

THE ROLE OF NATIONAL PARLIAMENTS IN THE EUROPEAN UNION

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I. National Parliaments in the EU framework

1. The role of national Parliaments in the European Union is highly controversial, particularly in regard to political and legal aspects of the democratic legitimacy of Union action. The controversy essentially takes on the question of whether the **European Parliament** is the exclusive or at least primary **source of democratic legitimacy** for the Union, or whether the **democratic legitimacy** of the Union is **provided primarily by the national Parliaments**. The German Federal Constitutional Court has expressed the latter view in its decision on the Maastricht Treaty and then in more specific terms in its judgment on the Lisbon Treaty. As it is known, in the Maastricht judgment the judges have regarded the European Parliament's "complementary" function in providing "the basis for democratic support for the policies of the European Union" and thus they have made the national legislative bodies the relevant organs to convey democratic legitimacy in the context of Germany's participation in the process of European integration.¹ In the Lisbon judgment, the Court has recognised the comprehensive right of individuals to participate in the democratic legitimacy of German public authority – a "right to democracy". At the same time, with regard to German Parliament's responsibility for integration in matters of the European Union, the Karlsruhe Court has affirmed the need that "the German Bundestag, which represents the people, and the Federal Government sustained by it, retain a formative influence on the political development in Germany". This is the case "if the German Bundestag retains own responsibilities and competences of substantial political importance or if the Federal Government, which is answerable to it politically, is in a position to exert a decisive influence on European decision-making procedures."² These conclusions of the highest German court, however, contrast with the Union Treaty of Lisbon. In Article 10.2 TEU, it stipulates that "citizens are directly represented at Union level in the European Parliament". Further, according to the provision of Article 14.1 TEU "the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions." On the other hand, the Lisbon Treaty defines the role of national Parliaments. According to the core provision of Article 12 TEU "national Parliaments contribute actively to the good functioning of the Union". Also, as a consequence of

¹ BVerfG (German Federal Constitutional Court) – 2 BvR 2134/92, 2 BvR 2159/92 (12 October 1993) p. 18 et seq. –

http://www.judicialstudies.unr.edu/JS_Summer09/JSP_Week_1/German%20ConstCourt%20Maastricht.pdf

² Cf. BVerfG – 2 BvE 2/08 (30 June 2009) para. 246, referring to BVerfG – 2 BvR 2134/92 – Maastricht – http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html. As a result of this judgment the Deutsche Bundestag has enacted the "Law on the taking of responsibility for integration by the Bundestag and the Bundesrat in matters of the European Union" of 22nd September 2009 (BGBl. I p. 3022), amended by Article 1 of the law of 1st December 2009 (BGBl. I p. 3822).

the national judicial interpretations of the future competences and prerogatives of the national Parliaments, on the one hand, and of the European Parliament's role in the process of legitimation of the Union (and in the interparliamentary cooperation), on the other hand, parliamentary participation will be structured mainly in a **horizontal dimension**, that is, **among national Parliaments**, or in a **vertical dimension**, **between each executive and each Parliament**. Solutions for this "multi-level parliamentary field" will depend on whether the enhanced involvement of national Parliaments, deriving from the Treaty of Lisbon, would result in an enrichment of the EU decision-making process or, on the contrary, would lead to a potential new brake in its functionality.³

2. By virtue of Article 12 lit. a TEU and the Protocol on the role of national Parliaments in the European Union (Article 1 and 2) national Parliaments have **adequate access to consultation documents**, as well as to draft legislative acts. National executives, given their dominance in the process of European integration, reflected by their role in the European Council and the Council, have at least an equal responsibility, at domestic level, to inform national Parliaments on white papers, green papers, communications and on draft legislative acts of the Union, but also on draft international agreements and other arrangements if they supplement, or are otherwise closely related to, the law of the European Union.⁴ The **(co-)responsibility of national governments** in informing the national Parliaments is also the logic of the European Treaties, which provide that national governments are "democratically accountable either to their national Parliaments, or to their citizens" (Article 10.2 TEU). This shall lead to a **"parliamentarisation" and to a politicisation of intergovernmental decisions** of the Union **at the domestic level**, as becomes evident with regard to the managing of the economic and sovereign debt crisis of the Member States. The simultaneous "parliamentarisation" at the Union level can be regarded as a response to the original marginalisation of Parliaments (de-parliamentarisation) in the European integration process, and particularly of national legislatures in favour of the executives.
3. The expansion of the number of acts to be submitted to national Parliaments – whether they are draft legislation acts or consultation and planning documents – fosters a greater potential for intervention by national Parliaments. At the same time, this expansion gives rise to the risk of inundating their structures with an enormous amount of documents. Complete and comprehensive information can therefore not always achieve effective parliamentary control of European policies, and could produce an information overload.⁵ However, **selection and anticipation** are possible,

³ C. Fasone/N. Lupo, in: Blanke/Mangiameli (eds.), *The Treaty on European Union (TEU) – A Commentary*, 2013, Protocol No. 1 para. 179.

⁴ Cf. Section 3 Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union (EUZBBG), originally of 12 March 1993, newly adopted on 4 July 2013 (BGBl. I S. 2170). Paragraph 1, sentences 1 and 2 provide: "The Federal Government shall notify the Bundestag comprehensively, as early as possible and continuously of matters concerning the European Union. This notification shall, in principle, be made in writing through the forwarding of documents or the presentation of the Federal Government's own reports and, in addition, orally." Paragraph 3 provides: "The duty of notification shall also encompass the preparation and course of discussions at informal ministerial meetings, at euro summits and at meetings of the Eurogroup and of comparable institutions that are held on the basis of international agreements and other arrangements which complement or are otherwise particularly closely related to the law of the European Union. The same shall also apply to all preparatory bodies and working groups."

⁵ Cf. P. G. Casalena, in: Blanke/Mangiameli (eds.), *The Treaty on European Union (TEU) – A Commentary*, 2013, Protocol No. 1 para. 33.

as shown by the parliamentary practice, particularly in the Baltic States and the European Scrutiny Committee of the British House of Commons.

4. National Parliaments are legitimate guardians of the subsidiarity principle. Considering the right of the Member States to bring actions before the Court of Justice of the Union for infringement of the principle of subsidiarity by a Union legislative act (Article 12 lit. b TEU, Article 8 of Protocol 2), national Parliaments are necessary partners in the political dialogue with the European Parliament (Article 12 lit. f TEU and Title Two of Protocol 1). Further, due to their competences and responsibility in the field of economic, budgetary and financial policy at domestic level, it is reasonable that the national Parliaments take part in the economic dialogue that has been created through the so-called Six-Pack legislation. However, the author of this investigation does not endorse the idea of a **third chamber**, as this **would hinder the European Parliament's evolution** towards a front-ranking body of democratic legitimation of Union decisions; and as this would over-complicate the EU institutional framework, creating overlapping roles and functions, add to the complexity of the EU decision-making process and present a challenge to the activity of the EP.⁶ Hence, the directly elected **European Parliament** should remain the **sole representative of the European citizens**.

5. As a consequence of the budgetary sovereignty the national Parliaments of the Member States must retain **control of fundamental budgetary decisions even in a system of intergovernmental governing**.⁷ Without a doubt a stronger political role of the EP in the budgetary and fiscal policy of the Member States would mean running the risk of a collectivisation of sovereign debt. Thus, the preponderance of the principle of solidarity is strengthened at the expense of sovereignty and subsidiarity in the European Union. However, such risk-conscious reflections on a transferal to the Union of competences in the field of national economic and fiscal policy – unavoidable at the latest by the end of the crisis – cannot be ignored. The debate on the future of a “real” EMU and its democratic legitimacy are oriented towards **Article 13 of the Treaty on Stability, Coordination and Governance**, which becomes a primary point of reference. Hence, it is considered possible that not only the governments of the Member States but also Parliaments agree on future European decisions regarding competitiveness and growth. At the Union level, the European Parliament would take over responsibility. Still the budgetary “conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments” reflects the powerlessness of the Union in the field of domestic economic and financial policy.

II. Formal role of national Parliaments

6. The Lisbon Treaty (Article 12 lit. f TEU and Protocol 1) has strengthened the advisory role of national Parliaments in the European integration process. The treaty defines a new structural framework for interparliamentary cooperation as a corollary and parallel activity, which is substantially required whenever a decision is assumed in the EU. By contrast, until 2004 the “traditional” forms of interparliamentary cooperation,

⁶ Cf. also C. Fasone, in: Blanke/Mangiameli (eds.), *The Treaty on European Union (TEU) – A Commentary*, 2013, Protocol No. 1 para. 159.

⁷ Cf. in the case of Germany BVerfG – 2 BvR 1390/12 (12 September 2012) para 211 – http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html.

besides COSAC, were not legally recognised by the Treaties. Since 2004 new tools of cooperation (Joint parliamentary meetings, Joint committee meetings) and the older ones (Convention method, political monitoring of Europol and evaluation of Eurojust, respect for the principle of subsidiarity) have become more institutionalised and now find their legal basis in Art. 9 of Protocol 1. Yet above all, the Treaty of Lisbon has attributed to the national Parliaments not only a purely advisory role (Article 10 paragraph 4 of Protocol 1), but also the right to comment to the Commission on draft legislation acts throughout the “Early Warning System” and the right to bring an action before the ECJ with regard to the principles of subsidiarity and proportionality (Articles 6 and 8 of Protocol 2). These reforms have promoted the **Europeanisation of national Parliaments**.

7. National Parliaments are enabled to act collectively and not only individually. In these procedures every parliamentary Assembly is “weighted” with two votes if it is unicameral, and with one vote for each chamber when the Parliament is bicameral (Articles 6 and 7 of Protocol No. 1). According to the so-called “**yellow card procedure**”, if the opinions on non-compliance of an European act with the principle of subsidiarity represent at least one third of the votes – a quarter when the project concerns the AFSJ – allocated to national Parliaments (19 out of 56 in the EU-28), the draft must be formally reviewed. In the first two years in which the early warning mechanism has been operational, the threshold necessary to activate the yellow card has never been 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 exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services⁸ was infringing the principle of subsidiarity (sub 9). A variation on this procedure is included in Article 7.3 of Protocol No. 2 (“**orange card**”) that introduces a “heightened” or qualified form of participation of national Parliaments (required by the Government of the Netherlands). The ex ante and political control (which can be compared to the “political safeguards of federalism” known to the US constitutional literature) follows a rather complicated and baroque procedure, in proportion to the results that can be achieved by it. In other words, a reasoned opinion subscribed to by the majority of national Parliaments does not have the force to stop the legislative proposal. Many have noted this paradox that such a situation entails in relation to the democratic principle, which the role of national Parliaments has been structured to foster.⁹
8. The **national understanding of the principle of subsidiarity** varies strongly and is different in (pre)federal Member States compared to centralised states of the Union. This is the result of the legally vague concept of “subsidiarity”, taken from the Catholic social doctrine, later implemented in the theory of federalism and from there to the supranational treaties. Most Member States lack screening systems in the area of the national Parliaments and executives, specifying the criteria to scrutinise the respect of the principle of subsidiarity by the Union legislator. Thus, when applying the provisions of Protocol 2 national Parliaments always run the risk that the result of their subsidiarity review does not stand the review by the ECJ. The same applies to the principle of proportionality, which is not rooted in the legal order of most Member States and has been adopted in the national legal orders only as a consequence of the

⁸ COM(2012) 130 final.

⁹ Cf. Olivetti, in: Blanke/Mangiameli (eds.), *The Treaty on European Union (TEU) – A Commentary*, 2013, Art. 12 para. 58.

Court's case law. On the basis of national constitutional experiences the representatives of national Parliaments in the COSAC could develop criteria that might be relevant for scrutinising the Union's draft legislative acts under the auspices of subsidiarity, or which at least could serve as points of reference. However, the national concepts of what subsidiarity means in a particular case are quite heterogeneous. This is also reflected by the fact that, in 2012, the Swedish *Riksdag*, the French *Sénat* and the German *Bundesrat* have submitted around 50% of the reasoned opinions formulated by the national Parliaments according to Article 6 of Protocol 2.

9. In the case of seven countries (Austria, Belgium, France, Germany, Italy, Spain, United Kingdom)¹⁰ – all of which have a two-chamber Parliament and six of which have regional Parliaments with legislative powers – there is generally a low number of opinions transmitted by the national Parliaments within the “**Early Warning System**” (Article 6 of Protocol No. 2) on compliance with the subsidiarity principle. In any case, it may be found that among them the Spanish Parliament is the most active one, with 16 opinions sent (in practice only 8 opinions were sent but they are worth twice the number given the procedure followed in that country). We then find the Parliaments of France (11 opinions), the United Kingdom (10), Germany (9), Austria (8), Italy (7) and Belgium (4). At the level of the individual chambers, it could be said that the chamber showing greatest interest in controlling compliance with the subsidiarity principles is the French Senate (10 opinions), followed by the two Spanish chambers (8), by the House of Commons and the German *Bundesrat* (7) and by the Austrian *Bundesrat* (6). The data provided confirm what was mentioned in the paragraph on Spain – how it has rationalised oversight on the principle of subsidiarity by conferring on the Mixed Committee for the European Union the competence to present the opinions (and votes) of both Chambers. Indeed, it is likely that most of the opinions sent by the Spanish Parliament were produced thanks to the **more streamlined procedure** they have set up, and which does not require double procedures in the two branches of Parliament. It goes without saying that this need to streamline procedures does not apply to those countries with a unicameral Parliament. Expanding the perspective to also include further EU Member States, there are other national Parliaments that prove to be more interested in controlling compliance with the principle of subsidiarity. For example, the Swedish Parliament has issued 27 reasoned opinions until November 2012. Further, the Polish Parliament, by adding up the opinions issued by its two chambers, has issued a total of 20 opinions. Especially if their small size is taken into account, the Parliaments of the Netherlands and of Luxembourg can also be considered to be quite active with 14 and 10 opinions issued respectively. Among the draft European laws that have been the subject of many reasoned opinions on failure to comply with the principle of subsidiarity, mention should be made of the proposal concerning the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. Indeed, this is the first time that the yellow card has been activated. In particular, the legislative proposal has received 12 opinions by the national Parliaments/chambers, corresponding to 19 votes (seven of those Parliaments are unicameral). In relation to the seven States mentioned above, the legislative drafts that received the most complaints from national Parliaments are those on the distribution of food products, with 5 opinions equivalent to 7 votes (French Senate and House of

¹⁰ For this comparison (with a synopsis) between these Member States cf. Blanke/Mangiameli, in: Blanke/Mangiameli (eds.), *The Treaty on European Union (TEU) – A Commentary*, Protocol No. 2 para 79-160.

Lords, Danish Parliament, Swedish Parliament, Dutch High Chamber); the General Data Protection Regulation, with 5 opinions equivalent to 6 votes (French Senate, Italian Chamber of Deputies, Belgian Chamber of Representatives, German Bundesrat, Swedish Parliament); seasonal employment, with 7 opinions equivalent to 7 votes (both Austrian chambers, House of Lords, both Czech chambers, Polish Senate, Dutch High Chamber); the establishment of a common European sales law, with 4 opinions equivalent to 4 votes (Austrian Bundesrat, Belgian Senate, German Bundestag, House of Commons); the award of concession contracts, with 4 opinions equivalent to 4 votes (Austrian Bundesrat, German Bundesrat, both Spanish chambers); patents, with 3 opinions equivalent to 3 votes (Italian Chamber of Deputies, both Spanish chambers); consolidated corporate tax base, with 5 opinions equivalent to 7 votes (House of Commons, Polish Sejm, Slovak Parliament, Swedish Parliament, Dutch Lower House).¹¹

III. Dialogue and scrutiny of EU policies

10. A rational application of Articles 9 and 10 of Protocol No. 1 could improve the effectiveness of cooperation between national Parliaments and the European Parliament. Article 9 provides that the composite framework of forms and tools of interparliamentary cooperation will be systematised and structured according to an intelligible and unitary ratio. To this end, it fixes both procedural and substantial requirements. So far, the basic structure of interparliamentary cooperation in the EU is given by conferences of committees from the EP and national legislatures, dealing with the same subject matter. In this regard the **role of COSAC should be strengthened as the centre and promoter of a stable interparliamentary cooperation**. With this aim COSAC should distance itself from the role of a “catch-all interparliamentary conference”, looking after only institutional issues (for the implementation of the Treaty of Lisbon and for future Treaty reforms) and acting as a forum for discussing and exchanging views amongst Parliaments, particularly regarding compliance with the principles of subsidiarity and proportionality. This kind of division of labour on the basis of policy, keeping COSAC’s activity concentrated on institutional matters, seems to be the most suitable option, since it allows a combination of specialisation and the aims of Article 9 of the Protocol, according to which the cooperation has to become effective and regular.¹² Article 10 and the practice following the first enforcement of the Treaty of Lisbon each require that the role of COSAC be revisited. Article 10 of Protocol 1 fixes some points of reference in this regard. COSAC’s role should be developed into that of a body dealing with the most important constitutional and institutional issues of the Union.¹³

IV. Capacity of national Parliaments

11. The effectiveness of political deliberation in matters of the European Union within national Parliaments depends largely on the human resources and the organisation of the **committee responsible for European affairs**. In these terms, the committee of the Lithuanian Parliament, for instance, is well organised. Following the recent

¹¹ Cf. Blanke/Mangiameli, in: Blanke/Mangiameli (eds.), *The Treaty on European Union (TEU) – A Commentary*, Protocol No. 2 para 156 et seqq.

¹² Cf. for this proposal Lupo, in: Blanke/Mangiameli (eds.), *The Treaty on European Union (TEU) – A Commentary*, 2013, Protocol No. 1 para. 136 et seqq. (143).

¹³ Fasone, in: Blanke/Mangiameli (eds.), *The Treaty on European Union (TEU) – A Commentary*, 2013, Protocol No. 1 para. 173.

decision of the German Federal Constitutional Court – which refers to the delegation of competences of the plenary to a parliamentary committee – the following rule applies: “If the German Bundestag, in order to safeguard other legal interests of constitutional status, transfers to a committee created by itself under its power of self-organisation or to another subsidiary body individual tasks among those it has to fulfil for independent exercise, taking the place of the plenary session, and if there are reasons for this which have the same weight as the requirement of equal rights to participation of all members, the restriction of the status rights of the elected members and the associated unequal treatment may not extend further than is absolutely necessary.”¹⁴ Therefore, **in its composition, each committee has to reflect the political proportions of the plenary at large.**¹⁵

¹⁴ BVerfG – 2 BvE 8/11 (28 February 2012) para. 125 with reference to BVerfGE 94, 351 (369) – http://www.bundesverfassungsgericht.de/entscheidungen/es20120228_2bve000811en.html.

¹⁵ Vgl. BVerfG – 2 BvE 8/11 (28 February 2012) para 127 – http://www.bundesverfassungsgericht.de/entscheidungen/es20120228_2bve000811en.html.