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# National Parliaments and their Role in European Integration: The EU's Democratic Deficit in Times of Economic Hardship and Political Insecurity

Marta Zalewska and Oskar Josef Gstrein



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European Political and Administrative Studies/  
Études Politiques et Administratives  
Dijver 11, B-8000 Brugge, Belgium  
[www.coleurope.eu/pol](http://www.coleurope.eu/pol)

## About the authors

Marta Zalewska holds two M.A. degrees (Law and European Studies) from the Adam Mickiewicz University in Poznan and completed postgraduate studies (LL.M./European Integration) at the Europa-Institut of Saarland University. She currently works as a research assistant at the Brussels office of the Bertelsmann Stiftung.

Oskar Josef Gstrein is research assistant at the chair of Prof. Dr. Thomas Giegerich, LL.M. director of the Europa-Institut of Saarland University. After earning two diplomas from the University of Innsbruck in Law and Philosophy and specialising in European Integration by completing an LL.M. at the University of Saarland he now works on his PhD project. He is also laureate of the 2012 Hans-Werner-Osthoff Prize awarded for outstanding achievements by young academics. His research activity mainly covers the development of European Human Rights protection and European Institutional Law.

### Address for correspondence:

[martazalewski@hotmail.com](mailto:martazalewski@hotmail.com)  
[o.gstrein@europainstitut.de](mailto:o.gstrein@europainstitut.de)

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Dijver 11, B-8000 Bruges, Belgium | Tel. +32 (0) 50 477 281 | Fax +32 (0) 50 477 280  
email [michele.chang@coleurope.eu](mailto:michele.chang@coleurope.eu) | website [www.coleurope.eu/pol](http://www.coleurope.eu/pol)

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## **Abstract**

The article describes and assesses the role of national parliaments in EU legislation considering the reforms introduced by the Lisbon Treaty. This is closely connected with the understanding and (political) application of the principle of subsidiarity. After an analysis of the possibilities and limitations of the relevant legal regulations in the post-Lisbon age, alternative ways for participation of national legislators on the European level are being scrutinized and proposed. The issue of democratic legitimization is also interconnected with the current political reforms being discussed in order to overcome the “Euro Crisis”. Finally, the authors argue that it does not make sense to include national parliaments in the existing legislative triangle of the EU, but instead to promote the creation of a new kind of supervisory body.

## Introduction

Although an expression of commitment to the rule of law and democracy already appeared in the Maastricht Treaty<sup>1</sup>, the problem of democratic deficit constitutes one of the most sensitive and controversial issues in the European Union today.<sup>2</sup> Recently published studies and public discussions point out that Member States' citizens continuously feel badly represented within the European Union.<sup>3</sup> In addition, the on-going Euro Crisis seems to transform from a macro-economic phenomenon into a discourse about adequate governance structures in one of the most sophisticated international organisations.<sup>4</sup> Bearing in mind the events surrounding the ratification of the European Constitution<sup>5</sup> and the Lisbon Treaty,<sup>6</sup> it seems inevitable that the European Union is about to face the same deadlock situation in which a decision between firm supranational unification and loose intergovernmental cooperation is

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<sup>1</sup> According to Article F of the Maastricht Treaty “[t]he Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy”, Treaty on European Union [1992] OJ C 191/1.

<sup>2</sup> J. Přibáň, *Desiring a Democratic European Polity: The European Union Between the Constitutional Failure and the Lisbon Treaty* in: *The European Union after Lisbon*, ed. H. Blanke, S. Mangiameli, Berlin 2012, p. 71.

<sup>3</sup> C. Seidl, *Österreicher sehen sich in der EU schlecht vertreten*, *Der Standard*, 16.07.2012; D. Szeligowska, *The European Citizens' Initiative – Empowering European Citizens within the Institutional Triangle: A Political and Legal Analysis*, „Bruges Political Research Papers”, no. 24/2012, p. 53.

<sup>4</sup> C. Calliess, *Der Kampf um den Euro: Eine „Angelegenheit der Europäischen Union“ zwischen Regierung, Parlament und Volk*, „NVwZ Neue Zeitschrift für Verwaltungsrecht”, no. 1/2012, p. 7; A. Voßkuhle, *Die Verfassung gilt auch in der Krise*, „Der Spiegel online“, <http://bit.ly/MdWc4d> [access: 17.07.2012]; S. Kuzmany, *Lasst uns abstimmen!*, „Der Spiegel online“, <http://bit.ly/QB5xZE> [access: 08.08.2012]; M. Aden, *Europa als Rechtsraum angesichts der Eurokrise*, „Recht der internationalen Wirtschaft“, no. 8/2012, p. 1; Conclusions of the European Council of 28-29.06.2012, EUCO 76/12, p. 15.

<sup>5</sup> Treaty establishing a Constitution for Europe [2004] OJ C310/1.

<sup>6</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2006] OJ C306/1.

required.<sup>7</sup> Under such conditions, sensible and pragmatic decision making processes become unpopular and almost impossible.<sup>8</sup>

While some academics try to define which lessons can be learned from the transfer of powers from European national states to the EU regarding similar processes of integration on a global scale,<sup>9</sup> citizens of the Member States fear the loss of democratic control regarding the most important political issues. The democratic deficit within the European Union is mainly associated with the powers of the European Parliament (the narrow meaning), but originally this concept is much wider. The essence of democratic deficit is expressed in an opinion that the European Union and its various bodies suffer from a lack of democratic accountability and legitimacy, moreover they seem inaccessible to ordinary citizens because their operating method is very complex, opaque and remote.<sup>10</sup> Taking into consideration the second, wider approach of democratic deficit, it is important to recall not only the role of the European Parliament within the European Union but also the role of national parliaments as an embodiment of representative democracy at the national level.<sup>11</sup> Undeniably, despite various similarities, the European Parliament and national parliaments differ within the scope of

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<sup>7</sup> See I. Pernice, *La Rete Europea di Costituzionalità – Der Europäische Verfassungsverbund und die Netzwerktheorie*, „Zeitschrift für ausländisches öffentliches Recht und Völkerrecht“, no. 1/2010, p. 52; J. Habermas, *Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts – Ein Essay zur Verfassung Europas*, „Zeitschrift für ausländisches öffentliches Recht und Völkerrecht“, no. 1/2012, p. 1.

<sup>8</sup> M. Draghi, *The future of the euro: stability through change*, „Die Zeit“, 29.08.2012; T. Ackermann et al., *Editorial Comments – Debt and democracy: “United States then, Europe now”?*, „Common Market Law Review“, vol. 49, p. 1833.

<sup>9</sup> A. Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations*, „European Journal of International Law“, no. 23/2012, p. 315.

<sup>10</sup> The European Commission has launched a number of initiatives in recent years to get in direct contact with the „EU’s citizens” in order to make their role as Europeans more visible or better known; See The „Future of Europe” Consultation; COM, IP/12/923, 31.08.2012.

<sup>11</sup> M. Ruffert, *Institutionen, Organe und Kompetenzen – der Abschluss eines Reformprozesses als Gegenstand der Europarechtswissenschaft* in: *Der Reformvertrag von Lissabon*, ed. J. Schwarze, A. Hatje, „EuR Beiheft“, no. 1/2009, p. 35; R. Hrbek, *The Role of National Parliaments in the EU* in: *The European Union after Lisbon*, ed. H. Blanke, S. Mangiameli, *The European Union after Lisbon*, Berlin 2012, p. 137; P. Craig, G. De Búrca, *EU Law. Text, Cases and Materials*, New York 2011, pp. 57-58.

the structure, election and wielded entitlements. Thus, also their roles within the EU are not identical.<sup>12</sup>

This becomes already visible when considering the composition of the legislative bodies on the national and the EU level. While national elections are being held with one legal regime in a consolidated space, the election process for the European Parliament takes place in the twenty-seven Member States, its basic rules being laid down by twenty-seven (harmonized) national laws.<sup>13</sup> Only the results of these single separate votes are being passed on to the common European level, where the outcomes have to be transformed from fragments to what becomes in the end a mosaic entitled to legislate in the European Union. Clearly, this difference in composition substantially influences the subsequent political processes, first and foremost manifesting in the lack of genuine European parties representing the totality of the population of the five hundred million European citizens.

Another issue, which is also highly related to the role of national parliaments within the European Union, concerns the division and control of competences between the Union and the Member States, as well as related principles of subsidiarity, proportionality and the principle of conferral.<sup>14</sup> The dimensions of, and links between, these three key aspects of European Integration are subject of constant discussion.<sup>15</sup>

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<sup>12</sup> See the Commission's Communication, 'A blueprint for a deep and genuine economic and monetary union' (Communication) COM (2012) 777 final, which states that '[t]he European Parliament, and only it, is that Parliament for the EU (...), ensuring democratic legitimacy for EU institutions' decisions. At the same time, the role of national parliaments will always remain crucial in ensuring legitimacy of Member States' action in the European Council and the Council.'

<sup>13</sup> Cf. Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals; further for Germany the *Gesetz über die Wahl der Abgeordneten des Europäischen Parlaments aus der Bundesrepublik Deutschland (Europawahlgesetz - EuWG) - Europawahlgesetz in der Fassung der Bekanntmachung vom 8. März 1994 (BGBl. I S. 423, 555), das zuletzt durch Artikel 2 G. vom 17. März 2008 (BGBl. I S. 394) geändert worden ist.*

<sup>14</sup> N. Foster, *Foster on EU Law*, New York 2011, p. 83; A. Nguyen, *Die Subsidiaritätsrüge des Deutschen Bundesrates gegen den Vorschlag der EU-Kommission für eine Datenschutz-Grundverordnung*, „ZEuS Zeitschrift für europarechtliche Studien“, no. 3/2012, p. 6.

<sup>15</sup> V. Trstenjak, E. Beysen, *Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung*, „EuR Europarecht“, no. 3/2012, p. 266.

While the competences of the European Union have been broadened over the past decades, the prerogatives of national parliaments have been substantially reduced in relation to the European institutions.<sup>16</sup> It should be mentioned that the creation of the European Union was inseparably connected with the formation of new institutional structures and decision-making processes which from the very beginning exceeded the rules of functioning of parliamentarism at the national level. In other words, the process of European integration resulted in surrendering legislative competence of national parliaments to supranational European Union institutions, which constituted the primary reason for deparliamentarisation.<sup>17</sup> This is especially visible in recent times, as Member States and the European Union try to solve the Euro Crisis by setting up new intergovernmental and EU facilities like the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM).<sup>18</sup> The European Union is often seen as „a classical case of a gradual process of de-democratisation through integration”,<sup>19</sup> whereas national parliaments are being described as “victims” and “losers”.<sup>20</sup> Drawing the borders between the national and international actors is an ongoing process shaped by politicians, national and EU officials and especially national high courts, which are often seen as the only legitimate “guardians” of their national constitutions.<sup>21</sup> This has also been highlighted most recently in the debate over the

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<sup>16</sup> A. Cygan, *The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments*, „European Law Review”, no. 36/2011, p. 480.

<sup>17</sup> A. Cygan, *National parliaments within the EU polity – no longer losers but hardly victorious*, „ERA Forum”, no. 4/2012, p. 518.

<sup>18</sup> H. Steiger, *Mehr Demokratie in der EU – aber wie?*, „Zeitschrift für Rechtspolitik”, no. 5/2012, p.14; M. Nettesheim, *Verfassungsrecht und Politik in der Staatsschuldenkrise*, „Neue Juristische Wochenschrift”, no. 20/2012, p. 1409.

<sup>19</sup> A. Maurer, *National Parliaments after Amsterdam: Adaptation, Re-Calibration and Europeanisation by process* in: *Paper for Working Group Meeting, XXIVth COSAC*, p. 6.

<sup>20</sup> J. O’ Brennan, T. Raunio, *National parliaments within the enlarged European Union. From ‘victims’ of integration to competitive actors?*, London 2007, p. 8; P. Norton, *Parliaments and Governments in Western Europe*, London 2011, pp. 1-15.

<sup>21</sup> U. Everling, *Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte Anmerkungen zum Urteil des Bundesverfassungsgerichts vom 30. Juni 2009 über den Vertrag von Lissabon*, „EuR Europarecht”, no. 1/2010, p. 91; A. Hatje, *Demokratische Kosten souveräner Staatlichkeit im europäischen Verfassungsverbund*, „EuR Beiheft”, no. 1/2010, p. 124.

“ESM-ruling” of the German constitutional court,<sup>22</sup> whose political weight and implications were very much disputed all over Europe.<sup>23</sup>

## 1. The role of national parliaments under the Lisbon Treaty

Undoubtedly, the strong position of parliaments as legislators within representative democracies is one of the cornerstones of western democracies as we know them.<sup>24</sup>

According to Article 10.1 TEU also the “functioning of the Union” is based upon this form of governance.<sup>25</sup> However, the European Union in the year 2012 is still a community capable of acting because the Member States pass on their sovereignty to an international organisation. In other terms, it is the national parliaments who have to be considered as the original roots of power of the European Union, even if there is a strong tendency to forget this in regard of the economic and political potential of “The United States of Europe”.<sup>26</sup> Nevertheless, the most important decisions still have to be taken by national legislators.<sup>27</sup> This aspect was strongly emphasized, supported and manifested by the rulings of different constitutional courts, including the Czech, German, Polish, Spanish and the French Conseil d’État.<sup>28</sup> Referring to Montesquieu's tripartite system,<sup>29</sup> national parliaments represent the whole population by carrying out legislative state power, which is then completed by the executive and the judiciary. However, parliaments are not only appointed to approve simple legislation and control the government, furthermore they are responsible for amending the constitution, which

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<sup>22</sup> BVerfG, 2 BvT 1390/12.

<sup>23</sup> P. Jendroszczyk, *Pomoc Niemiec w zawieszeniu*, „Rzeczpospolita“, 11.07.2012; P. Buras, *Wspólna Europa. Reaktywacja*, „Gazeta Wyborcza”, 13.09.2012.

<sup>24</sup> A. Cygan, *National parliaments...*, op. cit., p. 518.

<sup>25</sup> See A. Bogdandy, op. cit., p. 323.

<sup>26</sup> The term „United States of Europe“ was used *inter alia* by Winston Churchill in his speech delivered on 9 September 1946 at the University of Zürich, Switzerland.

<sup>27</sup> See M. Nettesheim, op. cit., p. 1410; with reference to the German Constitutional Court, BVerfGE 123, 267.

<sup>28</sup> A. Weber, *Der Vertrag vom Lissabon vor dem polnischen Verfassungsgericht*, „Europäische Grundrechte Zeitschrift”, no. 5-9/2012, p. 140.

<sup>29</sup> C. De Secondat, Baron de Montesquieu, *The Spirit of the Laws*, 1748.

is the central legal and only legitimate source for all activities of the regime and the administrative branch of a state. Therefore, securing the parliament's position on the national and the European level is also crucial for establishing and maintaining the rule of law within the political entities.

Along with developing Europeanization, which means the creation of the European Union as well as the subsequent process of European integration, the role of national parliaments has changed. The crucial moment came in the first direct election for the European Parliament, in 1979 (since 1979 the European Parliament has no longer been formed by members of national parliaments; although a dual mandate was not forbidden).<sup>30</sup> The side effect of this generally positive event, which is considered to bring additional democratic accountability to the EU, was the impairment of bonds between the national parliaments and the European institutions.<sup>31</sup> The system of direct elections for the European Parliament has created and maintained a distance between national parliaments and the European institutions. At the same time their direct influence on EU affairs is being reduced significantly.

As a result of the expansion of the Europeanization process, the problem of the democratic deficit has been discovered. The successive Treaties of Maastricht,<sup>32</sup> Amsterdam<sup>33</sup> and Nice<sup>34</sup> tried to resolve this problem. They contributed to improving the democratic legitimacy of the institutional system by strengthening the powers of the European Parliament, but at the same time, the issue of the role of national parliaments

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<sup>30</sup> J. Twieg, *Die Rolle der nationalen Parlamente in der europäischen Integration vom EGKSV bis zum Vertrag von Lissabon*, Norderstedt 2009, p. 16; Dual mandates at the European Parliament are entirely prohibited as of 2009, see Council Decision [2002] OJ L283/1.

<sup>31</sup> M. Chardon, *Mehr Transparenz und Demokratie – Die Rolle nationaler Parlamente nach dem Vertrag von Lissabon*, in: *Lissabon in der Analyse. Der Reformvertrag der Europäischen Union*, ed. W. Weidenfeld, Baden-Baden 2008, p. 173.

<sup>32</sup> Treaty on European Union [1992] OJ C191/1.

<sup>33</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1.

<sup>34</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C80/1.

within the European Union seemed to be overlooked. The slight shifts of legislative power from the Council to the European Parliament, which is according to Eurostat figures trusted only by about the half of the EU's population,<sup>35</sup> could simply not compensate for the loss of competences of national legislators to the Union as such.

The Lisbon Treaty,<sup>36</sup> which entered into force on 1 December 2009, takes a different approach that was designed in order to overcome these shortcomings entirely and foster the citizens' trust in democratic decision making in the European Union.<sup>37</sup> It reinforces not only the powers of the European Parliament (democratic legitimacy at the European level), but also the powers of national parliaments (democratic legitimacy at the national level).<sup>38</sup>

Moreover, reinforcing the powers of national parliaments in European matters is widely recognized as one of the most important political reforms introduced by the Lisbon legal framework.<sup>39</sup> The new entitlements of national parliaments were designed to improve the participation in the EU decision-making process and to fill the gap between European citizens and the European Union institutions.<sup>40</sup> Nevertheless the introduction of such amendments at this stage is quite surprising if one takes into consideration that at the beginning, national parliaments were peripheral to the development of European integration, and their democratic features were largely ignored.

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<sup>35</sup> Eurostat, *Trust of Citizens in EU Institutions*, table available under: <http://bit.ly/VORUZj> [access: 22.01.2013].

<sup>36</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2006] OJ C306/1.

<sup>37</sup> This new political approach is also considered to express the recent EU's drive for a new culture in European inter-institutional affairs. See M. Šefcovic, *New role of national Parliaments under the Lisbon Treaty*, Speech at the Conference organised by the C.E.P.C, Real Instituto Elcano and Fundación Manuel Giménez Abad Madrid, 22 October 2010.

<sup>38</sup> J. Příbáň, op. cit., p. 75.

<sup>39</sup> <http://libr.sejm.gov.pl/oide/> [access: 12.05.2012].

<sup>40</sup> C. Mellein, *Die Rolle von Bundestag und Bundesrat in der Europäischen Union*, „EuR Beiheft“, no. 1/2011, p. 48; A. Cygan, *National parliaments...*, op. cit., p. 518; S. Kurpas, B. Crum, *National Parliaments and the Subsidiarity Principle in: The Treaty of Lisbon: Implementing the institutional innovations*, „CEPS Special Reports“ 2007, p. 88.

Put simply, one could argue that executives of the European Union have relatively late realized that national parliaments, from which they themselves are often drawn, have a very distinct role to play in the enlarged European Union.<sup>41</sup> The head of states and ministers who compose the European Council and the Council accordingly, are appointed internally through political systems of Member States and therefore are by and large accountable to national parliaments.<sup>42</sup> Thus, the role of national parliaments should remain crucial in ensuring legitimacy of Member States' action both in the European Council and the Council. However, practice shows that this is not the case, making it necessary to close the gap between national and European legislative processes through changes of the primary law of the EU.

Hence, for the first time in the history of the European Union, national parliaments are now mentioned in the main text of the Treaty (under the Treaty of Maastricht the role of national parliaments within the European Union was regulated by non-binding Declaration No 13<sup>43</sup>; the Amsterdam Treaty contained the Protocol on the Role of National Parliaments in the European Union<sup>44</sup>).<sup>45</sup> Probably the most important Treaty provision on the role of national parliaments within the European Union is Article 12 TEU which states that “national Parliaments contribute actively to the good functioning of the Union”.<sup>46</sup> Although the Treaty of Lisbon provides for an increased role for national parliaments, it does so in a separate provision to the provisions on the institutions of the European Union under Article 13.1 TEU, suggesting that national

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<sup>41</sup> A. Cygan, *National parliaments...*, op. cit., p. 517.

<sup>42</sup> Cf. Article 23 lit. e of the Austrian Constitution (B-VG), which introduced such responsibilities after the accession of Austria to the EU in 1995.

<sup>43</sup> Declaration on the role of national Parliaments in the European Union [1992] OJ C191/1.

<sup>44</sup> Protocol on the role of national parliaments in the European Union [1997] OJ C340/1.

<sup>45</sup> Articles 5.3, 10.2 and 12 of the Treaty on European Union (TEU) refer directly to the position of national parliaments within the European Union.

<sup>46</sup> K. Fischer, *Der Vertrag von Lissabon. Text und Kommentar zum Europäischen Reformvertrag*, Vern 2010, p. 146.

parliaments are not intended to be at the heart of the Union, but instead are to remain secondary players.<sup>47</sup>

### 1.1 The “early warning mechanism”

The monitoring of subsidiarity could be perceived as the greatest improvement to the entitlements of national parliaments introduced by the Lisbon Treaty. The legal foundation for the possibility to ensure the compliance of EU actions with the principle of subsidiarity arises from Protocol No 2<sup>48</sup> in conjunction with Article 5.3 TEU. Protocol No 2 establishes the so-called “early warning mechanism”, which may be described as a pre-legislative constitutional intervention device.<sup>49</sup> Through its use, national parliaments have the possibility to directly inform the Commission, or other initiating bodies, whenever a legislative proposal does not, in their opinion, comply with the principle of subsidiarity.<sup>50</sup> Active participation of national legislators shall be made possible on the Union’s level. This prerogative could be regarded as the parliament’s future key task within the European Union. However, one of the most important requirements in order to apply the mechanism is a requirement of a strengthened horizontal political dialogue between national parliaments.<sup>51</sup>

One could say that the collective monitoring introduced by the Treaty of Lisbon is intended to change the position of parliaments from isolated individual actors in European Union affairs to a proactive horizontal bloc which determines subsidiary according to a uniform set of criteria.<sup>52</sup> The early warning mechanism gives them an

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<sup>47</sup> D. Chalmers, G. Monti, *European Union Law. Updating Supplement*, Cambridge 2008, p. 42.

<sup>48</sup> C. Mellein, op. cit., p. 49.

<sup>49</sup> A. Cygan, *The Parliamentarisation...* op. cit., p. 484.

<sup>50</sup> R. Streinz, C. Ohler, *Der Vertrag von Lissabon zur Reform der EU*, Munich 2010, pp. 73-74.

<sup>51</sup> C. Mellein, op. cit., p. 51; P. Kaczynski, *Paper tigers or sleeping beauties? National Parliaments in the post-Lisbon European Political System*, „CEPS Special Reports“ 2011, p. 8.

<sup>52</sup> A. Cygan, *National Parliaments...* op. cit., p. 527.

opportunity to challenge the compliance of a legislative proposal with the subsidiarity principle (*ex ante* control).<sup>53</sup>

Nevertheless it is important to note that an effective use of the mechanism necessitates an achievement of substantial consensus between the individual actors.<sup>54</sup> The requirement for the establishment of this form of horizontal dialogue between national legislators has been seen as problematic. According to early experiences, national parliaments are far from actively making use of the described mechanism.<sup>55</sup> Even in the case of controversial legislation, such as the Directive on the application of patients' rights in cross-border healthcare,<sup>56</sup> national parliaments are not always galvanised into putting forward concerns about compliance with the principle of subsidiarity.

This may also be connected with the fact that it remains so far unclear what exactly the parliaments can refer to when claiming that the principle of subsidiarity has been violated. Does this for instance also include the possibility to complain because of the violation of the principle of conferral as it is laid down in Article 5.2 TEU? And what about subsidiarity and proportionality? Most likely, important details of how to apply the procedure still have to be defined by further legislative acts, rulings of the ECJ and the practice of national actors. At least the German "Bundesrat"<sup>57</sup> seems to believe that the new mechanism enables the chamber to raise its concerns also regarding

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<sup>53</sup> J. Schoo, *Das neue institutionelle Gefüge der EU* in: *Der Reformvertrag von Lissabon*, ed. J. Schwarze, A. Hatje, „EuR Beiheft“, no. 1/2009, p. 56.

<sup>54</sup> P. Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform*, New York 2011, p. 186.

<sup>55</sup> See COM (2010) 291, paras 2.1 to 2.2; COM (2012) 373, paras 2.1 to 2.2; However, there are rare examples like the use of the mechanism by the German 'Bundesrat' on 30.03.2012 regarding the newly proposed 'General Data Protection Regulation' from 25.01.2012, Deutscher Bundesrat, Drucksache 52/12 (Beschluss).

<sup>56</sup> Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/45. This directive encroaches upon the ability of Member States to deliver publicly funded social services.

<sup>57</sup> Which is the federal chamber of the German parliament.

the other two mentioned principles, because due to their nature they are inextricably connected with what subsidiarity consists of.<sup>58</sup>

Without any doubt, the monitoring of subsidiarity remains an important political task which was created for those institutions which have an interest in its application. In academic literature, the early warning mechanism is mentioned as a possibility for national parliaments to be more directly engaged in EU affairs. Consequently, the monitoring of subsidiarity could help to prioritise EU subjects within national political debates.<sup>59</sup>

On the contrary, even though the introduction of the early warning procedure clearly broadens the competences of national parliaments within European Union affairs, there is still room for criticism. First of all, the warnings issued are of a non-binding nature. Draft Union legislative acts can still be adopted regardless of opposition from national parliaments.<sup>60</sup> Although the Commission has the obligation to review the questioned draft legislative act if the thresholds mentioned in Protocol No 2 have been reached, it is not obliged to change the proposed act.<sup>61</sup> Secondly, one could argue that it is highly probable that the early warning mechanism will never be triggered at all. On the one hand, the required thresholds are unattainably high.<sup>62</sup> Although in 2011 there have been given 64 reasoned opinions by national parliaments to 28 different legislative proposals on the Union level, neither a “yellow” or an “orange” card procedure had to be initiated.<sup>63</sup> These opinions were mainly concerned with the fields of taxation,

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<sup>58</sup> See A. Nguyen, *op. cit.*, p. 283, 293.

<sup>59</sup> A. Cygan, *The Parliamentarisation...* *op. cit.*, p. 486.

<sup>60</sup> D. Chalmers, G. Monti, *op. cit.*, p. 60.

<sup>61</sup> P. Craig, *op. cit.*, p. 47.

<sup>62</sup> According to Article 7 of Protocol No 2 every national parliament receives two votes, typically each of them being used by one of the two legislating chambers. In order for the mechanism to be applied, at least one third of these votes need to be used to flag a breach of the principle of subsidiarity and cause a review of the act. For legislative acts concerning the area of freedom, security and justice one fourth of the votes is sufficient.

<sup>63</sup> The early warning mechanism provides for two different procedures: “yellow” and “orange” cards, which require one-third and a simple majority of votes respectively in order to agree that a proposal

agriculture, internal market and justice.<sup>64</sup> On the other hand, coordination between national parliaments is insufficient. Each parliament uses its own internal procedure for applying the mechanism.<sup>65</sup> Additionally, the foreseen time periods are prohibitively short in order to achieve parliamentary consensus on an international level.<sup>66</sup> Thirdly, the early warning mechanism cannot be perceived as the fulfilment of a procedural function as it can only be used by national parliaments at the tail end of the decision-making process.<sup>67</sup> There is no direct involvement in the shaping of the legislative act as such. Last but not least, it must be pointed out that national parliaments can only indirectly enforce their position before the CJEU by filing a claim against the final legislative act.<sup>68</sup> In other words, the only non advisory form of control is of *ex post* nature, taking the shape of a complex trial in Luxembourg.<sup>69</sup> In the meanwhile the undesired effects of the already enforced legislative act may even make such an intervention useless regarding the practical consequences.

As a first result one could state that the introduction of the early warning mechanism should be considered as a symbolic gesture towards the national legislators and the issue of democratic legitimization within the European Union. The mechanism lacks, however, a legally binding nature, which would help to transform it into a gateway of genuine participation of national parliaments into the legislative process of the Union.

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violates the subsidiarity principle; see Article 7.2 and 7.3 of Protocol No 2.

<sup>64</sup> COM (2012) 373, p. 4; According to the report these opinions concerned mostly the fields taxation, agriculture, internal market and justice.

<sup>65</sup> COM (2012) 373, p. 4.

<sup>66</sup> P. Kiiver, *The Early-Warning System for the Principle of Subsidiary: The National Parliament as a Conseil d'Etat for Europe*, „European Law Review”, no. 98/2011, p. 100.

<sup>67</sup> A. Cygan, *National Parliaments...* op. cit., p. 524.

<sup>68</sup> Article 8 of Protocol No 2.

<sup>69</sup> D. Chalmers, G. Monti, op. cit., p. 60.

## 1.2 Strengthened right to obtain information

The second important improvement introduced by the Lisbon Treaty is the strengthened right to obtain information. This entitlement stems from the provisions of Protocol No 1 which define this privilege of national parliaments. The *raison d'être* is to eliminate the existence of an “information deficit” present under former Treaty regimes.<sup>70</sup>

In comparison to the Amsterdam Treaty Protocol on the Role of National Parliaments in the European Union, Protocol No 1 contains two elements, which have been considerably improved. First of all, the catalogue of documents with which national parliaments are to be provided has been substantially extended. Currently, Protocol No 1 requires the provision of: Commission consultation documents, the annual legislative programme;<sup>71</sup> draft legislative acts (regardless of whether they are provided by the Commission, initiated by a group of Member States or the European Parliament or requested by the CJEU, the European Central Bank or the European Investment Bank);<sup>72</sup> Council agendas;<sup>73</sup> minutes and the annual report of the Court of Auditors.<sup>74</sup> The second and most significant improvement is the commitment to transfer adequate documents in all official languages directly to national parliaments.<sup>75</sup> The documents stated in Protocol No 1 are received by the parliaments directly from the Commission, or other drafting institutions. In effect, all documents are accessible directly from the source. This improved flow of information creates a prerequisite for an

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<sup>70</sup> A. Cygan, *The Parliamentarisation...* op. cit., p. 493.

<sup>71</sup> Article 1 of Protocol No 1.

<sup>72</sup> Article 2 of Protocol No 1.

<sup>73</sup> Article 5 of Protocol No 1.

<sup>74</sup> Article 7 of Protocol No 1. Under the Amsterdam Treaty Protocol on the role of national parliaments in the European Union, national parliaments were provided only with Commission consultation documents and Commission proposals (Article 1 and 2 of Protocol on the role of national parliaments in the European Union [1997] OJ C340/113).

<sup>75</sup> Article 1 and 4 of Protocol No 1; P. Kiiver, op.cit., p. 99.

ensuing political dialogue.<sup>76</sup> A direct transfer of documents is a noteworthy development, particularly because of the close connection between national parliaments' right to obtain information and the before described procedure for monitoring compliance with the principle of subsidiarity.<sup>77</sup>

### 1.3 National parliaments as actors in EU Foreign Policy

Since the Union's foreign policy "is subject to specific rules and procedures"<sup>78</sup> this particular policy field needs to be investigated separately. First of all, a distinction between the external aspects of the policies which are harmonised within the EU<sup>79</sup> and the "classical" Common Foreign and Security Policy (CFSP) has to be made.<sup>80</sup>

For the latter mentioned area of policy, national legislators do have a - almost surprisingly - strong position. The Lisbon Treaty revision does not change the CFSP's basic character as a forum for Member States to coordinate their actions on the international level. The position of the European Institutions is weakened by the treaty framework compared to other fields of activity.<sup>81</sup> Classical inter-governmental decision making has to be applied almost exclusively, which is also expressed by emphasizing the need of unanimity.<sup>82</sup> In consequence, the position of national parliaments is defined by their own national constitutions, specifically the relationship and responsibility of the executing organs towards the national legislators.<sup>83</sup>

This comes despite the fact that the introduction of the Treaty of Lisbon resulted in some institutional changes, like the creation of the position of a High Representative

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<sup>76</sup> A. Cygan, *The Parliamentarisation...* op. cit., p. 493.

<sup>77</sup> R. Streinz, C. Ohler, op. cit., p. 73.

<sup>78</sup> Article 24.1 TEU.

<sup>79</sup> For instance the external dimension of tariffs and customs or the common commercial policy. Title V of the TFEU holds the relevant institutional norms.

<sup>80</sup> T. Jaag, *Demokratische Legitimation der EU-Außenpolitik nach Lissabon*, "Europarecht", no. 3/2012, p. 309.

<sup>81</sup> Article 24.1 TEU.

<sup>82</sup> Article 31.1 TEU.

<sup>83</sup> See e.g. for Austria Article 23a ff.; for Germany mainly Article 23 GG.

of the Union for Foreign Affairs and Security Policy.<sup>84</sup> However, the fact that the appointment of tasks between Member States and the Union in foreign policy is not an easy matter in practice can be studied by the slow progress made so far concerning the introduction of the European External Action Service (EEAS). This service was designed to support the work of the High Representative.<sup>85</sup>

And although the influence of parliaments on the national level on decision making of their representatives is relatively strong, the described “early warning mechanism” on EU level is not applicable, since it only works in reference to legislative acts.<sup>86</sup> All of the national parliamentarian’s information on CFSP decision making processes have to be drawn from the national executive organs or the media. These two aspects make it already visible that the “strong” position of national legislators is in the end the result of the fact that a genuine Common Foreign and Security Policy in the EU hardly exists.

Considering now the external dimension of the internally harmonised policy areas of the EU, the situation does not differ significantly from what has been described in general in the previous parts of this analysis. The most relevant treaty provision can be found in Article 218 TFEU, which contains the general rules of procedure for concluding agreements with third parties.<sup>87</sup>

National parliaments have a crucial position however, when an agreement has to be concluded as “mixed agreement”. This is usually necessary when an international treaty requires that Member States and the Union sign and ratify it because the allocation of competences between them is shared or unclear. In summary, this seems to

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<sup>84</sup> Article 18.1 TEU.

<sup>85</sup> S. Duke, *Now We Are One... A Rough Start for the EEAS*, EIPAScope, 2012, p. 29; See Article 27.3 TEU.

<sup>86</sup> T. Jaag, *op. cit.*, p. 316.

<sup>87</sup> For a commentary on the procedure see C. Calliess, M. Ruffert, *EUV/AEUV - Kommentar*, München 2011, p. 2046.

remain the only situation where one can clearly argue that a unified policy of the Union in a binding form exists and national parliaments, by blocking the required national ratification, do have direct influence on whether the relevant text will come into force or not.<sup>88</sup>

#### **1.4 Résumé of the recent legal framework**

Overall, the Lisbon Treaty has endeavoured to bring national parliaments from the margins of EU decision-making and render them within the EU polity. Articles 5.3, 10.2 and 12 TEU, as well as Protocol No 1 and Protocol No 2 undeniably reinforce the powers of national parliaments and equip them with some new and strengthened rights. Nevertheless, even though the new provisions give national parliaments an opportunity to play a more active role within the European Union in the future, they have not repositioned national parliaments as key actors within the European polity. The Treaty allocated no institutional status to national parliaments<sup>89</sup> nor are national parliaments situated within the legislative triangle. What can be mentioned positively though, is that the coming into force of the new rules has fostered the dialogue between national legislators and institutions of the Union, especially the European Commission.<sup>90</sup> In the post-Lisbon era it is clear, that national parliaments should have an influence on EU regulation in general, even if the legal quality and institutional positioning is not entirely defined yet. Maybe the current situation can be understood best if it is regarded as being the start of a new process, similar to what happened to the European Parliament over the last decades.

In other words, now the future of national parliaments within the European Union is in their hands. It depends solely upon them how proactively they will use the

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<sup>88</sup> T. Jaag, *op. cit.*, p. 320.

<sup>89</sup> Article 13.1 TEU *a contrario*.

<sup>90</sup> COM (2012) 375.

new provisions and how far they will meet the expectations in order to become an important institutional actor in the decision-making process of the European Union.

## **2. Scenarios for the future of national parliaments within the European Union**

The above discussion concerns the past and present situation of national parliaments within the European Union. In addition to this, a very important issue that should also be discussed is the future of national parliaments as actors in Europe. As has been shown so far, under the current legal and political framework, national parliaments remain mainly national actors. They can only legitimize the executive organ's acts within the EU, while they themselves do not exist as shaping factors of legislation on the European stage.<sup>91</sup>

It appears that the future of national parliaments within the European Union entirely depends upon the future of the European Union itself. More Europeanization heading towards a federal European state (the already mentioned “United States of Europe”<sup>92</sup>) will mean less power for national parliaments. And *vice versa*: the emergence of stronger interests of Member States within European integration will increase the importance of national parliaments as European actors. The role of transnational party groups in this process seems to be rather negligible.<sup>93</sup>

Nevertheless, one can speculate about consequences in the light of the recent developments both in Europe and the Union. The aforementioned first movement of stronger integration may eventually lead to new institutional reforms.<sup>94</sup> Such efforts would definitely be taken in order to overcome economic hardship and political instability, creating faster, sounder and also more ‘democratic’ decision-making

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<sup>91</sup> See H. Steiger, op. cit., p. 14.

<sup>92</sup> See footnote 25.

<sup>93</sup> See S. van Hecke, *Polity-Building in the Constitutional Convention: Transnational Party Groups in European Union Institutional Reform*, „Journal of Common Market Studies“, no. 5/2012, p. 848 ff.

<sup>94</sup> See „Foreign Ministers’ group report on the Future of Europe” 15.06.2012, especially p. 6.

processes. Especially the predominant role of executive organs in the creation of bodies to “overcome the Euro Crisis strongly highlighted once again the necessity for better integration of democratic legitimated EU legislative bodies.”<sup>95</sup> But similar issues will also have to be solved in relation to other policy fields than macro-economics.<sup>96</sup> The question is: how would such an integration of national parliaments look like in the future?

The first possibility would be the creation of a new supranational body using already existing patterns which could be named the “Committee of national legislators” and would consist of deputies from the Member States. It could be given the competence to issue statements after being consulted on certain legislation and therefore enable the parliaments to take their stance from an *ex-ante* perspective. The new body could take the form of a kind of *Conseil d’État* for the European Union.<sup>97</sup> Such a new body would consequently take a similar or possibly more prominent position as the already existing advisory institutions, namely the Economic and Social Committee and the Committee of Regions.

Theoretically, the second possibility could be an introduction of a new type of advisory or even judicial body considering the *ex-post* perspective. In this scenario, national parliaments would create a “subsidiarity tribunal” which would have the capacity to rule on the compatibility of EU legislative acts with the subsidiarity principle. At first glance, one may envisage a conflict with Article 19.1 TEU, which gives the CJEU the sole right to interpretation of the law of the Union. But so far the

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<sup>95</sup> C. Calliess, *op. cit.*, p. 7.

<sup>96</sup> H. Steiger, *op. cit.*, p. 15.

<sup>97</sup> P. Kiiver, *op. cit.*, p. 98. For example, in France the Conseil d’État advises the government on the preparation of bills, ordinances and certain decrees. It may also be consulted by the president of the National Assembly or the Senate for advice on draft parliamentary legislation. Moreover, if it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution of the Republic of France, the Conseil d’État may refer the matter to the Constitutional Council, within a determined period. See Articles 37 to 39, 61 and 74 Constitution de la République française du 4 octobre 1958. See also [www.conseil-etat.fr](http://www.conseil-etat.fr).

Luxembourg court has not laid down concrete definition of “subsidiarity” in regard to its political dimension, leaving it merely as an abstract figure related with institutional balance. One can furthermore find arguments in the scientific literature that support a broadening of the application of the principles of subsidiarity and proportionality and this would in a sense also restrict the capacity of the CJEU itself.<sup>98</sup> Such an understanding creates space for the creation of a new judicial body situated between the Union and the Member States.

To improve the democratic legitimisation of the rulings of this institution, its members could also be voted for by the national parliaments. For the creation of similar judicial bodies proposed candidates do have to fulfill objective requirements. This is especially useful in order to avoid a lack of quality and independence of the future officials, which is often regarded to be the major disadvantage of an electoral appointment of judges. As is already the case for the judges of the ECJ<sup>99</sup> and the ECHR,<sup>100</sup> a panel could be set up to hold hearings, which should be conducted in a transparent manner, ideally being public.

Considering the division of political power and thinking about the possible consequences of creating these sketched new bodies, the change of “role” of national legislators from decision-makers to supranational organs would mean a loss of influence. Carrying out a more detailed scrutiny however, one will balance this aspect with the current situation, which sees in many fields the erosion of national competences and therefore the almost total exclusion of national legislators from the political dialogue – especially with regard to the *ex ante* perspective. Furthermore, the currently effective early warning mechanism allows *de facto* solely an *ex ante* statement

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<sup>98</sup> T. Horsley, *Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?*, “Journal of Common Market Studies”, no. 2/2012, p. 267; V. Trstenjak, E. Beysen, op. cit., p. 267.

<sup>99</sup> Article 255 TFEU.

<sup>100</sup> Committee of Ministers, Resolution CM/Res (2010) 26.

considering a legislative act in relation to the subsidiarity principle and not beyond that narrow angle.

Last but not least, the direct involvement of national parliaments within the existing legislative triangle would also be a possibility. However, this scenario seems to be most unlikely, since the existing mechanisms are already pretty complex and the legislative barrier between national and EU politics would vanish entirely upon putting in place such a procedure. Therefore, the consequences of such a move can hardly be predicted. Most likely, an event like this would require basic changes of political and legal nature both in the Member States and the Union.

Despite these objections, such a scenario is undoubtedly worth discussing. One possibility would be the creation of a second, federalist chamber of the European Parliament, consisting of representatives of the Member States.<sup>101</sup> Such a chamber would be the counterpart to the European Parliament, as we know it, which is working with the assumption that it represents all Europeans as a single entity and not a Europe of different peoples. The competences of the new chamber would be similar to the chambers of regions in federal states. However, to avoid the creation of a European super-state, it would have to be strongly devoted to the principles of intergovernmental decision making, like the “one state, one vote” doctrine mirroring the equality of Member States regardless of their territorial size, population or economic power.<sup>102</sup> It is questionable however if the chamber would not lose its intergovernmental nature gradually over time, considering factual reasons and necessities to work together with the other institutions of the European Union.

Another variant of that proposal involves the national parliaments directly. In certain key policy areas, like the annual budget of the European Union, legislators could

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<sup>101</sup> H. Steiger, *op. cit.*, p.15.

<sup>102</sup> *Ibidem.*

receive the right to be “opting-out” of decisions made on the Union level. This could particularly be the case if such decisions entail the overtaking of significant positive duties for a single Member State in unusual circumstances.<sup>103</sup> It is clear that in the current situation such a proposal is being made by economically strong Member States in order to give their national parliaments more competences in the process of solving the European debt crisis.<sup>104</sup> However, the advantage of such a rule would be a gain for democratically legitimised decision making power on the one hand, while the inner-institutional balance and procedures in the EU itself would not have to be changed or disturbed very intensively. On the other side, this mechanism would most likely improve uncertainty in situations which need clear and swift decisions to be taken in order to be solved successfully. Nevertheless, it is certain that bringing national parliaments on board in the EU decision-making process could significantly contribute to the improvement of accountability of both the European Union and the executive powers of the Member States.<sup>105</sup> This thought also leads back to the distinction between the wider and the narrow meaning of the term “democratic deficit”, which was mentioned at the beginning of this article.

Arguably, there would be no problem of democratic legitimacy of decisions if competences of national parliaments would be entirely shifted to the European Parliament in Brussels and Strasbourg. Even if, as pointed out earlier in this article, the European Parliament in its current form is a mosaic of fragments appointed through national voting procedures, it is very likely that this would soon change if only the majority of legislative procedures in the EU were dominated by the assembly. This

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<sup>103</sup> Ibidem.

<sup>104</sup> Cf. also the ratio of the „ESM ruling” of the German Constitutional Court (Bundesverfassungsgericht), stating that it needs to be ensured that the German national parliament keeps the power to decide if and how financial contributions of the federal state to other Member States should be made; T. Ackermann, *op. cit.*, p. 1834 ff.

<sup>105</sup> J. Přibáň, *op. cit.*, p. 76.

would also entail that the European Parliament becomes more than the co-legislator as it is now.

In the current situation however, such a transfer of national competences to the higher level means typically taking away the legislative decision from national parliaments and moving it to a large extent into the hands of the Council, which consists of representatives from the national executive branches.<sup>106</sup> In other words, it is the lack of commitment of the Member States of the European Union to the organisation, which in effect results in a shift of legislative power from the legislative branch of a state to the combined executive branches of all Member States.

A further approach for institutional reform was advocated in a working paper promoted by Council President Herman van Rompuy dealing with possible reactions on the Euro Crisis.<sup>107</sup> The paper was due to be discussed at a European Council meeting scheduled for the end of October 2012 and deals mainly with an integrated financial and budgetary framework for the Eurozone. However, the issue of improved democratic legitimacy in decision-making is also being addressed. The question being asked is, whether a more harmonised economic policy necessitates the creation of what is being called “dedicated accountability structures specific to the euro area.”<sup>108</sup> One could think here of the creation of a “Eurozone Parliament.” Also the German government made similar remarks concerning a new way of parliamentary decision-making combined with the strengthening of the position of the European Commission.<sup>109</sup>

Despite the fact that these proposals are still vague, what seems to be clear at first glance is that a realisation would definitely weaken the existing national

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<sup>106</sup> See e.g. the ordinary legislative procedure; Article 294 TFEU.

<sup>107</sup> See Towards a Genuine Economic and Monetary Union, Interim Report of the President of the European Council, 12.10.2012; V. Pop, *Van Rompuy paper floats eurozone budget, parliament*, “EUobserver online”, <http://bit.ly/Sf4xHv> [access: 02.10.2012].

<sup>108</sup> Ibidem.

<sup>109</sup> N. Busse, M. Schäfers, *Berlin unzufrieden mit Debatte über Euro-Reform*, „Frankfurter Allgemeine Zeitung“, 17.10.2012.

parliaments as well as the European Parliament in its current form, making institutional interaction in the European Union even more complex. Besides, one would then have to ask “which” European Union one would talk about, since the “new” Parliament could well be regarded as the nucleus for a truly federal Union. Taking such a bold step seems to be rather unlikely given the current situation and especially in light of the fact that political tension in the Union overall seems to be rising.

The final outcome of this discussion is still open. What seems to be becoming ever clearer is however, that the only sustainable way out of the crisis means stronger integration, including also the strengthening of democratic legitimacy and accountability as a factor of balance for stronger European institutions. Neither of the other two options on the table,<sup>110</sup> namely the intergovernmental approach represented through institutions like the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM), nor legally, politically and not at least macro-economically questionable interventions of already existing institutions like the European Central Bank will be able to end the continuing struggle.

And finally, regarding all of this considerations and questions it has to be recognized as a fact that Member States’ citizens still feel mostly attached to their national identity, blocking the path to “the easy solution” and demanding a more sophisticated approach to establishing new institutional balance.<sup>111</sup>

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<sup>110</sup> Cf. T. Ackermann, *op. cit.*, p. 1834 ff.

<sup>111</sup> See EUROSTAT, Eurobarometer 73.3, p. 72.

## Conclusion

The reasoning behind the new provisions of the Lisbon Treaty on the role of national parliaments was connected to an expectation that, collectively, national parliaments would inject democratic legitimacy to the European Union. Filling up the legitimacy gap within the European Union is needed especially now, when the sheer endless Euro Crisis seems to be transforming from a macro-economic phenomenon into a discourse about adequate EU governance structures. Additionally, the “European idea” itself is being questioned, showing once more that even its own citizens do not really trust the Union and need to be convinced anew.<sup>112</sup>

The crucial decision Europeans must face is whether they regard a unified Europe as being part of their future or as being a failed project of the past. This decision will most likely be taken against the background of a rational cost-benefit analysis,<sup>113</sup> even if the “Cost-of-Non-Europe”- narrative can and should not be the only consideration of the Member States’ citizens.<sup>114</sup> Nevertheless, the European Economic and Social Committee adopted on the 18<sup>th</sup> of September 2012 an opinion, which supports the creation of an “updated study of the cost of non-Europe”<sup>115</sup> following the original idea of Paolo Cecchini’s publication from 1988.<sup>116</sup> Also the European Commission is following a similar path.<sup>117</sup>

What seems to be underestimated in the current discussion however is that as with every kind of identity, a collective identity of the European Union is shaped by the three dimensions of past, present and future. In other words and if one follows the

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<sup>112</sup> G. Westerwelle, *Der Wert Europas: Vier Thesen zum Zukunftsprojekt Europa*, „Integration”, no. 2/2012, p. 90.

<sup>113</sup> Ibidem, p. 93.

<sup>114</sup> D. Göler, *Die Grenzen des ‚Cost-of-Non-Europe‘ - Narrativs: Anmerkungen zur Sinnstiftung der europäischen Integration*, „Integration”, no. 2/2012, p. 135.

<sup>115</sup> European Economic and Social Committee, Press Release No. 57/2012.

<sup>116</sup> P. Cecchini, *The European Challenge 1992 – The Benefits of a single market*, Aldershot 1988.

<sup>117</sup> Ibidem; COM, Contact Notice 2011/S 141-233386, <http://bit.ly/SAnZ1d> [access: 02.10.2012].

philosophical roots of Martin Heidegger in this regard,<sup>118</sup> a strong belief in a common future in Europe already adds significantly to the existence of such an entity. Identity already comes into existence if there is a firm belief in a common project. Of course, such a process can only work when it is taking place between partners sharing a common layer, which is set up by mutual standards. And this is where the link to democracy and the issue of democratic legitimisation becomes visible and understandable. The reason why the European Union has so far been unable to gain the trust of the Member States' populations is that these shared standards have never been publically agreed upon. And even where they seem to exist in all Member States on a national level, the EU itself does not stick to them. This is especially true for the topic covered in this article.

According to the Treaty, democratic legitimacy within the European Union should be assured in a twofold manner.<sup>119</sup> First of all, by strengthening the powers of the European Parliament and successively extending the scope of the co-decision procedure. Secondly, by reinforcing the powers of national parliaments, giving them more influence on EU affairs. The question that has to be answered is: is this really the best way of addressing the democratic deficit at the European level? The EU institutional triangle seems to be already very complex and self-sufficient. Undeniably, the allocation of European institutional status to national parliaments would make the EU structure even more complicated and at the same time less transparent. The necessity of such repositioning of national parliaments is also questionable. Is the European Parliament, composed of directly elected MEPs, itself not enough to assure the appropriate level of democratic legitimacy within the European Union?

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<sup>118</sup> M. Heidegger, *Being and Time*, 1962, Division One, Chapter 6.

<sup>119</sup> Article 10 TEU states that „[t]he functioning of the Union shall be founded on representative democracy” and mentions the European Parliament as a representative of EU citizens and the European Council and the Council as representatives of Member States.

In an era where everything seems to be put in economic terms, it is almost astonishing that the Member States of the EU do not start to consider their transferred powers to the Union as a straight investment in a strict pragmatic sense. This thought also leads to the concept of a procedure of taking the power back from the Union, at least in theory or as a legal possibility, being laid down in specific procedures. The rules for a Member State to leave the EU, as they were introduced with the Treaty of Lisbon,<sup>120</sup> are a first step in that direction. However, this basic idea of giving the Europeans actual choice would need to become more detailed and nuanced, being made available for certain policy areas of the Union. In this way a common “Europe” could be transformed back from the “common duty” of today into an opportunity for the future, as it was always intended to be. Some might fear a fragmentation or the creation of a “Europe of two or several speeds” here. But considering the global challenges and factual necessities of our time, it is very likely that the European national states will work together in a constructive way. Despite being in dire straits, no Member State has chosen for itself to leave the Union, or even the Euro. Even the majority of Greeks are not in favour of an exit from the common currency, it is some representatives from other Member States who want them to leave.<sup>121</sup> And despite the Eurozone’s dull perspectives, prospective members are still trying to fulfil the criteria for joining the common currency.<sup>122</sup> It could well be argued that although there are large problems for the EU these days, it shows that it persists even under harsh conditions.

However, recent expressions of some heads of governments, seemingly demanding a weakening of national parliaments in the decision-making processes

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<sup>120</sup> Article 50 TEU.

<sup>121</sup> H. Carnegie, *Samaras demands end to talk of ‘Grexit’*, <http://on.ft.com/RHUs9L> [access: 07.09.2012].

<sup>122</sup> T. Krohn, *Wenig Lust auf den Euro*, „Deutschlandfunk – Europa heute”, <http://bit.ly/OYDpzt> [access: 07.09.2012].

addressing the solution of the Euro Crisis, have also clearly shown that the European public wishes for a strong role of their national parliaments in daily politics.<sup>123</sup>

The analysis of the new provisions on the role of national parliaments within the European Union provokes thought. One of the greatest powers of national parliaments introduced by the Treaty is the right to control compliance with the principle of subsidiarity. National parliaments participating in the monitoring of subsidiarity execute a supervisory function. The control they wield can be either *ex ante*, by means of the early warning mechanism under Article 7 of Protocol No 2 or *ex post* by means of an indirect right to start proceeding before the CJEU under Article 8 of Protocol No 2. Maybe this is the direction that national parliaments should head for? Creating a kind of supervisory body, regardless of its form, national parliaments would not duplicate the existing European institutional structures and at the same time would remain important actors within the European Union.

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<sup>123</sup> P. Wittrock, *Stunde der Scharfmacher*, „Der Spiegel online“, <http://bit.ly/R2gymz> [access: 06.09.2012].

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