IMPLEMENTING THE EARLY WARNING MECHANISM FOR SUBSIDIARITY: NATIONAL PARLIAMENTS BEYOND THE CONSTITUTIONAL TREATY

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1 Introduction

The cause to involve national parliaments in European Union policy process more closely is by now firmly established at the top end of the European institutional reform agenda. Much of the debate in that context revolves around the idea of an early warning mechanism, whereby parliaments of the member states would intercept and examine EU proposals *before* their adoption by the EU institutions. The Treaty establishing a Constitution for Europe, in its original form, linked such preliminary examination and objection procedure above all to the principle of subsidiarity: parliaments were to give notice if they considered that a matter was better suited for domestic, rather than European regulation. In the light of the rejection of the Constitutional Treaty in the French and Dutch referendums, can an early warning mechanism nevertheless be implemented, even without a new treaty? Why should it in fact be implemented? And what form should be given to enhanced national parliamentary involvement in general? This paper will argue that the links that connect national parliaments to the EU institutions are already manifold. They extend far beyond domestic government-parliament relations, whereby ministers would give account for their actions in the Council. Even without a new treaty, parliaments have at their potential disposal several avenues for dialogue with the EU institutions, and with each other. Moreover, such dialogue is by no means limited to the consideration of the principles of subsidiarity or proportionality in EU proposals: debate can go far beyond that. What is of crucial importance, however, is that parliamentary actors clearly see the *purpose* of their activities. Effective involvement in European affairs after all requires an investment of time, energy, and resources for the build-up of expertise with parliamentarians and their supporting staff. That is not an end by itself. It shall be argued that maintaining additional checks and balances on EU institutions is a very legitimate cause, but what makes parliaments special is that next to checks and balances they can, as democratic institutions, also foster societal embedding of European affairs. This requires the development of a robust connection between EU specialists and other members of parliament, and between members of parliament and the citizens. Subsidiarity control can be a catalyst for European awareness and learning among parliamentarians, yet that is not the end of their EU involvement: it is just the beginning.

2 Parliament's Links to the European Union

National constitutional law, as well as polycentric (multi-level) governance in the EU, offers a wide range of potential opportunities to national parliamentary actors for EU-level participation. These opportunities can be used far more visibly and effectively than they are now, in as far as they serve the purpose of societal embedding of EU policies.

Both in the literature and in European treaty-drafting and related exercises, when it comes to the involvement of national parliaments in the European Union, the emphasis is typically put on two sets of relationships. First, national parliamentary participation in the EU is construed from the angle of domestic government-parliament relations. The starting point then is the link of ministerial accountability to parliament, as it exists in parliamentary and semi-parliamentary democracies throughout the EU. Thus, the frequently perceived remoteness between Europe and the citizens is brought down to a domestic gap between, on the one hand, the government and its civil service which conduct European policies away from home, and, on the other hand, parliamentary actors who, for whatever reasons, maintain an insufficient degree of scrutiny and oversight in European matters. Solutions therefore above all aim at improving oversight mechanisms and the internal organization of parliaments to deal more effectively with EU questions (see 2.2 below).

Second, complementing and perhaps surpassing the link of ministerial accountability, approaches are developed to consolidate relations between national parliaments and EU institutions that are not mediated by the national governments. Such approaches, some of which are by now codified in treaties or other instruments and some of which remain informal, seek to activate parliamentary participation in a European polity that is perceived to be of a polycentric or multi-level character. Thus, instead of superimposing a hierarchically superior EU level of government on top of the member states, whereby national parliaments play a marginal role at best, modern conceptualizations seek to show that the member states and their internal bodies interact with EU bodies in a complex and above all non-hierarchical system of interest representation and checks and balances.

Multi-level governance or polycentric constitutionalism can thus offer a European role to domestic parliamentary actors, in that they are no longer limited to enforcing ministerial accountability in a purely national setting, but can also engage in direct EU-wide dialogues. Subsidiarity control is a prominent example in that context (see 2.3 below).

3 Why Bother? Pragmatism in Normative Debate

There are various reasons to endorse national parliaments in EU context. Not all perspectives and underlying agendas are truly compatible with each other. Pragmatically speaking, however, there is a convergence of opinion that national parliamentary involvement in EU matters should in fact be made more prominent.

Why should national parliaments enhance their domestic and cross-border activities as regards EU policy in the first place? As the possible starting points with respect to the involvement of

national parliaments in EU policy are identified, we should note that such enhanced involvement has a certain normative context. This means that reform measures in that regard, depending on how or when they are formulated, reveal their underlying normative approaches to the European Union as a whole. Depending on the actor, they can also reveal competing institutional interests and agendas.

The 'case for national parliaments' can in fact be disaggregated into sub-cases, and exposed not as a coherent case of its own right, but as a 'composite case', a smallest common denominator, and a minimum consensus between competing interests in the EU over the appropriate role for national parliaments.[1] The Constitutional Treaty, and the 'yes' campaigns in favour of its ratification, for example, made a strong point of emphasizing the envisaged involvement of national parliaments in EU decision-making, advertising it as a strong selling point. A closer analysis will however reveal that, from the point of view of the national governments, it is convenient to resort to measures that are of great symbolical weight but that do not challenge the fundamental logic of EU decision-making. A prominent place for national parliaments in a treaty, or in domestic instruments, therefore appears attractive to governments as an inexpensive gesture to appease sceptic constituents and to ensure the support of parliamentarians and, above all, voters in referendums, during a ratification process and beyond. The meaningfulness of such gestures, even if they are backed up by legally binding mechanisms such as veto powers for national parliaments, still depends on the degree to which a cleavage actually exists between the government and the parliamentary rank-and-file. In a somewhat cynical perspective, majority-dominated parliaments can even be mobilized as a proxy for the government, adding a flavour of parliamentary legitimacy to what is in fact executive action. Either way, the prerogatives of the governments and EU institutions in the European policy process would remain in place.

Also as regards schools of thought at a more abstract level, a stronger role for national parliaments in the EU dovetails with some normative approaches to the EU while it sits more uncomfortably with others. Politicization of EU issues in a domestic arena, for example, would readily imply a de-technicization of integration issues and an exposure of a member state's national stakes in the game. To what extent such a development is compatible with a neo-functionalist view of the EU, or with support for elite-driven consociational decision-making, is highly questionable. From a Euro-federalist point of view, national parliaments would be worth strengthening only to the extent that their benefits, such as added transparency, societal

[1] See Ph. Kiiver, 'The Composite Case for National Parliaments in the European Union: Who Profits from Enhanced Involvement?', 2 *European Constitutional Law Review* (2006) pp. 227-252.

acceptance and communication with the citizens, are not outweighed by, for example, the national-interest bias of their incentive structure.[2]

For the purposes of the present discussion, it is helpful to acknowledge that national parliaments are not universally endorsed, and that if they are, they are endorsed by different actors for different reasons and to different extents. Pragmatically speaking, however, it suffices here to note that even though normative justifications and premises may differ, there is in fact a minimum convergence of agendas on the point that it is generally desirable to address the role of national parliaments in the EU more prominently.

4 Improving Domestic Scrutiny

It is possible to improve national parliamentary oversight mechanisms in EU matters, even without an amendment of the national constitution or any statutory instruments. A legally binding framework can help underpin a political commitment to enhanced involvement in European affairs, but 'token reforms' should be avoided.

Our discussion of the practical inhibitions to parliamentary oversight in European affairs may start with the information gap between parliamentary actors and the executive. There are several actual or potential factors contributing to this information gap, the first of which is the difficulty to obtain relevant and timely EU-related information in the first place. In order to form an opinion on a draft EU act beforehand, parliamentary actors require (at the very least) access to the relevant initiative documentation, such as Commission proposals. However, the mere distribution of Commission documents will not ensure improved oversight by itself. First, by the time the Commission publishes a formal proposal, it will be usually too late for domestic parliamentarians to have an impact on the content: if influence is desired, the scrutiny process should start at an earlier stage, such as at the Green Paper stage or at the level of the annual work programme. Second, information is of limited use if it remains undigested: explanatory memoranda (by the Commission, the government, or both) are vital to improve the accessibility of draft acts to national MPs. Third, if parliamentarians desire to uphold a critical and independent view on their government, they should not make themselves dependent on a Commission or government monopoly on information and explanation, and instead consult

[2] For an overview of normative approaches to the EU, see M. Sie Dhian Ho, 'Democratisering van de EU: permanente evenwichtskunst', in M. Scheltema, ed., *De staat van de democratie. Democratie voorbij de staat* (Amsterdam, AUP, 2004); for an application to national parliaments, see Ph. Kiiver, *The National Parliaments in the European Union – A Critical View on EU Constitution-Building* (The Hague/London/New York: Kluwer Law International, 2006).

additional sources. Fourth, a point that qualifies the above, too strong an emphasis on volume can easily lead to inhibited scrutiny as MPs experience an overload of information.

4.1 European Information Facilities

Timely information as a prerequisite to effective scrutiny has already been addressed with priority at EU level throughout the 1990s. Thus, in Maastricht Final Act Declaration No. 13, the governments announced their willingness to ensure 'that national parliaments receive Commission proposals for legislation in good time for information or possible examination.' Article 2 of the Amsterdam Protocol on the role of national parliaments in the European Union, which is applicable and binding to date, referred to the commitment of each government to 'ensure that its own national parliament receives [EU proposals] as appropriate.' The EU Constitutional Treaty, as adopted by the Convention and the IGC, broadened the scope of information, and switched to a new approach of document distribution, whereby the Commission would not only distribute its consultation documents and its annual legislative programme directly to the national parliaments, but also all the 'draft legislative acts' that it introduces. Thus, instead of relying on the governments to forward documentation, the new Protocol would oblige the Commission to send its documents to the parliaments itself. In addition to Commission proposals, the national parliaments would be entitled to receive, under the heading of 'draft legislative acts', initiatives from a group of member states, initiatives from the European Parliament, requests from the ECJ, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a European legislative act. The European Parliament and the Council would also forward their legislative resolutions, respectively their common positions, to the national parliaments. Furthermore, the Commission would draw the national parliaments' attention to proposals to apply the flexibility clause of Article I-18 of the Constitutional Treaty, the successor of Article 308 EC; the national parliaments would have to be kept informed about the activities of Europol and Eurojust for evaluation and scrutiny subject to a European Law (read: regulation); the national parliaments would be notified of incoming EU membership applications from foreign states under Article I-58; they would be notified of any proposed treaty amendments under Article IV-443; they would be consulted under Article IV-444 about any initiative to unanimously move to qualified majority voting or to co-decision, and the objection from any national parliament within six months from notification would suffice to prevent the adoption of the move.[3]

[3] See for a discussion of selected features of the Constitutional Treaty: Ph. Kiiver, 'De parlementen van Nederland en België en het Europese besluitvormingsproces', 54 *SEW Tijdschrift voor Europees en Economisch Recht* (2006) pp. 222-229.

4.2 Domestic Information Facilities

Even in the absence of EU-level instruments, however, a national government remains accountable to its parliament under the heading of parliamentary confidence. That is, a cabinet may remain in office so long as it enjoys the confidence, or the tolerance, of a parliamentary majority, and it has to justify its policies so as to ensure acceptance among MPs. With a motion of censure as an ultimate sanction, parliamentarians can insist on the disclosure of information as part of an *ex ante* or *ex post* accountability process. The Dutch Constitution provides for a general confidence rule in Article 42 (2). In addition, it contains an explicit obligation for the government to disclose information to parliamentarians:

> Article 68. The ministers and state secretaries provide the chambers, separately and in joint session, orally or in writing the information demanded by one or more members, where such provision is not in conflict with the interest of the state.

The confidence rule and the obligation to provide information to parliament find functional equivalents in the other EU member states as well. In the Netherlands, an even more specific legal basis for information facilities, which applies to EU matters under the Third Pillar, has been inserted into the statute of ratification of the Treaty of Maastricht, and reinserted into the statutes approving the Treaties of Amsterdam and Nice. Statute obliges the government to notify both chambers of the Dutch parliament about all new proposals adopted under Title VI of the EU Treaty. The currently applicable legal basis from the Nice ratification statute provides:

> Article 3 (1). A draft of a decision that intends to bind the Kingdom shall, before any decision-making in that matter takes place in the Council in accordance with Title VI of the Treaty on European Union as amended by the [Treaty of Nice], promptly after the text of that draft has been adopted, be made public and be submitted to the States-General.

4.3 Scrutiny facilities: The Committee System

Once all the desired information has been made available, parliamentary actors can enter into the scrutiny process with respect to the received documentation and the government's position on them. Here the question arises as to which parliamentary actor, more specifically which parliamentary committee should be in charge of the scrutiny process. This question is answered in different manners in the national parliaments across the European Union.

In most reviews and analyses, it is the European affairs committees which attract most attention. By now all national parliaments in the EU have established such a committee, or have assigned a pre-existing committee such a function, namely to specialize in questions of European integration. At the same time, the role of the sectoral committees (e.g. agriculture, health, economic affairs), as well as the plenary as a whole, is increasingly addressed in the literature and in parliamentary practice.

Typically, larger European integration issues with a horizontal and cross-departmental scope fall within the immediate ambit of European affairs committees. That may include European Councils and IGCs, institutional reform of the EU or the enlargement process, in other words matters that would otherwise be covered by classic high politics in the area of pure foreign affairs. As regards the European Union's day-to-day activity, the allocation of competences as between European affairs and sectoral committees depends on the model chosen by the respective parliament.[4]

In a centralized system of scrutiny, all or most EU-related matters would fall within the competence of a European affairs committee. The prototype of such a model is Denmark, where the parliament's Europe committee receives extensive EU-related documentation and explanatory memorandums from the government and controls Brussels-bound ministers by tying them to negotiation mandates for subsequent Council meetings.[5] Usually on the Friday before a Council meeting, the competent minister or state secretary appears before the committee, and orally outlines a draft mandate on the basis of which the government is intending to negotiate. The mandate is passed by tacit approval, and the absence of a majority against it is noted without formal voting by the committee's chairman at the end of each round of discussion. The mandate is binding upon the minister politically, but is in practice so authoritative that it entails a quasi-legally binding instruction. If in the Council a compromise would require deviations from a given mandate, the minister seeks to obtain a new mandate, and the committee may hold a special meeting for that purpose. After the Council meeting the minister re-appears before the committee and reports back on the matter decided, as well as on his or her own line of

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[4] See for a comparative overview of scrutiny models in the EU-25: Ph. Kiiver, *The National Parliaments in the European Union – A Critical View on EU Constitution-Building* (The Hague/London/New York, Kluwer Law International, 2006). See also the edited volumes by A. Maurer and W. Wessels, eds, *National Parliaments on their Ways to Europe: Losers or Latecomers?* (Baden-Baden, Nomos, 2001); F. Laursen and S.A. Pappas, eds, *The Changing Role of Parliaments in the European Union* (Maastricht, European Institute of Public Administration, 1995) and E. Smith, ed., *National Parliaments as Cornerstones of European Integration* (London/The Hague/Boston, Kluwer Law International, 1996).

[5] See on Denmark e.g. J. Fitzmaurice, 'National parliamentary control', in M. Westlake, *The Council of the European Union* (John Harper, London 1999).

negotiation. The Danish model of centralization of European scrutiny has inspired several other parliaments, including those of Sweden, Austria, Latvia, Hungary and Slovakia.

The advantage of centralization of scrutiny in one European affairs committee is the efficiency of the deliberation process. In addition, it makes sure that European matters are in fact scrutinized at all. Mere dissipation of EU questions to the sectoral committees under the slogan 'Europe is everywhere' tends to lead to a situation where sectoral committees prioritize domestic bills over EU projects, and thus to fragmented or absent scrutiny. Still, the disadvantage of centralization in a European affairs committee remains the lack of institutionalized input from sectoral specialists. The European affairs committees tend to be generalist, and to miss out on technical expertise. To tackle this shortcoming, centralized parliaments increasingly rely on parallel information systems, as well as on overlapping committee membership for involved MPs so as to import sectoral expertise to the European scrutiny process.

4.4 Coordination of Scrutiny and the Finnish Model

One middle way between centralization and fragmentation of European scrutiny is the model of co-ordination. Thus, while the treatment of European affairs is left in principle to the sectoral committees, the respective European affairs committee can assist them and co-ordinate their efforts. The approach taken by the lower chamber of the Dutch parliament is particularly telling. Its first European affairs committee, established in the form of a cross-departmental general committee that required re-establishment after new elections, was to raise the awareness of European integration matters among MPs on the sectoral committees. The committee's function was intended to fade out with time.[6] In reality, the Dutch European affairs committee remained to permanently draw attention to particularly important Commission proposals, to hold joint meetings with sectoral committees, or to question ministers on its own. A similar approach is taken by the two chambers of the French parliament, as well as the German *Bundestag*, where the respective European affairs committees work together with a sectoral committee-in-charge.

Another hybrid model between centralization and fragmentation is the Finnish model of delegation. While following the basic Danish approach of centralized briefing, mandating and debriefing of ministers, the Finnish grand committee that is competent for European affairs delegates the practical scrutiny work to the sectoral committees. The sectoral committees in turn

[6] See B. Hoetjes, 'The Parliament of the Netherlands and the European Union: Early Starter, Slow Mover', in A. Maurer and W. Wessels, eds, National *Parliaments on their Ways to Europe: Losers or Latecomers?* (Baden-Baden, Nomos, 2001).

discuss the matter with priority and then submit a report with their recommendations to the grand committee. The grand committee considers the incoming reports, summarizes and mediates in case reports are submitted by more than one sectoral committee, and on that basis goes on to deliberate with Brussels-bound ministers, imposing politically binding negotiation mandates. The main difference between this Finnish delegation model and the described co-ordination models is that in the former case, the European affairs committee is accepted as a parliamentary spearhead that relies on an echelon of committees; in the latter case, sectoral committees-in-charge retain a greater autonomy with respect to the European affairs committee.

The Finnish system of delegated scrutiny and centralized briefing enjoys an increasingly good reputation, as it seems to outperform not only the more fragmented routines, but also the Danish model, long seen to be an archetype of oversight, in terms of broad parliamentary involvement. The Finnish model has already inspired the parliaments of Estonia, Slovenia and Lithuania to follow similar approaches. Interestingly, also the parliament of the Netherlands, an 'old' member state and in fact a founding father, has endorsed a completely new approach in anticipation to the subsidiarity early warning system under the Constitutional Treaty. First, it established a joint committee of both chambers, something long practiced in other bicameral parliaments but uncommon in the Dutch case. Second, the joint committee receives reports from the sectoral committees as regards compliance of Commission proposals with the principle of subsidiarity, so that it can draft reasoned opinions for adoption in the chambers where appropriate.[7] We shall come back to this shortly.

4.5 Scrutiny Reserves and Mandates

If parliamentarians wish to maximize their impact on EU decision-making on the domestic scene, they require sufficient time for scrutiny and a means to communicate their conclusions and preferences to the executive. As regards time, not only the absolute amount of time is important, but also the input moment or moments relative to the decision-making process. In this context, scrutiny reserves constitute a well-established tool. First introduced in the parliament of the United Kingdom, a reserve restricts the freedom of ministers to give their consent in the Council to matters which are still awaiting completion of parliamentary scrutiny. The UK reserve, as incorporated and regularly renewed in parliamentary resolutions, provides that ministers may proceed if domestic parliamentary scrutiny is completed, if the competent committee has waived the reserve for urgency reasons or for the sake of protection of the national interest, or if the

[7] See O. Tans, 'The Dutch Parliament and the European Constitution', in Ph. Kiiver, ed., *National and Regional Parliaments in the European Constitutional Order* (Groningen, Europa Law Publishing, 2006).

matter at hand is 'confidential, routine or trivial or is substantially the same as a proposal on which scrutiny has been completed.' Ministers may also proceed in the Council 'for special reasons', in which case they have to explain these reasons 'at the first opportunity' to the plenary or the committee. The French government has committed itself to a scrutiny reserve as well. The Italian parliament operates with a scrutiny reserve system that is coupled with a tacit approval clause. A similar system applies to the Dutch parliament in Third Pillar matters. The reserve is presumed lifted, and the government is free to proceed, if parliament has not made known its views within a fixed time period. In the Dutch case, statute provides for a time period of fifteen days.

As regards the second point, namely parliamentary input to the government's position, a range of methods is applied across the European Union. A useful way to categorize them is to distinguish between (a) mandating systems, whereby a minister is routinely bound to instructions prior to Council meetings; (b) systematic scrutiny, whereby parliament sifts through all incoming documentation and reserves the right to pass a resolution; and (c) informal influence, whereby parliamentarians and the executive interact in a more or less informal manner.[8] One should note that this categorization identifies methods, rather than results: a mandate may be broadly worded, or in fact boil down to a tacit parliamentary approval to a government's draft mandate; informal action is very well capable of producing politically binding instructions, especially if not only opposition parties but also government MPs support it.

4.6 Towards Stricter Enforcement of Ministerial Accountability?

To give the EU-related scrutiny process in the national parliament on the domestic scene a higher profile, parliamentarians may choose between several, partly overlapping approaches. One is to sharpen scrutiny itself, via a stricter enforcement of ministerial responsibility *ex ante* and *ex post*. To achieve this, a well-balanced interaction between generalists such as in the European affairs or subsidiarity committee, on the one hand, and specialists on the sectoral committees, on the other hand, can enhance the capacity of MPs of independent action. Possibly, higher expenditure for supporting staff, such as research departments, can narrow the information and expertise gap behind the executive apparatus. Furthermore, attention can be paid to the communication to the public of scrutiny efforts that are being made already, which is the main current approach of the

[8] This categorization is applied by A. Fraga, 'Wanting more power... a struggle for what? Comments on the report by Mr Tapio Raunio "Parliamentary Scrutiny of EU Decision-Making: Comparing National Systems"', in Finnish Eduskunta, ed*., National Parliaments and the EU – Stock-Taking for the Post-Amsterdam Era* (October 1999 COSAC seminar, Eduskunnan Kanslian Julkaisu 1/2000).

UK Lords.[9] Either approach may be supported by a legal codification of scrutiny rules, in the parliament's rules of procedure, in statute, or, as several EU member states have already done, even in the constitution. At this stage, however, three important qualifications need to be added.

First, high-level codification of scrutiny does neither indicate, nor lead to, sharper scrutiny in practice. Among those member states that have constitutionalized parliamentary involvement in EU affairs are some whose parliaments, in comparative analysis, rank among the most lenient in Europe, such as Belgium and Greece. Codification can thus not substitute scrutiny in reality, for codification alone does not guarantee parliamentary activity, nor is it by itself a safeguard that signals parliamentary activity to the public. A constitutional clause is not convincing as a token concession.

Second, those institutional and procedural reforms that do support stricter scrutiny, and that have in fact already been applied, do not require high-level codification. The allocation of resources is a budgetary matter, the improvement of the interaction between parliamentary committees a matter of rules of procedure and practical routine and attitude. For matters of high importance, however, statutory instruments and innovative institutional reforms can be adopted, as the examples of the Dutch assent procedure for the Third Pillar, which allows both chambers to instruct ministers to reject draft acts, and the new joint subsidiarity committee show.

Third, as a qualification underlying both of the above, the implementation of either legal rules or procedural frameworks with a view to scrutiny requires genuine politicization. On numerous occasions the capacity of parliaments to communicate Europe to the citizens is invoked, either by EU institutions or by a member state's political elite in both government and parliament. Communication, however, is bound to fail if it is understood as a one-dimensional parliament-to-citizen channel. The deliberative capacity of parliaments materializes not in efforts by MPs to explain parliament-backed policies, but in opportunities for citizens to relate with one or more actors *within* parliament, as opposed to other parliamentary actors. Communication as in public relations or media campaigns is not specifically parliamentary; they are even hazardous if MPs are exposed as being united over a cause that is in fact controversial. Communication that is carried out in a manner that is suited specifically for parliaments instead requires debate, which in turn requires intra-parliamentary cleavages. Cleavages, in turn, require informed opinions and an active stance on the part of parliamentarians.

[9] House of Lords EU Select Committee, *EU Legislation – Public Awareness of the Scrutiny Role of the House of Lords*, 32nd Report 2005/06, HL Paper 179.

4.7 A Plea Against Token Reforms

In the light of the discussed relation between written law and political reality, and coming back to the earlier overview of institutional and procedural scrutiny set-ups in Europe, we should, throughout our discussion, bear in mind one important guideline: the value of new institutions and procedures in a national parliament with a view to enhanced oversight in EU matters is very relative. The import or transplantation of new mechanisms can of course indeed help parliamentary actors to make their oversight activity more efficient and effective. Reform, such as the creation of a new committee, can become a catalyst to stimulate awareness of, and interest in, European integration among MPs.

However, we should always distinguish between cause and consequence when observing sharper or more lenient parliamentary practice working within codified or informal institutional arrangements. Scrutiny can be sharp on paper but relatively lenient in practice, as is the case in Austria where legally binding mandates that are issued to ministers are in fact worded in very permissive terms.[10] Scrutiny can also be largely custom-based but still relatively tight in reality, as is the case in Denmark. Either way, sharper scrutiny cannot be decreed. And what will certainly not generate any greater societal acceptance of European integration are token reforms, such as the creation of new institutions and procedures supporting the illusion of parliamentary involvement.

First of all, new procedures can in fact paradoxically have a crippling effect on parliamentary oversight, if they come with the implication that they substitute all previous tools. The early warning system for subsidiarity under the Constitutional Treaty, for example, can apparently easily be misunderstood as if national parliaments were in future to monitor subsidiarity *only*, thus abandoning all other scrutiny criteria.[11] The Dutch joint committee on subsidiarity is in that context relieved to see that subsidiarity clearance has turned out to be just a first step in the more detailed political scrutiny within the sectoral committees. Another example for paradoxical hazards is that the Dutch parliamentary assent procedure under the Third Pillar strikingly leads ministers to maintain that this procedure, which sets in at the final stage of Council negotiations, is *enough*. Ministers insist that they be able to negotiate free from parliamentary steering, leaving to

[10] See H. Hegeland and Chr. Neuhold, *Parliamentary participation in EU affairs in Austria, Finland and Sweden: Newcomers with different approaches* (European Integration online paper 6/10 (2002) at http://eiop.or.at/eiop/texte/2002-010a.htm).

[11] At the 32nd COSAC meeting, Finnish MP Heidi Hautala urged her fellow parliamentarians not to lose sight of other scrutiny criteria when implementing subsidiarity control.

parliament only the approval or the rejection of the final draft.[12] Of course, subsidiarity control does not absolve from other existing forms of control, nor does it preclude parliaments from developing new forms of control; and while accountability *ex post* does not have to imply parliamentary involvement *ex ante*, the omission of the latter erodes the effectiveness of the former.

Yet the most important point about institutional and procedural reform is that genuine parliamentary rights, especially minority rights, are claimed in power struggles at pivotal moments, e.g. ratification procedures, the aftermath of political crises, or in the course of a larger constitutional overhaul. They are *not* adopted in the hope of appeasing a sceptical or hostile public, at a time when parliamentary actors are in no fundamental and politicized disagreement with each other. The negative Dutch referendum on the Constitutional Treaty revealed a discrepancy between majority public opinion (which was against ratification) and political party alignment in parliament (the majority of which was in favour of ratification);[13] new procedures and new committees will not automatically create by themselves any intra-parliamentary cleavage where so far none has manifested itself.

What is worse, token reforms that are designed to appease the public will backfire on the political establishment if they reveal even more markedly the absence of politicization on potentially controversial issues, or if they are exposed as window-dressing that is merely supposed to make unwelcome European projects easier to sell. Without politicizing substantive policy proposals, parliamentary actors will only have aggravated their detachment from their constituents. What is needed is not a tinkering with the formal scrutiny set-up, perhaps mimicking other EU member states, but a clear awareness among parliamentary actors as regards the logic, the potential and the limitations of politicization of European affairs in a national parliament. Once that awareness is achieved, little stands in the parliamentarians' way to exploit procedures that already exist to their ends. Once that awareness is achieved, little stands in their way to even insist, spontaneously rather than calculatingly, on new institutions and procedures if the old ones prove insufficient. One plenary session on an EU project leaves too little time for debate? Another debate will be scheduled. A committee's supporting staff cannot handle the workload as EU measures get prioritized? New staff will be hired. Ministers take too much liberty when negotiating in the Council? Future committee hearings will get rougher. Thus, reform will be demanded when it is needed, not when parliament somehow feels obliged to adopt it. Of course, that also means that

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[12] See E. Jurgens, 'Parlementair toezicht op de EU-ministerraad ontbreekt, ten onrechte', in J.L.W. Broeksteeg, J.Th.J. van den Berg and L.F.M. Verhey, eds, *Ministeriële verantwoordelijkheid opnieuw gewogen* (Deventer, Kluwer, 2006).

[13] See O. Tans, 'The Dutch Parliament and the European Constitution', in Ph. Kiiver, ed., *National and Regional Parliaments in the European Constitutional Order* (Groningen, Europa Law Publishing, 2006).

no reform will be demanded if existing possibilities are quite sufficient. And existing possibilities are not limited to ministerial accountability enforcement alone; they already reach into the very heart of the European institutional framework.

5 Beyond Ministerial Accountability, Beyond Subsidiarity

National parliamentary actors can engage in extensive inter-institutional dialogues and interest networks in the European Union, even without European treaty amendments. National parliamentary participation in the EU need not be restricted to enforcing domestic ministerial accountability; direct cross-European dialogues need not be confined to subsidiarity arguments.

Approaches that exclusively focus on domestic ministerial accountability in order to link a national parliament to the EU quickly reach their inherent limits. In theory, ministerial accountability implies a duty for the executive to justify actions and omissions for which it is responsible before parliament, whereby the latter has at its disposal a sanction. Accountability then covers not only domestic policies, but also external representation in the EU, in the broadest possible sense. In the reality of European cooperation, however, the enforcement of ministerial accountability is constrained by a number of circumstances.

Accountability in a strict sense implies reporting and justification in retrospect, as in accounting for things done. In an EU policy context, however, even a sanction will not undo ministerial action: the formal validity of a directive, for example, or a minister's vote in favour or against it, is not affected by the fact that a minister has ignored a negotiating mandate or is sanctioned domestically afterwards.

For those parliamentary actors who wish to have a real impact, scrutiny therefore needs to set in during an *ex ante* stage, the earlier the more effective. This will however require additional efforts, including the allocation of time and energy to the acquisition of technical expertise and the monitoring of consultation and negotiation processes that are highly intransparent, that involve multiple actors including other member states and the civil service, and that follow an externally set time rhythm and agenda. Combined with majority support for the government in parliament, mainstream consensus over the desirability of European cooperation, low media attention and voter indifference, scrutiny of EU matters typically turns out weak as time and energy is better spent, from the point of view of many if not most parliamentary actors, on domestic issues.

Even if the enforcement of ministerial accountability were to be sharpened, the international character of EU decision-making, at least in the Council and European Council, provides for

another impediment: qualified majority voting on paper, and the Council's consensual decision-making mode of collegial compromise-seeking in reality, mean that even if domestic scrutiny is strong, the minister can be outvoted or prompted to agree to compromises. Especially smaller member states need to carefully choose the instances where they object to EU measures, so as to maintain bargaining credentials in the long run.[14] In theory, therefore, a minister's voting record in the Council is a textbook example of an object of accountability. In reality, a minister's 'no' vote, in line with parliament's wishes, can mean the forfeiture of a more attractive compromise. Meanwhile a failure to cast a 'no' can be justified with a reference to long-term interests, which is not necessarily a satisfactory justification in the short run. Apart from that, the Council reality of greenlighting without voting the decisions that have been pre-cooked by Coreper largely escapes parliamentary scrutiny. As far as a minister is concerned, it is generally not the voting behaviour that actually matters, but the *negotiating* behaviour, which is a far subtler notion that includes, but is not limited to, formal voting.

5.1 Institutional Involvement

Once the limits of domestic ministerial accountability enforcement are reached, neither national constitutional law, nor European law, prohibits the exploitation of informal networks of interest representation beyond the domestic arena. For national parliamentary actors this means that there are more and subtler access points to EU decision-making than just the holding to account of ministers as they return from the Council. Awareness of this fact presupposes a broader understanding of the term accountability, and it opens new avenues to national parliamentary actors who wish to break free from domestic constraints.[15]

As regards the *Council*, it is not inconceivable that ministers are made to account not only for their own negotiating and voting behaviour, in the narrow confines and with the inherent limitations of ministerial responsibility, but that they are prompted to justify the actions of the Council *as a whole*. After all, if the Council is considered to act as an institution at the European level, which engages, for example, in dialogues with the European Parliament, then instead of making the Council appear as a loose forum once the ministers return home, ministers and MPs can take account of this corporate identity in the domestic arena as well.

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[14] See T. Raunio and M. Wiberg, 'Parliamentarizing Foreign Policy Decision-Making: Finland in the European Union', 36 *Cooperation and Conflict* (2001) pp. 61-86.

[15] See for an enlightening discussion: L. Besselink, 'National Parliaments in the EU's Composite Constitution: A Plea for a Shift in Paradigm', in Ph. Kiiver, *National and Regional Parliaments in the European Constitutional Order* (Groningen, Europa Law Publishing, 2006).

As regards the *Commission*, the classical view would imply that accountability is owed to the European Parliament, not national parliaments, and certainly not national governments. Again, however, accountability can be understood more broadly than that. In fact, the nomination of new Commissioners by the governments is already subject to at least theoretical scrutiny in the respective national parliament. One might recall the decision of the first Schröder cabinet to give one of the then two German Commissioner posts to each of the two coalition partners, rather than to stick to the earlier custom of splitting the two posts between government and opposition.

5.2 A Dialogue with the Commission: The Dutch Subsidiarity Committee

Apart from nomination proceedings, Commission policies have deep regulatory impact in the member states, from competition policy and quasi-autonomous implementation of EU legislation to the formal drafting of proposals for secondary law. In this capacity, a direct dialogue between national parliamentary actors and the Commission is not only conceivable, but it already materializes. The Constitutional Treaty's early warning system for subsidiarity was in fact set up as a means for parliaments to at least formally bypass their governments in aligning competence boundaries with the EU legislator. Such a subsidiarity dialogue does not require a treaty amendment, it can be carried out already, prompting the Commission to, for instance, better justify its proposals under subsidiarity headings. The Dutch subsidiarity committee and the pilot projects on the early warning system carried out by COSAC, an inter-parliamentary conference, are a case in point: parliamentarians do not need to wait for a new treaty to start entertaining direct links. In fact, also proportionality, formal legality, quality in terms of enforceability and compatibility with existing law, political opportunity and many other criteria can be addressed at the same time that parliaments would be expected to assess subsidiarity compliance.

The Dutch subsidiarity committee succeeded in drawing higher and earlier attention to salient Commission proposals in the sectoral committees, albeit on a small scale, based on a selection of initially eleven Commission proposals, green papers, white papers, and communications. So far, it drafted letters that were adopted in the plenary of both chambers and sent to the Commission in four cases. In three of these cases, the Dutch parliament already received a reply from the Commission. The committee, originally established for one year, calls for making subsidiarity control a permanent routine, expanding its scope, and strengthening the committee's budget and staff.[16]

[16] Evaluatierapport Tijdelijke Commissie Subsidiariteitstoets (TCS 51 def).

Of course, Commissioners still may not receive instructions from the national capitals, which is a provision intended to prevent governments from seeing their nominee also as their national representative. Yet when the Commission is addressed as a body, or when Commissioners appear before national parliaments not because of their nationality but because of their portfolio, dialogues with national parliamentary actors can give practical effect to the notions of polycentric (or multi-level) governance, and co-actorship between national and European bodies in the preparation and adoption of European law.

5.3 The Subtle Connection to the European Parliament

As regards the *European Parliament*, accountability in the sense of ministerial responsibility to national parliaments is not present either. Both the European Parliament and national parliaments, at least their lower chambers, are directly elected. Cooperation or interaction between the two is moreover potentially overshadowed by structural rivalries, or a natural competitive relationship. Simply speaking, the European Parliament would favour broadened EU competences (which limits the freedom of national law-makers), the co-decision procedure (which is harder to monitor than Council unanimity), and a larger EU budget which still relies on taxpayer-financed member state contributions. Integration-friendly MPs in the member states would furthermore shy away from cooperation, let alone exerting influence on the European Parliament, invoking the notion that EU decision-making is legitimized by the European Parliament and should not be interfered with. Even where the expertise of MEPs is called upon, such as in national parliaments that reserve seats or maintain standing invitations for MEPs to join their European affairs committee, MEP attendance is as poor as is the attendance of national MPs to European Parliament committee sessions.

The crucial link between MEPs and national parliamentary actors is however not classical accountability, or a vague and often misleading notion of inter-parliamentary 'alliance', but internal party membership. Independent candidates, fringe parties and single-issue lists running for the European Parliament aside, the national political parties represented in the European Parliament are usually also represented in the national parliament. MEPs from these 'established' parties depend on the nomination by their party for the next European elections. This applies to the placement as a party candidate in a winnable electoral district, as well as to the placement on a promising place on the party list, depending on the electoral system. It is then not so much the national parliament as an institution, but the political parties represented in that parliament that have a potential tool for convincing MEPs from the same party to cooperate at the national level. The potential sanction would be, for instance, a lower rank on the party list for the next elections. Such links are already materializing, be it in a patchy form. Sometimes they even transcend

national party lines. Networking is quite possible in reality, as long as MPs and other politicians regard the European Parliament not as a hierarchically superior and autonomous body, but as yet another actor in a polycentric European polity.

5.4 Exploring Existing Possibilities

Depending on how parliamentarians define their role in the EU, it is very much conceivable and valid for them to refuse to bypass their cabinet. After all, government MPs may remain loyal to their executive, since they are elected to support it, albeit critically. To the opposition, the additional work might again not pay off in terms of electoral reward, either because the efforts are insufficiently visible, or insufficiently rewarded, or because the effects (such as an amended directive) set in independently of the domestic agenda and the national electoral rhythm. In either case, MPs might not be willing to interfere with EU decision-making for ideological reasons, sticking to the task of making sure that individual ministers justify their Brussels activities.

Yet if parliamentary actors commit themselves to engaging more pro-actively in the EU policy process, in line with polycentric governance and co-actorship, little stands in their way in terms of national constitutional law or EU institutional rules. No new treaty amendment is required for MPs to scrutinize not only their ministers, but also the Commission, MEPs, as well as the Council apparatus. Again, the benefit of these activities is tightly linked to their actual purpose. Enhanced activity with poor public visibility or awareness will not bring Europe closer to the citizens, and will become, or remain, unattractive to individual MPs. Again, the key is to link enhanced activity to an effective societal embedding.

6 Parliamentary Activity and Societal Embedding

Improving parliamentary powers is not an end by itself; it guarantees neither broad involvement of the whole plenary nor societal embedding of EU policy. Any effort to step up formal or informal means of parliamentary participation should be linked to a practice of targeted politicization.

A host of countries in the European Union display a discrepancy between the political class in government and parliament, on the one hand, and the citizenry, on the other hand, over Europe. Government and mainstream political parties in parliament tend to be more integration-friendly than large chunks of their electorate. In the Netherlands, this discrepancy has been made clear with the 2005 referendum on the EU Constitutional treaty: a 61% majority of voters rejected the

Treaty; in the lower chamber of parliament, meanwhile, the statute of ratification would have mustered a whopping 85% majority in favour.[17]

Taking this into account, one quickly arrives at two related gaps: a gap between the EU as a project and the citizens, and a gap between the domestic political class and, again, the citizens, over Europe. An increasingly popular recipe to tackle both is the addressing of the role of national parliaments in the EU. An enhancement of parliaments' powers in the EU policy process, as well as improved communication of the benefits of integration, is then meant to bridge the gap to the citizenry. This approach may be the most convenient for European treaty drafters, as it is sufficiently soft and open-ended so that it does not jeopardize the fundamental logic of the EU system, and remains acceptable to the greatest amount of players at both national and European level. The approach is, however, based on two fallacies. The first fallacy is to assume that mere power and activity in parliaments brings about societal embedding. The second is that parliaments as such are suitable for recruitment to communicate or in fact to 'sell' Europe to the citizens.

Enhanced powers, such as binding or non-binding parliamentary veto powers enshrined in a treaty, are questionable from the start since parliaments as such act by majority. If anything, veto powers, such as the objection right under the subsidiarity early warning system or the binding one-house veto against the application of the passerelle clause, envisaged in the Constitutional Treaty, bring about an empowerment of the upper chambers. In the lower chambers, however, the added value of a majority vote in parliament depends entirely on the degree of cleavage between a cabinet, on the one hand, and its own MPs, on the other hand.

Even if such cleavages do exist, powers alone will not promote societal embedding if they are not linked to an exercise of politicization. The same applies to domestically crafted measures: the already existing Dutch assent procedure for the Third Pillar whereby both chambers of parliament already may impose a scrutiny delay and negotiating mandates upon Brussels-bound ministers, does not seem to impress voters either. For communication in the sense of public relations, whereby politicians jointly seek to convince their citizens, a parliament is also ill-suited: it is exactly the lack of intra-parliament splits that contributes to the gap to the voters in the first place.

Thus, even if parliamentary scrutiny powers are sharpened, including more absolute vetoes at EU level and a mandating and reserve routine across the board domestically, without societal

[17] See O. Tans, 'The Dutch Parliament and the European Constitution', in Ph. Kiiver, ed., *National and Regional Parliaments in the European Constitutional Order* (Groningen, Europa Law Publishing, 2006).

embedding through politicization positive results will not come about as desired. The Danish model of centralized scrutiny, for instance, is exposed to criticism, in that oversight by the European affairs committee may be tight, but the sectoral committees and the plenary remain excluded from the process. The European affairs committee acts like a parliament within parliament, or in fact like an extended cabinet meeting.[18] Even in the Finnish parliament, which involves the sectoral committees in the European scrutiny work more closely, mandating meetings are not public, and Finland remains yet another member state where MPs are more pro-European as compared to their voters. The public in Denmark, meanwhile, does not appear to grow any more pro-European because of the parliamentary oversight regime, which again underlines a crucial point: scrutiny is not there to convince voters of the benefits of European integration, and make them more Europe-friendly. It is there to capture existing salience among the population, so as to translate voter sentiments into parliamentary politics and to maintain the legitimacy of the political class. For that, what is required is politicization: exporting debate beyond the circles of EU specialists, into the plenary, and beyond parliament, into society at large.

7 Conclusion

It is easy to call upon national parliaments to communicate Europe to the citizens, and to enhance their formal powers. Yet parliaments maintain their link to the citizenry, and their legitimacy, not through public relations festivals in favour of a common cause, or through paper competences that fail to impress. What parliamentarians can do, though, is reflect on why scrutiny of EU matters tends to be lenient, and where the limits of their own institutional and political capacities lie; select EU issues that they deem suitable for politicization in the light of their trade-offs, even if there will be but few such issues; commit themselves in public to a standpoint on the issue, preferably in logical continuation of their domestic manifesto; and then, on these occasions, not shy away from using to a full extent the formal and informal influence opportunities within their own member state and beyond. Parliaments are not limited to questioning their own ministers upon arrival from Brussels, they can engage in a host of inter-institutional and cross-border dialogues. Furthermore, while an institutional or procedural innovation, such as subsidiarity control, can help raise awareness of European affairs, parliaments should by no means feel restricted to focusing on subsidiarity alone: other criteria are, for the purposes of politicization, far more interesting, for example the cost and sheer desirability of a project in the first place. National parliaments will then not produce any miracles. But they can

[18] See Ph. Weber-Panariello, *Nationale Parlamente in der Europäischen Union* (Baden-Baden, Nomos, 1995) at p. 308.

contribute to Europe-wide checks and balances and, at the same time, put their relation with their own constituents as regards the attitude towards Europe on a new and clearer footing.