RANKED AMONG THE WORLD'S TOP 10 THINK TANKS
CEPS Special Report
Thinking ahead for Europe
CENTRE FOR EUROPEAN POLICY STUDIES

Paper tigers or sleeping beauties?

National Parliaments in the post-Lisbon European Political System

CEPS Special Report/February 2011

Piotr Maciej Kaczyński

There remains a degree of uncertainty about the role of national parliaments in the European system of governance under the rules of the Treaty of Lisbon. The legion of 10,000 national parliamentarians should guard the principle of subsidiarity in EU legislation, which now constitutes about one quarter of all laws adopted in member states. Confusion arises over how many of the new post-Lisbon prerogatives belong to individual national chambers, and how many require a collective response. Until the 'collective' voice is organised effectively, national parliaments will remain 'paper tigers' in the EU decision-making process. The national chambers' powers could have far-reaching consequences, however, as one of their roles is to contribute to the 'good governance' of the European Union. Even though the readiness of national chambers to engage actively in EU affairs is limited, it is on the increase, albeit disproportionately.

ISBN 978-94-6138-076-0
Available for free downloading from the CEPS website (http://www.ceps.eu)

Contents

PAPER TIGERS OR SLEEPING BEAUTIES?

NATIONAL PARLIAMENTS IN THE POST-LISBON EUROPEAN POLITICAL SYSTEM

CEPS Special Report/February 2011

PIOTR MACIEJ KACZYŃSKI *

Introduction

Among the promises offered by the Treaty of Lisbon, one of the biggest was to increase the democratic legitimacy of the European project. A crucial element in this process was the further empowerment of national parliamentary chambers. Their general institutional role is to "contribute actively to the good functioning of the Union". One year after the treaty entered into force, the national parliaments began to prepare themselves for the new powers allocated to them. The problem is that most of the national parliamentary chambers seem to have understood this objective, but only on an *individual* level – not necessarily on a collective one.

The question for debate is, therefore: should the new provisions allocated to the national parliaments be considered primarily (or only) as an individual empowerment of each of the chambers in the European decision-making process, with each national chamber having an individual veto power on a proposed treaty change? Or should the provisions be seen as a *collective* responsibility of a majority (or large proportion) of national chambers (i.e. is a quarter, a third or a half of national parliaments' voices necessary to use the new procedures labelled as 'yellow' or 'orange'[1])? The experience of the first year is rather that the first stage has become more of a fact; the second stage has not yet materialised.

The Treaty of Lisbon equipped the national parliaments *collectively* with a *de facto* power to veto European Commission (or any other institution's) legislative proposals before they are subject to adoption by the two legislative bodies, the European Parliament and the Council of Ministers. The technical and political cooperation between the national parliaments stretches back over 20 years. The new 'yellow' and 'orange' card procedure focuses on the respect of the subsidiary principle. Depending on how the new 'yellow' and 'orange' card procedure is used, it can become a major obstacle to European decision-making, but at the same time it can have the effect of strengthening the European Union's democratic legitimacy. The questions are, therefore: *if* the national parliaments use this new instrument, *how* should they do so, technically and in what policy fields?

There was a certain scepticism among the participants of the European Convention whenever the issue of the increased role of national parliaments came up for discussion; this new 'early warning' system would never work in practice, it was thought. There were – and remain – two major obstacles. The first is technical: there is an eight-week time limit in which to initiate the

* Piotr Maciej Kaczyński is a Research Fellow at CEPS. He expresses his gratitude for the generous support received for this research from the Böll Stiftung.

[1] The 'yellow card' procedure or 'early warning mechanism' is a mechanism whereby a third of national chambers can raise an objection ('yellow card') on the basis of the violation of the principle of subsidiarity. The proposal must then be reviewed by the initiating institution (in most cases the Commission). The 'orange card' means that a majority of national chambers found a breach of the subsidiarity principle; the legislators (the Parliament and the Council) must then take a position on the subsidiarity before working on the legislation (see more below).

procedure of arriving at a collective voice in the national chambers. The second is political: will there be enough interest in national capitals among decision-makers to engage in the process at an early stage? There are about 10,000 national parliamentarians who live and operate in 27 political landscapes and according to 27 political agendas. Channelling their interests is probably an impossible mission without necessary coordination instruments. For the system to work at all, a higher degree of information exchange is key – here the other national parliaments are the natural and most obvious partners, alongside the national governments and EU institutions (especially the Commission and the European Parliament).

1. Inter-parliamentary cooperation before 1 December 2009

The cooperation of national parliaments was initiated in the 1980s in the aftermath of the first direct elections to the European Parliament in 1979. Initially, the dialogue was conducted on a purely ad hoc basis. In 1989 the inter-parliamentary "Conference of Community and European Affairs Committees" (COSAC) was established. Its existence was consolidated by the introduction of a protocol on the role of national parliaments in the Amsterdam Treaty (1997). Since the very first meeting of national parliaments the issue has been how to *increase* national parliamentary control over EU affairs.

COSAC enables a regular exchange of information, best practices and views on European Union matters between European Affairs Committees of national parliaments and the European Parliament. It holds meetings twice a year, where six members represent each parliament. The presidency of COSAC is linked to the rotating presidency of the Council.

Apart from COSAC, the framework of inter-parliamentary cooperation takes other forms, such as the Conference of Speakers of the European Union Parliaments, which meets annually. The president of the European Parliament takes part in those meetings and the Conference adopts rules of procedure of inter-parliamentary cooperation. Other formats are regular meetings of the representatives of national parliaments to the EU (Monday Morning Meetings, or MMM), Joint Parliamentary Meetings on topics of common interest between the national parliamentarians and the members of the European Parliament, as well as the meetings of sectoral committees. The primary tool aimed at facilitating cooperation is the Inter-parliamentary EU Information Exchange (IPEX),[2] which is a platform for the electronic exchange of EU-related information between national parliaments in the Union.

The Protocol on the role of national parliaments in the European Union of the Treaty of Amsterdam allowed for an information exchange between the European institutions and national parliaments. The Commission was mandated to send all its consultation documents to national parliaments (Article 1 of the Protocol) and the legislative documents could be forwarded to the national parliaments by the national governments – yet there was no obligation to do so (Article 2 of the Protocol). Through COSAC the national parliaments could scrutinize the subsidiarity principle and inform the Commission, Council and the Parliament about their position (Article 6 of the Protocol). They could also examine any legislative proposal or initiative in the area of freedom, security and justice that might have a direct impact on the rights and freedoms of individuals and send their comments to the Commission, Council and the Parliament (Article 5 of the Protocol).

What the Amsterdam decision meant was a formal recognition of the right of national parliaments to be engaged in the European process. National parliaments were not the only consultative body, as there was also the Committee of the Regions (CoR) for example, or the European Economic and Social Committee (EESC). If Amsterdam levelled the powers of

[2] See the IPEX website at www.ipex.eu.

national parliaments (through COSAC) with that of EESC or CoR, the Convention on the Future of Europe and the subsequent Inter-Governmental Conferences have changed these dynamics considerably.

The composition of the Convention on the Future of Europe (2001-2003) was organised in an original way. The body also included representatives of national parliaments as full members alongside representatives of the European Commission, the European Parliament and the national governments. This has had an important consequence: the negotiated draft Treaty establishing a Constitution for Europe created the aforementioned 'yellow' card procedure. It provides the national parliaments with the possibility to withdraw a Commission legislative proposal before it is considered by the Parliament and the Council. The rejection of the draft Constitutional Treaty and emergence of the Treaty of Lisbon did not reverse the trend of strengthening the position of national parliaments vis-à-vis the existing treaties. It gave the national parliaments two more weeks (the previous version envisaged a six week deadline) to consider using the subsidiarity check. More importantly, it also established a stronger 'orange' card procedure.

2. Provisions of the Treaty of Lisbon

According to the Treaty of Lisbon, the main task of the national parliaments' engagement in the European decision-making process is to 'contribute actively to the good functioning of the Union'. The main instrument – yet not the only one – to deliver on this is the new subsidiarity check clause. In more detail, the Treaty provides for the following forms of engagement of national parliaments:

1. Article 12 of the Treaty on the European Union:
    a. ensures that national parliaments have information on all draft legislative acts of the Union;
    b. establishes the subsidiarity control system (with details in the Protocol 2, see below); and
    c. provides for the participation of national parliaments in the evaluation mechanisms in the area of freedom, security and justice, including:
        i. political monitoring of Europol; and
        ii. evaluation of Eurojust's activities;
    d. involves national parliaments in the revision procedures of the Treaties and ensures that they are fully informed about the accession applications; and
    e. confirms the inter-parliamentary cooperation between national parliaments and with the European Parliament.
2. **Protocol on the role of national parliaments** (Protocol 1) establishes a procedure in which the Commission directly informs the national parliament about its non-legislative and legislative proposals, including the annual legislative programme. Other actors with legislative powers also send their draft legislative proposals to the national parliament. The national parliaments have eight weeks in which to react to these proposals before the legislative process begins.
3. **Protocol on the application of the principles of subsidiarity and proportionality** (Protocol 2) establishes the rules of the subsidiarity check by national parliaments. If there is suspicion of a breach of the subsidiary principle, each national parliament or each chamber of a national parliament has eight weeks in which to communicate to the

presidents of the European Commission, European Council and the Council the reasons why it considers that a given draft does not respect the principle of subsidiarity. Regional parliaments with legislative powers can be also consulted. Two procedures can emerge from this process:

a. 'Yellow' card (Article 7, para. 2 of the Protocol): if a third of European national parliaments (two votes per country, one vote per chamber in bicameral systems) considers a subsidiarity principles breach, that a given draft legislation needs to be reviewed (a quarter in the justice, freedom and security area). The Commission – or any other legislative initiator for that matter – does not have to formally withdraw its proposal and can keep the original proposal in place. However, it does need to explain its decision. It will do so in a form of a Communication.

b. 'Orange' card (Article 7, para. 3 of the Protocol): should there be more than half of the national parliaments considering a subsidiary principle breach (but only in policy areas adopted by the ordinary legislative procedure) and the Commission still wants to proceed with the unchanged text, then the national parliaments' opinions ('why the proposal breaches the subsidiarity principle') and the Commission's reasoned opinion ('why the proposal respects the subsidiarity principle') are transmitted to the Union legislators. The Parliament and the Council need to take a decision on the existence (or not) of the subsidiarity breach before dealing with the proposal itself. The Parliament decides by a majority of votes cast on the issue. The Council requires a 55% majority of votes to decide if there is a subsidiary breach. If any of them share the opinion of the national parliaments – then the legislative proposal will not proceed. The Court of Justice of the European Union oversees the application of the principle of subsidiarity (Article 8 of the Protocol).

4. The representatives of the national parliaments are going to participate as full members in any future ordinary treaty revision (that is, involving establishment of a convention drafting a text), unless the European Council (with the consent of the European Parliament) decides that a given change does not necessitate a convention method.

5. The national parliaments also gained the power to veto the application of the **passerelle clause** (Article 48 para. 7). The clause can be used to change the decision-making mechanism from unanimity to majority voting in the Council, or change the special legislative procedure to an ordinary one (i.e. give greater oversight of a policy to the European Parliament). Such a decision can be taken by the European Council only by unanimity. However, any individual national parliamentary chamber has an individual veto power within six months following the proposal. The same procedure applies to a specific passerelle clause, which can be decided by the Council on legislation concerning family law with cross border implications (Article 81, TFEU). Here too any individual national parliamentary chamber can veto the decision within six months.

3. Implications for decision-making

The initial application of the treaties' provisions is far from complete. Among the first thoughts on the issue of the practical role of the national parliaments in the system is the fact that the treaties do not include a precise definition of subsidiarity. In the process, such a definition could be worked out by national parliaments themselves and communicated to the Commission – so that it knows more precisely what needs to be respected.

Second, there is a certain lack of clarity regarding the procedures to monitor subsidiarity in the later stages of negotiations when the draft law enters the decision-making process in the

Parliament and the Council; these are not yet clear even for the Commission's own amendments. A partial answer is provided by the right to bring the EU laws before the European Court of Justice for the subsidiarity control (Article 8 of the Protocol 2). As some authors have already indicated, the implications of the involvement of the Court of Justice in the process could be significant. For example, there is a risk of delays in legislation or even greater politicisation of the process by the Court. The Court of Justice could possibly even establish a working definition of 'subsidiarity'.[3]

Third, the role of regional parliaments with legislative powers needs still to be clarified. This process is taking place now; in fact there are a number of parallel processes that will eventually engage the regional parliaments in those countries where regional parliaments also have adequate competences. One element in the system is of particular importance in this regard; it may constitute a major challenge for those national parliamentary chambers that have to coordinate with regional parliaments to meet the eight-week deadline, or even to be able to scrutinise the impact correctly. This issue is particularly important in the following countries: Austria, Belgium, Germany, Italy, Portugal, Spain and the United Kingdom.

Fourth, the eight-week delay will most likely have limited impact on the overall length of the legislative procedure in the European Union. The time for the national parliaments to react to legislative proposals has been extended from six to eight weeks. This obviously does not include potential court delays. As for the 'pure' delays caused by national parliaments only, the only major time delay concerns the use of the passerelle clauses – where the decision will be delayed by six months before coming into force.

The Lisbon Treaty does not foresee any differentiation between national parliamentary chambers (in the bicameral systems) and treats them equally regardless of their functions or powers: "In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote" (Article 7 of Protocol 2). In many countries the second chamber has limited – often specific – functions. Therefore, in some cases the Lisbon Treaty might in fact have empowered the chambers beyond the national constitutions.

Finally, there is a clear distinction between the *individual* power of each of the national parliamentary chambers and the *collective* power of the national parliaments. The individual rights are the following:

a. The right to receive information on all draft EU legislation from the drafting institution (primarily the European Commission);

b. The right to participate and contribute to the future changes of the treaties whenever the change is channelled through an "ordinary revision procedure";

c. The right to veto an attempt by the European Council to use a passerelle clause to change the decision-making process in the Council from unanimity to a majority or by replacing the special legislative procedure with an ordinary legislative procedure;

d. The right to take the issue of subsidiarity breach (of a law, not draft legislation) to the European Court of Justice (through the national government).

The collective rights are the following:

---

[3] See, for example, Raffaello Matarazzo (ed.), "The State of Democracy in the EU after the Lisbon Treaty", IAI Quaderni, English series, Rome, April 2011 (forthcoming); Andrea Manzella, "The role of Parliaments in the democratic life of the Union", in Micossi, S, and G.L. Tosato (eds), *Europe in the 21st Century: Perspectives from the Lisbon Treaty*, CEPS, Brussels 2009.

a. The use of the yellow card procedure (a third of votes cast by national parliaments; a quarter in the area of justice, freedom and security);

b. The use of the orange card procedure (half of the votes being cast by national parliaments);

c. The right to be self-organised in inter-parliamentary cooperation.

This dualism means that in adapting themselves to the new competences allocated by the Lisbon Treaty the national parliaments have had to implement changes on two levels. First on the national level, which includes the procedural rearrangement of the division of labour in the chamber(s), the potential clarification of roles between chambers in bicameral systems (i.e. in Ireland both chambers process the subsidiarity checks jointly) and the involvement of regional parliaments. The second level is the inter-parliamentary one, including the assessment of pre-existing cooperation practices, including the COSAC.

4. Preparations for the Treaty's entry into force

On the inter-parliamentary level, the first challenge was to verify the technical capacities of national parliaments to deliver a quarter, a third or half of reasoned opinions on time within eight weeks.

The try-outs

The Treaty says that the national parliaments have eight weeks – if a subsidiarity breach is suspected – to communicate this information to the EU institutions. The question of implementation is *how* the national parliaments will organise themselves in this process. Unlike some other preparations for the new Treaty's entry into force, the preparations of the national parliaments were not suspended after the first Irish referendum on the Lisbon Treaty in June 2008.

Between 2005 and 2009, COSAC conducted eight 'subsidiarity checks' – try-outs of the incoming system aimed at verifying the national parliaments' capacities and dedication to make the new system work.[4] It also served as an occasion to exchange ideas and familiarise the national parliamentarians and the national parliaments' services with the 'yellow' and 'orange' card procedures. In short, during its twice-yearly meetings, COSAC took decisions to try out the application of the subsidiarity clause. The national parliaments examined the Commission's legislative programme and flagged those elements in the legislative plan that might contradict the subsidiarity principle. The moment the Commission put forward a legislative proposal previously selected as potentially breaching the principle, the COSAC secretariat would initiate the consultation process. For the purposes of the exercise only two legislative proposals were selected every year. Even if the official deadline was eight weeks, in reality the national parliaments had more time to act – it is the national parliaments' interpretation of this period; the time runs from the moment the official proposal is available in all EU official languages.[5] The eight-week time limit does not include official breaks for the month of August. The checks were carried out by national parliaments according to their own laws and procedures.

---

[4] More information on the exercise is available at http://www.cosac.eu/en/info/earlywarning/.

[5] In its Contribution to the EU Institutions in October 2007, the XXXVIII COSAC asked for a clarification of Article 6 of Protocol No. 2 to the Treaty on European Union (Protocol on the Application of the Principles of Subsidiarity and Proportionality) to the effect that the timeframe of eight weeks for the subsidiarity check should begin only when a draft legislative act is transmitted to national parliaments in all the official languages of the Union, Contribution of the XXXVIII COSAC, point 1.5; http://www.cosac.eu/en/meetings/Lisbon2007/plenary.

Table 1. Subsidiarity checks organised by COSAC, 2005-2009

Try-out (draft legislative proposal):	Timeline	No. of participating parliamentary chambers	No. of participating states	No. of breaches found (per chamber)	No. of votes (2 votes per chamber in unicameral parliaments)
1. 3rd Railway Package	Mar–Apr 2005	31/37	22/25	14/37	15/50 (EU-25)
2. Regulation on the applicable law and jurisdiction in divorce matters	Jul–Sep 2006	10/37	9/25	4/37	5/50
3. Directive on postal services	Nov–Dec 2006	10/37	9/25	1/37	2/50
4. Framework Decision on combating terrorism	Dec 2007-Jan 2008	25/40	20/27	1/40	1/54
5. Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation	Jul–Sep 2008	17/40	15/27	1/40	2/54
6. Directive on standards of quality and safety of human organs intended for transplantation	Dec 2008–Feb 2009	27/40	20/27	1/40	1/54
7. Framework Decision on the right to interpretation and translation in criminal proceedings	Jul – Sep 2009	21/40	17/27	3/40	5/54
8. Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession	Oct – Dec 2009	36/40	25/27	1/40	1/54

Source: Own compilation on the basis of the bi-annual COSAC reports. More information on all subsidiarity checks is available at http://www.cosac.eu/en/info/earlywarning/.

Each of the national parliamentary chambers had the choice to participate or not in the try-outs. They were asked to provide information *only if they considered* a subsidiarity principle breach. They were also instructed to examine only for the subsidiarity principle, not the proportionality one. The last check ended after the Lisbon Treaty entered into force; 35 out of 40 national parliamentary chambers participated in the exercise within the deadline, three further parliaments failed to meet the deadline. Clearly, the national parliaments have the capacity to trigger the subsidiarity control break should they deem it necessary. Each participating chamber had to examine:

1. If it wanted to participate in the exercise

2. How the legislative draft would be processed in the chamber:
   a. the role of the European committee
   b. the role of the specialised committees
   c. whether the final decision should be taken by the plenary or by a committee
3. If there was a need to consult the regional parliament
4. If the breach existed.

The exercise also showed that even if the capacity was there for the national parliaments to deliver on time, there was and is a problem in the definition of subsidiarity. The system failed to initiate any yellow or orange card procedure. The closest they came was the first attempt on the 3rd railway package, when 30% (hence, short of 3%) of the votes indicated there was a subsidiarity problem. This can also be interpreted positively: there is no subsidiarity problem with the draft laws should there be less than a third (a quarter in the case justice and home affairs) of national parliaments taking the opposite view.

5. The application of the national parliaments' prerogatives

The current debate among national parliaments is about the necessary degree of cooperation is the best use of the tools allocated to them. For the moment most national chambers seem to focus on individual national powers and little attention is paid to the collective exercise. This 'individualism' is clearly manifested not only in the decision (or, rather lack of it) on self-organisation, but also in the two processes that are already ongoing. The first concerns the political dialogue with the European Commission, and the second concerns the use of the early warning system in the first year of the Treaty of Lisbon being in force.

Political dialogue

The Treaty talks about the information exchange channels between the national parliaments and the European institutions. The most visible – and oldest – is the political dialogue with the European Commission. This dialogue, however, is managed bilaterally between the Commission and each national parliamentary chamber. There is a group of legislatures that uses this mechanism quite often; others have never used this parliament. Tellingly, in bicameral systems the national senates are usually more active than national lower chambers. Also, none of the Romanian and Spanish chambers have so far used this tool.

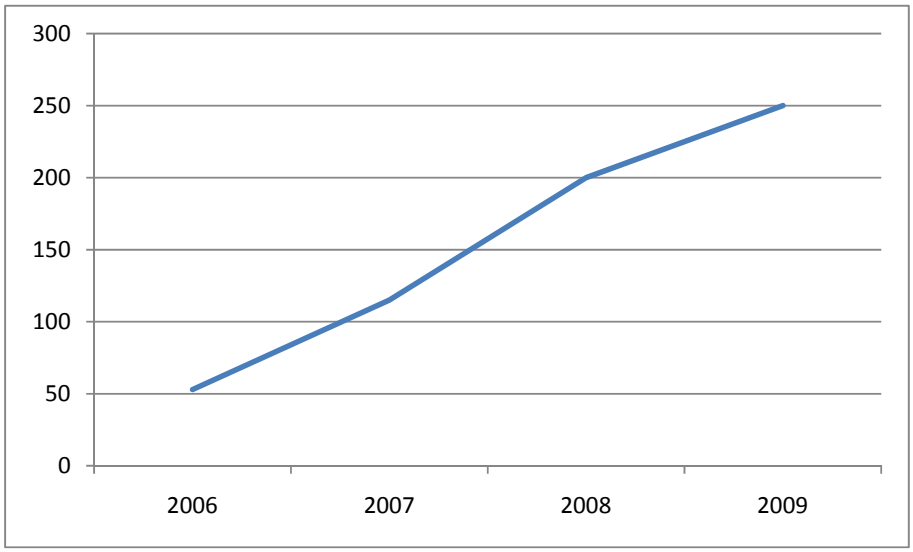
Table 2. Communications between national parliamentary chambers and the European Commission, 2006-2009 (per chamber)

Chamber	Country	2006	2007	2008	2009	2006-09
Assembleia da República	Portugal	0	19	65	47	131
Sénat	France	18	22	13	12	65
Bundesrat	Germany	6	15	18	16	55
Riksdagen	Sweden	0	17	16	18	51
Senát	Czech Rep.	2	9	11	27	49
House of Lords	UK	4	14	12	14	44
Folketinget	Denmark	2	10	11	12	35
Senato	Italy	0	0	8	17	25
Tweede Kamer (jointly EK)*	Netherlands	2	1	5	15	23
Camera dei Deputati	Italy	1	0	6	9	16
Bundesrat	Austria	0	0	4	10	14
Dáil Éireann / Seanad Éireann**	Ireland	0	1	7	6	14
Vouli Ton Ellinon	Greece	0	0	3	10	13
Bundestag	Germany	1	2	2	3	8
Chambre des Députés	Luxembourg	2	0	2	3	7
Seimas	Lithuania	2	1	0	3	6
Sejm	Poland	1	0	5	0	6
Sénat / Senaat	Belgium	2	0	2	2	6
Országgyülés	Hungary	1	1	0	3	5
Riigikogu	Estonia	2	0	2	1	5
Saeima	Latvia	0	0	2	3	5
Assemblée Nationale	France	1	1	0	2	4
Chambre des Représentants	Belgium	0	1	1	2	4
Eerste Kamer*	Netherlands	0	0	0	4	4
Nationalrat	Austria	0	0	0	4	4
Državni Zbor	Slovenia	1	0	0	2	3
House of Commons	UK	1	1	1	0	3
Narodno Sobranie	Bulgaria	-	0	1	2	3
Poslanecká Sněmovna	Czech Rep.	1	0	1	1	3
Vouli Antiprosopon	Cyprus	0	0	2	1	3
Eduskunta	Finland	1	0	0	0	1
Národná Rada	Slovakia	1	0	0	0	1
Il-Kamra Tad-Deputati	Malta	0	0	0	1	1
Senat	Poland	1	0	0	0	1
Camera Deputatilor	Romania	-	0	0	0	0
Congreso de los Diputados	Spain	0	0	0	0	0
Državni Svet	Slovenia	0	0	0	0	0
Senado	Spain	0	0	0	0	0
Senatul	Romania	-	0	0	0	0

* Until 2009 Tweede Kamer and Eerste Kamer sent the communications jointly; those communications are included in Tweede Kamer's statistics. In 2009 there were 8 communications sent by both chambers, 7 by Tweede Kamer and 4 by Eerste Kamer. ** Both chambers sent communications together.
Source: Annual Reports 2006, 2007, 2008, 2009 on relations between the European Commission and national parliaments.

Overall, the general trend is positive. Between 2006 and 2009 the volume of exchanges between the European Commission and national chambers rose five times from 53 to 250.

Figure 1. Communications between national parliamentary chambers and the European Commission, 2006-2009 (total volume)



Sources: Annual Reports 2006, 2007, 2008, 2009 on relations between the European Commission and national parliaments.

Inter-parliamentary cooperation

Following the pilot projects, the national parliaments were supposed to organise themselves in terms of how to meet the eight-week deadline. A degree of organisation is necessary especially if meeting the eight-week deadline is to be taken seriously. The technical capacity try-outs were organised through COSAC; the process was then centralised. However, at its 43rd meeting in Madrid in May/June 2010, COSAC decided to terminate the subsidiarity checks try-outs, although these checks may be conducted on an ad hoc basis at the proposal of a rotating presidency.[6] The decision taken was that there would be no harmonised cooperation between national parliaments, and the Conference "urged national parliaments to intensify their use of IPEX and other forms of cooperation in order to provide mutual information concerning their respective activities and standpoints".[7]

In practice it meant that the coordination remains loose. The procedure looks like this: each chamber of national parliaments receives a draft legislative proposal from the Commission (or any other institution that drafts the proposal in question) and initiates (or not) its own procedure. If it decides to scrutinise the draft law, it informs other national parliaments about this through IPEX. Should there be a subsidiarity breach, it transmits its opinion to the Commission (or other institution). The Commission is generally open to cooperation with national parliaments going

[6] Conclusions of the XLIII COSAC, http://www.cosac.eu/en/meetings/Madrid2010/ordinary.doc/conclus.pdf/.

[7] Ibid, point 1.5.

beyond the subsidiarity checks and, since the so-called Barroso Initiative in 2006 (see above), also welcomes non-subsidiarity related comments.

What is important is that each chamber initiates the procedure individually. When doing so, it informs other national chambers through IPEX. A problem might arise if the subsidiarity control were to be executed permanently by only a few national chambers and other chambers would look into the issue only if a breach were found by the 'initiators'. Here, the issue of late timing might arise – that is, if a chamber that regularly scrutinises all proposals suddenly 'discovers' a breach, there might simply not be enough time for other parliaments to complete their scrutiny. The only real early information exchange among national parliaments goes through the MMMs (Monday Morning Meetings) of representatives of national parliaments in Brussels.

The deadline of eight weeks might seem short for a number of reasons. It will be suspended for the month of August, and in many parliaments the final decision on a subsidiarity breach can only be taken by the full plenary or after a number of consultations with specialist committees. In some cases the general European committees can take legally binding positions on behalf of the entire chamber, in other member states information about a given member state government's position on a certain issue might be required. In the bicameral systems, cooperation between parliamentary chambers is envisaged. Finally, in the countries where regional parliaments have legislative powers – it is up to a given member state to determine the domestic procedure in such a way that the reasonable opinion could be provided within eight weeks.

The first year of using the procedure shows that the existing forms of cooperation are either too weak or poorly used. Only 59% of the scrutiny processes initiated were completed on time within the eight-week period. Only eight national chambers completed their procedures in all cases for which they initiated the subsidiarity control. Twelve others had significant problems with less than half of initiated subsidiarity controls being completed on time. Three of them have not completed a single process they started![8]

[8] One explanation – yet only a partial one – of the poor result of ending on time is the methodology used at IPEX. In most countries the reporting to IPEX has not been yet fully operationalised and needs further strengthening.

Table 3. Reasoned Opinions ("orange card" procedure) between 1 Dec 2009 and 2 Nov 2009 (out of 24, ranked in order completed scrutiny procedures)

Chamber	Country	Started scrutiny	Completed scrutiny	Reasoned Opinions sent
Poslanecká Sněmovna	Czech Republic	23	22 (96%)	1
Senato della Repubblica	Italy	24	21 (88%)	0
Bundesrat	Germany	19	19	1
Congreso de los Diputados	Spain	16	16	0
Riksdagen	Sweden	24	13 (54%)	1
Nationalrat	Austria	15	13 (87%)	2
Assembleia da República	Portugal	13	11 (85%)	0
Bundesrat	Austria	11	10 (91%)	1
Bundestag	Germany	24	**9 (38%)**	1
Dáil Éireann / Seanad Éireann	Ireland	7	7	0
Assemblée Nationale	France	6	6	0
Sejm	Poland	22	**5 (23%)**	0
Senát	Czech Republic	8	4 (50%)	1
Chambre des Députés	Luxembourg	6	4 (67%)	0
Seimas	Lithuania	4	4	0
Sénat / Senaat	Belgium	4	4	0
House of Lords	United Kingdom	7	**3 (43%)**	0
Folketinget	Denmark	9	**3 (33%)**	1
Camera dei Deputati	Italy	9	**3 (33%)**	0
Senat	Poland	22	**3 (14%)**	2
House Commons	United Kingdom	4	2 (50%)	0
Sénat	France	3	**1 (33%)**	1
Vouli Ton Ellinon	Greece	1	1	0
Saeima	Latvia	1	1	0
Eerste Kamer	The Netherlands	4	**1 (25%)**	1
Eduskunta	Finland	19	**1 (5%)**	0
Tweede Kamer	The Netherlands	3	0	1
Riigikogu	Estonia	0	0	0
Országgyülés	Hungary	0	0	0
Chambre des Représentants	Belgium	6	**0 (0%)**	0
Vouli Antiprosopon	Cyprus	0	0	0
Narodno Sobranie	Bulgaria	0	0	0
Državni Zbor	Slovenia	2	**0 (0%)**	0
Il-Kamra Tad-Deputati	Malta	0	0	0
Národná Rada	Slovakia	2	**0 (0%)**	0
Senado	Spain	0	0	0
Camera Deputatilor	Romania	0	0	0
Senatul	Romania	0	0	0
Državni Svet	Slovenia	0	0	0

Source: Own calculations based on data from IPEX.

None of the draft laws subject to subsidiarity control to date has gathered enough reasoned opinions to initiate any of the 'cards' procedures. The closest to meeting the threshold were two draft laws: 1) draft directive on Deposit Guarantee Schemes (COD/2010/0207) and 2) draft directive on conditions of entry and residence of third-country nationals for the purposes of

seasonal employment (COD/2010/0210). Yet both cases have shown that the real capacity (not virtual as in the try-outs) to produce a reasoned opinion claiming a subsidiarity breach is questionable. On the deposit guarantee schemes Directive, 16 parliaments started the procedure with 18 votes (33%). Should they all finish on time and all find a subsidiarity breach, it would be enough to start a yellow card procedure. Instead only five parliaments finished on time and four issued reasoned opinions (6 votes, 11%). On the draft directive on conditions of entry and residence of third-country nationals for the purposes of seasonal employment, 20 parliaments started the procedure with 25 votes (46%). Similarly, if most of them finished within the eight-week deadline and issued reasoned opinions, the yellow card procedure could be initiated. Instead only nine parliaments finished on time and seven issued reasoned opinions (seven votes, 13%).

6. Political consequences of the new system

The fact that there were major problems in meeting the deadline shows that further actions to improve national procedures are still necessary. Interestingly, the lack of definition of subsidiarity at the European level can also be observed at the national level. In the case of the draft directive on conditions of entry and residence of third-country nationals for the purposes of seasonal employment, both chambers of the Polish parliament finished the scrutiny on time; one chamber found a breach (the Senat) while the other did not (the Sejm). Hence, the definition of subsidiarity at the national level has not yet been fully clarified.

A bigger question is the impact of the new subsidiarity control mechanism on the decision-making of the European Union. Clearly, the primary function of the mechanism is to challenge the European Commission. In the worst-case scenario, the Commission could be paralysed and all its proposals challenged by the national chambers. In the best-case scenario, if the national parliaments initiate the procedure but do not find any breach of the subsidiarity clause, the Commission position could be strengthened vis-à-vis the European Parliament and especially the Council. In any case, the national parliaments cannot remain mute and need to perform their tasks to scrutinize draft European legislation. The existing trend of growing communication between the Commission and national parliaments (see above) can suggest a growing awareness in some of national parliaments about the possibilities of influencing the EU decision-making process at an earlier stage.

The experience of the first 24 files subject to the subsidiarity control also reveals another element. What will be the impact of the subsidiarity control on the negotiating position of the national governments in the Council in situations when there are a few reasoned opinions, but not enough to trigger either of the card mechanisms? First, if there is clearly no subsidiarity breach – this should empower the Commission's position. Yet second, those governments whose national parliaments have identified subsidiarity problems will most likely remove the problem to the negotiations nevertheless. Third, the governments whose national parliaments did not finish the scrutiny procedure in time (but finished later, for example, and could communicate their findings to the national government instead of the European Commission) would also be interested in the subsidiarity situation. Finally, those national parliaments that found the breach would clearly be disappointed. Should their problem continue to exist in the finally adopted legislation, there would be a natural tendency to take the issue to the European Court of Justice.

The nature of relationships between national governments and their national parliaments is probably going to be central to the application of subsidiarity control. These relationships vary greatly across the EU. There are cases where the parliaments are working in political unison with governments; hence there is a risk of governments using the new mechanism to achieve political objectives (or to delay or even derail the process). Alternatively, the empowerment of

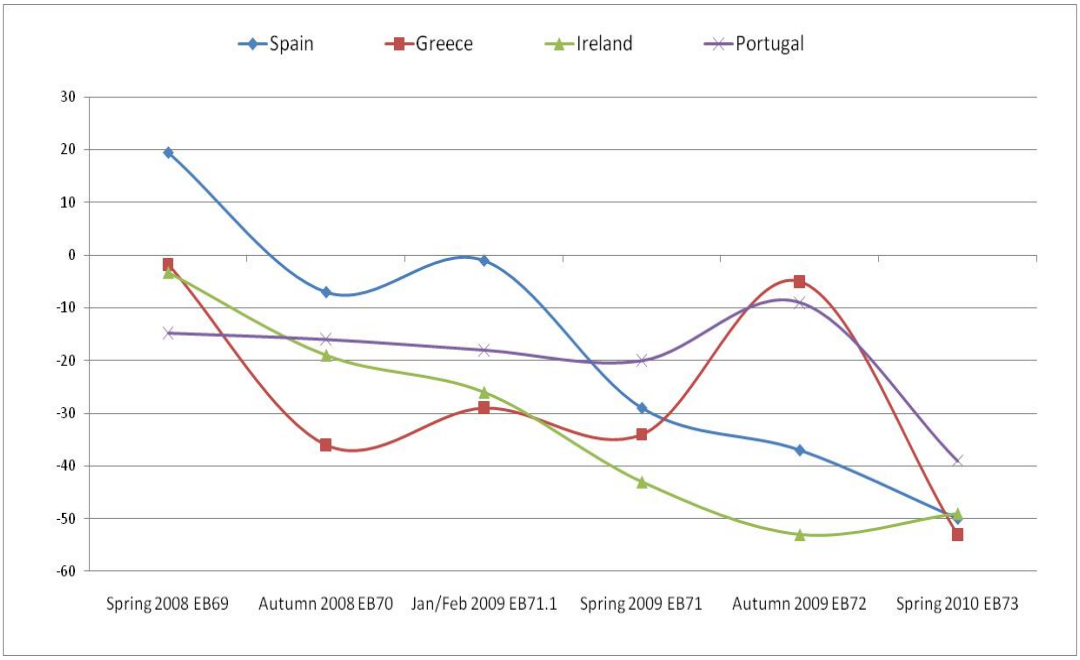
national parliaments vis-à-vis the national government can create new national dynamics that limit the freedom of the government in the formulation of a national negotiating position. This relationship will also be central in the process of taking the issue of subsidiarity control to the Luxembourg court.

In future years we are likely to see new dynamics and a much greater negative involvement of the national parliaments. In effect, this can contribute to enhancing the legitimate mandate of the adopted laws. There would be less room for political anti-Brussels accusations, as *politically* the national parliaments would now be co-responsible for the European legislation, not only in the *ex post* transposition phase, but also in the drafting of the original laws. This may stimulate a real public debate on the Commission proposals in many member countries.

7. The political readiness to be engaged

About a quarter of all legal rules applied across the European Union originate from European decision-making. Various studies have been carried out in many member states over many years. A precise EU-wide figure is impossible to give. For example, 29% of all new laws adopted in Bulgaria in the first legislative year of the current legislature (2009/2010) originate from the EU and 23% in Sweden in 2009. The German Bundesrat considers that about 36% of all laws it adopted between 1980 and 2005 had their source in the EU. Yet the Danish figure for 2007 is only 10%. The French Assemblée Nationale figure for 2007 was 20%, while the Irish calculations for the period 1992-2009 were at 29%, and the Dutch for the period 1994-2004 were at 21%. The Italian parliament puts the figure somewhere above 20%. In Latvia and Lithuania the figure is below 20% over the years. The British calculations suggest that about 15% of the laws adopted there come from the EU (based on the period 1987-2009).

Figure 2. Net trust towards national parliaments in Spain, Greece, Portugal and Ireland (2008-2010)



Source: Felix Roth, "The Eurozone Crisis and Its Effects on Citizens' Trust in National Parliaments", CEPS Commentary, 8 December 2010 (available at (http://www.ceps.eu/ceps/download/4013).

Realisation of this fact is crucial to understanding the position of national legislators in the European Union. This is particularly important if one considers that not only the procedural and technical elements are necessary for the system to work properly. The engagement and dedication of the national decision-makers is absolutely critical. To date they have a rather limited record, however. As trust in national parliaments decreases, their involvement becomes more important.

8. Concluding questions

The role of national parliaments in the system should not be an exclusively negative one. They should also contribute constructively to the 'good functioning' of the Union. The negative empowerment, or power to say 'no,' gives the national parliaments a power-bargaining position. With time, however, once the mechanism settles down and the feeling of co-responsibility is more widely shared among the national parliamentarians, this instrument can in fact contribute to the constructive engagement of the national parliaments, too.

In the short term, national parliaments face the challenge of how to improve coordination among themselves. Clearly, the system in place does not work; there is still huge room for improvement within the national chambers' procedures and staff responsibilities. Sometimes it requires a changed mindset and the use of instruments never used before (especially in Spain and Romania in political dialogue with the European Commission). But it also concerns the possibility of a more centralised coordination in the use of subsidiarity control. The dilemmas (or confusion) about which powers are individually allocated to national chambers (more important) and which ones are allocated only to all the national parliaments collectively (hence, politically less interesting) should cease.

The appetite for engagement in the European decision-making process, at least among some of the national parliaments, is reasonably high. They have the capacity to act and seem to have the political motivation to remain alert to subsidiarity breaches. There seems to be a feeling that the subsidiarity principles check is not enough and the national parliaments would like to reach out beyond those limits. The limitations of the Barroso Initiative are striking: it has engaged the parliaments constructively by sending all Commission documents to the national parliaments since 2006. Yet, it does not give them any power of veto. The problem is, however, that their greater negative empowerment could further complicate the already complex European decision-making mechanisms. One idea floated among national parliamentarians is to provide for greater involvement of national parliaments in European foreign policy-making. There are, however, very different traditions among member countries on the role of national parliaments in this field. Another idea is an expectation that the Commission substantiate its responses to the opinions sent by national parliaments.

For their valuable comments on this paper, the author would like to thank: Antoinette Primatarova (Bulgaria), Kyriakos Georgiou (Cyprus), David Král (Czech Republic), Mette Buskjær Christensen (Denmark), Costas Botopoulos (Greece), Aaretti Siitonen (Finland), Sebastien Brisard (France), Peadar ó Broin (Ireland), Jacopo Leone and Raffaello Matarazzo (Italy), Mike Beke and Tamara Rodriguez (Luxembourg and Malta), Dace Akule (Latvia), Simone Wolters (Netherlands), Agnieszka Łada and Aleksander Fuksiewicz (Poland), Joao Gil (Portugal), Agnes Nicolescu (Romania), Hans Hegeland (Sweden), Vladimír Bartovic (Slovakia), and Mark Dittmer-Odell (UK) and, last but not least, Loreta Raulinaityte from COSAC.

With grateful thanks to the Böll Stiftung for their support of this project.

About CEPS

Founded in Brussels in 1983, the Centre for European Policy Studies (CEPS) is among the most experienced and authoritative think tanks operating in the European Union today. CEPS serves as an leading forum for debate on EU affairs, but its most distinguishing feature lies in its strong in-house research capacity, complemented by an extensive network of partner institutes throughout the world.

Goals

- To carry out state-of-the-art policy research leading to solutions to the challenges facing Europe today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To act as a forum for discussion among stakeholders in the European policy process
- To provide a regular flow of authoritative publications offering policy analysis and recommendations.
- To build collaborative networks of researchers, policy-makers and business representatives across the whole of Europe.
- To disseminate our findings and views through our publications and public events.

Assets

- Multidisciplinary, multinational & multicultural research team.
- Complete independence to set its own research priorities and freedom from any outside influence.
- Seven research networks, comprising numerous other highly reputable institutes, to complement and consolidate CEPS' research expertise and to extend its outreach.
- An extensive membership base of Corporate and Institutional Members, which provide expertise and practical experience and act as a sounding board for CEPS policy proposals.

Programme Structure

Research Programmes

- Economic & Social Welfare Policies
- Financial Markets & Institutions
- Energy & Climate Change
- Regulatory Policy
- EU Foreign, Security & Neighbourhood Policy
- Justice & Home Affairs
- Politics & Institutions
- Agricultural & Rural Policy

Research Networks

- European Capital Markets Institute (ECMI)
- European Climate Platform (ECP)
- European Credit Research Institute (ECRI)
- European Network for Better Regulation (ENBR)
- European Network of Economic Policy Research Institutes (ENEPRI)
- European Policy Institutes Network (EPIN)
- European Security Forum (ESF)

CEPS organises a variety of activities, involving its members and other stakeholders in the European policy debate, including national and EU-level policy-makers, academics, corporate executives, NGOs and the media. Its funding is obtained from a variety of sources, including membership fees, project research, foundation grants, conferences fees, publication sales and an annual grant from the European Commission.

E-mail: info@ceps.eu
Website: www.ceps.eu

CENTRE FOR EUROPEAN POLICY STUDIES

Place du Congrès 1 • B-1000 Brussels
Tel: 32(0)2.229.39.11 • Fax: 32(0)2.219.41.51