Article 12 [The Role of National Parliaments]

National Parliaments[14–17] contribute actively to the good functioning of the Union[18–27]:

(a) through being informed[32–39] by the institutions of the Union[35] and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality[43–68];
(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 85 and 88 of that Treaty[78–83];
(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty[75,76];
(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;
(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.[86,87]

See also the commentaries on Protocols No. 1 and No. 2.

H.-J. Blanke and St. Mangiameli (eds.), *The Treaty on European Union (TEU)*,
DOI 10.1007/978-3-642-31706-4_13, © Springer-Verlag Berlin Heidelberg 2013

Contents

1 The Content of Art. 12 TEU

1 Art. 12 TEU summarises in a single provision—and therefore makes more "visible"[1]—the "rights" and **functions of national Parliaments** in the new constitutional architecture of the Union. These "rights" and functions are:

– The right to be informed;
– The control on the respect of subsidiarity principle;

[1] Morviducci (2008), p. 88; Villani (2009), p. 408 (but noting that the adoption of a single provision also "strengthens their political weight").

– The participation to the evaluation of the policies of the Union in the AFSJ;
– The participation to the scrutiny of Europol;
– The participation to the evaluation of the activities of Eurojust;
– The participation to the procedure to amend the Treaties;
– The right to be informed on the requests of new memberships in the Union;
– The participation to interparliamentary cooperation.

The very essential regulation included in Art. 12 TEU is completed by other provisions of the Treaty and, with more details, by the two Protocols, on the role of national Parliaments in the EU (No. 1) and on the control of the application of the principles of subsidiarity and proportionality (No. 2). In itself Art. 12 TEU is little more than a "**summary provision**",[2] and for some aspects it almost seems to lack an autonomous normative content[3] (different from that deriving from the provisions mentioned by it). Art. 12 TEU has in a certain sense a **symbolic character**,[4] as it expresses the EU's awareness of its incompleteness, and of the need to look beyond its constitutional structure to find a democratic legitimacy. **2**

2 Historical Remarks

Art. 12 TEU represents a remarkable **innovation**[5] both in relation to the Constitutional Treaty and to the pre-existing legal regulation of the role of national Parliaments in the institutional architecture of the Union. **3**

In relation to the Constitutional Treaty, the innovation is mainly (but not merely) formal, as the Treaty of Lisbon regroups in a single and specific provision[6] "which contains an inventory of special rights which the National Parliaments will enjoy",[7] that were previously scattered through various provisions of the Constitutional Treaty.

From the substantive point of view, Art. 12 TEU is the final point of a long evolution of the legal regulation of the place recognised to national Parliaments in EU law.

[2] Von Bogdandy and Bast (2010), p. 304.

[3] In this sense, see Louis (2009), p. 133, who also remembers (in fn. 2) that this is the only provision in the Treaty to be drafted in the "indicative present" and not as a shall prescription: this is a consequence of the opposition of the United Kingdom House of Commons to a previous draft text that seemed to impose a legal duty to Parliaments and that had been criticised in the House of Commons. See European Scrutiny Committee of the House of Commons—European Union Intergovernmental Conference, *Follow-up Report—Third Report of Session 2007–2008*, p. 7. According to Hölscheidt, in Grabitz et al. (2011), Art. 12 EUV para 4, Art. 12 TEU has "declaratory nature".

[4] Louis (2009), p. 132–133; Dann (2010), p. 267; Gianniti (2010), p. 171.

[5] "One of the great innovations of the Treaties", according to Fischer (2010), p. 146.

[6] A specific provision on national Parliaments had already been proposed by the report of the Group IV of the Convention on the Future of Europe, but it had not been included in the drafts and in the final text of the Treaty.

[7] Kapteyn et al. (2009), p. 218.

4 Already at the foundation of the European Communities, national Parliaments possessed some "functions" of the utmost importance for the creation, evolution and practical operation of the Treaties and of the institutions foreseen by them: these "traditional"[8] or **"original" functions** can be regrouped[9] under the headings of "**ratification**", "**implementation**" and "**accountability**" functions, and consisted, respectively, in the power to ratify the Treaties (and their amendments[10]), to implement the acts that were not self-executing[11] and to hold national Governments accountable for the positions adopted by them in the Council of Ministers.

5 All these functions—that correspond to the role played by Parliaments in the ratification and execution of international treaties—were pure and automatic consequences of the position of Parliaments in the national Constitutions of the six original MS: the only addition provided by the Treaties to these functions was the right of MS Parliaments to choose some of their members as members of the **Parliamentary Assemblies of the Communities**,[12] thus "incorporat[ing] the national Parliaments in the decision-making procedures of the Communities".[13] These Assemblies were endowed with simply consultative functions. On the whole, the position of national Parliaments in the three European Communities was not particularly different from the position they enjoyed in some other international organisations[14] (like the Council of Europe and the WEU). It cannot surprise, therefore, that "national Parliaments have been for a long time the great absent of the construction of Europe".[15]

[8] Gennart (2010), p. 19.

[9] Kiiver (2008), p. 9 et seqq.; Blumann and Dubouis (2010), p. 482 (who speak of functions of "ratification", "contrôle", "implementation").

[10] The partial exceptions being those national Constitutions that allow ratification on the base of a referendum, that by-passes the parliamentary decision, like in the case of France (Art. 11 Const.): Oberdorff (2008), p. 718.

But also in the cases where Parliaments do preserve the power of ratification of the Treaties, the freedom of which they dispose "is largely reduced if not annihilated, because it cannot do anything else than accepting or refusing the Treaty that is submitted to it" (Saulnier 2002, p. 100).

[11] Also for the implementation of directives, the margins of choice for the national Parliaments are limited (Oberdorff 2008, p. 720). The French Constitutional Council has correctly underlined that the implementation of directives is "a community obligation and a constitutional necessity", Decision 2004-496 DC (Judgment of 10 June 2004).

[12] Art. 20–25 ECSC Treaty; Art. 107–114 Euratom Treaty; Art. 137–144 EEC Treaty.

[13] Oeter (2010), p. 66.

[14] Decaro and Lupo (2009), p. 18 remark that at his origins the EP was "configurated as a typical Assembly of an international organization". After all, as Besselink (2006), p. 1, notes, "European integration is by origin a foreign affairs matter. These affairs are traditionally dominated by national executives. National Parliaments play a role only in the margins".

[15] Oberdorff (2008), p. 715. Also Orrù (2003), p. 1754 and Sicardi (2007), p. 41 remark that national Parliaments' role was very weak—notwithstanding the "original functions"—in the first decades of the history of the Communities.

The **history** of the involvement of national Parliaments in the European constitutional framework[16] and of the impulse to put in evidence and to effectively exercise their national functions as a resource of the European decision-making system is a result of a long process originated on one side by the enlargement of the powers of the European Communities (and, from 1992, of the Union) through the various Treaty reforms starting from the mid-1980s and, on the other side, by the admission in the Community of new MS with a strong parliamentary tradition and with remarkable "Eurosceptic" sections of their public opinions (mainly Denmark and the United Kingdom[17] after 1973). **6**

The "first official European texts that explicitly faced the problem"[18] of a direct recognition in the Treaties of the legislative assemblies of MS have been the **Declaration No. 13** on the Role of national Parliaments in the EU, annexed to the **Treaty of Maastricht**, that merely encouraged a better participation of national Parliaments in the EU decision-making process,[19] and the Declaration No. 14, that suggested regular formal meetings between national and European MPs. **7**

The first normative provisions in EU law were those included in the **Protocol** on national Parliaments annexed to the **Treaty of Amsterdam**, that have regulated their position and prerogatives in EU law till the entry in force of the Treaty of Lisbon. The Treaty also established a Protocol on the principles of subsidiarity and proportionality, but national Parliaments were not mentioned in it as devices to control their respect. **8**

The **Treaty of Nice** did not modify the regulation included in the Amsterdam Protocol, but in its Declaration No. 23 invited national Parliaments to take part to the debate on the future of the EU. **9**

The **Laeken Declaration** on the future of Europe of 15 December 2001 asked to the Convention on the Future of Europe three questions that directly concerned the subject of this comment: (a) "Should [national Parliaments] be represented in a new institution, alongside the Council and the European Parliament?"; (b) "Should they have a role in areas of European action in which the European Parliament has no competence?"; (c) "Should they focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?" (→ Protocol No. 1 para 15).[20] **10**

[16] For a detailed account see for example Sicardi (2007), p. 40 et seqq.

[17] Rideau (1996), p. 170 mentions a proposal of the British delegation of 6 March 1991 during the Political Union Intergovernmental Conference, suggesting the adoption by the Conference of a Declaration "by which the Member States would commit themselves to transmit to their Parliaments all the legislative proposals made by the Commission, to take the necessary measures in order to allow the Parliaments to survey the said proposals and to ensure that the procedures followed by the Council would make available a previous examination of the final decisions at national level". Rideau also notes that "the ideas developed in this note can also be found in a resolution adopted by the European Parliament on 10 October 1991".

[18] Cartabia (2007), p. 105–106.

[19] This first mention of national Parliaments is correctly defined "minimal" by Chalmers et al. (2006), p. 28.

[20] On these three questions, and their connections, see Linde Paniagua (2004), p. 169 et seq.

11 To face these questions, the **Convention on the Future of Europe** created a specific Working Group (No. IV) on this topic[21] that was also examined by Working Group I, concerning the principle of subsidiarity.[22] The debate in the Convention was the decisive moment, in the sense of being "the time when a deep and serious discussion about the role of National Parliaments in the Union took place".[23] The results of this discussion were the provisions included in the **Convention Draft**[24] and in the TCE[25]: giving a positive answer to the third of the abovementioned questions asked by the Laeken Declaration, national Parliaments were seen as an answer not only to the problem of their involvement in the EU decision-making process, in the perspective of its democratisation, but also to the problem of monitoring the application of the principle of subsidiarity. Besides the provisions scattered through the text of the Treaty, an organic regulation was included in the Protocols on national Parliaments and on the principles of subsidiarity and proportionality.

12 After the failure of the ratification of the Constitutional Treaty, the conclusions of the Presidency of the European Council held at Brussels on 21/22 June 2007[26] established in the mandate for the 2007 IGC that the role of national Parliaments should have been enhanced in comparison to the Constitutional Treaty. Therefore, the **Treaty of Lisbon** redrafted the rules concerning national Parliaments already included in the Constitutional Treaty, making them more visible through the "**codification**" provided by Art. 12 TEU.[27] Some further changes were also introduced in the two Protocols on the role of national Parliaments in the European Union (No. 1) and on the application of the principles of subsidiarity and proportionality (No. 2) (→ para 53–56). The **two Protocols** have the same legal force as the Treaties (Art. 51 TEU), they partially overlap and must be read in tandem[28] and in their systematic connection with the Treaties.

13 To situate Art. 12 TEU and the debate in the legal (and political science) literature that has preceded and followed it, it is necessary to ask two preliminary

[21] See the conclusions in CONV 353/02.

[22] See the conclusions in CONV 286/02.

[23] Passos (2008), p. 27.

[24] In the Convention draft national Parliaments had been dealt with by Art. III-160: "1. Member States' national Parliaments shall ensure that the proposals and legislative initiatives submitted under Sects. 4 and 5 of this Chapter comply with the principle of subsidiarity, in accordance with the arrangements in the Protocol on the application of the principles of subsidiarity and proportionality. Member States' national Parliaments may participate in the evaluation mechanisms contained in Article III-161 and in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles III-177 and III-174".

[25] Hölscheidt, in Grabitz et al. (2011), Art. 12 EUV para 2, notes that in the Constitutional Treaty national Parliaments were mentioned in 13 provisions.

[26] Doc. 11177/07 of 23 June 2007, Annex I, para 11.

[27] Villani (2009), p. 408.

[28] Craig (2008), p. 149.

questions: (a) **who are national Parliaments** from the perspective of Art. 12 TEU (→ para 14 et seqq.)? (b) **why** does the European law "**bother**"[29] with them (→ para 18 et seqq.)?

3 Who Are National Parliaments?

Apparently, the first of the two abovementioned questions seems superfluous, and its answer obvious. It is evident that the homogeneity requirements for the membership of the EU deriving from the common values outlined in Art. 2 TEU presuppose the democratic organisation of the MS, whose first sign is the presence of **representative assemblies**, directly elected by the people with universal adult suffrage, and with the competence to adopt legislative acts (→ Art. 2 para 18 et seqq.). Nonetheless, the landscape of Parliaments in Europe is rather heterogeneous,[30] and this fact must be taken seriously in consideration. **14**

The notion of "national Parliament"[31] is not completely defined by European law, but is derived from national constitutional law,[32] that fills the gap left by the European notion. The main difference between the Parliaments existing at the national level in MS is between **unicameral**[33] and **bicameral**[34] Parliaments (where in some cases the second Chamber is only indirectly elected by the people or—in the case of the British House of Lords—is not elected at all), that is explicitly acknowledged by Art. 8 of Protocol No. 1 on national Parliaments (→ Protocol No. 1 para 113–119) and Art. 7.1 of Protocol No. 2. This latter provision gives to each Chamber one vote, if the Parliament is bicameral and two votes if the Chamber is the only assembly composing the national Parliament. But, besides this question, also the relevance of subnational Parliaments as national Parliaments in European **15**

[29] Using the language of Schmitter (2000).

[30] Grabenwarter (2007), p. 88 sees a heterogeneity of the parliamentary landscape in Europe. See also the remarks of Kiiver (2006), p. 19 et seqq.

[31] On this see the remarks of Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 12. It is interesting to remark that the language of European law uses the definition of "national" and not of "Member State" Parliaments: the idea of nation, with all its historic and semantic ambiguities, appears here, almost to testify that democratic legitimacy requires the nation-State.

[32] Uerpmann-Wittzack (2009), p. 462 underlines that the question of what is a national Parliament, or a Chamber thereof (for example the question if the German *Bundesrat* is a Chamber or not), "belongs to the fundamental political and constitutional structures of the MS". Of course this does not mean that national law is entirely free in the choice qualifying of an authority as a national Parliament in the sense used by the Treaties: see on this problem Kiiver (2012), p. 48 et seqq.

[33] Unicameral Parliaments are foreseen by the Constitutions of Bulgaria, Cyprus, Denmark, Estonia, Finland, Latvia, Lithuania, Greece, Hungary, Luxemburg, Malta, Portugal, Slovakia and Sweden.

[34] The bicameral Parliaments of the EU MS are those of Germany, United Kingdom, France, Italy, Spain, Poland, Rumania, Netherlands, Czech Republic, The Netherlands, Belgium, Austria, Slovenia.

sense in the Belgian case has to be mentioned (cf. Declaration No. 51),[35] while it is necessary to consider the possibility that the functions recognised by European law to national Parliaments can be delegated by national laws to **Parliamentary Committees**, like in the Spanish case.[36] The Committees—both the special Committee for European Affairs and the sectoral Committees—are actually major players who often "speak" in name of the Assemblies in the formation of the national position on European acts (→ para 104).

16 From the strictly legal point of view, these remarks could be satisfying. But if we look beyond the legal regulation, we see an even more **heterogeneous landscape**, because of the constitutional position of each national Parliament and of its situation in its own political system. If all European national Parliaments have a share in the legislative function and control the executive power, there are various differences,[37] concerning the monopoly or the sharing of the legislative function in unitary and regional[38] or federal States,[39] the existence of areas of regulation reserved to the Government[40] or in which the Government can largely intervene,[41] the characters of the confidence relation with the Government,[42] the type of parliamentary government according to the characters of the political system

[35] It could be argued that this Declaration could be interpreted analogically in order to allow other MS to recognise subsidiarity objections formulated by their subnational Parliaments as if they were formulated by a Chamber of their national Parliaments.

[36] In Spain the main European functions of the two Chambers that compose the *Cortes Generales* are exercised by a Joint Committee (*Comisión mixta para la Unión Europea*): see Law No. 8/1994 as modified by Law No. 24/2009.

[37] An overview of many of the factors mentioned here can be found in Bergman (1997).

[38] See the examples of Italy, Spain and Portugal (for the regions of Azores and Madeira), where regions are endowed with legislative powers guaranteed by the constitution with the consequence that in some areas the national Parliament cannot intervene or can intervene only in a limited form. Also the UK must be considered in this list: even though the *Scotland Act 1998* does not limit the power of the Westminster Parliament to legislate for Scotland, the "Sewel convention" provides in this sense and the role of constitutional conventions in the constitutional system of the United Kingdom is functionally equivalent to that of constitutional rules in other European countries.

[39] See the cases of Germany, Austria and Belgium.

[40] The classical case is Art. 34 of the French Constitution.

[41] This can be the case of the powers of Governments to adopt acts having force of (primary) law in Italy and in Spain.

[42] See for example the difference in the powers of Parliaments to influence Governments (up to the point of dismissing them) between rationalised and non-rationalised parliamentary systems and—within the formers—between systems where only a constructive motion of no confidence can be adopted to dismiss the Government (like in Germany, Spain, Belgium and Slovenia) and systems where a simple vote of no confidence is the form to reach that end (like in Italy, Austria and Sweden). Moreover, the existence of an independent President, directly elected by the people and endowed with extensive powers (specially in France and Cyprus), strongly reduces the power of Parliament to influence the executive power (given the constitutional rule according to which that Head of State is not responsible before his national Parliament, while his Prime Minister is: Besselink 2006, p. 6) and reduces the importance of the confidence relation (that in Cyprus seems not to exist at all; Cyprus is also quoted by Grabenwarter (2010), p. 109 as the only EU country whose Parliament does not have any competences to participate to the European legislative process).

(single-party governments; coalition governments; minority governments). And the heterogeneity concerns also the structures and procedures foreseen in national law to deal with European affairs (→ para 96 et seqq.), whose functioning, on the other side, depends also on the aforementioned differences.

Moreover, national **Parliaments are not a "unitary" phenomenon**, unless one moves from the identification of each Parliament with its majority: on the contrary, this is after all the less interesting aspect, given the fact that in a parliamentary system (the form of government practiced in almost all European MS) the majority (especially when composed of a single political party) usually upholds the government in power, and therefore often lacks an interest to express a position differentiated from that held by the Government. It is therefore necessary to consider other "players", like the single (backbench) MPs,[43] the minor parties in a government coalition (in the case of coalition governments), the internal sections of the majority party, and the opposition[44] (or the various minorities, in a fragmented Parliament). The relevance of these various players depends not only on the political situation, but also on the distribution of powers in the national Constitution and in the internal regulations of the Chambers. Also the prevailing political culture (majoritarian or consensual[45]) and the position of a Country's public opinion on the EU (Euroscepticism vs. consensus for Europe) can be relevant in shaping the actual role of a national Parliament. **17**

4 National Parliaments: Why Bother?

Even though the long and articulated debate on national Parliaments in the European constitutional architecture has given a familiar flavour to the problem of their role, it has, after all, to be reminded why the TEU mentions national Parliaments in order to address not (only) national but (also) European constitutional problems. While also some regional or federal States recognise (national or federal) constitutional functions to regional or MS assemblies,[46] what happens with the European "use" of national Parliaments[47] is qualitatively different: in this case, national **18**

[43] See Saalfeld (2005).

[44] See Holzhacker (2005).

[45] According to the seminal distinction proposed by Lijphart (1984).

[46] For example the participation to the formation of the second Chamber (in Austria), or to constitutional amendment (in the United States) or to the election of the President (in Italy and in Germany).

[47] Kiiver (2006), p. 99 et seqq. underlines that national Parliaments are national institutions, that perform a national constitutional function and that defend national interests. "Using" them in a European perspective is not impossible nor in itself dangerous, but must move from the idea that they are not European organs—neither supranational, nor intergovernmental—in their nature. According to Maurer and Wessels (2001), p. 464, national Parliaments are weak performers on the supranational scene, because they are trapped in their national role.

Parliaments are not regarded as an expression of the federative principle but are considered as a complementary channel of democratic legitimacy of supranational institutions[48] and of control on the limitations to their sphere of competence. The **reason** of this approach must be found in some structural shortage, or in the nature itself of the European constitutional system, whose character of a "close long-term association of States (*Staatenverbund*[49]) which remain sovereign" continues to combine supranational and intergovernmental elements.

19 On the whole, national Parliaments have been seen as a possible answer to two different sets of problems: the ***democratic deficit*** (→ para 20 et seqq.) and the enforcement of the principle of *subsidiarity* (in the framework of the ***legitimacy deficit***; → para 24 et seqq.).[50]

4.1 National Parliaments as an Answer to Democratic Deficit

20 The first problem is the enduring structural **democratic deficit**[51] of the EU, caused by the increase of the competences of the former EC and by the consequent reduction of national competences[52]: the direct election of the EP and the increase of its powers[53] after the Treaty of Amsterdam have not eliminated the deficit (→ Art. 14 para 63, 66).

On one side, the prevailing role of the European Council and of the Council of Ministers, where national Governments are represented, as a consequence of the enduring intergovernmental character of the EU, leads to look at the national level for solutions to the question of the democratic deficit. The solution has therefore been seen—at least till the Treaty of Nice[54]—in strengthening the powers of national Parliaments to direct and control the European policy of their Governments. "National Parliaments are believed to be indispensable in connecting the EU to its social environment: a collection of political communities with divergent cultures, ethnicity and backgrounds".[55]

---

[48] Brosius-Gersdorf (1999).

[49] This is the language used by the German Federal Constitutional Court, 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) C.I.2.a—*Treaty of Maastricht*, and 2 BvE 2/08 et al. (Judgment of 30 June 2009) headnote 1 and para 229—*Treaty of Lisbon*.

[50] It is possible to generalise to the overall role of national Parliaments the opinion of Cooper (2006), p. 282: "[T]he Early Warning System has the dual purpose of promoting both democratic legitimacy and subsidiarity compliance within the EU".

[51] Kamann (1997), p. 200 et seqq. For a criticism of the discourse on democratic deficit see, from the political science perspective, Moravcsik (2002).

[52] Calliess, in Calliess and Ruffert (2011), Art. 12 EUV para 4.

[53] Von Bogdandy (2005) underlines the growth of the powers of the EP as a factor that reduces the impact of the de-parliamentarisation.

[54] But actually the real starting point is the Maastricht decision of the German Constitutional Court (1993). See Cartabia (1994), p. 203 et seqq.

[55] Tans (2007a), p. 3.

On the other side, the absence of a **European *demos*** (→ Art. 14 para 56; → Art. 1 para 28, 32),[56] of a European public opinion[57] and the highly mediated structure and actual role of pan-European political parties (Art. 10.4 TEU; → Art. 10 para 38–48)[58] weaken the democratic legitimacy of the EP,[59] notwithstanding its constitutional position as a universally elected representative assembly.

21 The legal and political science analysis in the last two decades has given evidences of the thesis that depicts national Parliaments as the "losers" of integration[60]: the "Europeanisation" has brought with it the "**de-parliamentarization**"[61] ("*Entparlamentarisierung*"[62]) of the decision-making process and the strengthening of the Governments, and specially of the Prime Ministers (who sit in the European Council, where the great choices are made), that is sometimes seen as a (almost necessary) consequence of a model of integration based on "**executive federalism**".[63] This scenario—that depicts Parliaments as merely reactive institutions, incapable of autonomous initiative, that have therefore been marginalised by the European integration—is difficult to be challenged, but it must be said that the increase of the powers of Prime Ministers and Presidents and the de-parliamentarisation itself is a more general phenomenon[64] that characterises West European democracies and that is typical also of Countries with parliamentary systems not participating to the EU (Canada being a classical example): the thesis of

[56] See on this point the German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 297—*Treaty of Lisbon*.

[57] See on this point the German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 250–251—*Treaty of Lisbon*.

[58] See Ninatti (2004), p. 1405 ("a Parliament without politics").

[59] A factor of this weakness is the reduced turnout at European election: historically low (starting from the highest percentage, 62 % in 1979), the turnout has steadily declined, arriving to 43 % in the 2009 election. Of course this is not a legal, but a cultural and political factor of weakness, expression of the absence of a European public opinion, mentioned in the text.

The German literature frequently points to another factor of weakness: "the distribution of the representatives' seats among the individual Member States does not fully correspond to the population, even if taking into account a base for the smaller Member States" [Everling 2010, p. 719, among many]. This position has been restated by the German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 280–287—*Treaty of Lisbon*.

[60] See O'Brennan and Raunio (2007), p. 2–5.

[61] Schmidt (1999).

[62] See the rich debate in the German constitutional literature: e.g. Kirchhof (2001); Ruffert (2002); Herdegen and Morlok (2003); Dieringer (2005). For a critical view of this line of thought see von Bogdandy (2005), p. 448–459, arguing that the history of the role of Parliaments in Europe, both at the national and at the European level, has been a story of increase of powers and not of decline.

[63] Dann (2004), p. 269.

[64] Von Bogdandy (2005) remarks that the role of Parliaments in Europe has been strenghtened in the last decades of the twentieth Century: two examples of this growth of powers are the central role recognised to Parliament by the Constitutions of Central and Eastern European States after 1989 and the recover of authority of the French Parliament in the last 50 years, notwithstanding the diminishing provisions included in the Constitution of 1958. But these two facts, although remarkable, are not enough to counter the general trend described in the text.

the "presidentialization" of politics[65] in parliamentary systems is a good summary of that. Moreover, the crisis of political representation has also other causes, rooted in the transformations of politics in post-industrial societies.

22 Although the progressive increase of the powers of the EP after the Treaty of Maastricht, and specially under the Constitutional Treaty, and now under the Treaty of Lisbon ("**internal democratisation**"; → Art. 14 para 4)[66] is aimed at reducing the democratic deficit at the supranational level, the enduring role of the intergovernmental structures of the EU requires to integrate this approach with an "**external democratisation**", enabling national Parliaments to influence more deeply their Governments.[67] In this perspective, if there is "a trend towards a parliamentarisation of European politics",[68] "internal" and "external" parliamentarisation do not necessarily exclude each other.[69] On the contrary: they can play complementary roles in the perspective of building a European parliamentary system.[70] This complementarity was already highlighted in the Maastricht decision of the German Constitutional Court of 1993.[71]

23 "Up to the European Constitutional Treaty the problem of the position of National Parliaments in the European institutional system has been treated and perceived as a problem of *internal* [i.e. Member State] Constitutional law".[72] During the works of the Convention on the Future of Europe, the perspective changed and two different approaches emerged.

The traditional view was developed in the sense that the role of national Parliaments should have been enhanced only eliminating all the obstacles that prevent each single Parliament from exercising an appropriate **influence** on **the** position of its **Government** in the Council of Ministers (and specially facing the information deficit), but without changing the European decision procedures.

---

[65] See Poguntke and Webb (2005) and Di Giovine and Mastromarino (2007).

[66] According to Jacqué (2009), p. 67–68, the increase of the role of democracy in the Treaty of Lisbon has reduced the democratic deficit to "a political argument without a foundation in the reality of the Treaties". But see the opposite opinion of the German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 293—*Treaty of Lisbon*.

[67] On national Parliaments as "forms of external democratic legitimacy" see Ferraro (2003), p. 184. On internal and external democratisation see Verola (2006), p. 206–208, Gambale, (2006), p. 836 and Mastroianni (2010), p. 196–197. On the necessity of promoting both the role of the EP and that of national Parliaments in a complementary perspective, see Matía Portilla (2003), p. 214.

[68] Katz and Wessels (1999), p. 11.

[69] Gambale (2006) and Ninatti (2004), p. 1415 et seq., remark that the EP and national Parliaments have for a long time worked in two different functional areas: the first tried to increase its role in the legislative process, while the seconds attempted to strengthen their functions of control and direction of the respective governments.

[70] Manzella (1999), p. 944. For the alternative between an "either/or" and an "and/and" approach to the roles of the EP and of national Parliaments see Besselink (2001), p. 3.

[71] German Federal Constitutional Court, 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) C.I.2 b2—*Treaty of Maastricht*.

[72] Cartabia (2007), p. 126.

According to another view, on the contrary, a specific place for national Parliaments in the EU constitutional architecture should have been found, if necessary modifying the way in which EU had worked till that moment and enabling national Parliaments to exercise powers in the formation of European acts.[73]

While in the first perspective internal and external democratisation each have their own—specific and distinctive—field, from the second point of view a certain degree of **competition between the two forms of parliamentarisation** could emerge, especially if the idea of allowing to national Parliaments a direct—and not only an indirect—participation to the EU decision-making process should have been developed to the point of creating a second Chamber at the European level.

The compromise solution adopted by the Convention, and further developed by the Treaty of Lisbon, while refusing the institution of a second Chamber (→ para 26), has recognised a **"direct" role** of national Parliaments that seems to be built in order to avoid a competition with the EP and of strengthening the **parliamentary control**, extending it to the phase of the formation of European acts, from the point of view of the principle of subsidiarity.

4.2 National Parliaments and the Principle of Subsidiarity

24 The two faces of the *principle of* subsidiarity—leaving the decision (the so called *Vorrangentscheidung*) at a level of government that is the nearest possible to the citizen and enabling "higher" levels of government to attract the exercise of competences when the nearest level is not the appropriate one—and the decline of the federal ideal during the 1990s have highlighted the *legitimacy deficit* of European decisions[74]: such "decisions" (especially legislative acts) are legitimated only if it can be demonstrated that a given action can be better pursued and realised at the European level rather than at the national or local level and only if such action is limited to what must be necessarily done at a supranational level. Given the fact that national Parliaments are the main losers[75] when a competence is exercised at the European level, enhancing their role in the European decision-making process means to seek in them a check to the expansion of the regulation from Brussels. "National Parliaments, more than any other institution, are uniquely appropriate for the role of vigilant '**subsidiarity watchdogs**' because they are 'at the frontier of

[73] According to Ninatti (2004), p. 1414, "it could be said that while the integrationist/federalist school of thought upholds the valorisation of the European Parliament, the intergovernmental school continues to underline the centrality of National Parliaments for the purpose of the democratic legitimacy of the community system".

[74] See Morviducci (2008), p. 85 for the distinction between the legitimacy and the democratic deficits.

[75] See Maurer and Wessels (2001); De Felice (2008), p. 263 et seqq., who speaks of "comeback of the losers". National Parliaments are losers because they actually suffer not only of a loss of competence (that affects also national Governments) but also of the loss of the power to participate to the modification of the European "rule" (that Governments acquire).

competence'". Whenever the EU acts in the sphere of shared competences, regulated by the principle of subsidiarity, "this entails a potential encroachment upon National Parliaments' domain".[76]

25 These two **problems** are of course **intertwined**: the more the decision is "attracted" at the European level, the higher is the necessity of a democratic legitimacy not only through the EP, but also through national Parliaments, because of the fact that the powers of national Governments are increased when a matter is transferred to the European level. "While advancing subsidiarity, [national Parliaments] also—being, for the most part, directly elected representative bodies—advance democratic legitimacy".[77] This need is of course stronger in those fields where the role of the EP is reduced or excluded[78] (such as in the AFSJ, the former third pillar).

26 The most radical solution to face the problem of the role of national Parliaments would have been the creation of a **Chamber of the States** (or a "Chamber of subsidiarity" or a European Senate[79]), composed of members of national Parliaments, that should have been placed at the side of the directly elected Parliament, thus giving a bicameral structure to the EP. Besides subsidiarity, a European second Chamber could have been instrumental to "fill the gaps" of the democratic control in the EU, checking the activities of the European Council and operating specially in the areas not covered by the EP's powers.[80]

Against this solution[81] lies not only the fact that a second Chamber of this type resembles the indirectly elected EP originally created by the Treaty of Rome, before the adoption of the direct election in 1976 and its implementation in 1979,[82] but also the fact that the MS already enjoy a strong representation in the EU institutional system through the Council (Art. 10.2 (2) TEU; → Art. 10 para 11). The Council, indeed, performs a role that can for certain aspects be compared to a Chamber of States that would be duplicated by a Chamber of Parliaments.[83] Some observers also remark that a second Chamber, being indirectly elected, would be of little help in terms of democratic legitimacy, while it would have further complicated the decision-making system.

During the works of the Convention on the Future of Europe, besides the idea of a second Chamber, the proposal of the creation of a "**European Congress**", composed of some members of the national Parliaments and of the EP, was

[76] Cooper (2006), p. 292.

[77] Bermann (2009), p. 157.

[78] This was one of the questions posed by the Laeken Declaration.

[79] Van der Schyff and Leenknegt (2007).

[80] Linde Paniagua (2004), p. 169–171.

[81] This idea has often been advocated by the French National Assembly, by the French Senate [see Poniatowski 1992] and by the British Government (e.g. by the then UK Foreign Secretary Robin Cook in 1998). The problem was expressly posed by the first question of the Laeken Declaration, but the answer of Group IV of the Constitutional Convention was negative.

[82] It also reminds of the shortages of that representative assembly: for a summary see Kiiver (2006), p. 135–137.

[83] See debate in the COSAC, mentioned in Neri (1998), p. 151 et seqq.

discussed. It was strongly supported by the Convention's President, *Valéry Giscard d'Estaing*, and it was included in the "preliminary draft" of 28 October 2002,[84] but it was opposed by the EP and was finally rejected (→ Art. 13 para 36).

Furthermore, it is possible to see here at the highest level of clarity a trade-off concerning the regulation in EU law of national Parliaments within the EU decision-making process, in the context of the institutional reforms after the Treaty of Nice: the trade-off[85] is between a **stronger institutionalisation** of the role of national Parliaments (and therefore the democratisation of the Union) and the **simplification** of the decision-making process, which was another objective of the failed constitutional season.[86] **27**

5 Classifying the Functions of National Parliaments in the European Perspective

While the base of the role of national Parliaments is an accurate and swift **information** about the activities of the EU institutions, the attributions of national Parliaments in European law can be classified in **two categories**, the second of which has to be divided into three sub-categories. **28**

The basic distinction is between European rules that enable national Parliaments to better fulfil their functions of control on their respective governments at the national level, in the formation of national positions about the adoption of European acts, and rules that allow national Parliaments to participate to European procedures as such, besides and beyond the control of their own governments.[87] While the first type of functions find its (European) legal base in Art. 10 TEU (while its proper foundation lies in national constitutional law[88]), Art. 12 TEU is the legal basis for the second type of functions, that are labelled under a common purpose: to "contribute actively to the good functioning of the Union".

This second category—the one that is, *ça va sans dire*, the more problematic—can be further subdivided in three types of functions:

[84] See Art. 19 of the Preliminary Draft (CONV 369/02).

[85] Dann (2010), p. 269, calls this the "dilemma between their own right to control and the efficiency of Union procedures. The more they try to control their governments by means of supervision, the more they run the risk of blocking procedures". See also Sleath (2007), p. 563 and Weber (2011), p. 503.

[86] In the terms of the Laeken Declaration of 2001, the trade-off is between the second (simplification) and the third (democratisation, also through a stronger role of national Parliaments) question.

[87] This is basically the same difference highlighted by Weatherill (2003), p. 909, between supervision of the performance of State representation acting in Council and holding them accountable for it on one side and engage directly the national Parliaments in the European law-making process.

[88] See the Preamble of the Protocol (No. 1) on national Parliaments. For Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 8, "it is in first line competence of the internal legal orders to regulate the participation of national parliaments in European affairs".

a) Functions aimed at **protecting national prerogatives**,[89] in which national Parliaments act as a check or as a "brake" of some activities of the institutions of the EU;
b) Functions corresponding to the **classic parliamentary control**, in which national Parliaments integrate and complement the role of the EP;
c) **"Cooperative" functions** both with the EP (vertical) and with Parliaments of other MS (horizontal).[90]

29 This classification of the rights and powers recognised to national Parliaments can of course be read together with a classification that puts in evidence the **type of Union activity** to which Parliaments are entitled to take part ("general" Union activity; AFSJ; CFSP), or the kind of (European) constitutional role Parliaments are entitled to play. But even though the "depillarisation" of the EU falls short from eliminating every trace of it, a classification based on the purpose of the activity of national Parliaments appears more interesting in order to try to understand their role.

30 Although Art. 12 TEU is placed in the Title of the Treaty dedicated to the democratic principles—in a perspective that channels the democratic impulse through the EP on one side and through the national Governments, on the base of the responsibility of the latter before the national Parliaments (→ para 101), on the other side (Art. 10.2 TEU)—it is easy to see that the functions of national Parliaments cannot be reduced simply to a democratic perspective. It seems more accurate to situate them in the context of the EU constitutional architecture, i.e. of a "**multilevel parliamentarism**"[91] or of a "*Mehrebenendemokratie*"[92] as a part of the European "multilevel constitutionalism": "national Parliaments are becoming a consistent part of the multilevel European institutional system".[93]

In this context, national Parliaments perform **multiple functions**, and while governments perform "legislative" functions in the European institutional framework

[89] Villani (2009), p. 411, defines the powers of national Parliaments in the control of subsidiarity principle as "an instrument of protection of the prerogatives of those Parliaments".

[90] Álvarez Conde and López de los Mozos Díaz-Madronero (2006), p. 156 propose to distinguish the functions of national Parliaments in: (a) "participation" of national Parliaments to the legislative function; (b) control; (c) cooperation. Geiger, in Geiger et al. (2010), Art. 12 EUV para 4 et seqq. classifies all the functions in: (a) rights to information; (b) rights to take a position; (c) interparliamentary cooperation. Bogdandy and Bast (2010), p. 304 construct all the functions of national Parliaments as political control. The German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 293—*Treaty of Lisbon*, distinguishes the functions of national Parliaments in relation to the principle of subsidiarity between opportunities of influence and legally enforceable rights of participation.

[91] Ninatti (2004), p. 1413 and 1425. For this author, Art. I-46 (2) TCE [and now Art. 10.2 (2) TEU] demonstrate that accountability of European governance is structured through the various levels of government and that "the principle of political responsibility at the community level is clearly characterized by a multilevel dimension". Another concept used in this perspective is that of league or union of Parliaments (*Parlamentsverbund*), that puts in evidence the horizontal dimension: see Weber (2010), para 228; Pernice and Hindelang (2010), p. 409.

[92] Schmidt-Radefeldt (2009), p. 773–787.

[93] Pernice (2008–2009), p. 391.

although being originally non-legislative bodies, national Parliaments, though being properly legislative bodies in their national constitutional contexts, perform functions of control, check and "brake" in the European constitutional context. Clearly, at least at this stage of the evolution of the European institutions, the interparliamentary "soul" of the European institutional system cannot be compared with the intergovernmental "soul" and its strength is based more on advisory than on binding functions.

31 All the rules concerning national Parliaments, with the exception of those that establish duties of information, share a fundamental character in relation to national Parliaments: they have a **"facultative" nature**, in the sense that they can only enable or authorise national Parliaments to play a role in the European system, but they cannot oblige them. We can describe this situation with the words of *Philip Kiiver*: "The European Union can hardly *prevent* the national Parliaments from exercising a stricter oversight, if they so wish, but it cannot *force* them to be more active either. All it can do is to stimulate their interest and facilitate or even institutionalize their EU-level participation for a European purpose, depending on how that purpose is defined".[94]

6 The Right of National Parliaments to be Informed

32 The first group of rules concerning national Parliaments in the Treaty of Lisbon is aimed at eliminating or at least at **reducing** the condition of **information deficit**,[95] or of information asymmetry[96] in which they are placed in relation to national Governments and the EU institutions. The elimination, or at least a sensible reduction, of this asymmetry is functional to allow them to direct the action of Governments and to hold them actually accountable in EU affairs. Therefore, the constitutional grounds of these rules are to be found not only in Art. 12 TEU, but also in the working of representative democracy as outlined in Art. 10.2 TEU, articulated on one side on the direct election of the EP by the citizens and, on the other side, on the democratic accountability of national Governments to their national Parliaments.

33 The Treaty of Lisbon faces the information deficit and represents an evolution of the existing legal regulation both from the perspective of the ***quality*** of the informations that national Parliaments are entitled to receive from the European institutions, and from the perspective of the ***extension*** of the said informations. Its objective is to "increase the flow of information about the Union's legislative

[94] Kiiver (2006), p. 93 (emphasis added). For similar reasons Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 17 says that the information duties have a symbolic value.

[95] O'Brennan and Raunio (2007), p. 7. Maurer and Wessels (2001), mention information (together with availability of time and ability to bind their governments) as the key factors that determine the degree of influence of national Parliaments in EU affairs.

[96] Raunio (2007), p. 79.

activities",[97] both in the way in which information is transmitted (→ para 34) and in the extension of the said information (→ para 35).

34 According to the Protocol annexed to the Treaty of Amsterdam, "all Commission consultation documents (green and white papers and communications) shall be promptly forwarded to national Parliaments of the Member States" (Art. 1.1): the text did not specify that the documents had to be forwarded directly.[98]

The Treaty of Lisbon states now expressly that the notification of the documents that Parliaments are entitled to receive must take place "**directly**" by the Commission, at the same time when they are transmitted to the EP and to the Council (Art. 1 of Protocol No. 1). In the same way, legislative drafts elaborated by the EP must be transmitted *directly* from the EP to national Parliaments, while drafts originating from other institutions must be transmitted by the Council (Art. 2 of Protocol No. 1). The intermediation of national Governments is thus suppressed.[99]

35 According to the Protocol annexed to the Treaty of Amsterdam, the objects of the national Parliaments' right to be informed were consultation documents (green papers, white papers, communications), while Commission proposals for legislation had to be made available for the MS Governments, upon whom did rest the responsibility for their transmission to national Parliaments.

According to the Treaty of Lisbon, the **object** of information has been widened to a long series of items:

1) Annual legislative program,[100]
2) Any other instrument of legislative planning or policy,[101]
3) Draft legislative acts originating from the Commission, the EP, a group of MS, the CJEU, the ECB and the EIB,[102]
4) Amended legislative drafts adopted by said actors,[103]
5) Agendas and outcomes of the Council,[104]

---

[97] Dougan (2008), p. 657.

[98] Art. 88-4 of the French Constitution—introduced in 1992 with the ratification of the Treaty of Maastricht and before the Treaty of Amsterdam—is an example of a national constitutional provision that establishes a series of information duties of the Government towards Parliament. For Italy see Art. 13.1 of Law No. 128/1998 and more recently Art. 3 of Law No. 11/2005 (on this law see Cartabia 2007, p. 118–125 and Cannizzaro 2005, p. 153).

[99] Cartabia (2007), p. 130.

[100] Art. 1 of Protocol No. 1 (→ Protocol No. 1 para 20–21).

[101] Art. 1 of Protocol No. 1 (→ Protocol No. 1 para 20–21). It is of course very important for national Parliaments to use these two first instruments in order to be prepared at best to use the 8-weeks windows foreseen by the early warning system (→ para 44).

[102] Art. 2 (3)–(5) of Protocol No. 1 and Art. 4 of Protocol No. 2 (→ Protocol No. 1 para 25–33). Bribosia (2005), p. 74, had criticised the limitation to "legislative acts" in the text of the Protocol on Subsidiarity included in the Constitutional Treaty because it did not include regulations not adopted with a legislative procedure, and some acts of implementation, like those elaborated through the comitology procedure.

[103] Art. 4 (1)–(3) of Protocol No. 2 (→ Protocol No. 2 para 46).

[104] Art. 5 of Protocol No. 1 (→ Protocol No. 1 para 85–88).

6) Legislative resolutions of the EP and positions of the Council,[105]
7) Annual report of the Court of Auditors,[106]
8) Applications from foreign States for accession to the Union.[107]

Additional procedures aimed at reducing the information asymmetry are included in the specific functions of the national Parliaments concerning the flexibility clause, the accession of new MS, the amendment procedures, and the specific control functions on Europol and Eurojust. In the case of the **flexibility clause**, Art. 352.2 TFEU specifically mandates the Commission to **recall the attention** of national Parliaments on the proposals based on that Article. **36**

In this context, even though there is the "risk of submerging interested parties in a mass of unprioritised information which could not possibly be digested",[108] the right to be informed seems to be effectively granted, given the fact that only the area of the CFSP remains outside the scope of these information duties and rights. **37**

Information is only a pre-condition to allow national Parliaments to participate to the European decision-making process, both directly and indirectly (through their Governments).[109] The widening of the information flow requires from Parliaments the willingness and the ability to **use** it, first of all becoming able to **select the information**, and secondly building procedures allowing the use of the relevant information.[110] This is the national side of the problem that remains outside the scope of the Treaty, given the principle of constitutional autonomy of MS. Art. 10 of Protocol No. 1, enabling the COSAC to prepare codes of best practices is a soft way to support the role of national Parliaments, without eroding the constitutional autonomy of MS (→ Protocol No. 1 para 161, 167).

The right of each national Parliament to be informed is functional to the right to **participate effectively to the formation of the national position** on the act that is going to be adopted. To allow this participation already the Protocol on national Parliaments annexed to the Treaty of Amsterdam had established a period of 6 weeks between the date in which a legislative proposal is made available in all **38**

[105] Art. 4 (4) of Protocol No. 2 (→ Protocol No. 2 para 46).

[106] Art. 7 of Protocol No. 1 (→ Protocol No. 1 para 103–112).

[107] New accessions are regulated by Treaties that have to be ratified by each MS. France has a constitutional provision (Art. 88-5), introduced in 2005 and modified in 2008, establishing a special procedure for the ratification of Treaties of this type. While the procedure introduced in 2005 totally deprived Parliament of the ratification power (requiring always a referendum), the modification of 23 July 2008 permits ratification with a motion adopted by the two Chambers with a majority of three fifths: on this provision see Dero-Bugny (2009).

[108] Weatherill (2003), p. 911. For this problem in the British House of Commons see Carter (2001), p. 407.

[109] Calliess, in Calliess and Ruffert (2011), Art. 12 EUV para 11: "information rights are the starting point and the precondition of the power of parliamentary control". For Gennart (2010), p. 33, the rules of the Treaty of Lisbon that facilitate the acquisition of information by national Parliaments are not a "major evolution" and are placed in the same logic of the Treaty of Maastricht, that of supporting Parliaments without modifying directly their functions of control.

[110] Hölscheidt (2005), p. 442 et seqq.

the languages to the EP and the Council by the Commission "and the date when it is placed on a Council agenda for decision".

This period—now increased to **eight weeks** by the Treaty of Lisbon[111]—should be used by a national Parliament to influence the position of his government in the Council. In order to avoid the frustration of this possibility, the Protocol annexed to the Treaty of Lisbon expressly forbids ("save in urgent cases for which due reasons have been given") that "agreement may be reached on a draft legislative act during those eight weeks". For the same reason the Protocol also establishes that "a ten-day period shall elapse between the placing of a draft legislative act on the provisional agenda for the Council and the adoption of a position".[112]

Art. 3.3 of the **Council's Rules of Procedure** adopted in 2009[113] establishes now that legislative acts are placed on the provisional agenda of the Council 8 weeks after their communication to national Parliaments.

These new rules, and specially the 8 weeks deadline, "constitute a condition of validity of the act adopted"[114]: their violation would open the way to "the risk that not merely the member State, but also any person, will be able to invoke the inapplicability of the Union act (i.e. the full act and not just part of it) before the Court of Justice via the preliminary ruling procedure".[115]

39 European law does not foresee a right of a national Parliament to submit **opinions** to the European Commission on the **content of a legislative proposal**. But the general statement that opens Art. 12 TEU ("National Parliaments contribute actively to the good functioning of the Union") and its connection with the right to information (that is not limited to subsidiarity profiles) can be seen as a legal base for a right of national Parliaments to submit contributions to the European organs in any phase of the procedure for the adoption of legislative acts.

In 2006 the Commission expressed the intention to start a political dialogue with national Parliaments, inviting them to express their opinions both on the content of the documents elaborated by the Commission and on the respect of the principles of subsidiarity and proportionality and this intention was welcomed by the Council. Therefore, on 17 July 2006, a letter of the President of the Commission, *José Manuel Durão Barroso*, to the Presidents of national Parliaments announced this extended implementation of the procedure foreseen in the Protocol on the principle of subsidiarity. A new letter of the Commission on 1 December 2009, at the moment in which the Treaty of Lisbon entered in force, has confirmed this procedure (usually defined as "**political dialogue**" or "Barroso initiative"). This procedure runs parallel to the

[111] Art. 4 of Protocol No. 1 (→ Protocol No. 1 para 67). Hrbek (2012), no. 5.1 underlines that the current working of the "Comitology" system obliges national Parliaments "to become involved in the decision-making process as early as possible, since otherwise they would see themselves marginalised".

[112] Art. 4 of Protocol No. 1 (→ Protocol No. 1 para 73).

[113] Council Decision of 1 December 2009, 2009/937/EU *establishing the Council's Rules of Procedure*, O.J. L 325/35 (2009).

[114] Passos (2008), p. 36.

[115] Passos (2008), p. 36.

early warning system and is actually intertwined with it. But it is necessary to underline that the political dialogue has at the same time a partially different object (all the documents elaborated by the Commission, not only the draft legislative acts, but not the draft legislative acts elaborated by other authorities) and a wider scope (not only the respect of the principle of subsidiarity, but also the respect of the principle of proportionality and the content of the document). In the framework of the Barroso initiative, the Commission has received 168 opinions in 2006–2007, 200 in 2008, 250 in 2009, 387 in 2010 and 623 in 2011.

7 "Functions" of National Parliaments in the European Union Aimed at Protecting National Prerogatives: The Control on the Respect of the Principle of Subsidiarity

Two of the questions asked by the European Council in the Declaration of Nice adopted in 2000 concerned the role of national Parliaments in the European architecture and the **control** on the respect of the principle of **subsidiarity** by EU institutions.[116] Identifying national Parliaments as the guardians of subsidiarity has been the convergence of two different problems that were of course already connected before 2000, with the joint purpose of upgrading the Parliaments and of upgrading the principle.[117] **40**

Yet, it must be remembered that this was not the only possible solution and that others had been proposed,[118] that would have had a **judicial** (a "chamber of subsidiarity" in the CJEU; an *ex ante* judicial review on subsidiarity grounds[119] or even a new independent Court, specialised in subsidiarity questions[120]) or an entirely **political** nature (a special committee composed of a member of the Commission and national MPs,[121] the appointment of a "Mr." or "Mrs. Subsidiarity"—a sort of ombudsman—giving maybe the maximum possible visibility to the issue). The regulation adopted in the Constitutional Treaty and confirmed in the Treaty of **41**

[116] Kiiver (2006), p. 154–155.

[117] Kiiver (2006), p. 158; see also → para 10.

[118] See a synthesis of the debate in Maiani (2004).

[119] Jacqué and Weiler (1990), p. 204–206

[120] Weiler (1999), p. 322. The idea of a Chamber of subsidiarity in the CJEU was also advanced during the Convention on the Future of Europe.

[121] A similar proposal was made by the European Scrutiny Committee of the British House of Commons in 2002: Cygan (2003), p. 397. See criticism of this proposal in von Bogdandy and Bast (2010), p. 303.

Lisbon combines a **procedural solution** that involves national Parliaments with an *ex post* judicial control before the CJEU that may be activated (also) by them (→ para 62 et seqq.).

42 **Four mechanisms** have been foreseen by the Treaty of Lisbon, adopting (and, in marginal aspects, adapting) solutions that had emerged in the Convention on the Future of Europe and that represent a substantive innovation in relation to the previous Treaties: (a) the obligation to justify legislative drafts with regard to the principles of subsidiarity and proportionality (→ para 43); (b) the "early warning" system (→ para 44 et seqq.); (c) the "yellow card" mechanism (→ para 50 et seqq.); (d) the "orange card" mechanism (→ para 53 et seqq.). An action before the CJEU "crowns" and completes this system.

This kind of mechanisms does not have any connection with the federalist tradition[122] and their *ratio legis* lies only in the peculiarities of a League of sovereign States like the EU.

7.1 Justification of European legislative Drafts with Regard to the Principle of Subsidiarity

43 The main function recognised to national Parliaments in the Treaty of Lisbon is that of *guardians*,[123] *sentinels*[124] or *watchdogs*[125] *of subsidiarity*.

In order to allow national Parliaments to perform this function, each legislative draft has to be "**justified** with regard to the principles of subsidiarity and proportionality". For this purpose, each draft should include a detailed statement explaining how both principles have been complied with.[126]

This procedure was originated by an inter-institutional agreement between the EP, the Council and the Commission on the procedures to implement the principle of subsidiarity[127] and had already been codified in the Protocol on subsidiarity annexed to the Treaty of Amsterdam.[128] Neither the Constitutional Treaty, nor the Treaty of Lisbon have added anything on this point.

[122] Bermann (2009), p. 156 correctly underlines this, recalling—from a United States perspective—John Calhoun's doctrine of "state nullification of federal laws" as the only possible example.

[123] Kiiver (2006); Oberdorff (2008), p. 724.

[124] Sauron (2008).

[125] Cooper (2006), p. 281. Mayer (2007), speaks of "Hüter des Subsidiaritätsprinzips".

[126] Art. 5 of Protocol No. 2 (→ Protocol No. 2 para 47 et seqq.).

[127] Bull. EC 10/93, point 2.2.2.

[128] Constantinesco (1997), p. 765; Feral (1998), p. 95; Moscarini (2006), p. 206 et seqq.

7.2 *The "Early Warning System"*

On the base of this information, national Parliaments have a period of **eight weeks** (in comparison with the 6 weeks foreseen by the Protocol annexed to the Constitutional Treaty; → para 38[129]) to submit to the Presidents of the EP, of the Council and of the Commission their **reasoned opinions** in which are exposed the reasons for which they believe that the draft does not comply with the principle of subsidiarity. This is the so called *early warning system*,[130] whose introduction had been proposed by the Group I of the European Convention. **44**

The meaning of this procedure—differently from the Treaty of Amsterdam, where only a right of information, substantial criteria on the application of the principle of subsidiarity and a delay of 6 weeks were foreseen, but no procedure for the participation of national Parliament was devised—is to allow national Parliaments to formulate their **objections** before a European act has been adopted. If a weakness of the Amsterdam Protocol was that it did not provide "a political mechanism through which the Commission's justification could be challenged on **subsidiarity** grounds", the early warning system creates "the conditions for a thoroughgoing inter-institutional argument on whether proposed legislation is appropriate in the light of subsidiarity".[131] According to *Cooper*,[132] the early warning system has been structured as **a dialogic instrument** and therefore requires a dialogic approach—a mutual openness to persuasion—both from the Commission (who must justify its proposals, take into account the reasoned opinions and review them in the case of the use of the yellow card) and from national Parliaments (who can submit "reasoned" opinions and must therefore argue with the Commission, not simply exercise a—merely negative—veto power). **45**

The principle of subsidiarity is the general criterion according to which national Parliaments are enabled to submit to the Presidents of the EP, the Council and the Commission *reasoned opinions* in the framework of all legislative procedures.[133] According to the wording of the Protocol, the opinions cannot criticise the draft act **46**

[129] Criticism of the 6-weeks period, considered too short, had emerged in the 33rd COSAC meeting held in Luxembourg in 2005 (Kiiver 2006, p. 159; other criticism in Davies 2003, p. 692). For Bermann (2009), p. 160, even the increased term "may be simply insufficient in light of the need to consult sectoral parliamentary committees and regional parliaments, not to mention stakeholders and, of course, parliamentarians in other States". The option to increase the period from 6 to 8 weeks was made by the European Council in his Brussels meeting of 21 June 2007 that established the mandate for the ICG.

[130] The definition is widely used, beginning with the summary of the European Constitutional Draft prepared by the Secretariat of the EP after the IGC of Brussels in June 2004.

[131] Cooper (2006), p. 287.

[132] Cooper (2006), p. 236.

[133] Art. 3 of Protocol No. 1 (→ Protocol No. 1 para 48–56) and Art. 6 of Protocol No. 2 (→ Protocol No. 2 para). According to Cooper (2006), p. 290, the early warning system is "strictly subsidiarity focused".

from the point of view of the **proportionality**[134] or of its substance, but must be limited to the subsidiarity profiles (→ para 39), notwithstanding the fact that the Commission's proposals have to be justified from the point of view of both principles (→ Protocol No. 2 para 47 et seqq.).

This possibility to submit an opinion seems to be limited to the areas of **shared competences**. This means that it should be excluded both in the areas that fall in the exclusive competences of the EU, whose exercise is not regulated by the principle of subsidiarity, and in the areas in which the Union does not have competences at all. Therefore it could be argued that the subsidiarity monitoring procedures may not be used to denounce the lack of competence of the Union.[135] But from a systematic point of view, the control on the respect of the principle of subsidiarity presupposes the control of the respect of the principle of attribution[136]: actually, an action of the Union totally outside the sphere of its competence, although violating in first line the principle of conferral, would generate also a violation of the principle of subsidiarity in its more general sense of prohibiting all the actions that can be better realised at the MS level and in the cases where the EU does not have competence at all, the preference for the level of government nearest to the citizen is legally presumed.

47 For what concerns the **AFSJ**, given the peculiarity of the working of the EU in this area, Art. 69 TFEU expressly confirms that MS' Parliaments control that proposals and legislative initiatives in the fields of "judicial cooperation in criminal matters" and of "police cooperation" "comply with the principle of subsidiarity, in accordance with the arrangements laid down by [Protocol No. 2]".

48 The institutions who have prepared the draft to which the opinion is referred shall **take into account** the opinions of the national Parliaments who have submitted it.[137] This means that the EU institutions must interact with them, not just

[134] See criticism of this limitation in Schütze (2009), p. 533 and Cooper (2006), p. 283 and 300: "just as is true with subsidiarity, National Parliaments are well positioned for the role of 'proportionality watchdogs', because they are directly affected when the EU violates this principle". The proportionality review is actually different from the subsidiarity review, but it is complementary to it: this latter concerns the question of the necessity of a EU legal act, while the former deals with the appropriateness of the means to the ends. National Parliament could be in favour of a EU legal act, but against its form (e.g. in the case of the adoption of a regulation instead of a directive) and be directly affected by this latter choice.

[135] Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 22.

[136] Ritzer and Ruttlof (2006), p. 132; Buschmann and Daiber (2011), p. 505; Kiiver (2012), p. 98. An example of an area included in the exclusive competences of the Union, where the subsidiarity check should apply are, according to Barents (2010), p. 711 the amendments to the Statute of the CJEU (Protocol No. 3 annexed to the Treaty of Lisbon).

[137] It has already been recalled (→ para 39) that this kind of procedure was already operational before the entry into force of the Treaty of Lisbon, because of a decision of the Council adopted in 2006, though without a legal base in the (then) existing Treaties.

acquire knowledge of the opinion.[138] An **integration of the motivation** of the act seems to be necessary,[139] but there is no other obligation for the authority who prepared the draft.

Even though the Commission remains free to maintain its proposal, because there is not a legal obligation for the Commission to conform its proposals to the opinions,[140] the reasoned opinions are likely to be taken seriously in consideration, if the Parliaments are determined to use their influence on their respective Governments, and therefore on the Council.[141] Here it is possible to observe the interaction between the "European" and the "national" functions of national Parliaments, between Art. 12 and Art. 10 TEU.

The possibility for national Parliaments to submit reasoned opinions in which they argue that the principle of subsidiarity has been infringed became operative starting on 6 February 2010, when the Commission transmitted to the national Parliaments its first proposals in the framework of the early warning system. On 29 April 2010 the Commission received the first reasoned opinion from the Polish Sejm. During 2010 the Commission has received 34 reasoned opinions arguing that the principle of subsidiarity had been violated. Other 63 opinions of this type have been adopted by national Parliaments in 2011, for a total of 117 in the first 2 years in which the early warning system has been operative. The numbers of reasoned opinions of this type are clearly smaller than those submitted to the Commission in the framework of the "political dialogue" (→ para 39).

Art. 6.1. of the Protocol on the principle of subsidiarity leaves to each national Parliament to consult "**regional parliaments** who have legislative powers" and to take their opinions into account before submitting their own reasoning opinion to the EU authorities. This provision should be interpreted as establishing a duty to consult (in MS where regional Parliaments with legislative powers actually exist), but the addressee of this duty is only the national legislator, who is responsible to structure the consultation as a duty for the national Parliament or for one of its Chambers and to define also what consequences follow from a regional parliament's opinion.[142] Art. 23.g.3 of the Austrian constitution and Art. 6 of the Spanish law no. 24/2009 both require their national parliamentary authorities (respectively the National Council and the Mixed Commission on European Union Affairs) to transmit the legislative projects to regional Parliaments and to take into account their opinions. **49**

[138] Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 25.

[139] Vecchio (2009), p. 177. This seems to be a legal obligation for the Commission: the violation of it could be considered as infringement of the principle of subsidiarity that could be contested before the CJEU.

[140] Bussjäger (2010), p. 56.

[141] Bussjäger (2010), p. 56 remarks that "it is unlikely that a Government will approve in the Council a proposal against which its Parliament has submitted objections from a subsidiarity point of view".

[142] According to Grabenwarter (2010), p. 115, the consultation of regional Parliaments is not an obligation but a possibility.

7.3 The "Yellow Card"

50 Besides this first form of participation, a second level of interaction between national Parliaments and European institutions is foreseen by Art. 6 and 7 of Protocol No. 2: through it, MS Parliaments are enabled to **act collectively** and not only individually. In these procedures every parliamentary Assembly is "weighted" with **two votes** if it is the only Chamber composing the national Parliaments, and with one vote when the Parliament is bicameral. Every Chamber can express an opinion and can be "weighted" in the procedures foreseen in the Protocol: the two Chambers of a national Parliament are not required to agree on the reasoned opinion, at least from the Union point of view (→ Protocol No. 1 para 113; → Protocol No. 2 para 74 et seqq.; 161 et seqq.).[143]

51 According to the so called "***yellow card procedure***", if the opinions concerning the non-compliance of an European act with the principle of subsidiarity represent at least **one third** of the votes allocated to national Parliaments (18 votes out of the 54 given to the 27 national Parliaments), the draft must be formally reviewed.

52 The threshold (that in itself is rather high,[144] especially if we consider that physiologically national Parliaments are not fit to build a supranational consensus, as Governments are, but are placed in the perspective of their own national interest) is lowered to **a quarter** when the project concerns the AFSJ.

The protocol does not require the reasoned opinions to be coordinated[145] or coherent with each other, and therefore does not require a formal **coordination** between the national Parliaments in submitting the opinion, but of course nothing forbids such a coordination to take place spontaneously through the interparliamentary coordination foreseen by Art. 9 of Protocol No. 1. Indeed, it seems likely that the early warning system "will lead to an extension of networks between National Parliaments".[146]

After the review, the Commission or the other authorities who had prepared the draft has three choices: maintaining, amending, or withdrawing the legislative draft. "Reasons must be given for this decision".

In the first 2 years in which the early warning mechanism has been operational, the threshold necessary to activate the yellow card was never reached. It has been reached for the first time on 24 May 2012, when 12 national Parliaments (7 unicameral and 5 chambers of bicameral Parliaments) have submitted to the Commission reasoned opinions arguing that the draft regulation on the right to strike[147] was infringing the principle of subsidiarity. At the moment it is not yet clear how the Commission will react.

---

[143] Calliess, in Calliess and Ruffert (2011), Art. 12 EUV para 12.

[144] Kiiver (2006), p. 157.

[145] On the coordination problem see Bermann (2009), p. 160.

[146] Pernice (2009), p. 381.

[147] COM(2012) 130, based on the flexibility clause.

7.4 The "Orange Card"

A variation on this procedure is included in Art. 7.3 of Protocol No. 2, that introduces a "**heightened**"[148] or qualified form of participation of national Parliaments, that is a novelty even in comparison with the Constitutional Treaty (and actually the only entirely new provision included in the Protocols No. 1 and No. 2 annexed to the Treaty of Lisbon in comparison with those annexed to the Constitutional Treaty[149]). **53**

This form of control was required by the Government of the Netherlands, who considered the yellow card system insufficient and negotiated the introduction of an "additional specific mechanism" during the German Presidency of 2007. Both considering the national colour of the Netherlands and the fact that this procedure is a middle way between the "yellow card" and a "red card" (that was not accepted by the Treaty of Lisbon), this system is sometimes called "***orange card***" (→ Protocol No. 2 para 178–183).[150]

This type of participation of national Parliaments is qualified in two directions: on one side it is expressly limited to "the ordinary legislative procedure" (the co-decision of EP and Council); on the other side it operates when the reasoned opinions concerning the non-compliance with the principle of subsidiarity are adopted by the **majority** of national Parliaments (28 votes out of 54). Therefore, the "orange card" is a variation, or a heightened form of the "yellow card" mechanism, and not a second stage of it, like the one proposed in the Convention on the Future of Europe "wherein National Parliaments could issue a second round of 'reasoned opinions' when the Conciliation Committee is convened".[151] **54**

In this case, **the draft must be reviewed** and after such review the Commission[152] decides whether to maintain, amend or withdraw the proposal. The decision to maintain the proposal has to be motivated (not, it seems, the decision to withdraw or to amend it[153]) with reference to the principle of subsidiarity and the reasoned opinions both of the Commission and of national Parliaments are submitted with the draft to the legislative authority of the EU, who must take account of both positions. **55**

Before concluding the first reading, the legislator (EP or Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, **taking *particular* account** of the reasoned opinions of the Commission and of national Parliaments. But in these cases "it is very likely that the majority of government votes needed in the Council to enact legislation at the EU level is already lacking".[154] **56**

[148] Dougan (2008), p. 660.

[149] Calliess, in Calliess and Ruffert (2011), Art. 12 EUV para 7.

[150] Piris (2010), p. 129.

[151] Cooper (2006), p. 289.

[152] This decision is reserved to the Commission alone: Calliess, in Calliess and Ruffert (2011), Art. 12 EUV para 19; Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 29.

[153] Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 29.

[154] Bermann (2009), p. 160.

If a majority of the Council (55 %) or of the EP finds that the proposal infringes the principle of subsidiarity, "the legislative proposal shall not be given further consideration": it is a sort of subsidiarity (political) preliminary ruling[155] that forbids the continuation of the legislative procedure.

It has been argued that this is **a symbolic rule**, because, without a majority in the Council and in the EP no proposal could be approved.[156]

7.5 Some Critical Remarks

57 The orientation that had emerged in the Constitutional Treaty against an even stronger procedure, that would have allowed to a qualified group of national Parliaments to veto a proposal for infringing the principle of subsidiarity[157] (the so called "***red card*** procedure"[158]) has been confirmed by the Treaty of Lisbon, "in order to avoid infringing the monopoly of initiative of the Commission".[159]

The kind of control introduced by the Treaty of Lisbon can be defined—like the similar procedure included in the Constitutional Treaty—as an *ex ante* and political control,[160] that can be compared to the "political safeguards of federalism" known to the US constitutional literature.[161]

58 This procedure is rather **complicated**[162] and baroque, in proportion to the results that can be achieved through it. While the result of the procedure in the first type of participation—simply obliging the Commission to review the draft in front of the reasoned opinions of a minority of national Parliaments—seems proportionate to the degree of parliamentary involvement that it requires, the "qualified" procedure for which the agreement of the majority of national Parliaments is necessary should either not have been foreseen, or have been given a major strength, allowing it to interrupt directly the legislative procedure. That a reasoned opinion subscribed by the majority of national Parliaments does not have the force to stop the legislative

[155] Gianniti (2010), p. 174 speaks of a "pregiudiziale di sussidiarietà".

[156] Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 32, who also notes that the majorities required in the EP for objecting to a legislative initiative on the ground of the principle of subsidiarity is different from the majority of the members required by Art. 294.7 lit. b TFEU to reject a proposal.

[157] In favour of it, for example, Raunio (2004). Against it Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 33: "it would have been alien to the system [systemfremd] to recognize a veto power to national Parliaments at the beginning of the European legislative procedure".

[158] Saulnier-Cassia (2009), uses this definition ("carton rouge") for the action before the CJEU.

[159] Louis (2009), p. 141.

[160] Violini (2003), p. 286; Álvarez Conde and López de los Mozos Díaz-Madronero (2006), p. 157 (speaking of the Constitutional Treaty). For Ninatti (2004), p. 1424–1425 the early warning system is a new device of political control that can be put in function by national Parliaments that will be so enabled to take part directly to the European legislative process.

[161] For the comparison see Schütze (2009), p. 526–527; for the US literature see Wechsler (1954), p. 543.

[162] According to Bussjäger (2010), p. 55, it is "rather difficult to be applicated".

proposal is a **paradox** in the perspective of the **democratic principle**, to the foster of which the role of national Parliaments has been structured.[163] On the other side, it must be recognised that, given the fact that national Parliaments are simply calculated on an equal footing, without considering the number of people they do represent (with a consequence that a majority of national Parliaments could correspond to a slim minority of the EU total population), this latter objection cannot be overemphasised.

This is even more true if we consider that the burden placed on national Parliaments is rather high. According to *Paul Craig*, it "may not be easy [...] to present a reasoned argument as to why the Commission's comparative efficiency calculation is defective" and "it will be even more difficult for the requisite number of National Parliaments to present reasoned opinions in relation to the same EU measure so as to compel the Commission to review the proposal".[164]

Moreover, the importance of the pre-emptive control system described above **59**
has "little constitutive value",[165] if we consider that, after all, national Parliaments could already file complaints and send them to the Commission, without the need of formally been enabled to do so.[166] But this procedure has "some **catalyst potential**",[167] in the sense that is stimulates the use of powers already possessed, and now formally recognised at the level of the Treaties and instrumentally enriched with a complete flow of information to support them.

On the whole, the sense of these procedures seems to be twofold. On one side, **60**
the weight of the opinions of a group of national Parliaments, if they are able to formulate the required reasoned opinions, is likely to be high, independently from the formal duty of the Commission to review the proposal[168]: this **informal strength** should not be underestimated.

[163] This procedure has been criticised also from an opposite point of view. Manzella (2008), p. 338–339 sees in the possible interruption of the legislative process an "interference" of a "casual majority" of national Parliaments in the European decision-making process. But to this opinion it is possible to reply that the interference is an appropriate phenomenon in a multilevel constitutional system, in which the various level of government, and the different constitutional powers of each level, interact with powers placed at another level. The question should be to see if such interference is justified and functional.

[164] Craig (2008), p. 151 and Craig (2010), p. 48. Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 38 underlines that coordination—maybe in the COSAC framework—is necessary.

[165] Kiiver (2008), p. 81.

[166] Besselink (2006), p. 8.

[167] Kiiver (2008), p. 82.

[168] This is also the opinion of Craig (2008), p. 151. Kiiver (2011), p. 102–103, has compared the functions of national Parliaments to the role played by the Council of State in the French legal system: it is not a real co-legislative authority, but it cannot be regarded simply as one of the various subjects who are consulted. It is an institution that takes part to the consultative function, with the task not of expressing support to the measure on which it gives an opinion, but only to express reasoned objection on the base of a pre-defined criterion. In the light of this interpretation of the role of national Parliaments, Kiiver believes that the early warning system should be focused "on the lawfulness, on the admissibility of legislation, rather than on its political desiderability" (p. 108).

On the other side, should the act be adopted even against the opinion of a high number of national Parliaments, these procedure introducing a *ex ante* political control on the principle of subsidiarity could be **instrumental to strengthen the *ex post* judicial review** on the respect of the same principle.[169] Actually, the tentative[170] to "give teeth" to the principle of subsidiarity can be seen not only in itself but also in the perspective of a successive legal challenge to the regulation adopted against the reasoned opinions on the respect of the principle of subsidiarity.

61 The *ex ante* subsidiarity control that national Parliaments can activate, both as a single Chamber and as a group (in the forms regulated by Art. 6 and 7 of Protocol No. 2), requires the adoption by the MS of **internal provisions** concerning the procedures for the adoption of the reasoned opinions. At the moment, while some MS have adopted new **constitutional provisions**,[171] other States have chosen the **statutory** form[172] or have regulated the procedure through an informal—and provisionally not yet codified—**practice**.[173] Concerning the substantial choices, the main difference seems to be between the States who have empowered a **Committee** to adopt the reasoned opinions[174] and those that have reserved the decision to the **Assembly**,[175] but sometimes exceptions to the general rule are allowed.

---

[169] Von Bogdandy and Bast (2010), p. 304: "There is [. . .] a chance that political ex ante scrutiny and ex post judicial scrutiny could mutually enhance each other".

[170] Von Bogdandy and Bast (2010), p. 304: The "promising political experiment whose functioning cannot yet be foreclosed".

[171] This is the case of France (Art. 88-6.1 Const.: "L'Assemblée nationale ou le Sénat peuvent émettre un avis motivé sur la conformité d'un projet d'acte législatif européen au principe de subsidiarité. L'avis est adressé par le président de l'assemblée concernée aux présidents du Parlement européen, du Conseil et de la Commission européenne. Le Gouvernement en est informé".) and Austria (Art. 23g B-VG); Protocol No. 1 para 17.

[172] This is the case of Spain, Portugal and Germany (but in this latter case, Section 11.1 of the *Integrationsverantwortungsgesetz* of 22 September 2009 delegates the regulation of the procedure for the adoption of the opinion to the Rules of Procedure of each of the two Chambers: see now Art. 93a.1 sentence 2 and 4 and Art. 93c of the Rules of Procedure of the German *Bundestag*; → Protocol No. 1 para 17).

[173] This is the case of Italy, where an experimental procedure has been adopted in 2009 with an opinion of the Constitutional Affairs Committee of the Chamber of deputies ("Bressa-Calderisi Opinion": see Esposito 2009, p. 1165. This first opinion was modified in 2010: see Fasone (2010), p. 7) and by the Rules of Procedure of the Committee of the Senate (→ Protocol No. 1 para 56).

[174] This is the case of Spain, where the *Comisión mixta para la Unión Europea* is empowered to approve the reasoned opinions on the respect of the principle of subsidiarity, with the exception of the cases in which one of the two Chambers asks to debate and vote directly on the opinion (Art. 5 of Law No. 8/1994, introduced by Law No. 24/2009). This is also the case of Italy (see Esposito 2009, p. 1165), Austria, France and Germany (in this latter case, it remains to be seen which regulation will be adopted by each of the two Chambers).

[175] This is in principle the solution adopted in Portugal: the opinion is adopted by the *Asambleia da República* with a resolution (Art. 3.1 of Law No. 43/2006). But Art. 3.2 permits an exception: "em caso de fundamentada urgência, é suficiente um parecer emitido pela Commissão de Assuntos Europeus". The solution provisionally adopted by the Italian Senate gives to the Committee on the European Union the power to examine the draft European act both on the substance and on the subsidiarity point of view, but when the Committee finds objections based on the principle of

8 The Access of National Parliaments to Judicial Protection Against the Infringement of the Principle of Subsidiarity

8.1 The European Law Framework

According to Art. 8 of Protocol No. 2, the CJEU "shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act".[176] The Treaty of Lisbon thus confirms the **justiciability** of the principle of subsidiarity, already established in the case law of the Court of Justice. But the difficulty of using the principle of subsidiarity as a mean to check in a case before a judge the intervention of the "subsidiary" level of government is very well known, both in the experience of some federal States (especially Germany, concerning Art. 72 of the Basic Law) and in the decisions of the Court of Justice. The Court of Luxemburg, actually, has been consistently unwilling to review Union legislation for alleged violations of subsidiarity[177] and, at least in the EU harmonisation legislation, restricts its review to "examining whether [the exercise of the discretion of the legislator] has been vitiated by manifest error or misuse of powers, or whether the institution has manifestly exceeded the limits of its discretion".[178] **62**

The "**proceduralisation**"[179] of the principle of subsidiarity already outlined in the Protocol annexed to the Treaty of Amsterdam, and now strongly developed by the Treaty of Lisbon will allow the Court to check the compliance with the procedural rules devised to protect the respect of that principle[180]: the "proceduralisation is the necessary prerequisite of a judicial review [of the principle of subsidiarity] that will be centered on the control of the motivation and of the violation of the rights of participation".[181] Viewed in connection with the *ex ante* political control, the "***ex post* judicial review** on subsidiarity grounds may be

subsidiarity, the Assembly must examine the draft (the Assembly may also require to examine the drafts when one third of the Committee so requires).

[176] For Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 23 MS Parliaments can also denounce the violation of the order of competences and of the principle of proportionality.

[177] Cooper (2006), p. 284. According to Barents (2010), p. 726, the principle "hardly plays any role" in the case-law of the Court.

[178] Case C-84/94, *United Kingdom v Council* (ECJ 12 November 1996) para 58; for more recent decisions, showing some hints of a deeper control C-377/98, *Netherlands v European Parliaments and Council* (ECJ 9 October 2001); C-491/01, *ex parte British American Tobacco* (ECJ 10 December 2002); Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health et al.* (ECJ 12 July 2005), quoted by Dougan (2008), p. 660 (notes 221 and 222). On the decisions of the Court of Justice concerning the principle of subsidiarity see Sander (2006), p. 517 et seqq.

[179] On the procedural dimension of the principle of subsidiarity see D'Atena (2000); Mager (2003).

[180] Porchia (2010), p. 44; Shirvani (2010), p. 757.

[181] Woelk (2010), p. 13.

poised to take a whole new potency; [. . .] thanks to the yellow card system, the Court may be presented with a mass of 'reasoned opinions' detailing the subjective objections held by National Parliaments. With such a wealth of material, argumentation over subsidiarity could metamorphose from the politically subjective into the readily **justiciable**".[182]

63 But the Treaty also introduced an innovation, consisting in the forms in which such action can be brought before the Court by MS.[183] Art. 8 (1) of the Protocol recalls "the rules laid down in [Art. 263 TFEU]", but adds that the action can also be "notified by [the MS] in accordance with their legal order **on behalf of their national Parliament** or a chamber thereof".[184]

The aforementioned provision of the Protocol is for some aspects ambiguous: National Parliaments are expressly mentioned as **initiators** of an action before the CJEU, but, at the same time, the Protocol confirms that only national Governments are entitled to bring the case before the Court, also in the case in which the initiative comes from their Parliaments. The proposal included in the report of Working Group I of the Convention on the Future of Europe to recognise to Parliaments the power to bring **directly** an action before the Court[185] has therefore not been totally accepted and the solution already foreseen in the Constitutional Treaty (the intermediation of Governments) has been adopted: Art. 8 of Protocol No. 2 "does not grant national Parliaments a **right of action** to the ECJ, but, rather, makes such an action dependent on **national law** and the normal requirement of an action for annulment".[186] A reason for this choice can be found in the respect of the constitutional autonomy of the MS, to which a margin of choice on the regulation of this topic has been recognised.

64 The room left to MS in the **regulation of the standing** before the Court against the infringement of the principle of subsidiarity is not clear. It has been suggested

[182] Dougan (2008), p. 661. Similar is the opinion of Bermann (2009), p. 159: the participation of national Parliaments to the control on the respect of the principle of subsidiarity avoids a direct and excessive pressure on the CJEU and, at the same time, it gives to the Court—when an action is brought before it after Parliaments have elaborated and submitted their reasoned opinions and the act has been adopted, notwithstanding this—"an analytic and documentary trail that could be of great use and value to the Court of Justice if it were inclined to take a 'harder look' at compliance with the subsidiarity principle". According to Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 39 the action for the infringement of the principle of subsidiarity has above all a "legal psychological effect".

[183] Being an action for annulment, the general rules apply for the deadline, that also in this case is of 2 months (Art. 263.6 TFEU): Calliess, in Calliess and Ruffert (2011), Art. 12 EUV para 30; Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 35; Shirvani (2010), p. 757.

[184] The German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 305—*Treaty of Lisbon*, has raised the doubt about the possibility to bring action also against activities of the EU that are outside the competence for the draft European act.

[185] For criticism of this proposal see Ferraro (2003), p. 191.

[186] Von Bogdandy and Bast (2010), p. 304.

that Art. 8 is not an innovative provision, and that nothing has changed in the rule that the Governments, and only the Governments, can bring an action before the CJEU.[187]

The **interpretation** of the provision of the Protocol has to face at least three problems. Firstly, it can be interpreted as establishing an **obligation** for the national legislator to foresee a request of the Parliament to bring the action before the Court or as a mere **Authorization** to the national legislator to introduce the parliamentary request: the necessity to interpret the provision in the sense of giving it a meaning instead of an absence of meaning suggests that the national legislator is obliged to foresee the parliamentary request.[188] But, in this case, what would be the consequence of the violation of such an obligation? Could it be controlled by the CJEU or should the violation be reviewed solely by a national Court (e.g. by a Constitutional Court), given the necessity to respect the principle of institutional autonomy of MS confirmed by Art. 4.2 TEU?[189]

Secondly, it is necessary to define the **margins of choice for the national legislator**, concerning the form in which the parliamentary request must be prepared and the existence of a margin of appreciation of the national Government: in this field constitutional autonomy should lead to give value to the margins of choice of the national legislator.[190]

Thirdly, it should be asked what could be the consequences of the **inactivity of the national legislator** in implementing Art. 8 of the Protocol: in our opinion, the Parliamentary request should not be considered as paralised till the moment of the adoption of a national law on the topic, but in that cases some elements of incertitude remain, for example about the consequences of the inactivity of the Government in transmitting the request.

65 Any **violation** of a mandate of a national Parliament—and more generally of national constitutional or statutory rules on this subject—should find its sanction within the single national legal order, and should be channelled either through the rules of **political responsibility** or through the instruments foreseen by national law to resolve conflicts between the organs of the State.

66 The right to contest an European act on subsidiarity grounds before the Court of Justice is **not restricted** to those Parliaments—or those Chambers—who have submitted reasoned opinions in the early warning system (this had been, on

[187] Adinolfi (2010). Also according to Porchia (2010), p. 45, note 74 "it is not possible to infer from the letter of the Protocol provision an obligation for the Government".

[188] Thiele (2010), p. 47.

[189] For Barents (2010), p. 727, the formula included in the Protocol "leaves in the dark whether the Government of a Member State is obliged to bring an action if its Parliament so decides, or whether it has some discretion in doing so".

[190] For Grabenwarter (2010), p. 115 "the way in which Parliament institutes the proceedings is an issue of national State organisation, which is decided by the national legislator according to the constitution".

the contrary, the proposal of the Working Group I of the Convention on the Future of Europe),[191] but can be exercised also by Parliaments who remained inactive in the first phase. The right is expressly recognised to each Chamber of bicameral Parliaments.

8.2 Some Examples of Provisions Implementing Art. 8 of Prot. No. 2 in National Law

67 An example of a national provision granting to a national Parliament the power to bring action before the CJEU is now Art. 88-6.2 of the **French Constitution**, as amended by Constitutional Act No. 2008-103 of 4 February 2008,[192] according to which each of the two Chambers of the French Parliament can bring an action against a European legislative act to the CJEU for infringement of the principle of subsidiarity and such action is transmitted to the CJEU by the French Government. In principle the Government has a margin of appreciation, but, if 60 MPs or 60 senators so require, the Government is legally obliged to submit the action to the Court ("le recours est de droit").[193]

In **Austria** the *Lissabon Begleitnovelle* of July 2010 has introduced in the Constitution an Art. 23h, that goes in the same direction.

68 A different perspective is adopted by Art. 23.1 sentence 2 of the **German Basic Law**, as amended in the process of ratification of the Treaty of Lisbon. In this case, the action is brought before the Court by the Government, on the base of a request adopted

[191] See Group I, *Final Report*, 7 and comments in Di Capua (2005), p. 121 and in Petrangeli (2003), p. 174. According to Petrangeli (2003), p. 174 and Gianniti (2010), p. 172–173, the solution adopted in the Treaty is justified by the fear that a filter would have stimulated the use of the early warning system just to keep the possibility to bring later an action before the CJEU. On the contrary, according to Vecchio (2009), p. 179, the solution adopted in the Treaty does not incentive national Parliaments to exercise the preventive control, submitting reasoned opinions and leaves the controversy on subsidiarity to the judicial arena.

[192] The present text of Art. 88-6 is the result of three constitutional amendments. The first two have been adopted by Constitutional Law No. 2005-204 of 1 March 2005 and by Constitutional Law No. 2008-103 of 5 February 2008, that had been made necessary by two decisions of the Constitutional Council that had declared contrary to the Constitution the procedures on subsidiarity adopted respectively by the Constitutional Treaty (Decision No. 2004-505 of 19 November 2004) and by the Treaty of Lisbon (Decision No. 2007-560 of 20 December 2007). A third amendment was adopted by Constitutional Law No. 2008-724 of 23 July 2008, that actually introduced the possibility to oblige the Government to submit the action to the Court. On the history of Art. 88-6 see Saulnier-Cassia (2009) and the following footnote.

[193] This possibility is the most remarkable innovation added by the constitutional reform of 23 July 2008 on European affairs (it was introduced by an amending proposal of a MP). According to Saulnier-Cassia (2009), p. 1981, the last phrase of Art. 88-6 "apporte une valeur ajoutée considerable à la prerogative parlementaire de saisine de la Cour de Justice des Communautés européennes pour un cas de violation du principe de subsidiarité, puisque elle permet de s'assurer de la transmission obligatoire du recours".

by the lower or by the upper Chamber of the Parliament. In the case of the lower Chamber, when one fourth of its members propose a motion requesting to bring the action to the Court of Justice, the lower Chamber is constitutionally obliged to adopt it: it is therefore structured as a right of a qualified **parliamentary minority**.[194]

The existence of a formal deliberation of the Chamber fully satisfies the requirements established by Art. 8 of Protocol No. 2, that foresees a request of the Parliament or of one Chamber (and therefore of a majority of it).[195]

A third solution has been adopted in **Spain**, where the power to propose, on behalf of Parliament, an action before the CJEU for infringement of the principle of subsidiarity has been structurally delegated to the Joint **Committee** on the European Union (*Comisión Mixta para la Unión Europea*).[196] But a role of "filter" is recognised to the national Government, giving him a margin of appreciation on the decision of the Parliament: the Government can decide not to interpose the action asked by the Committee. In that case, the Government must state the reasons for its decision and must justify it in front of the Committee, when this so requires. **69**

9 Other Functions Aimed at Protecting National Prerogatives

9.1 Veto Powers

Besides this general form of participation aimed at protecting the MS' competences, the Treaty of Lisbon formally recognises to national Parliaments some **powers of participation** in specific areas, when the Treaties foresee mechanisms that allow to enlarge the areas of competences of the Union or to widen the fields where a decision can be taken with a method different from unanimity. **70**

The most interesting procedure is foreseen by the general "**passerelle clause**" of Art. 48.7 TEU (former Art. IV-444 TCE[197]). This procedure enables the European Council to adopt by unanimity a decision authorising the Council to act by a qualified majority in an area or in a case for which Title V of the TEU or the TFEU require the rule of unanimity: this procedure allows to extend the range of application of the ordinary legislative procedure, replacing some special legislative procedures foreseen for the adoption of legislative acts. The decision of the Council **71**

[194] Hölscheidt, in Grabitz et al. (2010), Art. 12 EUV para 37 defines it as a "parlamentarische Minderheitsrecht". Shirvani (2010), p. 756–757 recalls that this minority right is constitutionally foreseen only in the lower Chamber, while in the upper Chamber the decision is left to the majority (or to a possible different solution if the internal rules of that Chamber will so decide).

[195] Uerpmann-Wittzack and Edenharter (2009), p. 313–329.

[196] See Art. 7 of the Law No. 8/1994, added by the Law No. 24/1999.

[197] That provision had not been included in the text adopted by the Convention and was added by the IGC of 2004.

must be **notified** to national Parliaments and in case of the **opposition** of one national Parliament the decision shall not be adopted (→ Art. 48 para 47–54; → Protocol No. 1 para 89–102).

72 The power of national Parliaments to oppose[198] the enlargement of the fields in which it would be possible to decide with a qualified majority is an evolution of one of their original functions, the one that has been called of "ratification" (→ para 4). But the veto mechanism is based on the idea that, from the perspective of the European law, what is sufficient to allow the adoption of the decision of the Council is the simple absence of a contrary deliberation of a national Parliament: therefore—differently from the ratification procedures—the consent of national Parliaments is not required and the old principle *qui tacet consentire videtur si loqui debuisset ac potuisset* does apply.

This mechanism has been regarded as insufficient by the **German Constitutional Court** in its decision on the constitutionality of the Treaty of Lisbon: the Court has required that, for the German consent to be validly given from the point of view of German constitutional law, the decision of the Council must be positively approved by the German Parliament with a law (and—when required by German constitutional rules—also by the German Federal Council),[199] thus transforming the veto power in a reserve of legislation.[200]

A similar solution has been adopted by the ***European Union Act 2011*** in the United Kingdom and by Art. 23i of the Austrian Constitution, introduced by the ***Lissabon Begleitnovelle*** of July 2010: in the case of use of the "passerelle clause", the Austrian Federal Government is obliged to require the authorisation of the two Chambers with a majority of two thirds of the MPs who participate to the vote (provided that the participants are at least half of the members of each Chamber) in each of them before voting for it.[201]

---

[198] The German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 319—*Treaty of Lisbon*, defines it as an "Oppositionsrecht".

[199] See German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 319–320—*Treaty of Lisbon*. According to Lecheler (2009), p. 1159, the Court has thus transformed the rights of participation of Parliament (*Mitwirkungsrechte*) in obligation to participate (*Mitwirkungspflichten*)

[200] German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 320—*Treaty of Lisbon*: "It is not possible to renounce to the veto right in the Council without the participation of the competent legislative authorities". Already in its decision on the Treaty of Maastricht, the German Constitutional Court had underlined that the (then) European Communities and Union were legitimated on the base of the competences recognised to them by the Treaty and that on one side those competences needed to be clearly determined (point I.3 of the decision) and that on the other side further devolutions of powers to them needed an express decision of the German Parliament (and of the other National Parliaments) in order to respect the democratic principle. The role of the German Parliament was also underlined in its capability to influence the European policies of the Government (point II.1). According to Classen (2009), p. 886, this second element is less important in the Lisbon Decision.

[201] According to Art. 23i (2), in the case of the other (specific) passerelle clauses, the two Chambers can use their veto power, but in these cases they have to agree on the refusal, not authorise the consensus of the Austrian government.

This role recognised by Art. 48.7 TEU to national Parliaments is very similar to the one mentioned in Art. 81.3 TFEU (**special passerelle clause**), according to which each national Parliament is endowed with a veto power in relation to a decision of the Council "determining those aspects of **family law** with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure" instead of that with a special legislative procedure. Not only the decision to change the procedure must be adopted by the Council unanimously, but national Parliaments must be informed of such decision and they have a delay of 6 months to oppose it. If one national Parliament does oppose it, the decision is not adopted. It is not clear what happens if only one of the two Chambers composing a national Parliament opposes this decision, and if the position of one of the two Chambers in favour of the European decision has the power to **block** the veto power of each national Parliament. **73**

Art. 48.7 TEU and Art. 81.3 TFEU literally require the opposition of "**a national Parliament**": a literal interpretation of these provisions seems to lead to the consequence that, when the Parliament is composed of two Chambers, the opposition, to be validly expressed according to the Treaties, should be expressed by both Chambers.[202] This interpretation could have the paradoxical consequence that the opposition of a popularly elected lower Chamber, without the consent on it of a non-elected upper Chamber (the extreme case could be that of the House of Lords in the UK) would not satisfy the requirement established by Art. 48.7 TEU and Art. 81.3 TFEU to block the use of the "passerelle clause". A teleological interpretation, on the other hand, moving from the purpose of the abovementioned provision, that protects the position of MS as defined by their elected representatives (and, therefore, the principles of democracy and of subsidiarity) could lead to support the thesis that the opposition to the use of a "passerelle clause" from a popularly elected Chamber has in itself the legal force of blocking the use of it.[203] **74**

Other **special "passerelle" clauses** are regulated by the Treaty, but in those cases national Parliaments do not have a right to be previously informed, nor do they enjoy the right to veto the decision[204]: this happens in some cases concerning the Union's social (Art. 153.2 TFEU) and environmental policies (Art. 192.2 TFEU), in the AFSJ (Art. 82 TFEU), of intellectual property (Art. 262TFEU) and in the adoption of the Union's multiannual financial framework (Art. 312.2 TFEU). **75**

In the case of the "**flexibility clause**" (Art. 352 TFEU, former Art. 308 EC) the veto power of national Parliaments is not foreseen, but the duty of the Commission

[202] This is actually the interpretation given by Art. 88-7 of the French Constitution, that requires a motion adopted by the two Chambers with the same content.

[203] Also the systematic interpretation of Art. 6 and 8 of Protocol No. 1 in conjunction with Art. 48.7 TEU could lead to the same conclusion: but only at the condition of referring Art. 8 of Prot. No. 1 also to Art. 48.7 TEU and not just to the provisions of the Protocol.

[204] See German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 318—*Treaty of Lisbon*.

to "**draw national Parliaments' attention** to proposals based on" it is specifically recalled. In this case, the Treaty relies implicitly on the national function of national Parliaments: i.e. to legitimise, influence and direct their Governments, who have a veto power, given the fact that the Council must act unanimously. The German Constitutional Court has considered not sufficient the duty of the Commission to inform national Parliaments and has required that, in the German legal system, the German representative in the Council cannot formally give the consent to the use of the flexibility clause without the ratification by the two chambers of the German Parliament.[205]

9.2 Participation to the Revision of Treaties

76 An important power of participation of national Parliaments is foreseen by Art. 48 TEU (a reformulation of Art. IV-443 TCE; → Art. 48 para 32) in the **ordinary procedure for the amendment of the Treaties**. This ordinary procedure is characterised by the elaboration of the amendment by a **Convention**, composed of "representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission", according to the experience of the Conventions on the Charter of Fundamental Rights (1999–2000) and on the Future of Europe (2002–2003).

77 The measure of the **representation of national Parliaments** is not defined by the TEU. The importance of this representation is diminished from the fact that the Convention procedure can be avoided, in favour of the direct recourse to a Conference of the representatives of the Governments of MS, if the European Council (with a decision adopted with a simple majority and the consent of the EP) so decides, when "to convene a Convention" is not justified "by the extent of the proposed amendments". The choice seems to be a political question: it is difficult to imagine the nullity of a modification of the Treaties decided with a simplified procedure when the "extent"[206] of the modification should have suggested calling a Convention.

Furthermore, the role of national Parliaments is limited also from other points of view: they do not have a power of **initiate** a revision of the Treaties, they are represented in the Convention by a **small number** of their members and the amendment elaborated by the Convention is only a proposal, the decision being reserved to the IGC.[207]

---

[205] See German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 328—*Treaty of Lisbon*.

[206] Moreover: it is not clear in what sense is "extent" to be understood: for example the extent could be judged from the number of articles affected or from the importance of the subject (even if the modification could be referred to a single article).

[207] Gennart (2010), p. 35.

10 Functions Corresponding to "Classic" Parliamentary Control

The former second and third Pillars of the EU have traditionally been **sensitive areas of the democratic deficit**, given the reduced powers of the EP in these fields. While the Treaty of Lisbon has tried to open new perspectives of parliamentary control[208] in the AFSJ (→ para 79–84), it left the CFSP only to the development of interparliamentary cooperation (→ para 85–87). More recent developments have added the economic governance as an emerging field for control by national Parliaments (→ para 88–92). **78**

10.1 Parliamentary Control in the AFSJ

Art. 12 TEU outlines a specific role for national Parliaments within the framework of the AFSJ,[209] articulating it in **three aspects**, one more general and two sectoral: the participation to "the **evaluation** mechanisms for the implementation of Union policies in that area" and the involvement in the **control** both of *Eurojust* and *Europol*. Before the entry in force of the Treaty of Lisbon—and also after it, pending the implementation of Art. 85 and 88 TFEU—Eurojust and Europol were accountable to the Council of Ministers for Justice and Home Affairs. **79**

Council Decision 2009/371/JHA of 6 April 2009,[210] adopted under Title VI of the TEU (before the entry in force of the Treaty of Lisbon), established Europol as a European Agency. It has introduced a control of the EP in Art. 48, that can be activated on request of Parliament "taking into account the obligations of discretion and confidentiality". At the same time, notwithstanding the pending of the ratification of the Treaty of Lisbon, the **Europol Council decision** has ignored national Parliaments: "replacing the Europol Convention with the Europol Council decision has reduced the power of National Parliaments to control the development of Europol. Moreover, any reference to the role of national Parliaments (Art. 34.3 of Europol Convention) has disappeared in the Europol Council decision".[211] Concerning **Eurojust**, the Council Decision 2009/426/JHA[212] reforming Eurojust, foresees only duties to inform the EP, not national Parliaments.

The **rules** laid down by the Treaty about MS' Parliaments role in this area are basically **instrumental**: they empower further sources of law to regulate the subject. **80**

[208] On the different forms through wich parliamentary control may be exercised see Dann (2004), p. 166 et seqq. and Rivosecchi (2003), p. 289 et seqq.

[209] Art. 69 TFEU also confirms the subsidiarity check made by national Parliaments in this area: → para 46.

[210] O.J. 15.5.2009 L 121/37. See De Moor and Vermeulen (2010).

[211] De Moor and Vermeulen (2010), p. 1177.

[212] Council Decision 2009/426/JHA of 16 December 2008, O.J. L 138/14 (2009).

Art. 70 TFEU foresees that national Parliaments and the EP will be **informed** of "the content and results of the evaluation" of the implementation by the MS authorities of the Union policies in the AFSJ. That evaluation will be regulated by a "measure" adopted by the Council on the base of a proposal of the Commission.

Art. 85 and 88 TFEU empower a regulation[213] to define the forms of the **control** on the two organisations by the EP, to which national Parliaments are associated.

81 The form of this control remains largely **undetermined** at the moment, and it will be defined by the measure mentioned by Art. 70 TFEU and by the EU regulation foreseen by Art. 85 and 88 TFEU.[214]

These Articles include only an authorisation to the EU regulation to establish the forms of such control, and use different words to define it in general: "information" of "the content and results of the evaluation" for the control of MS authorities in implementing the EU policies; "evaluation" for Eurojust (Art. 12 lit. c TEU and Art. 85.1 TFEU) and "political monitoring" (Art. 12 lit. c TEU) and "scrutiny" for Europol (Art. 88 TFEU).[215]

In the first case only an information right seems to have been foreseen by Art. 70 TFEU, thus reducing the importance of the activity mentioned in Art. 12 lit. c TEU, where it is spoken of "taking part [...] in the evaluation mechanisms", and therefore of an active and not of a merely passive role for MS' Parliaments.

82 Concerning Eurojust and Europol, the **form of oversight** of the latter seems to be more intensive than that of the former, but the difference is not clear.[216] Also other profiles remain unclear, such as the subjects actually involved for a national Parliament (probably each Chamber of it), the forms of coordination between national Parliaments and the EP and—above all—the general purpose of this control, moving from the basic fact that is should be some form of *ex post* parliamentary oversight.

83 A communication of the Commission seems to choose for **Europol** an interrelated form of control, exercised by a joint body: "An interparliamentary forum could consist of both the national Parliaments' and the EP's committees responsible for police matters. This joint body could meet at regular intervals and invite the Director of Europol to discuss questions relating to the agency's work".[217]

---

[213] Both Articles were already present in the Constitutional Treaty, almost in identical form (Art. III-273 and III-276), with the difference that the forms of control were delegate to a "European law", according to the "constitutional" terminology used in that Treaty.

[214] Following the *Action Plan implementing the Stockholm Program*, [COM(2010) 171, final], the Commission intends to make a proposal for a regulation in 2013.

[215] This difference is underlined by House of Commons—European Scrutiny Committee, *Subsidiarity, National Parliaments and the Lisbon Treaty*, XXXIII Report of Session 2007-08, p. 16.

[216] For the opposite opinion see Hölscheidt (2008), p. 261, according to which the role of national Parliaments in the control of Europol is "clearly smaller" than that outlined for Eurojust.

[217] See IP/10/1738 of 17 December 2010 and the Commission Communication *on the procedures for the scrutiny of Europol's activities by the European Parliament, together with national Parliaments*, COM(2010) 776 final, point 5.1.

In both cases, the weak element of this form of control seems to be the **absence of a possible sanction** at the end of the control activity of a single national Parliament: it is not plausible to recognise a sanction power to a single Parliament and a sanction decided by the joint body has not been foreseen.

84 According to Art. 71 TFEU, national Parliaments as well as the EP are informed of the activities of the **Standing Committee** "set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union".

In this case there is no proper Union activity—not even in the special (intergovernmental) form that is the general rule under the former Third Pillar—but just a form of cooperation between MS that the Treaty tries to channel through a Standing Committee of the Council (that inherits the role of the Committee foreseen by Art. 36 TEU). The Standing Committee on Internal Security has operational coordination tasks and not legislative powers. Art. 71 TFEU, ensuring that national Parliaments are kept informed of the activity of this Committee, aims to allow them to exercise effectively their control powers.[218] *Ingolf Pernice* has correctly seen in this mechanism—as well as in the interparliamentary cooperation—a horizontal dimension of multilevel constitutionalism.[219] According to Art. 6.2 of Decision 2010/131/EU[220] "[t]he Council shall keep informed the European Parliament and the national Parliaments of the proceedings of the Standing Committee".

10.2 Parliamentary Control of CFSP

85 It must be remarked that national Parliaments, though involved in the control on the activity of the Union in the AFSJ (the former third pillar), remain totally outside of the former second pillar, now the **CFSP**,[221] at least from the point of view of European law, who does not mention them in this area.

In this field also the EP plays a marginal role and the power is concentrated in the European Council and in the Council[222]: the control on the CSDP agenda, the approval of the budget in this field (introduced by the Treaty of Amsterdam[223]), the control on civil activity in this framework, and the control on the HR.

[218] Kotzur (2010), p. 362–363.

[219] Pernice (2008–2009), p. 381–382.

[220] Council Decision 2010/131/EU *on setting up the Standing Committee on operational cooperation on internal security*, O.J. L 52/50 (2010).

[221] Wagner (2009), p. 157–169; Thym (2005); Born et al. (2008), p. 19 et seqq.; Gourlay (2004), p. 183–200; Schmidt-Radefeldt (2009), p. 773 et seq..

[222] Mangiameli (2009), p. 417, pointing at Art. 21 TEU.

[223] The Treaty of Amsterdam has inserted in the Community budget not only administrative expenses, but also the large majority of operational expenses, thus allowing a control of the EP on them.

86 On the other side while no express role is foreseen by the Treaties for national Parliaments,[224] they do actually exercise a major role in **controlling the decisions of their Governments**, especially where the employment of troops is necessary. This of course depends purely on national constitutional reasons and principles: where—like in Germany—the parliamentarisation of the use of the army outside the national territory is absolute, national Parliaments play a major role, fully legitimising the action taken by the single national government in the framework of the CFSP. But of course there are variations on this theme, depending from national equilibriums.

87 The Treaties do not foresee a **coordination** of the functions of national Parliaments and of the EP in this area of strategic importance: the Protocol on national Parliaments now seeks to stimulate a role of the COSAC in CSDP. In the framework of this cooperation, an indirect role of the EP in the organisation of interparliamentary conferences on the CFSP is thus opened.[225] The recent conference of the Speakers held in Brussels in 2011 and in Warsaw in 2012 have set up an Inter-Parliamentary Conference for the CFSP and the CSDP.[226]

10.3 National Parliaments and Economic Governance

88 The crisis of the global economy after 2008, and specially the crisis of the Eurozone after 2010, have highlighted the democratic deficit existing also within the EMU. Also this field is governed by specific rules,[227] slightly different from the supranational system: the Commission does not have the monopoly of initiative; the EP does not have codecision power, but only the right to be consulted and in some cases only to be informed ex post; very important powers are recognized to the ECB and, above all, the Council plays a central role.

In the context of these procedures, whose character is strongly intergovernmental, with relevant constrictive powers further limiting MS autonomy, the Treaty of Lisbon did not foresee any role for national Parliaments, but the constitutional crucible generated by the Euro-crisis has opened some avenues for their involvement.

---

[224] But it could be argued that the new definition of the documents that shall be transmitted to the national Parliaments according to Art. 1 of Protocol No. 1 ("any [...] instrument of legislative planning or policy") should include documents falling under the CFSP, that were not included in the documentation to be forwarded to national Parliament according to the Protocol annexed to the Treaty of Amsterdam.

[225] Manzella (2008), p. 336.

[226] See the conclusions of the two conferences in http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/emartinezdealosmoner/public/Conclusions%20de%20la%20Pr%C3%A9sidence%20belge%20EN%20-%20FINAL%20VERSION%20(2).docx for that of Brussels and http://www.parl2011.pl/prezydencja.nsf/attachments/DKUS-8SYGLC/%24File/conclusions_PL_EN_FR.pdf for that of Warsaw.

[227] See now Pitruzzella (2012), p. 9–49.

89 The first interesting element is the Europe 2020 Strategy,[228] aimed to face the economic and financial crisis and to build a framework for sustainable growth and for the increase of employment in the EU. Through that strategy, a huge transfer of powers from the MS to the European level has been put in motion, especially through the coordination of MS' fiscal policies and through the obligation to discuss and condition in advance, at a European level, the adoption of structural reforms.[229] The Strategy Europe 2020 has been implemented through a series of acts, that compose together the so called "Six-pack" (five regulations[230] and a directive,[231] who entered in force on 13 December 2011). These acts require, in many provisions, that national Parliaments shall be involved in a closer and more timely form in the economic governance,[232] that in applying the Regulation on the prevention and correction of macroeconomic imbalances the role of national Parliaments shall be fully respected[233] and that, "in line with the legal and political arrangements of each Member State, national Parliaments should be duly involved in the European Semester and in the preparation of stability programs, convergence programs and national reform programs in order to increase the transparency and ownership of, and accountability for the decisions taken".[234] According to Regulation No. 1175/2011—that comprehensively reformed Reg. No. 1466/1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies—the stability programme that each MS has to submit to the Council and to the European Commission "shall include information on its status in the context of national procedures, in particular whether the programme was presented to the national Parliament, and whether the national Parliament had the

[228] See the press release by the Commission COM(2010), 2020 final of 3 March 2010.

[229] Perez (2011), p. 1053.

[230] Parliament/Council Regulation (EU) No. 1173/2011 of 16 November 2011 *on the effective enforcement of budgetary surveillance in the euro area*, O.J. L 306/1 (2011); Parliament/Council Regulation (EU) No. 1174/2011 of 16 November 2011 *on enforcement measures to correct excessive macroeconomic imbalances in the euro area*, O.J. L 306/8 (2011); Parliament/Council Regulation (EU) No. 1175/2011 of 16 November 2011 *amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies*, O.J. L 306/12 (2011); Parliament/Council Regulation (EU) No. 1176/2011 of 16 November 2011 *on the prevention and correction of macroeconomic imbalances*, O.J. L 306/25 (2011); Council Regulation (EU) No. 1177/2011 of 8 November 2011 *amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure*, O.J. L 306/33 (2011).

[231] Council Directive 2011/85/EU of 8 November 2011 *on requirements for budgetary frameworks of the Member States*, O.J. L 306/41 (2011).

[232] See Regulation No. 1173/2011 (consideration 11), Regulation No. 1174/2011 (consideration 9), Regulation No. 1175/2011 (consideration 11), Regulation No. 1176/2011 (consideration 5) and Regulation No. 1177/2011 (consideration 9).

[233] Consideration 25 to Regulation No. 1176/2011.

[234] Consideration 16 of Regulation No. 1175/2011. The transmission to Parliament of the national reform programme is foreseen in Italy by Art. 4-ter of Law No. 11/2005, as reformed by Art. 7 of Law No. 96/2011.

opportunity to discuss the Council's opinion on the previous programme or, if relevant, any recommendation or warning, and whether there has been parliamentary approval of the programme".[235] The participation of national Parliaments to the decision-making process on economic and financial governance is aimed to compensate with a supplement of democracy the increase of powers at European level.[236]

90 Finally, the Report "Towards a genuine economic and monetary union", submitted by President of the European Council *Herman Van Rompuy* to the European Council of 28/29 June 2011 remarks that "moving towards more integrated fiscal and economic decision-making between countries will [...] require strong mechanisms for legitimate and accountable joint decision-making" and that "close involvement of the European parliament and national Parliaments will be central, in the respect of the community method. Protocol 1 TFEU on the role of national Parliaments in the EU offers an appropriate framework for inter-parliamentary cooperation".[237]

91 Secondly, the role of national Parliaments is frequently underlined as essential in some judicial decisions of the **German Federal Constitutional Court**. With a first decision, adopted on 7 September 2011, the Court found that the approval by the German lower Chamber was necessary for financial support measures of great entity,[238] because of the responsibility of Parliament for budget decision, rooted in the democratic principle of the German fundamental law.[239] With a second decision, adopted on 28 February 2012 the Court underlined that such measures (to be adopted, in that case, in the frame work of the European Financial Stability Facility [EFSF]) require the approval from the plenum of the lower Chamber of the German Parliament, and not simply of an internal committee, as originally foreseen by the German law.[240] Also in this second decision, the German Constitutional Court based its arguments on the democratic principle, besides various specific provisions.[241] The reasoning of the Court based in Karlsruhe is actually justified by the intergovernmental nature of some mechanisms, like the EFSF, that are not submitted to the control of the EP, with the consequence that a control by each national Parliament is required in the perspective of Art. 10.2 TEU.[242] On the other side, at least from the point of view of a foreign observer, some practical consequences of this principle in the decision of 28 February 2012 appear less

[235] Art. 3.4 of the Regulation No. 1466/1997, as amended by Regulation No. 1175/2011.

[236] Perez (2011), p. 1054.

[237] EUCO 120/12 of 26 June 2012.

[238] German Federal Constitutional Court, 2 BvR 987/10 et al. (Judgment of 7 September 2011). See the remarks by Thym (2011), p. 1011 et seqq.; Ruffert (2011a), p. 842 et seqq.; Dechâtre (2011), p. 9–22.

[239] See German Federal Constitutional Court, 2 BvR 987/10 et al. (Judgment of 7 September 2011) para 121–124.

[240] German Federal Constitutional Court, 2BvE 8/11 (Judgment of 28 February 2012).

[241] German Federal Constitutional Court, 2BvE 8/11 (Judgment of 28 February 2012) para 109 et seqq.

[242] Ruffert (2011b), p. 1790; Calliess (2012).

uncontroversial: the need of an approval by the plenum, justified in the perspective of German constitutional law as it may be, appears rather odd in the perspective of the constitutional law of MS concerning the Union, where the most important control functions of national Parliaments are actually delegated, in various forms, to internal committees (→ para 15, 104).

92 Last, but not least, the **Treaty on Stability, Coordination and Governance in the Economic and Monetary Union** (→ Protocol No. 1 para 145), signed in Brussels on 3 March 2012 by 25 of the 27 MS and currently submitted to the ratification process, foresees now that "as provided for in Title II of Protocol (No 1) [...], the European Parliament and the national Parliaments of the Contracting Parties will together determine the organisation and promotion of a conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments in order to discuss budgetary policies and other issues covered by this Treaty". This provision opens the way to a development of the cooperation of parliamentary committees that in the future could run parallel to that centered on COSAC or be integrated in the COSAC system, retaking a suggestion that emerged in the Group IV of the Convention on the Future of Europe, in favor of the development of the cooperation not only between the Commissions on European affairs, but also between other sectoral commissions.[243]

11 Cooperative Functions of National Parliaments

93 The Treaty of Lisbon expressly acknowledges the importance of **cooperation** between Parliaments.

Interparliamentary cooperation is not specific of the EU, but it is a more general phenomenon, that can take shape in many different forms: bilateral and multilateral; based on agreement for (more or less) specific activities or giving birth to interparliamentary organs; contingent or permanent; etc. The most structured forms of interparliamentary cooperation is the (already traditional) Interparliamentary Union and, more recently, the parliamentary structures in some international organisations (the Parliamentary Assemblies of NATO, OSCE, WEU and Euro-mediterranean partnership[244]).

In abstract, in a multilevel legal system like the EU, it is possible to distinguish a vertical and a horizontal cooperation: the ***vertical* cooperation** takes place between the EP and national Parliaments, while the ***horizontal* cooperation** has mainly national Parliaments as its parts. But in the practical working of interparliamentary cooperation in the EU the two phenomena are intertwined, and the EP plays *de facto*

[243] CONV 353/02 WG IV 17 point 36, 18. In this sense see already COM(2010) 367 final of 30 June 2010.

[244] On all these forms see Amico (2009). In some other cases, Parliaments integrate the foreign activities of governments, without creating specific interparliamentary forums: this is the case of ONU.

a leading role in the cooperation between Parliaments: the EP is actually the barycentre of interparliamentary cooperation (→ Protocol No. 1 para 120–125).[245]

94 The Treaty of Lisbon does not recognise a formal *status* in EU primary law to the "**vertical cooperation**" as an autonomous phenomenon. A form of it is foreseen by Art. 130 of the EP's Rules of Procedure (*Exchange of information, contacts and reciprocal facilities*), recently modified.[246] In the practice, cooperation between the EP and national Parliaments takes place through various mechanisms: contacts between Committees, information visits from members of national Parliaments in Brussels, relations with political groups in the EP, national Parliaments' representations in Brussels, the Conventions on the Charter of Fundamental Rights and on the Future of Europe.[247]

The Treaty, on the other side, gives specific recognition to the ***horizontal*** parliamentary **cooperation**, putting at the centre of this phenomenon the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) (→ Protocol No. 1 para 149–176). Furthermore, in this regard, it has to be mentioned Art. 13 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), signed by 25 MS on 2 March 2012, which tries to address the issue of the Euro-national parliamentary scrutiny over financial matters. It provides for "a conference of representatives of the relevant committees of the national Parliaments and representatives of the relevant committees of the EP in order to discuss budgetary policies and other issues covered by this Treaty" (→ Protocol No. 1 para 145-146)

These forms of cooperation "puts together horizontally and vertically the political elites of the Union and of the MS. They generate a mutual understanding and the emerging league or union of Parliaments (*Parlamentsverbund*) becomes a democratic counterpower in front of the Executive power in the Union".[248]

12 Short Remarks on National (Constitutional and Statutory) Provisions

95 In general, the role of national Parliaments on the base of the information that they receive is not limited to the control on the respect of the principle of subsidiarity or to the participation to the various functions mentioned in Art. 12 TEU, but is instrumental to express their position on the content of the draft of European act. This evaluation shall be channelled through the national "portion" of the EU decision process and each national Parliament will have to try to influence the official position of his government in the Council, thus "legitimising" it, and, through it, the Council's decision. The base of this role is the general principle stated in Art. 10.2 TEU,

[245] Amico (2009), p. 76.

[246] The last modification, in November 2010, has introduced the paragraphs 2, 3 and 4.

[247] For this list see Neunreither (2010), p. 466 et seqq.

[248] Pernice and Hindelang (2010), p. 409; Weber (2010), para 228.

according to which the Heads of State and Government sitting in the European Council and the Governments sitting in the Council are "democratically accountable either to their national Parliaments, or to their citizens". But this **national "portion"** of national Parliaments role is of course highly relevant for the EU decision-making process: when they "do not only legitimize, but also control, their respective ministers in the Council—or Heads of State and Government in the European Council—and in this role they are actors of the EU and bear important European responsibilities".[249]

96 Therefore, to have a complete picture of the role of national Parliaments in the EU it would be of course necessary to analyse, besides the rules of European law, both the legal **provisions** (constitutional and subconstitutional), the practices and the political culture **at the national level**.[250] Only this kind of bottom-up analysis—that cannot be developed here in detail—would allow to understand the role of each national Parliament and of the national Parliaments as a whole and of their ability to use the new powers foreseen by the Treaty of Lisbon and, more generally, to perform the function of controlling the European policy of their governments, thus making effective this second channel of a European Democracy.

97 From this point of view, the Treaties are an **"incomplete" constitution** of Europe and the substantial "Constitution" of the EU is completed at the national level by the provisions concerning the Union included in national Constitutions: the role of national Parliaments in the European decision-making process is regulated both at European and at national level. Here the concept of "multilevel constitutionalism"—often evoked merely as a descriptive image—can be used in its technical meaning: national and European laws, and national and European authorities (Parliaments, in this case) are "complementary elements of one system" and "are in permanent interdependency".[251]

This is confirmed by Protocol No. 1, that begins with the explicit recognition that "the way in which national Parliaments scrutinise their governments in relation to the activities of the Union is **a matter for the particular constitutional organisation and practice of each Member State**". Constitutional autonomy, after all, is itself a basic structural feature of the EU.[252]

98 In a historical perspective, it has been convincingly argued by *Philip Norton* that the adaptation of national Parliaments to European integration happened through **three stages**.

In the first stage, from the foundation of the Communities to the 1970s, "there was **limited or no involvement**" of national Parliaments in the European decision-making process. "Most chambers of the legislatures of the original six Member

[249] Pernice (2009), p. 343.

[250] These are the three factors highlighted by Tans (2007a), p. 11–17.

[251] Pernice (2009), p. 373.

[252] Oberdorff (2008), p. 724 remarks that MS "enjoy a constitutional autonomy in order to organize themselves according to their choice and to their constitutional traditions".

States did not modify significantly their structures or procedures in response to the moves towards European integration".[253]

In the second stage—starting with the accession to the European Communities of Denmark, Ireland and the UK in 1973 and developing as a reaction to the White Paper on the Completion of the Single Market in the 1980s—a process of **adaptation** to changing developments within the Communities took place, both because of the mix of euroscepticism and of strong national parliamentary traditions in Denmark and in the UK and because of the widening of the European legislation for the completion of the Single Market.[254] "The result has been that, in the field of EC affairs, national Parliaments have exhibited, from the mid 1980s onwards, three distinct characteristics: (i) greater specialisation [through the creation of Committees devoted to European affairs], (ii) greater activity, and (iii) some attempts to integrate MEPs into their activities".[255]

"The third stage of development is one in which national Parliaments are viewed as important **means of addressing the democratic deficit** within the Union".[256] The "participation of Parliaments to the adoption of community decisions is a common principle diffused and rooted" in MS' legal orders.[257]

99 Comparing national Constitutions and other legal (and sometimes also non legal) sources that implement and develop them, it is possible to see the consolidation of a **"constitutional law of integration"** (*droit constitutionnel de l'intégration*)[258] or of a "Union constitutional Law of Member States" ("*Staatliches Unionsverfassungsrecht*")[259] as that aspect of the "Europeanization of national Constitutions"[260] that regulates the forms in which the various organs of the MS take part to the definition of the national positions in the adoption of European acts.

100 The "constitutional law of integration" also defines the forms through which national Parliaments exercise that "**responsibility for integration**" (*Integrationsverantwortung*) that, according to the German Federal Constitutional Court, belongs to the German Parliament,[261] but that it is possible to say it belongs to all national Parliaments both from the perspective of Art. 10 and 12 TEU and from a national Constitutional law perspective. Also from this perspective it is in fact possible to infer the existence of such a responsibility, moving from the option to take part to the process of European integration—expressly stated in many

[253] Norton (1996), p. 176.

[254] On these models see Cartabia (2007), p. 111 et seqq.

[255] Norton (1996), p. 179.

[256] Norton (1996), p. 182.

[257] De Martino (2002), p. 248 (and also p. 244).

[258] Grewe (2009), nr. 41.

[259] Grabenwarter (2010), p. 121.

[260] Oberdorff (2008), p. 716.

[261] See German Federal Constitutional Court, 2 BvE 2/08 et al. (Judgment of 30 June 2009) para 240, 243, 245, 320, 330—*Treaty of Lisbon*. For a positive evaluation of this concept even in a critical comment of the decision see Häberle (2009), p. 404.

Constitutions[262]—and from the role that is recognised to a Parliament in a representative democracy (and that is confirmed by various constitutional or legal rules in relation to the participation to European integration).

101 In this comment it is possible only to make some general remarks. First of all, Parliaments have kept their **original functions** of implementation (for example in the case of non-self-executing EU directives), ratification (as in the case of enlargement Treaties) and—above all—accountability. This latter function is practically the most important, given the constraints on the freedom of Parliaments in the first and in the second of its original functions (→ para 4). It is grounded in a general constitutional guiding principle that drives the role of national Parliaments in controlling their Governments in EU affairs: the principle of **ministerial responsibility** that is common to MS and is expressly recalled by Art. 10.2 TEU (→ Art. 10 para 7–29). In the majority of cases ministerial responsibility is placed in the context of a relation of confidence between Government and Parliament.[263] This principle is the base that justifies and allows the *ex ante* and the *ex post* control and many limits of the said control are consequences of the shortcomings of that principle.[264]

102 Secondly, the two main instruments of control—both connected to the principle of ministerial responsibility—are the **right of Parliament to receive information**[265] from the Government (both about the documents on which a certain European decision will have to be taken[266] and about the negotiation position of the Government) and **the right of Parliament to state its position** (*Stellungnahmerecht*).[267]

103 Thirdly, almost all the forms of Parliamentary control of EU affairs are exercised through Parliamentary (single-Chamber or joint) **Committees**, to whom the Constitution,[268] the ordinary law or the regulations of the Chambers have conferred this task. From this point of view, it is possible to introduce various distinctions.

The first is between a **"centralised" type of control**, in which the EU affairs committee plays the leading role, and a **"decentralised" type of control** where the main role is given to the sectoral Committees. The Finnish system,[269] trying to

[262] Art. 11 and 117 Const. of Italy; Art. 23 German Basic Law; Art. 88-4 Constitution of France; Art. 23 Constitution of Austria.

[263] Tans (2007b), p. 231–233.

[264] Tans (2007b), p. 237–239.

[265] For an analysis see Janowski (2005).

[266] See for example art. 5 of the Portuguese law No. 43 of 2006.

[267] Grabenwarter (2010), p. 150.

[268] See Art. 45 of the German Basic Law. Recently also France, that had created in 1979 a "parliamentary delegation" (*delegation parlementaire*) in each Chamber, with an information role, but distinguishing them clearly from Parliamentary Committees, has introduced two "Parliamentary Committees responsible for EU affairs" with the constitutional reform of 23 July 2008 (now Art. 88-4, last paragraph of the French Constitution).

[269] See Kiiver (2006), p. 50–51 on the Finnish model.

combine decentralised and centralised element,[270] lies for some aspects in the middle and has a reputation of high efficiency.

A second distinction concerns the degree of **selection** of the EU documents actually analysed by the Committees in the "maremagnum" of the EU documentation.

The third—and for many reasons the most interesting—concerns the degree of **obligation** deriving from the "mandate" given to the government by the Committee, with the Austrian[271] and the Danish[272] EU Affairs Committees playing the strongest role.

104 While some Parliaments focus their attempt to influence the position of the Government on a **mandate-based system**, other Parliaments are more focused on a "**document-based system**" that is structured around the examination of the draft European acts that are transmitted to the national Parliament or to one of its Committees. In this system it is sometimes possible for Parliament to place a "reserve of scrutiny",[273] which provides that Ministers should not agree to proposals in the Council until parliamentary scrutiny has been completed. Originally introduced in the British House of Commons after the accession of the United Kingdom to the EC in 1973, this system has been later adopted also in France (1994) and in Italy (2005).[274]

13 Conclusions

105 The **upgrading** of national Parliaments and their elevation to direct actors in the European Constitutional architecture[275] was a clear and explicit choice of the European Constitutional season of 2002–2005 that has been confirmed and further enhanced by the Treaty of Lisbon. This is for the moment the point of arrival of an evolutionary process that has seen a progressive growth of the role of national Parliaments both through the evolution of the "Union constitutional Law of Member States" and through successive revisions of the Treaties.[276] This double—national and European—evolutionary process can be summed up with the subtitle of a recent book on this subject, that underlines the change of position of national Parliaments "from victims of integration to **competitive actors**"[277] or even—

[270] The base is Art. 96 of the Const. of Finland: "[. . .] the proposal is considered in the Grand Committee and ordinarily in one or more of the other Committees that issue statements to the Grand Committee".

[271] See Blümel and Neuhold (2007).

[272] See Riis (2007).

[273] Cartabia (2007), p. 137 criticises the absence of recognition of this mechanism in the Constitutional Treaty (nothing changed on this point with the Treaty of Lisbon).

[274] On this latter experience see Art. 4 of law No. 11/2005 and, among others, Gambale (2006).

[275] Hrbek (2012), para 1: "National Parliaments are an integral part of the institutional architecture of the European Union, attributing them a role in the decision-making system".

[276] Louis (2009), p. 132.

[277] O'Brennan and Raunio (2007).

according to some (maybe too optimistic) opinions—to the "great winners" of the reform achieved with the Treaty of Lisbon.[278]

The choice of "investing" in the "resource" represented by national Parliaments is one of many elements that distinguish the European polity from the federal States, whose traditions do not show a similar role for MS' Parliaments. **106**

The formal importance of the "original functions" of national Parliaments in the European Communities (ratification, implementation, accountability) has been sharply reduced by the way in which the Communities—and later the Union—worked. Some of the functions of national Parliaments examined in this comment may be actually regarded as attempts to revitalise those original functions: it seems to be the case of the power to participate to the revision of the Treaties (Art. 12 lit. d TEU), of the information of applications for new accessions (Art. 12 lit. e TEU) and of the veto powers in front of the use of the "passerelle clauses" (Art. 48.7 TEU), that can be seen in connection with the "ratification" function. The strengthened information rights (Art. 12 lit. a TEU) can also be seen as a device to remove the obstacles to the actual exercise of the "accountability" function. "Updating" these original functions could be seen as a consequence of the adaptation of the role of national Parliaments of an international organisation to that required in a "close long-term association of States which remain sovereign" (→ para 18).

It is more difficult to place in this perspective some other functions of national Parliaments. Also the early warning system could be seen as a development of the "ratification" function (i.e. recognising to Parliaments the role of watchdogs in the use of shared competences, and therefore controlling the "dynamic" element of the division of competences built in the Treaties), but the comparison—based on the common element represented by the protection of the position of MS that both the ratification functions and the early warning system are expected to serve—would go too far in this case: the early warning system is a protection within the exercise of powers that the Treaties have already recognised to the Union, not against a modification of the Treaties.

On the whole, national Parliaments have been endowed with powers that make of them **supplementary watchdogs of national prerogatives**, using "soft constitutional solutions" (instead of "hard" ones)[279] in order to avoid a further complication of the (already complex) EU decision-making process. The actual exercise of these tasks will require political will[280] and a change of mind by national politicians and it will have to be verified in the practice.[281] **107**

[278] See the statement of Jaime Gama, Speaker of the Portuguese Parliament, quoted by Louis (2009), p. 132. But, according to Hölscheidt (2008), p. 265, "die Tendenz zur Entparlamentarisierung des Integrationsgeschehens ist ungebrochen".

[279] Schütze (2009), p. 530.

[280] Craig (2010), p. 48 remarks that "much will depend on the willingness of National Parliaments to devote the requisite time and energy to the matter".

[281] Kiiver (2008), p. 83. For Cooper (2006), p. 289 it has to be seen how the process unfolds; for Louis (2009), p. 146 and 152 it is too early to speak of a change of paradigm.

108 The question, asked by some observers, about the possibility that national Parliaments could go beyond that (mainly "**negative**" and protective) **role** and become real actors of the legislative procedure of the Union[282] or a "constituent part of the multilevel European institutional system"[283] able to influence the content of the choices as a sort of **"diffused" second Chamber**[284] is even harder to answer. The first phrase of Art. 12 TEU could actually be seen as the base for some sort of "implied powers" of the Parliaments of MS that go beyond the list of specific powers recognised to them in the abovementioned "protective" role. Here lies all the discourse about the association of national Parliaments to the "democratic governance" of the Union and about a new form of democracy, of transnational type, at the European level[285]: if it can be considered true that the provisions of the Treaty of Lisbon are "aimed at strengthening National Parliaments as a basis for strengthening the democratic legitimacy of the Union"[286] it is not clear if this enhanced strength will be directed only towards a stronger legitimacy of the Union in the "negative" sense of protecting MS' competences,[287] checking its excessive interventions in the area of shared competences through the control on the respect of the principle of subsidiarity, or will be also able to increase in a "positive" sense (and not only in a protective sense) the legitimacy of the EU decision making process.

109 Clearly national Parliaments have acquired a role that is formally independent from that of their governments and are potentially direct interlocutors of the institutions of the Union,[288] going beyond their traditional role of legitimising actors of the choices made by their respective "executive powers". But the instruments that they can use at the moment to become active players in the Union architecture are still in an "embryonic" phase: the interparliamentary cooperation through the COSAC, the control in the AFSJ, the possibility to submit opinions to all European authorities, while the Treaty has not recognised to them formal powers of solicitation of the initiative of the Commission like those conferred to one million of electors by Art. 11.4 TEU.[289]

---

[282] Villani (2009), p. 410. The question is properly asked by Blumann and Dubouis (2010), p. 484: "gardiens des prèrogatives nationals ou nouveaux acteurs de la procedure legislative de l'Union?". See also Bilancia (2009), p. 282–283.

[283] Pernice (2009), p. 391.

[284] Thus Manzella (2008).

[285] See e.g. Oberdorff (2008), p. 728.

[286] These words are taken from the Polish Constitutional Court, Ref. No. K32/09 (Judgement of 24 November 2010) nr. 4.2.3.

[287] Avbely (2009–2010), p. 529 remarks that the Treaty of Lisbon "giving National Parliaments more say through subsidiarity control and strengthening the role of the European Council could act as a good and hopefully not excessive counterbalance" to the possibility recognised to the EU institutions "to make their decisions more effectively and thus allow these institutions to occupy more of the legal space that previously remained in the National domain".

[288] Gianniti (2010), p. 171.

[289] Bilancia (2009), p. 283.

For the moment, the initial statement of Art. 12 TEU and the active—and not merely reactive—role that it seems to recognise to national Parliaments may be regarded as an **enigmatic promise**.

Table of Cases

ECJ 12.11.1996, C-84/94, *United Kingdom v Council*, ECR I-5755 [cit in para 61]
ECJ 09.10.2001, C-377/98, *Netherlands v Parliament and Council*, ECR I-7079 [cit in para 61]
ECJ 10.12.2002, C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, ECR I-11453 [cit in para 61]
ECJ 12.07.2005, Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health et al*., ECR I-6451 [cit in para 61]

References

Adinolfi, A. (2010). La Corte di Giustizia dell'Unione europea dopo il Trattato di Lisbona. *Rivista di diritto internazionale, 1*, 45–64.
Álvarez Conde, E., & López de los Mozos Díaz-Madronero, A. E. (2006). Los Parlamentos nacionales y la Unión Europea: el mecanismo de alerta temprana. *Revista de Derecho Político, 65*, 149–168.
Amico, G. (2009). Lo sviluppo della cooperazione interparlamentare a livello globale. In C. Decaro & N. Lupo (Eds.), *Il "dialogo" tra parlamenti: obiettivi e risultati* (pp. 25–96). Rome: Luiss University Press.
Avbely, M. (2009–2010). The Treaty of Lisbon, an ongoing search for structural equilibrium. *Columbia Journal of European Studies, 16*, 521–530.
Barents, R. (2010). The Court of Justice after the Treaty of Lisbon. *Common Market Law Review, 47*(3), 709–728.
Bergman, T. (1997). National parliaments and EU affairs committees: Notes on empirical variations and competing explanations. *Journal of European Public Policy, 4*(3), 373–387.
Bermann, G. (2009). National parliaments and subsidiarity – An outsider's view. In I. Pernice & E. Tanchev (Eds.), *Ceci n'est pas une Constitution – Constitutionalisation without Constitution?* (pp. 155–161). Baden-Baden: Nomos.
Besselink, L. (2001). *The role of National Parliaments. The Dutch experience in comparative perspective*. www.iecl.ie/Besselink%202.doc. Accessed 28 June 2012.
Besselink, L. (2006). Shifts in governance: National parliaments and their governments' involvement in European Union decision-making. In G. Barrett (Ed.), *National parliaments and the European Union: The constitutional challenge for the Oireachtas and other Member State Legislatures* (pp. 117–131). Dublin: Clarus Press.
Bilancia, P. (2009). The role and powers of European and National Parliaments in the dynamics of integration. *Rivista italiana di Diritto pubblico comunitario*, 273–284.
Blumann, C., & Dubouis, L. (2010). *Droit institutionnel de l'Union Européenne* (4th ed.). Paris: LexisNexis-Litec.
Blümel, B., & Neuhold, C. (2007). The parliament of Austria: A "normative" tiger? In O. Tans, C. Zoethout, & J. Peters (Eds.), *National parliaments and European democracy. A bottom-up approach to European Constitutionalism* (pp. 143–160). Groningen: Europa Law Publishing.
Born, H., Anghel, S., Dowling, A., & Fuior, T. (2008). *Parliamentary oversight of EDSP missions*. Geneva Center for Democratic Control of Armed Forces (DCAF) (Policy Paper No. 28,

Geneva, 2008). http://www.sv.uio.no/arena/english/research/publications/arena-publications/reports/2008/Report_07_08.pdf. Accessed 28 June 2012.
Bribosia, E. (2005). La répartition des compétences entre l'Union et ses États membres. In M. Dony & E. Bribosia (Eds.), *Commentaires de la Constitution de l'Union européenne* (pp. 47–82). Brussels: L.G.D.J.
Brosius-Gersdorf, F. (1999). Die doppelte Legitimationsbasis der Europäischen Union. *Europarecht, 34*(2), 133–169.
Buschmann, M., & Daiber, B. (2011). Subsidiaritätsrüge und Grundsatz der begrenzten Einzelermächtigung. *Die Öffentliche Verwaltung, 64*(13), 504–509.
Bußjäger, P. (2010). La via procedurale alla sussidiarietà: la partecipazione dei Parlamenti nazionali e delle assemblee regionali nel Trattato di Lisbona e i relativi problemi. In J. Woelk & P. Bußjäger (Eds.), *Il Trattato di Lisbona e le Regioni: il controllo di sussidiarietà* (pp. 51–71). Bolzano: Eurac Research.
Calliess, C. (2012). Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk. *Neue Zeitschrift für Verwaltungsrecht*, 1–7.
Calliess, C., & Ruffert, M. (2011). *EUV/AEUV* (4th ed.). Munich: C.H. Beck.
Cannizzaro, E. (2005). La riforma della legge La Pergola e le competenze di Stato e Regioni nei processi di formazione e di attuazione del norme dell'Unione europea. *Rivista di diritto internazionale*, 153–156.
Cartabia, M. (1994). Il pluralismo istituzionale come forma della democrazia sopranazionale. *Politica del diritto, 2*, 203–227.
Cartabia, M. (2007). In Associazione italiana dei costituzionalisti (Ed.), *Annuario 2005 – L'integrazione dei sistemi costituzionali europeo e nazionali. Atti del XX Convegno Annuale – Catania, 14-15 ottobre 2005* (pp. 103–150). Padova: Cedam.
Carter, C. A. (2001). The Parliament of the UK from supportive scrutiny to unleashed control? In A. Maurer & W. Wessels (Eds.), *National Parliaments on their way to Europe: Losers or latecomers?* Baden-Baden: Nomos.
Chalmers, D., Hadjiemmanuil, C., Monti, G., & Tomkins, A. (2006). *European law*. Cambridge: Cambridge University Press.
Classen, C. D. (2009). Legitime Stärkung des Bundestages oder verfassungsrechtliches Prokustesbett? Zum Urteil des BVerfG zum Vertrag von Lissabon. *Juristen Zeitung, 64*(18), 881–889.
Constantinesco, V. (1997). Les clauses de "cooperation renforcée", le protocole sur l'application des principes de subsidiarité et de proportionnalité. *Revue trimestrielle de droit européen, 33*(4), 751–767.
Cooper, J. (2006). The watchdogs of subsidiarity. National parliaments and the logic of arguing in the European Union. *Journal of Common Market Studies, 44*(2), 281–304.
Craig, P. (2008). The Treaty of Lisbon: Process, architecture and substance. *European Law Review, 33*(2), 137–166.
Craig, P. (2010). *The Lisbon Treaty. Law, politics and treaty reform*. Oxford: OUP.
Cygan, A. (2003). Democracy and accountability in the European Union – The view from the House of Commons. *Modern Law Review, 66*(3), 384–401.
D'Atena, A. (2000). *Sussidiarietà e sovranità, in Associazione Italiana dei Costituzionalisti, La Costituzione europea – Annuario 1999*. Padova: Cedam.
Dann, P. (2004). *Parlamente im Exekutivföderalismus*. Berlin: Springer.
Dann, P. (2010). The political institutions. In A. von Bogdandy & J. Bast (Eds.), *Principles of European constitutional law* (pp. 237–273). Portland/Munich: Hart Publishing/C.H. Beck.
Davies, G. (2003). The post-Laeken division of compentences. *European Law Review, 28*(5), 686–698.
De Felice, D. (2008). Il ritorno degli sconfitti: il controllo dei Parlamenti nazionali sul comportamento governativo in sede Europea. In E. Rossi (Ed.), *Studi pisani sul Parlamento* (pp. 263–291). II, Pisa: Plus.

De Martino, F. R. (2002). Parlamento nazionale e decisione comunitaria. In M. Scudiero (Ed.), *Il diritto costituzionale europeo. Principi e diritti fondamentali* (Vol. II, pp. 229–250), tomo I. Naples: Jovene.

De Moor, A., & Vermeulen, G. (2010). The Europol Council Decision: Transforming Europol into an Agency of the European Union. *Common Market Law Review, 47*(4), 1089–1121.

Decaro, C., & Lupo, N. (2009). Introduzione. In C. Decaro & N. Lupo (Eds.), *Il "dialogo" tra parlamenti: obiettivi e risultati* (pp. 9–22). Rome: Luiss University Press.

Dechâtre, L. (2011). La décision de Karlsruhe sur le mécanisme européen de stabilité financière: une validation sous condition et une mise en garde sibylline pour l'avenir. *CDE, 47*, 9–22.

Dero-Bugny, D. (2009). Art. 88-5. In F. Luchaire, G. Conac, & X. Prétot (Eds.), *La Constitution de la République française. Analyse et commentaires* (3rd ed., pp. 1956–1970). Paris: Economica.

Di Capua, A. (2005). Parlamenti nazionali e Parlamento europeo. Prime considerazioni sui Protocolli sul ruolo dei Parlamenti nazionali e sull'applicazione dei principi di sussidiarietà e di proporzionalità. In P. Bianchi, E. Catelani, & E. Rossi (Eds.), *Le "nuove" fonti comunitarie* (pp. 115–129). Padova: Cedam.

Di Giovine, A., & Mastromarino, A. (Eds.). (2007). *La presidenzializzazione degli esecutivi nelle democrazie contemporanee*. Torino: Giappichelli.

Dieringer, J. (2005). Entparlamentarisierung oder Renaissance der Volksvertretungen? Zur Rolle nationaler Parlamente im europäischen Integrationsprozess. In K. Beckmann, J. Dieringer, & U. Hufeld (Eds.), *Eine Verfassung für Europa* (pp. 235–260). Tübingen: Mohr Siebeck.

Dougan, M. (2008). The Treaty of Lisbon 2007: Winning minds, not hearts. *Common Market Law Review, 45*(3), 617–703.

Esposito, A. (2009). Il Trattato di Lisbona e il nuovo ruolo costituzionale dei parlamenti nazionali: le prospettive per il Parlamento italiano. *Rassegna parlamentare, 4*, 1119–1173.

Everling, U. (2010). The European Union as a federal association of states and citizens. In A. von Bogdandy & J. Bast (Eds.), *Principles of European Constitutional Law* (2nd ed., pp. 701–734). Portland/Munich: Hart Publishing/C.H. Beck.

Fasone, C. (2010). *Quale è la fonte più idonea a recepire le novità del Trattato di Lisbona sui Parlamenti nazionali?* n. 3/2010. www.Osservatoriosullefonti.it. Accessed 28 June 2012.

Feral, P. A. (1998). Le principe de subsidiarité, progrès ou status quo après le Traité d'Amsterdam? *Revue du Marché Unique de l'Union Européenne, 5*(1), 95–118.

Ferraro, F. (2003). Il ruolo dei Parlamenti nazionali nella fase ascendente dell'Unione europea. *Diritto pubblico comparato ed europeo*, 183–192.

Fischer, H. K. (2010). *Der Vertrag von Lissabon* (2nd ed.). Baden-Baden: Nomos.

Gambale, P. (2006). Le "garanzie parlamentari" nella fase ascendente del diritto comunitario: cenni di diritto comparato e novità nell'ordinamento italiano. *Rassegna parlamentare, 3*, 833–852.

Geiger, R., Khan, D.-E., & Kotzur, M. (Eds.). (2010). *EUV/AEUV Kommentar* (5th ed.). Munich: C.H. Beck.

Gennart, M. (2010). Les Parlements Nationaux dans le Traité de Lisbonne: évolution ou révolution? *CDE, 46*(1–2), 17–46.

Gianniti, L. (2010). Il ruolo dei Parlamenti nazionali. In F. Bassanini & G. Tiberi (Eds.), *Le nuove istituzioni europee. Commento al Trattato di Lisbona* (2nd ed., pp. 171–190). Bologna: Il Mulino.

Gourlay, C. (2004). Parliamentary accountability and EDSP: The National and the European level. In H. Born & H. Hänggi (Eds.), *The "double democratic deficit"* (pp. 183–200). Aldershot: Ashgate.

Grabenwarter, C. (2007). Die Rolle der nationalen Parlamente in den Mitgliedstaaten (nationale und regionale Ebene). In H. Schäffer & J. Iliopoulos-Strangas (Eds.), *Staatsmodernisierung in Europa* (pp. 85–138). Athens/Berlin/Brussels: Sakkoulas/Berliner Wissenschafts-Verlag/Bruylant.

Grabenwarter, C. (2010). National constitutional low relating to the European Union. In A. Bogdandy & J. Bast (Eds.), *Principles of European Constitutional Law* (pp. 83–129). Munchen: C.H. Beck.

Grewe, C. (2009). Constitutions Nationales et droit de l'Union européenne. *Rep. Communautaire Dalloz*, 152–187.

Häberle, P. (2009). La regresiva "sentencia Lisboa" como "Maastricht-II" anquilosada. *Revista de Derecho Constitucional Europeo, 12*(6), 397–429.

Herdegen, M., & Morlok, M. (2003). Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung?. In *VVDStRL* (Vol. 62, pp. 7–116). Berlin: De Gruyter.

Hölscheidt, S. (2005). Europäischer Konvent, Europäische Verfassung, Nationale Parlamente. *Jahrbuch des Öffentliches Rechts*, 429–456.

Hölscheidt, S. (2008). Formale Aufwertung – Geringe Schubkraft: die Rolle der Nationalen Parlamente gemäß dem Lissabonner Vertrag. *Integration, 31*, 254–265.

Hölscheidt, S. (2011). Art. 12. In E. Grabitz, M. Hilf, & M. Nettesheim (Eds.), *Das Recht der Europäischen Union – Kommentar* (pp. 1–21). Munchen: C.H. Beck.

Holzhacker, R. (2005). The power of opposition parliamentary party groups in European Scrutiny. *Journal of Legislative Studies, 11*(3), 428–445.

Hrbek, R. (2012). The role of National Parliaments in the EU. In H.-J. Blanke & S. Mangiameli (Eds.), *The European Union after Lisbon. Constitutional basis, economic order and external action* (pp. 129–158). Heidelberg: Springer.

Jacqué, J. P. (2009). Les réformes institutionnelles introduites par le Traité de Lisbonne. In E. Brosset, C. Chevalier-Govers, V. Edjaharian, & C. Schneider (Eds.), *Le Traité de Lisbonne. Reconfiguration ou deconstitutionnalisation de l'Union européenne?* (pp. 57–73). Brussels: Bruylant.

Jacqué, J. P., & Weiler, J. H. H. (1990). On the road to the European Union. A new judicial architecture: An agenda for the intergovernmental conference. *Common Market Law Review, 27*(2), 185–207.

Janowski, C. A. (2005). *Die Nationalen Parlamente und ihre Europa-Gremien. Legitimationsgarant der EU?* Baden-Baden: Nomos.

Kamann, H.-G. (1997). *Die Mitwirkung der Parlamente der Mitgliedstaaten an der Europäischen Gesetzgebung*. Frankfurt am Main: Lang.

Kapteyn, P. J. G., McDonnell, A. M., Mortelmans, K. J. M., Timmermans, C. W. A., & Geelhoed, L. A. (2009). *The law of the European Union and the European communities, with references to changes to be made by the Lisbon Treaty* (4th ed.). Boston: Wolters Kluwer.

Katz, R. S., & Wessels, B. (1999). Introduction. In R. S. Katz & B. Wessels (Eds.), *The European Parliament, the national parliaments, and European integration* (pp. 3–18). Oxford: OUP.

Kiiver, P. (2006). *The national parliaments in the European Union. A critical view on EU constitution-building*. The Hague: Kluwer.

Kiiver, P. (2008). The Treaty of Lisbon, the National Parliaments and the principle of subsidiarity. *Maastricht Journal, 15*, 77–84.

Kiiver, P. (2011). The early-warning-system for the principle of subsidiarity: The National Parliaments as a Conseil d'Etat for Europe. *European Law Review, 36*(1), 98–108.

Kiiver, P. (2012). *The early warning system for the principle of subsidiarity. Constitutional theory and empirical reality*. Abingdon: Routledge.

Kirchhof, P. (2001). Demokratie ohne parlamentarische Gesetzgebung? *Neue Juristische Wochenschrift, 55*(18), 1332–1334.

Lecheler, H. (2009). Die Mitwirkungsgesetzgebung an der europäischen Integration vor und nach dem Urteil des BVerfG zum Lissabon-Vertrag. *Juristen Zeitung, 64*(23), 1156–1160.

Lijphart, A. (1984). *Democracies. Patterns of majoritarian and consensus government in twenty-one countries*. New Haven: Yale University Press.

Linde Paniagua, E. (2004). Los Parlamentos Nacionales y regionales y su implicación en la toma de decisiones en la Unión Europea. *Revista de derecho de la Unión Europea, 6*, 161–181.

Louis, J.-V. (2009). National parliaments and the principle of subsidiarity – Legal options and practical limits. In I. Pernice & E. Tanchev (Eds.), *Ceci n'est pas une Constitution – Constitutionalisation without Constitution?* (pp. 132–154). Baden-Baden: Nomos.
Mager, U. (2003). Die Prozeduralisierung des Subsidiaritätsprinzip im Verfassungsentwurf des Europäischen Konvents. *Zeitschrift für europarechtliche Studien, 6*(4), 471–484.
Maiani, F. (2004). Monitoring the delimitation of EC competences: Some remarks on the current debate's order of priorities. In R. Miccù & V. Atripaldi (Eds.), *The European constitution in the making* (pp. 141–152). Baden-Baden: Nomos.
Mangiameli, S. (2009). Il ruolo del Parlamento europeo nella PESC, alla luce delle innovazioni apportate dal Trattato di Lisbona. In C. Decaro & N. Lupo (Eds.), *Il "dialogo" tra Parlamenti: obiettivi e risultati* (pp. 417–432). Rome: Luiss University Press.
Manzella, A. (1999). L'identità costituzionale dell'Unione europea. In A. Pace (Ed.), *Studi in onore di Leopoldo Elia* (Vol. II, pp. 923–950). Milano: Giuffré.
Manzella, A. (2008). I parlamenti nazionali nella vita dell'Unione. In S. Micossi & G. L. Tosato (Eds.), *L'Unione europea nel XXI secolo. "Nel dubbio per l'Europa"* (pp. 333–349). Bologna: Il Mulino.
Mastroianni, R. (2010). La procedura legislativa e i parlamenti nazionali: osservazioni critiche. In F. Bassanini & G. Tiberi (Eds.), *Le nuove istituzioni europee. Commento al Trattato di Lisbona* (2nd ed.). Bologna: Il Mulino.
Matía Portilla, F. J. (2003). Parlamento europeo y parlamentos nacionales: doble legitimidad en el marco de la Unión Europea. *Revista de estudios políticos, 119*, 191–220. http://www.zaoerv.de/67_2007/67_2007_4_b_1141_1218.pdf. Accessed 28 June 2012.
Maurer, A., & Wessels, W. (Eds.). (2001). *National parliaments on their way to Europe: Losers or latecomers?* Baden-Baden: Nomos.
Mayer, F. C. (2007). Die Rückkehr der Europäischen Verfassung? *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 67*, 1141–1217.
Moravcsik, A. (2002). In defence of the "democratic deficit". Reassessing legitimacy in the European Union. *Journal of Common Market Studies, 40*(4), 603–624.
Morviducci, C. (2008). Il ruolo dei Parlamenti nazionali. *Diritto pubblico comparato ed europeo, 1*, 83–94.
Moscarini, A. (2006). Il principio di sussidiarietà. In S. Mangiameli (Ed.), *L'ordinamento europeo, Vol. II: L'esercizio delle competenze* (pp. 153–223). Milano: Giuffrè.
Neri, G. (1998). Il ruolo dei Parlamenti nazionali nel processo normativo dell'Unione europea. In Camera dei Deputati (Ed.), *Il Parlamento della Repubblica. Organi, procedure, apparati* (pp. 145–178). Rome: Camera dei deputati.
Neunreither, K. (2010). The European parliament and National parliaments: Conflict or cooperation? *Journal of Legislative Studies, 11*(3/4), 466–489.
Ninatti, S. (2004). La formula parlamentare europea dagli esordi al Trattato costituzionale. *Rivista italiana di diritto pubblico comunitario*, 1395–1430.
Norton, P. (1996). Conclusion: Addressing the democratic deficit. In P. Norton (Ed.), *National Parliaments and the European Union* (pp. 177–193). London: Frank Cass.
O'Brennan, J., & Raunio, T. (Eds.). (2007). *National Parliaments within the enlarged European Union: From "victims" of integration to competitive actors*. New York: Routledge.
Oberdorff, H. (2008). Le Parlement français à l'épreuve de la construction européenne? In B. Mathieu (Ed.), *1958–2008. Cinquantième anniversaire de la Constitution française* (pp. 715–728). Paris: Dalloz.
Oeter, S. (2010). Federalism and democracy. In A. von Bogdandy & J. Bast (Eds.), *Principles of European constitutional law* (pp. 55–82). Portland/Munich: Hart Publishing/C.H. Beck.
Orrù, R. (2003). Prospettive di "parlamentarizzazione" dell'Unione: Assemblee nazionali e assemblea europea. *Diritto pubblico comparato ed europeo, 4*, 1753–1762.
Passos, R. (2008). Recent developments concerning the role of national parliaments in the European Union. *ERA-Forum, 9*, 25–40.

Perez, R. (2011). L'azione finanziaria europea nel tempo della crisi. *Rivista Italiana di Diritto pubblico comunitario, 21*(5), 1043–1055.
Pernice, I. (2008–2009). The Treaty of Lisbon: Multilevel constitutionalism in action. *The Columbia Journal of European Law, 15*, 349–407.
Pernice, I., & Hindelang, S. (2010). Potenziale europäischer Politik nach Lissabon – Europapolitische Perspektiven für Deutschland, seine Institutionen, seine Wirtschaft und seine Bürger. *Europäische Zeitschrift für Wirtschaftsrecht, 21*(11), 407–413.
Petrangeli, F. (2003). Sussidiarietà e Parlamenti nazionali: evitare la confusione istituzionale. *Quaderni costituzionali, 1*, 173–175.
Piris, J. C. (2010). *The Lisbon Treaty. A legal and political analysis*. Cambridge: Cambridge University Press.
Pitruzzella, G. (2012). Chi governa la finanza pubblica in Europa? *Quaderni costituzionali, 32*(1), 9–49.
Poguntke, T., & Webb, P. (Eds.). (2005). *The presidentialization of politics*. Oxford: OUP.
Poniatowski, M. (1992). *Le principe de subsidiarité*. Rapport d'information. Paris: Sénat-Delegation pour les Communautés européennes.
Porchia, O. (2010). La sussidiarietà attraverso il riordino delle competenze? Il Trattato di riforma e la ripartizione competenziale. In J. Woelk & P. Bußjäger (Eds.), *Il Trattato di Lisbona e le Regioni: il controllo di sussidiarietà* (pp. 21–50). Bolzano: Eurac Research.
Raunio, T. (2004). *Two steps forward, one step behind? National Legislatures in the EU constitution* (Paper of the Federal Trust for Education and Research, London). http://www.fedtrust.co.uk/uploads/constitution/raunio.pdf. Accessed 29 July 2010.
Raunio, T. (2007). The Finnish Eduskunta: Effective scrutiny, partisan consensus. In O. Tans, C. Zoethout, & J. Peters (Eds.), *National Parliaments and European Democracy. A bottom-up approach to European constitutionalism* (pp. 23–45). Groningen: Europa Law Publishing.
Rideau, J. (1996). National parliaments and the European parliament – Cooperation and conflict. In E. Smith (Ed.), *National Parliaments as cornerstones of European integration* (pp. 159–178). London: Kluwer Academic Publishers.
Riis, P. (2007). National Parliamentary Control of EU Decision-making in Denmark. In O. Tans, C. Zoethout, & J. Peters (Eds.), *National Parliaments and European Democracy. A bottom-up approach to European constitutionalism* (pp. 185–202). Groningen: Europa Law Publishing.
Ritzer, C., & Ruttlof, M. (2006). Die Kontrolle des Subsidiaritätsprizips: Geltende Rechtlage und Reformperspektiven. *Europarecht, 41*(1), 116–137.
Rivosecchi, G. (2003). La funzione di controllo parlamentare tra Parlamento europeo e Parlamenti nazionali. In *Quaderni della Rassegna di Diritto pubblico europeo, I, Studi sulla Costituzione europea. Percorsi e ipotesi* (pp. 289–304). Naples: Edizioni Scientifiche Italiane.
Ruffert, M. (2002). Entformalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung? *Deutsches Verwaltungsblatt, 117*(17), 1145–1154.
Ruffert, M. (2011a). Die europäische Schuldenkrise vor dem Bundesverfassungsgericht Anmerkung zum Urteil vom 7. September 2011. *Europarecht*, 842–855.
Ruffert, M. (2011b). The European debt crisis and European Union Law. *Common Market Law Review, 48*(6), 1777–1806.
Saalfeld, T. (2005). Deliberate delegation or abdication? Government backbenchers, Ministers and European Union legislation. *Journal of Legislative Studies, 11*(3/4), 343–371.
Sander, F. (2006). Subsidiarity infringements before the European Court of Justice: Futile interference with politics or a substantial step towards EU federalism? *The Columbia Journal of European Law, 12*, 517–572.
Saulnier, E. (2002). *La participation des parlements français et britannique aux communautés et à l'Union européenne. Lecture parlementaire de la construction européenne*. Paris: Librairie Générale de Droit et de Jurisprudence.
Saulnier-Cassia, E. (2009). Art. 88-6. In F. Luchaire, G. Conac, & X. Prétot (Eds.), *La Constitution de la République française. Analyse et commentaires* (pp. 1971–1983). Paris: Economica.

Sauron, J.-L. (2008). Le nouveau role des Parlements nationaux après le Traité de Lisbonne. *Gazette du Palais,* (171).

Schmidt, V. A. (1999). European "federalism" and its encroachments on National Institutions. *Publius, 29*(1), 19–44.

Schmidt-Radefeldt, R. (2009). Die parlamentarische Dimension der Europäischen Sicherheits- und Verteidigungspolitik – Pluralität von demokratischer Legitimation in einer europäischen Mehrebenendemokratie. *Zeitschrift für Parlamentsfragen, 4*, 773–787.

Schmitter, P. (2000). *How to democratize the European Union – and why bother*. Lanham-Md: Rowman & Littlefield.

Schütze, R. (2009). Subsidiarity after Lisbon: Reinforcing the safeguards of federalism? *Cambridge Law Journal, 68*(3), 525–536.

Shirvani, F. (2010). Die europäische Subsidiaritätsklage und ihre Umsetzung ins deutsche Recht. *Juristen Zeitung, 65*(15), 753–759.

Sicardi, S. (2007). Il problematico rapporto tra (vecchia e nuova) Unione europea e Parlamenti nazionali: integrazione o contrapposizione? In Associazione italiana dei costituzionalisti (Ed.), *Annuario 2005 – L'integrazione dei sistemi costituzionali europeo e nazionali, Atti del XX Convegno Annuale – Catania, 14-15 ottobre 2005* (pp. 27–101). Padova: Cedam.

Sleath, W. (2007). The role of National Parliaments in European Affairs. In G. Amato, H. Bribosia, & B. De Witte (Eds.), *Genèse et destine de la Constitution européenne. Commentaire au Traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir* (pp. 545–564). Brussels: Bruylant.

Tans, O. (2007a). Introduction. National parliaments and the European Union; In search of a common ground. In O. Tans, C. Zoethout, & J. Peters (Eds.), *National Parliaments and European Democracy. A bottom-up approach to European constitutionalism* (pp. 3–17). Groningen: Europa Law Publishing.

Tans, O. (2007b). Conclusion. National Parliaments and the European Union. Coping with the limits of democracy. In O. Tans, C. Zoethout, & J. Peters (Eds.), *National Parliaments and European Democracy. A bottom-up approach to European constitutionalism* (pp. 227–250). Groningen: Europa Law Publishing.

Thiele, A. (2010). Das Rechtsschutzsystem nach dem Vertrag von Lissabon – (K)ein Schritt nach vorn? *Europarecht, 45*(1), 30–50.

Thym, D. (2005). *Parlamentsfreier Raum? Das Europäische Parlament in der Außen- und Sicherheitspolitik* (Walter Hallstein-Institut-Paper 2/2005). www.whi-berlin.de/documents/whi-paper0205.pdf. Accessed 25 July 2010.

Thym, D. (2011). Anmerkung. *Juristen Zeitung, 20*, 1011–1015.

Uerpmann-Wittzack, R. (2009). Frühwarnsystem und Subsidiaritätsklage im deutschen Verfassungssystem. *Europäische Grundrechtezeitschrift, 36*, 461–468.

Uerpmann-Wittzack, R., & Edenharter, E. (2009). Subsidiaritätsklage als parlamentarisches Minderheitsrecht? *Europarecht, 44*(3), 313–329.

Van der Schyff, G., & Leenknegt, G.-J. (2007). The case for a European Senate: A model for the representation of National parliaments in the European Union. *Zeitschrift für öffentliches Recht, 62*, 237–258.

Vecchio, F. (2009). Il principio di sussidiarietà nel Trattato costituzionale: procedimentalizzazione vs. giustizi abilità. In E. Castorina (Ed.), *Profili attuali e prospettive di diritto costituzionale europeo* (pp. 170–183). Torino: Giappichelli.

Verola, N. (2006). *L'Europa legittima*. Florence: Passigli Editori.

Villani, U. (2009). L'impatto del Trattato di Lisbona sul ruolo dei Parlamenti Nazionali. In C. Decaro & N. Lupo (Eds.), *Il "dialogo" tra parlamenti: obiettivi e risultati* (pp. 407–413). Rome: Luiss University Press.

Violini, L. (2003). I Parlamenti nazionali come fattori di incremento del principio democratico e come garanti del rispetto del principio di sussidiarietà. In *Quaderni della Rassegna di Diritto pubblico europeo, I, Studi sulla Costituzione europea. Percorsi e ipotesi* (pp. 269–288). Naples: Edizioni Scientifiche Italiane.

von Bogdandy, A. (2005). Parlamentarismus in Europa: eine Verfalls- oder Erfolgsgeschichte? *Archiv für Öffentliches Recht, 130*, 445–464.

von Bogdandy, A., & Bast, J. (2010). The federal order of competences. In A. von Bogdandy & J. Bast (Eds.), *Principles of European Constitutional Law* (2nd ed., pp. 275–307). Portland/ Munich: Hart Publishing/C.H. Beck.

Wagner, W. (2009). Die parlamentarische Kontrolle der europäischen Außen- und Sicherheitspolitik. In S. Kadelbach (Ed.), *Europäische Integration und parlamentarische Demokratie* (pp. 157–169). Baden-Baden: Nomos.

Weatherill, S. (2003). Using National Parliaments to improve scrutiny of the limits of EU action. *European Law Review, 28*, 909–912.

Weber, A. (2010). *Europäische Verfassungsvergleichung*. Munich: C.H. Beck.

Weber, A. (2011). Europäisches Parlament und nationale Parlamente im Europäischen Rechtsetzungsverbund. *Die Öffentliche Verwaltung, 64*, 497–504.

Wechsler, H. (1954). The political safeguards of federalism: The role of the states in the composition and selection of the National Government. *Columbia Law Review, 54*, 543–560.

Weiler, J. H. H. (1999). *The constitution of Europe*. Cambridge: Cambridge University Press.

Woelk, J. (2010). Il controllo di sussidiarietà: freno d'emergenza o nuovo canale per un dialogo istituzionale? In J. Woelk & P. Bussjäger (Eds.), *Il Trattato di Lisbona e le Regioni: il controllo di sussidiarietà* (pp. 11–21). Bolzano: Eurac Research.