

EU Democratic Legitimacy and National Parliaments

Sonia Piedrafita

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The role of national parliaments in the EU has been a long debated issue. Since the Maastricht Treaty, new powers to the EU level have been accompanied by not only an increasing role of the European Parliament in the legislative process, but also by a number of declarations and protocols to ensure that national parliaments receive the information and documents required to effectively monitor their governments in EU affairs. The Lisbon Treaty extended the guarantees and also included new modes of direct participation. The proper use of the mechanisms in place, namely, the subsidiarity checks, the political dialogue with the European Commission and the inter-parliamentary cooperation with the European Parliament, has become of vital importance in view of recent developments in EU economic policy and beyond. The choice for increasing inter-governmentalism in decision-making and the centralisation of the implementing and supervisory powers in the Commission and the European Central Bank (ECB) have raised questions about political accountability and the appropriate involvement of parliaments. However, the extent to which national parliaments should be more involved is rather controversial. The first section of this essay looks into the difficulty of defining and addressing the question of the democratic legitimacy in the EU. Section two examines the role of the national parliaments in the treaties and section three explores ways in which they can contribute to improve EU democratic legitimacy.

1. The trouble with EU democratic legitimacy

The transfer of powers to the EU level, rather than following the Community method, is increasingly taking the form of intense inter-governmentalism and the centralisation of the implementing and supervisory competences in supranational bodies (e.g. the Commission and the ECB). This has raised concerns of political accountability and the appropriate involvement of parliaments, especially when many of these decisions touch upon the core of

Sonia Piedrafita is a Research Fellow at the Centre for European Policy Studies, Brussels.

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national sovereignty and citizens can feel their impact in their daily lives. However, there is no consensus on whether the reinforcement of the role of the European Parliament should suffice or whether a higher involvement of national parliaments would be desirable.

Some contend that democratic control and accountability have to be carried out at the level at which decisions are taken and, therefore, the role of the European Parliament should be strengthened. Nevertheless, increasing the European Parliament's powers would not definitively settle the question of EU democratic legitimacy. Political legitimacy is a very contentious concept when referring to non-state entities such as the EU. Beetham (1991) distinguished between three standards of legitimacy that apply to liberal democracies: output legitimacy, that is, their capacity to deliver results and improve citizens' welfare; substantial legitimacy, that is, the protection and promotion of collective values and common identity; and procedural legitimacy, that is, the respect for the democratic principles of representation and checks-and-balances.¹ However, the EU's political system largely differs from the system of separation of powers in place in modern democracies. The executive, legislative and judicial powers are not wielded exclusively by any single EU institution, and the checks and balances are understood in a different fashion. The principle of institutional balance – rather than Montesquieu's principle of separation of powers, which is overseen by the Court of Justice – ensures that EU institutions act within the limits of the powers conferred to them by the treaties. As for the principle of representation, the current distribution of seats of the European Parliament among member states represents a substantial deviation from equality, with the larger member states being underrepresented and the smaller states being largely overrepresented.² Moreover, the legislative powers of the European Parliament are more limited than those of the national parliaments, and the EU executive branch does not depend on a majority in the European Parliament. Therefore, unlike in liberal democracies, EU decisions do not necessarily reflect the 'will of the majority'.

For this reason, some defend – in line with the German Constitutional Court's ruling of 30 June 2009 – that the further development of the competences of the European Parliament can reduce, but not completely fill the gap between the extent of the EU's decision-making power and citizens' democratic power. In order to address the question of the EU democratic deficit, it is thus unavoidable to reinforce the role of the national parliaments in the EU. Despite the undoubtedly European nature of the decisions, they argue, one cannot dodge the fact that they have to be implemented at national level and have a strong impact on national taxing and spending policies. Opponents of strengthening the role of national parliaments counter that members of the national parliaments (MPs) are not in the position to engage in a truly European debate beyond their national politics, perceptions and interests, and insist that such a development risks bringing the EU decision-making process to a halt.

The reinforcement of the role of the European Parliament, especially its scrutiny powers, in the policy-making processes outside the Community method is essential for EU democratic legitimacy. But so too is a closer engagement of the national parliaments in EU affairs, which can be achieved within the current institutional framework. The Early Warning Mechanism (EWM) could be used in a more active and constructive way, rather than just as a veto instrument, which has been its fate to date. There is also margin to enhance the political dialogue with the Commission and the inter-parliamentary cooperation with the European Parliament in such a way that they become efficient mechanisms to collect the views of the

¹ D. Beetham, *The legitimization of power*, Basingstoke: Macmillan, 1991.

² The Gini coefficient is an index that measures inequality from 0 to 1. For the distribution of the European Parliament seats, it is 0.27.

national parliaments and to promote the involvement of MPs in EU affairs. All this would, on the one hand, foster and facilitate the parliamentary scrutiny of the governments at national level and, on the other, contribute to bring EU decisions and politics to the core of national debates and closer to citizens. Last but not least, a more active engagement of national parliaments would have positive effects on the implementation of EU legislation in member states.

2. The national parliaments in the treaties

The question of the democratic deficit came to be debated in depth with the development of the political and the economic and monetary union (EMU) with the Treaty of Maastricht (1992). In order to improve the parliamentary scrutiny of EU affairs at national level, Declaration 13 provided that “the governments of the Member States will ensure that national parliaments receive Commission proposals for legislation in good time for information or possible examination”. The reflection group preparing the 1996 Intergovernmental Conference on institutional reform reaffirmed that the main role of national parliaments in the EU was to check their governments’ actions in the Council and, therefore, recommended the revision of the treaties to guarantee that they received the necessary information in time. A protocol annexed to the Amsterdam Treaty (1997) established that legislative proposals would be included in the agenda of the Council for discussion at least six weeks after being delivered to the member states by the European Commission, “so that the government of each Member State may ensure that its own national parliament receives them as appropriate”. Therefore, the Commission had the duty to guarantee a lapse of time before the discussion of the proposal, but the timely reception of all the legislative drafts by the national parliaments remained the responsibility of their governments.

With the Treaty of Lisbon, which entered into force in December 2009, it was the first time that the national parliaments were included in the body of the treaty. The Treaty of the European Union (TEU) states that national parliaments ensure compliance of the EU with the principle of subsidiarity (Art. 5) and hold their governments accountable for their actions in the Council (Art. 10). They can also contribute to the good functioning of the Union (Art. 12) by taking part in the evaluation mechanisms for the implementation of the Union policies in the area of freedom, security and justice (AFSJ) in accordance with Art. 70 TFEU; in the political monitoring of Europol and the evaluation of Eurojust’s activities in accordance with Articles 85 and 88 TFEU; in the revision procedures of the treaties in accordance with Art. 48 TEU and in the inter-parliamentary cooperation between national parliaments and the European Parliament. They will also be notified of applications for accession to the Union in accordance with Art. 49 TEU.

The Protocol on National Parliaments (No. 1 in the Lisbon Treaty) broadens the scope of the documents to be forwarded to the national parliaments to include all draft legislative acts, consultation documents, the annual legislative programme and any other instrument of legislative planning of the Commission, the Council’s agendas and minutes and the Annual Report of the Court of Auditors. “An eight-week period shall elapse between a draft legislative act being made available (by the EU institutions) to national parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure”. A new Protocol (No. 2) on the application of the principles of subsidiarity and proportionality establishes the conditions for the application of these principles and sets out a system for monitoring possible breaches of the subsidiarity principle. In this way, the Lisbon Treaty includes both measures to improve the parliamentary scrutiny of the national governments

in EU affairs as well as other mechanisms to promote the active participation of the national parliaments at EU level.

3. The Early Warning Mechanism

To ensure that EU acts comply with the subsidiarity principle, Protocol No. 2 of the Lisbon Treaty establishes the EWM (Early Warning Mechanism). Within eight weeks any member parliament may submit a reasoned opinion stating why it considers that a draft legislative act does not comply with the principle of subsidiarity. If the number of opinions that find there is a breach of the subsidiarity principle exceeds the threshold, the proposal must be reviewed, although the Commission may decide to maintain it. For acts under the ordinary legislative procedure, if the number of negative opinions represents a simple majority of the votes and the Commission decides to maintain the proposal, the Council and the European Parliament can reject it in the first reading.

Table 1. The early warning mechanism

	'Yellow card' procedure	'Orange card' procedure <i>Only for ordinary legislative procedure</i>
Threshold	A number of negative opinions representing: <ul style="list-style-type: none"> • at least 1/3 of the total votes (2 votes per MS) or • ¼ for legislative acts concerning the area of freedom, security and justice 	A number of negative opinions representing at least a simple majority of the votes allocated to national parliaments
Effect	The initiating EU institution (usually the Commission) must review the proposal. It can maintain, amend or withdraw it.	The European Commission must review the proposal, and it can maintain, amend or withdraw it. If the European Commission decides to maintain the proposal, it has to justify its decision, and both the Council and the European Parliament can reject it before the end of the first reading if they find it incompatible with the subsidiarity principle.

In 2012, the Commission received a total of 83 (compared to 64 in 2011 and 34 in 2010) reasoned opinions stating a breach of the subsidiarity principle in relation to 34 legislative proposals (out of around 120). Twenty-four legislative chambers from 19 member states sent at least one opinion. The Swedish *Riksdag* submitted 21, followed by the French *Sénat* with 7 and the Dutch *Eerste Kamer* and *Tweede Kamer* with six each.³ With the exception of the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (the so-called 'Monti II'), each of the other drafts received fewer than five opinions. In the case of the Monti II, 12 national parliaments issued reasoned opinions stating a breach of the subsidiarity principle, which triggered the 'yellow card' procedure for the first time since its establishment by the Lisbon Treaty. Inter-parliamentary cooperation and an effective lobbying campaign by the Danish parliament drew in parliament after parliament in opposition to the proposal. As a result, the threshold for the yellow card was reached at the very last moment, forcing the Commission to initiate a review process. In January 2013, the

³ Annual Report 2012 on Subsidiarity and Proportionality, European Commission, COM (2013) 566 final.

Commission decided to withdraw the proposal. More recently, national parliaments of 14 member states expressed their critical concerns regarding the Commission's proposal on the European Public Prosecutor's Office and 11 formally submitted a reasoned opinion stating a breach of the subsidiarity principle, which set off the yellow card procedure for the second time.

Even if the threshold is not reached, the Commission is committed to reply to the reasoned opinions and take the views of the national parliaments into account. For instance, following (11) reasoned opinions received in relation to the Proposal for a Directive on deposit guarantee schemes [COM (2010)368], the proposal was later modified. However, in general, there is no way to assess whether and how the Commission takes in the views of national parliaments. In a similar vein, some chambers have noted that the reply letters are sometimes too general and do not properly address the specific objections raised by them. On certain occasions, a similar letter is sent to all the chambers submitting a reasoned opinion.⁴ Moreover, during the eight-week period, talks in the working groups of the Council – and even within the European Parliament – might start with the original draft of the Commission, which will only deal with the reasoned opinions submitted by the national parliaments at a later stage. This all contribute to the perception that national parliaments do not have a say beyond their possibility to block a proposal on the grounds of a subsidiarity breach, underscoring the negative connotation of their participation in the EU decision-making. To avoid this, it would be necessary that either the subsidiarity checks took place at an earlier stage or that at least the Commission provided national parliaments with a proper follow-up, explaining whether and how their views were taken into account.

Another shortcoming derives from the different interpretation that national parliaments make of the subsidiarity principle and the EWM. The number of legislative proposals and other documents scrutinised, as well as the procedure and the criteria to issue a reasoned opinion, varies broadly across national parliaments. In some cases, all the documents received are examined in a very mechanical exercise, whereas in others there is some sort of sifting at either the administrative or the political level. The latter can take place either in an open committee session or in a closed meeting of the relevant members. In some parliaments, there is the perception that the scrutiny of EU legislation is becoming quite legalistic and confined to a simple verification that the subsidiarity principle has been observed, which poses a serious risk to the political scrutiny of the government and EU policies.

In general, national parliaments tend to make a broad interpretation of the concept of subsidiarity and many reasoned opinions go beyond the requirements of Protocol 2 and Article 5, TEU. Some of them are explained in terms of domestic politics (e.g. the government of that country opposes the legislative proposal) and a breach of the subsidiarity principle is difficult to justify. Nor is there either a common approach regarding the control of the proportionality principle. Most of the legislative chambers consider proportionality criteria as part of the subsidiarity checks and many of them find it difficult to separate the two concepts.⁵ It would be advisable that reasoned opinions on the breach of the subsidiarity principle focused strictly on this issue according to Protocol 2 – with everything else falling within the context of the political dialogue with the European Commission. Guidelines with specific common criteria to carry out the subsidiarity checks could be developed, following a

⁴ Sixteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, COSAC, October 2011.

⁵ Eighteenth Bi-annual Report: Developments in European Union Procedures and Practices relevant to Parliamentary Scrutiny, COSAC, October 2012.

thorough revision of the concept of subsidiarity. The proportionality principle should be included in the criteria, given that both principles are intrinsically connected and it is in the spirit of the Lisbon Treaty that the national parliaments also ensure compliance of legislative proposals with this principle.

A more strict and homogenous interpretation of the principle of subsidiarity along with a Commission that is more responsive to the views of the national parliaments would undoubtedly contribute to the goal of better regulation in the EU. The proposal to give some kind of legislative initiative to the national parliaments might be much more contentious, but the reinforcement of the mechanisms already in place so as to enhance their say in the case of poor legislative proposals in terms of subsidiarity and proportionality does not seem to constitute an extraordinary challenge to which the national parliaments would fail to rise. Nor would it pose a risk to EU decision-making.

4. The political dialogue with the Commission and the inter-parliamentary cooperation

In contrast to the negative connotation that the EWM might evoke, other forms of direct interaction with EU institutions, namely the political dialogue with the European Commission and the inter-parliamentary cooperation with the European Parliament, have more positive implications. However, they are still far from being exploited to their full potential.

Political dialogue with national parliaments, launched in 2006 by the Barroso Commission, encourages parliaments to submit their opinions on any aspect (not only questions of subsidiarity) of the legislative proposals and consultation documents, with the commitment of the European Commission to reply to them and take their views into account.⁶ The number of opinions sent by national parliaments to the Commission in the framework of this political dialogue increased by 55% in 2010 and 60% in 2011. In 2012, however, the increase was slightly below 7%, which might signal of little variation in the future to come, especially if one takes into account that all legislative chambers have finally been engaged in the process this year. Participation in the political dialogue is very different across member states. Fully one-half of the 663 opinions in 2012 were submitted by six of the 41 legislative chambers: the Portuguese Assembleia, the Italian Senato, the Czech Senate, the German Bundesrat, the Swedish Riksdag and the Romanian Camera Deputatilor. In particular, the Portuguese parliament sends an opinion for every legislative proposal received from the EU institutions, although most of the time it is just to confirm compliance with the subsidiarity and proportionality principles. At the other end of the spectrum, other parliaments such as the Finnish Eduskunta and the Spanish Cortes Generales are much more reluctant to send any opinion beyond what is required by the Protocol and Art. 5 of the Treaty.

Table 2. Opinions in the framework of political dialogue with the Commission

	Total submissions	Reasoned opinions	Political dialogue	Variation %	Chambers not participating
2010	387	34	353	55	10
2011	622	64	558	61	4
2012	663	83	580	7	0

Source: European Commission, Annual Reports on Subsidiarity and Proportionality.

⁶ Communication from the Commission to the European Council: A citizens' agenda. Delivering results for Europe, European Commission, COM (2006) 211 final.

Participation in the political dialogue might lack attractiveness for some national parliaments for different reasons. Among others, they might find it difficult to see a clear purpose and any impact in the exercise. The European Commission does not provide national parliaments with an appropriate follow-up explaining how their views are taken into account. For instance, the annual report of the Commission in 2012 gives scant detail of the opinions received in the framework of the political dialogue. As for the reply letters by the Commission, some come late or never. Some chambers also complain that sometimes they are too vague or general and do not address satisfactorily the objections raised by the parliament.⁷

National parliaments have also a direct link with the European Parliament through different instruments of inter-parliamentary cooperation. Joint committee and parliamentary meetings organised by the European Parliament and the parliament of the member state holding the rotating presidency of the Council have gradually given way to Inter-Parliamentary Committee meetings and Presidency meetings. The Inter-parliamentary Committee meetings are organised by a committee of the European Parliament to discuss a specific legislative proposal with the members of the respective select committees at national level. Some 45 such meetings were held during the term of the 7th European Parliament and some have proved an effective tool to engage MPs in discussions on EU legislation with a two-fold objective: to glean their views and expertise, and to improve the implementation at a later stage. The national parliament of the country holding the rotating presidency also hosts a number of chairpersons' meetings of specific committees (Presidency meetings) during the six-month presidency.

The Conference of Speakers gathers together the speakers of the parliaments of the member states and the President of the European Parliament each spring in the country that held the presidency during the second semester of the previous year. Every six months, members of the EU Affairs Committees and the European Parliament also come together in the Conference of Parliamentary Committees for Union Affairs (COSAC) in the country holding the rotating presidency. COSAC may submit contributions for the attention of the EU institutions and aims to promote the exchange of information and best practices between national Parliaments and the European Parliament (Art. 10 TEU, Protocol No. 1).

The parliament of the member state holding the presidency of the Council also hosts the Inter-Parliamentary Conference for the Common Foreign and Security Policy and the Common Security and Defence Policy (created in 2012), which provides a framework for the exchange of information and best practices in this policy area and may issue non-binding conclusions as well. The Lithuanian Presidency has, for the first time, convened the Inter-parliamentary Conference on Economic and Financial Governance of the European Union (16-18 October 2013) envisaged in Art. 13 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. The aim is to engage representatives of the relevant committees of the European Parliament and the national parliaments to discuss budgetary policies and other issues covered by the treaty. The conference could constitute a forum for the national parliaments to develop and express their views on the Annual Growth Strategy and the subsequent country-specific recommendations in the framework of the Eurosemester.

All these inter-parliamentary meetings and conferences can become effective instruments for networking, exchange of information and best practices. However, given the size of the

⁷ Sixteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, Conference of Parliamentary Committees for Union Affairs (COSAC), October 2011.

conferences, participants might find it difficult to raise their voices and the conclusions of the meetings might lack sufficient ambition to have any impact. All this, together with time constraints and other political motivations, might deter some MPs from attending. As in the case of the political dialogue with the Commission, it is essential to find mechanisms to enhance the visibility of their impact and encourage the participation of the representatives from the national parliaments. A higher engagement of the national parliaments in both the political dialogue with the Commission and the inter-parliamentary cooperation with the European Parliament could promote the debate on EU affairs at national level and facilitate parliamentary control of the national governments. In the context of the political dialogue with the Commission, hearings with members of the College in the national parliaments (on the floor or in the relevant committee) to present and debate the Commission's Work Programme every year could also contribute to this objective.

5. Scrutiny of the national governments

Reinforcing the positive dimension of the EWM and enhancing both the political dialogue with the Commission and the inter-parliamentary cooperation with the European Parliament would not make national parliaments genuine decision-makers, but it would provide them with effective tools to improve their capacity to control and influence their governments' actions and policies in the EU. In the end, this is the most straightforward way for national parliaments to have a say in EU affairs and to improve democratic legitimacy both at national and EU level. The situation is not very promising, however, in a number of member states.

The parliamentary control of the government in EU affairs can take place basically in one of two forms. In some member states (e.g. Finland, Sweden and Denmark), the focus of the scrutiny is the government's position in the Council, and the parliament or the relevant body can give a mandate or approve the position of the government before the corresponding minister starts the negotiations in the Council. The role and involvement of the legislative assemblies that fall in this category vary across countries, depending on factors such as the binding or non-binding nature of the mandate, the actual use of the formal procedures, the margin and incentives of MPs to influence their government's position, the scrutiny capacity – also at the early stages of the EU legislative process – and the participation of the standing committees. Other parliaments, on the other hand, focus their scrutiny on EU legislation and documents, collecting additional information from the government and third parties and adopting resolutions (e.g. France, the UK and Germany). The merits of the document-based model also vary across countries depending on the time, scope and quality of the scrutiny, the committees involved and the extent to which the government is bound by the parliamentary resolutions.

Winzen (2012) measured the robustness of parliamentary control in EU affairs in member states in 2010, taking into consideration their capacity to access information on EU affairs, their ability to process it and the enforceability of their resolutions.⁸ As regards access to information, he considered whether parliaments were receiving all legislative proposals, planning and consultation documents, as well as an attached memorandum from the government. To measure their capacity to process this information, he took into account the involvement of the EU affairs committee and the standing committees in the scrutiny as well

⁸ T. Winzen, "National Parliamentary Control of European Union Affairs: A Cross-national and Longitudinal Comparison", *West European Politics*, Vol. 35, No. 3, 2012, pp. 657-672.

as whether the member state had a “Scrutiny Reserve”⁹ in effect. Finally, he considered the extent to which the government was bound by the parliamentary resolutions or mandates. With the exception of Denmark, Finland and Germany, all EU-15 member states ranked below 2, on a scale of 0 to 3. Spain, Greece, Belgium and Luxembourg were at the bottom of the list, ranking below 1. Malta and Cyprus were in a similar situation. Whereas the Central and Eastern European countries generally adopted more advanced systems of parliamentary control in EU affairs, in practise the competences are far from being exercised to their full potential, with perhaps the exception of Estonia and Lithuania.¹⁰

6. Conclusions

The question of EU democratic legitimacy is difficult to address given the special nature of the EU political system. However, intense inter-governmentalism and supranational centralisation make it imperative both to reinforce the European Parliament’s powers of scrutiny and to engage national parliaments further in EU affairs. This can be achieved in the framework of the current treaties through the improvement of existing mechanisms and without the risk of stalling EU decision-making. The revision of the subsidiarity principle and the harmonisation of subsidiarity checks across member states, the reinforcement of the positive dimension of the EWM, a stronger commitment by the Commission to provide a proper follow-up and to engage in a real political dialogue with the national parliaments including the annual work programme and improved inter-parliamentary cooperation could all contribute to better parliamentary scrutiny of the governments at national level. Such actions would also bring EU decisions and politics to the core of the national debates, and thus closer to citizens. Last but not least, a more active engagement of national parliaments would also have positive effects on EU policy-making and in the implementation of EU legislation in the member states.

⁹ Parliamentary scrutiny reserves have become a popular parliamentary instrument for the scrutiny of EU documents over the last two decades. While the exact provisions for them vary from one member state to another and according to their parliaments’ overall scrutiny system, parliamentary reserves generally mean that government representatives do not, or cannot, officially agree to a proposal in the Council (or COREPER or the working groups) while the parliamentary scrutiny process is going on.

¹⁰ J. Karlas, “Parliamentary Control of EU Affairs in Central and Eastern Europe: Explaining the Variation”, *Journal of European Public Policy*, Vol. 18, No. 2, 2011, pp. 258-273 and Katrin Auel, Olivier Rozenberg and Angela Tacea, “Fighting Back? And if Yes, How? Measuring Parliamentary Strength and Activity in EU Affairs”, in Claudia Heffler, Christine Neuhold, Olivier Rozenberg, Julie Smith and Wolfgang Wessels (eds), *Palgrave Handbook on National Parliaments and the European Union*, Basingstoke/Hampshire: Palgrave Macmillan, forthcoming 2014.



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