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The Portuguese Parliament: Blazing the Trail to the European Scrutiny Trophy?

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Abstract

This article analyses the constitutional, statutory and informal arrangements available to the Portuguese Assembly of the Republic for participation in EU decision making. The focus is on the 2006 European Scrutiny Act, the 2010 reform of the scrutiny procedures and the Barroso initiative. These developments provide a solid basis on which the Assembly's dependence on the Government can be reduced. The informal method of parliamentary scrutiny of EU affairs hitherto practised in Portugal has morphed into a document-based system. In these respects, the Portuguese Parliament no longer deserves the epithet of a laggard.

Introduction: taking stock of the research on national parliaments in the EU

National parliaments first received academic attention in the early 1970s. As Niblock (1971: 20-21) observed in his pioneering work, besides the ratification processes, domestic legislatures were only involved in the implementation of directives. This did not permit ex ante parliamentary pronouncement, that is before the decision has been made at the Community level. The governments' dominance over the European agenda was a universal diagnosis. Many a national parliament was relegated to the status of a rubber-stamping body. Parliamentary intervention was, therefore, "isolated and sporadic" (Niblock 1971: 24).

These problems became emphatic in post-Maastricht period, when the literature on the democratic deficit spawned ceaselessly (Marquardt 1994; Kuper 1998; Majone 1998; Moravcsik 2002). National parliaments were recognised as a suitable institutional remedy for the scanty representative basis of the newly established European Union (EU or the Union). Their electoral proximity to the citizen and conduciveness to engendering partisan political debates were precious assets. Yet the scholarly analyses in this period have shown that national parliaments were passive and disengaged. With the notable exception of Denmark, they were unable satisfactorily to hold their governments to account for the positions defended in the Council of Ministers (Council) (Laursen and Pappas 1995; Norton 1996; Smith 1996).

The most emblematic modes of parliamentary adjustment to a more potent Union were the establishment of committees devoted to EU affairs, a closer association of specialised committees and the crafting of instruments for the scrutiny of EU decision making. Overall, however, the national parliaments' reaction was sluggish (Maurer and Wessels 2001). The efforts in designing a collective role for them were of limited impact, too. COSAC, a biannual conference of European Affairs Committees of national parliaments and the European Parliament, was successful in coordinating an exchange of views and best practices, but it lacks binding thrust regarding EU initiatives (Tordoff 2000; Latek 2003). By contrast, the Assizes meeting held in 1990 was a failure.

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With the Constitutional Treaty came the idea of ex ante involvement of domestic parliaments, which was elaborated in the Lisbon Treaty. The latter Treaty endows on national parliaments several European functions (Barrett 2008; Passos 2008; Gennart 2010; Delcamp 2011; Kiiver 2011). The most important among them are the monitoring of subsidiarity, the policing of certain bridging clauses and the control over Europol and Eurojust.

While a part of the literature on the role of national parliaments in the European Union has accordingly begun probing deeper into their Europeanisation (Auel 2007a; Besselink 2006; Pliakos 2007), separate country studies have progressed unevenly. The focus has primarily been on the parliaments of western, northern and, of late, central and eastern European Member States (Kiiver 2006; O'Brennan and Raunio 2007; Tans 2008; Barrett 2008). Southern European parliaments have either been omitted or treated as a group, without further inquiring into the intricacies of their scrutiny arrangements (Bandeira 2003; Magone 2007a; Magone 2007b). This was justified to some extent, because the parliaments of southern Europe exhibit similar patterns of institutional behaviour, marked by inertia and subordination to their governments.

In this contribution, we address this shortcoming in respect of the Portuguese Assembly of the Republic (Assembleia da República or Assembly), the analysis of which is slowly moving away from the unabated focus on the consolidation of democracy (Bandeira 2004 and 2001; Corkill 1993; Manuel 1996; Maxwell and Monje 1991) towards Europeanisation. The powers of the Assembly have not been examined in detail elsewhere in the literature and where they have been the object of analysis, they are largely out of date due to the entry into force of the Lisbon Treaty. This paper seeks to fill this gap. More concretely, we seek to answer the question of whether the Portuguese Parliament is still a laggard in EU affairs. Has the Assembly Europeanised? Has it reacted to the challenges posed by European integration?

To this end, we furnish an in-depth insight into the constitutional, statutory and informal arrangements for the Assembly's participation in the shaping of EU policies. The article argues that the Portuguese Parliament has availed itself of scrutiny methods that can reduce its hitherto virtually exclusive dependence on the Government and that a catalyst for this was the establishment of closer links with the European Commission (Commission). While we do not carry out an empirical analysis of the actual scrutiny of secondary EU decision making, some examples from the Barroso initiative and statistical data corroborating the main argument are provided.

Taking Portugal's Parliament seriously: from laggard to strategic Europeaniser

> Being part of the European Union is probably the greatest historical moment of Portuguese history since the Age of Discoveries. (Magone 2006: 11)

Having spent a long time with its back turned to the continent of Europe, and not having been quick enough to interpret the historic destiny of its colonial period, Portugal let itself be left on the fringe of the European family and fell into a position that placed it politically and economically on the periphery […but…] today we see Europe as another name for freedom. (Costa 2000: 7, 9)[1]

A befitting point of departure for the present purposes is an argument advanced a decade ago regarding the impact of European integration on the system of government and Parliament of Portugal. It was then maintained that the accelerated pace of integration had had a profound and adverse effect in four main respects: (a) the loss of legislative competence; (b) the governmentalisation of the political decision to revise the Constitution; (c) the growing importance of compromises agreed by the Government at the EU level that are presented to Parliament as fait accompli; and (d) the absence of relations with EU institutions (Miranda João 2000: 16).

Until 2006, Portugal practised the "system of informal influence" (Fraga 2001b) or "system of information" (Filipe 2005: 69), which means that there was no systematic scrutiny of EU matters but only limited supervision through irregular meetings with the Government. This situation was steeped in the consensus among the largest political parties about the positive impact of European integration on Portugal. As a consequence, EU matters were not politicised, cleavages did not occur and Europe was kept outside Parliament (Paulo and Bandeira 2006: 6; Lobo 2003). For these reasons, the Assembly excessively depended on the Government for information and could not exert any decisive influence even in the fields of its exclusive legislative competence

1 Francisco Seixas da Costa was the Secretary of State for European Affairs of Portugal from 1995 to 2001.

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(Filipe 2005: 71; Magone 1996: 153). The patchy nature of European scrutiny was also a corollary of the internal process of democratic consolidation, because it expedited the entrenchment of the Government's preponderance over the Assembly. The two legislatures with absolute majorities mustered by a single political party, the Social Democrats, namely V legislature (1987-1991) and VI legislature (1991-1995), represented a step further in subjugating the Assembly to the Government (Bandeira 1996).

Meanwhile, other Member States installed mechanisms that permit substantive participation in secondary EU decision making. Several examples suffice to juxtapose the Portuguese Parliament against its counterparts.

France, for instance, introduced in 1992 a constitutional possibility for both the Assemblée nationale and the Sénat to adopt politically binding European resolutions.[2] In 1994 the French Government committed to a scrutiny reserve (réserve d'examen parlementaire),[3] whereby nowadays during eight weeks no agreement will be given in the Council if Parliament has expressed intention to examine a certain draft EU legislative act.[4]

In the United Kingdom, there is a long tradition of applying the scrutiny reserve, whose existence in an inchoate form dates back to the negotiations following the establishment of the Coal and Steel Community.[5] Presently, there are two types of scrutiny reserve in Britain: (a) a general one, which applies to any EU initiative and which is not limited in time; and (b) a special one, which applies to the Government's decision on whether to opt into a given draft EU measure in the Area of Freedom, Security and Justice and which must be exercised within eight weeks.[6] Westminster further relies on regular scrutiny reports as well as in-depth inquiries into salient matters on the EU roster.

In Germany, the legitimating role of the Bundestag in EU affairs has been a pivotal issue since the Maastricht Treaty. The Bundesverfassungsgericht reiterated in its landmark Lissabon-Urteil of 2009 that national parliaments were the primary, fundamental source of the Union's democratic legitimacy, whereas the European Parliament was merely a secondary, complementary source (Jančić 2010: 355-356). In response to this judgement, the German Parliament made enactments (Jančić 2010: 371), inter alia, to concretise both the constitutional right of the Bundestag to state its position before the EU legislative process begins and the corresponding duty of the Federal Government to take this position into account in Council negotiations.[7] As a consequence, the Government shall henceforth use the Bundestag's position statement as a basis in the negotiations and is obliged to report on the manner in which it has been asserted in the Council. Furthermore, if the Government is unable to exact the MPs' concerns in the negotiations, it must invoke a parliamentary reserve (Parlamentsvorbehalt). If a consensus with the Bundestag cannot be reached, the Government may only deviate from the position statement for important reasons of foreign or integration policies (Jančić 2010: 377).

Denmark is famous for giving ministers politically binding mandates for Council negotiations. These mandates are, in fact, not formally issued but are considered agreed if no member of the European Affairs Committee opposes the Government's negotiating plans. The practice of mandates became customary following the political crisis of February 1973, which broke out because the Minister of Agriculture accepted an interim price arrangement for Danish export bacon without securing the backing of the Folketing (Fitzmaurice 1976: 286; Laursen 2005).

This system contrasts with the Austrian one, where the Nationalrat and the Bundesrat may adopt legally binding opinions, which the Federal Government is obliged to respect during the negotiation and voting phases of EU decision making.[8] Deviation is only admissible for imperative reasons of foreign and integration policies. Yet it has been attested that despite an animated start, Parliament incrementally reduced the use of legally binding opinions (Pollak and Slominski 2003: 713). One possible reason was the negative experience with the very first such opinion. This was in 1995, when the Minister for Agriculture was forced to vote against a directive on animal transport but was outvoted and a solution unfavourable to Austria was adopted nonetheless (Pollak and Slominski 2003: 714; Blümel and Neuhold 2001: 329).

Not all Member States are avid European

2 Article 88-4(2) of the French Constitution.

3 Circulaire du 19 juillet 1994 relative à la prise en compte de la position du Parlement français dans l'élaboration des actes communautaires, points I and II.

4 Circulaire du 21 juin 2010 relative à la participation du Parlement national au processus décisionnel européen, annexe, point III.3. See more on the French Parliament's European scrutiny in (Siritzky 2008).

5 See the undertaking by Minister Duncan Sandys in: House of Commons, Debate of 21 February 1955, Vol. 537, col. 886.

6 See further on the British Parliament's European scrutiny in (Cygan 2007; Kerse 2008).

7 Article 23(3) of the Grundgesetz.

8 Article 23e(2) and (6) of the Bundes-Verfassungsgesetz.

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scrutineers, however. Such is, for instance, the case with Belgium (Vos 2007) and Greece (Zervakis and Yannis 2001), whose Parliaments are content to give their Governments a free hand both in the general conduct of their country's EU policy as well as in Council negotiations proper.

This brief summary warrants the conclusion that the Portuguese Assembly deserved to be placed within the group of inactive parliaments. Indeed, all these considerations have led to orthodox descriptions of the Portuguese Parliament as slow adapter (Maurer and Wessels 2001: 463) or loyal scrutiniser (Fraga 2001b). Appraisals that the Assembly's European scrutiny is ineffective are ubiquitous (Fraga 2001b: 366; Guedes and Coutinho 2006: 101; Magone 2006: 18; Miranda Jorge 2001: 38; Miranda and Medeiros 2006: 513; Ramos 1995: 185). Such appraisals were not undue. In the two decades following Portugal's EU accession, spanning the period from IV to IX legislature (1985-2005), only 70 out of a total of 1866 plenary debates addressed EU matters, which is less than 5% (Cunha 2009: 23). Ana Fraga, a former clerk of the European Affairs Committee (Comissão de Assuntos Europeus), attested, nonetheless, that regarding specific questions of national interest the Assembly could influence or even reinforce the Government's position in the Council (2001b: 368). Similarly, a study of the Assembly's involvement in Community affairs during the legislative session 1992-1993 showed that "notwithstanding an emphatic 'deficit' of action by parliamentary committees […], the European Community's weight is so big that it translates into an intense presence in the debate and parliamentary work" (Sá 1994: 409). This increased presence of the Community in the Assembly was principally attributable to the Portuguese Presidency during the first semester of 1992 and the Maastricht negotiations. While Magone agreed that the Assembly could enhance "the influencing ability of its national government" (1996: 162), he observed that the parliamentary scrutiny of EU affairs was "very sporadic and deferential to the Government" (Magone 2007a: 122). Yet whereas the Government remains the main scrutiny addressee and whereas the Assembly's participation in EU decision making was so far "necessarily intermediated by the Government" (Roseira 2010: 396), it is no longer true that the "whole process of scrutiny is ex post" (Magone 2007b: 241). The finding that "the European integration process did not change the pattern of behaviour between the executive and legislative branch" has become equally untenable (Magone 2006: 20).

The emerging dynamic analysed in this article mitigates a bulk of these arguments. The European Union has proven to be the external link that propelled the reform (Magone 2007a: 129). This is not the first time that the Union has influenced internal constitutional relations in Portugal. As has been observed, "the thickening of the institutional networks between the supranational and national levels reinforced even more the prospects of democratic consolidation and institutionalisation" (Magone 1996: 158). Actually, one of the major political factors for EU accession was "the desire to strengthen pluralist democratic institutions" (Cunha 1983: 322). Oft-quoted patrimonial and clientelistic features of Portuguese politics (Magone 2007a: 116) have been surmounted to the extent that the Assembly now has greater opportunities for input in the shaping of EU decisions. In fact, it is plausible that precisely these features have contributed to the scrutiny reform through the MPs' relations with their compatriot, two-time Commission President José Manuel Durão Barroso. To be sure, contacts with EU institutions are not an entirely new activity, as the Assembly has been reported receiving EU documentation from the Commission and the European Parliament ever since the Maastricht era (Magone 1996: 156). However, the scope and intensity of these information channels have gained momentum.

We proceed with an analysis of the Assembly's prerogatives concerning EU decision making. After examining the relevant provisions of the Constitution, we turn to the 2006 European Scrutiny Act. We dissect this Act into several key elements that define European scrutiny in most national parliaments. These are the scope, objectives, information and instruments of scrutiny. We then present the reforms effected in 2010 and Portugal's participation in the Barroso initiative.

Constitutional framework of the Assembly's European competence

The Portuguese Assembly derives three EU-related competences from the Constitution.

First, the Constitution entrenches the Assembly's ex ante involvement in EU decision making by obliging the Assembly to make pronouncements on EU matters in the sphere of its exclusive legislative competence.[9]

9 Article 161(n) of the Constitution. This provision was introduced by Lei Constitucional no. 1/97 of 20 September 1997.

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In Otero's opinion, this constitutional provision represents the recognition that, in the context of the European Union, Parliament has suffered a "clear erosion of the legislative power", because the Government or the persons appointed by it have acquired "exclusive decision-making protagonism" in areas falling within the Assembly's exclusive legislative competence (1997: 143). Second, it pertains to the Assembly to supervise and consider Portugal's participation in the process of constructing the European Union.[10]
Third, the Government is under a constitutional duty to submit to the Assembly information on the construction of the European Union in good time.[11]

Statutory and informal framework of the Assembly's European competence

Scope of scrutiny

The current statutory regulation of the Assembly's European competence is the Act on the Monitoring, Assessment and Pronouncement by the Assembly of the Republic Within the Scope of the Process of Constructing the European Union of 2006 (European Scrutiny Act).[12] This Act foresees both ex ante and ex post instruments of parliamentary participation in secondary EU decision making, for which purpose there shall be regular consultations between the Assembly and the Government.[13] It is notable that the Assembly is obliged to pronounce itself not only on draft EU legislation falling within the ambit of its exclusive legislative competence but also on documents containing guidelines for EU policies and measures.[14] This is a wide-ranging competence, because it encompasses both legislative and non-legislative EU initiatives in all policy fields, formerly called pillars (Assembly of the Republic 2007: 5, 17). Below we analyse the Assembly's scrutiny competence regarding the non-Community fields of action.

In the eyes of the Assembly, the transfer of the former Third Pillar to the First Pillar affects its scrutiny insofar as new proposals falling under the transferred areas come within the terms of the Barroso initiative and are directly transmitted by the Commission. This assists Parliament in having a say both in accordance with the European Scrutiny Act and in the framework of the political dialogue with the Commission (COSAC 2006b: 173). No difference in scrutinising the substance of such proposals is envisaged. In other words, not only will the Assembly not abandon its scrutiny because the European Parliament will gain competence in the transferred policy areas, but its scrutiny potential will actually augment.
As regards the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP), the Constitution charges the Armed Forces with "fulfilling Portugal's commitments in the military field and taking part in humanitarian and peace missions undertaken by international organisations to which Portugal belongs"[15] and the Assembly with "supervising the involvement of military contingents and security forces abroad"[16]. In 2003, the Assembly passed the Act Regulating the Assessment by the Assembly of the Republic of the Involvement of Portuguese Military Contingents Abroad.[17] Under this statute, the Government shall, prior to deploying Portuguese military troops abroad, communicate its decision to do so to the Assembly for ex ante assessment and post facto monitoring. The Government shall submit two types of reports to the Assembly: a semester report on the involvement of the Portuguese military abroad and a final report within 60 days of the termination of a mission. Within the Assembly, scrutiny of these reports is the competence of the National Defence Committee. The Standing Orders of this Committee expressly envisage its duties to monitor Portugal's participation in the construction of the European Union in the areas falling within its portfolio and to take part in periodic meetings with counterpart parliamentary committees from the other Member States.[18] The Assembly scrutinises CFSP decisions by way of "overall assessment" (COSAC 2005b: 107). Although no specific arrangements exist in the Assembly for scrutinising

10 Article 163(f) of the Constitution. This provision was introduced by Lei Constitucional no. 1/92 of 25 November 1992.
11 Article 197(1)(i) of the Constitution. This provision was introduced by Lei Constitucional no. 1/92 of 25 November 1992.
12 Lei no. 43/2006 Acompanhamento, Apreciação e Pronúncia pela Assembleia da República no Âmbito do Processo de Construção da União Europeia of 25 August 2006.
13 Articles 1(2) of the European Scrutiny Act and 261(2) of the Rules of Procedure of the Assembly no. 1/2007 of 1 September 2007 (Regimento da Assembleia da República).
14 Article 4(2) of the European Scrutiny Act.
15 Article 275(5) of the Constitution.
16 Article 163(i) of the Constitution.
17 Lei no. 46/2003 Lei que Regula o Acompanhamento, Pela Assembleia da República, do Envolvimento de Contingentes Militares Portugueses no Estrangeiro of 22 August 2003.
18 Articles 3(e) and 4(j) of the Standing Orders of the National Defence Committee of 17 November 2009.

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civilian CSDP missions (COSAC 2005b: 108), the regular meetings that the National Defence Committee holds with the Ministry of National Defence also deal with matters related to the Union's civilian or military actions (COSAC 2006a: 57).

With respect to the Union's external relations, the Assembly in principle does not hold the Government to account for negotiations within the Council. It scrutinises neither international agreements falling under the exclusive competence of the EU, such as common commercial policy, nor those falling under the shared competence. However, at any time during the negotiations, the Foreign Affairs Committee may resort to regular mechanisms of political accountability of the Government (COSAC 2008b: 114). Furthermore, there is no systematic scrutiny of EU accession treaties. This means that the Assembly intervenes in the phase of approval of a given accession treaty according to the procedure applicable to all other treaties (COSAC 2008a: 178-179).

Finally, the Assembly is "not directly involved" in the processes of open method of coordination, but acknowledges that they facilitate both access to comparative statistics for different Member States and the monitoring of what their respective governments are planning in relation to employment, growth, training, new technologies, the knowledge society, cutting red tape, etc (COSAC 2007b: 115).

Objectives of scrutiny

The main objective of the Assembly's European scrutiny is to hold the Portuguese Government to account for the positions held in the Council. This stems from the constitutional link between the Assembly and the Government. Namely, whereas the Government is generally responsible both to the President of the Republic and the Assembly, it is politically responsible only to the Assembly.[19] There is, however, no procedure of mandating the ministers.

Besides the scrutiny of the Government, the European Affairs Committee is, by virtue of the European Scrutiny Act, explicitly charged with developing relations with EU institutions. This is to be done by: (a) intensifying exchanges with the European Parliament and organising regular meetings with members of the European Parliament (MEPs), particularly those elected in Portugal; (b) promoting meetings or hearings with EU institutions, bodies and agencies on matters important to Portugal; (c) promoting inter-parliamentary cooperation within the EU; and (d) appointing Portuguese representatives to COSAC and assessing its outcomes.[20] The right of the European Affairs Committee to invite Portuguese MEPs to participate in its work is specifically foreseen in its Standing Orders.[21] Another noteworthy aspect of the work of the European Affairs Committee is the organisation of public debates and hearings on European topics with civil society representatives with a view to creating a public European forum at the national level (Magone 2006: 19).[22]

Since "Parliament's monitoring can include the activities of all EU institutions that it deems relevant for the scrutiny procedure" (COSAC 2010: 394), maintaining contact with EU institutions is a complementary means of participating in EU affairs.[23] Since by the time parliamentary scrutiny commences, the Government's negotiation position is typically not yet defined or is unavailable, scrutiny is in practice primarily directed at documents received from EU institutions, especially the Commission's initiatives (COSAC 2007b: 111). The European Affairs Committee describes the addressee of its scrutiny as follows:

Although most of the documents scrutinised are those of the Commission, in terms of steps taken/positions adopted, scrutiny is directed primarily at the Government. Accordingly, neither of these entities can be regarded as the primary subject of scrutiny (COSAC 2007b: 111; emphasis in original).

Information for scrutiny

To aid Parliament's European scrutiny, the Government is obliged to keep it duly informed about the positions and proposals that are or will be discussed by EU institutions. The Government shall send the Assembly all relevant documents as soon as they reach the Council. The documents listed exempli causa in the European Scrutiny Act include: draft treaties to be concluded by the Union or between the Member States within the framework of the Union; proposals for binding and non-binding acts; the Commission's instruments of legislative programming; legislative resolutions on Council common positions; passerelle

19 Articles 190 and 191 of the Constitution.

20 Article 6(2)(g)-(j) of the European Scrutiny Act.

21 Article 4(2) of the Standing Orders of the European Affairs Committee of 18 November 2009 (Regulamento da Comissão de Assuntos Europeus).

22 Article 6(2)(m) of the European Scrutiny Act.

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

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authorisations; agendas, minutes and results of Council sessions; subsidiarity reports; consultation documents; major economic, social and other guidelines; and annual reports of the European Court of Auditors.[24] Many of these documents are also provided directly by the Commission. In addition to the information and documents obtained via the Barroso initiative, the Assembly receives from the European Parliament those resolutions that may be of relevance to national parliaments.

Moreover, the Assembly has had permanent representation in Brussels since 1 January 2007 in the form of a representative to the COSAC Secretariat and since 24 June 2008 in the form of a permanent representative to the EU. The main task of the representative is to relay information about the EU decision-making process to the Assembly as a qualitative support for scrutiny. The other tasks include the setting up of a network of contacts with EU institutions and other national parliaments, monitoring European Parliament debates, gathering comparative information on parliamentary practices and preparing reports at the request of the Assembly.[25] The representative works under the supervision of the Secretary-General of the Assembly and prepares a report on his or her work prior to the end of each legislative session (COSAC 2009a: 213-215).

Instruments of scrutiny

The Assembly's key instruments of European scrutiny are: reports, formal written opinions, reasoned opinions, resolutions, debates and meetings on EU issues. We analyse them in turn.

1. Report (relatório). Reports on draft EU initiatives are prepared by both specialised committees and the European Affairs Committee. They provide a summary and conclusions about a given proposal.[26] They usually furnish a basis for the adoption of formal written opinions.

However, reporting is not only the competence of Parliament. The Government is under a duty to lay before the Assembly annual reports on Portugal's participation in the process of constructing the European Union, which provide information on the EU decisions that had the greatest impact on Portugal in the previous year and on the measures that the Government has taken as a result of those decisions.[27] In Fraga's view, these annual reports are not a particularly useful instrument of ex post control of the Government because of Parliament's inability to analyse these reports rigorously (2001a: 610).

2. Formal written opinion (parecer). The Assembly is statutorily obliged to adopt a formal written opinion whenever an EU proposal falls within the ambit of its exclusive legislative competence.[28] Correspondingly, the Government is under a statutory duty to inform the Assembly of the existence of such proposals, invite it to issue a written opinion and provide it in good time with a summary of the proposal, an analysis of the proposal's implications and, if available, the position that it has taken. Written opinions are prepared by the European Affairs Committee in consultation with competent specialised committees. Once formulated, they are sent to the plenary for debate and voting. The Assembly may prepare new opinions in subsequent phases of EU decision making. With respect to non-legislative, non-binding or consultative EU documents that fall outside the ambit of its exclusive legislative competence, the Assembly may but need not formulate formal written opinions and the Government need not inform the Assembly of such initiatives.

It should be stressed that although there is formally no scrutiny reserve, the Government's obligation to obtain the Assembly's formal written opinion on a given EU initiative sometimes practically functions as a scrutiny reserve. For example, during Council negotiations on the PNR Framework Decision, the Government informally agreed to this proposal, but it withheld its formal agreement pending the receipt of the Assembly's opinion. This caused disenchantment among MPs, because the Government had in advance frustrated meaningful parliamentary pronouncement.[29]

3. Reasoned opinion (parecer fundamentado). In accordance with the Lisbon Treaty and the Subsidiarity Protocol, the Assembly may send the Presidents of the European Parliament, the Council and the Commission reasoned opinions stating why a draft EU initiative, or any subsequent amendment thereof, fails to comply with the principle of subsidiarity. Reasoned opinions are only adopted regarding EU documents that fall within the ambit of the competence shared between the Union and the Member States (Bermann 2008;

24 Article 5(1) of the European Scrutiny Act.
25 Regulation no. 354/2008 of 24 June 2008.
26 Article 16(5) of Standing Orders of the European Affairs Committee.
27 Article 5(3) of the European Scrutiny Act.
28 Articles 1(1), 2 and 6(2)(b) of the European Scrutiny Act.
29 Interview with Bruno Dias Pinheiro, clerk of the European Affairs Committee of the Portuguese Assembly, Lisbon, 8 June 2010.

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Louis 2008). Reasoned opinions as a rule take the form of resolutions.[30]

4. Resolution. As the most far-reaching instrument in its scrutiny arsenal, the Assembly may adopt resolutions on EU proposals that fall within its exclusive legislative competence but also on any other document emanating from an EU institution, such as green and white papers, strategic guidelines, communications, etc.[31] Resolutions are always adopted by the plenary.

5. Debates. A number of plenary and committee debates concern EU issues.[32]

First, a plenary debate is held with the Government following the last European Council meeting of each EU Presidency.

Second, as an increasingly important tool of ex ante involvement, the plenary debate in the first half of the year may analyse the Commission's annual policy strategy and that in the second half of the year the Commission's legislative and work programme.

Third, there is a plenary debate each year on the aforesaid Government's annual reports on Portugal's participation in the construction of the Union. The Assembly or the Government may also instigate debates on all other subjects under discussion in EU institutions that fall within their areas of responsibility.[33]

Fourth, after each COSAC meeting the Chairman of the European Affairs Committee presents a report. This report, together with any contributions or conclusions reached by COSAC, is debated in the European Affairs Committee and the main issues arising there from are duly taken into account in the work of the Assembly (COSAC 2010: 404).

6. Meetings. In the weeks before and after European Council meetings, the European Affairs Committee holds meetings with the Government. Similarly, in the week before or after the meetings of the Council, there will be joint meetings between the European Affairs Committee, the competent specialised committee and the member of the Government in charge of the matter.[34]

The effects of all these scrutiny instruments remain within the political sphere. There are no legal sanctions for cases when the Government disregards Parliament's views. However, the described instruments are not futile. As the Assembly explains, where the Government fails to comply with formal written opinions or resolutions, where it fails to request their issuance or where it fails to provide the required information, the Assembly may resort to ex post political sanctions. To wit, the Government bears "a political onus to provide sufficient grounds so as not to be subject to widespread criticism, which in the last instance could undermine the majority supporting it and trigger the more drastic forms of supervision such as a motion of censure" (COSAC 2007b: 112). The MPs may also refuse to transpose directives that fall under the Assembly's transposing competence or request an assessment of the Government's decree-laws that seek to transpose directives.[35] With regard to primary EU law, the Assembly may refuse to approve a treaty negotiated by the Government. Yet these formal possibilities are hamstrung in practice, because the Government typically enjoys the support of a stable majority.

Finally, the Assembly's influence on the Commission is limited to the importance that the Commission decides to attach to its reports, formal written opinions or resolutions. The Assembly also ascertains that its influence on the Council and the European Parliament is indirect and commensurate to the influence that it is able to exert on the Government and Portuguese MEPs respectively (COSAC 2007b: 112-113).

The reform of EU scrutiny procedures: refocusing on ex ante involvement

On 20 January 2010, the European Affairs Committee approved a new mechanism of scrutiny of EU initiatives (Assembleia da República 2010). Three types of scrutiny procedures are envisaged: enhanced, normal and urgent. All of these procedures refer to Commission initiatives. If an initiative does not originate from the Commission, the European Affairs Committee shall decide whether to conduct scrutiny at all.

1. Enhanced scrutiny. This procedure is a product of the Assembly's positive experience with the Barroso initiative and centres on the Commission's legislative and work programme. Enhanced scrutiny begins with a pre-selection process using the criterion of political relevance of an EU initiative for Portugal. Each specialised committee notifies the European Affairs Committee whether it intends to submit any Commission's initiative to enhanced scrutiny. Upon receiving these

30 Article 3 of the European Scrutiny Act.
31 Articles 6(2)(e) and 7(5)-(6) of the European Scrutiny Act.
32 Article 4(1)(a)-(b) of the European Scrutiny Act.
33 Article (4)(4) of the European Scrutiny Act.
34 Article 4(1)(c)-(d) of the European Scrutiny Act.
35 See more on the transposition of directives in Portugal in (Sousa 1992).

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notices, the European Affairs Committee chooses from the pre-selected ones a maximum of six initiatives per year for enhanced scrutiny. A broader custom-made scrutiny programme is then drafted for each of the selected initiatives. Enhanced scrutiny proceeds on the basis of these programmes and includes a wide array of activities: seeking clarifications from the Government; obtaining information from EU institutions; exchanging information with other national parliaments; organising hearings with the competent Commissioner, the Presidency and the European Parliament's rapporteur; holding public hearings; gathering views from stakeholders; and producing studies. All other initiatives are scrutinised in accordance with the normal procedure.

2. Normal scrutiny. This procedure differs from the enhanced one insofar as no specific scrutiny programmes are drawn up and no extra action is taken. An important innovation is the introduction of deadlines for the drafting of reports and formal written opinions. Specialised committees must do so within six weeks from the date of receipt of the Portuguese language version of a given EU initiative. Thereafter, the European Affairs Committee has two weeks to draft its own opinion. Also, in order to prevent the passivity of specialised committees, any member of the European Affairs Committee may request the competent specialised committee to issue a report.

3. Urgent scrutiny. The urgent procedure applies when the European Affairs Committee finds out, through IPEX[36] or through its permanent representative in Brussels, that an EU initiative has raised doubts in other national parliaments about subsidiarity compliance.

Mastering the Barroso initiative: a new kind of coalition?

Since September 2006, the Assembly has received draft EU documents directly from the Commission as part of the so-called Barroso initiative. This unilateral commitment of the Commission consists in a wide-ranging political dialogue with national parliaments not only on subsidiarity but also on the proportionality, legal basis, substance and political aspects of EU consultation documents and legislative and non-legislative initiatives. Due to the entry into force of the Lisbon Treaty, the Barroso initiative was partly formalised in the form of a narrower procedure dubbed 'early warning mechanism' (Jančić 2010: 32-36).[37]

For the Portuguese Assembly, this direct link with the Union's legislative initiator did not merely represent a new source of information. In the words of a clerk of the European Affairs Committee, "it raised the profile of Parliament vis-à-vis the Government".[38] But how and why is this so?

In the wake of the adoption of the European Scrutiny Act, which coincided with the beginning of the Barroso initiative, the European Affairs Committee decided to pay special attention to the political dialogue with the Commission. The reason for it was to allow the Assembly to pronounce itself beyond subsidiarity, which, in the opinion of this Committee, "is not even the most important aspect of EU legislation".[39] In turn, the direct receipt of information on the Commission's legislative activity reduces the Assembly's dependence on the Government. This exchange of views and feedbacks prior to the onset of the EU legislative procedure eviscerates the Government's inherent privilege of timely possession of all relevant information and pre-empts its recourse to scapegoating practices, otherwise nurtured by the Union's multilevel system (Herzog and Gerken 2007: 211-212).

Three key repercussions flow from this.

First, since it is highly probable that the Assembly will receive relevant information from the Commission, the Government can no longer prevent the Assembly from acting by withholding information from it.

Second, the Government cannot present negotiations in the Council as fait accompli, because the Assembly will be in direct dialogue with the Commission and will have the knowledge of the facts related to the EU legislative process, albeit only of those that the Commission is willing to share.

Third, the Commission itself will be able to counter the Government whenever the latter, during Council negotiations, abstractly uses the Assembly as an excuse for unwavering adherence to its position. In these situations, the Commission can invoke the position

36 IPEX stands for Interparliamentary EU Information Exchange and is an online database established in July 2006. It contains a complete catalogue of Commission documents from 2006 and parliamentary documents pertaining to the national scrutiny of decisions taken at the EU level. Each national parliament uploads the information and documents that it wishes to share with other national parliaments. See: www.ipex.eu.

37 Article 7 of Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality annexed to the Lisbon Treaty.

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

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

obtained from the Assembly through the political dialogue and thereby reduce the Government's room for manoeuvre.[40]

Such Assembly's approach fits one of the patterns of strategic Europeanisation of national parliaments, whereby the latter attempt to overcome the nationally imposed constraints by bypassing the national government and engaging in direct dialogue with external actors, such as EU institutions (Auel 2007a; Auel and Benz 2005; Benz 2004: 887-888).

The immediate fruits of this newly enthusiastic approach to EU affairs are borne out by the Commission's reports. The Portuguese Parliament has so far sent most opinions to the Commission. As a "particularly active chamber" and one with a "particular interest in subsidiarity questions", the Assembly, while remaining silent in 2006, sent 19 opinions in 2007, 65 in 2008 and 47 in 2009. This amounts to a total of 131 opinions in the period 2006-2009. By way of comparison, in the same period the French Sénat adopted a total of 65 opinions, the German Bundesrat 55, the Swedish Riksdag 51, the Czech Senát 49, the British House of Lords 44, the Danish Folketing 35, the Italian Senato 25, the Dutch States-General 23, the Italian Camera dei Deputati 16, the Austrian Bundesrat and the Irish Oireachtas 14 and so on (Kaczynski 2011: 9).

However, an analysis of the contents of the Assembly's opinions in the period from 2006-2011 reveals that they typically contain a description of the EU initiative scrutinised and a short verdict on whether subsidiarity was breached or not. In most cases, no justification or further commentary is provided.[41] On occasion, the Assembly does offer substantive remarks. Only in these cases is the Commission likely to respond to the MPs' concerns. For example, examining Iceland's accession process, the Assembly inter alia found that this country's policy of permitting whale hunting was at variance with the acquis. In reply to the Assembly, the Commission stated that the next progress report on Iceland would address this topic together with the recommendations raised in the Assembly's opinion. In other replies, the Commission typically notes the Assembly's stance on EU initiatives and gives more information on the dossier in question. Conversely, the Commission almost always replies, for instance, to the opinions sent by the parliaments of France, the United Kingdom and Germany. Since the Commission tends to send replies where parliamentary opinions address the contents of EU policies and provide substantive observations, this comparative insight means that the Portuguese scrutiny of EU affairs is still evolving.

Yet the upsurge in the number of the opinions sent to the Commission should be assessed from a different viewpoint. In contrast to the previous situation, it signifies the Assembly's pro-active attitude to scrutiny. If one recalls the standpoint of the European Affairs Committee that subsidiarity is not the most significant element of its involvement in EU decision making, then Portugal's record in the political dialogue might be a ramification of a more comprehensive metamorphosis of its approach to European scrutiny. Interestingly, the European Affairs Committee has itself perceived that the shift towards more frequent relations with EU institutions has actually resulted in "the neglect of its scrutiny of the Government", which will need to be bolstered.[42]

Lastly, the figures relating to the Barroso initiative reflect a more general flurry of the Assembly's scrutiny activity in the post-2006 period. The statistical data show that in the period between October 2006 and mid-February 2009 the Assembly scrutinised a total of 204 EU initiatives (131 legislative and 73 non-legislative) and that the specialised committees adopted 156 reports, of which 126 were definitively adopted by the European Affairs Committee (Comissão de Assuntos Europeus 2009). In the first legislative session of XI legislature only, which lasted from October 2009 to July 2010, the number of scrutinised EU initiatives was 192, with 83 reports adopted by the specialised committees and 55 by the European Affairs Committee (Comissão de Assuntos Europeus 2010). Contrarily, none was adopted before 2006.

Since 2006 there has also been a degree of stabilisation and regularity in the other scrutiny activities, such as meetings, hearings and appearances organised or held by the European Affairs Committee as shown in the table and graph below.

40 Interviews with Bruno Dias Pinheiro held in Brussels on 27 May 2008 in his capacity as representative of the Portuguese Assembly to the COSAC Secretariat as well as in Lisbon on 8 June 2010 in his capacity as clerk of the European Affairs Committee.

41 See: http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/portugal/2009_en.htm, accessed on 2 June 2011.

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

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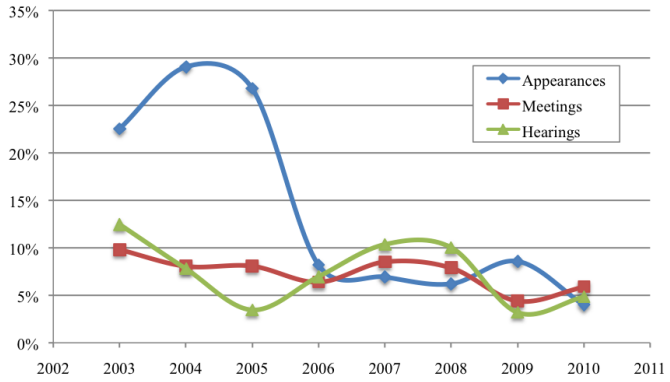
Table 1. Share of the scrutiny activities of the European Affairs Committee as absolute number of the total number of committee activities in the Assembly

European Affairs Committee	Meetings (ordinary)	Hearings	Appearances*
XI Legislature, 1st Session 15.10.2009. – 22.07.2010.	38 of 645	18 of 370	9 of 226
X Legislature, 4th Session 15.09.2008. – 14.10.2009.	29 of 659	11 of 340	13 of 152
X Legislature, 3rd Session 15.09.2007. – 14.09.2008.	51 of 646	39 of 388	11 of 178
X Legislature, 2nd Session 15.09.2006. – 14.09.2007.	57 of 669	34 of 328	12 of 174
X Legislature, 1st Session 10.03.2005. – 14.09.2006.	54 of 844	31 of 444	17 of 208
IX Legislature, 3rd Session 15.09.2004. – 09.03.2005	16 of 198	3 of 86	15 of 56
IX Legislature, 2nd Session 15.09.2003. – 14.09.2004	50 of 620	24 of 307	59 of 203
IX Legislature, 1st Session 05.04.2002. – 14.09.2003.	80 of 815 9.81%	64 of 513 12.47%	85 of 377 22.54%

Graph 1. Share of the scrutiny activities of the European Affairs Committee as percentage of the total number of committee activities in the Assembly



Source: Assembleia da República, Divisão de Informação Legislativa e Parlamentar

* Although there is no clear-cut criterion for differentiating between a hearing and an appearance, they are categorised separately in the activity reports of the European Affairs Committee.

The data presented above represent a nascent scrutiny trend in the Assembly. They can be interpreted in a threefold fashion.
First, the rising number of adopted reports means that EU initiatives are no longer adopted at arm's length from the MPs. The scrutiny of EU affairs is becoming a routine business rather an ad hoc activity. EU documents are penetrating not only the European Affairs Committee but also the specialised committees. This transversal involvement is significant for a sustained performance of Parliament's controlling and legitimating functions.
Second, the stabilisation of the number of meetings, hearings and appearances reflects the fact that the Assembly's information sources have become more diversified and that its opportunity for a more informed scrutiny of EU policies has increased.
Third, and from a broader perspective, these findings, taken together with those relating to the Assembly's participation in the Barroso initiative, allow us to conclude that Portugal is gradually joining the group of active parliaments, albeit that qualitative differences from other Member States remain salient. One wonders whether Portuguese MPs will build on these successful first steps in utilising their European scrutiny powers.

Concluding remarks: Europe discovered?

The foregoing analysis shows that the Portuguese Assembly has undergone a tacit renaissance in its engagement EU policy and decision making. This is a direct consequence of two factors: scrutiny reforms and the Barroso initiative. That these two factors occurred almost concomitantly only fuelled the transformation.
The major added value of the establishment in 2006 of a system of systematic scrutiny of EU affairs was that both the Assembly and the Government assumed duties in the scrutiny process. Parliamentary control of EU decisions has, therefore, ceased to be a matter of the Government's good will. This development stands in stark contrast with the period preceding 2006, during which the Assembly operated informal scrutiny. This meant, for instance, that a dossier as politically salient as the Services Directive was not scrutinised at all.[43] As a result of the changes implemented from 2006 onwards, the Assembly has asserted that its scrutiny system has become document-based. (COSAC 2007b: 113). In this sense, the Portuguese scrutiny system has become similar to the models embraced by both Houses of Parliament in the United Kingdom, France, Germany, Italy, Ireland and Czech Republic, as well as by the Dutch Eerste Kamer and the Belgian Senate (COSAC 2005a: 10-11; COSAC 2007a: 8). EU documents are now sifted

43 Personal correspondence with Maria João Costa, a clerk of the European Affairs Committee, March-May 2011.

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in the early stages of the decision-making process, so that if an EU initiative is not scrutinised, this is because Parliament and not the Government decided so.

The Assembly has taken advantage of the Barroso initiative and emerged as a leader in the political dialogue with the Commission. Yet, compared to some other Member States, this leadership is more quantitative than qualitative and actual correspondence with the Commission remains exceptional. The importance of the Barroso initiative for the Portuguese Parliament lies elsewhere, however. It sparked the Assembly's activity and its reformative approach to European scrutiny. Direct links with the Commission were supplemented with joint meetings and exchanges of documents with the European Parliament. The significance of the burgeoning of new informal practices of cross-level and cross-branch cooperation within the Union is nicely illustrated by the fact that the principal innovation is no longer, as it used to be some 15 years ago (Ramos 1995: 182), the regular exchange of information with the Government but with the European Commission and, to a lesser extent, with the European Parliament and other national parliaments. While the Government continues being an important provider of information, the Assembly has successfully begun an emancipation of sorts, so that its scrutiny ceased to be dependent only on information furnished by the Government.

On a larger scale, one is advised to revisit the hypothesis that the national parliaments' European competences derive only from "a wide range of factors of the internal order" (Filipe 2005: 65). Direct links with EU institutions and their utilisation for external or internal political ends do not diminish the foremost importance of the inextricable constitutional tie between the Assembly and the Government. It does, however, mean that this tie is becoming endowed with another facet extraneous to the Portuguese constitutional order. The case of Portugal demonstrates that this facet can be the espousal of ex ante involvement. This is all the more significant since, as Fraga has rightly underlined, political accountability concerns the Government's conduct in Council negotiations much more than its participation in the transposition of EU acts (2001a: 604, 609). Since the existence of formal rights or scrutiny mechanisms cannot automatically be equated with their utilisation in practice (Auel 2007b), an empirical insight into the contents of the Assembly's ex ante scrutiny of draft EU initiatives is a necessary prerequisite for testing the quality of Portuguese parliamentary supervision of EU decision making. Though any such query is impaired by the lack of clear-cut criteria for assessing scrutiny effectiveness (Raunio and Wiberg 2010), ex ante parliamentary involvement should guide future research endeavours (Raunio 2009, Sprungk 2010).

Yet one should also not overestimate the Assembly's accomplishments. The Assembly has itself assessed that "more important than what the text of the Treaty may guarantee to national parliaments is what the new Treaty may offer the citizens" (COSAC 2007b: 114). On a similar note, Quadros has argued that "the participation of national parliaments can reinforce the democratic legitimacy of the Union, but it is not an essential condition to achieve the Union's approximation to the citizens of the Member States" (2004: 313). The Assembly, thus, understands itself solely as one element of the Union's democracy, as part of a larger constitutional construct composed of EU institutions, national organs of sovereignty and citizens.

Finally, it ought to be conceded that the Portuguese Parliament's mission of "discovering Europe" (Magone 1996) has of late turned into that of Europe discovered, even though only in formal terms since the Assembly cannot boast the levels of institutionalisation and professionalisation found in Britain, France or Germany (Magone 2007b: 230). That notwithstanding, despite the erosion of its competences due to the rapid process of Europeanisation, the Assembly was able to regain a portion of influence in EU decision making by refurbishing its scrutiny powers and redirecting them to a considerable extent towards EU institutions. The Assembly has become aware of the multifarious identity of the Union's democracy. It is a laggard no more. The Portuguese Parliament has significantly Europeanised. The instalment of a host of EU-oriented rather than Government-oriented scrutiny procedures is an essential testament thereto. From a broader perspective, the Portuguese case indicates that national parliaments possess the capacity to adapt to European integration. If accrued, even slow and piecemeal adaptations can lead to more overarching parliamentary reforms. These findings are potentially replicable. The analysis of the Portuguese Parliament provides good reasons to believe that other domestic legislatures, described as latecomers or slow adapters, could follow the same path.

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