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## The Barroso Initiative: Window Dressing or Democracy Boost?

Davor Jančić\*

### 1. Introduction: refurbishing EU parliamentary democracy

Although historically five years is a negligible period of time, in European integration it can spark important developments. Such is the case with the so-called Barroso Initiative (the Initiative), named after João Manuel Durão Barroso, incumbent second-term President of the European Commission. The purpose of his Initiative is to reinforce the democratic basis of the Union by involving national parliaments of the Member States more closely in the EU policy-making processes beyond the texts of the founding treaties.

This development is partially inspired by age-old appraisals that the Union is democratically deficient, because it does not live up to the standards of parliamentary democracy of its Member States. The EU is allegedly not as democratically legitimate as the states that created it.<sup>1</sup> As Siebersson has assessed, however, the Lisbon Treaty offers more opportunity than before for public input. The European Parliament becomes ‘a full co-legislator and full participant in the budgetary process,’ national parliaments play a significant but predominantly consultative role in the pre-legislative phase,<sup>2</sup> and the EU citizenry profits from the citizens’ initiative and better information about Council negotiations. Yet, the democratic deficit persists.<sup>3</sup>

While the assertion of a democratic deficit is certainly a matter of the criteria used,<sup>4</sup> these voices have been loud enough to exert a reaction by the Commission, whose powers of legislative initiative and implementation place it at the forefront of the EU executive branch. A hand of cooperation was extended

\* Postdoctoral Fellow, Institute of Constitutional and Administrative Law, Utrecht University School of Law, Utrecht (the Netherlands) and Visiting Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Germany). E-mail: [D.Jancic@uu.nl](mailto:D.Jancic@uu.nl).

1 See for instance: D. Chrysochoou et al., ‘European Democracy, Parliamentary Decline and the “Democratic Deficit” of the European Union’, 1998 *Journal of Legislative Studies* 4, no. 3, pp. 109-129; R. Kuper, ‘The Many Democratic Deficits of the European Union’, in A. Weale & M. Nentwich (eds.), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, 1998, pp. 143-158; A. Follesdal & S. Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’, 2006 *Journal of Common Market Studies* 44, no. 3, pp. 533-562. See contra: A. Moravcsik, ‘In Defence of the “Democratic deficit”: Reassessing Legitimacy in the European Union’, 2002 *Journal of Common Market Studies* 40, no. 4, pp. 603-624.

2 See useful overviews in: M. Wyrzykowski et al., ‘General Report: The Role of National Parliaments in the European Union’, in G.C.R. Iglesias & L.O. Blanco (eds.), *The Role of National Parliaments in the European Union: Proceedings of the FIDE XXIV Congress Madrid 2010 – Vol. 1*, 2010, pp. 1-78; M. Gennart, ‘Les Parlements Nationaux dans le Traité de Lisbonne: Évolution ou Révolution’, 2010 *Cahiers de Droit Européen* 46, no. 1-2, pp. 17-46; G. Barrett, ‘“The King is Dead, Long Live the King”: The Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty Concerning National Parliaments’, 2008 *European Law Review* 33, no. 1, pp. 66-84; A. Delcamp, ‘Les Parlements Nationaux et l’Union Européenne: De la Reconnaissance à l’Engagement’, 2011 *Revue du Marché Commun et de l’Union Européenne*, no. 544, pp. 7-12.

3 S.C. Siebersson, ‘The Treaty of Lisbon and Its Impact on the European Union’s Democratic Deficit’, 2008 *Columbia Journal of European Law* 14, no. 3, pp. 463-464.

4 G. Majone, ‘Europe’s “Democratic Deficit”: The Question of Standards’, 1998 *European Law Journal* 4, no. 1, pp. 5-28.

to national parliaments.<sup>5</sup> The Barroso Initiative therefore represents a move towards mitigating the persisting democratic deficit in the Union.

This article carries out an in-depth analysis of the Barroso Initiative from a juridico-political point of view. The objective is to shed light on its nature, meaning and implications for national parliaments. To this end, we first describe how and why it came into being, what it is and how it operates. Thereafter, we make a sweeping comparison across the Member States in order to provide a broad overview of the most typical features of national parliamentary participation in this Initiative. On that basis, we turn to a more detailed examination of the activities of the French, British and Portuguese parliaments within it in order to show the different constitutional consequences that the Initiative can have for domestic parliamentary bodies.

## 2. Origins of the Barroso Initiative

The Barroso Initiative can be traced back to 2001 when the Commission set out to reform EU governance. In its preparatory report for the White Paper on European Governance, the Commission *inter alia* sought to make national parliaments – together with the European Parliament, the Committee of the Regions, and the Economic and Social Committee – ‘the architects of public debates on European matters.’<sup>6</sup> This initial enthusiasm, likened by an author to *perestroika* and *glasnost* of President Gorbachev of the Soviet Union,<sup>7</sup> dissipated into thin air with the White Paper itself, since it did not make much progress in integrating national parliaments under the Union’s aegis.<sup>8</sup>

It was in February 2005 that the Commission adopted what it called a ‘national parliaments approach’. It conceded that it could not remain indifferent to the representation of national assemblies in Brussels and that it could not afford not to exchange views with national parliaments during the period of reflection on the Constitutional Treaty. Neither could it ignore the evolving national systems of *ex ante* parliamentary scrutiny. The Commission did however declare allegiance to two principles: (a) the institutional balance, meaning that its primary discussion partners are the European Parliament and the Council; and (b) respect for the constitutional diversity of the Member States. The objectives laid down in a ten-point plan by Margot Wallström, the then Vice-President of the Commission, included visits to national parliaments, participation in COSAC and the Conference of Speakers of the EU Parliaments, and a more technical support for national parliaments.<sup>9</sup>

In May 2006, the Commission, presided over by José Barroso, announced its wish to transmit all new proposals and consultation papers, such as Green and White Papers, directly to national parliaments and invited them to react with a view to improving the processes of policy formulation and their implementation.<sup>10</sup> This is the first time the Barroso Initiative appeared in an official EU document. The wish was endorsed at the European Council meeting in June 2006:

‘The European Council notes the interdependence of the European and national legislative processes. It therefore welcomes the Commission’s commitment to make all new proposals and

5 However, there is no consensus in the literature that the direct participation of national parliaments in EU processes is a positive course of action. See for instance: Y. Devuyt, ‘The European Union’s Institutional Balance after the Treaty of Lisbon: Community Method and Democratic Deficit Reassessed’, 2008 *Georgetown Journal of International Law* 39, no. 2, pp. 311-315; P. Kiiver, *National Parliaments in the European Union: A Critical View on EU Constitution-Building*, 2006.

6 European Commission, ‘European Governance: Preparatory Work for the White Paper’, 2002, p. 31.

7 A. Cygan, ‘The White Paper on European Governance – Have Glasnost and Perestroika Finally Arrived to the European Union?’, 2002 *Modern Law Review* 65, no. 2, p. 230.

8 European Commission, ‘European Governance: A White Paper’, COM(2001) 428. The White Paper did recommend that ‘[d]emocratic institutions and the representatives of the people, at both national and European levels, can and must try to connect Europe with its citizens’ (p. 3), that ‘the involvement of national parliaments and their specialised European affairs committees, as already practiced by the European Parliament, could also be encouraged’ (p. 17), and that ‘[t]he European Parliament and all national parliaments of the Union and the applicant countries should become more active in stimulating a public debate on the future of Europe and its policies’ (p. 30). This last recommendation became an action point. See more in: A. Follesdal, ‘The Political Theory of the White Paper on Governance: Hidden and Fascinating’, 2003 *European Public Law* 9, no. 1, pp. 73-86; C. Scott, ‘The Governance of the European Union: The Potential for Multi-Level Control’, 2002 *European Law Journal* 8, no. 1, pp. 59-79.

9 European Commission, ‘Annual Report 2005 on the Relations with the National Parliaments’, SEC(2006) 350.

10 European Commission, ‘A Citizens’ Agenda: Delivering Results for Europe’, COM(2006) 211, p. 9.

consultation papers directly available to national parliaments, inviting them to react so as to improve the process of policy formulation. The Commission is asked to duly consider comments by national parliaments – in particular with regard to the subsidiarity and proportionality principles. National parliaments are encouraged to strengthen cooperation within the framework of the Conference of European Affairs Committees (COSAC) when monitoring subsidiarity.<sup>11</sup>

Thereupon, the Barroso Initiative began its operation in September 2006 and continues to apply.

### 3. Definition and scope of the Barroso initiative

The Barroso Initiative is a broad political dialogue between the Commission and the national parliaments of the Member States on all aspects of the former's legislative agenda. It primarily encompasses the invigilation by national parliaments of the Commission's compliance with the principles of subsidiarity, proportionality, conferral and political accountability.

The monitoring of the *subsidiarity* principle is aimed at ensuring that, in the areas falling outside the ambit of its exclusive competence, the Union acts only when the goals of the action it proposes to take cannot be sufficiently achieved at the national level, but can be better achieved at EU level.<sup>12</sup> Subsidiarity, hence, does not apply where the Union is exclusively competent to act. This concerns the customs union, competition policy, monetary policy for the Eurozone, the conservation of marine biological resources under the common fisheries policy and common commercial policy.<sup>13</sup> In all other areas, the EU must respect the subsidiarity principle.

In similar fashion, the principle of *proportionality* requires that the content and form of EU action do not exceed what is necessary to meet the Treaty objectives.<sup>14</sup> Proportionality is thus not restricted and applies to all policy sectors.

Under the principle of *conferral* the Union may only act within the boundaries set by the Member States in the Treaties and only in order to attain the objectives laid down therein.<sup>15</sup> The policing of this principle is performed by verifying whether the Commission acts under a correct legal basis. This shields the Member States' competences from possible encroachment by the Union.

The principle of *political accountability* is an essential component of democratic government whereby the executive branch is under a duty to provide parliamentary bodies with adequate explanations, clarifications and reasons for its action.<sup>16</sup> Within the context of the Barroso Initiative, this means that the Commission is under a duty to justify its policies to national parliaments. Yet this would address only one portion of the accountability deficit in the Union, of which the unaccountability of the Council of Ministers as a collective EU body is perhaps even more acute.<sup>17</sup>

11 Presidency Conclusions, Brussels European Council of 15-16 June 2006, Para. 37.

12 Art. 5(3) TEU. See recent analyses in: T.v.d. Brink, 'The Substance of Subsidiarity: The Interpretation and Meaning of the Principle after Lisbon', in M. Trybus & L. Rubini (eds.), *The Lisbon Treaty and the Future of European Law and Policy*, forthcoming in 2012; R. Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', 2009 *Cambridge Law Journal* 68, no. 3, pp. 525-536; S.M. Constantin, 'Rethinking Subsidiarity and the Balance of Powers in the EU in Light of the Lisbon Treaty and Beyond', 2008 *Croatian Yearbook of European Law and Policy* 8, pp. 152-179; A.V. Bausili, 'Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity, National Parliaments and Legitimacy', in J. Shaw et al. (eds.), *Convention on the Future of Europe: Working Towards an EU Constitution*, 2003, pp. 95-122; G. Bermann, 'The Lisbon Treaty: The Irish 'No'. National Parliaments and Subsidiarity: An Outsider's View', 2008 *European Constitutional Law Review* 4, no. 3, pp. 453-459; P. Kiiver, 'The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity', 2008 *Maastricht Journal of European and Comparative Law* 15, no. 1, pp. 77-83; R. Barents, 'Het Subsidiariteitsbeginsel in het Hervormingsverdrag', 2007 *Nederlands Tijdschrift voor Europees Recht*, no. 11, pp. 253-261; I. Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU', 2006 *Journal of Common Market Studies* 44, no. 2, pp. 281-304.

13 Art. 3 TFEU.

14 Art. 5(4) TEU. See more in: T.I. Harbo, 'The Function of the Proportionality Principle in EU Law', 2010 *European Law Journal* 16, no. 2, pp. 158-185.

15 Art. 5(2) TEU. See further: B. Guastaferrro, 'The European Union as a Staatenverbund? The Endorsement of the Principle of Conferral by the Treaty of Lisbon', in M. Trybus & L. Rubini (eds.), *The Lisbon Treaty and the Future of European Law and Policy*, forthcoming in 2012.

16 See discussions in: L. Verhey et al. (eds.), *Political Accountability in Europe: Which Way Forward?*, 2008; P. Slominski, 'Accountability in the EU's Multilevel System of Governance – Taking Political Science Seriously', 2008 *Vienna Journal on International Constitutional Law* 2, no. 2, pp. 77-91; M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', 2007 *European Law Journal* 13, no. 2, pp. 447-468; T. Raunio, 'Holding Governments Accountable in European Affairs: Explaining Cross-National Variation', 2005 *Journal of Legislative Studies* 1, no. 3, pp. 319-342; C. Harlow, *Accountability in the European Union*, 2002.

17 W. van Gerven, 'Which Form of Accountable Government for the European Union?', 2005 *Netherlands Yearbook of International Law* 36,

The Initiative furthermore allows national parliaments to assess any other legal and political aspect of proposed EU legislation, such as the opportuneness and desirability of action. This is done by examining the substance of draft EU acts and the Commission's instruments of legislative planning, the most significant of which are annual policy strategies and legislative and work programmes.

Thus, whereas the control over the principle of conferral ensures that the EU possesses the competence to act, the control over the principles of subsidiarity, proportionality and political accountability ensures that the EU uses its existing competence in harmony with the conditions agreed between the Member States as Masters of the Treaties. The involvement of national parliaments in the processes of political enforcement of these cornerstone EU principles is an important, albeit rudimentary, element of an evolving multilevel EU representative democracy.

#### 4. Mode of operation and purpose of the Barroso Initiative

The Barroso Initiative is an innovative tool for involving national parliaments in EU policy making. It operates in two main modes: (a) *in the early phase* of the Commission's policy-making cycle in order to impart national concerns to its draft legislative proposals; and (b) *at any other time* through a motley array of visits to national parliaments by Commission officials, meetings with national parliamentary committees and permanent parliamentary representatives to the EU, and gatherings in various interparliamentary forums.

The first mode is generally considered more advantageous to national parliaments as it encourages the *ex ante* pronouncement of MPs and senators, i.e. prior to the onset of the applicable decision-making procedure at EU level. It functions as follows. If, after receiving draft EU acts directly from the Commission, any parliamentary chamber detects an infringement of any of the aforesaid principles that govern the existence and use of EU competences, it may send a reasoned opinion to the Commission explaining why it considers that there has been an infringement. The Commission is not obliged to reply, but does so in practice whenever parliamentarians raise crucial points of law or policy. Where reasoned opinions are positive about the proposed EU measure, the Commission either takes no action or returns an acknowledgment or take-note letter.

This political dialogue allows parliamentarians to provide feedback to the Commission from the perspective of their Member State and to express any possible concerns about the direction that the Commission intends to take. However, only rarely should one expect the Commission to alter its policy choices due to parliamentary opposition, because the Initiative is geared towards discussion and consultation rather than strict enforcement.<sup>18</sup> The Initiative is indeed a unilateral, informal and non-binding commitment of the Commission. No legal instrument exists to sanction the Commission for disregarding the national parliaments' reasoned opinions. The Commission is, therefore, in a win-win situation, whereby national parliamentary participation may increase the legitimacy of EU policies without posing too great a risk of jeopardising the Commission's original blueprint.<sup>19</sup>

In an early assessment, Commission President Barroso described the fruits of the dialogue as being threefold:

- to provide an opportunity for national parliaments to take a more proactive attitude about European issues;
- to supply them with necessary information;<sup>20</sup> and
- to facilitate the scrutiny of their own governments.<sup>21</sup>

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p. 252.

18 See also: T. Raunio, 'Destined for Irrelevance? Subsidiarity Control by National Parliaments', *Elcano Royal Institute, Working Paper No. 36/2010*, p. 13; T. Jans & S. Piedrafita, 'The Role of National Parliaments in European Decision Making', *European Institute of Public Administration, Eipascope 2009/1*, p. 22.

19 A. Buzogány & A. Stuchlik, 'Paved with Good Intentions: Ambiguities of Empowering Parliaments after Lisbon', *Deutsches Forschungsinstitut für Öffentliche Verwaltung, FÖV Discussion Paper 66/2011*, p. 16.

20 The lack of access to relevant information has indeed been a 'chronic disease' crippling the effectiveness and influence of national parliaments in EU decision making throughout the European integration process. See: V. Miller & R. Ware, 'Keeping National Parliaments Informed: The Problem of European Legislation', 1996 *Journal of Legislative Studies* 2, no. 3, pp. 184-197.

21 Speech by Commission President José Barroso at the 3<sup>rd</sup> Joint Parliamentary Meeting on the Future of Europe, *SPEECH/07/388* of 12.6.2007, p. 4.

The purpose of the Barroso Initiative has been further stated by the Commission in seemingly clear terms during a hearing before the EU Committee of the British House of Lords. As explained by Christian Leffler, the then Head of Commissioner Wallström's Cabinet:

'It is not an attempt to somehow circumvent established procedures, to go behind the back of the Council, of governments in the Council and enlist the support of their national parliaments, or to go behind the back of the European Parliament. It is a way of trying to offer a dialogue which will allow national parliaments to be better informed and more actively engaged at an early stage in the preparation and formation of European policy so that they are better placed to engage in the dialogue at national level with their governments (...) to make sure that they fully represent their national positions because those national positions will have been built on the input of well-informed parliaments.'<sup>22</sup>

In sum, the Barroso Initiative was installed to 'shift national legislators' activity from passive policy taking towards more active policy shaping.'<sup>23</sup>

## **5. The Barroso Initiative vs. the early warning mechanism**

The European Constitutional Treaty envisaged the so-called early warning mechanism under which the national parliaments of the Member States would have policed whether the Commission used its legislative initiative in accordance with the principle of subsidiarity. When the French and Dutch electorates rejected this Treaty in 2005, Commission President Barroso launched the Initiative to resuscitate the gist of the provisions on national parliaments of the failed Constitutional Treaty. The Lisbon Treaty subsequently incorporated this mechanism in a slightly revised form.

The early warning mechanism operates similarly to the Barroso Initiative.<sup>24</sup> National parliaments receive draft legislative acts from the Commission and are invited to send reasoned opinions within eight weeks on whether these acts comply with subsidiarity.<sup>25</sup> Each Member State disposes of two votes, which are allocated to parliamentary chambers according to the national constitutional rules. In most cases, one reasoned opinion equals one vote. Yet there may be situations where a bicameral parliament decides that a single reasoned opinion would represent the view of both chambers. In any event, there are three possible scenarios:

(a) If the number of the votes cast does not reach the threshold of one third of the total number of votes, the reasoned opinions shall merely be taken into account by the relevant EU institution, which is mostly the Commission.

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22 House of Lords, EU Committee, 'The EU Reform Treaty: Work in Progress', *HL Paper 180, Minutes of Evidence of 19 September 2007*, Q55, pp. 14-15.

23 A. Buzogány & A. Stuchlik, 'Paved with Good Intentions: Ambiguities of Empowering Parliaments after Lisbon', *Deutsches Forschungsinstitut für Öffentliche Verwaltung, FÖV Discussion Paper 66/2011*, p. 15.

24 Arts. 6 and 7 of Protocol on the Application of the Principles of Subsidiarity and Proportionality. See more in: A. Cygan, 'Collective' Subsidiarity Monitoring by National Parliaments after Lisbon: The Operation of the Early Warning Mechanism', in M. Trybus & L. Rubini (eds.), *The Lisbon Treaty and the Future of European Law and Policy*, forthcoming in 2012; P. Kiiver, 'The Early Warning System for the Principle of Subsidiarity: The National Parliament as a Conseil d'État for Europe', 2011 *European Law Review* 36, no. 1, pp. 98-108; A. Met-Domestici, 'Les Parlements Nationaux et le Contrôle du Respect du Principe de Subsidiarité', 2009 *Revue du Marché Commun et de l'Union Européenne*, no. 525, pp. 88-96; O. Tans, 'De Oranje Kaart: Een Nieuwe Rol voor Nationale Parlementen?', 2007 *SEW – Tijdschrift voor Europees en Economisch Recht*, no. 11, pp. 442-446; S. Rothenberger & O. Vogt, 'The "Orange Card": A Fitting Response to National Parliaments' Marginalisation in EU Decision Making?', *Paper prepared for the conference 'Fifty Years of Interparliamentary Cooperation'*, Berlin, 13 June 2007; D. Wyatt, 'Could a "Yellow Card" for National Parliaments Strengthen Judicial and Political Policing of Subsidiarity?', 2006 *Croatian Yearbook of European Law and Policy* 2, pp. 1-17; P.A. Feral, 'Retour en Force du Principe de Subsidiarité dans le Traité Constitutionnel: De Nouvelles Responsabilités pour les Parlements Nationaux et pour le Comité des Régions?', 2004 *Revue du Marché Commun et de l'Union Européenne*, no. 481, pp. 496-499; A.V. Bausili, 'Beyond the Early Warning Mechanism: The Reform of EU Governance and National Parliaments', in I. Pernice & J. Zemaněk (eds.), *A Constitution for Europe: The IGC, the Ratification Process and Beyond*, 2005, pp. 211-222.

25 The phrase 'draft legislative acts' is broadly conceived. It includes not only draft Commission proposals, but also initiatives from a group of Member States, European Parliament initiatives, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act. See Art. 3 of Protocol on the Application of the Principles of Subsidiarity and Proportionality.

(b) If the number of the votes cast reach one third (or one fourth in the Area of Freedom, Security and Justice), then the proposal must be reviewed, after which the Commission may decide to maintain, amend or withdraw it. This is commonly known as the *yellow card* procedure.

(c) If the number of votes cast amount to a simple majority of the votes allocated, the Commission must again review the proposal and decide whether to maintain, amend or withdraw it. However, if it wishes to proceed, the EU legislature must give it the green light. Unless approved by the European Parliament by a majority of the votes cast or by the Council by a majority of 55% of its members, the proposal fails. This is the *orange card* procedure.

*In formal terms*, the differences between the Barroso Initiative and the early warning mechanism lie in their nature, effect and scope. As regards their *nature*, the Barroso Initiative is not based on the founding treaties, while the early warning mechanism is. The Commission could abolish the Barroso Initiative unilaterally at any time if it so wished, but the early warning mechanism could only be abolished by means of a Treaty amendment. In other words, the Barroso Initiative is based on a promise and the early warning mechanism on a legally binding obligation. Concerning *effect*, the Barroso Initiative is entirely dependent on the Commission and its willingness to observe the positions of national parliamentarians, whereas the effect of the early warning mechanism is determined by the Treaties. The fact that the latter procedure is hamstrung by the difficulties of attaining high thresholds regarding the number of the reasoned opinions and votes cast required to trigger a blockage of the proposal in no way affects its legal and formal status, but only its utility. With respect to *scope*, the Barroso Initiative is a considerably broader procedure than the early warning mechanism, because the latter is restricted to compliance with subsidiarity. Hence, the Barroso Initiative endows domestic legislatures with greater leeway to voice their views and transmit the stances of the national political parties on to EU level. Therefore, the Barroso Initiative is formally a more volatile arrangement whose effect is less constraining for the Commission than that of the early warning mechanism.

*In practical terms*, however, there is hardly any perceptible difference between the Barroso Initiative and the early warning mechanism. National parliaments do not send two types of reasoned opinions to the Commission. Rather, the reasoned opinions serve for the purposes of both the Barroso Initiative and the early warning mechanism. There is no crystal-clear demarcation line between the two procedures. An analysis of the Commission's website that lists the reasoned opinions of national parliaments testifies to this. Accordingly, from September 2006 to December 2009, only the Barroso Initiative was operative. Since the entry into force of the Lisbon Treaty, the Barroso Initiative has blended with the early warning mechanism into one *hybrid procedure* with two purposes. The Commission indeed understands the Barroso Initiative and the early warning mechanism as 'two sides of the same coin',<sup>26</sup> so that although separate, the two procedures run in parallel.<sup>27</sup>

Consequently, reasoned opinions contain two parts, which are of a different legal nature. The part of each reasoned opinion that deals with subsidiarity compliance is counted towards the thresholds applicable within the early warning mechanism and the part that deals with any other element of the proposal is taken into account during the political process and deliberations in EU institutions according to the strength of the arguments adduced by national parliaments. Put more succinctly, the part of the reasoned opinion on subsidiarity is *politically enforceable* through the early warning mechanism, while all other parts are not.<sup>28</sup> The parliamentary comments on matters other than subsidiarity have the status of advice or recommendations. Nonetheless, this does not mean that these recommendations will necessarily have less effect in practice, because what ultimately drives the Commission's work is policy analysis and if important points unrelated to subsidiarity are raised, they can be expected to stir up some controversy in the Commission, especially when the European Parliament and other national parliaments share the same sentiments. It should be mentioned, moreover, that breaches of subsidiarity are also *legally en-*

26 European Commission, 'Annual Report 2009 on Relations between the European Commission and National Parliaments', COM(2010) 291, p. 8.

27 Press release 'Commission Dialogue with National Parliaments Reaches a New High', IP/09/1368 of 28.9.2009. See also: *Assemblée nationale, Délégation pour l'Union européenne, Rapport no. 562 sur le Traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 88.

28 J.V. Louis, 'The Lisbon Treaty: The Irish 'No'. National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits', 2008 *European Constitutional Law Review* 4, no. 3, p. 450.

forceable before the Court of Justice by means of subsidiarity actions, which any national parliamentary chamber may file through the government.<sup>29</sup>

## 6. Vicissitudes of national parliamentary participation in the Barroso Initiative

The national parliaments' participation in the political dialogue is mainly characterised by two differences and two similarities. Their scrutiny differs as to the actors of scrutiny and as to the object of inspection. Their scrutiny is similar as to the addressee and as to the nature of the scrutiny.<sup>30</sup>

### 6.1. Differences

As regards the actors, there is a manifest tendency of the active participation of upper chambers, in particular of the French *Sénat*, the German *Bundesrat*, the British House of Lords and the Czech *Senát*. The hitherto dormant chambers seem to have awakened. While the Italian *Senato della Repubblica*, the Austrian *Bundesrat*, the Greek, Cypriot and Bulgarian parliaments sent their first reactions in 2008, the Austrian *Nationalrat* and the Maltese House of Representatives did so in 2009.<sup>31</sup> The first time the Spanish and Romanian parliaments participated was in 2010.<sup>32</sup> The only parliament that has never taken part in the political dialogue is the Slovenian *Državni svet*.

As regards the object of inspection, national parliaments have so far focused their reasoned opinions on the substance of Commission documents rather than on subsidiarity.<sup>33</sup> Yet they have adopted various practices in accordance with their internal constitutional rules. For example, the Danish *Folketing* and the Swedish *Riksdag* predominantly focus on the scrutiny of the Commission's consultation documents and address the scrutiny of draft proposals to their governments. Then, whereas the French *Sénat*, the Dutch *Tweede* and *Eerste Kamer* and the Portuguese *Assembleia da República* target especially the principles of subsidiarity and proportionality, the British House of Lords performs in-depth inquiries beyond these principles.

### 6.2. Similarities

The first thread that binds most of the parliaments together is the fact that their positions mirror those adopted and presented by their governments in the Council.<sup>34</sup> However, while parliaments tend to address the results of their scrutiny to their governments,<sup>35</sup> the distinction is by no means clear-cut, because in some cases their observations were directly relevant for EU action,<sup>36</sup> or were addressed both at the government and at the EU.<sup>37</sup> The second thread is that parliaments mostly examine the political issues related to the contents of EU proposals.<sup>38</sup>

29 Art. 8 of Protocol on the Application of the Principles of Subsidiarity and Proportionality.

30 European Commission, 'Annual Report 2008 on Relations between the European Commission and National Parliaments', COM(2009) 343, pp. 4-6.

31 European Commission, 'Annual Report 2009 on Relations between the European Commission and National Parliaments', COM(2010) 291, p. 2.

32 European Commission, 'Annual Report 2010 on Relations between the European Commission and National Parliaments', COM(2011) 345, p. 5.

33 European Commission, 'Annual Report 2009 on Relations between the European Commission and National Parliaments', COM(2010) 291, p. 8.

34 European Commission, Annual Report 2008 on Relations between the European Commission and National Parliaments', COM(2009) 343, p. 6.

35 Some examples thereof concern the examination of the energy and climate package and the proposal for CAP health check. In relation to climate and energy, the Italian *Camera dei Deputati* asked the Government to make its agreement in the Council subject to certain amendments in the wording of the proposal, such as to strengthen the flexibility mechanisms to reflect the economic and financial situation. In relation to CAP, the Czech *Senát* recommended the Government to open discussions on genetically modified organisms during the Czech Presidency so as to ensure agricultural competitiveness within the EU. Likewise, the Italian *Senato della Repubblica* requested the Government to take concrete action vis-à-vis EU institutions to introduce systems for monitoring external borders and procedures to control their implementation, in order to ensure compliance with European standards on agricultural products.

36 An example is the proposal for cross-border health care, regarding which the French *Sénat*, the Dutch *Tweede* and *Eerste Kamer*, as well as the German *Bundesrat* raised concerns about subsidiarity, reaffirming that the organisation of health systems is the competence of the Member States.

37 For example, regarding the climate and energy package, the British House of Lords asked the Government and the EU to set an objective for 2030 in order to encourage technology and investment which will not have been fully deployed by 2020.

38 European Commission, 'Annual Report 2008 on Relations between the European Commission and National Parliaments', COM(2009) 343,

## 7. Practical effects of the Barroso Initiative

The parliaments' scrutiny of the substance of Commission proposals generally consists of requesting and receiving from the Commission more thorough explanations of the motivations underlying the latter's legislative initiative. Some parliaments send rejoinders to the Commission's replies.<sup>39</sup> The first to do so was the French *Sénat* in 2006, when it requested additional information from the Commission on four proposals. This has now become a regular practice for proactive parliaments. The Commission, in turn, has promised to take parliamentary observations into account when drafting its proposals.<sup>40</sup>

The European Parliament and the Council are kept informed of the dialogue. To show its enthusiasm for the cause, the European Parliament envisages a 'more systematic monitoring' of the Barroso Initiative so as to obtain early information about national parliamentary positions on draft EU legislation, for which reason it has called on national parliaments to make their opinions available to it at the same time as to the Commission.<sup>41</sup> This could be interpreted both as a sign of the European Parliament's goodwill to pay heed to *ex ante* political assessments of national parliaments, but also as a hint of surreptitious institutional rivalry. It nonetheless appears that the European Parliament's activism is more than rhetorical. Its three Vice-Presidents, the Directorate for relations with national parliaments and the Conference of Presidents are in charge not least of exchanging information and maintaining contact with national parliaments as well as organising various types of interparliamentary meetings and conferences. The European Parliament has also proposed that the interparliamentary forum that takes place every autumn in the presence of the Commission should focus on the latter's legislative and working programme. On top of that, the European Parliament has vowed to keep national parliaments regularly informed of its activities.<sup>42</sup>

Immediate, tangible effects of the Barroso Initiative are not as spectacular as one might hope for, but, as the Commission reports, 'in many cases opinions expressed by national parliaments are reflected in the legislative process by either the [European] Parliament or the Council'.<sup>43</sup> In the first year and a half of the political dialogue, such cross-level influence occurred on four occasions.<sup>44</sup> It is worth noting that all of these four proposals were either the object of a COSAC subsidiarity check<sup>45</sup> or of parliamentary rejoinders.<sup>46</sup> However, this should not give a negative connotation to the COSAC subsidiarity checks, because the vast majority of the parliamentary reactions sent to the Commission as part of these experiments were positive.<sup>47</sup>

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p. 5.

39 For example, the French *Sénat* sent a rejoinder on the proposals concerning the ban on the use of dog and cat fur, motorway infrastructure safety and penalties for employers of illegally staying third-country nationals. The House of Lords reacted twice to the proposal on the European Technology Institute. That the dialogue is a continuous process is further evidenced by the fact that the French *Sénat* and the German *Bundesrat* revised in 2007 the comments they had made a year before on the proposal for soil protection. European Commission, 'Annual Report 2007 on Relations between the European Commission and National Parliaments', COM(2008) 237, p. 3.

40 European Commission, 'Annual Report 2007 on Relations between the European Commission and National Parliaments', COM(2008) 237, p. 4; European Commission, 'Annual Report 2008 on Relations between the European Commission and National Parliaments', COM(2009) 343, p. 3. This has led, for instance, at the suggestion of the French *Sénat*, to a modification of the title of the proposal on the protection of pedestrians and other vulnerable road users and to an amendment of the recitals in the proposal on fruit and vegetables in order to make more explicit the justification on subsidiarity and proportionality grounds.

41 European Parliament, 'Resolution of 7 May 2009 on the Development of the Relations between the European Parliament and National Parliaments under the Treaty of Lisbon', OJ C 212E/94, point 16.

42 Rule 130 of the Rules of Procedure of the European Parliament of July 2009.

43 European Commission, 'Annual Report 2009 on Relations between the European Commission and National Parliaments', COM(2010) 291, p. 9.

44 European Commission, Annual Report 2007 on Relations between the European Commission and National Parliaments', COM(2008) 237, p. 4.

45 Proposal for the completion of the internal market for postal services.

46 Proposals concerning soil protection, motorway infrastructure safety and the European Technology Institute.

47 The Commission, for example, states the following results: (a) the proposal on the applicable law and jurisdiction in divorce matters: 15 reactions, of which two were negative, due to the lack of justification; (b) the proposal on the completion of the internal market for postal services: 14 reactions, of which four were negative on various aspects of the proposal; (c) the proposal for combating terrorism: 12 reactions, of which one was negative on the ground of subsidiarity and several more on the ground of the lack of justification; (d) proposal on the application of the principle of non-discrimination against people on the grounds of religion, race, age or sexual orientation: 15 reactions, one negative. Sources: European Commission, 'Annual Report 2006 on Relations between the Commission and the National Parliaments' (annexed to the 'Memo to the Members of the Interinstitutional Relations Group' meeting of 4 May 2007), SP(2007) 2202/4 of 8.5.2007, p. 4; European Commission, 'Annual Report 2008 on Relations between the European Commission and National Parliaments', COM(2009) 343, p. 5. There were other COSAC subsidiarity checks afterwards. It should be noted that COSAC data differ somewhat for

All of these results led the Commission to proclaim the political dialogue to be ‘part and parcel of the EU’s institutional practices’.<sup>48</sup> Irrespective of that, the Barroso Initiative appears to have raised awareness among the majority of national parliaments of the issues at stake in European decision making. Since the Commission’s data reveal a steady increase in the participation in the political dialogue, one might consider that the dialogue is taking root. For example, in the period from 1 January 2005 to 31 December 2008, the Commission had a total of 521 contacts with national parliaments. Furthermore, from September 2006 to June 2011, the Commission received a total of 1255 opinions from national parliaments, of which more than a half were received since January 2010.<sup>49</sup> Not so bad for a fledgling procedure after all.

More than anything else perhaps, the Barroso Initiative marks the Commission’s departure from its previous negative attitude towards national parliaments. For instance, Christopher Soames, Commission Vice-President in the mid-1970s, expressly rejected the idea of the Commission discussing pre-legislative proposals directly with national parliaments.<sup>50</sup> This ‘cultural’ change is conducive to narrowing, albeit to a modest extent, the gap between the EU and national levels.

## 8. Cross-country analysis: a varied response by domestic legislatures

In the following sections, we inquire about the attitude and role perceptions of the French, British and Portuguese MPs, senators and peers regarding the Barroso Initiative. The aim is to gain insight into the operation of the Initiative in parliamentary practice and the dilemmas and problems encountered during this process. The purpose is not to provide a structured quantitative overview based on statistical methods but to unveil the perceived utility of the Initiative and its impact on the national legal orders.

### 8.1. The French Parliament: an engaged watchdog

In line with an upgraded set of rights of participation in EU affairs and a generally proactive attitude to scrutiny of EU policies,<sup>51</sup> the French Parliament approaches the Barroso Initiative with sizeable enthusiasm. Indeed, the Chairman of the European Affairs Committee of the *Assemblée nationale*, Pierre Lequiller (UMP), praised the success of the political dialogue with the Commission, stating that: ‘We will exercise this control of subsidiarity not in a niggling way, but positively, in order to guarantee that Europe makes a real added value’.<sup>52</sup> In a report on the Lisbon Treaty that he prepared, he underlined that the French Parliament’s more resolved *ex ante* engagement in subsidiarity control would pre-empt Eurosceptics’ contestation of EU decisions to the extent that these decisions would be validated beforehand.<sup>53</sup> The *Sénat*, too, urged the political dialogue to continue to run in parallel regardless of the Lisbon Treaty mechanisms.<sup>54</sup>

While one might consider the *Assemblée nationale* a laggard in the Barroso Initiative, the *Sénat* can take pride in its prominent participation. As it declares, this House ‘seeks to obtain justifications from the

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three reasons: first, because COSAC focuses on subsidiarity and not necessarily also on the substance; second, because the Commission and COSAC may and do at times interpret the parliamentary reactions differently; and third, because they may use different ‘formulas’ to count reactions (e.g. as votes, as chambers or as parliaments).

48 European Commission, ‘Annual Report 2008 on Relations between the European Commission and National Parliaments’, COM(2009) 343, p. 4.

49 European Commission, ‘Annual Report 2009 on Relations between the European Commission and National Parliaments’, COM(2010) 291, p. 2; European Commission, ‘Annual Report 2010 on Relations between the European Commission and National Parliaments’, COM(2011) 345, p. 5.

50 M. Kolinsky, ‘Parliamentary Scrutiny of European Legislation’, 1975 *Government and Opposition* 10, no. 1, p. 64.

51 See for instance: D. Jančić, ‘The French Parliament: A European Scrutineer or National Actor?’, *Paper prepared for the LEGIPAR final conference ‘Parliamentary Legitimation and Democratic Government in France and in the European Union’*, Sciences Po Bordeaux, 1-2 December 2011; D. Siritzky, ‘Ensuring Democratic Control over National Government in European Affairs: The French Model’, in G. Barrett (ed.), *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures*, 2008, pp. 433-454.

52 *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 11 décembre 2007, 80<sup>e</sup> séance de la session ordinaire 2007-2008, JORF* [2007], A.N. (C.R.) 79[2], 12.12.2007, p. 5189.

53 *Assemblée nationale, Délégation pour l’Union européenne, Rapport no. 562 sur le Traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 112.

54 *Sénat, Commission des lois, Rapport no. 175 sur le projet de loi constitutionnelle, adopté par l’Assemblée nationale, modifiant le titre XV de la Constitution* of 23 January 2008, rapporteur Patrice Gélard (UMP), p. 52.

Commission with respect to the necessity and extent of Union action.<sup>55</sup> According to the Commission's data, the *Sénat* sent a total of 71 observations in the period 2006-2010, whereas the *Assemblée nationale* sent only four.<sup>56</sup> We therefore concentrate below on the *Sénat's* participation in the political dialogue.

During the first year of the operation of the Barroso Initiative, the *Sénat* selected for closer scrutiny only 8% of the documents received from the Commission. On this basis, 31 observations were sent back to the Commission and 24 replies were received in return. On five occasions the Commission's reply was found unsatisfactory, either because it did not quite respond to the observations, because it made new statements that appeared arguable or ambiguous, or because it raised new questions of principle. This allowed the dialogue to extend beyond a single exchange, which did indeed occur.<sup>57</sup> The *Sénat's* key conclusions about its involvement in the Barroso Initiative were threefold.

First, subsidiarity monitoring escapes straightforward definition. It is a multifaceted task. It is almost impossible to dissociate the concept of subsidiarity from that of proportionality as well as to find a clear boundary between subsidiarity and proportionality, on the one hand, and legal basis or substance of initiatives, on the other. For example, on what ground should a directive that is too detailed be criticised? Does the problem lie in the choice of the legal instrument (subsidiarity) or in its excessive legal solutions (proportionality)?<sup>58</sup> Similarly, distinguishing between the shared and exclusive competences surfaced as problematic on several occasions when the Commission failed to justify its initiative on the ground that it had the exclusive competence to act. On the intervention of the *Sénat*, the Commission stepped back in all instances, admitting that it had used the concept of exclusive competence injudiciously and providing clarifications of the meaning it attached to it.<sup>59</sup> Yet the Commission did not always furnish satisfactory explanations. Particularly worrying for the *Sénat* were those justifying action on the mere basis that the measures taken by the Member States vary widely or that the Union co-finances certain projects through structural or cohesion funds. These arguments were, for example, used in the draft directive on the safety of road infrastructure.<sup>60</sup> The compliance with subsidiarity of this and some other Commission proposals was also debated in the Council and the European Parliament. Based on this experience, the *Sénat* makes the case that the Union legislature now takes subsidiarity more seriously and that an increased number of debates on subsidiarity issues in EU institutions should incentivise the Commission to engage more deeply in the political dialogue with national parliaments at the earliest possible stages of policy and decision making.<sup>61</sup>

Second, as France is a centralised state to which the concept of subsidiarity is with one exception foreign,<sup>62</sup> it does not come as natural, so the *Sénat* argues, to challenge an EU initiative whose contents

55 COSAC Secretariat, 'Annex to the 8<sup>th</sup> Biannual Report of COSAC: National Parliaments' Replies to the Questionnaire', prepared for XXXVIII COSAC meeting held in Estoril, 14-16 October 2007, p. 49.

56 European Commission, 'Annual Report 2008 on Relations between the European Commission and National Parliaments', COM(2009) 343, p. 9; European Commission, 'Annual Report 2009 on Relations between the European Commission and National Parliaments', COM(2010) 291, p. 10; European Commission, 'Annual Report 2010 on Relations between the European Commission and National Parliaments', COM(2011) 345, p. 12.

57 Out of a total of 787 documents received in the period from 1<sup>st</sup> September 2006 to 31<sup>st</sup> August 2007, 727 were excluded from scrutiny. These are: (a) documents with no regulatory implications that are not the precursor to legislative proposals (348 or 44%); (b) documents not likely to raise comments on the ground of subsidiarity or proportionality because of their subject-matter (302 or 39%); (c) documents occurring at an advanced stage of the decision-making process (50 or 6%); and (d) codifying documents (27 or 3%). *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), pp. 10-13.

58 *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), p. 19.

59 For example, with respect to the harmonisation of rules in the field of civil aviation, the Commission explained that its invocation of exclusive competence did not refer to transport policy, but to the competence to implement inter-institutional procedures on comitology. Also, regarding the draft directive on the VAT regime applicable to television and broadcasting services, the Commission was forced to concede that its reference to exclusive competence was only based on the fact that the proposal's aim was to extend the period of application of a Community act. The Commission was reminded of the duty to provide explanatory notes also concerning the regulation reforming the common market organisation for fruits and vegetables. *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), pp. 24-25.

60 *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), pp. 53-56.

61 *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), pp. 26-27.

62 This exception is Art. 72(2) of the Constitution, which allows territorial communities to take decisions in all matters that can best be implemented at their level.

are satisfactory or compatible with French interests merely because the Union may not be the best level at which to act. In such a constellation, questions of substance of EU initiatives are discussed with the Government and those of subsidiarity and proportionality directly with the Commission.<sup>63</sup>

Third, the *Sénat* takes a proactive approach to subsidiarity control. Even where the Commission is not under a duty to justify its initiative, such as concerning Green Papers, which the *Sénat* fully accepts, it nonetheless alerts the Commission of the solutions that would respect subsidiarity the most. The senators also intend to ascertain whether their observations are taken into account.<sup>64</sup>

The mission of the political dialogue with the Commission is accomplished once the latter provides further clarifications of its reasoning or intentions and answers Parliament's preoccupations.<sup>65</sup>

## 8.2. The British Parliament: a self-assured inspector

From the very start of the intergovernmental negotiations on the Lisbon Treaty, Westminster advocated the enshrinement of the political dialogue in the text of the Treaties.<sup>66</sup> When this did not materialise, it was argued that the Barroso Initiative should be kept alongside the early warning mechanism, even though documents received from the Commission are 'not usually used in the scrutiny process', because they only arrive shortly before the Government sends them.<sup>67</sup> Lord Grenfell, former Chairman of the EU Committee of the House of Lords, nevertheless stressed that the Barroso Initiative 'could be more valuable to national parliaments than what is in the Treaty (...)'.<sup>68</sup>

For the House of Commons, the Commission's undertaking to consider national parliaments' opinions in formulating European policies is only 'potentially of interest', since the European Scrutiny Committee has, even before the start of the Barroso Initiative, addressed comments on legislative proposals and other documents directly to the Commission where that was deemed appropriate.<sup>69</sup> But the Commons' record in the political dialogue has been poor. The analysis of the Commission's data shows that this House has until the beginning of 2011 sent a total of only nine reactions: one each in 2006, 2007 and 2008, none in 2009 and six in 2010. That can be explained by its specifically close constitutional relationship with the Government and a particular focus on the latter's accountability and less so on that of EU institutions.<sup>70</sup>

Quite the opposite has been the record of the House of Lords, which has been a fairly active participant. In the same period, their Lordships sent 58 reactions altogether, of which 4 in 2006, 14 in 2007, 12 in 2008, 14 in 2009 and 14 in 2010. Compared to other national parliaments, the Lords were placed sixth in 2009 and ninth in 2010. As their colleagues in the Commons, the peers frequently provide the Commission with those of its reports that recommend action or restraint by the Union and they regularly receive the Commission's replies.<sup>71</sup>

63 *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), p. 21.

64 *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), p. 31. See also the intervention by Christian Cointat (UMP) during the discussion of this report in Delegation for the European Union: 'Subsidiarity should not be invoked just to put the brakes on. Institutions have to be able to function. In this regard, let us avoid laying all the blame at the Commission's door. It comes more from the Council, which plays the dual role of executive and legislature. Often it allows national egoism and *raison d'État* to triumph, which is a long way from democratic considerations. We have to take a political approach. Subsidiarity must be handled with intelligence and good judgment'. *Ibid.*, p. 39.

65 *Sénat, Rapport d'information no. 88* on the dialogue with the European Commission on subsidiarity of 21 November 2007, rapporteur Hubert Haenel (UMP), p. 23.

66 See the statement to that effect by Lord Grenfell in: House of Lords, EU Committee, 'Evidence from the Minister for Europe on the June European Council and the 2007 Intergovernmental Conference', *HL Paper 142, Minutes of Evidence of 12 July 2007*, Q25, p. 6.

67 House of Lords, EU Committee, 'The EU Reform Treaty: Work in Progress', *HL Paper 180, 35<sup>th</sup> Report of Session 2006-07* of 1 November 2007, Paras. 34 and 55, pp. 10 and 14.

68 House of Lords, EU Committee, 'The Treaty of Lisbon: An Impact Assessment – Vol. II: Evidence', *HL Paper 62-II, Minutes of Evidence of 6 December 2007*, Q190, p. S49.

69 House of Commons, European Scrutiny Committee, 'The Work of the Committee in 2006', *HC 41-xiii, 13<sup>th</sup> Report of Session 2006-07* of 15 March 2007, Para. 34, pp. 12-13.

70 M. Flinders, 'The Enduring Centrality of Individual Ministerial Responsibility within the British Constitution', 2000 *Journal of Legislative Studies* 6, no. 3, pp. 73-92. See also: C. Kerse, 'Parliamentary Scrutiny in the United Kingdom Parliament and the Changing Role of National Parliaments in European Union Affairs', in G. Barrett (ed.), *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures*, 2008, pp. 349-377; A. Cygan, *The United Kingdom Parliament and European Union Legislation*, 1998.

71 House of Lords, EU Committee, 'The Treaty of Lisbon: An Impact Assessment – Vol. I: Report', *HL Paper 62-I, 10<sup>th</sup> Report of Session*

It ought to be emphasised that the Barroso Initiative forms but a small part of the European scrutiny process at Westminster. The major object of appraisal in the House of Commons is the Government's action in the Council to compensate for the takeover of a portion of the British constitutional powers by the Union.<sup>72</sup> The House of Lords earnestly focuses on European policies as such, along with the Government's and EU institutions' activities in shaping them. Being the mother of parliaments, with the long-established but ever-evolving tradition of scrutiny, the British Parliament, unlike for instance the Portuguese Assembly, has been only marginally affected by the Barroso Initiative.

### 8.3. *The Portuguese Parliament: an ambitious newbie*

With a total of 237 reasoned opinions emitted in the period 2006-2010 – of which none in 2006, 19 in 2007, 65 in 2008, 47 in 2009 and 106 in 2010 – the Portuguese Assembly of the Republic is an absolute leader of the Barroso Initiative scoreboard. Among the parliaments lagging behind it are the runner-up Italian *Senato della Repubblica* with 96 opinions, the sixth-placed French *Sénat* with 68 opinions and the British House of Lords with 56 opinions.<sup>73</sup> However, while for the French and British parliaments the Barroso Initiative was merely a useful complement to their existing scrutiny arrangements, for the Portuguese Parliament it was a catalyst of tacit constitutional change that had a fairly palpable impact on Parliament's status. The fact that the Commission was presided over by a Portuguese national certainly accelerated this process.<sup>74</sup>

Namely, the establishment of a channel for direct liaison with the Commission represented an independent new source of information for the MPs. This greatly increased the autonomy of Parliament from the Government, which for long was the sole provider of EU-related information. Even though the Government was since 1992 constitutionally obliged to submit in due time all relevant information on the process of European integration to the Assembly,<sup>75</sup> this was not implemented in political practice and scrutiny was entirely contingent on the Government's willingness to cooperate. The system of scrutiny was *ex post*, it was performed sporadically and it was of an informal nature.<sup>76</sup> When in 1997 the Constitution charged the Assembly with pronouncing itself on EU matters that fall within the ambit of its exclusive legislative competence, the dependence on the Government became emphatic.<sup>77</sup> The Portuguese parliamentarians were severely precluded from fulfilling their constitutional duties.

Things began improving with the passage of the European Scrutiny Act in August 2006,<sup>78</sup> which obliged the Assembly to adopt formal written opinions (*pareceres*) on EU matters in the fields of the Assembly's exclusive legislative competence. Pertinently, this enactment occurred only days before the Commission sent the first EU documents directly to national parliaments. This temporal coincidence of accrued scrutiny rights and the impetus provided by the Barroso Initiative towards applying them in practice was a key factor of transforming the Portuguese Parliament's European scrutiny into a routine business.<sup>79</sup>

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2007-08 of 13 March 2008, Para. 11.21, p. 283. In an intervention in the plenary, Lord Grenfell stated that this practice is 'as yet modest', but that the Commission's responses are 'prompt and thoughtful'. Direct correspondence is with the Commission Vice-President in charge of relations with national parliaments. House of Lords, Debates of 5 December 2007 (Vol. 696, col. 1734) and of 7 November 2007 (Vol. 696, col. 73).

72 See: A. Cygan, 'EU Affairs before the United Kingdom Parliament: A Case of Scrutiny as Substitute Sovereignty?', in O. Tans et al. (eds.), *National Parliaments and European Democracy: A Bottom-Up Approach to European Constitutionalism*, 2008, pp. 75-96.

73 D. Jančić, 'The European Union in the Portuguese Assembly: The Primary and Secondary EU Decision Making Scrutinised', *Paper prepared for the international conference 'Portugal and International Organisations'*, New University of Lisbon, 10-11 November 2011, p. 14.

74 A. Buzogány & A. Stuchlik, 'Paved with Good Intentions: Ambiguities of Empowering Parliaments after Lisbon', *Deutsches Forschungsinstitut für Öffentliche Verwaltung, FÖV Discussion Paper 66/2011*, p. 16.

75 Art. 197(1)(i) of the Constitution. This provision was introduced by the Constitutional Act (*Lei constitucional*) no. 1/92 of 25 November 1992.

76 A. Fraga, 'The Parliament of Portugal: Loyal Scrutiny and Informal Influence', in A. Maurer & W. Wessels (eds.), *National Parliaments on Their Ways to Europe: Losers or Latecomers?*, 2001, pp. 359-375; A. Filipe, 'A União Europeia e os Parlamentos Nacionais', 2005 *Res Pública: Revista Lusófona de Ciência Política e Relações Internacionais*, no. 1, p. 69.

77 Art. 161(n) of the Constitution. This provision was introduced by the Constitutional Act (*Lei constitucional*) no. 1/97 of 20 September 1997.

78 The full name of this statute is Act no. 43/2006 on the Monitoring, Assessment and Pronouncement by the Assembly of the Republic within the Scope of the Process of Constructing the European Union of 25 August 2006 (*Lei Acompanhamento, Apreciação e Pronúncia pela Assembleia da República no Âmbito do Processo de Construção da União Europeia*). See a fuller analysis in: D. Jančić, 'The Portuguese Parliament: Blazing the Trail to the European Scrutiny Trophy?', 2011 *Interdisciplinary Political Studies* 1, no. 1, pp. 93-108.

79 Interviews with Bruno Dias Pinheiro held in Brussels on 27 May 2008 in his capacity as permanent representative of the Assembly to the

On the one hand, since the MPs are henceforth in direct communication with the Commission, it has become more difficult for the Government secretly to manipulate Parliament in EU negotiations. Accusations that the Government plays multilevel games could be heard, for instance, during the plenary debate on the Commission's Annual Policy Strategy for 2009, when Mário Santos David (PSD) stated that:

'[W]e cannot but note (...) the dual standards of the Portuguese Government and the Socialist majority that supports it, which, in Portugal, criticises, attacks and rejects the proposals of Social Democrats and in Brussels, the following day, applauds, defends and approves these same measures.'<sup>80</sup>

On the other hand, the Barroso Initiative enhances the Commission's negotiating power. Since it possesses the position of the Assembly, the Government is no longer able abstractly to invoke national parliamentary circumstances as preventing it from agreeing to a certain decision. Conversely, the appearance of a given Member State in EU negotiations might be reinforced if the Commission realises that Parliament firmly backs the Government's stance. This may make EU decision making somewhat more transparent while depicting Parliament and the Government as separate actors whose views, depending on the matter at hand, can both converge and diverge.

Nevertheless, the Assembly's reasoned opinions as a rule contain no more than a description of the EU proposal and a short verdict on compliance with subsidiarity without providing extensive reasons for the findings reached.<sup>81</sup> Only occasionally does the Assembly offer substantive remarks and only then is the Commission likely to respond.<sup>82</sup> In contrast, the Commission almost always replies to the opinions by the parliaments of France<sup>83</sup> and the United Kingdom,<sup>84</sup> which have more developed scrutiny systems. Since the Commission tends to send replies where parliamentary opinions address the contents of EU policies and where these provide substantive observations, this means that the Portuguese scrutiny of EU affairs is still evolving. An empirical insight suggests, however, that the Assembly does not carry out 'isolated' scrutiny. There are indeed instances where the MPs take due account of the positions and arguments produced by various EU bodies, including both those that are directly involved in the EU legislative process (e.g. the European Parliament), those that are only involved in the adoption of implementing EU acts (e.g. comitology committees) and those that remain outside the decision-making sphere altogether (e.g. the European Data Protection Supervisor).<sup>85</sup>

In addition, inspired by the successful participation in the political dialogue, the Assembly reformed its scrutiny mechanisms in January 2010. Henceforward, several EU acts or proposals from the Commission's legislative and work programme are selected for 'enhanced scrutiny', which involves constant monitoring of the decision-making procedure and contacts with EU institutions and other national parliaments.<sup>86</sup>

It could therefore be argued that the upsurge in the number of the reasoned opinions sent to the Commission signifies the Assembly's revamped attitude to the scrutiny of EU decisions. The Barroso

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COSAC Secretariat as well as in Lisbon on 8 June 2010 in his capacity as clerk of the European Affairs Committee.

80 Accusations that the Government plays multilevel games could be heard, for instance, during the plenary debate on the Commission's Annual Policy Strategy for 2009, when Mário Santos David (PSD) stated that 'we cannot but note (...) the dual standards of the Portuguese Government and the Socialist majority that supports it, which, in Portugal, criticises, attacks and rejects the proposals of PSD and in Brussels, the following day, applauds, defends and approves these same measures'. *Diário da Assembleia da República, I Série*, No. 28, 19 December 2008, p. 44.

81 See: <[http://ec.europa.eu/dgs/secretariat\\_general/reactions/reactions\\_other/npo/portugal/2010\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/reactions/reactions_other/npo/portugal/2010_en.htm)>, accessed on 2 June 2011.

82 For example, examining Iceland's accession process, the Assembly *inter alia* found that this country's policy of permitting whale hunting was at variance with the *acquis*. In reply to the Assembly, the Commission stated that the next progress report on Iceland would address this topic together with the recommendations raised in the Assembly's opinion.

83 See: <[http://ec.europa.eu/dgs/secretariat\\_general/reactions/reactions\\_other/npo/france/2009\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/reactions/reactions_other/npo/france/2009_en.htm)>, accessed on 2 June 2011.

84 See: <[http://ec.europa.eu/dgs/secretariat\\_general/reactions/reactions\\_other/npo/united\\_kingdom/2009\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/reactions/reactions_other/npo/united_kingdom/2009_en.htm)>, accessed on 2 June 2011.

85 D. Jančić, 'The European Union in the Portuguese Assembly: The Primary and Secondary EU Decision Making Scrutinised', *Paper prepared for the international conference 'Portugal and International Organisations'*, New University of Lisbon, 10-11 November 2011, p. 15.

86 D. Jančić, 'The Portuguese Parliament: Blazing the Trail to the European Scrutiny Trophy?', 2011 *Interdisciplinary Political Studies* 1, no. 1, pp. 100-101.

Initiative hence provided an essential spark for the Europeanisation of the Portuguese Parliament. Interestingly, the European Affairs Committee has itself noted that its shift towards more frequent relations with EU institutions has actually resulted in ‘the neglect of its scrutiny of the Government’, which, as a pivotal element of the Assembly’s function of political accountability, will need to be bolstered.<sup>87</sup>

## 9. Concluding remarks

After half a decade of its existence, the Barroso Initiative is a more stable platform for liaison between the national and European institutions of public law. It is a modest but workable medium for public debate on EU policies. As such, it contributes to the fulfilment of the controlling and communicative functions of domestic parliaments and it helps to bring Europe closer to the citizenry. In fact, the Initiative discretely requests these parliaments to reorient their scrutiny away from the control of the national government towards the control of the ‘European government.’<sup>88</sup> The political dialogue thus embodies the awakening of the Commission, and potentially other EU institutions, to the necessity of building a Union that will rest not only on the EU’s own democratic resources but also on those of its Member States. It is a sign of factual interdependence between the European and national decision-making processes and of the intricate relationships that bind the EU to its constituents.

There are good reasons for the European Union to return to its founders. It has become increasingly difficult for EU institutions to turn a blind eye to the centuries of tradition of parliamentary democracy that certain domestic parliaments have accumulated. The French and British parliaments are cases in point. In addition, the Barroso Initiative jostled a number of parliaments into action. The Portuguese case strongly corroborates this conclusion. The statistical data show that national parliamentary participation has indeed grown. Yet, as we have seen, a growth in quantity does not automatically mean a growth in quality. It should also be borne in mind that the political dialogue with national parliaments is only one channel through which national parliaments and the Commission exchange views in the policy formulation processes. Above all, the dialogue is entirely voluntary. It is not legally binding on the Commission, whose formal institutional position remains intact. In political terms, a custom may be in the making that would establish a routine consultation practice before draft European proposals reach the EU legislature.

A cynic could view the Barroso Initiative as an act of window dressing, whereby the Commission seeks to tie the hands of member-state representatives in the Council by giving national parliaments a symbolic say in policy making. Conversely, an optimist could argue that the political dialogue is a step forward in democratic terms, since it offers the representatives who are directly elected by the citizens of the Member States another opportunity to vent their concerns over the execution, and sometimes expansion, of EU competences. Although one should not *a priori* discard these two views, we think that the Barroso Initiative is a laudable development that may shore up the democratic legitimacy of the European project. Yet whether this will come to fruition will ultimately depend on the preferences and actions of its protagonist, the Commission, and the main beneficiaries, national parliaments.

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87 Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee of the Portuguese Assembly, Lisbon, 8 June 2010.

88 T. Jans & S. Piedrafita, ‘The Role of National Parliaments in European Decision Making’, *European Institute of Public Administration, Eipascopie 2009/1*, p. 22.