, officials of the European Bureau of the *Eerste Kamer*, which supports members of the Upper House in European affairs, made an e-file and put this online.<sup>30</sup> The e-file also contained other information from these officials for the Committee on European Cooperation Organizations and for further consideration in the other standing committees of the *Eerste Kamer*. If the Committee on European Cooperation Organizations decided to forward a proposal to a standing committee, the proposal was assigned a number of stars (ranging from one to three), indicating an assessment of their importance.<sup>31</sup> The standing committees discussed these proposals on a regular basis and, if they wanted more information, consulted the Government.<sup>32</sup>

Since the Upper House changed its practical procedures in 2009, the e-files are no longer based on the government *fiches*, but on the decision of a standing committee that a European legislative proposal is of special importance.

## 2.2. Agenda procedure

The *Tweede Kamer* – unlike the *Eerste Kamer* – supervises the Government in European affairs through the so-called 'agenda procedure'.<sup>33</sup> Under this procedure, at least one week prior to a Council or a European Council meeting, an annotated agenda for that specific meeting is sent to Parliament. Although the agendas are sent to both Houses, it is the *Tweede Kamer* in particular which discusses them, usually during the weekly 'Europe deliberation'. Participants in these meetings are members of the European Af-

26 For an extensive description of the *fiches* procedure see N.Y. Del Grosso, *Parlement en Europese Integratie*, 2000, pp. 173-177.

27 Aanwijzingen voor de regelgeving, aanwijzing 332. The origin of the *fiches* procedure goes back to a parliamentary debate in 1990, in which the Minister of Finance was requested to give Parliament information on EC legislation concerning insurances more frequently (*Handelingen II* 14 February 1990, 40-2323). Subsequently the Government was requested to extend this procedure to all policy areas (*Kamerstukken II* 1989-1990, 21 109, no. 17). The Government was willing to do so, and promised to present a list of Commission proposals on a monthly basis (*Kamerstukken II* 1989-1990, 21 109, No. 36).

28 *Algemene Rekenkamer, Aandacht voor financiële gevolgen Europees beleid* (Report of the Court of Audit of September 2004), *Kamerstukken II* 2003-2004, 29 751, no. 2.

29 This confirms an earlier evaluation of the General Committee for European Affairs, *Kamerstukken II* 1997-1998, 26 054, no. 1. See also O. Tans, 'The Dutch Parliament and the EU; A Constitutional Analysis', in O. Tans et al., *National Parliaments and European Democracy, A Bottom-up Approach to European Constitutionalism*, 2007, p. 172.

30 See <[www.europapoort.nl](http://www.europapoort.nl)> (last visited 28 October 2011).

31 The maximum of three stars was, for example, assigned to a proposal concerning the European Union Agency for Fundamental Rights (COM(2005) 280).

32 Further information about the *fiches* procedure in the *Eerste Kamer* can be found in *De Eerste Kamer en Europa*, <[http://www.eerstekamer.nl/id/vhyxhwkzewyv/document\\_extern/ekeneuropa/f=/ekeneuropa.pdf](http://www.eerstekamer.nl/id/vhyxhwkzewyv/document_extern/ekeneuropa/f=/ekeneuropa.pdf)>, pp.10-15 (last visited 5 March 2009), and *Nuttige wenken voor Leden van de Eerste Kamer der Staten-Generaal*, 2007, p. 5.

33 P.P.T. Bovend'Eert & H.R.B.M. Kummeling, *Het Nederlandse parlement*, 2010, p. 365 and N.Y. Del Grosso, *Parlement en Europese Integratie*, 2000, pp.177-189.

fairs Committee, members of the relevant standing committees and the ministers who will take part in the relevant Council meeting. After the Council meeting, ministers give an account of what happened in 'Brussels' to the same members of Parliament who were involved in discussing the agenda.<sup>34</sup>

The annotated agendas of European Council meetings are always first discussed in a committee, with the possibility to introduce resolutions in the plenary, where these are debated in a brief 'two-minute' debate. Until the spring of 2003, the results of each European Council were debated in the plenary, but this is no longer the case.

For the purpose of the agenda procedure, use can be made of the relevant *fiches* for proposals on the agenda, but frequently the annotated agenda includes issues for which no *fiche* is available. This is particularly true for the European Council agendas.

### 2.3. Consent requirement

In the Netherlands, parliamentary consent was required for binding decisions in the 'third pillar' (Title VI of the former EU Treaty which contained provisions on police and judicial cooperation in criminal matters) and decisions based on Title IV of the former EC Treaty which were not taken under the co-decision procedure. A similar requirement of parliamentary consent was first introduced upon the approval of the Schengen Agreement.<sup>35</sup> The Approval Acts of the Maastricht Treaty, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Prüm contain a similar provision.<sup>36</sup> The main reason for introducing the requirement of parliamentary consent was to compensate for the existence of a democratic deficit with respect to these decisions, as the European Parliament had no co-legislative role.

In practice, the major effect of the consent requirement has been that the Government has informed Parliament considerably more intensively about the state of negotiations, the positions of the Government and other Member States, and Parliament has in several instances influenced positions taken by the Government in the Council. An actual veto has never been cast. When the Treaty of Lisbon entered into force the most important change concerned the abolition of the consent requirement. Parliament agreed with the Government, after a long debate on the Approval Act of the Lisbon Treaty, that the requirement of parliamentary consent should be abolished in all cases in which the EP has powers of co-decision. It is maintained only for decisions in the Area of Freedom, Security and Justice (Title V of the Treaty on the functioning of the European Union) where the European Parliament has no co-legislative powers.<sup>37</sup>

### 2.4. Scrutiny reserve

The Act of Approval of the Lisbon Treaty provides for a duty of the Government to inform Parliament with respect to EU legislative proposals which one of the Houses finds of such particular political interest that it wishes the Government to inform it more specifically about that proposal.<sup>38</sup> Upon notification, the Government shall forthwith make a parliamentary reservation in Brussels. Within four weeks after the scrutiny reserve has been made, Parliament will consult with the Government as to the 'particular political significance' of the EU proposal, the manner of providing Parliament with information as regards the state of the negotiations, the legislative procedure and possible further consultations with the Government. The scope of this parliamentary procedure is limited to 'legislative acts in the sense of Article 2 of the Protocol concerning the Role of National Parliaments in the EU'.<sup>39</sup>

The *Tweede Kamer* and the *Eerste Kamer* each agreed on procedural principles to be followed in practice as regards the scrutiny reserve. The procedural principles in the *Tweede Kamer* are as follows.<sup>40</sup> Each year, on the basis of the Legislative and Work Programme of the European Commission, the *Tweede*

34 O. Tans, 'The Dutch Parliament and the EU; A Constitutional Analysis', in O.Tans et al., *National Parliaments and European Democracy, A Bottom-up Approach to European Constitutionalism*, 2007, p. 173.

35 Amendment by Van Traa-de Hoop Scheffer, *Kamerstukken II 1991-1992*, 22 140, no. 20.

36 Lastly, Arts. 3 and 4 *Rijkswet houdende goedkeuring van het Verdrag van Nice*, *Staatsblad* 2001, 677. The consent requirement was introduced in the Approval Act of the Treaty of Maastricht by amendment (Amendment by Van der Linden et al., *Kamerstukken II 1992-1993*, 22 647 (R1437), no. 20).

37 *Kamerstukken II 2007-2008*, 31 384 (R 1850), no. 11; the consent requirement is Art. 3 in the Act of Approval.

38 Art. 4(1) of the Act of Approval of the Lisbon Treaty.

39 *Kamerstukken II 2007-2008*, 31 384 (R1850), no. 23; this amendment became Art. 4 of the Act of Approval of the Lisbon Treaty.

40 *Kamerstukken II 2009-2010*, 32 258, no. 2.

*Kamer* establishes a list of European ‘priority proposals’ which may be subject to a scrutiny reserve or will be assessed on the principles of subsidiarity, proportionality and legal basis in EU law. The list is based on proposals pinpointed by the standing committees, and consolidated into a list by the European Affairs Committee. After a committee deliberation with the Government the (updated) list is submitted to the plenary for final approval. The Government must send a *fiche* within three weeks after the publication of a listed proposal. The relevant standing committee then decides if it wants to make a scrutiny reserve. If so, this decision is conveyed to the European Affairs Committee. The European Affairs Committee will ensure that it is transmitted for approval to the plenary. If the plenary decides to make a scrutiny reserve, the Government is informed in writing. At that moment the Government is obliged to make a parliamentary reserve at the European level. Within four weeks after the scrutiny reserve has been made, the *Tweede Kamer* will consult with the Government. In principle this consultation takes the form of a general deliberation (*Algemeen Overleg*) of the relevant standing committee with the responsible minister. Upon completion of this consultation the parliamentary scrutiny reserve is formally lifted. The first time the *Tweede Kamer* decided to make a scrutiny reserve was on the proposal for a regulation regarding the ‘Financial Regulation applicable to the general budget of the European Union’ in September 2010.<sup>41</sup>

In the *Eerste Kamer*, the decision whether a scrutiny reserve is to be made on a specific proposal is taken at the initiative of the relevant standing committee examining it after the publication of the relevant EU proposal.<sup>42</sup> Within four weeks after the scrutiny reserve has been made, the relevant standing committee of the *Eerste Kamer* consults with the Government. This consultation takes place in an oral deliberation of the relevant standing committee. This is quite exceptional as exchanges of the *Eerste Kamer* committees with the Government are usually in writing. Contrary to the procedure in the *Tweede Kamer*, the scrutiny reserve is not as a rule and necessarily lifted after consultations with the Government have taken place. The *Eerste Kamer* explicitly stated that it is possible to prolong the scrutiny reserve in case it wishes to receive more or continued information from the Government. Furthermore, the decision to lift the scrutiny reserve needs the approval of the plenary.

By the end of 2010, the *Eerste Kamer* had not yet made a scrutiny reserve. Also, with respect to the scrutiny reserve procedure the *Eerste Kamer* wants to complement and not overlap the work of the *Tweede Kamer*. It is as yet uncertain what this means in practice.

## 2.5. Sanctions

As to the enforcement of the Government’s duty to provide information to the Houses of Parliament and its members under Article 68 of the *Grondwet*, it is up to the individual MPs and to the relevant House, respectively, to assess whether the Government has fulfilled its constitutional duty towards Parliament in answering questions – a majority of the House is required in order to sanction any perceived infringement of this duty. Only the consent procedure provides Parliament with an efficient and effective instrument in order to make the Government more forthcoming in providing information. But this has largely been abolished, thus depriving Parliament from its most effective weapon. The scrutiny reserve may fulfil a similar function, but the *Tweede Kamer*, contrary to the *Eerste Kamer*, seems to consider this an instrument with a legally binding time limit, thus limiting the opportunity to demand further government information to the period between the making of the reservation and the lapsing thereof with the end of the committee consultation with the Government only. This would give the Government the power eventually to ignore Parliament’s requests for further information about the relevant EU decision beyond that timeframe. This means that the information position of the Lower House is weaker than under the consent requirement previously.

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41 COM(2010) 260. The general consultation was held on 5 October 2010, *Kamerstukken II* 2010-2011, 32 437, no. 8.

42 The procedure of the *Eerste Kamer* regarding the scrutiny reserve is explained in a memo of 4 March 2010, at <[http://www.eerstekamer.nl/eu/behandeling/20100304/memo\\_uitwerking\\_procedure/f=/vidrl6eloxz6.pdf](http://www.eerstekamer.nl/eu/behandeling/20100304/memo_uitwerking_procedure/f=/vidrl6eloxz6.pdf)> (last visited 28 October 2011).

### III. RELATIONS BETWEEN GOVERNMENT AND PARLIAMENT

European integration has no doubt reinforced the position of the executive at the expense of the position of Parliament. As a general phenomenon, this is no different from other countries, but we here seek to give an explanation for the particular causes of this in the Netherlands. We point to three possible explanations within the Dutch constitutional order: the constitutional system governing relations between Government and Parliament, the structure and organization of the executive in European affairs, and the position of Parliament in the parliamentary scrutiny of European affairs.

#### 1. Constitutional parameters of the relations between Government and Parliament

The constitutional parameters regarding the respective positions of the executive and Parliament in EU affairs explain the executive dominance on three points: the role of Parliament and the executive in the conclusion and revision of the founding Treaties, the position of Parliament in implementing secondary EU legislation, and the constitutional position of EU law under Dutch constitutional law.

##### 1.1. Approval of (the amendment of) the Founding Treaties

When entering into or amending the European project, Parliament can ultimately only say yes or no to whatever the outcome is of the negotiations leading to the founding treaties, the amendment treaties and the accession treaties. Of course, in the process leading up to the negotiated result, the Government does not act in total isolation from parliamentary involvement. But this involvement is merely deliberative. Parliament cannot force the Government to adopt a particular position. Nor does the Government always seek guidance from Parliament; on the contrary, it involves Parliament to muster support for its position, so as to make the results acceptable as far in advance as possible.

The ‘convention method’ does not fundamentally change the legitimacy of the result in terms of parliamentary involvement. The nomination of Parliament’s representatives was such that in a broad and nuanced political party landscape of minority parties, it could exclude certain voices.<sup>43</sup> Although Parliament met a number of times in a committee of both Houses – in itself a pretty unique circumstance – to discuss the state of affairs in the convention, this was similarly deliberative and did not seek to steer the position to be taken by the representatives.

##### 1.2. Implementing legislation

Obviously, the position of the legislature in implementing EU directives and framework agreements is of necessity weaker than when the legislature acts autonomously. For all intents and purposes, the right to amend bills is diminished to what is allowed by the EU measures. Very often, legislative implementation is through executive orders on the basis of a delegation clause in legislation. The more open the delegation clause, the broader the discretion for the executive to set the norms which they themselves execute. This reinforces executive dominance.

##### 1.3. The status of EU law in the Dutch legal order

Executive dominance is reinforced by the constitutional position of European secondary legislation in the Dutch legal order under the present Constitution. The *Grondwet* is fairly unique in providing that if their provisions are directly effective, decisions of international organizations overrule conflicting national law, including provisions of the *Grondwet* itself.<sup>44</sup> Unlike treaties, there is no general requirement of parliamentary approval for decisions of international organizations.

43 The *Tweede Kamer* had agreed unofficially that it would appoint a member of the Labour Party (PvdA), Timmermans, while the *Eerste Kamer* would appoint a member of the Christian Democrats (CDA), thus leaving the second largest party – the VVD – only the alternates. The VVD found that this interfered with the principle of proportional representation traditionally adhered to. See *Handelingen* / 5 February 2002, vol. 18, p. 890.

44 Art. 93 *Grondwet*: ‘Provisions of treaties and of decisions by international organizations under public international law which are binding everyone by virtue of their contents shall become binding after they have been published.’ Art. 94 *Grondwet*: ‘Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international

Moreover, there is a uniquely Dutch point of view in the doctrine that the autonomy of EU law also means that its legal effect in the Dutch legal order is not governed by national constitutional law. Although this conflicts with the very purpose for which the constitutional provisions on the effect of decisions of international organizations were introduced in the 1950s, even the penal chamber of the *Hoge Raad* (Supreme Court) has endorsed this view in an *obiter dictum*, in a judgment within days after the conclusion of the Treaty on a Constitution for Europe.<sup>45</sup> This view, if it were taken to its logical conclusion, would place EU law outside the purview of Parliament and the other constitutional organs unless EU law itself attributes powers to them. This would emasculate the powers of Parliament whenever the executive acts within the framework of the EU. Luckily, this position has not been taken up explicitly, although the previous Government took the view that under the Lisbon Treaty Parliament can only take positions which are binding on the Government if and when the Treaty explicitly attributes a role to national parliaments.<sup>46</sup> This comes very close to saying that the EU treaties determine the cases in which national parliaments can make use of their constitutional powers.

## 2. Structure and organization of the executive in European affairs

Executive dominance in EU affairs is in line with the traditional situation for foreign affairs. Though European affairs have traditionally been dominated by the Ministry of Foreign Affairs, this is less so now. Instead of reducing executive dominance, however, the normal non-foreign affairs part of the executive has acquired a dominance vis-à-vis Parliament in European affairs which it previously did not have in autonomous national affairs. European affairs have become, broadly speaking, internal affairs; in internal affairs with a European aspect to them, the executive has been able to assert a dominant position over Parliament which it did not previously possess.

The increased ‘spread’ of European affairs over different ministerial departments has increased the difficulty of coordinated executive action. An investigation by the *Algemene Rekenkamer* (Court of Audit) of 2004 indicated that, in the various ministries, there was usually no complete and uniform file available for the 60 dossiers it analysed with a view to Government informing Parliament on these files, but such a file needed to be ‘composed’ for the occasion, while in many cases information was incomplete or missing.<sup>47</sup> Usually, the substantive knowledge was in the policy directorates, while the knowledge of the negotiation process and communication with Parliament resided in the EU or international directorates.

Evidently, the incoherence of information within the executive increases the difficulty of a parliamentary grip over executive action in European affairs. Many reports have appeared on the improvement of the executive coordination of European affairs in the past few years. They acknowledge that a lack of such coordination makes it more complicated for the executive to provide information to Parliament.<sup>48</sup>

## 3. Dependence on the executive in parliamentary scrutiny

The tendencies towards executive dominance over Parliament are, of course, counteracted by the attempts of Parliament at involvement whenever EU decision-making is involved. For this, the information position of Parliament is crucial.

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organizations under public international law, which are binding everyone.’ There is a minority view that the overriding effect of directly effective international law over constitutional provisions is restricted only to treaties which have been adopted with a two-thirds majority under Art. 91(3) *Grondwet*, i.e. treaties which Parliament has declared to deviate from the *Grondwet*. This is relevant to EC and EU law as the founding and amending treaties were never approved under this provision.

45 HR 2 November 2004, LJN: AR1797. The timing can hardly be coincidence, in particular since the statement about European law’s effect *praeter constitutionem* was immaterial to the dictum. It remains a matter of speculation what exactly was the intention of this *obiter dictum*.

46 The Minister of the Interior stated that as the Lisbon Treaty does not provide for national parliamentary consent or involvement in the decision to make use of the *passerelles*, the Treaty prohibits even a *constitutional* provision requiring parliamentary consent before the Dutch representative in the Council agrees to such a Council decision; *Handelingen II* 17 June 2009, 96-7571.

47 *Algemene Rekenkamer, Aandacht voor financiële gevolgen Europees beleid* (Report of the Court of Audit of September 2004), *Kamerstukken II* 2003-2004, 29 751, no. 2, pp. 32-33.

48 *Raad van State, Jaarverslag 2004; Raad van State, Advies nr. W04.05.0338/I over de gevolgen van de Europese arrangementen voor de positie en het functioneren van de nationale staatsinstellingen en hun onderlinge verhouding, Kamerstukken II* 2005–2006, 29 993, no. 22; *Raad voor het Openbaar Bestuur, Nationale coördinatie van het EU-beleid: een politiek en proactief proces*, 2004.

### 3.1. *The success of the consent requirement and its abolition at the Government's initiative*

Most successful in this respect was no doubt the introduction of the consent requirement with regard to binding decisions in the area of Justice and Home Affairs and of the Area of Freedom, Security and Justice whenever there was no co-decision involving the European Parliament. This gave Parliament an instrument to force Government to give full information at all stages of the decision-making process as long as the Houses had not given their consent. Whenever the Government was reticent in providing information, when it gave incomplete information or was slow in providing information, the Houses (in practice nearly always acting upon the proposal of the *Eerste Kamer* Committee for the Justice and Home Affairs Council) could and would refuse consent until the matter was cleared. The consent requirement was in practice not a veto power that would ever be exercised, except in very unusual circumstances.

A brief investigation of the practice before and after the abolition of the consent requirement with regard to the Area of Freedom, Security and Justice after the introduction of co-decision is telling. As a consequence of the move to co-decision,<sup>49</sup> the consent requirement was abolished, as stipulated under the Act of Approval of the Treaty of Amsterdam. Whereas before co-decision was introduced, the *Eerste Kamer* in particular showed a relatively intense interest in decision-making, the *Eerste Kamer* no longer took any significant initiative afterwards, not even with regard to such highly sensitive issues as the Schengen Border Code,<sup>50</sup> the establishment of SIS II,<sup>51</sup> or the powers of the Frontex Rapid Border Intervention Teams.<sup>52</sup> The main explanation for this is that it received significantly less information from the Government; or rather, as a consequence of abolishing the consent requirement it no longer had an instrument to force the Government to keep it informed of the state of play in negotiations and the position which the Government took on draft legislation.<sup>53</sup>

Apart from the fact that the consent requirement was abolished with the entry into force of the Lisbon Treaty, except for a very small number of issues, most EC and EU measures have always been outside the scope of the consent requirement. Here, the information position of Parliament is – at least in practice – comparatively weak.

The success of the consent requirement with respect to the information position of Parliament became clear immediately after the entry into force of the Lisbon Treaty. The *Eerste Kamer* Committee for the Justice and Home Affairs Council noticed a significant decline in the provision of relevant documents by the Government since the abolishment of the consent requirement. The committee entered into correspondence with the relevant minister and eventually invited him to discuss the matter orally.<sup>54</sup> During this oral deliberation the minister was requested to inform the committee in the same way as he used to do under the consent requirement. The minister promised to inform the committee more extensively, yet there are still some documents which will not be forwarded to the committee that they previously received. For example, documents which are qualified as '*limite*' will not be submitted, whereas this was common practice under the consent requirement.<sup>55</sup>

### 3.2. *The fiches in practice*

Initially, Parliament had made itself practically entirely dependent on the information from the Government on EC and EU matters, thus reaffirming executive dominance.<sup>56</sup> Only in recent years has Parliament become aware of the limitations this poses. As to the present practice with the *fiches*, it is a well-known fact, also admitted by the Government, that they are usually too late. They very often appear after negotiations have begun, which diminishes the scope for parliamentary influence.

49 Council Decision 2004/927/EC, 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 Art. 251 of that Treaty; for the *passerelle*, see Art. 67, para. 2, second indent EC Treaty.

50 Regulation (EC) No. 562/2006 of the European Parliament and of the Council.

51 Regulation (EC) No. 1987/2006 of the European Parliament and of the Council.

52 Regulation (EC) No. 863/2007 of the European Parliament and of the Council.

53 Van Mourik & Besselink, *supra* note 17, p. 318.

54 *Handelingen I*, 15 June 2010, 32 317, J.

55 See the letter of the Minister of Justice of 6 July 2010, *Kamerstukken I* 32 317, no. P.

56 L.F.M. Besselink, 'Parlement en Europese besluitvorming', in *Parlement en buitenlands beleid*, 1993, pp. 47-83.

It has been the intention since 2003 to send a *fiche* to Parliament within 6 weeks of publication of the Commission proposal. Since 2005, a shorter *fiche* on important proposals should reach Parliament within three weeks. In reality, in 2005 no more than 8 % of the *fiches* were sent on time; this improved to nearly 35 % in 2008. This still means that about two thirds of the *fiches* are too late. If one looks at the average number of days it takes, the figures are even worse. Instead of being within the maximum term of 42 days, the average in the period 2005-2008 was 78 days (over the period 2001-2004 it was 83 days).<sup>57</sup> This does not necessarily mean that the matter has already been dealt with in the EU Council. In an estimate by the *Algemene Rekenkamer*: around one third of the *fiches* reach Parliament after the matter has been decided in the Council – but this figure may be distorted; the estimate does not appear to take into account the various ways in which a proposal can be put on the Council agenda, or the various kinds of status such proposals may have.

The introduction of the shorter *fiches* has not really remedied the situation. Briefer versions of the already brief *fiches* usually mean less information, but what is more decisive is the fact that they are hardly used in practice.

The State Secretary for European Affairs, who made his own evaluation shortly before the *Algemene Rekenkamer* published its results, was above all happy with the improvement since 2005 (the reduction to, on average, a 35-day delay!); but he promised once again to improve his ways.<sup>58</sup>

### **3.3. The agenda procedure**

It should be stressed that the *fiche* is usually not the only information sent to Parliament by the Government.<sup>59</sup> In approximately two thirds of the cases, extra documents are sent, of which the annotated agendas form an important part. Occasionally, the Government provides information, mostly in the annotated Council agendas, before a *fiche* has been prepared.<sup>60</sup>

In the agenda procedure, the annotated agenda of an EU Council (or European Council) meeting is discussed briefly before the relevant meeting takes place. In a number of cases the agenda item will have an accompanying *fiche*, but often the annotation is the only information on the basis of which Parliament discusses the matter.

This annotation is often significant in that the negotiating position is made clear. This clearly has the potential to trigger political interest. There is no certainty that in cases in which a *fiche* is available, the *Tweede Kamer* makes full use of that information, but in the absence of a *fiche*, it may be more difficult for the *Tweede Kamer* to assess the importance of a certain agenda item. The *Algemene Rekenkamer* has established that with regard to the ‘second pillar’, the discussion was never on the basis of a *fiche* as none was made.<sup>61</sup> The only information Parliament has to go by is the annotation by the Government to the relevant agenda items.

### **3.4. Does it make a difference and does it matter?**

Two more issues are whether *Parliament* in practice proves really to care about the information provided on EU affairs, and whether the *Government* really cares what Parliament’s views are. On both scores the evidence of some years ago is not reassuring.

In 2004, the *Algemene Rekenkamer* undertook an in-depth analysis of the files and *fiches* on the basis of a stratified random sample of 60 files and how they were treated in the *Tweede Kamer*. (This analysis has already been referred to above.) Of these 60 issues, 23 were put on the agenda for debate at least once in one of the standing committees of the *Tweede Kamer*; on 14 occasions a question was put in a committee meeting; written questions were posed on four issues, and twice a resolution was proposed. In four

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57 The figures are in the *Algemene Rekenkamer* report, *Aandacht voor financiële gevolgen van Europees beleid; Terugblik 2009*, 29 September 2009, *Kamerstukken II 2009-2010*, 29 751, no. 4, pp. 13-16.

58 Letter of the State Secretary for European Affairs Timmermans of 29 June 2009 containing his own evaluation of the *fiches* procedure, *Kamerstukken II 2008-2009*, 22 112, No. 884.

59 *Algemene Rekenkamer* 2004, supra note 28, pp. 39-40.

60 *Ibid.*, p. 41; this occurred in 23 out of 220 letters sent by ministers to the Lower House which were analysed.

61 *Ibid.*, p. 23.

cases, the *Tweede Kamer* requested and obtained further information. Out of the 60 subject files, five *fiches* were used and discussed intensively by the *Tweede Kamer*.<sup>62</sup>

It was also found that where matters were put on a committee agenda, in the majority of cases the matter was not discussed due to an overload of agenda items.<sup>63</sup>

In the same report the *Algemene Rekenkamer* found that there was a ‘great discrepancy’ between what was contained in the files at ministerial departments concerning information to and from the *Tweede Kamer*, and what could actually be traced in the official Parliamentary Documents. Interviews at the ministerial departments revealed that often the officials dealing with the substance of a file did not know that the Lower House had been informed, nor did they know anything about what the *result* of Lower House action was concerning the relevant file.<sup>64</sup> This gives food for thought, and implies that not only is there executive dominance over Parliament in EU affairs, but more disconcertingly, the executive is not interested in what Parliament’s actions and views are with regard to EU affairs.

### 3.5. *Alternative sources of information*

One cause of information asymmetry is that many MPs are often not highly informed or very knowledgeable about EU affairs in general. This is also the case for MPs elected on the anti-European ticket of the populist parties from the left and right. This means that unless clerical support is rallied, and civil society (NGOs and the like) brings issues to the attention of Parliament, these will not easily be picked up independently by MPs or their parliamentary groups.

In 2010, clerical support was such that the EU Affairs Committee of the Lower House has 8 fte substantive expert support, over and above one clerk and a secretarial staff of one (in 1993 it was still only 0.5 clerk, 0.25 staff and a 0.25 secretarial support). The *Eerste Kamer* committee has one expert and one further support staff; its Europa Bureau has 4 staff members and 2 deputy clerks, as well as two information specialists. The *Tweede Kamer* EU committee has a separate travel budget, which is significantly higher than for other permanent committees, but lower than for the Foreign Affairs Committee; the *Eerste Kamer* committee does not have a separate budget for travel for the committee. Since 2004, the States General have a permanent representative of the *Eerste* and *Tweede Kamer* in Brussels, Mr Overbeeke, who liaises between the institutions and the States General, and can bring proposals to the attention of the Houses at a very early stage.

The *Eerste Kamer* has an open website, ‘*Europa portaal*’, through which information and documentation per file is collected and made available.<sup>65</sup>

### 3.6. *Independent information gathering and ‘politicization’*

The States General has for a long time been receiving all Commission documents directly from Brussels, but it has taken a long time to set up a procedural mechanism to deal with these independently. This really only started to take shape with the introduction of the subsidiarity review.

For politicians, it is the Government’s position which is the major cue for MPs to take a stance on issues. In EU affairs, this position tends not to be a highly politicized view, either because the substance of the issue is highly technocratic, or to avoid parliamentary controversy; so parliamentary activity is not easily triggered spontaneously.

In this light it remains to be seen in practice how the new approach introduced as of September 2009 in the *Eerste Kamer*, indicated above, will work out. The abolition of the coordinating and stimulating role which the Committee on European Cooperation Organizations played (its ‘gatekeeper’ function) is supposed spontaneously to be taken over by the regular standing committees. This may only work in practice if the subsidiarity scrutiny is taken as a cue in order to create a political approach to the EU files.

The abolition of the Joint Committee on Subsidiarity, due to a perceived lack of added value by the Upper House, may highlight the question whether separate scrutiny is in fact more efficient, although

62 *Ibid.*, p. 23.

63 *Ibid.*, p. 43.

64 *Ibid.*, pp. 40-41.

65 The website is not very transparent and ‘user friendly’, as is true of many documentary websites of national parliaments on EU affairs.



it is claimed to save time. The intention is to have a mutual exchange of information by the committees of each House as to which decisions are under scrutiny. This still has to prove itself in practice.<sup>66</sup> The simultaneous undertaking of the *Eerste Kamer* not to engage in the scrutiny of proposals which are under scrutiny at the Lower House may prove counterproductive, in as much as the quality of the scrutiny by the Lower House has on the whole been inferior to that of the Upper House.

Again, one should not expect a subsidiarity review to work wonders. Experience has confirmed that national positions which governments take on the matter tend to be reproduced at the level of the national parliaments. Small wonder, as governments tend to be supported by a parliamentary majority. Moreover, national positions in EU affairs tend not to be overly divisive along the political lines of government/opposition cleavages.

The major advantage of subsidiarity scrutiny may be that Parliament is involved and has informed itself about some European dossiers from a very early stage – but some dossiers only, as the subsidiarity test is limited to *legislative* proposals, and ‘legislative’ issues do not take the highest place in the priority ranking of the more political branch of parliaments either in the Netherlands or in other parliamentary systems.

#### **IV. THE STATES GENERAL AS A EUROPEAN PARLIAMENT: PARLIAMENTARY LEGITIMACY OF THE EU**

In the academic literature, the view has been put forward that the role of national parliaments within the encompassing constitutional order of Europe depends on whether one views them as exclusively bound to their national constitutional context, or views them within the larger complex of interacting public institutions, empowering and regulating the exercise of public authority in Europe. In the latter view national parliaments may gradually become actors within the EU system as such.<sup>67</sup> This would mean that a national parliament – representing EU citizens – would directly communicate with the European institutions, and the European institutions with the national parliaments, as well as parliaments with each other.

We briefly discuss the extent to which this has taken shape for the States General, and the various forms it takes.

##### **1. Parliamentary participation and cooperation beyond the national constitutional order**

Both Houses do not consider their position in a dogmatic way as being exclusively linked to and merely functioning within the national constitutional setting. Beyond the national constitutional setting, we distinguish between the dynamics from Europe directly to the national parliament and that from the national parliament to Europe.

###### ***1.1. From Europe to the national parliament***

One form of parliamentary involvement beyond the national constitutional institutions is the round of visits which the European Commission President has made to national parliaments of all the Member States, during which he has debated with parliaments to defend the Commission programme. The speech by Barroso and the plenary debate with the *Assemblée Nationale* in 2006 was exemplary.<sup>68</sup> In the Netherlands, however, the Commission President did not have that kind of public reception. Unlike heads of state and government, he has never been received in order to speak to the States General in Joint Session, nor in any of the Houses. The speech to the States General has remained off the parliamentary records, and the questions posed on that occasion to Barroso as well as his answers have remained confidential. The opportunity to hold an EU institution to account in Parliament was not seized.

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66 For some practical arrangements see *Kamerstukken I* 2008-2009, 30 953, G and *Kamerstukken II* 2009-2010, 30 953, no. 4.

67 L.F.M. Besselink, ‘National Parliaments in the EU’s Composite Constitution: a Plea for a Shift in Paradigm’, in Ph. Kiiver (ed.), *National and Regional Parliaments in the European Constitutional Order*, 2006. pp. 117-131; also L.F.M. Besselink, *A Composite European Constitution*, 2007.

68 For the full debate, see <[www.assemblee-nationale.fr/international/barroso.asp](http://www.assemblee-nationale.fr/international/barroso.asp)> (last visited 28 October 2011).

Another aspect is that members of the European Parliament, who have been elected in the Netherlands, have the right to speak and participate in the deliberations of the *Tweede Kamer*.<sup>69</sup> For a number of years they have been invited to Parliament to intervene in the yearly debate on the State of the European Union. In addition, MEPs are welcome at the EU committee meetings (though there is no information on whether they attend). A similar possibility is not provided for in the Rules of Procedure of the *Eerste Kamer*.<sup>70</sup> Initially, the *Tweede Kamer* showed extreme caution in allowing MEPs to speak in the plenary. The anecdote is recounted that the first time MEPs showed up to take their seats in the front row in the Lower House, some members of the *Tweede Kamer* quickly occupied the seats intended for the MEPs to prevent them from taking such prominent places. Also, a discussion took place on whether, as a matter of principle, they were allowed to pose questions to the Government and whether the Government should be allowed to answer them, as Article 68 *Grondwet* seemed to suggest to some that there is an exclusive communicative relation between the members of the States General and the Government. These matters now seem to belong to the past.

### 1.2. From the national parliament to Europe: the political dialogue under the Barroso initiative

Another, and perhaps more significant, form of parliamentary activity beyond national constitutional boundaries is the ‘Barroso initiative’ undertaken by the European Commission since 2006, in order to consult the national parliaments before a definitive Commission proposal has been formulated. This is viewed by the responsible commissioner, Wallström, and by Barroso as a ‘political dialogue’ with ‘unprecedented’ possibilities for national parliaments ‘to give comments, criticism and positive feedback on Commission proposals, and the Commission the opportunity to both listen and to explain better.’<sup>71</sup>

From the annual reports which the Commission has published on the response from national parliaments to pre-legislative draft proposals, it appears that the Dutch Parliament has not fully seized its opportunity to give its input and full assessment of the Commission proposals. After a slow start, the States General have increased their response over the years, from 2 in 2006 and 1 in 2007 to 8 registered opinions in 2008, and 19 in 2009.<sup>72</sup>

Unlike some other parliaments, the States General took a fairly limited approach to the ‘political dialogue’ by restricting themselves to a ‘subsidiarity review’ (which in Dutch practice includes an assessment of the legal basis under Article 5 EC and proportionality) instead of giving a full political assessment of the draft proposals. If the States General have concluded that there is no ‘subsidiarity’ problem, they do not state why, nor do they communicate any further political assessment, so no response from the Commission is elicited. The full merits of the draft proposal have so far not been made the object of communications with the Commission, although the Commission has explicitly solicited such an assessment on the merits. Yet, we notice a marked broadening in the comments provided on Commission proposals. Nevertheless, the Dutch Parliament’s assessments do not always seem to make an impact. A striking example was the proposal for a Directive on quality and safety standards for human organs intended for transplantation, which was the object of intense scrutiny by the *Tweede Kamer*. Its final assessment that it infringed the principle of subsidiarity was, however, totally ignored by the Commission, possibly due to the late conclusion of the assessment and the phrasing of its first response to the Commission: courteous but critical in Dutch eyes, favourable in the eyes of the Commission.<sup>73</sup>

### 1.3. Subsidiarity review

Finally, there is the subsidiarity review. A central role was played by the Temporary Joint Committee for Subsidiarity Review, but, as we mentioned above, that body has been defunct since 1 September 2009.

69 Art. 55a, Rules of Procedure *Tweede Kamer*.

70 This does not mean their participation is impossible, but requires ad hoc decisions to that effect. To our knowledge members of the European Parliament who were not simultaneously members of the *Eerste Kamer* have never participated in the deliberations of the House. Some MEPs have, however, participated in deliberations about EU affairs at the level of political groups in the Upper House.

71 See Press release by the European Commission (Barroso/Wallström), 28 September, 2009, IP/09/1368; letter by Barroso and Wallström, 1 December 2009 to the Parliaments.

72 Annual Report 2009 on Relations Between the European Commission and National Parliaments, Brussels, 2.6.2010, COM(2010) 291 final, with Annexes, published June 2010; some double counting may have occurred.

73 See Annual Report 2009, June 2010, supra note 72, pp. 4-5: ‘(...) only the Austrian *Bundesrat* issued a negative subsidiarity opinion’.

Since a *fiche* is only produced when an official Commission (or sometimes Member State) proposal has been published, while a subsidiarity review (in its broad sense, and including a review of proportionality and legal basis) occurs in an earlier phase, there are no *fiches* available to take as a starting point. If a *fiche* is produced on a dossier for which a subsidiarity review has taken place, this is included in the *fiche*. In practice, the regular standing committees of both chambers select a number of draft proposals on the basis of the European Commission's legislative and work programme.

The Lisbon Protocol on Subsidiarity and Proportionality (despite its name) only seems to grant national parliaments a right to issue a reasoned opinion to the Commission based on subsidiarity, according to the Commission's own fairly technical definition.<sup>74</sup> As we have mentioned above, however, the States General have not restricted their judgement to a narrowly defined subsidiarity test, but have extended their judgement to cover issues of proportionality as well as an assessment of the legal basis for the legislative proposal.

This is quite understandable, as subsidiarity, even in a strict definition, involves a broader political assessment. The Dutch Government had stated upon the adoption of the Act of Approval of the Lisbon Treaty that it supports the continuation of the practice to take a broader approach so as to include a review of proportionality and legal basis.<sup>75</sup> Moreover, the broader approach is by no means a uniquely Dutch phenomenon, as proven by the COSAC pilot projects on subsidiarity.<sup>76</sup> As a matter of fact, the European Commission takes an even broader view by relating the role of parliaments in the context of subsidiarity to a full political dialogue on its proposals.<sup>77</sup>

Three questions on the future consequences of this practice remain, however. The first is whether the Commission will attach any consequence to an objection on the proportionality or the legal basis of the proposed legislative measure. A second point concerns the relation between the political dialogue of the Barroso initiative and the subsidiarity procedures. It is unclear to what extent the political dialogue will recede into the background under pressure from the 'yellow' and 'orange card' procedures. On the one hand, the Dutch Parliament has never fully seized the opportunity of a broad political dialogue with the Commission on draft proposals but has limited itself to issues of their subsidiarity, proportionality and legal basis. On the other hand, this scrutiny has most recently been taken more seriously by the *Tweede Kamer* than before, and has been broader in scope than before.

Thirdly, the effects of the strict subsidiarity review under the Protocol's procedures might lead a national parliament to take a narrow view of its role within the larger EU framework. This seems to be the case with the States General.

#### ***1.4. Judicial protection of national parliaments at the European Court of Justice***

The pre-Lisbon Protocol on the Role of National Parliaments may already mean that if the time limits stipulated therein within which national parliaments must be informed of legislative proposals have not been respected, this legally vitiates the validity of an EC measure taken. No case, however, has been brought to the ECJ arguing that invalidity. It would have needed an initiative from a parliament affected by that procedural shortcoming to have its government bring an appeal for annulment. In German law, the federal government has been under the obligation to bring such a case to the ECJ since the entry into force of the Maastricht Treaty.<sup>78</sup> Similar legislation does not exist in the Netherlands.

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74 See Art. 7(2) and (3) of Protocol No. 2.

75 See *Kamerstukken II* 2007-2008, no. 31 384, on p. 88.

76 See COSAC, *Tenth Biannual Report: Developments in the European Union, Procedures and practices relevant to parliamentary scrutiny*, 2008, p. 19.

77 See EU Commission, 1 December 2010, Practical Arrangements for the Operation of the Subsidiarity Control Mechanism Under Protocol No. 2 of the Treaty of Lisbon, p. 4: 'As the subsidiarity control mechanism will be applied *alongside the political dialogue, which covers all aspects of those documents transmitted to national Parliaments, and not only compliance with the principle of subsidiarity*, the Commission invites national Parliaments to distinguish in their opinions as far as possible between subsidiarity aspects and comments on the substance of a proposal, and to be as clear as possible as regards their assessment on a proposal's compliance with the principle of subsidiarity.' (emphasis added).

78 This is a constitutional obligation as to subsidiarity complaints with the entry into force of the Lisbon Treaty, see German constitutional amendment of 8 October 2008, which inserted an Art. 23(1a) into the *Grundgesetz*: 'Der Bundestag und der Bundesrat haben das Recht, wegen Verstoßes eines Gesetzgebungsaktes der Europäischen Union gegen das Subsidiaritätsprinzips vor dem Gerichtshof der Europäischen Union Klage zu erheben. Der Bundestag ist hierzu auf Antrag eines Viertels seiner Mitglieder verpflichtet.'

A new element in Protocol No. 2 is that Article 8 provides for actions for the annulment of an EU act being brought to the ECJ not only by Member States (read: governments), but also by parliaments for an infringement of the subsidiarity principle. It provides that the ECJ shall have jurisdiction in cases ‘notified by [the Member States] in accordance with their legal order on behalf of their national Parliament or a chamber thereof’. The language reveals that it is not the government or Member State which is actually bringing the action, but the parliament or a chamber thereof: the government merely ‘notifies’ it. Parliaments are thus recognized as true actors in their own right within the EU constitutional order, prised away from the grip of their governments in the particular context of European Union decision-making, also vis-à-vis the European Court of Justice.

In the Netherlands, the Act of Approval concerning the Lisbon Treaty failed to provide for a legislative right for Parliament and a concomitant duty for Government to bring a case to the ECJ. As implementing legislation is in practice passed together with the Act of Approval of a treaty necessitating implementation,<sup>79</sup> it would seem to follow that the Government did not intend to create a binding obligation on its part. After the entry into force of the Lisbon Treaty, however, the Government has announced that it will act upon a legally not binding resolution (Dutch: *motie*) or a decision of the Houses to bring an action for annulment before the ECJ for an infringement of the subsidiarity principle on behalf of the chamber(s).<sup>80</sup> Parliament decides on the contents of the appeal, which means that the agent of the Government at the court in Luxembourg only fulfils a notifying role. Overall, the question remains why this procedure was not included in the Act of Approval. The way in which this method is now arranged might be considered as politically binding. There is, however, no legal obligation for the Government to comply with a request of either one or both Houses, as a resolution or a decision of the chamber cannot be regarded as legally binding on the Government.

## 2. Relations with other national parliaments

The position of the Dutch Parliament towards the COSAC is currently somewhat ambiguous. This can in part be explained by the preoccupation of the *Eerste Kamer* with disbanding the Joint Committee on Subsidiarity, and creating a procedure which should do more justice to its ‘complementary’ nature in relation to the *Tweede Kamer*’s more prominent political role. Initially, the *Tweede Kamer*, or some of its key members in this respect, had high hopes of the potential role of COSAC in formally coordinating the subsidiarity mechanism after the entry into force of the Lisbon Treaty. To that effect, a proposal was made to COSAC at the Bled-Brdo meeting (May 2008), which was finally rejected at the Paris meeting in November 2008. Instead it is now left to parliaments themselves to exchange relevant information in the course of the subsidiarity procedure under Lisbon, via the IPEX website. This seems to have disillusioned some Dutch MPs.

In view of the frequency of COSAC’s meetings and the limited number of concrete policy files dealt with (only two per year), COSAC, which has always had a very limited institutional role to play in effective interparliamentary political exchange, is not considered an appropriate body in that respect. COSAC is a useful instrument, but its usefulness is restricted, is the prevalent view. Also, the fact that COSAC is a forum for European affairs committees, not of sectoral and subsidiarity committees, imposes restrictions. The permanent representatives of the national parliaments in Brussels are, however, considered to be of great importance for interparliamentary contacts between MPs.<sup>81</sup>

79 This follows from the *Aanwijzingen voor de regelgeving*, Art. 311 and its explanation.

80 See for the initiative of the Government regarding this issue *Kamerstukken I 2009-2010*, 30 953, K and L. The *Tweede Kamer* decided to use a resolution to express its wish to bring a case before the ECJ. The *Eerste Kamer* prefers to use ‘a decision of the chamber’.

81 This is a widely accepted view among officials of the *Tweede Kamer*. In preparation of the national report for the biannual Conference of the *Fédération de Droit Européen* in Madrid 2010, Auke Baas conducted an interview with officials of the *Tweede Kamer* and the parliamentarian (*Tweede Kamer*) Ten Broeke. The interviewees confirmed the great importance of the permanent representatives in Brussels.

### 3. The relations with the European Parliament

At the practical level, the relations with the European Parliament are quite limited. No new initiatives have been developed, as requested by the Brok resolution of the European Parliament (6 May 2009).

At staff level, contrary to the well-established relationship with the Commission, contacts with EP officials are ad hoc. At the political level, ways are sought to bring MPs and MEPs together, but of existing possibilities, the speaking time for MEPs at the annual State of the Union debates, mentioned above, is the most concrete example. At party level, there are periodic meetings between the members of the political groups represented in the States General and the MEPs of the same party, but these do not appear to be the powerhouses for exchanging political information on concrete dossiers of common political concern.

At the ideological level a deeply enshrined major obstacle to close cooperation between the States General and the European Parliament is the doctrine of their mutual exclusiveness. From the beginning onwards, the role of national parliaments has been understood to be mainly a compensation for the lack of democratic parliamentary legitimacy at the European level. This lack of democratic legitimacy is not viewed in factual political terms, but in terms of formal competence: the lack of formal co-decisive power of the European Parliament is considered the main justification for the Dutch Parliament's involvement in European affairs.

It was the reason for introducing the consent requirement in the context of the Schengen Implementing Convention, the Third Pillar of the Maastricht Treaty, and the introduction of the Euro. The formalism went so far as to stipulate in the Act on Approval of the Amsterdam and Nice Treaties that the consent requirement was automatically rescinded as of the moment that for issues within Title IV of the EC Treaty (Area of Freedom, Security and Justice) the unanimity procedure was exchanged for the regular co-decision procedure. The lack of a formal role for the EP was not only the reason for *giving* a strong role to the national parliament; the existence of formal co-decisive powers was also a reason *to take away* that role from the national parliament.

The constitutional logic of this reasoning may be highly disputable,<sup>82</sup> but the previous Government was happy to use it, and took the initiative to abolish the whole of the consent requirement in the Bill for the Approval of the Lisbon Treaty. It was even a reason for the Government strongly to resist the introduction in that Bill of a formal scrutiny reserve.<sup>83</sup> The Government maintained that in practice this would have the same effect as a consent requirement, because it would enable Parliament to retain a reserve until the Government yielded to Parliament's wishes. On the consent requirement, the Government largely got its way through the use of pressure on the coalition parties in the *Tweede Kamer* – giving them their 'marching orders' as a prominent Labour MP called it off the record. On the second, it only mellowed when an amendment on a 'scrutiny reserve' in a weakened form was proposed, which was supported by a majority of the House: a 'scrutiny' reserve can be imposed by either of the Houses on issues of particular political importance within two months after the European proposal is received (see also Section II, Subsections 2.3 and 2.4).

## V. FINDINGS AND CONCLUSIONS

We first sum up some distinctive elements regarding the parliamentary legitimacy of national government action regarding the EU, in light of the question whether Parliament's activity has been able to offset the increased executive dominance. Secondly, a short assessment is given of Parliament's role in the legitimacy of the EU itself. We end with an overall assessment of the role of the Dutch Parliament in the EU decision-making process.

The Dutch Parliament has designed several instruments which are aimed at holding the Government to account with regard to EU affairs. Special among them was the consent requirement with regard to bind-

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82 See Van Mourik & Besselink, *supra* note 17.

83 See on this particular matter E.C.M. Jurgens, 'Senatu deliberante, Europam probat', 2009 *RegelMaat*, no. 5, pp. 274-275.

ing Third Pillar decisions and intergovernmental decisions under Title IV of the EC Treaty, which was largely abolished with the entry into force of the Lisbon Treaty. The States General have been the only national parliament which formally had a legal veto power regarding secondary EU law. Its abolition of the consent requirement was based on the assumption that a national parliament only has a role to play with regard to EU decision-making if the European Parliament formally does not have a role – we return to this below.

The abolition of the consent requirement had immediate negative effects on the information position of Parliament, which is crucial for the attempts of Parliament to counteract the increased executive dominance. The abolition of the consent requirement weakened the information position of Parliament, as the instrument was mainly used to force the Government to keep Parliament informed on European decision-making.

The abolition may partly be compensated by the ‘scrutiny reserve’ introduced with the approval of the Lisbon Treaty. With respect to the *Eerste Kamer* it is questionable, however, whether or not the scrutiny reserve will have such an effect. In light of the new working method of the *Eerste Kamer*, the *Eerste Kamer* wants to complement and not overlap the work of the *Tweede Kamer*. Hence, the *Eerste Kamer* has announced caution in its use of the ‘scrutiny reserve’. Under the consent requirement the *Eerste Kamer* used to have a different approach, which followed from the fact that the Government needed the consent of both Chambers of Parliament. Since the *Eerste Kamer* was regarded as the most active chamber with regard to scrutinizing EU decision-making, it would seem that the weakened information position negatively affects the *Eerste Kamer*’s role especially. This makes it more difficult for Parliament to counterbalance the executive dominance in EU affairs.

The assessment as to Parliament’s role in the legitimacy of the EU itself would be that the States General have been open to direct communication with the EU in the framework of the Barroso initiative and the subsidiarity mechanism, although with some reticence and quite a slow start. It is a regrettable, however, that the strict subsidiarity review under the Lisbon Protocol on Subsidiarity and Proportionality only seems to grant national parliaments a right to issue a reasoned opinion to the Commission based on subsidiarity. In the Netherlands this seems to have the effect that the States General take a narrow view of its role within the larger EU framework, although it is too early to make more definitive statements on this.

The overall assessment would be that the States General have all in all dealt with EU decision-making fairly actively. Over time, instruments have been put in place aimed at the scrutiny of the national representatives in the Council and European Council, thus enabling parliamentary legitimacy within national constitutional terms to their functioning within EU institutions. Instruments and practices have been developed also for direct scrutiny and communication of EU institutions concerning the Barroso initiative and the EU subsidiarity mechanism.

The instruments exist, although some have shortcomings, in particular the instrument of a parliamentary appeal to the ECJ (no adequate legal form binding the Government to bring a case) and the practice under the *fiches* procedure (the lack of timely provision of information and relative parliamentary neglect); for ‘comitology’ procedures no effective instrument has been designed, nor has attention been paid to them otherwise, thus effectively placing a large part of executive activity outside the sphere of parliamentary scrutiny.

The practice shows that most instruments have been used, though with different degrees of intensity and continuity in the two Houses of Parliament and their different parliamentary committees. Notably, they have been slow in using the European instruments, notwithstanding some (perhaps too) early enthusiasm on subsidiarity review. This reflects the relative ‘cognitive dissonance’ of MPs with the EU and its affairs; EU affairs bring many MPs outside their comfort zone. This is not only because they are not all and equally well versed in EU affairs, but also because of the particular circumstance of a new Eurosceptic political mood which has been reigning in Dutch politics since the referendum of 2005 and which showed the extent to which politicians and electors can be out of touch on EU affairs.

This may also explain the deep confusion of the distinct roles with regard to the parliamentary legitimacy of *national* actors in EU affairs and the parliamentary legitimacy of the *EU* itself. This confusion reached constitutional proportions in the justification for abolishing the ‘consent requirement’. The

abolition was based on the assumption that a national parliament has no role to play with regard to EU decision-making if and when the European Parliament has formal decisional powers in the relevant EU matter. If that were true, this would have two consequences. Firstly, it would mean that members of the national executive are no longer accountable to parliament – indeed, the national constitution would no longer be relevant to their action within the EU institutions. The second consequence would be that the EU institutions themselves, although they exert considerable powers over national subjects, need no longer to possess national parliamentary legitimacy. This runs counter to Article 12 of the TEU since the Treaty of Lisbon. As both these consequences are at odds with Dutch constitutional principles, the logic of the abolition of the ‘consent requirement’ – whatever its other merits or demerits – must be dismissed. Our final conclusion can therefore be that constitutionally the States General contribute to the parliamentary legitimacy of the EU, both in terms of national constitutional accountability and in terms of contributing to the legitimacy of the EU institutions themselves.