

## Working Paper

Research Unit EU Integration  
Stiftung Wissenschaft und Politik  
German Institute for International  
and Security Affairs

*Andreas Maurer, Daniela Kietz*

# National Parliaments' New Competencies in the Monitoring of Compliance with the Principle of Subsidiarity

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Ludwigkirchplatz 3-4  
10719 Berlin  
Phone +49 30 880 07-0  
Fax +49 30 880 07-100  
[www.swp-berlin.org](http://www.swp-berlin.org)  
[swp@swp-berlin.org](mailto:swp@swp-berlin.org)

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## 1. Introduction

The last decade has seen an increasingly intense debate on the **role of national parliaments in the EU legislative process** in regard to their scrutiny power vis-à-vis national governments and monitoring proper compliance with the Subsidiary Principle.

The European Convention agreed on a new mechanism of **direct parliamentary participation** in the principle's application. This direct participation of parliaments is a means to **decrease the Union's democratic deficit** due the **strongly legitimising nature** of national parliaments as directly elected representatives of EU-citizens.

Given the agreed increase in majority decision making in the EU Council of Ministers the immediate responsibility of governments towards their parliaments decreases. The new mechanism could be used to counterbalance this trend, since the parliamentary monitoring of the subsidiarity principle allows for immediate influence and scrutiny on the European legislative process.

However, the new form of participation does not necessarily increase the transparency of EU decision making as laid down in the declaration of Laeken. Still, it does in this context force parliaments to **take up the challenge** of broader, but at the same time efficient, participation of national parliaments in the process of passing European secondary law.

## 2. The 'early warning mechanism'

Under article I-32 of the draft Constitution the Commission would directly send its legislative drafts to all national parliaments of Member States for a '**preliminary reading**'.

Within six weeks of the proposal's transmission, parliaments may draft their **position on whether the proposal does comply with the subsidiarity principle or not**.

All positions will be weighted and counted: unicameral parliaments have two votes, in bicameral ones each chamber has one vote. If 1/3 (1/4 for proceedings under art. III-160 concerning drafts on judicial cooperation in criminal matters and police cooperation) of all chambers draw up **negative positions**, the Commission has to review its proposal and subsequently either withdraw, amend, or maintain it.

This first round takes place **exclusively between the Commission and the chambers of national parliaments**. It is only after that 'reading' that the Commission submits the possibly revised proposal to the ordinary legislative process.

Finally, those parliaments which have drafted a negative position have the **possibility to take legal action** against the commission at the EJC on the grounds of an **infringement of the subsidiarity principle**. During the Court proceedings parliaments will be represented by their

governments which act on their behalf.

What will be the procedural and institutional consequences for national parliaments?

It is also conceivable that parliaments submit **positive positions** to the Commission. On the one hand, parliaments could in this way **support government's positions** against the interests of third parties. On the other, parliaments could clarify their own points of view at this early stage and **set limits** for their own **government's negotiations** in the Council of ministers. It is also likely that such positive positions set signals for the European Parliament, as its political group majorities in Brussels or Strasbourg become clear.

However, it is also likely that **strong governments** would use the mechanism to **back up their position in Brussels** by simply advising parliaments to submit negative positions.

Therefore, the effective use of the mechanism depends not only on institutional arrangements but on the **self-perception of parliaments** regarding their scrutiny role vis-à-vis the executive and the EU institutions. Strongly scrutinizing parliaments concerning EU-business will behave differently from those which rather tend to support their government in international and European affairs.

### 3. Key questions concerning a possible organisational adaptation of parliaments

The parliaments' desire to use the **opportunity for direct, active participation** and **scrutiny** will necessitate a certain structural re-organisation due to the crucial variables of **cost** and **time**:

An effective scrutiny within the short period of six weeks requires a **central, efficient parliamentary organisation** that is able to collect, filtrate and digest information **independent of governmental expertise**.

1. How could the institutional and procedural arrangements necessary to be implemented the new mechanism look like in detail? Is it necessary to amend laws regulating the handling of EU documents at national level or the rules of procedure of parliament or government?
2. How should the EU-Affairs Committees (EAC) and the special committees share responsibilities?
3. Who should be in overall charge of the drawing up and forwarding of the position to the Commission?
4. Under which conditions could the EAC become the central coordinating and organisational body?
5. Could expertise in EU-matters and specific knowledge of the special committees be combined through a re-organisation of the EAC's composition?
6. An extension of human resources will be required. Should these capacities concentrate on the special committees, exclusively on

the EAC, or be assigned to a central coordinating body between the two?

7. How could single MP's be encouraged to take on the working on Commission's proposals, the editing of the position etc ? Could possibly a system of 'rapporteurs' designed according to the EP's model where rapporteurs bring in their own ideas in the justification of the position, render this work more attractive?

### Information Gathering

8. How and when should parliaments use already existing governmental information/expertise which was gathered at EU level during the preparation phase of the Commission's proposal?
9. How can be ensured that parliaments do take legislative proposals into account at an earliest possible stage, possibly already before the official transmission? Should the EAC and/or special committees already draft informal positions on the basis of strategic documents such as the Commission's annual legislative programme to be prepared at the point of official transmission?
10. In how far should and could parliaments act independently from governmental expertise? Do parliaments already use the EP-based data such as the Legislative Observatory?

### Court proceedings

11. The governments are obliged to represent their respective parliaments at the EJC, even against their own stand. How can parliaments participate and ensure the proper representation of their interests?

## 4. Implementation alternatives

In most parliaments the EACs will be the **central body** to receive, collect, select and forward all EU documents to the special committees. Ideally, assuming a **strong filter and processing function of the EAC** in relation to the other committees, the EAC would be in overall charge in dealing with the Commission's proposals. The special committees would only have consultative status and be asked to give their opinion on the respective draft.

The procedure is different if the EAC and the special committees are of **equal status**. In this case, it is more likely that at an earlier stage an independent body (i.e. the parliamentary presidium) coordinates the forwarding of documents to the committees in charge and those with consultative status. One or more rapporteurs of the respective committees would then draw up a '**subsidiarity monitoring report**' and as a result of this, add a proposal for the parliamentary position on the Commission's draft. If the special committees or the EAC are not in charge to act on parliaments behalf, the position would then be forwarded to the plenary in form of a resolution proposal. After a formal decision, the position would be passed on to the EU Commission.

Article 4 of the subsidiarity protocol obliges the Commission to **precisely justify** its proposals with regard to the principles of subsidiarity and proportionality. Since a few years the Commission already adds a **subsidiarity statement** (fiche de subsidiarité) which shall now give detailed information making it possible to appraise compliance with the principles. It mentions explicitly information on the financial impact and, in the case of a framework law, the implications for the rules to be put in place by the Member states, including regional legislation. If the Commission finally believes an objective to be met most efficiently at EU level, it must be able to give qualitative and quantitative evidence. It “shall take account of the need for any burden, whether financial or administrative, falling upon the union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.”

It is to be expected that the Commission will fall back upon parliaments to raise necessary data. Therefore it is inevitable that parliaments think of a procedure to reply to such requests within the framework of the “early warning system”. They must generate their own information or make use of governmental expertise already at the planning stage of a proposal of the Commission. Otherwise parliaments might at a later stage be pressed for time and completely depend on governmental expertise thereby lessening their influence.

An **EP-like rapporteur-system** could serve to prevent an instrumentalisation of the mechanism by governments that try to impose their political objectives through parliamentary majority. The system could allow MPs in the position as a committee’s rapporteur and expert in the respective field of knowledge, to distinguish themselves by taking stand, possibly even against the governmental position.

If the early warning system will be implemented as laid down in Convention’s protocol, the still widely claimed decrease in parliaments’ influence due to the European integration process won’t bear close examination. The **immediate possibility of objection** by parliaments – outside formal governmental influence and with the direct supply of information - before the actual legislative process strengthens parliaments’ autonomy vis-à-vis their governments. The **right to directly give their opinion ex-ante** and to **take legal action** if overruled **ex-post** could – if taken seriously – lead to an **emancipation of parliaments** in the face of their governments.

Figure 1: The future participation of national parliaments in EU policy making

