# THE NETHERLANDS

## The Roles of the National Parliament and the European Parliament in EU Decision-Making: The Approval of the Lisbon Treaty in the Netherlands

Leonard F.M. Besselink and Brecht van Mourik*

The provisions on the role of national parliaments in the Treaty of Lisbon and its Protocols have been presented by Member State governments as a major reinforcement of the democratic legitimacy of the European Union (EU). The Netherlands government made the 'strengthening of the role of national parliaments, in particular with regard to the scrutiny of new European legislative proposals' one of the five *red lines* in renegotiating a new treaty.[1] At the end of negotiations on the IGC 'mandate', the 'orange card' procedure was presented by the Netherlands government as a trophy to its parliament.

In this article, we briefly discuss how the role of the Netherlands parliament within the EU has fared in the Netherlands Act of Parliament approving the Lisbon Treaty. This is all the more interesting since role which the Netherlands Parliament, the *States General*, should play with regard to EU decision-making dominated the parliamentary debate on the Act of Approval in the Lower House. This debate used arguments that transcend the national debate and immediately touch on the relationship between national parliaments and the European Parliament (EP).

Two related issues were the main object of this parliamentary debate. Technically speaking, the first concerned an amendment seeking to introduce a parliamentary scrutiny reserve on draft EU decisions – an amendment strongly resented by the government. The second issue concerned the abolition of the present parliamentary consent requirement for (briefly) binding decisions in the 'third pillar' (Title VI of the EU Treaty on

* Lenoard F.M. Besselink is professor of European Constitutional Law and Brecht van Mourik is lecturer at the University of Utrecht. The research for this paper has been facilitated by the support from the European Commission through the FP6 Integrated Programme CHALLENGE.

[1] Kamerstukken II [Parliamentary documents, NL Lower House] II, 2006-2007, document nrs 21 501-20, nr. 344, nr. 356; also the explanatory memorandum to the Bill approving the Lisbon Treaty; Kamerstukken II 2007-2008, 31 384 (R 1850), nr. 3, 7, 8.

Besselink, Leonard F.M. & Brecht van Mourik. 'The Roles of the National Parliament and the European Parliament in EU Decision-Making: The Approval of the Lisbon Treaty in the Netherlands'. *European Public Law* 15, no. 3 (2009): 307-318.

police and judicial cooperation in criminal matters) and decisions based on Title IV of the EC Treaty (on visas, asylum, immigration, and other policies related to free movement of persons) which are not taken under the co-decision procedure. The abolition of the parliamentary consent requirement was proposed by the government.

The major justification for the abolition of the parliamentary consent which the government adduced interests us most here. This was the co-decisive role that the EP has been granted under the Reform Treaty. As the EP has a co-decisive role to play, the previous democratic deficit has been removed, and the national parliament no longer needs to step in to provide such decisions with democratic legitimacy.

After a brief sketch of the political context of the approval of the Lisbon Treaty, we first discuss the present instruments of the *States General* for parliamentary involvement in EU decision-making. Next, we sketch the fate of the amendment on the introduction of a parliamentary scrutiny reserve. Finally, we very briefly discuss the merits of the argument that since the EP has been granted co-decisive powers in the Lisbon Treaty, there no longer is a democratic deficit, and no need for national parliamentary approval of binding 'third pillar' instruments, nor for a scrutiny reserve. We will argue that this reasoning is flawed.

## 1. The Referendum and the Treaty of Lisbon

The referendum on the Constitutional Treaty of 1 June 2005 was traumatic for the political establishment in the Netherlands. Across the political spectrum, the political elite had traditionally supported European integration in its most supranational form: one in which European law is considered to be supra-constitutional in every possible respect.[2] The shock wrought by the massive 'no' was strongly felt in the aftermath, and was still very much the context of the parliamentary approval of the Reform Treaty of Lisbon.[3]

A major aspect of the political context of how to deal with the aftermath and what resulted in the Lisbon Treaty was formed by the elections of November 2006 and the ensuing coalition negotiations. The three parties which ultimately formed the government coalition were the Labour Party (*Partij van de Arbeid*, PvdA), the Christian Democrat Party (CDA), and the small, but numerically indispensable social evangelical party the Christian Union (*Christen Unie*). In the 2005 referendum campaign, the former two had campaigned in favour of the Constitutional Treaty, the latter against. In the 2006 election campaigns, the Labour Party had pledged unconditionally to hold a new

[2] On the referendum, see L.F.M. Besselink, 'Double Dutch: The Referendum on the European Constitution', *European Public Law* 12, no. 3 (2006): 345-352; see on the supra-constitutional status of EC law, Besselink, 'The Netherlands Constitutional Law and European Integration' [with Christoph R.A. Swaak], *European Public Law* 2, no. 1 (1996): 34-39 and 'The Separation of Powers under Netherlands Constitutional Law and European Integration', *European Public Law* 3, no. 3 (2009): 313-321.

[3] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December. 2007, OJ C 306, 17 December. 2007; *Rijkswet van 10 juli 2008 houdende goedkeuring […] van het Verdrag van Lissabon […]* [Act of Approval of 10 Jul.y 2008 of the Lisbon Treaty], *Staatsblad* [Official Journal] 2008, 301.

referendum on a revised reform treaty, the Christian Democrats had always been against a referendum, while the latter had not taken a clear position. None of these parties campaigned for any particular type of outcome of the intergovernmental conference; to the contrary, unlike Sarkozy's presidential campaign in France, the EU was evidently too dicey a topic to make it the object of a Dutch electoral campaign.

The outcome of the coalition negotiations was that there would only be a referendum if the treaty were to have a constitutional character; to determine whether this is the case, it was agreed that the advise was to be sought of the *Raad van State*, Council of State.

The advisory opinion was requested on the basis of the 'mandate of the IGC' of June 2007, which delineated the parameters of the Reform Treaty in great detail. To the government's opinion, this mandate was in line with the position on the objectives for which the government had previously received majority support in the *Tweede Kamer*, the Lower House, in a number of plenary and committee debates.

The *Raad van State* came up with a rather nuanced approach to the whole matter, obviously aware of the political implications of its opinion. It concluded on the one hand that just as was the case with the difference between the present Treaties and the Constitutional Treaty, the differences between the Constitutional Treaty and the Reform Treaty were, when looked at each separately and from a legal point of view, a matter of 'shifts in accent, changes in form and the removal of symbols'. However, when viewed altogether, the abandonment of the idea of a constitution, no longer incorporating the Charter of Fundamental Rights, and the clearer demarcation of the limits to EU powers (in particular the protocol on services in the general interest) and the non-inclusion of the symbols European unification, these amendments are of wider significance:

> Altogether, these changes aim to purify the reform treaty from those elements of the Constitutional Treaty which could have been starting points for the development of the EU in the direction of a state or a federation. This leads to the conclusion that the proposed reform treaty distinguishes itself significantly from the Constitutional Treaty.

This was followed by five conditions which, in the opinion of the *Raad van State* need to be fulfilled before a consultative referendum (binding ones are constitutionally impossible) could be held. These are mostly of a general nature. The *Raad van State* refrained from giving any answer to the question whether the Reform Treaty lived up to those conditions. However, given the critical approach implied in those criteria, everyone, including the government and a majority in the *Tweede Kamer* conveniently failed to answer the question whether the Treaty actually did or did not do so, and simply assumed that these conditions would not be fulfilled. The impression was, after all, that the Treaty was, different from the Constitutional Treaty, not of a constitutional nature, so no referendum was required (a finding which was notoriously absent in the *Raad van State*'s advisory opinion). No political party with governmental power was waiting to be defeated in a second referendum.

After a parliamentary debate on the matter, as well as a number of debates on the eventual results of the IGC, the major obstacles for approving the Treaty were removed. The debate on the actual Bill for approving the Treaty could therefore be left to relative backbenchers; leaders of the political groups in the *Tweede Kamer* were not needed, and with one exception (a minor three MP parliamentary group), none of them showed up. In the debate, the spokesmen for the Liberal Party proposed by amendment to reinstate the requirement of parliamentary consent for decisions in the 'area of freedom, security and justice' and also to introduce a binding parliamentary scrutiny reserve.

Before we briefly discuss the fate of these amendments, we first sketch the present parliamentary instruments.

## 2. The Existent Instruments of the Netherlands Parliament Regarding EU Decision-Making

According to Article 68 of the Netherlands Constitution:

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

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

First, there is what is known as the '*fiches* procedure'.[4] Through this procedure, both Houses of parliament are informed about new European Commission proposals, which to the opinion of the relevant minister(s) have 'special significance for the national legal order' on a monthly basis.[5] The European Commission proposals are abstracted for the government by ministries at the request of a committee of civil servants from various ministries on special forms, called '*fiches*', specification cards. The *fiche* contains a brief summary and an assessment of the subsidiarity and proportionality of the proposal. It also contains a negotiating position on the basis of the effects of a proposal for the Netherlands legal order. These *fiches* are sent to both Houses of Parliament.

Upon arrival in the Lower House, *Tweede Kamer*, the European Affairs Committee (*Commissie EU-Zaken*) selects the *fiches* that are of specific interest and forwards them to the relevant Standing Committees. Despite the fact that the *fiches* procedure enables the

---

[4] See, for an extensive description of the *fiches* procedure, N.Y. Del Grosso, *Parlement en Europese Integratie* (Deventer: Kluwer, 2000), 173-177.

[5] Aanwijzing 332 of the 'Aanwijzingen voor de regelgeving' (*Guideline on legislation by the Prime Minister nr. 332)*. The origin of the *fiches* procedure goes back to a parliamentary debate in 1990. In this debate, the Minister of Finance was requested to give parliament information about EC legislation concerning insurances more frequently (Handelingen TK 14 Feb. 1990, 40-2323). Subsequently, the government was requested to extend this procedure to all policy areas (TK 1989-1990, 21 109, nr. 17). The government was not only willing to do that, it even promised to present a list of Commission proposals on a monthly basis (TK 1989-1990, 21 109, nr. 36).

Lower House to influence the government with respect to European decision-making in an early stage, the *fiches* are not discussed on a regular basis.[6]

The Upper House, *Eerste Kamer*, quite contrary to the *Tweede Kamer*, uses the *fiches* intensively. On the basis of the *fiches*, clerks of the European Bureau of the *Eerste Kamer* make an E-file and put this online.[7] The E-file also contains the advice from the clerks of the European Office of the *Eerste Kamer* for the Committee for European Cooperation Organizations (*Commissie ESO*) and for further consideration in the other Standing Committees of the *Eerste Kamer*. If the *Commissie ESO* decides to forward a proposal to a Standing Committee, the proposal is assigned one to three stars, indicating an assessment of their relative importance.[8] The Standing Committees discuss these proposals on a regular basis and, if they want more information, consult with the government.[9]

Another instrument of the Netherlands parliament for supervising the government with regard to European decision-making is the so-called 'agenda procedure'.[10] Under this procedure, at least one week prior to a Council or a European Council meeting, an annotated agenda for that specific meeting is sent to the parliament. Although the agendas are sent to both houses, especially the *Tweede Kamer* discusses them, usually during the weekly 'Europe deliberation'. Participants in these meetings are members of the *Commissie EU-zaken*, members of the relevant standing committees, and the ministers that will take part in the relevant Council meeting. After the Council meeting, ministers give an account of what happened in 'Brussels' to the same members of parliament that were involved in discussing the agenda.[11]

In the Netherlands, parliamentary consent is required for binding decisions in the 'third pillar' (Title VI of the EU Treaty which contains provisions on police and judicial cooperation in criminal matters) and decisions based on Title IV of the EC Treaty (provisions on visas, asylum, immigration, and other policies related to free movement of persons) which are not taken under the co-decision procedure. A similar requirement of parliamentary consent was first introduced at the approval of the Schengen Agreement.[12] The Approval Acts of the Maastricht Treaty, the Treaty of Amsterdam, the

---

[6] This follows from an evaluation of the General Committee for European Affairs. See TK 1997-1998, 26054, nr. 1. See with respect to this specific issue also O. Tans, 'The Dutch Parliament and the EU: A Constitutional Analysis', in *National Parliaments and European Democracy, A Bottom-up Approach to European Constitutionalism*, eds O. Tans, C. Zoethout, & J. Peters (Groningen: European Law Publishing, 2007), 172.

[7] See <www.europapoort.nl>.

[8] The maximum of three stars was, e.g., assigned to a proposal concerning the European Union Agency for Fundamental Rights (COM(2005)280).

[9] Information about the use of the *fiches* procedure in the *Eerste Kamer* can be found in De Eerste Kamer en Europa, <www.eerstekamer.nl/id/vhyxhwkzewyv/document_extern/ekeneuropa/f=/ekeneuropa.pdf>, 10-15, last consulted on 5 March. 2009, and *Nuttige wenken voor Leden van de Eerste Kamer der Staten-Generaal* [Useful Suggestions for Members of the Eerste Kamer], Den Haag, juni 2007, 5.

[10] See P.P.T. Bovend'Eert & H.R.B.M. Kummeling, *Het Nederlandse Parlement* (Deventer: Kluwer, 2004), 300 and Del Grosso, *supra* n. 4, 177-189.

[11] O. Tans, *supra* n. 6, 173.

[12] Amendment Van Traa-de Hoop Scheffer, TK 1991-1992, 22140, nr. 20.

Treaty of Nice, and the Treaty of Prüm have contained a similar provision.[13] The main reason for introducing the requirement of parliamentary consent was to compensate for the existence of the democratic deficit with respect to these decisions, as the EP had no co-legislative role.

In practice, the major effect of the consent requirement has been that the government has informed parliament considerably more intensively about the state of negotiations, positions of the government and other Member States, and has in several instances influenced positions taken by the government in the Council. An actual veto has never been cast.

The *States General* does not only limit itself to addressing the government regarding the European decision-making process. It also addresses European institutions directly.[14] In this context, the Temporary Joint Committee Subsidiarity Review (*Tijdelijke Gemengde Commissie Subsidiariteitstoets*, *TGCS*) reviews whether European legislative proposals comply with the principles of subsidiarity and proportionality. This committee, which consists of members of both Houses, consults the relevant Standing Committees before it presents its final view to the plenary sessions of the Houses. If both houses agree that a specific European proposal is not in accordance with the principles of subsidiarity and proportionality, this will be communicated to the European institutions. In 2006, for the first time a letter was sent directly to the European Commission, concerning the directive on criminal measures aimed at ensuring the enforcement of intellectual property rights.[15]

All in all, the *States General* possess quite a few instruments and procedures which enable them to follow the European decision-making process, influence the government, and hence influence European decision-making. Major questions that arose in the context of approving the Treaty of Lisbon were whether there is a useful place for a parliamentary consent requirement as the EP had extended powers of co-decision, thus removing the major reason why that requirement was introduced in the first place; and the other question was whether one would need to add a general scrutiny reserve for all EU decisions to the repertoire of national parliamentary instruments.

## 3. The Act of Approval of the Lisbon Treaty: The Parliamentary Debate

The discussion on introducing a scrutiny reserve regarding EU decision-making in the Netherlands began some time ago. A 'national convention' on constitutional reform, as

---

[13] Lastly, Arts 3 and 4 of the *Rijkswet houdende goedkeuring van het Verdrag van Nice* [Act for the Realm concerning approval of the Treaty of Nice, *Staatsblad* [Official Journal] 2001, 677]. The requirement of consent was introduced in the approval act of the Treaty of Maastricht by an amendment of a member of parliament (Amendment Van der Linden c.s., TK 1992-1993, 22647 (R1437), nr. 20). In the approval acts of the treaties of Amsterdam and Nice, the government initiated the absorption of the requirement of consent.

[14] The Barroso initiative of 2006 made it possible for national parliaments to address the European institutions directly with respect to all kinds of issues. As we shall see, the Netherlands parliament limits itself to communicating cases in which it finds there is an infringement of the subsidiarity principle.

[15] COM(2006)168. See for more proposals which would, according to the Dutch parliament, cause a breach with the principles of subsidiarity and proportionality: De Eerste Kamer en Europa, <www.eerstekamer.nl/id/vhyxhwkzewyv/document_extern/ekeneuropa/f=/ekeneuropa.pdf> last consulted on 10 March. 2009, 24. See also J.J. van Dijk, 'Hoe verging het de Tijdelijke Commissie Subsidiariteitstoets (TCS)?', *RegelMaat* afl. 2007/4 (2004): 141-149.

well as a government think tank, recommended the introduction of a scrutiny reserve in order to enhance the role of the Dutch parliament in an early stage of the EU decision-making process.[16] The government, however, made clear that it did not favour such an instrument. The main argument the government used against the introduction of a scrutiny reserve was that in its view a scrutiny reserve had no added value over and above the existent instruments of the Dutch parliament for scrutinizing EU decision-making.[17]

That this was an important point for the government became clear when a few days before the parliamentary debate in the *Tweede Kamer* a round table hearing was held by its European Affairs Committee about this specific topic.[18] The participating MPs from the coalition parties which were previously well disposed to the introduction of a scrutiny reserve were, for the very same reasons the government used earlier, unexpectedly skeptical about introducing such a reserve by amendment into the Bill of Approval of the Treaty of Lisbon.

This notwithstanding, an opposition Member of Parliament submitted an amendment to the effect of introducing a scrutiny reserve into the Bill during the plenary debate.[19] This amendment stated that, as long as a house of parliament has not finished scrutinizing a European proposal, the representative of the Netherlands cannot cooperate in the conclusion of a legislative act in the Council.

The alleged main problem for the coalition parties and especially the State Secretary for European Affairs, who acted as main spokesperson on behalf of the government, Timmermans, was that this scrutiny reserve would as a matter of fact result in a consent requirement, which would negatively affect the government's negotiating position in the decision-making process.[20]

After a hot debate, a compromise was reached on an amendment containing a special duty for the government to inform the parliament with respect to EU legislative proposals, which one of the houses finds of a 'special political interest'. If one of the houses finds a European proposal of a such political interest that it wishes the government to inform it specifically about that proposal, it shall notify the government as soon as possible. Upon such notification, the government shall forthwith make a parliamentary reservation in Brussels. Within four weeks after the scrutiny reservation has been made, parliament will consult with the government as to the 'special political significance' of the EU proposal, the manner of providing parliament with information as regards the state of the negotiations, the legislative procedure, and possible further consultations with the government. The scope of this parliamentary procedure is limited to 'legislative acts in the sense of Article 2 of the Protocol concerning the Role of National Parliaments in the EU'.[21]

---

[16] See, e.g., the report of the National Convention: Nationale Conventie, Hart voor de publieke zaak, Aanbevelingen van de Nationale Conventie voor de 21e eeuw, SeptemberSeptember 2006, 53-55. The report can be found on <www.parlement.com>, last consulted on 4 February. 2009. See also the report of the WRR 'Europa in Nederland', 142-143. This report can be found on <www.wrr.nl>, last checked on 4 February. 2009.

[17] TK 2007-2008, 31202, nr. 5, 9.

[18] See for the minutes of this meeting TK 2007-2008, 31384 (R1850), nr. 26.

[19] TK 2007-2008, 31384 (R1850), nr. 14.

[20] Handelingen TK 2007-2008, 91, 6457.

[21] TK 2007-2008, 31384 (R1850), nr. 23; this amendment became Art. 4 of the Act of Approval of the Lisbon Treaty, *supra* n. 3.

## 4. The Removal of the Consent Requirement

As to the requirement of parliamentary consent with respect to EU decision-making in the area of freedom, security, and justice, it was argued that its original rationale no longer applied. When the Lisbon Treaty enters into force, the co-decision procedure will be applicable in most cases. This means that the EP on those occasions will be co-legislator. Therefore, a majority of the *Tweede Kamer* held that the democratic deficit would no longer exist, and hence the requirement of consent the relevant decision-making should be abolished.[22]

This opinion was not shared by everyone. In the build-up to the parliamentary debate, many specialists tried to convince the parliamentarians to maintain the requirement of parliamentary consent.[23] The coalition MPs – who were put under unexpectedly heavy pressure from the government – could not be convinced to maintain the existent requirement of parliamentary consent, while most opposition parties wanted to maintain the requirement in full. Several amendments to retain the parliamentary consent were submitted by the opposition .[24] According to one of them, the requirement of parliamentary consent not only should be maintained in the Area of Freedom, Security, and Justice (Title V of the consolidated version of the new Treaty on the functioning of the EU) but should also be extended to the general provisions on the Union's external action and specific provisions on the common foreign and security policy (Title V of the consolidated version of the new Treaty on EU), as in that area there is no co-decision whatsoever.[25]

Despite all these views, the *Tweede Kamer* decided otherwise.[26] It decided that the requirement of parliamentary consent should be abolished in most cases and only be maintained for decisions in the Area of Freedom, Security, and Justice (Title V of the consolidated version of the Treaty on the functioning of the EU) where the EP has no co-legislative powers – and this is in very few cases indeed.[27]

## 5. The Role of National Parliaments and the Role of the EP: Mutually Exclusive?

The debate and its outcome raise a fundamental question concerning the relation between the role of the national parliaments and the role of the EP with regard to EU decision-making.

---

[22] This position was also taken by the *Raad van State* in its advisory opinion concerning the Bill on approval of the Lisbon Treaty. The report and the response of the government can be found in TK 2007-2008, 31384, nr. 4.

[23] For example, the Commission-Meijers wrote a letter to the Dutch parliament in which they argue that, for many reasons, the requirement to parliamentary consent should be maintained. Letter of the Commissie-Meijers of 8 May 2008. See also the memo of 3 January. 2008. The letter and the memo can be found on <www.commissie-meijers.nl>, last checked at 6 February. 2009. See also L.F.M. Besselink, D.M. Curtin, & J.H. Reestman, 'Instemmingsvereiste én behandelingsvoorbehoud voor EU-besluiten! Nu of nooit!', NJB afl. 22 (2008): 1349-1350.

[24] TK 2007-2008, 31384 (R1850), nr. 13 and TK 2007-2008, 31384 (R1850), nr. 12.

[25] TK 2007-2008, 31384 (R1850), nr. 12.

[26] The *Eerste Kamer* does not have the right of amendment.

[27] TK 2007-2008, 31384 (R1850), nr. 11; this amendment is incorporated as Art. 3 in the Act of Approval.

The first question is the following. If it is true that national parliaments have a role to play particularly in cases in which the EP has no co-decisive powers, is the inverse also true? That is to say, does it follow that if the EP *does* have co-decisive powers, there is *no* role for national parliaments?

The first limb of this argument (whenever the EP has no co-decisive powers, national parliaments have a role to play in EU affairs) was followed when the consent requirement was introduced for decisions under the third pillar and in the area of freedom, security, and justice. The second limb (if the EP has co-decisive powers, there is no role for national parliaments) was added by the government (and supported by the *Raad van State*) in its dealings with the Bill on the approval of the Treaty in order to abolish the consent requirement. It had an unfortunate precedent in the legislation on the present consent requirement as formulated at the time of the Nice Treaty, which stated that the consent requirement was only applicable to EU decisions for which no co-decision applied and would lapse as soon as the EP would acquire co-decisive powers. Hence, this was a precedent which may explain why, at the time of approval of the Lisbon Treaty, the government was tacitly followed in its reasoning by the coalition majority in parliament.

Essentially this reasoning was also, however, followed by the government in opposing the introduction of a parliamentary scrutiny reserve. It held that if a minister cannot cooperate in adopting a legislative act as a consequence of parliament not lifting the reserve, this in fact amounted to a consent requirement – the effect of a scrutiny reserve is the same as with a consent requirement: the government cannot vote in favour of legislative proposal.

We think this reasoning is flawed.

### 5.1. Is a parliamentary scrutiny reserve amount to the same as a requirement of parliamentary consent?

First, a brief remark on whether a scrutiny reserve is equivalent to a consent requirement, as the Dutch government maintained. It is a common understanding in other EU Member States that a parliamentary scrutiny reserve is legally and constitutionally not the same as a consent requirement. The reason is quite simple: if consent is withheld, the government is forced to vote against or block a proposal in the Council. This cannot be the effect of a scrutiny reserve. Even if legally the effect of the reservation is that a Member State representative cannot cooperate on the adoption of the proposal in the Council, there is no obligation to vote against a proposal. Particularly in case of required unanimity, this means legally that the abstention cannot prevent the proposal from being adopted (Article 204(3) EC).[28]

[28] Of course, in a parliamentary system of government, a government which overrides a scrutiny reserve wished for by parliament risks losing confidence, as any governmental behaviour potentially does. In a sense, this would mean that if the Council were to adopt a measure which is still under a scrutiny reserve of one or more Member States, this would be a show of 'constitutional intolerance' which would brutalize constitutional relations as it exposes the representative of a Member State to the loss of confidence of his parliament and hence may effectively lead to his removal from the Council. As a matter of fact, the Council would not easily do so.

### 5.2. Ought a National Parliament Step Back When the EP has Co-legislative Powers?

The thesis that a national parliament has no significant role to play in cases in which the EP has co-legislative or co-decisive powers is flawed. There are many reasons why. We mention only two.

Firstly, from the point of view of the distinct roles of national parliaments and the EP, it is quite clear that the EP has no powers over the behaviour of individual members of the Council; national parliaments do. No individual Member State, nor any of its representatives acting as such, can be held to account to the EP; they can be held to account to their national parliament. Hence, far from reducing the democratic deficit, leaving issues which are dealt with in the Council exclusively to the EP would *increase* the democratic deficit. If the role of national parliaments is insignificant because all is left to the EP, this effectively creates unaccountability for national executives.

Secondly, also when viewed from the perspective of the political legitimacy of EU decision-making as a whole, it is hard to maintain that national parliaments have only a role to play with regard to their national governments and none with regard to European decision-making. To say that national parliaments need to step in when there is no co-decisive power for the EP, but that they need to retreat as soon as the EP has such powers, is to suggest that national parliaments are only surrogate parliaments as far as the EU is concerned: they do not really represent the peoples which together have formed the EU, only the EP does. Although the aggregation of these peoples as to representativeness at European level is a problem which in a sense is solved through the establishment of a directly elected EP, denying that national parliaments do not represent the peoples of the Member States is a bold claim which seems to deny at least three centuries of European democratic and parliamentary tradition.

## 6. Some Empirical Evidence: Competing or Concurrent Parliamentary Roles?

The suggestion that the roles of the national parliaments and of the EP are mutually exclusive in the sense that the former should step back when the latter has acquired co-decisive powers seems also to be falsified by the actual behaviour of parliaments. There is some factual evidence which suggests that a move from no co-decisive role for the EP to a co-decisive role has not changed the behaviour of the national parliaments with regard to relevant EU decisions.

The field in which this can be established is that of the move from unanimity to qualified majority voting with regard to certain decisions in the area of freedom, security, and justice under the *passerelle* of Article 67, second paragraph, second indent, EC.[29]

[29] Council Decision of 22 Dec. 2004, (2004/927/EC), OJ L 396,45.

On 1 January 2005, the EP has acquired full co-decisive powers on this set of measures, which it did not have before.[30]

With some students, we looked at three or four decisions from before co-decision for each of the relevant parliaments of France, Germany, the United Kingdom, and the Netherlands.[31] We compared the parliamentary behaviour of the houses of these parliaments[32] in the form of a preliminary perusal of parliamentary documents with regard to these decisions and compared them with parliamentary activity from after the introduction of co-decision with regard to three or four selected decisions.[33]

It concerns EC decisions with comparable political sensitivity. This perusal of documents confirms what is common knowledge: the upper houses are significantly more active than the lower houses. The *Bundesrat* gives a far more elaborate and precise analysis and recommendation of the same document as the *Bundestag* – the *Bundestag* often merely takes note of the proposal and leaves it at that even though with regard to the subject matter of the EU decision it has – within the German constitutional framework – a legislative competence which the *Bundesrat* lacks but the *Bundestag* does. The *House of Lords* also gives its opinions on EU decisions that do not bind the United Kingdom.

The documents, however, do not seem to indicate any changes in attitude neither in the French *Sénat*, the German *Bundestag* and *Bundesrat*, nor in the Houses in Westminster if we compare the degree of parliamentary activity before and after co-decision. There simply is no evidence to suggest that the intensity of scrutiny correlates in any manner with the EP co-decisional powers as regards these parliaments.

As to the Netherlands parliament, the situation is different. The *Tweede Kamer*, like its counterparts abroad, has not changed its practice after the EP acquired co-decisive powers; it did as much – which is not very much – before as after co-decision. To that extent, the *Tweede Kamer* does not live by the words it professed at the adoption of the Bill approving the Lisbon Treaty. Its views do not correspond with reality in parliamentary practice in other Member States we looked at, but neither with its own practice.

---

[30] It concerns the matters mentioned in Art. 62(1), (2)(a), and (3), as well as measures referred to in Art. 63(2)(b) and (3)(b) of the Treaty: the abolition of border controls at internal borders, standards and procedures at internal borders, conditions of short-term freedom to travel for third country nationals; burden sharing regarding asylum seekers; illegal immigration and illegal residence, including repatriation of illegal residents.

[31] These included Council Regulation No. 2007/2004, 26 Oct. 2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union; Council Regulation No. 2252/2004, 13 Dec.December 2004, on standards for security features and biometrics in passports and travel documents issued by Member States; Council Regulation No. 539/2001, 15 Mar. 2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

[32] For France, we only had the opportunity to look at the *Sénat*.

[33] Regulation (EC) No. 863/2007 of the EP and of the Council, 11 Jul. 2007, establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004, as regards that mechanism and regulating the tasks and powers of guest officers; Regulation (EC) No. 1987/2006 of the EP and of the Council, 20 Dec. 2006, on the establishment, operation, and use of the second-generation Schengen Information System (SIS II); Regulation (EC) No. 562/2006 of the EP and of the Council, 15 Mar. 2006, establishing a Community Code on the rules governing the movement of persons across borders (Schengen Border Code).

For the *Eerste Kamer*, the situation is quite different. Remarkably, it has not adopted any explicit position with regard to two out of the three decisions we have looked at, whereas it did so with regard to all the decisions before co-decision. There is not a trace in the parliamentary documents, however, that this is a conscious decision adopted because of the role of the EP. The explanation which seems more readily at hand is quite different. For this, we should be reminded that the change towards co-decision meant under the previous Acts on Approval of the Amsterdam and Nice Treaties, respectively, that the requirement of parliamentary consent no longer applied. This has meant that the mechanism for scrutiny which previously equipped the *Eerste Kamer* with the means for active scrutiny has no longer been available. As was pointed out by some experts, the major effect of the consent requirement was not to obstruct decision-making, but to have means of keeping the government under pressure to inform parliament about the details of the relevant issues concerning selected and politically sensitive dossiers. Here, we see that government has managed to escape from parliamentary oversight with regard to such politically prominent and sensitive issues as the Schengen Border Code and SIS II.

## 7. Conclusion

The Netherlands Parliament has from the very beginning of the EEC Treaty lamented the limited role of the EP (previously Assembly) and noted the consequent democratic deficit. At the time of the Convention Implementing the Schengen Agreement, the Treaty of Maastricht, Amsterdam, and Nice, this led to the introduction of a requirement of parliamentary consent of both houses for any decisions taken under the third pillar, and later Title IV EC without co-decision. By a freak of political logic, reinforced by the logic of coalition politics, this was turned round to mean that parliament should not have a significant role with regard to EU decision-making when the EP has acquired co-decisional powers. Consequently, the government successfully fought an amendment to introduce a general scrutiny requirement as it exists in a very large number of Member States. Also, the consent requirement was abolished on the basis of that logic. The practical consequence we can foresee on the basis of experience with decisions in the area of freedom, security, and justice before and after the *passerelle* decision introducing co-decision in December 2004 is twofold. The *Tweede Kamer*, which has not always scrutinized in any great detail EU legislative proposals themselves, nor their evolution within the process of EU decision-making, will probably continue the way it has done – thus not abiding by the logic prevailing at the time of approving the Lisbon Treaty. The considerably more active *Eerste Kamer* will be deprived of an instrument of scrutiny which will give the government and its representatives in Brussels free reign, unrestrained as remains from national parliamentary as well as EP oversight. It is ironic that this would be the result of what was sold as the strengthening of the democratic nature of the EU and its decision-making.