

The "Orange Card": A fitting Response to National Parliaments' Marginalisation in EU Decision-Making?

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Introduction: National Parliaments and the democratic challenge facing the EU

The idea of European integration has made remarkable progress over the past fifty years. With every reform of the Treaties, the competences of the European Community and, later, the European Union have been gradually and steadily increased. More and more decisions affecting the everyday life of European citizens are today taken by European Institutions. By the same token, the elected parliaments of Member States have lost a considerable part of their legislative and political power to the European level. It is assumed that up to 70 % of the decisions taken in National Parliaments today are in one way or another pre-determined by European decisions.

In its "Laeken Declaration on the Future of the European Union" of December 2001, the European Council acknowledged "the democratic challenge facing Europe".¹ It demanded that the European Institutions must be brought closer to its citizens and called for "more democracy, transparency and efficiency in the European Union". Recalling that "the national parliaments also contribute towards the legitimacy of the European project", the Heads of State of Government mandated the Convention on the Future of Europe to prepare a proposal for the reform of the Treaties. One of the issues to be discussed by the Convention was the future role of National Parliaments: "Should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European Parliament has no competence? Should they focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?"

The Convention answered these questions with the proposal of the so-called early warning mechanism by which National Parliaments were to monitor the compliance with the principle of subsidiarity. To ensure this, two Protocols were annexed to the draft Constitutional Treaty as signed in October 2004: the Protocol on the Role of National Parliaments in the European Union (hereinafter: 2004 Protocol on National Parliaments) and the Protocol on the Application of the Principles of Subsidiarity and Proportionality (hereinafter: 2004 Protocol on Subsidiarity).²

Even though the Constitutional Treaty will not come into force as it was signed in October 2004, the idea of an early warning system involving National Parliaments managed to survive. After the "reflection period" about the fate of the doomed Treaty, the European Council in June 2007 decided to convene yet another Intergovernmental Conference (IGC) in the second half of the same year.³ Its task is to produce a "Reform Treaty" which is to enter into force before the European Parliament elections in 2009. The negotiating mandate is quite detailed and includes a series of provisions with regard to National Parliaments.⁴ The Intergovernmental Conference has officially been launched on 23 July 2007. A first draft of the Reform Treaty has been made available on the internet.⁵ According to these documents, the early warning mechanism of the draft Constitutional Treaty ("yellow card") will be further

¹ http://europa.eu/european_council/conclusions/index_en.htm

² Treaty Establishing a Constitution for Europe, OJ C 310 of 16 December 2004. See also: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML>.

³ http://europa.eu/european_council/conclusions/index_en.htm.

⁴ The mandate is attached to the Presidency Conclusions of the European Council of 23 June 2007; http://europa.eu/european_council/conclusions/index_en.htm.

⁵ A French language version is available at:

http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1297&lang=en

developed to a reinforced subsidiarity control mechanism ("orange card") and a separate Article on National Parliaments will be introduced in the Treaty.

The aim of this paper is to assess possible implications of these new provisions for National Parliaments. Will they result in a stronger involvement of National Parliaments in the European law making process - even a blocking power - or are they a manoeuvre to distract them from scrutinizing their governments and the European legislator - like a bone thrown to a dog?

The assessment is mainly based on the experience gathered in subsidiarity and proportionality tests conducted by National Parliaments within the Framework of COSAC and the feedback given by National Parliaments in response to questionnaires of the COSAC-Secretariat. It also draws on the correspondence between National Parliaments and the European Commission in the framework of the new "dialogue" between National Parliaments and the European Commission that was established in September 2006.

1. The "early warning" system as foreseen by the draft Constitutional Treaty

The term "early warning" usually refers to the system established by the 2004 Protocol on Subsidiarity as attached to the draft Constitutional Treaty. Before analysing possible implications of the June 2007 European Council Mandate and the first draft of the Reform Treaty, it is useful to recall the main traits of the system.

According to the 2004 Protocol on Subsidiarity, National Parliaments would for the first time be directly involved in the legislative process of the European Union. Draft legislative acts would be forwarded directly to National Parliaments. They would have the opportunity to review draft EU legislation and, within a time frame of six weeks, send a reasoned opinion if they consider that the draft in question does not comply with the principle of subsidiarity. EU Institutions would be obliged to "take account" of the reasoned opinions. If a significant number of parliaments raise objections with regard to the principle of subsidiarity, the draft must be reviewed. The regular quorum is one third of the Parliaments and one quarter in the area of Justice and Home affairs. Each National Parliament has two votes which can be split in the case of a bicameral parliamentary system.

However, the result of this review is open. The institution which has produced the draft, in most cases the Commission, "may decide to maintain, amend or withdraw the draft". Because of its "warning" character, this *ex ante* subsidiarity control is often referred to as the yellow card system.

In addition, the 2004 Protocol on Subsidiarity provides for an *ex post* control by the European Court of Justice: the Court would have jurisdiction to control possible infringements of the principle of subsidiarity not only in actions brought by Member States - this possibility already exists - but also notified by Member States "on behalf of their national Parliament or a chamber of it".

The limitations of the yellow card are obvious. Firstly, although the Protocol on the application of the principles of subsidiarity and proportionality explicitly refers to both principles, National Parliaments may only issue reasoned opinions with regard to the subsidiarity principle, and not concerning proportionality. Secondly, even if a significant number of parliaments raise objections, there would be no legal obligation on EU Institutions to withdraw or amend the proposal.

The term "early warning" that was already introduced by the European Convention⁶ is somewhat of a misnomer. The warning is not "early" if National Parliaments enter the game only after the Commission has produced its draft legislation. In fact, lobby groups acting in Brussels concentrate their efforts to exert influence on the drafting process within the Commission.⁷ It is not really a "warning" if National Parliaments are flooded with drafts for European legislative acts and have to select the politically sensitive proposals themselves. It could rather be referred to as an "emergency brake".

Another problem is that the National Parliaments are put into a rather negative position: they might gain the power to block European legislation or at least step on the brake, but there is no possibility to put own initiatives forward. Some National Parliaments may wish to play a more constructive role in European Integration, given the fact that today a large share of the draft legislation is produced by the Commission on request from one or many Member State governments.

2. The current legal situation and the new "dialogue" between National Parliaments and the Commission

To date, there is no legal basis for a direct participation of National Parliaments in the EU decision making process. However, the "Protocol on the role of the National Parliaments in the European Union" as annexed to the Treaty of Amsterdam (hereinafter: the 1997 Protocol on National Parliaments) stipulates a number of obligations of EU Institutions and national governments vis-à-vis the National Parliaments: 1. All Commission consultation documents (green and white papers, communications) must be forwarded to National Parliaments. 2. Draft legislation shall be made available in good time so that the Government of each Member State can forward them to their parliament. 3. In order to give parliaments a minimum of deliberation time, a period of six weeks shall elapse after a proposal for legislation has been published in all languages and before it is placed on the Council agenda for adoption.

In addition, the Conference of European Affairs Committees (COSAC) has the right to make any contribution for the attention of EU Institutions, in particular on the basis of draft legal texts which have been forwarded to it, especially legislative proposals or initiatives which might have a direct impact on the rights and freedoms of individuals. COSAC may also make any contribution in relation to the application of the principle of subsidiarity, the area of freedom, security and justice as well as questions regarding fundamental rights.

During the so-called reflection period, the Commission announced in its Communication "A Citizens' Agenda - Delivering Results for Europe" of 10 May 2006 that it would directly transmit all new proposals as well as consultation papers to National Parliaments, inviting them "to react so as to improve the process of policy formulation".⁸ The European Council in June 2006 welcomed this announcement and asked the Commission "to duly consider comments by National Parliaments - in

⁶ The European Convention, Conclusions of Working Group I on the Principle of Subsidiarity of 23 September 2002, CONV 286/02.

⁷ Of course there would be a number of practical and constitutional difficulties for parliaments wishing to act like lobby groups, not the least of them being that there would have to be a formal mandate issued by the majority in order to exert influence in a specific direction.

⁸ Commission Communication to the European Council of 10 May 2006, COM (2006) 211 final.

particular with regard to the subsidiarity and proportionality principles."⁹ The direct transmission of documents by the Commission to National Parliaments was launched on 1 September 2006.

The Commission repeatedly expressed its commitment to take into account the views submitted by National Parliaments.¹⁰ However, there is of course no legal obligation for the Commission, or any other of the EU Institutions, to respect statements of National Parliaments even if a significant number should express concern about similar issues. Commission officials however underline that the newly established dialogue is useful in order to increase common understanding and point to the administrative system that has been established with the Commission services in order to deal with the statements in a politically adequate way.

Through these channels, National Parliaments can participate to some degree in the European decision making process, but for the time being, they do not have institutional rights at the EU level. Nevertheless, a number of Parliaments have stepped up their efforts for parliamentary scrutiny of Commission proposals in response to the Commission's initiative. The French Senate, for example, has begun to scrutinize all Commission proposals sent to National Parliaments and created a specific procedure with regard to the principles of subsidiarity and proportionality. The UK House of Lords has prepared a number of reports on green papers as well as draft legislation and engaged in an active dialogue with the Commission.

3. Experience gained with early warning in the framework of COSAC

With a view to the draft Constitutional Treaty, COSAC decided at its meeting in The Hague in November 2004 to conduct a "pilot project" in order to assess the feasibility of the early warning mechanism. COSAC chose the Commission's 3rd Railway Package as the subject for this initiative. The pilot project was launched on 1 March 2005 and completed by National Parliaments on 12 April 2005.

One of the results was that, even though a number of parliaments criticised one or more of the draft directives in the package with regard to subsidiarity, no single proposal attracted so many critical comments that the minimum number of National Parliaments necessary to oblige the Commission to review its draft as foreseen in the 2004 Protocol on Subsidiarity would have been reached. Another lesson learnt was that most parliaments had difficulties in producing a reasoned opinion within the six week deadline.¹¹

After the two failed referenda on the Constitutional Treaty in France and the Netherlands, COSAC delegations felt that the momentum for a subsidiarity and proportionality check of National Parliaments had to be upheld. The COSAC conference in London agreed in October 2005 that those National Parliaments which wished to participate would conduct a subsidiarity and proportionality check on a selection of two EU legislative proposals. The aim for the National Parliaments was to develop their existing scrutiny role as recognised in the 1997 Protocol on National Parliaments and to stress their role in relation to subsidiarity vis-à-vis the Commission.

⁹ http://europa.eu/european_council/conclusions/index_en.htm

¹⁰ Cf. Rapport annuel 2006 sur les relations avec les parlements nationaux, SEC(2006) 898.

¹¹ See the report on the pilot project at: <http://www.cosac.eu/en/info/earlywarning/pilotproject/>

Based on suggestions from National Parliaments, the COSAC chairpersons meeting in February 2006 in Vienna chose to carry out checks on the Proposal for a Regulation on the applicable law and jurisdiction in divorce matters¹² and the Proposal for the full accomplishment of the Internal Market for postal services.¹³ With regard the 1997 Protocol on National Parliaments, the examination was to be carried out within a period of six weeks.

The scope of these two checks went slightly beyond what is foreseen in the early warning mechanism of the draft Constitutional Treaty in that parliaments were asked to scrutinize proposals also with regard to the proportionality principle.¹⁴ After finding that many parliaments also made remarks with regard to the justification of the legal basis of the two proposals, these statements were also included in the summary of the results.¹⁵ The lessons learnt can be outlined as follows:

a) Subsidiarity and proportionality check on the matrimonial matters regulation

In the first subsidiarity and proportionality check of the proposal for a regulation on matrimonial matters, 27 parliamentary chambers from 21 Member States participated. Only 11 chambers from nine Member States concluded the check within six weeks. Four parliaments or parliamentary chambers indicated that they found the Commission proposal in breach of the subsidiarity principle and seven parliamentary chambers found that the proposal breached the proportionality principle. Quite a number was dissatisfied with the justification the Commission had given with regard to both principles. Four parliaments or parliamentary chambers raised doubts with regard to the justification of the legal basis the Commission had chosen, recalling that Article 65 of the EC-Treaty applies only in so far as it is necessary for the proper functioning of the internal market.

One of the main points was that the Commission had failed to show by relevant statistical data that an actual problem for many European citizens warranted an EU-wide solution. It is difficult to establish whether this shortcoming constitutes a breach of the subsidiarity principle, the proportionality principle or an insufficient justification for applying the common market competence. In its report on the results of the check, the COSAC Secretariat concluded that "the results [...] suggest that the scope for subsidiarity complaints can be rather limited even where National Parliaments may have genuine concerns with regard to proposed legislation. In order to make full use of the parliamentary scrutiny with regard to the principles of subsidiarity and proportionality, parliaments should develop a common understanding of the said principles."¹⁶

b) Subsidiarity and proportionality check on the directive on postal services

¹² Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM (2006) 399 final of 17 July 2006.

¹³ Proposal for a Directive of the European Parliament and the Council amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services, COM (2006) 594 of 18 October 2006.

¹⁴ Cf. aide-memoire of the COSAC Secretariat for the check "matrimonial matters " at: <http://www.cosac.eu/en/info/earlywarning/doc/divorce>

¹⁵ Cf. the reports of the COSAC-Secretariat on the result of both checks at: <http://www.cosac.eu/en/info/earlywarning/>

¹⁶ See <http://www.cosac.eu/en/info/earlywarning/doc/>

In the second subsidiarity and proportionality check on the draft directive on postal services, 27 parliaments from 21 Member States took part. Ten chambers from nine Member States concluded their examination within the agreed deadline. One chamber found the proposal in breach of the subsidiarity principle, and five found the justification with regard to this principle inadequate. Seven chambers found a breach of the proportionality principle or expressed reservations in this regard and six expressed some doubts about the justification with regard to proportionality. The Luxemburg Chamber of Deputies questioned not only the effectiveness of the proposed abolition of "reserved areas" for postal services, but also predicted "great difficulties" in the case of a complete liberalisation of the postal market. This argument seems difficult to associate with the subsidiarity principle.

Under the heading of the proportionality principle, many parliaments voiced concern that the abolition of the reserved areas for existing monopolies could weaken postal operators providing universal service. The financing of the universal service through other means than a reserved area was also called into question. This is not the place to discuss the validity of these arguments, but it is hard to see that they fit under the proportionality principle.

In its report, the COSAC Secretariat concluded that National Parliaments "seem to understand the possible scope for reservations with regard to proportionality as wider than that of the subsidiarity principle. Many of the doubts expressed by National Parliaments centred on the political core of the proposed directive, calling one of its goals [...] into question. This would appear to stand in some contrast with the rather narrow definition and guidelines stipulated in the Protocol on the application of the principles of subsidiarity and proportionality attached to the Amsterdam Treaty."¹⁷

c) Preliminary conclusion: limited scope of the subsidiarity principle

With a view to the Constitutional Treaty, a number of National Parliaments have already set up special systems in order to check draft legislation with regard to the principles of subsidiarity and proportionality. One example is the Joint Committee on Subsidiarity of both chambers of the Dutch Parliament that was established in 2005 in order to implement the early warning mechanism of the draft Constitutional Treaty. The German Bundestag has amended its legislation on the cooperation with the Federal Government in European Union affairs and concluded an agreement with the government setting out details about *inter alia* the regular and timely information of parliament.¹⁸ The German Bundesrat has recently introduced a written survey procedure in the Chamber of European Affairs, a special body which has the power to take decisions in EU matters instead of the plenary.

However, the three subsidiarity and proportionality checks within the COSAC framework have shown that only a limited number of National Parliaments are currently in a position to conduct a scrutiny procedure with regard to subsidiarity and proportionality within the six week time frame before a legislative proposal is placed on a Council agenda for decision.

¹⁷ See <http://www.cosac.eu/en/info/earlywarning/postal/>

¹⁸ Cf. "Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union vom 12. März 1993 (BGBl. I S. 311), geändert durch Artikel 2 Abs. 1 des Gesetzes vom 17. November 2005 (BGBl. I S. 3178)" and "Vereinbarung zwischen dem Deutschen Bundestag und der Bundesregierung über die Zusammenarbeit in Angelegenheiten der Europäischen Union", http://www.bundestag.de/aktuell/archiv/2006/eu_angelegen/index.html

Arguably, the scope for blocking a legislative draft on grounds of subsidiarity is quite limited. The proposals for the checks were chosen by National Parliaments from the list attached to the Commission's Legislative and Work Programme for 2006. Even though Parliaments presumably chose subjects that would appear to encroach on their national legislative prerogatives (family law) or politically and economically sensitive areas (postal services), the examination of the actual proposal led only to a small number of subsidiarity related statements. Had the 2004 Protocol on Subsidiarity already been in force, the number of statements would not have reached the necessary quorum. Even if the proposal on divorce law could be considered to fall under the lower threshold for Justice and Home Affairs, the number of National Parliaments with subsidiarity concerns was far from reaching a quarter. The same is true for the scrutiny of the draft postal services directive which attracted only one subsidiarity related concern.

It also became clear that parliaments seem to interpret the principles of subsidiarity and proportionality in very different ways. Naturally, the National Parliaments' assessment whether new European legislation would bring added value is based on the historical, political and social experience at home. It is however worth discussing whether the national perspective should be predominant in determining whether there should be legislation on the European level. At the very least, this would seem to seriously limit their capacity to act jointly in order to have EU legislative proposals reviewed by the Commission.

To date, there is no definition of the principle itself beyond Article 5 of the EC-Treaty. The subsidiarity principle has been invoked before the European Court of Justice a number of times, but the Court has never further explained the principle nor found a violation of the principle by legislative actions of the Community. The 1997 Protocol on Subsidiarity is a set of guidelines rather than a definition. It is, by its nature and content, directed towards the EU Institutions. The Constitutional Treaty would not have improved this situation. Despite setting out the detailed procedure for the early warning mechanism, the draft Constitutional Treaty does not include a further explanation of the principles of subsidiarity and proportionality. The guidelines established in the 1997 Protocol on Subsidiarity were not included in the draft Constitutional Treaty. It did however enlarge the notion of subsidiarity in so far as the regional and local level must be taken into consideration.¹⁹ The draft Reform Treaty uses the new wording of the Article on subsidiarity of the Constitutional Treaty and places it in the Treaty on European Union.

Regardless of the exact legal definition of the subsidiarity principle, it seems somewhat unlikely that political bodies such as National Parliaments would accept a limitation of their scrutiny to such a narrow, arguably legalistic concept. In the political debate, the word subsidiarity is often used in a very general manner in an attempt to limit the legislative ambitions of the Commission. In the constitutional debate, it is also used to argue for the re-nationalization of Community competences to the national level altogether. It is very seldom pointed out that the subsidiarity principle can also constitute an argument for taking action at the European level.

¹⁹ See Art. I-11 Nr. 3 of the draft Constitutional Treaty: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level [...]".

4. Experience gained with the direct transmission of Commission documents

The Commission's initiative for a dialogue with National Parliaments is broader in scope than the early warning mechanism of the draft Constitutional Treaty: it is not limited to questions of subsidiarity and proportionality and does not only refer to legislative acts. Also, it does not set up any deadline for the scrutiny of documents. On the other hand, the Commission has no obligation to reconsider its proposals on the grounds of the statements of National Parliaments. It has however set up an administrative procedure within its services to ensure that National Parliaments receive a written answer to their statements and that remarks raising politically sensitive issues are brought to the attention of the College of Commissioners.

a) A welcome tool for National Parliaments

A significant number of parliaments have made use of the opportunity to comment on the Commission's proposals. By April 2007, an evaluation conducted by the COSAC Secretariat²⁰ established that approximately 85 opinions of National Parliaments were sent to the Commission since the establishment of the new mechanism. About one third of these opinions referred to the two legislative proposals subject to the COSAC subsidiarity and proportionality checks (see above). The French Senate, the German Bundesrat, the British House of Lords, the Danish Folketinget and the Dutch Eerste Kamer took the opportunity to comment on a number of other proposals and documents forwarded by the Commission and continue to do so. By the end of June 2007, the Commission had received 100 statements from National Parliaments.

By April 2007, there were a number of proposals that triggered comments from more than one parliament: the Green Paper on modernising labour law²¹, the Green Paper on a Europe free from tobacco smoke,²² the draft Directive establishing a framework for the protection of soil,²³ the draft Directive on the safety of road infrastructures²⁴ and the draft regulation establishing the European Institute of Technology.²⁵ Almost all National Parliaments who took up the dialogue with the Commission used the opportunity to raise concerns regarding the substance of the scrutinized proposals - they did not limit their comments to subsidiarity and proportionality. Furthermore, documents other than legislative proposals, such as consultation documents or reports from the Commission, have also been commented upon. On the whole, parliaments took advantage of the broad scope of the new mechanism by making clear that subsidiarity is not their only concern and by not limiting themselves to the scrutiny of legislative proposals only.

The Commission, in turn, has made an effort to provide parliaments with detailed and individual answers to their opinions. In some cases it also added further explanations in order to better justify its initial proposal. Nevertheless, no case has yet been

²⁰ The evaluation is part of the 7th biannual report: <http://www.cosac.eu/en/documents/biannual/>.

²¹ Green Paper - Modernising labour law to meet the challenges of the 21st century, COM (2006) 708.

²² Green Paper - Towards a Europe free from tobacco smoke: policy options at EU level, COM (2007) 27, see http://ec.europa.eu/health/ph_determinants/life_style/Tobacco/Documents/gp_smoke_en.pdf

²³ Proposal for a Directive of the European Parliament and the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC, COM (2006) 232, http://ec.europa.eu/environment/soil/pdf/com_2006_0232_en.pdf

²⁴ Proposal for a Directive of the European Parliament and of the Council on road infrastructure safety management, COM (2006) 569, http://ec.europa.eu/transport/roadsafety_library/infrastructure/directive_proposal_en.pdf

²⁵ Proposal for a Regulation of the European Parliament and the Council establishing the European Institute of Technology, COM (2006) 604.

reported in which the Commission has amended one of its original proposals. It is therefore still unclear which way the new mechanism for a dialogue between National Parliaments and the Commission has actually contributed to "improve the process of policy formulation". To make the new mechanism a real alternative to the early warning mechanism, the Commission would have to be obliged to reconsider its proposals where parliaments find a breach of subsidiarity, proportionality or have serious concerns regarding the substance of a proposal.

b) Divergence in the application of subsidiarity and proportionality

The statements of National Parliaments in the framework of the new dialogue with the Commission confirm the analysis already suggested by the COSAC subsidiarity and proportionality checks: National Parliaments do not always have a common understanding of the principles of subsidiarity and proportionality - at least the two principles can be easily confused. Some statements submitted by the German Bundesrat and the French Senate, who have in many cases commented on the same legislative proposals, provide good examples.

Although the German Bundesrat and the French Senate both found the draft Directive on road safety to be in breach of subsidiarity, they came to this conclusion on different grounds. The Bundesrat pointed out that the measures proposed in the directive had already been implemented in Germany in the form of safety programmes and that an action on EU level was therefore unnecessary. The French Senate underlined that an exchange of best practice between Member States would be sufficient for guaranteeing road infrastructure safety and make action at the EU-level superfluous. The opinion of the French Senate could be regarded as an argument referring to proportionality rather than subsidiarity.

In its comments to the Green Paper on a Europe free from tobacco smoke, the French Senate did not state which of its observations referred to subsidiarity and which to proportionality. It seems to consider that some of the proposed measures would breach both principles by pointing out that many Member States had already adopted legislation in this field. The Bundesrat stressed that the Union had no legal competence for the protection of non-smokers if not in the workplace. It furthermore stated that the Commission did not abide by the principle of subsidiarity as the strategy's aims could be sufficiently realized at Member State level.

A third example is the proposal for a Directive on the protection of soil. The Bundesrat found a breach of subsidiarity on the grounds that the objectives of the directive could be more effectively reached at Member State level due to the regional diversity of soil. It went on to state that the cross-border effects of soil are negligible due to its immobility. The French Senate, on the other hand, is of the opinion that an intervention on EU level is justifiable as soil is connected with other environmental media like water which fall within the competence of the EU. The Senate furthermore referred to the functioning of the internal market, the cross-border dimension of soil as well as food safety aspects to underpin its assessment.

The latest Subsidiarity Report of the German government²⁶ seems to suggest that the scope of the subsidiarity principle is quite limited in general. In 2004, the number of proposals contestable on subsidiarity grounds was rather small. The Federal

²⁶ Subsidiaritätsbericht der Bundesregierung 2004, Bundesrat Drucksache 52/06;
http://www.bundesrat.de/cln_051/SharedDocs/Drucksachen/2006/0001-0100/52-06,templateId=raw,property=publicationFile.pdf/52-06.pdf.

Government raised subsidiarity concerns with regard to only four of 73 legislative proposals; two of four consultation documents gave rise to concerns. Even though the Bundesrat found 12 legislative proposals and 11 non-legislative Commission documents of circa 160 documents in breach of the subsidiarity principle in the same period, subsidiarity does not seem to be the prime issue.

c) Preliminary conclusion: scope for comprehensive parliamentary scrutiny

National Parliaments have used the new dialogue with the Commission to show that subsidiarity and proportionality were important issues, but certainly not their sole concern. Many issues raised are arguably better suited for a comprehensive scrutiny procedure. Therefore, the dialogue with the Commission could be regarded to be equally as important as the early warning mechanism. In order to make full use of this instrument, National Parliaments must coordinate their action vis-à-vis Commission, Council and European Parliament. However, parliamentary scrutiny of proposed EU measures can also take place in the relationship between National Parliament and government, where parliaments aim to control and influence the actions of government in Council.

6. Possible implications of the Reform Treaty for National Parliaments

According to the negotiating mandate for the IGC which is attached to the Conclusions of the European Council and the first draft of the Reform Treaty of 23 July 2007, the Reform Treaty will integrate much of the substance of the draft Constitutional Treaty into the existing Treaty on European Union and the Treaty establishing the European Community. The Treaty on European Union will keep its present name whereas the EC Treaty will be renamed in "Treaty on the Functioning of the Union". Under the heading "Provisions on democratic principles", the European Council decided that the role of National Parliaments would be "further enhanced compared to the provisions agreed in the 2004 IGC". This refers mainly to amendments to the early warning system as foreseen in the 2004 Protocol on Subsidiarity, but also to a new Article on National Parliaments which will be included in the EU Treaty. According to the IGC mandate and the first draft, the Reform Treaty will include the Protocol on the role of national parliaments and the Protocol on subsidiarity and proportionality as attached to the 2004 draft Constitutional Treaty which will be further developed.

a) Monitoring subsidiarity

A first modification is that the period given to National Parliaments for the examination of draft legislative acts and the preparation of a reasoned opinion on subsidiarity will be extended from six to eight weeks.

A second modification is the introduction of a "reinforced control mechanism of subsidiarity" which will supplement the yellow card procedure foreseen in the 2004 Protocol on Subsidiarity. The new mechanism provides for a two-step approach to subsidiarity control. In the first step, National Parliaments come into play in a similar way as in the yellow card mechanism. If parliaments raise concerns with regard to subsidiarity, the Commission can be obliged to re-examine its proposal. However, the threshold is higher than for the yellow card - a simple majority. If the Commission, after having reviewed its draft, decides to maintain it, it has to give a reasoned opinion stating why it considers that the draft complies with the principle of subsidiarity.

In a further step, "the EU legislator", namely Council and Parliament, comes into play. If the proposal is maintained despite the subsidiarity concerns of a majority of National Parliaments, a "specific procedure" is triggered. The legislator shall, "before concluding first reading under the ordinary legislative procedure" consider the compatibility of the legislative proposal with the principle of subsidiarity, taking into account the reasons expressed by the majority of National Parliaments as well as the reasoned opinion of the European Commission. This step can lead to the definitive dismissal of a Commission proposal. If 55% of the members of the Council or a majority of the votes cast in the European Parliament find a breach of the principle of subsidiarity, the proposal is rejected.

The new mechanism will provide National Parliaments with the opportunity to rule out proposed EU legislation on subsidiarity grounds. However, the quorum of a majority of National Parliaments is relatively high and the final decision is left to the EU legislator. The reinforced subsidiarity control mechanism is therefore referred to as the "orange card" instead of "red card" which would imply a direct right of veto.

b) New Article on the role of National Parliaments

The IGC will include a new Article on the role of National Parliaments into the Treaty on European Union. The proposed wording is reproduced in Annex I to the negotiating mandate and included in the first draft of the Reform Treaty.

The Article describes the role of National Parliaments in general terms by making reference to provisions and Protocols that will be contained elsewhere in the Reform Treaty. The main novelty of the Article itself is that it puts National Parliaments visibly into the main body the EU Treaty.

The new provision refers to the transmission of information and draft European legislative acts by EU institutions to National Parliaments, the participation in the scrutiny of subsidiarity as well as cooperation between National Parliaments and with the European Parliament. Further stipulations recall specific articles on National Parliaments which were already contained in the draft Constitutional Treaty and will be part of the Reform Treaty. National Parliaments will take part in the evaluation mechanisms of Member States regarding the implementation of the Union policies in the area of freedom, security and justice.²⁷ They will also be involved in the monitoring of Europol and Eurojust.²⁸

The Article on National Parliaments also points to the fact that the Reform Treaty will preserve the Convention method. National Parliaments will take part in the revision procedures of the Treaties as laid down in the draft Constitutional Treaty.²⁹ The so-called ordinary revision procedure provides for the setting up of a Convention in which representatives from National Parliaments take part. Even if the Council decides that the limited extent of proposed amendments does not warrant a Convention, National Parliaments would in any case be notified of the proposed amendments.

The two simplified revision procedures of the draft Constitutional Treaty will also be included in the Reform Treaty.³⁰ According to the first simplified procedure, the European Council can move from unanimity to qualified majority voting in certain

²⁷ Art. III-260 of the draft Constitutional Treaty.

²⁸ Art. III-276 and III-273 of the draft Constitutional Treaty.

²⁹ Art. IV-443 and IV-444 of the draft Constitutional Treaty.

³⁰ See chapter "Final Provisions" of the IGC mandate.

subject areas or decide to apply the co-decision procedure where the Treaty provides for special legislative procedures (passerelle clause).³¹ Any initiative in this regard will be notified to National Parliaments. It will be blocked if any one National Parliament makes known its opposition within six months, thus conferring upon National Parliaments a direct right to veto.

The new Article furthermore stipulates that National Parliaments will be notified of any application for accession to the European Union according to the EU Treaty in force. This was already foreseen in the draft Constitutional Treaty.³²

c) Assessment of the future role of National Parliaments in the European Union

The IGC mandate states that the role of National Parliaments will be "further enhanced compared to the provisions agreed in the 2004 IGC". The extension of the deadline for National Parliaments to scrutinize legislative proposals constitutes a clear improvement compared to the current situation and the draft Constitutional Treaty.

The same can be said for the introduction of the early warning mechanism and the additional tool of a reinforced subsidiarity control mechanism. However, the new possibility to effectively block legislative proposals on subsidiarity grounds is partly offset by the high quorum necessary to kick off the procedure and the fact that the final decision is left for the EU legislator.

The narrow scope of the yellow card warning mechanism as foreseen in the draft Constitutional Treaty will be maintained and will also apply to the orange card mechanism. Parliaments will only be able to raise concerns with regard to subsidiarity but not regarding proportionality or the substance of a given proposal. It is doubtful whether concerns regarding the legal base of a proposal would fall within the scope of the mechanism.

The coordination of National Parliaments in order to assure the necessary quora, especially the majority needed to produce the orange card, constitutes a formidable challenge and will require the stepping up of interparliamentary cooperation. The exchange of information between National Parliaments and efforts to develop a common understanding of subsidiarity will need to be intensified. Interparliamentary cooperation might become more political as only political families might be able to mobilize the necessary majority of National Parliament votes.

The formal involvement of the EU legislator in the subsidiarity control mechanism constitutes a new element; its practical implications are difficult to assess. It is questionable whether Council and European Parliament will necessarily share National Parliaments' understanding of subsidiarity. Concerns about giving National Parliaments too much influence and informally establishing a second parliamentary chamber on EU level might play a role in this context.

A point that should be clarified during the IGC is the reference in the mandate and the first draft to the "ordinary legislative procedure" in the second step of the orange card. This could be construed to limit the subsidiarity control mechanism to proposals falling under the co-decision procedure which would considerably narrow the scope and effectiveness of the new mechanism and was probably not intended. National Parliaments should be able to make use of the new procedure with regard to any legislative proposal, regardless of the procedure applicable on the EU level.

³¹ Art. IV-444 of the draft Constitutional Treaty.

³² Article I-58 of the draft Constitutional Treaty.

The same wording could also be interpreted to extend the powers of Council and European Parliament. If the mechanism applies to all proposals regardless of the legislative procedure applicable, the European Parliament would gain participation rights where it currently has limited or no legislative competencies, like in the field of the Common Agricultural Policy. In addition, it would be able to reject a proposal on subsidiarity grounds independently from the Council. In turn, it would be possible for the Council to reject a Commission proposal by a 55% majority instead of unanimity as is currently the case.³³ It should also be noted in this context that the quorum for the Council to reject a proposal on subsidiarity grounds refers to its members and not to the weighted votes used for qualified majority voting.

Another point for clarification is whether the specific procedure would also be triggered if the Commission amends its proposal following subsidiarity concerns by a majority of National Parliaments, but decides to uphold some problematic parts of it. The wording of the mandate and of the first draft would seem to suggest that in this case, the second phase of the reinforced control mechanism would not be triggered.

In addition, the IGC might wish to redraft the wording according to which "National parliaments shall contribute actively to the good functioning of the Union..." This proposed wording would appear to impose a duty on democratically elected National Parliaments by the European Union, and it may be construed to restrict their freedom of action in EU matters in a way which is unprecedented, and arguably undesirable.

Parliaments will have to closely follow negotiations in the IGC in order to be able to influence their respective government's position in a way that will facilitate the necessary clarifications. It is therefore no surprise that the Lisbon meeting of the Chairpersons of the EU Committees of National Parliaments in July 2007 formulated a request to the Council Presidency to invite National Parliament Observers, namely the Chairpersons of the EU Committees of the Parliaments of Portugal, Germany and Slovenia, to the Intergovernmental Conference.³⁴

Conclusion

The mandate given by the European Council in June 2007 for the IGC must be assessed against the backdrop of the 2001 Laeken Declaration. Will the Reform Treaty answer the questions raised at the beginning of the project? Will the role of National Parliaments be clarified in a satisfactory manner?

The XXXVII COSAC meeting of May 2007 in Berlin demanded that the future role of National Parliaments "... must be at least equal in strength to that foreseen in the Constitutional Treaty. The Protocol on the role of National Parliaments in the European Union and the Protocol on the application of the principles of subsidiarity and proportionality as annexed to the Constitutional Treaty must be maintained and better and more effectively implemented, as must be the new system by which the Commission transmits all proposals directly to National Parliaments [...]." ³⁵

³³ arg. 250 EC-Treaty.

³⁴ Letter from the Speaker of Assembleia da República to the Council President concerning the involvement of National Parliaments in the IGC,
<http://www.cosac.eu/en/meetings/Lisbon2007/chairpersons/>.

³⁵ Contribution and Conclusions of the XXXVII COSAC,
<http://www.cosac.eu/en/meetings/Berlin2007/plenary/>

If the Reform Treaty finally comes into force, there is no doubt that it will improve the participation of National Parliaments in the European decision making process in a significant way. Compared to the current legal situation, the early warning mechanism and the reinforced subsidiarity control mechanism, despite its high procedural thresholds, constitute major steps in this direction. Another improvement is the right for National Parliaments to request through their governments an *ex post* subsidiarity control by the European Court of Justice. The involvement of National Parliaments in the treaty revision process, the accession procedure and in Justice and Home affairs are equally important in this sense.

However, the new orange card mechanism will be limited to issues of subsidiarity. The question of proportionality and the choice of legal base which have proven to be equally, if not more important, than subsidiarity will largely remain outside the scope of National Parliaments scrutiny even though they are also linked with the division of competence between the Union and its Member States.

It should be recalled that not all the options mentioned in the Laeken Declaration were upheld: there will not be a new institution alongside Council and the European Parliament. There is no specific role for National Parliaments where the European Parliament has no competences. The idea of giving National Parliaments a right to initiate legislation on the EU level has not made its way into the draft Reform Treaty. The wish of some National Parliaments to enshrine the direct dialogue between National Parliaments and the Commission into the Treaties was rejected.

One could say that the Reform Treaty will go only half the way. National Parliaments will remain limited to the role of a veto player in subsidiarity issues and the use of the passerelle rather than a constructive force in European integration. On the other hand, their role will be enhanced while preserving the institutional balance in the EU. The possibility for National Parliaments to kick off a procedure which can eventually lead to the dismissal of a Commission legislative proposal is compensated not only by a higher quorum but also by referring the final decision back to the EU legislator. The Reform Treaty will certainly not constitute National Parliaments as a second parliamentary chamber or third legislative chamber on the EU level. Even in subsidiarity issues, the Community method will prevail.

National Parliaments should therefore not concentrate their limited resources to subsidiarity only and risk being distracted from their original, constitutional role in controlling their governments. Stepping up parliamentary scrutiny in EU affairs on the national level, like many parliaments have recently done, might offer better chances to exert influence on Council decisions than subsidiarity control. In addition, the direct dialogue with the Commission can and should be continued regardless of the Reform Treaty. After all, it has been established outside formal Treaty structures and endorsed by the European Council in June 2006. The Commission has repeatedly stressed the usefulness of this new tool and seems to be willing to continue with the practice. And the Commission is not the only counterpart or partner. The European Parliament has repeatedly offered close cooperation with National Parliaments on substantial issues and legislative dossiers; this should not be rejected in an offhand way.

Parliaments will have to work hard to make efficient use of the additional rights in the Reform Treaty. It is safe to assume that the Reform Treaty will not be the last one in European history. The establishment of the Convention method as the regular procedure for Treaty reform is an important step because it gives National Parliaments the right to be directly involved in the drafting procedure. They will also wish to

scrutinize the assessment of the Council should it decide not to convene a Convention. The right to veto the use of the passerelle clause carries an important responsibility for each National Parliament. Also, the mandate to take part in the evaluation of EU policies in the area of freedom, security and justice and the monitoring of Europol and Eurojust is no small challenge and will help to raise awareness of National Parliaments in this rapidly developing policy area.

The new provisions on the role of National Parliaments in the European Union certainly provide no miracle cure against over-regulation or the loss of decision making power parliaments may have suffered in the course of European integration. On the contrary, it further adds to the complexity of the European Union's legislative process. But it might provide some National Parliaments with an additional incentive to become more involved in EU affairs. This would in itself be an important contribution in order to meet the democratic challenge facing the European Union.