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The parliamentarisation of EU decision-making? The impact of the Treaty of Lisbon on national parliaments.

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Subject: European Union. **Other related subjects:** Constitutional law

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Abstract: Considers how "deparliamentarisation" has arisen in the EU Member States through the transfer of legislative powers from national parliaments to the EU. Examines the subsidiarity monitoring provisions of the Treaty of Lisbon 2007 Protocol 2, the provision of information to national parliaments under Protocol 1 and the Barroso Initiative of 2006. Comments on the German Federal Constitutional Court's judgment in Re Ratification of the Treaty of Lisbon (2 BvE 2/08). Assesses the extent to which Protocols 1 and 2 and the Treaty on the Functioning of the European Union art.12 will lead to improved accountability and legitimacy.

Legislation Cited: Treaty of Lisbon 2007 Protocol 1

Treaty of Lisbon 2007 Protocol 2

Treaty on the Functioning of the European Union art.12

Cases cited: Ratification of the Treaty of Lisbon, Re (2 BvE 2/08) [2010] 3 C.M.L.R. 13 (BverfG (Ger))

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*E.L. Rev. 480 Abstract

Europeanisation has marginalised national parliaments and their democratic practices leading to a "deparliamentarisation" within the European Union. The Treaty of Lisbon includes substantive provisions designed to improve participation by national parliaments in EU decision-making, the most significant of which is the allocation of subsidiarity monitoring. This is intended to address concerns that national parliaments are peripheral within the EU polity, and that EU legislation lacks legitimacy among its citizens. Protocols 1 and 2 of the Treaty of Lisbon promote a horizontal political dialogue between national parliaments within subsidiarity monitoring, but, this does not assure improved legislative legitimacy, nor does it adequately address deparliamentarisation. This article argues that, while the Treaty of Lisbon enhances the privileges of national parliaments, they are not "recentred" as an influential collective bloc of actors within the European Union's institutional framework.

Introduction

Europeanisation[1] has created a shared policy and legislative agenda which Member States are bound to implement. "Hard" law, as a tool of harmonisation, is complemented by an increased reliance on "soft" law and policy co-ordination following the adoption of the Lisbon Agenda in 2000. Europeanisation utilises a distinct governance framework at the centre of which is the ordinary legislative procedure. Legislative powers have been transferred to the Council and European Parliament at the expense of national institutions and actors.[2] This caused a "deparliamentarisation"[3] due to the absence of national parliamentary ***E.L. Rev. 481*** participation in decision-making, and the limited domestic accountability of the executive in EU affairs.[4] Domestic scrutiny focused exclusively on ministerial accountability, varied in effectiveness across the Member States, operated independently of the EU legislative process, and was no substitute for the loss of legislative competence.

The marginalisation of national parliaments may be more accurately described as "de-nationalparliamentarisation". The Treaty of Lisbon 2007[5] acknowledges this criticism by including a revised Protocol 1 on National Parliaments[6] and a new art.12 TEU, which states that "national parliaments contribute *actively* [emphasis added] to the good functioning of the Union".[7] This "active contribution", through participation in subsidiarity monitoring under Protocol 2,[8] creates an expectation that, collectively, national parliaments will inject democratic legitimacy to EU legislation.

The purpose of this article is to consider the extent to which these revised Treaty provisions "recentre" national parliaments within the EU polity. In particular, do the subsidiarity monitoring arrangements offer a framework for a vibrant political dialogue out of which a new collective of national parliaments may emerge? When considered together with other informal developments, for example, the Barroso Initiative for the provision of information to national parliaments, to what extent do these new opportunities to participate in EU decision-making address the criticism of deparliamentarisation?

Finally, the article evaluates these new procedures and practices and whether they have the capacity to create a new paradigm for improved accountability and legitimacy.

Deparliamentarisation within the Member States

The loss of legislative competence

Europeanisation has transferred legislative competence for key economic and social policies to the European Union and is the overriding cause of deparliamentarisation.[9] National parliaments have been described as "victims" of Europeanisation[10] because the technocratic characteristics of EU decision-making have strengthened executives and the Council at the expense of national parliamentary practices.[11] Ministers have assumed overall legislative responsibility in policy areas which have been "Europeanised", for example, police and judicial co-operation. Furthermore, the regulatory tools of Europeanisation have not been restricted to directives, regulations and decisions. The European Union has extensively utilised soft law and the Court of Justice remains a key actor in shaping integration. Together these regulatory techniques ***E.L. Rev. 482*** have delivered a gradual, but consistent, expansion of EU competences at the expense of national parliaments.

In response to criticisms that Europeanisation created an institutional "democratic deficit" Treaty reform has pursued democratisation. Since the Single European Act (1986), all Treaties have extended the legislative powers of the European Parliament,[12] the purpose of which was to improve both input and output legislative legitimacy.[13] This democratisation occurred without direct reference to national parliaments and their democratic traditions, and this political evolution has reinforced deparliamentarisation.[14]

National parliaments as variable actors in EU affairs

Europeanisation has resulted in substantive and procedural deparliamentarisation.[15] Substantively, through Treaty ratification, national parliaments have ceded legislative competence.[16] Procedural deparliamentarisation arises from the absence, within the Treaties, of any reference to national parliaments until the Maastricht Declaration and Amsterdam Protocol acknowledged parliamentary scrutiny reserves. These reserves were intended to secure ministerial accountability by restricting ministerial action in Council, until the parliament had completed its review of the legislative proposal. However, the scrutiny activities which the reserve protected varied in practice and effectiveness,[17] and did not constitute individual component parts of a collective Council accountability.[18]

The disparity of internal modus operandi led to parliaments being classified as either "strong" or "weak" actors in respect of their EU oversight activities.[19] Working Group IV of the Convention[20] recognised that differentiated participation by parliaments decreased political accountability and legislative legitimacy. The Treaty of Lisbon acknowledges these criticisms and assigns to national parliaments the task of subsidiarity monitoring for two identifiable reasons.[21] First, to address the discrepancy between "weak" and "strong" parliaments Protocol 2 introduces a harmonised minimum standard for EU scrutiny activities. This presumes that effective subsidiarity monitoring necessitates political dialogue within an organised horizontal collective. Secondly, and in a marked development, subsidiarity monitoring is intended to provide output legitimacy.[22]

E.L. Rev. 483 The Treaty of Lisbon has decoupled the requirements of input and output legitimacy previously attributed to the legislative functions of the European Parliament.[23] Collective subsidiarity monitoring implies that citizens are more likely to accept legislation if national parliaments confirm its compliance with EU competences. To secure this consent, Protocol 2 includes a compulsory consultation procedure between parliaments on the question of subsidiarity compliance. This development of political dialogue has been highlighted as an opportunity through which parliaments may reposition themselves within the EU polity. For example, Passos considers that national parliaments have become a "new actor in the European Union legislative process to be added to the existing European Parliament-Council-Commission triangle".[24] The forthcoming sections examine the practice of subsidiarity monitoring and whether this creates a framework for improved parliamentary participation in EU decision-making.

Subsidiarity monitoring by national parliaments

Protocol 2 is the single most important development for national parliaments since their contribution was first recognised by Declaration 13 of the Treaty of Maastricht. There are three reasons for this. First, subsidiarity monitoring confirms the presumption that, within a multi-level governance framework, legislation is made at the appropriate level. Secondly, under Protocol 2, parliaments are expected to engage in a political dialogue, principally through the Conference of European Affairs Committees of National Parliaments (COSAC).[25] By so doing they should arrive at a consensus concerning the compliance of a legislative proposal with subsidiarity.[26] But this task is not without difficulties because, inter alia, the Treaty of Lisbon does not provide a clear and unambiguous explanation of what constitutes subsidiarity. Finally, recognition of national parliaments as guardians of competence acknowledges the presence and importance of the nation state within EU integration. Parliaments, above all other institutions, provide a ***E.L. Rev. 484*** tangible embodiment of the state, and it is they that have dutifully ratified each new Treaty that has enabled deeper integration.

Defining subsidiarity

Under art.5(3) TEU, in policy areas which do not come within the scope of exclusive EU competence the Union shall act only if, and,

"insofar as the objectives of the proposed action cannot be achieved by the Member States … but can rather by reason of scale or effects of the proposed action be better achieved at the EU level."

This, prima facie, suggests a presumption against EU action, but, since the Treaty of Maastricht, the precise meaning of subsidiarity has been the subject of much debate.[27] The Court has favoured a restrictive interpretation, shared by the Commission, in whose view art.5 TEU raises a presumption that the measure satisfies the dual requirements of necessity and effectiveness for EU action to be justified.[28]

Wyatt[29] considers this dual requirement unnecessary and poses a different single test,[30] namely "can the objectives of the proposed action *only* be achieved by [EU] wide action"? If the answer is "no", then action should be taken at the national level. On this interpretation, the purpose of subsidiarity monitoring would be to distinguish between those measures which *will* produce an EU wide outcome, from those which *must.* [31] This distinction is significant for parliaments because the single requirement would focus them on the core task of Protocol 2, i.e. to examine whether the European Union needs to act in order to attain the objective. This does not automatically require consideration of related questions of proportionality under art.5 TEU. Wyatt's analysis also exhibits greater consistency with the allocation of input and output legitimacy post Lisbon. Once parliaments determine that the European Union should not act, it is unnecessary to consider the effectiveness of legislation. Even if parliaments conclude that EU action is appropriate, this implies that the measure is proportionate.[32]

Protocol 2 includes what is known as the "Early Warning Mechanism" which provides parliaments with a pre-legislative constitutional intervention device. Through the mechanism parliaments inform the Commission, or other initiating institution, if a legislative proposal fails to comply with subsidiarity. This necessitates the completion of national parliamentary scrutiny which incorporates a process of horizontal political dialogue. The mechanism includes two different procedures, the "yellow" and "orange" cards, which require different thresholds to be attained. Following the conclusion of the political dialogue, if the requisite number of chambers concludes that the measure breaches subsidiarity, then, the initiating institution is asked to review the proposal. On this analysis Protocol 2 provides a framework through which individual parliaments assess Subsidiarity compliance to arrive at what *may* subsequently, subject ***E.L. Rev. 485*** to the relevant thresholds being attained, be defined as a "collective" decision. Protocol 2 does not, per se, create a collective of national parliaments.

Enforcing subsidiarity: the operation of the "yellow" and "orange" card procedures

The Early Warning Mechanism creates a new dynamic for national parliaments by enabling them to express opinions on subsidiarity directly to the initiating institution. Commenting on the original provisions within the Constitutional Treaty, the House of Lords EU Committee Report stated that:

"The raising of a yellow card would have a significant effect on the EU Institutions … if national parliaments operate the mechanism *effectively* [emphasis added] it would be hard for the Commission and the Council to resist such sustained political pressure."[33]

"Effectively" implies substantial consensus between parliaments which Protocol 2 does not presume.

The orange and yellow card mechanisms in practice

To operate the yellow card, Protocol 2 states that within eight weeks from the,

"date of transmission of a draft legislative proposal in the official languages of the Union, any parliament or chamber may submit a reasoned opinion stating why it considers that the draft in question does not comply with the principle of Subsidiarity."

The yellow card covers Commission proposals and those from other EU Institutions with powers of initiative. A voting system applies, with one vote allocated per chamber within a bicameral parliament [34] totalling 54 votes in the 27 Member States. If one-third of the votes submit[35] that a proposal violates the subsidiarity principle, then the institution which made it must review it.[36] Though the Commission is required to reconsider the proposal, and may choose to amend it in the light of the subsidiarity review, there is *no* mandatory obligation within the Protocol that, under these circumstances, it should be amended or withdrawn.[37]

The orange card applies only to proposals under the ordinary legislative procedure and necessitates a simple majority of votes cast.[38] The Commission may amend, maintain or withdraw the proposal, but, if it chooses to maintain the proposal, it must provide reasons for doing so. In these circumstances, the European Parliament and Council must, before the conclusion of the First Reading, benchmark the proposal against the subsidiarity criteria, taking into account the views of the parliaments and the Commission. If the Council acting by a majority of 55 per cent, or the European Parliament by a majority of the votes cast, finds against the proposal, then it will fall.

In the light of the modest thresholds required to activate the mechanism, the term "effective" necessitates levels of participation by national parliaments that exceed the minimum thresholds, and herein lies the problem. It has been suggested that silence on the part of a parliament may be construed as either no ***E.L. Rev. 486*** objection, or tacit consent to a legislative proposal.[39] While this may be correct in some instances, this hypothesis may be challenged. One determining factor, which remains an issue in parliaments of smaller Member States, is the limited availability of personnel. There may simply be a shortage of available MPs to undertake a subsidiarity review which, had it taken place, could culminate with an objection being raised. Even within the Scandinavian parliaments, where scarcities of resources or personnel are not immediate concerns, the issue of adequate time, and their preoccupation with pursuing ministerial accountability have deterred participation in subsidiarity monitoring.[40]

In relation to the subsidiarity provisions within the Constitutional Treaty it was highlighted that difficulties would exist to secure even the one-third threshold to trigger the Early Warning Mechanism. Kiiver illuminated that the threshold would be unattainable other than through "coincidence or some other unrelated events".[41] This criticism is equally applicable to the orange card procedure where a simple majority of chambers is required. Furthermore, notwithstanding the practical problems of securing the majority threshold, national parliaments remain dependent upon the proxy representation of their collective position by either the European Parliament or the Council to formally activate the orange card. It is doubtful that these institutions will share the subsidiarity concerns of national parliaments, and this is just one of several limitations with the Early Warning Mechanism.

The limits of subsidiarity monitoring

It would be churlish to dismiss Protocols 1 and 2 outright, as they have formalised a process of political dialogue between national parliaments. Subsidiarity monitoring could also mainstream EU affairs within parliaments, and may have spill-over effects by which increased resources are invested in EU affairs, especially if the parliaments believe their opinions are influential. Furthermore, subsidiarity monitoring has the potential to galvanise a culture of accountability in parliaments where strong executives dominate. The channelled and focused scrutiny of EU legislative proposals may offer a model for regulating parliamentary/executive relations.

Subsidiarity monitoring remains an important political task which Protocol 2 leaves to those institutions which have an interest in its application. Yet despite these new provisions, criticisms that Europeanisation is the root cause of deparliamentarisation remain. For example, subsidiarity monitoring does not influence "upstream" policy formulation; rather it could be considered as the

fulfilment of a procedural function of limited competence monitoring at the “fag end” of the decision-making process.

Protocol 2 represents a departure from the Amsterdam arrangements, but the extent to which it repositions parliaments within the EU polity is debatable. It has been argued that the Early Warning Mechanism is flexible enough for parliaments to be more directly engaged in EU affairs. Kiiver suggests that through the mechanism parliaments, and in particular upper chambers, could evolve in to an advisory body, such as a Conseil d'état for the European Union.[42] This suggests both *real* influence and the genesis of a quasi-institutional organ representing national parliaments, which could position them alongside the legislative triangle.

The early experience does not indicate parliaments actively seeking this enhanced role. Upper chambers continue, as before, to have greater capacity to engage in EU affairs, but the evidence indicates that ***E.L. Rev. 487*** participation within lower chambers remains inconsistent.[43] Subsidiarity monitoring could increase the sense of “ownership” over EU affairs among parliamentarians but this does not guarantee that, within the context of their overall commitments, parliaments will use the mechanism proactively. While upper chambers may have more time to review EU policy, it is questionable whether legislative legitimacy would improve significantly if the operation of the mechanism was exclusively within the domain of, or dominated by, upper chambers. For example, acting independently upper chambers would struggle to show a yellow, let alone, an orange card.

The objective of subsidiarity monitoring is to provide output legitimacy. It is therefore crucial to secure the chain of legitimacy to the citizen through the participation of directly elected lower chambers. However, the preoccupation within many chambers of ministerial accountability may continue to act as a deterrent for lower chambers which, as the example of the Nordic parliaments illustrates, could decide to opt out of subsidiarity monitoring altogether.[44]

The absence of a “red card” is considered within some parliaments as a weakness of the Early Warning Mechanism.[45] The ability of parliaments to stop the legislative process would suggest real influence.[46] Working Group IV rejected the idea of national parliaments either individually or collectively curbing the legislative process as being inconsistent with democratisation and institutional balance.[47] The Treaty allocates no institutional status to national parliaments, nor are they sited within the legislative triangle. Constitutionally this makes a red card inappropriate and its inclusion would be politically inconsistent with the restriction of the national veto in the Council.

The primary criticism with the Early Warning Mechanism is that, in the case of an orange card, the Protocol fails to find an appropriate compromise between efficiency and accountability. This arises from the absence of a safeguard clause which may have addressed the concerns of national parliaments. This weakness is most apparent with the orange card because its activation necessitates a majority of chambers. The flaw with the Protocol is that it does not offer sufficient protection to the views of a majority. The evolution of a Conseil d'état, or other quasi-institutional representation, without a designated Treaty role offers only a vague prospect of influence in, for example, circumstances when the Council and the European Parliament decide not to provide the necessary proxy representation to confirm an orange card. In these circumstances, a Conseil d'état should not be seen as offering a functional alternative to transparent Treaty provisions which could have guaranteed parliamentary rights of participation. A more pragmatic solution would have been for Protocol 2 to include procedural safeguards which provided that, in circumstances where a majority of parliaments raised an objection, there would be a presumption that the proposal is withdrawn, and parliaments could protect this prerogative through the Court of Justice.

For example, in circumstances of 55 per cent or more of the chambers voting against a proposal, the Protocol could have included provisions which required a “special” procedure. The presumption would be that the Council and European Parliament withdraw the proposal, but which could be rebutted by overriding reasons of urgency or necessity. These could be objectively justified before the Court of Justice through an action for judicial review brought *directly* by national parliaments.

E.L. Rev. 488 This should not be interpreted as a proposal for a “red card”, but would amount to national parliaments protecting their Treaty prerogatives. A parallel can be drawn with the Court's acknowledgment that the European Parliament could protect its prerogatives to participate in decision-making[48] even though these prerogatives were not formally recognised within the Treaty. The Court considered their protection, directly by the European Parliament, as necessary to the maintenance of political accountability within decision-making.

The limited evidence of horizontal co-ordination since 2009[49] indicates that even in the case of controversial legislation, for example the Directive for Patient Mobility,[50] which encroaches upon the ability of Member States to deliver publicly funded social services, this will not necessarily galvanise parliaments to raise subsidiarity concerns. It is therefore likely that the 55 per cent threshold would only be achieved in exceptional circumstances, indicating that national parliaments would rarely commence proceedings before the Court. However, Treaty acknowledgment of the persuasive nature of a majority, and the opportunity to seek judicial review, could have addressed the sense of doubt that the views of parliaments may not be sufficiently recognised in circumstances of popular opposition.[51]

This form of political settlement could have enhanced accountability and legislative legitimacy by comparison with the existing orange card procedure. Constitutionally, it would have offered an improved framework by which to maintain the chain of legitimacy to parliaments, through an action for judicial review which objectively determined whether the grounds of urgency or necessity have been satisfied. This narrow extension of locus standi to national parliaments would have placed the burden upon the Institutions to justify the measure and subjected these political decisions to independent and binding review, something which, for example, a Conseil d'état would be unlikely to offer.

Although judicial review is possible under Protocol 2 the action is not commenced directly by national parliaments. Article 8 of Protocol 2 permits Member States, presumably the governments of Member States, to seek judicial review under art.263 TFEU, on behalf of a parliament. This may occur when an objection to a legislative proposal on grounds of subsidiarity is rejected, but creates no new privileges for national parliaments. Proxy actions brought by Member States on behalf of their legislatures are not a new development but are rare events, possibly because the very governments bringing the action are also involved in the decision-making process through the Council. In the *Tobacco Advertising* case,[52] the German Government commenced an action before the Court, following subsidiarity objections raised by the Bundestag, but this is a parliament with a strong tradition of pursuing competence issues. The forthcoming section examines how the 2009 German Federal Constitutional Court's (FCC) *Lisbon Treaty* judgment[53] considered subsidiarity monitoring under the Treaty of Lisbon and whether Protocol 2 improves legislative legitimacy and guarantees parliamentary rights of participation.

The FCC Lisbon Treaty judgment 2009 and the application of subsidiarity

The Treaty of Lisbon promotes representative democracy.[54] In EU decision-making this is complemented by elements of participative, associative and direct democracy. Article 10(2) TEU highlights that representative democracy arises from two tracks of legitimation.[55] These are the European Parliament, ***E.L. Rev. 489*** which directly represents citizens, and the European Council and Council which represent the Member States and which are accountable to national parliaments.

The FCC reviewed Protocol 2 and whether it includes adequate guarantees against the alleged infringement of democracy arising from a transfer of competence. The judgment is noteworthy because it provides a domestic judicial and constitutional perspective on subsidiarity monitoring and whether this maintains the chain of legitimacy to national parliaments.

The FCC stressed that, notwithstanding Europeanisation, Member States must retain a significant degree of political control over economic, social and cultural matters. In policy areas where limited Europeanisation has occurred, for example, police and judicial co-operation and family law, the FCC considers that cultural differences prevent the creation of a fully homogenous Union approach.[56] The transfer of powers to the European Union should only occur where there is a *genuine* cross-border dimension which necessitates harmonised action, and parliaments have a responsibility to remain vigilant and guard against unnecessary EU legislation.[57]

In an ambiguous judgment, the FCC seeks to delineate the boundaries of EU competence beyond which Member States remain free to regulate. The FCC held that, in the absence of adequate legal protection at the EU level, it reserves the right to review the compliance of legal instruments with subsidiarity.[58] Notwithstanding this “line in the sand”, the FCC stresses that it does not view the protection of fundamental political and institutional structures in Germany as a contradiction with the principle of loyal co-operation. The FCC emphasises the Basic Laws' “openness” towards integration and argues that safeguarding national constitutional identity and protecting Treaty rights go “hand in hand”.[59] Though the FCC accepts the primacy of EU law it is questionable whether, on this reasoning that the circle can always be squared.

The FCC concludes that the requirement of democratic legitimacy in, for example, criminal law can *only* arise from the legislative activities of national parliaments.[60] An implication of this is that in sensitive policy areas the FCC does not consider subsidiarity monitoring as an adequate alternative to the exercise of exclusive Member State competence reviewed by the national parliament. This reasoning recognises the importance of the individual scrutiny function and questions the effectiveness and desirability of collective subsidiarity monitoring. The FCC reserves a right of exclusive parliamentary control for the Bundestag in sensitive policy areas, even though the EU institutions may consider the existence of a cross-border dimension. The judgment considers the Bundestag best placed to determine which legislative proposals infringe German constitutional competence and questions the value of Protocol 2. This reasoning displays a degree of mistrust towards other parliaments. The FCC implies that they may not take subsidiarity monitoring seriously, which may permit EU legislation in policy areas where, the FCC believes, the Member States should retain exclusive competence.

The judgment also displays scepticism towards the representative functions of the European Parliament. The absence of a formal parliamentary system of governance necessitates a prominent role for national parliaments to prevent “competence creep”.[61] The judgment leaves an imprecise threat hanging over exactly ***E.L. Rev. 490** *how* the FCC will act in future disputes when it considers that EU law breaches subsidiarity; perhaps this is deliberate and the judgment is intended to act as a deterrent to any further legislative or judicial competence creep.

The Treaty of Lisbon provides institutional recognition for national parliaments, but they are not “EU Institutions”. Their status, as directly elected institutions at the margins of a decision-making process which seeks to improve participatory democracy, is an irony not lost on the FCC. The FCC considers that this limited form of Treaty recognition does not compensate for the continuing legitimation deficit arising from the representation provided by the European Parliament.[62] This argument is not without merit when, for example, turnout at European Parliament elections is compared with national parliamentary elections.[63]

The extension of EU competence and the demise of the veto make parliamentary control of ministers more difficult. Ministers, who are mandated to vote in a particular way in Council (as is the case in Denmark), may employ the justification that they were outvoted, notwithstanding their opposition, with the threat of minimal domestic censure. This undermines the political control of ministers to parliaments which art.10(2) identifies as one of the two tracks of participatory democracy. The question addressed by the FCC is whether procedural strengthening through subsidiarity monitoring “shifts existing political rights of self-determination to procedural possibilities of intervention and legally assertable claims of participation”.[64]

The FCC is not totally dismissive of subsidiarity monitoring as a buffer against competence creep and acknowledges the importance of output legitimacy. The FCC does not, however, consider subsidiarity monitoring as a substitute for legitimacy arising from direct elections, or the broader representative functions of national parliaments. Subsidiarity monitoring *may* improve legitimacy when performed by *all* Member States under a uniform set of criteria. But the judgment doubts whether a horizontal political dialogue is consistently achievable, or, that it offers a viable alternative to ministerial accountability.[65]

Protocol 2 creates the procedural framework for a political dialogue which represents a departure from earlier arrangements. Previous Treaties recognised the individual rights of parliaments to secure ministerial accountability, which the FCC views as integral to legislative legitimacy, and did not seek to collectivise or harmonise their actions. The forthcoming sections consider two issues discussed within the FCC judgment. First, can collective monitoring by national parliaments better prevent competence creep, and secondly, will this inject output legitimacy in to EU legislation?

Article 12 TEU and Protocols 1 and 2--collectivising the activities of EU parliaments?

Under the pre-Lisbon arrangements, the overriding purpose of parliamentary scrutiny was to influence the minister prior to the final vote in Council through a review of the Council's draft common position. This scrutiny had minimal impact outside national capitals and sited parliaments in a “monist” position vis-à-vis governments.[66] The primary weakness was that the pursuit of ministerial accountability occurred within a legislative process in which majority voting restricted ministerial responsibility. As a result national parliaments were neither central nor influential actors, and more appropriately could be described as “lobbyists” seeking to influence their government.

*E.L. Rev. 491 Encouraging inter-parliamentary co-operation

Protocols 1 and 2 represent a re-alignment from the "monist" position through the introduction of a horizontal political dialogue. The aim is to move the focus of national parliaments away from the monist objective of ministerial accountability to engage in a process of dialogue to arrive at a single opinion which represents the collective view of parliaments on the question of subsidiarity compliance. This "polycentric" methodology has been identified as a shift towards a single EU scrutiny paradigm through which parliaments cease to function as isolated individual actors and evolve in to a proactive horizontal bloc.[67] Ostensibly this may be viewed as national parliaments recentred, but the early evidence indicates that, notwithstanding Protocols 1 and 2, systematic collective subsidiarity monitoring is yet to be achieved.[68]

Relations with the European Parliament

Under art.12(f) TEU, national parliaments and the European Parliament participate in "inter parliamentary cooperation" in accordance with Protocol 1. This Protocol expands the concept of the "collective" and implies that subsidiarity monitoring should not be an exclusively horizontal task. Article 9 of Protocol 1 requires the European Parliament and national parliaments to determine together "the organisation and promotion of regular inter-parliamentary cooperation within the Union". When considered alongside the requirements of Protocol 2, this vertical co-operation must include consensus on the application of subsidiarity. Inter-parliamentary co-operation is not a new idea. COSAC has promoted information and best practice exchange between national parliaments and with the European Parliament since 1989. The Amsterdam Protocol formally recognised COSAC enabling it to, inter alia, "address to the EU Institutions any contribution it deems appropriate on the legislative activities of the Union". Article 9 of Protocol 1 goes further and COSAC is identified as a forum to debate policy and information exchange.[69] Horizontal and vertical collaboration between these actors is important but, establishing a framework for dialogue is not the challenge. For example, co-operation within COSAC originated *without* the need for Treaty amendment and has been supplemented by other informal initiatives such as the IPEX database.[70]

The *real* test of this relationship arises within the ordinary legislative procedure. Significant scope for disagreement exists because the input legitimacy provided by the European Parliament may not necessarily correspond to the acceptable limits of output legitimacy defined by national parliaments through subsidiarity monitoring. Put bluntly, it is questionable whether the European Parliament would share an expansive interpretation of subsidiarity with national parliaments, for example, making the European Parliament an unreliable partner in a case where an orange card was shown. The evidence further indicates that the Court is unlikely to resolve a dispute in favour of national parliaments and provide an interpretation of subsidiarity that is inconsistent with Europeanisation.[71]

*E.L. Rev. 492 A prescribed collective?

Academic commentators[72] and parliamentarians[73] have argued that the creation of a coherent "collective" of national parliaments is an unlikely and even undesirable goal, which cannot be achieved through a Treaty. However, the Preamble to Protocol 1 includes the statement of "desiring to encourage greater involvement of national parliaments in the activities on the Union …". This complements the objective in art.12 TEU that "national parliaments contribute actively to the good functioning of the Union".

The original English language draft of art.12 TEU included a statement that "national parliaments *shall* contribute actively to …", suggesting a positive requirement to participate in subsidiarity monitoring. The final English language version omits any mention of "shall", but this omission does not necessarily suggest the absence of a mandatory connotation in the provision.[74] The UK Government disagreed with a purposive interpretation of art.12 TEU and responded that the provision was purely declaratory. However, it may be argued that art.12 TEU creates a prescriptive function for parliaments which subordinates them to pursue subsidiarity monitoring rather than ministerial accountability.

Article 12 TEU, which if read together with the reference in Protocol 1 to "desire to encourage participation", creates an expectation, if not an explicit requirement for national parliaments. The Treaty of Lisbon identifies subsidiarity monitoring as the key task for them; they are the ones losing power to the institutions of the Union and are best placed to make the political judgment of how to apply this principle. The concern within several parliaments, for example the Danish Folketing, was that a synchronised opinion on subsidiarity could only be obtained at the expense of ministerial

accountability.[75] The parliamentary EU Committee of the Folketing is an influential strong committee which mandates the minister to vote in advance of the Council meeting.[76] It is not prepared to sacrifice this tradition of executive accountability to pursue political dialogue with parliaments who have historically been "weak" actors. This brings in to sharp focus the distinction between the individual and collective functions of national parliaments. Because, even post Lisbon, differentiated levels of participation in EU affairs remain, national parliaments can only continue to effectively fulfil the former and not the latter.[77]

Ministerial accountability and subsidiarity monitoring are not mutually exclusive tasks. The exercise of inquiry and review of draft legislation will generally inform both activities. Yet these remain detailed and onerous tasks for parliaments to complete within an eight-week period, and parliaments considered "weak" may decide not to engage. More generally, the problems of time and resources may lead some parliamentarians to conclude that, politically, there is nothing to be gained from subsidiarity monitoring, and art.12 TEU and the Protocols will not change their priorities.[78]

***E.L. Rev. 493** Irrespective of the purpose of scrutiny, the timely provision of information remains paramount and on this issue there have been two important developments. The first arises from the Treaty. The second is an informal, practical proposal for improved vertical co-operation between the Commission and national parliaments contained within the 2006 Barroso Initiative. To determine whether, and to what extent, these developments facilitate collective action by national parliaments, it is first necessary to consider how, in practice, they receive documentation.

The provision of information to national parliaments

The Amsterdam Treaty provisions

Under the Amsterdam Protocol parliaments were wholly dependent upon governments for the provision of information,[79] and the systematic late provision of a limited number of documents impaired executive accountability.[80] In relation to legislative proposals, the Amsterdam Protocol was weak, requiring the Commission to make these available in "good time" for governments to distribute them to parliaments "as appropriate". This inconsistent access to documents across the Member States reinforced the inconsistency between weak and strong parliaments and created an "information deficit" within many legislatures.

Notwithstanding these limitations, parliaments were not hampered to the point of impotence in their oversight of EU activities. Rather than being passive "victims", many parliaments, at least in the context of information transmission, took the initiative and improved internal procedures designed to maximise ministerial accountability. These mechanisms originated independently from the Treaty and were in the form of procedural parliamentary guarantees. In the UK Parliament, the Scrutiny Reserve Resolution, introduced in 1980, is the "cornerstone" of the scrutiny process and includes assurances similar to those in most Member States.[81] The Reserve incorporates binding guarantees that the executive will not agree to a legislative proposal in Council until the scrutiny process is complete, save in cases of "urgency". The Amsterdam Protocol recognised scrutiny reserves as a means of securing ministerial accountability, but this constituted only a rudimentary acknowledgement of individual parliamentary procedures.

The Treaty of Lisbon arrangements

The primary development in Protocol 1 is an extended right to receive a variety of documents *directly* from the Commission, or other originating institution. In a scrutiny process where time is of the essence, this is a noteworthy development. Protocol 1 requires the direct provision of draft legislative acts,[82] the annual legislative programme, Council agendas,[83] minutes and the annual report of the Court of Auditors.[84] Of most significance is the commitment to transmit draft legislative acts *directly* to parliaments which are a prerequisite for an ensuing political dialogue. The improved provision of information is only part of the picture, as the provision of information must be *timely.* The protracted provision of information has proved ***E.L. Rev. 494** problematic for parliaments, primarily because their internal scrutiny mechanisms and the ordinary legislative procedure operate independently.

The Amsterdam Protocol provided that "a period of at least six weeks must elapse between publication of draft EU legislation in all languages and placing the matter on a Council agenda for a

decision" to enable national parliaments to complete their scrutiny. Protocol 1 extends this period to eight weeks, with a further 10 days elapsing between placing the proposal on the agenda and its adoption under the ordinary legislative procedure. The additional two-week period is longer than the equivalent period in the Constitutional Treaty,[85] but, in practice, it is unlikely to make a significant difference.[86] An increasingly emerging feature of decision-making after the 2004 enlargement is that proposals are agreed by the European Parliament at the first reading stage.[87] The consequence of this is that, if a parliament completes scrutiny towards the end of the eight week period, its views may only be incorporated if the Early Warning Mechanism had been triggered.

The improved provision of documentation is not a panacea and will not unilaterally collectivise or improve subsidiarity monitoring, but it may aid the process of political dialogue. This point was recognised by Commission President José Manuel Barroso who, in 2006, launched the eponymous Barroso Initiative in the aftermath of the rejection of the Constitutional Treaty. The Barroso Initiative has two underlying objectives which place the convergence of parliamentary participation in EU affairs at the centre. First, it includes a commitment to national parliaments to provide a wider selection of documents. Secondly, it encourages both a vertical and a horizontal political dialogue with the Commission and between national parliaments.

The Barroso Initiative for dialogue with national parliaments

The 2006 Barroso Initiative committed itself to a more efficient provision of a wider set of documents which de facto superseded the obligations within the Amsterdam Protocol. This included, for the first time, the transmission of all legislative proposals and consultation papers *directly* to national parliaments. This was a politically astute commitment by Barroso, because it gave national parliaments much, if not more than what the Constitutional Treaty delivered through a Protocol.

Protocol 1 remains important because it provides legally binding guarantees and formalises political dialogue. However, parliaments have, in practice, benefited more directly from the Initiative which encourages them to position themselves within the EU polity through a vertical political dialogue with the Commission. In a departure from the Amsterdam Protocol, parliaments have moved "upstream" to obtain documents directly from source. They responded to legislative and policy proposals through the use of individual or collective reasoned opinions similar, in practice, to those used under Protocol 2.

National parliaments have reacted positively to the Initiative. In the 2009 Annual Report for Dialogue between the European Commission and National Parliaments,[88] the Commission noted that it received ***E.L. Rev. 495*** 250 opinions from 30 chambers in 22 Member States. By comparison with only 200 opinions in 2008[89] and 168 in 2007,[90] a political dialogue between the Commission and national parliaments has become a regular practice and the statistics illustrate a clear upward trend.[91] A vertical dialogue with the Commission is important, and may improve horizontal exchange of information between parliaments as part of the overall process of political dialogue. Through interaction with the Commission, national parliaments have already rehearsed this political dialogue and this experience may, ultimately, improve the operation of the Early Warning Mechanism. Nonetheless, the 2009 Report provides only limited evidence of horizontal discussion.[92]

The Treaty of Lisbon and the Barroso Initiative have endeavoured to bring national parliaments from the margins of EU decision-making and render them within the EU polity. Both developments recognise the need for improved accountability secured through political dialogue. The question considered in the next section is whether these new opportunities offer the potential to realign institutional balance and position national parliaments as a new EU "organ", alongside the European Parliament-Council-Commission triangle?

A new EU organ of national parliaments?

The Barroso Initiative and the Treaty of Lisbon have led to suggestions that these developments may constitute the beginnings of a new "EU organ" representing national parliaments.[93] Cooper considers that the Early Warning Mechanism could evolve in to a "virtual third chamber",[94] and this sits alongside Kiiver's proposal for an advisory Conseil d'état.[95] New designations which indicate engaged and proactive national parliaments can be readily attached, but, within the existing Treaty framework, parliamentary priorities and overall parliamentary workloads, any enlarged function amounts to no more than an aspiration.

Neither the Treaty nor the Barroso Initiative includes reference to institutional representation for national parliaments. Furthermore, proposals for a second EU parliamentary chamber comprising representatives from national parliaments were rejected within the Constitutional Convention as inconsistent with institutional balance.[96] With the exception of IPEX and COSAC as forums to exchange information--and both pre-Lisbon developments--the Early Warning Mechanism is not bound to result in a significant increase of inter-parliamentary co-operation.

Paradoxically, evidence within the 2009 Report indicates that the improved provision of information under the Barroso Initiative facilitates the pursuance of ministerial accountability rather than improving a horizontal political dialogue. The Report identifies that fewer than 25 out of the 250 opinions delivered to the Commission expressed subsidiarity concerns.[97] For example, the proposed Directive on the ***E.L. Rev. 496** Application of Patients' Rights in Cross-border Healthcare[98] generated seven opinions to the Commission, of which only three raised subsidiarity concerns. Prima facie, this low number indicates an absence of political dialogue and challenges the assertion that subsidiarity monitoring has the capacity, at least in the foreseeable future, to develop in to an expanded role for national parliaments.

This evidence suggests either disagreement amongst national parliaments with regard to the application of subsidiarity, or, more generally, an absence of consultation between them. In either case, the small number of subsidiarity objections and the limited political dialogue in 2009 could imply that parliaments are using the modest increase in time, and the improved information transmission to pursue monist objectives of executive accountability. In 2009 for example, 250 opinions were issued by national parliaments to the Commission which were based upon 139 documents. Yet only 10 of these documents were commented upon by four or more assemblies, indicating very limited horizontal discussions.[99] This suggests that the vertical political dialogue with the Commission provides for a better opportunity through which to channel subsidiarity concerns.

This still leaves one outstanding question arising from Protocol 2. In the light of the above evidence, how is the concept of a “collective” to be understood? Should it refer only to the allocated task of subsidiarity monitoring, or is the interpretation to be broadened and applied to attainment of the thresholds in Protocol 2? Kiiver noted that attaining thresholds under the Constitutional Treaty provisions would not necessarily improve Subsidiarity monitoring. The primary concern of parliaments remained ministerial accountability and any co-ordination would amount to no more than a “phantom collective”, which would be achieved by coincidence rather than by design.[100] The evidence from the 2009 Report reinforces this and indicates that, if a legislative proposal impacts upon core domestic welfare policies, such as healthcare, national parliaments prioritise their review to evaluate domestic implications and convey any concerns directly to the Commission.[101]

This article questions the ability and the desirability on the part of parliaments to consistently secure the thresholds within Protocol 2. The example of Nordic parliaments displaying an indifference to subsidiarity monitoring has already been identified. Yet the Protocol acknowledges that collective action needs to be “fostered and encouraged”, principles which also underpin the practice of the Barroso Initiative. Through the improved Treaty provisions and the practical lessons of the Barroso Initiative, it may be argued that, given more time and experience, national parliaments *could* attain the one-third threshold for a yellow card in circumstances when it was merited. On this analysis, the term “collective” could apply to both the task of subsidiarity monitoring and its outcomes, though it remains difficult to justify as “collective” a response which barely attains the one-third threshold.

The scrutiny of non-ordinary legislative procedures

National parliamentary scrutiny of soft law and policy, such as the open method of co-ordination (OMC), has been problematic.[102] This less formal decision-making, which encompasses an exchange of policy ideas between Member States, is an important instrument of Europeanisation through which non-mandatory policies have developed. Soft law advances Europeanisation because it enables the European Union to embrace spontaneous realignment of national policy to correspond to a single EU model. However, an ***E.L. Rev. 497** increased use of soft law creates new challenges for parliamentary scrutiny committees to monitor soft law under existing terms of reference and practices. Furthermore, the Amsterdam Protocol did not apply to the OMC and the Treaty of Lisbon has not altered this position.

Managing diversity among 27 Member States requires an adaptation of Europeanisation techniques. The Commission envisaged that the OMC would “supplement existing decision-making through the

use of quantitative and qualitative benchmarks and indicators, and peer review procedures".[103] Peer review and benchmarking are intended to provide a degree of accountability for the OMC, but, as the OMC is concerned with policy co-ordination, these forms of accountability are incompatible with traditional parliamentary methods. The additional scrutiny consequence for national parliaments is the absence of a structured legislative process which culminates in a "hard" legislative proposal.

Despite the non-legislative and intergovernmental nature of policy co-ordination, soft law should be considered within the overall allocation of EU competences. Most significantly, soft law raises similar questions of subsidiarity compliance to hard law, and the Treaty of Lisbon envisages an expansion in the use of soft law. For example, art.5 TFEU requires policy co-ordination on core integration policies including economic[104] and employment[105] policies and encourages the co-ordination of Member States' social policies.[106]

Article 6 TFEU extends competence and envisages policy co-ordination to "supplement the actions of Member States" in new areas such as sport and tourism. Article 6 TFEU Europeanises, albeit in an informal manner, policies which had, hitherto, remained outside the scope of the Treaties. While there is a legitimate debate concerning EU regulation of sport,[107] its inclusion within the Treaty requires national parliaments to monitor policy developments and consider their subsidiarity implications. However, in the context of their overall responsibilities, limited time and human resources, these factors may dictate that parliamentarians elect to prioritise hard law. Soft law will be conceived without appropriate review reinforcing the proposition that Europeanisation causes deparliamentarisation.[108]

The OMC encourages participation by a diverse range of stakeholders and seeks to improve input legitimacy. Unlike the ordinary legislative procedure the Commission does not have a monopoly on proposals, and, when considered with the broad range of stakeholder input, this makes the OMC difficult for parliaments to monitor. The OMC is intergovernmental in practice which strengthens the role of the Council. This should, constitutionally, place parliaments in a stronger position to influence and exercise control over ministers, even by comparison with Protocol 2.[109] In practice it is civil servants, and not ministers, who take the lead in policy formulation making parliamentary control under established scrutiny procedures inappropriate.

E.L. Rev. 498 The empirical evidence indicates that parliaments have devoted little time to the review of OMC proposals.[110] It is not clear whether this arises from a lack of awareness or voluntary non-participation, but Armstrong suggests that a failure to grasp the purpose and effect of soft law, which produces tangible results through different regulatory procedures, is part of the reason. In the case of the UK Parliament, the OMC is developing as a mode of governance which is "acting outside the traditional scrutinising structures of representative democracy".[111] UK parliamentary procedures are geared towards the scrutiny of hard law, and governance techniques which have a domestic impact are "slipping through the scrutiny net".[112] Benchmarking and peer review as modes of accountability remain alien concepts within the UK Parliament. On this analysis there is no reason to suggest that, taking the UK Parliament as the yardstick of a "strong" actor in EU affairs, the review of soft law will be markedly improved in parliaments considered as "weak" actors.

Limited participation by parliaments in the OMC arises from the poor dissemination of information and because OMC documents are non-legislative, the information rights granted to national parliaments have been weaker. The Barroso Initiative partially addresses this problem through the provision of consultation documents directly to national parliaments. The 2009 Report for Dialogue with National Parliaments states that of the 250 opinions submitted, approximately half concerned non-legislative policy proposals.[113] Confirming their monist scrutiny priorities and their pre-occupation with the impact of soft law upon existing social or welfare policies, the parliamentary chambers of Sweden and Denmark have only engaged in a political dialogue with the Commission in relation to these non-legislative documents.[114] On the one hand this is encouraging and indicates that the importance of soft law has been recognised by what are classified as "strong" parliamentary chambers. On the other hand, this has not utilised the process of political dialogue, which, together with the non-participation by these chambers in Protocol 2, undermines parliamentary co-operation.

Despite the difficulties with reviewing soft law, national parliaments should reflect upon their internal scrutiny mechanisms and whether these may be adapted to secure improved accountability of the OMC. The increased use of soft law should not lead to a new democratic deficit within EU decision-making. Articles 5 and 6 TFEU formalise policy co-ordination, and these provisions will become increasingly important, for example to deliver the Commission's Agenda 2020 programme.[115]

The issue is whether national parliaments have the capacity and desire to adapt internal procedures

to undertake a systematic scrutiny of soft law. Two reasons for more proactive parliaments can be identified. First, scrutiny may indirectly improve the quality of domestic legislation through the incorporation of policy ideas from other states. Secondly, this review could strengthen parliamentarians by providing information that can be used to challenge their government. This underlies the purpose of the OMC which is to expose national politicians and civil servants to new ideas and practices from other Member States with the purpose of policy improvement. The scrutiny of soft law therefore has the capacity to empower parliaments vis-à-vis their executives, but it has not, to date, improved political dialogue between parliaments.

*E.L. Rev. 499 Conclusion

Working Group IV identified that,

"national parliaments have a distinct role to play within the EU polity. It concluded that their enhanced involvement would help to 'strengthen the democratic legitimacy of the Union and bring it closer to its citizens."[116]

In the post-Lisbon EU, parliaments engage in subsidiarity monitoring to provide output legitimacy, but they remain sceptical of performing these functions.[117] Securing ministerial accountability remains the overwhelming priority for many parliaments. Furthermore, rather than improved co-ordination in scrutiny matters, the evidence suggests that some national parliaments, for example, those in Nordic Member States, are selective with their involvement in political dialogue and have been unenthusiastic about Protocol 2.

Subsidiarity monitoring has not recentred national parliaments. Participation in this task is disparate as both the 2009 Report and Subsidiarity monitoring[118] exercises indicate. Improved co-operation within COSAC and the Barroso Initiative *may* promote political dialogue, but these developments do not guarantee collectivity, nor do they constitute parliamentarisation. Similarly, subsidiarity monitoring does not alter institutional balance and the fulfilment of this task does not presuppose the beginnings of a new EU organ. The Treaty of Lisbon continues the trend established since Single European Act 1986 that, the Treaties pursue Europeanisation and democratisation in parallel. These two objectives have not, formally or informally, rendered national parliaments at the centre--except to ratify each new Treaty.

A collective voice from national parliaments speaking out against competence creep *may* uphold subsidiarity, but national politicians must see value in the Treaty provisions and be willing to engage more directly and more often in EU affairs. EU integration is not a "vote winning issue" in national parliamentary elections, and, if parliamentarians remain preoccupied with the domestic political agenda and ministerial accountability, then horizontal political dialogue will not become a priority.

Senior Lecturer in Law. I am indebted to Professor Stephen Weatherill, Professor Panos Koutrakos, Dr Lorenzo Spadacini and Auke Baas for their comments on an earlier draft. I am also grateful to the UK National Parliament Representative and Dominic Rowles at the Local Government Association, both based in Brussels, particularly in relation to information concerning the operation in the Early Warning Mechanism. The usual disclaimer applies.

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1. See S. Bulmer and C. Lequesne (eds), *The Member States of the European Union* (Oxford: Oxford University Press, 2005), esp. Chs 13--16; and D.G. Dimitrakopoulos, "Incrementalism and Path Dependence: European Integration and Institutional Change in National Parliaments" [2001] J.C.M.S. 405.

2. See H. Kassim, "The Europeanisation of Member State Institutions" in *The Member States of the European Union,* 2005, pp.297--303.

3. See J. O'Brennan and T. Raunio, "Deparliamentarisation and European Integration" in J. O'Brennan and T. Raunio (eds) *National Parliaments within the Enlarged European Union: From Victims of Integration to Competitive Actors* (London: Routledge, 2007), pp.2--8.

4. See P. Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution Building* (The Hague: Kluwer Law International, 2006), pp.41--42.

5. See M. Dougan, "The Treaty of Lisbon 2007: Winning Minds Not Hearts" (2008) 45 C.M.L. Rev. 617, esp. 657--661.

6. Protocol 1 of the Treaty of Lisbon on the Role of National Parliaments in the European Union (Protocol 1).

7. Article 12 TEU is the first reference to national parliaments in the main text of the Treaty.

8. Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality (Protocol 2).

9. See A. Maurer, "National Parliaments in the European Union Architecture: From Latecomers Adaptation Towards Permanent Institutional Change" in A. Maurer and W. Wessels (eds), *National Parliaments on their Ways to Europe: Losers or Latecomers?* (Nomos: Baden-Baden, 2001).

10. See P. Norton "Introduction: The Institution of Parliaments" in P. Norton (ed.), *Parliaments and Governments in Western Europe* (London: Frank Cass, 1998), pp.1--15; and Maurer and Wessels (eds), *National Parliaments on their Ways to Europe,* 2001, p.432. By contrast Raunio and Hix argue that integration is only one part of a wider deparliamentarisation. Domestic factors, for example, strong executives and devolution have contributed to the loss of competence. See T. Raunio and S. Hix, "Backbenchers Learn to Fight Back: European Integration and Parliamentary Government" (2003) 23 *Western European Politics* 142, 145.

11. See A. Moravscik, "Introduction: The Choice for Europe" in A. Moravscik, *The Choice for Europe: Social Purposes and State Power from Messina to Maastricht* (Ithaca, NY: Cornell University Press, 1998) p.9.

12. See Maurer, "National Parliaments in the European Union Architecture" in *National Parliaments on their Ways to Europe,* 2001, p.28.

13. See generally F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999); and F.W. Scharpf, "Legitimacy in the Multi-Level European Polity" in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism* (Oxford: Oxford University Press, 2010), p.89.

14. A. Maurer, *The Convention and the National Parliamentary Dimension,* Arena Working Papers (2005), at *http://www.arena.uio.no/publications/papers/wp05_01.pdf* [Accessed June 30, 2011].

15. See K. Goetz and J.-H. Meyer-Sahling, "The Europeanisation of National Political Systems: Parliaments and Executives" (2008) 3 Living Rev. Euro. Gov., at *http://www.livingreviews.org/lreg-2008-2* [Accessed June 30, 2011].

16. See Dimitrakopoulos, Incrementalism and Path Dependence" [2001] J.C.M.S. 405.

17. See A. Cygan, *The UK Parliament and European Union Legislation* (The Hague: Kluwer, 1998), Ch.3.

18. See Kiiver, *The National Parliaments in the European Union,* 2006, pp.162--163.

19. See Goetz and Meyer-Sahling, "The Europeanisation of National Political Systems" (2008) 3 Living Rev. Euro. Gov., at *http://www.livingreviews.org/lreg-2008-2* [Accessed June 30, 2011]. "Weak" parliaments are those where there is a lack of resources, information exchange and co-ordination across policy levels, ministries and agencies. Harlow suggests that participation in EU affairs by national parliaments is determined by the extent of control over foreign affairs by parliaments. See C. Harlow "A Plethora of Parliaments" in *Accountability in the European Union* (Oxford: Oxford University Press, 2002), p.78 at p.85.

20. See *Final Report of Working Group IV on the Role of National Parliaments,* CONV 353/02, paras 4--8.

21. For a comparison of the provisions in the Constitutional Treaty and Treaty of Lisbon see G. Barrett, "The King is Dead, Long Live the King: the Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty Concerning National Parliaments" (2008) 33 E.L. Rev. 66.

22. In evidence to the House of Commons European Scrutiny Committee on May 14, 2008 Professor Alan Dashwood stated: "It is my view that the European Union is a unique polity. It is what I call a constitutional order of sovereign states … we have to have a system of dual legitimation through the European Parliament, which is directly elected, but also through the responsibility of ministers meeting within the Council to their national parliaments and electorates. I see the new subsidiarity mechanism as reinforcing that second aspect of the dual legitimation which the EU system requires." See *Subsidiarity, National Parliaments and the Lisbon Treaty,* HC 563 (2007--8), p.39, Q.33.

23. See Maurer, "National Parliaments in the European Union Architecture" in *National Parliaments on their Ways to Europe,* 2001.

24. See R. Passos, "Recent Developments Concerning the Role of National Parliaments in the European Union" (2008) 9 ERA Forum 25, 35. See also D. Jancic, "A New Organ of the European Union: 'National Parliaments Jointly' " (February 2008), Federal Trust Policy Commentary, at *http://www.fedtrust.co.uk/uploads/Parliaments_Jointly.pdf* [Accessed June 30, 2011]; and P. Kiiver, "The Early Warning System for the Principle of Subsidiarity -- The National Parliament as a Conseil d'état for Europe" (2011) 36 E.L. Rev. 98.

25. The Conference of European Affairs Committees of national parliaments, founded in 1989, is known by the acronym COSAC from its French title (*Conférence des organes spécialisés dans les affaires communautaires*). COSAC meets biannually in the Member State holding the Presidency of the Council.

26. In 2005 COSAC organised a Subsidiarity Monitoring Pilot Project on the 3rd Railway Package to test the subsidiarity early warning mechanism that was proposed by the Constitutional Treaty. COSAC received reports on the pilot project

from 31 of the 37 parliamentary chambers that participated in the test. In total 14 chambers indicated that they found that one or more of the legislative proposals in the 3rd Railway Package breached the principle of subsidiarity (11 of these chambers adopted a reasoned opinion). In addition, a further three parliaments expressed doubts as to whether one or more of the four proposals conformed to the principle of subsidiarity. The parliaments did not, however, identify problems with the same legislative proposals. Subsequent projects carried out in 2009, including a proposal for a Directive on Standards of Quality and Safety of Human Organs Intended for Transplantation, and a proposal for a Council Framework Decision on the Right to Interpretation and Translation in Criminal Proceedings both highlight a lack of consensus on the definition and application of subsidiarity. Only the Austrian Parliament raised subsidiarity concerns in relation to the Criminal Procedure proposal. The Organ Transplantation proposal led to objections within several parliaments, including the Austrian, Maltese and Irish parliaments. These opinions indicated that the proposal was excessive suggesting objections on grounds of proportionality rather determining subsidiarity compliance.

27. See I. Cooper, “The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU” (2006) 44 J.C.M.S. 281; S. Weatherill, “Better Competence Monitoring” (2005) 30 E.L. Rev. 23; J.P. Gonzalez, “The Principle of Subsidiarity” (1995) 20 E.L. Rev. 355.

28. See The Report of the European Commission on Subsidiarity and Proportionality 2007 (COM(2008) 586 final), p.2.

29. D. Wyatt, “Could a Yellow Card for National Parliaments Strengthen Judicial as well as Political Policing of Subsidiarity” (2006) 2 *Croatian Yearbook of European Law and Policy* 1, 5.

30. Wyatt, “Could a Yellow Card for National Parliaments Strengthen Judicial as well as Political Policing of Subsidiarity” (2006) 2 *Croatian Yearbook of European Law and Policy* 1, 6. See also the written evidence of Professor Wyatt to the House of Lords Select Committee on the European Union: *Strengthening national parliamentary scrutiny of the EU -- The Constitution's early warning mechanism,* HL 101 (2004--5), pp.4--5.

31. *Strengthening national parliamentary scrutiny of the EU,* HL 101 (2004--5), p.3.

32. Under the Protocol the Commission is required to provide, inter alia, a financial and regulatory impact assessment of the proposed legislation.

33. In evidence to the House of Lords Select Committee on the European Union Sir David Edward stated that if national parliaments did not raise subsidiarity objections at the yellow card stage then it may be harder for any party to run subsidiarity arguments later. See *The Treaty of Lisbon: an Impact Assessment,* HL 62-1, para.11.40.

34. Chambers may vote independently and arrive at different conclusions, but evidence from the Subsidiarity Monitoring Projects indicates that bicameral chambers consulted each other and arrived at a united position.

35. This currently stands at 18.

36. For proposals under police and judicial co-operation in criminal matters the threshold to secure a yellow card is one-quarter. This lower threshold reflects the political sensitivity of co-operation in this area.

37. Article 7(3) Protocol 2.

38. This would constitute 28 votes out of the 54 available.

39. See Kiiver, “The Early Warning System for the Principle of Subsidiarity” (2011) 36 E.L. Rev. 98, 103.

40. See Annual Report 2009 on Relations Between The European Commission and National Parliaments (COM(2010) 291 final, June 2, 2010), para.2.1. The parliaments of Sweden and Denmark did not submit any opinions to Commission on proposals for legislation but only in relation to consultation documents.

41. See further Kiiver, *The National Parliaments in the European Union,* 2006, pp.162--164.

42. See Kiiver, “The Early Warning System for the Principle of Subsidiarity” (2011) 36 E.L. Rev. 98, 105.

43. See COM(2010) 291, paras 2.1 to 2.2. Between September 2006 and December 2009 there have been a total of 618 opinions received from 35 chambers.

44. COM(2010) 291, para.2.1.

45. See *Subsidiarity, National Parliaments and the Lisbon Treaty,* HC 563 (2007--8), p.27.

46. There is one exception where the equivalent of a “red card” may be applied by a single national parliament. This concerns decisions taken under art.81(3) TFEU which determine those aspects of family law with cross-border implications which may be the subject of acts adopted under the ordinary legislative procedure. Any proposal under art.81(3) TFEU must be notified to parliaments and any *one* may block it by indicating their opposition within six months.

47. See *Final Report of Working Group IV on the Role of National Parliaments,* CONV 353/02, para.27.

48. *European Parliament v Council* (*Chernobyl*) (C-70/88) [1990] E.C.R. I-2041.

49. See Directive on the Application of Patients' Rights in Cross-border Healthcare COM(2008) 414.

50. Directive on the Application of Patients' Rights in Cross-border Healthcare COM(2008) 414.

51. See *Subsidiarity, National Parliaments and the Lisbon Treaty,* HC 563 (2007--8), pp.24--26.

52. See *Germany v European Parliament and Council* (C-376/98) (*Tobacco Advertising*) [2000] E.C.R. I-8419; [2000] 3 C.M.L.R. 1175.

53. Judgment of June 20, 2009, Bundesverfassungsgericht, BVerfG, 2 BvE 2/08.

54. See art.10(1) TEU.

55. See *Subsidiarity, National Parliaments and the Lisbon Treaty,* HC 563 (2007--8), p.39, Q.33.

56. Judgment of Bundesverfassungsgericht, BVerfG, 2 BvE 2/08 at [351].

57. Judgment of Bundesverfassungsgericht, BVerfG, 2 BvE 2/08 at [251].

58. Judgment of Bundesverfassungsgericht, BVerfG, 2 BvE 2/08 at [240].

59. Judgment of Bundesverfassungsgericht, BVerfG, 2 BvE 2/08 at [240].

60. Judgment of Bundesverfassungsgericht, BVerfG, 2 BvE 2/08 at [101]. See further, A. Steinbach, “The Lisbon Judgment of the German Federal Constitutional Court -- New Guidance on the Limits of European Integration? (2010) 11 *German Law Journal* 367, 376; and D. Doukas, “The verdict of the German Federal Constitutional Court on the Lisbon Treaty: not guilty, but don't do it again” (2009) 34 E.L. Rev. 866, 887.

61. One possibility exists within art.48(7) TEU. This enables the Council to adopt legislative acts using the ordinary legislative procedure notwithstanding the Treaty requires the use of a special legislative procedure. In such circumstances parliaments are notified and any parliament may object to this change of legislative process. This gives parliaments a limited right of “veto” to prevent the use of qualified majority voting and can be exercised *individually* by parliaments.

62. Judgment of Bundesverfassungsgericht, BVerfG, 2 BvE 2/08 at [253].

63. The Commission described the 43% turnout at the 2009 European Parliament elections as “real failure for democracy”. See Special 320 Eurobaromoter Post Electoral Survey (2009), p.6.

64. Judgment of Bundesverfassungsgericht, BVerfG, 2 BvE 2/08 at [294].

65. Judgment of Bundesverfassungsgericht, BVerfG, 2 BvE 2/08 at [259].

66. See F.M. Besselink, “National Parliaments in the EU's Composite Constitution: A Plea for a Shift in Paradigm” in P. Kiiver (ed), *National and Regional Parliaments in the European Constitutional Order* (Groningen: Europa Law Publishing, 2006), p.119.

67. Besselink, “National Parliaments in the EU's Composite Constitution” in *National and Regional Parliaments in the European Constitutional Order,* 2006, pp.121--123.

68. See the Subsidiarity Monitoring Pilot Project on the 3rd Railway Package organised by COSAC to test the subsidiarity early warning mechanism that was proposed by the Constitutional Treaty, and subsequent projects.

69. The conference may communicate with the European Parliament; the Council and the Commission may not bind national parliaments or “prejudge their positions”; “shall” promote exchange of information and best practice; may organise inter-parliamentary conferences.

70. IPEX is the Interparliamentary EU Information Exchange and contains parliamentary documents and information from national parliaments concerning EU policy.

71. See *R. v Secretary of State for Health Ex p. British American Tobacco and Imperial Tobacco* (C-491/01) [2002] E.C.R. I-11453; [2003] 1 C.M.L.R. 14 in particular at [177] and [185]. The Court held that once considered necessary to adopt common rules to regulate the Internal Market this could only be achieved through EU action, and must inevitably comply with subsidiarity.

72. See, for example, A. Maurer, “National Parliaments in the Architecture of Europe after the Constitutional Treaty” in G. Barrett (ed), *National Parliaments and the European Union: the Constitutional Challenge for the Oirechtas and Other Member State Legislatures* (Dublin: Clarus Press, 2008) at pp.60--61.

73. See House of Commons European Scrutiny Committee, *European Union Intergovernmental Conference, 35th Report* HL 104 (2006--07) and House of Lords EU Committee, *The EU Reform Treaty: Work in Progress, 35th Report* HL 180 (2006--07).

74. The original language French version reads “*Les parlements nationaux contribuent* …” which can be translated literally

as “national parliaments contribute …”.

75. See P. Riis, “National Parliamentary Control of EU Decision-making in Denmark” in O. Tans, C. Zoethout and J. Peters (eds), *National Parliaments and European Democracy: A Bottom-Up Approach to European Constitutionalism* (Groningen: Europa Law Publishing, 2007), p.185 at p.199. The parliaments of Sweden and Denmark did not submit any opinions to Commission on proposals for legislation but only in relation to consultation documents.

76. See D. Arter, “The Folketing and Denmark's ‘European Policy’: The Case of an Authorising Assembly” (1990) 13 *Western European Politics* (Special Issue, “Parliaments in Western Europe”) 110.

77. See also Kiiver, *The National Parliaments in the European Union,* 2006, p.163, commenting on the Constitutional Treaty arrangements.

78. See Tans, Zoethout and Peters (eds), *National Parliaments and European Democracy,* 2007, p.229.

79. See *Subsidiarity, National Parliaments and the Lisbon Treaty,* HC 563 (2007--8), p.4.

80. See *Final Report of Working Group IV on the Role of National Parliaments,* CONV 353/02, pp.9--15. See also Tans, Zoethout and Peters (eds), *National Parliaments and European Democracy,* 2007, p.229.

81. See A. Cygan, *National Parliaments in an Integrated Europe: An Anglo German Perspective* (The Hague: Kluwer, 2001), p.63.

82. See art.2 of Protocol 1. This includes draft legislation that has originated from a group of Member States under art.329 TFEU and proposals for policy co-ordination under art.5 TFEU.

83. Article 5 Protocol 1.

84. Articles 1 and 2 Protocol 1.

85. The Constitutional Treaty maintained the six-week period included within the Treaty of Amsterdam. See Barrett, “The King is Dead, Long Live the King” (2008) 33 E.L. Rev. 66.

86. In evidence to the House of Lords EU Select Committee Professor Damian Chalmers notes that the eight-week period for review is inadequate and equates to the same period granted to private parties to make written observations to the Commission under it consultation process. See *The Treaty of Lisbon: An Impact Assessment,* HL 62-II (2007--8), p.333. See also *The Treaty of Lisbon: An Impact Assessment,* HL 62-I (2007--8), p.243, para.11.42; and *Subsidiarity, National Parliaments and the Lisbon Treaty,* HC 563 (2007--8) p.33, para.44.

87. According to the European Parliament, *Report on the Application of the Co-decision Procedure: Analysis and Statistics of the 2004--9 Legislature,* 72% of legislative proposals were agreed at first reading. This is an increase from 33% for the 1999--2004 parliamentary term; see *http://ec.europa.eu?statistics/docs/report_statistics_public_draft.pdf* [Accessed June 30, 2011].

88. See COM(2010) 291 final, para.2.1. Between September 2006 and December 2009, a total of 618 opinions were received from 35 chambers.

89. See COM(2009) 343 final, para.2.1.

90. See COM(2008) 237 final, para.2.1.

91. See *Report on the Application of the Co-decision Procedure,* para.2.1, at *http://ec.europa.eu?statistics/docs/report_statistics_public_draft.pdf* [Accessed June 30, 2011]. National parliaments have differed in the extent to which they have used this procedure. A number of upper chambers such as the French Sénat, the German Bundesrat, the UK House of Lords and the Czech Senát have been very active. Together these four chambers issued 69 of the 250 opinions submitted in 2009.

92. *Report on the Application of the Co-decision Procedure,* para.2.1, at *http://ec.europa.eu?statistics/docs/report_statistics_public_draft.pdf* [Accessed June 30, 2011].

93. See D. Jancic, “A New Organ of the European Union” (February 2008), Federal Trust Policy Commentary, at *http://www.fedtrust.co.uk/uploads/Parliaments_Jointly.pdf* [Accessed June 30, 2011]. See also Passos, “Recent Developments Concerning the Role of National Parliaments in the European Union” (2008) 9 ERA Forum 25.

94. See Cooper, “The Watchdogs of Subsidiarity” (2006) 44 J.C.M.S. 281, 283.

95. See Kiiver, “The Early Warning System for the Principle of Subsidiarity” (2011) 36 E.L. Rev. 98.

96. See CONV 353/02, para.33.

97. *Report on the Application of the Co-decision Procedure,* para.2.2, at *http://ec.europa.eu?statistics/docs/report_statistics_public_draft.pdf* [Accessed June 30, 2011].

98. COM(2008) 414.

99. See COM(2010) 291 final at para.2.1.

100. See Kiiver, *The National Parliaments in the European Union,* 2006, pp.162--164.

101. See E. Szyszczak, “Legal tools in the liberalisation of Welfare Markets in R. Nielsen et al. (eds), *Integrating Welfare Functions in to the EU -- From Rome to Lisbon* (Copenhagen: DJOF, 2009), p.279. Szyszczak argues that in areas such as healthcare national parliaments are preoccupied with domestic considerations.

102. See T. Raunio, “Does OMC Really Benefit National Parliaments?” (2006) 12 E.L.J. 130. For an opposing view see F. Duina and M. Oliver, “To the Rescue of National Parliaments: A Reply to Raunio” (2006) 12 E.L.J. 132.

103. White Paper on European Governance COM(2001) 428 final, pp.8--9.

104. Article 5(1) TFEU states that “The Member States shall coordinate their economic policies within the Union. To this end the Council shall adopt measures, in particular broad guidelines to these polices”.

105. Article 5(2) TFEU states that “The Union shall take measures to ensure coordination of employment policies of the Member States, in particular by defining these guidelines”.

106. Article 5(3) TFEU states that “The Union may take initiatives to ensure coordination of Member States' social policies”.

107. See S. Weatherill, “On overlapping legal orders: What is the purely sporting rule?” in Bogusz, Cygan and Szyszczak (eds), *The Regulation of Sport in the EU* (Cheltenham: Edward Elgar, 2008), p.48 at p.55.

108. The House of Commons and House of Lords have recognised the importance of the OMC and consider proposals, particularly when they have implications for public services. See, for example, *Progress of European Scrutiny,* HC 34-xviii (2005--6), and *A European Strategy for Jobs and Growth,* HL 137 (2005--6).

109. See F. Duina and T. Raunio, “The Open Method of Coordination and National Parliaments: Further Marginalisation or New Opportunities?” [2007] *Journal of European Public Policy* 489, 492--493; and T. Raunio, *National Parliaments and OMC: Destined to Remain Apart?,* Paper delivered at “50 years of Inter-Parliamentary Cooperation: Progressing Towards Effective Cross-Level Parliamentarism”, Bundesrat, Berlin, June 13, 2007, at *http://swp-berlin.org/en/get_document.php?asset_id+4124* [Accessed February 12, 2010].

110. See Duina and Raunio “The Open Method of Coordination and National Parliaments” [2007] *Journal of European Public Policy* 489; and K.A. Armstrong, “How Open is the UK to the OMC Process of Social Inclusion?” in J. Zeitlin and P. Pochet with L. Magnusson (eds), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies* (Brussels: Peter Lang, 2006), pp.287--310 at p.302.

111. See Armstrong, “How Open is the UK to the OMC Process of Social Inclusion?” in *The Open Method of Co-ordination in Action,* 2006.

112. Armstrong, “How Open is the UK to the OMC Process of Social Inclusion?” in *The Open Method of Co-ordination in Action,* 2006.

113. See COM(2009) 343 final, para.2.1.

114. COM(2009) 343 final, para.2.1.

115. See: A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020.

116. See CONV 353/02, para.4.

117. See for example The Treaty of Lisbon, HL 62-I, para.4.180.

118. See the Subsidiarity Monitoring Pilot Project on the 3rd Railway Package organised by COSAC to test the subsidiarity early warning mechanism that was proposed by the Constitutional Treaty, and subsequent projects.