

# **The Lisbon Treaty Evaluated: Impact and Consequences**

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*Late wake-up call or early warning?:*  
Parliamentary participation and cooperation in light of the Lisbon Treaty

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**Comments welcome**

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## Introduction<sup>1</sup>

National parliaments have undergone a remarkable fate within the EU system of multi-level governance. From political players that have largely been side-lined by way of Treaty reform, the Treaty of Lisbon<sup>2</sup> now upgrades the role of national Parliaments in the European Union by foreseeing a number of mechanisms through which national Parliaments are to “contribute actively to the good functioning of the Union”.<sup>3</sup> A series of provisions are thus foreseen in the Lisbon Treaty and its protocols in order to strengthen the powers of national parliaments within the EU system of multi-level governance. A cornerstone in this context is the mechanism of subsidiarity control, which is commonly known as early warning. These tools have been criticized both by academics and by practitioners as unlikely to have much impact; only going half the way and turning parliaments into passive veto players (Raunio 2007a, Rothenberger and Vogt 2007).

Little is known as to how national parliaments will actually seize the opportunities provided for in the Lisbon Treaty. This paper wants to come in here by analyzing first empirical experiences when it comes to implementing selected Treaty provisions. In this quest the paper sets off by examining the so-called subsidiarity tests carried out by the Conference of Parliamentary Committees for Union Affairs (COSAC) since 2005. Eight of these tests have been conducted so far and although they might have been carried out in somewhat artificial conditions they still shed light on some relevant issues at stake in the practical political process. The paper also looks at selected (informal) strategies that have been adopted by national parliaments to overcome some of the limitations of the Treaty partly as a consequence of the subsidiarity checks.

The paper aims to analyse these empirical experiences but wants go beyond a mere evaluation by examining whether the categorizations of parliamentary control of EU affairs at the national level established in the scholarly debate still hold or whether we can find (new) patterns of parliamentary practice. What is of interest here is the extent to which “pro-active” players on the domestic level within EU affairs take on a similar role when it comes to implementing provisions of the Lisbon Treaty on parliamentary control.

Two important caveats have to be added in this context: the Lisbon Treaty only came into force on 1. December 2009 so our practical insights into its implications are limited but some elements of the Treaty have already been anticipated and tested before the Treaty came into force since the middle of this decade. Another limitation is - due to the scope of this paper - that not all Member States can be covered in detail but only some trends can be indicated at this stage.

The research strategy is based on documentary analysis and interviews with staff of COSAC and National Parliamentary Representatives (NPRs) in the EP. The latter have been contacted as they play a crucial role when it comes to implementing

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<sup>2</sup> Art. 12 of the amended Treaty on the European Union (TEU). This will be quoted as TEUn (TEUnew version)

<sup>3</sup> Modifications were made to the TEU and the Treaty establishing the European Community TEC, and merged into the Treaty on the Functioning of the European Union (TFEU).

some of the provisions of the Lisbon Treaty into the practical political process and have a comprehensive insight into their respective legislative system. One has tried to have a representative sample of interview partners by selecting representatives from all rounds of EU enlargement and coming from Member States that represent different “categories” of parliamentary control within the EU, i.e. “forerunners versus laggards” (see annex).

To this avail the paper is structured as follows: the focus will first be put on the academic debate on the role of national parliaments in the system of EU multi-level governance, where an attempt will be made to broadly classify parliaments when exercising control over EU affairs within their internal legal order. From the literature review themes are derived that will be used as focal points to assess the COSAC subsidiarity tests. After examining the main provisions of the Lisbon Treaty on parliamentary control, first experiences of putting the new prerogatives on national parliamentary control to the test are analysed. This is done by way of examining the subsidiarity tests carried out by COSAC, where practical issues linked to their implementation are also probed into and whether the subsidiarity check was actually activated. Attention is then paid to an unintended consequence (partly) due to the COSAC tests, i.e. the increased cross-border cooperation between national parliaments. The paper concludes with an examination of the main trends when exercising prerogatives of parliamentary control after Lisbon and an attempt of an outlook.

## **1. (Academic) debate on the role of national parliaments in the EU**

Upgrading the role of national parliaments within the EU system of multi-level governance has generally been seen as a remedy against the alleged democratic deficit. The academic literature has reflected the transformations national parliaments have gone through and classifications of parliamentary control across Member States have been developed. These reflect the stark contrast between legal provisions and parliamentary practice (Auel and Benz 2005; Raunio 2005, Kiiver 2006) .

In this context the Nordic parliaments are generally considered as the most “proactive and engaged” within EU decision-making but some elements are currently under pressure for reform (O’Brennan and Raunio 2007, p. 21). Although the Danish parliament has been traditionally been described as holding the strongest prerogatives in EU affairs due to its mandate system, this strength is currently in question due the complexity of taking decisions at EU level (Sousa 2008). The Swedish parliament is attempting to follow the Finnish Eduskunta, which is involving specialized committees more into the policy process in order to increase the ability of the parliament to influence the position of the government (Hegeland 2007). The Austrian parliament follows suit with (at least on paper) strong powers of parliamentary control (Pollak and Slominski 2003). The relative newcomers to the EU, for example Slovakia and Latvia, which have, at least on the basis of the legislative arrangements, an obligatory system of consultation with Parliament before a proposal is discussed in the Council of Ministers, are described as assigning the Parliament quite strong a role (Dimitrova and Mastenbroek 2006). The system of the Czech Republic is based on elements of the Austrian system but the government is only responsible to the Chamber of Deputies and not the Senate. The provisions in the Czech Constitution on parliamentary control and the rules of procedure are seen as being an “open gateway”, but it depends on political will whether these avenues will actually be used (Pitrova and Coxova 2007). The Hungarian and the Polish systems have tried to adopt a model

of best practice prevalent in older Member States and also have potential instruments at their disposal but are for the time not able to resort to them effectively (Gyori 2007; Lazowski 2007). Other states, such as Estonia and Lithuania, are seen to assign an intermediate role to their parliaments. These countries provide for involvement under certain conditions but not for obligatory consultation within all policy domains (Mastenbroek and Dimitrova 2006). Overall the parliaments of these (relative) newcomers still face shortcomings but these can be expected to diminish over time leaving countries such as Slovenia, which has also largely taken over the Finnish system, with an effective system of control and oversight (Szalay 2007, Vehar 2007).

The UK, the Irish, the Dutch, the German and the French parliament have also been classified as “moderate” players with having impact on their respective government’s position but without being able to block a governmental decision. The main task of the scrutiny committees of both Houses of the UK parliament is described as resting in the ex ante review of legislative proposals prior to Council meetings but with the development of the scrutiny reserve both chambers have acquired stronger mechanisms of ex post accountability (if the respective ministers breach the scrutiny reserve) (Cygan 2007, p. 93). It has to be stressed that both the Irish and the Dutch system have been empowered due to the negative referendums on the Nice and Constitutional Treaty respectively. However the systems still seem to have their shortcomings but at least suggest potential for effective parliamentary control (Conlan 2007, Neuhold and De Ruyter 2010). Despite the fact that the German parliament enjoys constitutional powers and the French does not, both parliaments are seen to converge when it comes to comprehensive rights to information and by way of stating an opinion (Sprungk 2007).

The Belgian parliament is seen as a rather weak player, where a permissive consensus of the elite is contributing to a lack of political will to scrutinize EU affairs. (Vos et.al 2007). The Luxembourgesse parliament is also described as being a “toothless tiger” due to the lack of resources but at least on paper has the means to develop into a critical watchdog (Bossaert 2001). The Southern European Member States have traditionally been coined as “laggards” where can see that the Italian and Portuguese parliament, are since the 1990s, investing more resources into the scrutiny of EU affairs. The Spanish and Greek parliaments still seem to be very weak when it comes to controlling their government in EU affairs (Magone 2007). Countries that have joined the EU most recently, are also seen as still in the need of a more balanced relationship with the executive: Bulgaria has been described as suffering from a period of de-parliamentarisation in the process of Europeanisation (Stoykova 2007) and Romania is currently just in the process of building up its system of parliamentary scrutiny of EU affairs. It is however seen as having reached a relatively high degree of institutionalization when it comes to other aspects such as party cohesion and committee structures since the first free and fair elections of 1990. (Chiva 2007). The role of the parliaments of Cyprus and Malta in EU affairs has thus far been largely eclipsed by the literature.

Whereas all EU Member States now have European Affairs Committees (EAC) the literature places a special emphasis on the need for specialized committees within the scrutiny of EU affairs. Their function is seen as being twofold, on the one hand to process the technical details of EU legislation and on the other as offering parliaments considerable opportunities to assert their role as “national representatives and legislators, as well as scrutinizers of government” (MacCarthaigh 2007, p.37). The Finnish parliament is seen somewhat as the shining light in this context where

particularly the decentralization of scrutiny and policy formulation to sectoral committees “increases the ability of the whole parliament to influence the government” (Raunio 2007b, p. 42).

The literature also reflects the trend that the process of parliamentary scrutiny of EU affairs is complicated by the fact that almost half of the Member States have bi-cameral systems. Here the German Bundesrat is seen as the strongest player at least on paper. The involvement of the Laender governments is seen as more nuanced in the practical political process, however, as their participatory powers in European affairs depend on the extent to which to the Laender or the Bundesrat are actually affected by EU measures (Kiiver 2006, p. 55). In the practical process the involvement of the Bundesrat thus illustrates the aim of preserving the domestic democratic balance rather than controlling the government by democratic means (Thym 2007). Other upper houses for example in Austria and Belgium and the Czech Republic are seen as being over-shadowed by lower chambers when it comes to exercising control in EU affairs (Pollak and Slominski 2003, Vos et.al. 2007, Pitrova and Coxova 2007).

Based on these observations one can derive the following three guiding themes for assessment of the practical implementation of parliamentary provisions of the Lisbon Treaty, more in particular the COSAC subsidiarity tests (apart from practical issues related to their implementation):

- a. The relationship between government and parliament when it comes to EU affairs and whether the parliament has comprehensive information rights on these issues;
- b. The role of specialized committees;
- c. The cooperation of upper houses and lower houses and the consultation of regional parliaments.

## **2. Powers of parliamentary control after the Treaty of Lisbon**

The debate on the democratic deficit of the EU has led to renewed interest in the possible role of national parliaments within the EU institutional framework - not only within the scholarly debate - but also on the political level. Within the political debate this is exemplified by the fact that the issue of national parliaments was considered by the Convention on the Future of Europe. As a result, stipulations on enhancing the role of national parliaments were not only enshrined into the Constitutional Treaty but taken over (with few exceptions) virtually unchanged into the Lisbon Treaty (Raunio 2007a).

These new mechanisms foreseen by the Treaty and its protocols<sup>4</sup> include the following :

First, national parliaments are to receive information and draft legislative acts from the EU institutions.<sup>5</sup>

Secondly, provisions relating to the so-called passerelle clause are enshrined in the protocol on the role of national parliaments. This clause stipulates the transition from unanimity to qualified majority or transition from special to ordinary legislative procedure and to this end it is foreseen that national parliaments shall be informed at

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<sup>4</sup> See especially article 12 TEU and the two Protocols to the Treaty of Lisbon – the protocol on the role of national parliaments to the EU and the protocol application of the principles of subsidiarity and proportionality.

<sup>5</sup> For a detailed description of what types of documents this includes and the respective procedures, please see: article 1 and article 2 of the protocol on the role of national parliaments.

least six months before any decision is adopted.

Thirdly, compliance with the principle of subsidiarity is to be ensured by way of a mechanism, which is commonly referred to as early warning (Rothenberger and Vogt 2007). To this end it is that all the draft legislative acts sent to national parliaments shall contain a detailed statement that makes it possible to appraise the compliance with these principles. A general procedure for this subsidiarity monitoring mechanism is foreseen, according to which any national Parliament or any chamber of a national Parliament may, within 8 weeks from the date of transmission of a legislative act, in the official languages of the Union, send to the Presidents of the EP, the Council and the Commission a reasoned opinion stating why it considers that the draft in question violates the principle of subsidiarity. Each national parliament has two votes and in the case of bicameral systems, each of the two chambers has one vote. In this context two procedures commonly referred to as “yellow and orange cards procedures” form one of the cornerstones of the Treaty when it comes to parliamentary control. The so-called 'yellow' card procedure consists of the following: where reasoned opinions on violation of subsidiarity represent at least one third of all the votes allocated to national parliaments, the draft must be reviewed (i.e. 18 votes out of 54);<sup>6</sup>. After such review, the institution that has put forward the proposal may decide to maintain, amend or withdraw the draft and justify its decision. The 'orange' card procedure states that under the ordinary legislative procedure, if the reasoned opinions regarding subsidiarity represent at least a simple majority of the votes allocated to national parliaments (28 votes out of 54), the proposal must be reviewed. After this review, the Commission may decide to again overrule parliaments by deciding to maintain, amend or withdraw the proposal but must give a reasoned opinion if it maintains the draft. This opinion, together with the reasoned opinions from national parliaments, shall be submitted to the Council and EP. These can then overrule the Commission<sup>7</sup> and no further consideration shall be given to the draft. In the literature these mechanisms have been described as injecting legitimacy into the process but neither is subsidiarity seen as a very relevant issue nor is this mechanism regarded as turning parliaments into active players, positively impacting on the process of EU integration (Raunio 2007b, Rothenberger and Vogt 2007).

Moreover national parliaments can participate in the request for filing an action for annulment before the Court of Justice of the European Union on grounds of a breach of the principle of subsidiarity. Fourthly, national parliaments are to take part in the evaluation mechanisms for the implementation of the Union policies in the area of freedom, security and justice and to be involved in the political monitoring of Europol and in the evaluation of activities of Eurojust. Moreover, national parliaments are to be involved in the revision procedures of the Treaties and receive notifications of applications for accession to the European Union. Furthermore, national parliaments are to play a role in the inter-parliamentary cooperation between national Parliaments and with the European Parliament (COSAC 2008).

### **3. First observations on putting the Treaty provisions to the test: Subsidiarity checks carried out by COSAC**

#### *3.1. Background*

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<sup>6</sup> If the draft legislative act is about the area of freedom, security and justice (Article 76 TFEU), this threshold shall be 1/4 (i.e. 14 votes out of 54).

<sup>7</sup> By a majority of 55% of the members of the Council or a simple majority of the votes cast in the EP.

As shown above the provisions on subsidiarity are one of the cornerstones of involving national parliaments within the EU system by way of the Lisbon Treaty. Due to the fact that they are highly complex it comes as no surprise that COSAC has tried to put the provisions to a test before they actually came into force. With the implementation of the Constitutional Treaty looming in the air and the EU enlarging to 10 new Member States, COSAC decided in November 2004 at its meeting in the Hague to put these provisions to the test in the practical political process. The first testing ground chosen was the Commission's third railway package, which was still conducted according to the rules of the Constitutional Treaty. Since then there were 7 other so-called tests subsidiarity checks covering the following draft legislative acts:

- Council Regulation on matrimonial matters {COM(2006) 399 final}
- Directive of the EP and of the Council on postal services {COM(2006) 594 final}
- Council Framework Decision on combating terrorism {COM(2007) 650 final}
- Council Directive on equal treatment {COM(2008) 426 final}
- Directive of the EP and of the Council on standards of quality of human organs intended for transplantation {COM(2008) 818 final}
- Council Framework Decision on the right to interpretation and translation in criminal proceedings {COM(2009) 338 final}
- Regulation of the European Parliament and of the Council on matters of succession {COM(2009) 154 final}

These checks might still continue in the future, despite the Treaty being in force. Member States are currently split when it comes to their continuation, with the Dutch States General of the Netherlands taking the lead of a group of chambers of newer Member States such as the Slovenian parliament, the Senate of the Czech Republic, the National Council of the Slovak Republic, the Senate of Poland but also the Senate of the French Republic and the German Bundestag being in favor of these concerted endeavours. The idea behind this is that COSAC could build upon past years' experiences thus contribute to effective parliamentary control and that COSAC is a very effective medium for coordination (Interview 16<sup>th</sup> November 2010 and 9<sup>th</sup> December 2010).<sup>8</sup> Other Member States such as Austria, Finland, Sweden, the UK, Ireland and Denmark see no need for their continuation, as parliaments should be capable to conduct these checks on their own (Interviews 16. November 2010a; Interviews 16. November 2010b; Interview 27. September 2010, Interview 22. November 2010, Interview, 13. January 2011a).

The main guidelines for carrying out the checks were laid down at the COSAC Conference held in London in 2005. COSAC agreed that, for those national parliaments which wish to participate, the check should operate as follows: National parliaments should inform the COSAC Presidency of the proposals they wish to be subject to the subsidiarity and proportionality check. Parliaments were thus enabled to select several proposals where they might have subsidiarity concerns based on the Commission's annual work programme and these results were ranked by COSAC. Proposals were then selected that would then be submitted to the collective

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<sup>8</sup> Letter of the above mentioned chambers to the Chairperson of the Committee on European Union Affairs, 26. November 2009.

subsidiarity check by national parliaments (Interview, 9<sup>th</sup> November 2010b, COSAC 2007). This is of course somewhat of an artificial situation as parliaments were instructed which proposals they are to screen according to the subsidiarity principle rather than this stemming from concerns raised during the practical political process. Nevertheless parliaments were able to highlight which proposals might give rise to subsidiarity concerns which is also the case in the practical political process. It is noteworthy that currently Member States such as the Netherlands, Denmark and the Czech Senate also select draft legal acts that could give rise to subsidiarity concerns in advance based on the Commission's annual workprogramme<sup>9</sup> (Interview 9.December. 2010, Interview 9<sup>th</sup> November 2010a and 16<sup>th</sup> November 2010d).

Moreover participating national parliaments were instructed to complete their scrutiny within a six- week period (as the tests started when the Constitutional Treaty was deemed to be adopted), where the clock would start to tick to once the proposal had been published in all languages. Participating national parliaments or chambers should send any comments on subsidiarity or proportionality directly to the Commission, the European Parliament and the Council within the foreseen period, copying those comments to the COSAC Presidency (COSAC 2006).

### *3.2. The functioning of the checks in the practical political process*

It would go beyond the scope of this paper to examine each of the subsidiarity checks carried out since 2005 in great detail but the aggregate results are very instructive when it comes to the limits and challenges posed by the provisions on parliamentary control in the Treaty.

First of all it has to be stressed that a varying number of national parliaments participated in the checks. In 2005, when the first pilot project was carried out within the EU 25, 31 of the 37 national parliamentary chambers took part in the test. In 2006 this number was reduced slightly to 27, which can be explained by the fact that some countries such as Austria and Sweden could not take part because of their parliamentary elections and the Spanish parliament was in the process of revising its EU scrutiny procedures and thus could not carry out the checks. It has to be stressed however that only 11 parliamentary chambers had actually completed the check within the set deadline due to the fact the proposal was adopted just before the summer break. A similar amount of responses can be found when it comes to the subsidiarity check on a Framework Decision on Combating Terrorism in 2008 (29 chambers or parliaments) and on the Proposal for a Directive on Implementing the Principle of Equal Treatment (33 chambers or parliaments). Once the Treaty actually came into force the number of parliaments not only participating in the checks but also completing them reached a record high: 36 national parliamentary chambers out of 40 participated in the subsidiarity check on the Commission proposal on jurisdiction, applicable law, recognition in matters of succession in December 2009. These mere figures tell us little about the actual functioning of the checks but we can see an increase in participation of national parliaments and also in the completion within the deadline of 6, i.e. 8 weeks (see table 2).

Questions of interest in light of the Lisbon Treaty being in force are how these checks actually worked, i.e. what were the main problems national parliaments encountered. On the one hand the tests reflected some organisational shortcomings

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<sup>9</sup> These issues are pre-discussed in sectoral committees and then debated with the government and Commissioners giving some input

such as lack of official translations into all the languages. This was especially pertinent when the checks started off, where in the case of the third railway package in 2005 the Commission documents were only available in the languages of the EU 15. This has improved since but still persisted in selected cases.

Another closely related issue that was raised was the issue of timing, where the deadline for scrutiny was six weeks under the Constitutional Treaty and has been increased to eight weeks under Lisbon. This is still a very short period especially during periods of recess and is problematic especially when interested parties or regional parliaments are to be consulted and when it comes to achieving a broad consensus in European Affairs committees. These problems have been largely overcome however and parliaments seem to have put procedures in place in order to carry out these checks effectively. This is reflected by the fact that 34 out of the 36 parliaments participating in the most recent check on matters of succession reported no particular problems. And even those that reported problems: the Portuguese Assembly of the Republic and the UK House of Commons carried out the checks and successfully completed them within the eight-weeks deadline. A problem that as of yet still needs to be solved is the fact that a majority of parliaments find it impossible to carry out effective parliamentary control during the period of parliamentary recess (Interview 16<sup>th</sup> November 2010c)

One key element of the yellow or orange card mechanism is the coordination of positions across national boundaries.. It is in this setting that national parliaments flagged up difficulties during the checks of knowing results in other parliaments. In this context the Interparliamentary EU Information Exchange Database (IPEX) database is of relevance.<sup>10</sup>This database and website has been created by national parliaments in cooperation with the European Parliament and contains a complete catalog of Commission documents from 2006. An increasing number of parliaments uploaded information within the IPEX database but there are still parliaments or chambers that do not post or update information. If one examines the use of IPEX during the COSAC subsidiarity checks across Member States one finds that the Austrian Federal Council and the Swedish Riksdag resorted to IPEX the most together with Greece and Latvia. Some other countries such as Finland and Denmark that are generally seen as forerunners when it comes to parliamentary control do not resort to IPEX as it is not seen as an informative tool to exchange information as the “human face is missing” (Interview, 16<sup>th</sup> November 2010a). Moreover the quality of information exchange differs significantly (Interview, 17<sup>th</sup> November 2010).

It is in this context that national parliaments reflected on the increasing importance of the network of national Parliamentary Representatives (NPRs) in the EP (see below). The significance of this network has been growing and within the last check eight parliaments reported contacts at the level of parliamentary officials (COSAC 2010).

### *3.3. The political playing field: actors and mechanisms of coordination*

Apart from the coordination of the tests across national boundaries the checks were evaluated according to the following factors: cooperation between parliament and government and respective information rights, involvement of specialized committees and the cooperation between Upper and Lower Houses and consultation of regional parliaments.

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<sup>10</sup> See: [www.ipex.eu](http://www.ipex.eu).

Cooperation with the government is seen as crucial especially when it comes to information on the government's position on the EU legislation in question as "information is a fundamental pre-requisite for both controlling the government and influencing the policy proposals coming from the executive" (Raunio 2007, p. 83). In this context it has to be noted that in most cases a vast majority of the governments provided written information and assessments on whether the proposal at stake complied with the subsidiarity principle or gave evidence to the committees scrutinising the proposals. Forerunners in this context were the UK, Denmark, Sweden, Ireland, Luxembourg, the Netherlands, Austria, Germany (both to the Federal Council). This is very much in line with the image portrayed within the literature at least when it comes to legal prerogatives of parliamentary control: all these parliaments have been coined as strong or moderate players with rather comprehensive scrutiny and information rights.

This trend of cooperation between the executive and legislative can also be observed within newer Member States such as Estonia, Slovakia, Slovenia, Lithuania, Latvia and Bulgaria and to a certain extent the Czech Republic. This sheds light on the fact that a cooperative relationship between the executive and legislative has developed within these Member States at least within these checks and that the avenues for cooperation sketched out in the literature are actually being resorted to within the practical political process. Romania is currently just in the process of setting up its scrutiny procedures on EU affairs but nevertheless participated in the two of the checks with the government providing information (Interviews, 10<sup>th</sup> November 2010a and 11. November 2010)

Member States where there was virtually no cooperation with the government include Italy, Hungary, Portugal and the Polish Senate (see table 1). This is again somewhat in line with traditions prevalent on the national level when it comes to controlling EU affairs where we thus far find little cooperation between the legislative and the executive (Gyori 2007, Lazowski 2007, Magone 2007).

The involvement of specialized committees was examined as within the internal legal order, the rise of sectoral committees in the quest of dealing with EU legislation can be observed (MacCarthaigh 2007, p. 40). In this context one has to stress the fact that during the COSAC checks mostly the staff of European Affairs Committees were the main players carrying out the checks but we do see a strong involvement of sectoral committees in countries that have a pertinent tradition for involving such fora, for example in Finland, Sweden and Denmark but also in Luxembourg, Belgium, Germany, Greece, the Netherlands and the UK House of Lords and Portugal. In the practical process this is explained by the fact that committees can be activated by way of the subsidiarity checks to process legislation quickly which is vital due to the tight deadlines (Interview 9. November 2010a and 17<sup>th</sup> November 2010) This trend is not confined to "older" Member States but can also be found in countries that joined the EU during the last round of enlargement such as Estonia, Lithuania and Latvia, which are noteworthy for having adopted some aspects of the Nordic systems of parliamentary control (Interviews 9<sup>th</sup> November 2010b and 03. November 2010). Bulgaria, which is described as having suffered from a trend of de-parliamentarisation is also embarking on consultation of sectoral committees in order to enhance its role when scrutinizing the government. Member States where the EAC took the lead without the involvement of sectoral committees were Austria, Hungary, the UK House of Commons and the Polish Sejm. This is also in line with the legal framework and traditions prevalent on the national level when it comes to the scrutiny of EU affairs.

Moreover coordination within bicameral parliaments and consultation of regional parliaments was examined as this is one of the main features of the subsidiarity mechanism. Within parliaments that have two chambers each has one vote and one would thus expect a coordination of positions and also the consultation of regional parliaments. Here, however, the picture is quite bleak. This can at least be partly explained by the very limited time available for conducting these checks. 13 parliaments in the EU of 27 Member States are bi-cameral parliaments but formal cooperation between these chambers has in fact been quite restricted, with Ireland and the Netherlands being forerunners in this context as they have (or had) a joint committee bringing together actors from both chambers. Even so parliaments find it difficult to coordinate positions. One example is the case of the proposal on translation in criminal proceedings where in the Netherlands there was not enough time in the Joint Committee on Subsidiarity to come up with the same opinion and so slightly different opinions were sent to the Commission.<sup>11</sup> Regional parliaments were consulted also only in exceptional cases with the UK and Austria being in the lead here but this caused the Austrian Bundesrat to miss the deadline in the case of the proposal on implementing the Principle of Equal Treatment.

**Table 1. Conduct of the subsidiarity checks carried out by COSAC across Member States<sup>12</sup>**

Member State	Other committees involved but EAC	Government participated/ Provided info	Consultation of regional parliaments	Cooperation with other national parliaments <sup>13</sup>
Austria National Council	2 x No	2 x Yes	None	None
Austria Federal Council	1 x Yes 6 x No	7 x Yes	1x Yes	4 x use of IPEX
Belgium Chamber of Representatives	6 x Yes 1 x No	4 x Yes 3 x No	None	2 x use of IPEX
Belgium Senate	7 x Yes	2 x Yes 5 x No	None	2 x use of IPEX
Bulgaria	5 x Yes	5 x Yes	5 x No	3 x use of IPEX
Cyprus	1 x Yes 6 x No	5 x Yes 2 x No	7 x No	-
Check Republic Chamber of Deputies	3 x Yes 4 x No	6 x Yes 1 x No	7 x No	2 x IPEX
Check Republic Senate	1 x Yes 6 x No	5 x Yes 2 x No	7 x No	3 x IPEX and 3 x NPRs
Denmark	8 x Yes	8 x Yes	8 x No	None
Estonia	7 x Yes	7 x Yes	7 x No	1 x IPEX and 1 x NPRs

<sup>11</sup> The temporary joint subsidiarity committee has ceased to exist in the Netherlands as of autumn 2009. The Tweede Kamer still has a committee dealing with subsidiarity and acting as a switchboard towards other committees.

<sup>12</sup> This is expressed numerically, i.e. in how many times out of the 8 subsidiarity checks conducted by COSAC so far the given category applies (or does not apply).

<sup>13</sup> This category was only recorded by COSAC in 4 out of the 8 tests carried out by COSAC.

France Senate	2 x Yes 6 x No	3 x Yes 5 x No	8 x No	1 x NPRs and 2 x IPEX
France National Assembly	4 x Yes 3 x No	5 x Yes 2 x No	7 x No	2 x IPEX, 2 x NPRs
Finland	5 x Yes 1 x No	4 x Yes 2 x No	6 x No	None
Germany Bundestag	6 x Yes	5 x Yes 1 x No	6 x No	2 x IPEX
Germany Bundesrat	7 x Yes	7 x Yes	7 x No	3 x IPEX
Greece	7 x Yes	4 x Yes 3 x No	7 x No	4 x IPEX
Hungary	1 x Yes 6 x No	2 x Yes 5 x No	7 x no	3 x NPRs and 1 x COSAC
Italy Senate	3 x Yes 3 x No	6 x No	6 x No	3 x IPEX
Italy Deputies	3 x Yes 2 x No	5 x No	5 x No	3 x IPEX
Ireland	5 x Yes 3 x No	8 x Yes	8 x No	1 x IPEX, 2 x NPRs,
Latvia	5 x Yes 2 x No	6 x Yes 1 x No	7 x No	4 x IPEX and 2 x NPRs
Lithuania	7 x Yes	7 x Yes	7 x No	2 x IPEX and 1 x NPRs
Luxembourg	7 x Yes	7 x Yes	7 x No	2 x IPEX
Malta	1 x No	1 x No	1 x No	1 x IPEX
Netherlands Tweede Kamer	8 x Yes	7 x Yes 1 x No	8 x No	1 x IPEX
Poland Sejm	8 x No	3 x Yes 5 x No	8 x No	None
Poland Senate	6 x Yes 2 x No	8 x No	8 x No	None
Portugal	7 x Yes	7 x No	7 x No	3 x IPEX 1 x NPRs
Romania	2 x Yes	2 x Yes	2 x No	2x IPEX
Slovakia	3 x No 3 x Yes	6 x Yes	6 x No	IPEX
Slovenia National Assembly	8 x Yes	8 x Yes	8 x No	None
Slovenia National Council	6 x Yes 2 x No	7 x Yes 1 x No	8 x No	None
Sweden	6 x Yes	6 x Yes	6 x No	4 x IPEX
UK House of Commons	8 x No	8 x Yes	2x Scottish parliament	Ireland
UK House of Lords	8 x Yes	8 x Yes	2 x Scottish parliament	2 x NPRs

### 3.4. Results of the checks

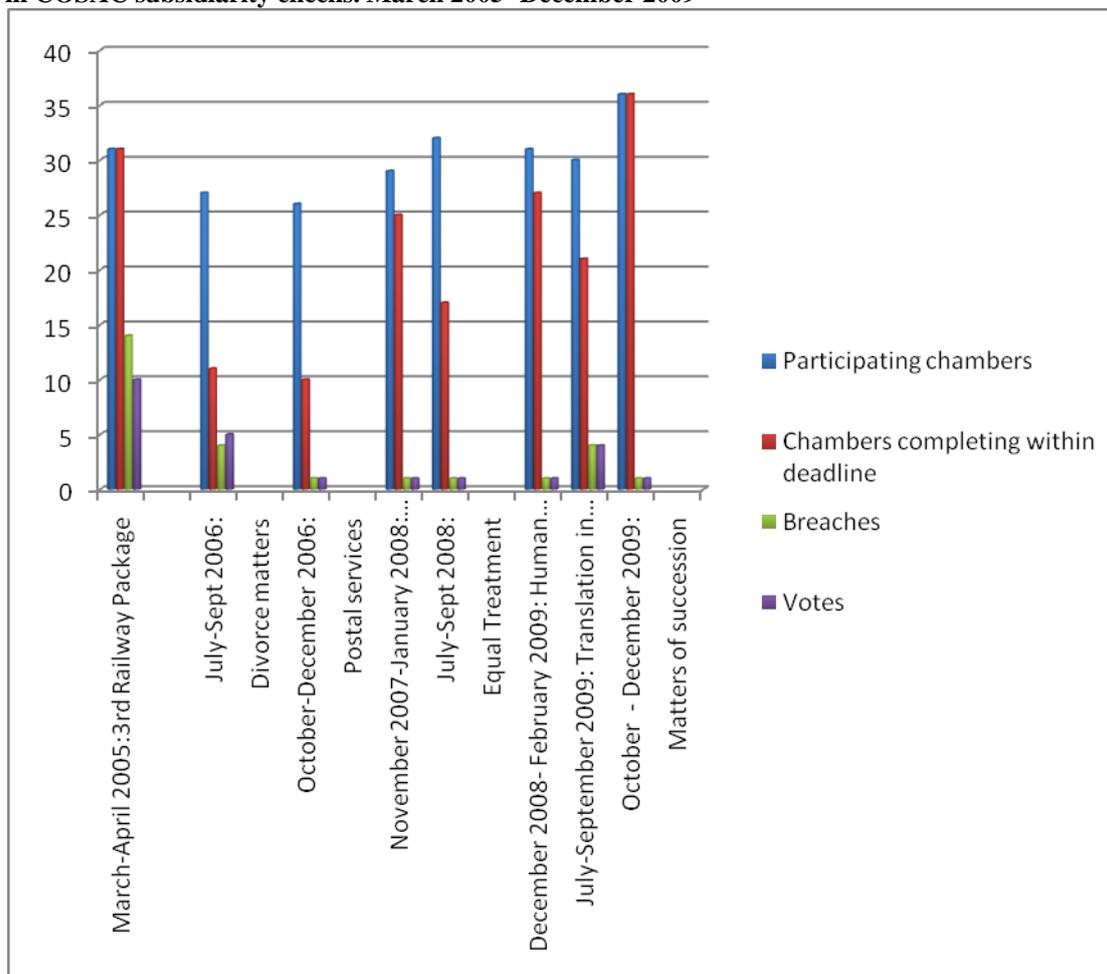
One of the elements which is key, when examining the functioning of the early warning mechanism is whether parliaments actually found breaches with the subsidiarity principle and whether we can identify parliaments taking the lead in this quest. A trend one can observe when analyzing the tests carried out so far is that in

none of the cases the necessary majority of votes to activate the early warning mechanism could be found. Even in the case of the third railway package where 14 parliamentary chambers - out of the 31 that participated - found a violation of the subsidiarity principle, they did not identify problems with the same proposal.

In the other checks the maximum number of parliaments finding a breach of the subsidiarity principle added up to a mere four and in several cases only one parliament or chamber identified a violation. This can at least partly be explained by the fact it is difficult to define and to separate the scrutiny of subsidiarity from the examination of the substance, which was stressed as being rather artificial and technical (COSAC 2008). Another reason that is given is that the Commission tries to avoid to come up with proposals that could be violating the principle of subsidiarity (Interview 14<sup>th</sup> September 2010, Interview 27<sup>th</sup> September 2010, Interview 9<sup>th</sup> November 2010 and Interview 17. November 2010, Interviews 22. November 2010a).

One might expect certain Member States that take a pro-active position on the national level when it comes to EU affairs to flag up frequent breaches with the subsidiarity principle but this is not actually the case; where for example the Nordic countries did not try to activate the subsidiarity mechanism (see Table 2). In this context it has to be noted that Member States such as Finland actually concentrate on parliamentary control within their own internal legal order and not at EU level (Interview, 16<sup>th</sup> November 2010a).

**Figure 1 Number of breaches detected by parliamentary chambers in COSAC subsidiarity checks. March 2005- December 2009**



When analyzing the performance of parliaments under the checks, we find that upper houses resort to flagging up a breach with the subsidiarity principle more often than lower houses. In this context the Czech senate is the forerunner with finding breaches in 4 out of the 7 proposals scrutinized. This is explained by the fact that MPs represented in the senate took a rather Euro-sceptic stance and wanted to give a clear message that these proposals were going too far as regards to the delegation of powers to the European level (Interview 16<sup>th</sup> November 2010d). This activism of the Czech Senate goes in a different direction than the rather passive picture that is painted within the literature (Pitova and Coxova 2007) whereas the Czech Chamber of Deputies was very much hindered by changes in the Czech political system which is reflected in the fact that EAC was without a chair for 1.5 years and was thus unable to work effectively (Interview 2. December 2010). The fact that the Belgian and French senate, the Austrian and German Bundesrat and the UK House of Lords also found breaches with the subsidiarity principle could be seen as a first indication that this is used as tool by these chambers to flex their muscles vis a vis the government and to enhance their position within the political system more generally (Interviews 22. November 2010a and Interview November 22. 2010b, Interview 16<sup>th</sup> November 2010).

**Table 3: Results of the checks carried out by COSAC: Breaches of subsidiarity according to chambers**

Member State	Breach of subsidiarity principle
Austria Bundesrat	2 x
Belgium, Senate	2 x
Czech Republic Chamber of Deputies	1 x
Czech Republic Senate	4 x
France National Assembly	1 x
France Senate	1 x
Germany, Bundesrat	3 x
Ireland	4 x
Malta	1 x
Netherlands (both chambers)	2 x
Poland Sejm	1 x
Poland Senate	1 x
UK, House of Commons	2 x
UK, House of Lords	2 x

Overall the subsidiarity checks are not seen as an end in themselves but rather as a means to activate national parliaments by fostering inter-parliamentary cooperation (Interview 14<sup>th</sup> September 2010; Interview, 27 September 2010; Interview 9 November 2010b, Interview 22. November 2010b, Interview, 13<sup>th</sup> January 2010). As one actor put it:

*“Subsidiarity is not an issue for politicians, it is mixed up with political content. But what is much more important are the procedures derived from that such as the*

*exchange between national parliamentary representatives (Interview, 9. November 2010a)."*

#### **4. Strategies developed by national parliaments beyond the Treaty provisions**

##### *4.1. The network of parliamentary representatives in the EP*

As illustrated the subsidiarity checks conducted by COSAC were a concerted effort to test some of the new provisions in the Lisbon Treaty but at the same time gave rise to new strategies or to the intensification of existing structures. A main one - that was underlined by a majority of the parliaments during their participation in the COSAC checks - was the network of Parliamentary Representatives in the EP (NPRs).<sup>14</sup>

The network of the representatives of national Parliaments is an informal network of parliamentary officials delegated by national parliaments and is based at the EP. The Danish parliament is a forerunner in this respect as it has sent a permanent representative to Brussels to cover EU affairs since 1990 (but it was at time not based at the EP). The reason behind this was that the Danish parliament was the first to deal with EU issues quite intensively by way of the system of mandating the respective minister in the Council, so this came as natural consequence (Interview, 9. November 2010a). The Finnish parliament also decided to send a representative in 1996 due to the fact that information of the government often arrived too late and was not always seen as reliable. The Swedish parliament then built on these experiences and sent a permanent representative to Brussels since 2005 before a delegate was only sent to cover strategic issues such as for example the Swedish Presidency and the Convention (Hegeland 2007, Interview, 9. November 2010a). By now all the EU parliaments delegate a representative to the EP, with a great influx coming in 2005, except Malta and Slovakia.<sup>15</sup> Most bi-cameral parliaments also have two different representatives covering each chamber. A majority of the representatives are parliamentary career civil servants, so they have a comprehensive insight into their respective legislative system (Interviews, 16<sup>th</sup> November 2010a and 16<sup>th</sup> November 2010c, 13<sup>th</sup> January 2011),.

Building on the provisions of the Lisbon Treaty as a legal basis, national parliamentary representatives to the EP have derived a common task for themselves. This is embedded in the exchange of information on the stance of their respective parliament towards the principle of subsidiarity, i.e. to flag up in advance when their chamber or parliament will indicate a breach. This goes as far as representatives warning each other even before the Commission officially comes up with her proposal that their Member State will activate the subsidiarity mechanism. This is done by way of regular weekly meetings. Moreover the fact that all representatives work in the same building builds a basis for informal information exchange.

Apart from fulfilling a bridge-building function between different parliaments, the tasks of the respective officials can be broadly grouped as follows:

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<sup>14</sup> Another strategy that was highlighted was the political dialogue with the Commission. It would however go beyond the scope of this paper to probe into this.

<sup>15</sup> Slovakia had a representative since 2006 until 2009 but she was called back to her national parliament for financial reasons.

a. *Alerting their respective parliament to issues negotiated at EU level:* This consists of supplying data for the scrutiny activities of their respective parliaments and to flag up salient issues where the subsidiarity mechanism could be activated from the domestic perspective. As one representative remarked: “we are the spies in the camp” (Interview 13. January 2011).

b. *Creating a network of contacts with EU institutions:* This consists in the cooperation with their respective Permanent Representation to the European Union in order to liaise with the Council and in direct contacts with MEPs. Direct contacts with the Commission are also seen as crucial and this is inter alia ensured by the fact that Commission services regularly attend the meetings of permanent representatives of national parliaments in the EP.

c. *Representational function:* This inter alia consists of working visits of Members of Parliament in Brussels and bringing MPs in contact with MEPs or Commissioners.

d. *Contributing to the exchange of best practices* when it comes to exerting parliamentary control.

The network of national parliamentary representatives is still in its infancy however and is described as suffering from its heterogeneity as representatives come from such different political systems providing for different degrees of empowerment and cooperation. Nevertheless intense cooperation can be observed between parliaments and chambers that have inter alia also been active during the COSAC subsidiarity checks and embark on a rather pro-active stance (also) after the Lisbon Treaty came into force. This includes the Netherlands, Denmark, Germany, the Czech Senate and UK House of Lords (Interviews 14<sup>th</sup> September 2010, 9<sup>th</sup> November, 16<sup>th</sup> November 2010c and 17<sup>th</sup> November 2010).

## **Concluding remarks**

The analysis reflects that while a degree of path dependency when it comes to exercising parliamentary control at the EU level can be observed, we also see the opening of new avenues.

On the one hand intense cooperation with the government and comprehensive information rights at the domestic level are also mirrored within the activation of the subsidiarity checks. In this context we find that this phenomenon is not restricted to the “usual suspects” such as Denmark but also that newer Member States have access to the government’s position in the quest of holding the executive to account. Parliaments that take on a pro-active role within EU affairs at the national level, do however, not necessarily take on a leading role when it comes to activating the subsidiarity mechanism at least within the COSAC subsidiarity checks. This could be explained by the fact that although subsidiarity is seen as a cornerstone of the Lisbon Treaty, it is not always seen as a relevant issue to intervene. Nevertheless it can be regarded as a means to involve national parliaments at a very early stage into the EU policy process and to then follow these dossiers throughout the policy cycle.

When it comes to the involvement of sectoral committees we see that these are on the rise, again not only in countries where this phenomenon is rather well

documented such as Finland, but also in other Member States. Their role in this context is two-fold: on the one hand to process the technical details of EU legislation but also to enhance the parliament's role as scrutinizers of government.

Examining the relationship between upper and lower houses one can observe that upper houses that quite often play a secondary role within the internal legal order when it comes to EU affairs were the most active players when it came to activating the multi-colored cards under Lisbon. In the practical process this is explained by the fact that these chambers try to compensate for their secondary role at the national level. Upper houses thus begin to use the opportunity structures offered by the Lisbon Treaty.

Overall we see the beginning of new inter-institutional balances and new avenues of inter-parliamentary cooperation. While it is true that quora necessary to activate the multi-colored cards available to national parliaments under the Lisbon Treaty are difficult to reach and thus far have also not been activated in the practical political process, we find that the Lisbon Treaty has some (possibly) unintended consequences of inter-parliamentary cooperation.

Whereas the Treaty foresees provisions on inter-parliamentary cooperation namely between the EP and national parliaments, cooperation *across* Member States parliaments is not explicitly foreseen in the form is currently practised. The network of national parliamentary representatives in the EP is an informal forum of parliamentary administrative players that fulfills a bridge-building function across national parliaments to alert parliaments to dossiers that could be problematic from the viewpoint of subsidiarity or a more political perspective. In this context it is still too early to tell whether this network will move from a body of information exchange to a forum where – in cooperation with other institutional actors - parliaments will consciously develop common positions.

The provisions on parliamentary control foreseen in the Lisbon Treaty are however only one side of the coin; a two pronged approach is necessary. One the one hand we can see parliaments collectively strengthening their position by way of inter-parliamentary cooperation but they of course still face the challenge of improving their stance within their own political system (O'Brennan and Raunio 2007). In this context it is noteworthy that only one Member State does not follow this compounded approach, which is Finland. This Member State sees effective parliamentary control as embedded within the domestic arena and thus concentrates its resources at that level.

This brings us to some elements of a future research agenda. While this paper has focused on some general trends prevalent at the EU level at an early stage of the implementation of the Lisbon Treaty, there is still a lacuna when it comes to in-depth comparative studies of not only of how the provisions of the Lisbon Treaty on parliamentary impact on the domestic level but also how parliaments actually use the opportunity structures provided by the Treaty.

## **Interviews**

Representative of the French National Assembly in the EP, 14<sup>th</sup> September 2010

Administrators of the Austrian European Affairs Committee, 27. September 2010

Representative of UK House of Commons in the EP, 29<sup>th</sup> October 2010

Representative of Lithuanian parliament in the EP, 3<sup>rd</sup> November 2010\*<sup>16</sup>

Representative of Danish Folketinget in the EP, 9<sup>th</sup> November 2010a

Representative of COSAC Secretariat, 9<sup>th</sup> November 2010b

Representative of Romanian Senate in the EP, 10<sup>th</sup> November 2010a\*

Representative of Latvian Parliament in the EP, 10<sup>th</sup> November 2010b\*

Representative of Romanian Chamber of Deputies, 11<sup>th</sup> November 2010\*

Representative of Finnish Eduskunta in the EP, 16<sup>th</sup> November 2010a

Representative of Portuguese Parliament in the EP, 16<sup>th</sup> November 2010b

Representative of Slovenian second chamber in the EP, 16<sup>th</sup> November 2010c

Representative of Czech Senate in the EP, 16<sup>th</sup> November 2010d\*

Representative of Swedish Riksdag in the EP, 17<sup>th</sup> November 2010

Representative of Austrian Nationalrat in the EP, 22. November 2010a

Representative of House of Lords in the EP, 22. November 2010b\*

Representative of the Czech Chamber of Deputies in the EP, 2. December 2010\*

Representative of the Dutch Chamber of Deputies in the EP, 9<sup>th</sup> December 2010

Representative of the Irish Houses of Parliament in the EP, 13<sup>th</sup> January 2010a

Representative of the Estonian Parliament in the EP, 13<sup>th</sup> January 2010b

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<sup>16</sup> \*Thanks to Alexander Strelkov, who conducted these selected interviews partly based on questions provided by the author.

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