The Lisbon Treaty Evaluated: Impact and Consequences

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Paved with good intentions: Ambiguities of empowering parliaments after Lisbon

Aron Buzogány, Andrej Stuchlík

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Abstract

The subsidiarity mechanisms of the Lisbon Treaty have received much attention with their promise to redress the position of national and regional parliaments, which were seen as losers in the integration process. One year later, beyond formal rules and good intentions, the question remains as to whether these novelties actually succeeded. The paper offers two interrelated perspectives: The first assesses the formal and informal changes regarding the position of national parliaments that took place following the Lisbon Treaty. The second perspective offers a closer look at developments in the German Bundestag and the regional parliaments. What emerges from both perspectives is that while there is significant activism among legislative actors that could lead to the improved scrutiny of EU decision-making, the actual change has been very limited. The reasons for this are both institutional and structural. First, the new provisions only partly shift control back to national legislatures, not only because the provisions require high thresholds but also because the national legislature's involvement occurs at a rather late stage in the EU policy-cycle. Second, the incentives of individual MPs to engage in matters of subsidiarity are low and will continue to be so. We briefly discuss three potential solutions to remedy this situation: (i) strengthening the interaction between parliaments and administrations, (ii) the use of informal (informational) networks, and (iii) promoting role change of subsidiarity stakeholders.

Aron Buzogány
German Research Institute for Public Administration Speyer
P.O. Box 1409
D-67324 Speyer
Email: buzogany@foev-speyer.de

Andrej Stuchlík
German University of Administrative Sciences Speyer
P.O. Box 1409
D-67324 Speyer
Email: stuchlik@dhv-speyer.de

I. Introduction

Recently, the formal instruments of the subsidiarity check, an early-warning mechanism of the Lisbon Treaty,[1] have received much attention due to their promise to redress the position of national and regional parliaments, which were seen as losers in the integration process. More than a year later, beyond formal rules and good intentions, the question remains as to whether these innovations actually succeeded in empowering national legislative bodies.

Most debates addressing the effects of Europeanization on democratic legitimacy and effectiveness at the domestic level have focused on the question of whether national parliaments are to be regarded as losers in the integration process or whether they have managed to "fight back" and now command relatively far-reaching powers to scrutinize their governments regarding EU matters. Consequently, the design and choice of parliamentary scrutiny procedures have been among the main points of interests for researchers. The development of scrutiny procedures has been described as possibly being dependant upon political-administrative relations, minority governments, political culture, party-based or popular euro-scepticism or the strength of parliamentary committees prior to establishing oversight for EU matters (cf. Maurer 2005, Goetz and Meyer-Sahling 2008, Raunio 2009).

The so-called Deparliamentarization thesis has been at the centre of the debates for the last two decades when discussing parliamentary democracy in EU member states (Goetz and Meyer-Sahling 2008). The debate has developed around the question of whether European integration can be regarded as one of the – albeit possibly quite numerous – causes for the declining importance of parliaments in the member states. According to this view, European integration has led to both constitutional and political developments that have undermined the power of the legislative branches. Both developments have been part of a more general move towards supranational state-building, which has limited national sovereignty in order to achieve the potentially higher benefits of increased regional integration. Currently, a substantial portion of domestic legislation originates from the European legal level – even if the "80 per cent Myth" has since been adjusted downwards (Christensen 2010, Töller 2010).[2] Even so, constitutional developments that have shifted legislative powers to the European level have impacted the member states' legislatures more than their executives. Along the way, as predicted by intergovernmental integration theory, political developments at the European level have benefited mainly national bureaucracies. One reason for this lies in the central role of technical expertise in the EU policy-making process, which could not be matched by national legislators with their limited capacities.

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[1] Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty].

[2] Jacques Delors once claimed that 80 per cent of legislative production in the member states goes back to an EU impetus.

However, creeping Deparliamentarization is only part of the story. It did not go without a response but was met by various responses from national legislatures trying to diminish their disadvantage vis-à-vis their executives (O'Brennan and Raunio 2007). Starting in the late 1950's, national parliaments established European Affairs Committees (EACs) in order to oversee their government's activities in Brussels. This process accelerated after the Maastricht Treaty, which delegated more policy-making powers to the EU, with national parliaments further extending their participatory and scrutiny rights. For instance, having previously been dependent of their government's benevolence for information, MPs established both formal and informal ways to enhance the flow of information. One of the most important issues to tackle was the "always one step behind" problem (Raunio 1999), which reduced the role of domestic legislators from active "policy-shapers" to rather passive "policy-takers" (Börzel and Sprungk 2007, Sprungk 2008). Hence, to counter this trend, parliaments established their own offices in Brussels[3] and started forging closer ties with MEPs (Neunreither 2005). Liaising with other legislators has led to the establishment of interparliamentary fora such as the Conference of Community and European Affairs Committees (COSAC)[4], which brings together members of the EACs of the national legislatures (Tordoff 2000, Seidel 2010, Silberhorn 2010). Though quite slowly, their increasingly pro-active behaviour has helped legislatures to become increasingly acknowledged and included in the policy-process, both, by the European Parliament and the European Commission.[5] Going with the winds of criticism about the EU's democratic deficit, the role of the parliaments has found its ways into the European Treaties. While the annexes to the Maastricht Treaty rather vaguely talk of the role to be played by legislatures, this was strengthened with the protocol on the role of national parliaments of the Amsterdam Treaty and has been further reinforced with the Lisbon Treaty.

The general question remains whether national parliaments will be "kissed awake" by the Lisbon Treaty and start using their powers? Primarily only in the field of legal studies have the provisions of the Treaty been examined in greater detail. Beyond this legal perspective, political scientists are relatively uncertain about its potential outcomes. Some have hypothesized that an increasing role for national parliaments might result in something like a "*Virtual Third Chamber*" (Cooper 2010), "*Parliaments Jointly*" (Jancic 2008) or a "*Joint parliamentary field*" (Crum and Fossum 2009). Others warned early on that the new content of the Lisbon Treaty regarding the rights granted to parliaments are so inherently complex that little change should be expected (Passos 2008). Adding to this, the quorums required to

[3] Albeit rather late, with the German Bundestag being the frontrunner since 2007.

[4] Conférence des Organes Spécialisés dans les Affaires Communautaires et Européennes des Parlements de l'Union européenne, established in 1989. [http://www.cosac.eu/en/].

[5] As acknowledged by one Commission officer who stressed the growing importance of involving national parliaments (personal interview).

have a collective say in an ordinary legislative procedure (Art. 294 TFEU) are prohibitively high, and reaching them may prove to be unattainable (see section III of this paper). At the same time, while agreeing that it remains difficult for national parliaments to be real players in the multi-level system, others have pointed out that the main added value of the new Treaty provisions are indirect (Barrett 2008). The procedures might inherently be a way to strengthen parliamentary actors by making them more aware of the European dimension of their activities. The empowerment of national parliaments would leave MPs without the argument that they are side-lined in the European decision-making process. As a result, the legitimacy of the EU might be enhanced through the increased "EU-ization" of national public spheres.

On the more negative side, the question remains as to whether giving national parliaments more demanding oversight responsibilities for EU decision-making might overburden them. Parliaments need to adopt new institutional solutions and establish novel procedures in order to quickly review the new documents channeled to them *en masse* from the Commission. A further reason for skepticism about the benefits of empowering parliaments is that they might emerge as reluctant veto players, which could have negative consequences also for their national governments. Increased parliamentary involvement could weaken a government's position at the EU-level by obliging them to consult and coordinate with a reluctant parliament. While this might be good news for transparency, it probably does not lead to greater efficiency (Emmanouilidis and Stratulat 2010). One a more cynical note, governments might hide beyond their national parliaments when trying to block EU initiatives by using the so-called "scrutiny reserve".[6] In practice, such strategic manifestations of parliamentary scrutiny can have considerable power in COREPER meetings and in working bodies.[7] A further expectation about the impact of the Lisbon Treaty is that it might empower some parliaments over others. While upper houses usually have only special and limited functions in their national systems, the Lisbon Treaty puts them on an equal footing with the lower houses and thus tends to strengthen them domestically. Finally, some have argued that establishing a second level of national parliaments "in Brussels" in order to alleviate the perceived democratic deficit of the EU might ultimately run counter to the very logic of representative democracy, with the parliaments ending up being represented twice in Brussels (Kiiver 2006).

In this paper we discuss the capacities and willingness of national and regional parliaments to use the enhanced powers accorded to them by the Lisbon Treaty. In the next section we briefly introduce the institutional innovations regarding the role of national parliaments that

[6] Of course, this would not be a totally new development. E.g. in the 45 COREPER I sessions of 2008, 46 parliamentary reservations were voiced by governments.

[7] Anecdotal evidence suggests that the Danish Folketing was quite active here.

were introduced by the Treaty. Subsequently we will provide a general description of various institutional adaptations and the cooperation among national parliaments. Our data come from various sources, including responses from national parliaments to various surveys and COSAC reports; interviews with MPs, parliamentary and ministerial staff[8]; and discussions during workshops organized for these groups.[9] We find that, in line with many expectations, very little has changed in the (admittedly relatively short) time period "after Lisbon". Using the German case as an example we highlight in some detail both the institutional developments taking place and the questions that remain to be answered. To pay special attention to the case of German is important for several reasons: as a federal member state it was mainly the *Länder* who fought successfully for a subsidiarity clause to be included in the Maastricht Treaty. Another pull factor was a set of restrictive past rulings by the German constitutional court that limited the scope of powers that could be delegated to the EU.[10] However, so far the members of the German Bundestag have displayed rather limited interest in EU policy, let alone scrutiny, which has left Germany in the "moderate" camp of parliamentary scrutiny. Beyond the institutional questions of intra-parliamentary adaptation we explore two structural issues that are likely to influence the way in which national parliaments deal with Europe: in section III, we examine the general problem of collective action among national parliaments, which is required to make effective use of their enhanced rights, and later we discuss (section IV) the impact of the roles and self-perceptions of parliamentarians on EU policy-making. The final part of the paper concludes.

II. The role of national parliaments in the EU

Responding to the EU's much debated democratic deficit, the Lisbon Treaty introduced several changes relating to the role of national parliaments in EU policy-making. National parliaments are now directly referred to in both the Treaty itself and two of its protocols. Art. 5(3) TEU explicitly names national parliaments as responsible for making sure that the EU complies with subsidiarity,[11] while Art. 12 TEU enumerates their roles and functions: evaluating the implementation of policies in the area of freedom, security and justice;

[8] Most interviews were carried out in an ongoing research project at the German Research Institute for Public Administration Speyer. The project analyzes the interactions and mutual role perceptions of politicians and bureaucrats involved in different policy fields of EU policy-making. For further information and outputs, see [http://www.foev-speyer.de/Rolleneuropa/inhalte/06_english.asp]

[9] Forum "Subsidiaritätskontrolle", Conference organised by DHV Speyer, Bundesrat, Berlin, 18-19 October 2010

[10] For a short overview on the Maastricht decision and the so called "Solange I" and "Solange II" cases see e.g. Kiiver 2009.

[11] In its Lisbon Case the German Federal Constitutional Court explicitly stressed the "integration responsibility" (Integrationsverantwortung) of the German Bundestag. See Lisbon Case, BVerfG, 2 BvE 2/08, 30 June 2009, available at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html].

monitoring of Europol and Eurojust; and regarding treaty revisions or inter-parliamentary cooperation. The first protocol describes information rights, while the second lays out the procedural components of the application of the principles of subsidiarity and proportionality[12] (Papier 2010: 9, Seidel 2010).

In practice, this means that the Commission provides national parliaments with draft legislation. Here, the Treaty has given significant rights to MPs in the area of subsidiarity and extended the period within which they can object to the drafts, by submitting a reasoned opinion, from an original six to the current eight weeks. This can result in a review of the proposal based on the "yellow" and "orange" card mechanisms.[13] The yellow card mechanism starts after objections of non-compliance are received from at least one-third of the parliaments. If the Commission decides to proceed further with the matter, it has to justify this decision and to include the European Parliament and the Council. The orange card mechanism starts if a majority of the national parliaments object to the Commission's proposal, though the orange card can be rejected by the Parliament and the Council before the first reading. Additional rights for the national parliaments concern information rights and the increased rights to insert stumbling blocks to the general passerelle procedure, under which the Council can shift from unanimity to QMV according to Art. 48 (7) TEU.[14]

New scrutiny powers have also been granted to the regional level, with the Committee of Regions (CoR) now being able to challenge draft legislation on the matter of subsidiarity. Moreover, each legislative proposal must now include an analysis of its financial and administrative impact on regions and municipalities. However, the position of regional parliaments is not yet really clarified,[15] as we will highlight later in the case of the German *Landtage*. With the recent Lisbon Case strengthening the position of both German chambers, the Länder parliaments are still seeking to find paths by which increase their say and have begun by trying to improve flows of information and cooperation procedures between the 16 regional bodies (e.g. Landtag Brandenburg 2007).

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[12] Protocol on the Role of national parliaments in the European Union C 306/148; Protocol on the application of the principles of subsidiarity and proportionality, C 306/150, 13 December 2007.

[13] Art. 7(2) and 7(3) of the Protocol on the application of the principles of subsidiarity and proportionality.

[14] As well as an individual right to veto the specific passerelle clause in Art. 81(3) TFEU, which allows the Council to move from a special to the ordinary legislative procedure in respect of measures for judicial cooperation in civil matters concerning family law and with cross-border implications. Here as well any individual national parliamentary chamber can veto the decision within six months.

[15] This is especially important in countries that deal with these actors: Austria, Belgium, Germany, Italy (see: Kessler 2010), Portugal, Spain, and the United Kingdom.

II.1 National parliaments: Status quo ante

Regarding parliamentary scrutiny of EU affairs, so far most of the literature has focused on the European Affairs Committees and their institutional setup (Maurer and Wessels 2001, Auel 2005). During the last two decades, the number of EACs has increased as has their impact in terms of political oversight. While Denmark, Austria, Sweden and Finland have been considered particularly strong scrutinizers, the newer EU member states from Central and Eastern Europe have followed suit and most of them took their institutional blueprints from the examples of the older member states (Dieringer and Stuchlík 2003, Buzogány 2010).

The scrutiny procedures of national parliaments can be broadly grouped into two models (Raunio 2005). They differ regarding their structural attributes such as timing and scope of information made available by governments, the "bindingness" of parliamentary opinion for the governments and the inclusion of other sectoral parliamentary committees in formulating the opinion of the parliament. There are also important differences regarding the frequency of the EACs' meeting, the inclusion of MEPs in the work of the Committees, and simply in the manpower and technical capacity the EACs possess both in terms of members and supporting staff. The first, so-called *document-based model*, emphasises the procedural component of parliamentary scrutiny. In essence, EACs examine all incoming EU documents. In most cases, the pre-selection is done by a Secretariat, which prioritises the legislative proposals which will undergo closer scrutiny. Committee discussions and information processing are at the centre of this model. For example, the EAC might invite external experts to its hearings, helping to shape its opinion on certain policy issues. Importantly, document-based systems do not try to exert direct control over their government's activity in Brussels. This does not mean, however, that they have no impact on the position of the government. Instead, this impact is based on persuasion through deliberation in parliamentary hearings or through issuing well-founded expert opinions. The second scrutiny system applied in national parliaments is the *mandating-model*. If the UK is the "ideal type" for the document-based system, the Danish Folketing's "Market Committee" is the archetype for the mandating-based approach. Its development can be explained by the special features of Danish governmental system, which is characterized by frequent minority governments. This results in rather weak governments that encounter a strong parliament which seeks to bind the government's hands. The mandating process focuses on the output, i.e. on the government position that is to be represented in the European Council. That is why EACs using the mandating approach focus very closely on the schedule of the Council meeting. In practical terms, EACs meet the week prior to Council meetings and provide the national negotiators with explicit voting recommendations. How "explicit" this mandating is can differ. Some states have installed so-called systematic mandating requirements and might force governments to change their

positions. Other parliaments, while having the power to issue politically binding mandates, do so rather infrequently.

While the two models clearly help us in systematizing the main scrutiny procedures, they have their limitations as well. Many parliaments lie somewhere in-between the two models (Szalay and Juhász-Tóth 2006). An increasing amount of empirical research suggests that even formally weak scrutinizers might turn into strong watchdogs if the salience of the policy at stake resonates strongly among decision-makers (Sprungk 2008, Stephenson 2009, Neuhold and de Ruiter 2010, Sprungk 2010). The differences in parliamentary activity resulted also from the different procedures in place for subsidiarity checks. In most cases, subsidiarity issues have been one of the permanent elements of review, and are carried out within the general framework of the scrutiny of EU legislative proposals (UK, BG, SL, DE, FR, CZ – Senate, NL, SE, PT, FI). Few parliaments checked for subsidiarity selectively (IT, LT), while some of the newcomers did not have any procedure in place at all (EE, CY, PL and RO). Hence, when examining the overall scope of the enhanced monitoring capacities of national parliaments, one has to keep in mind that these actors themselves take different scrutiny approaches and thereby had different starting points. Thus, as we will see, the different national arrangements and traditions for monitoring EU policies at the domestic level continues to play a role in determining parliamentary scrutiny even after the Lisbon Treaty.

II.2 Changes post Lisbon

Clearly, the Lisbon Treaty's primary effect on national parliaments was to require the excessive drafting of rules of procedure, and in some cases also legislation, in order to accommodate the changes and enable them to cope with these changes (COSAC 2010). But far from every parliament did so. Some considered their procedural settings to already be "in tune" with the new procedure, such as some of the new member states, which installed such legislation when the Lisbon provisions were already on the horizon.[16] Most parliaments have used procedural or administrative measures to implement the changes.[17] A few others have changed legislation.[18] Two different models emerged regarding where compliance tests take place. One, *centralized model,* places these in the EU affairs committees (UK-HoL, CY, SLO, IT). These EACs occasionally involve other specialized Committees when necessary, like the Foreign Affairs Committee in the Case of the Czech Senate or the Lithuanian Saemas, or a special subcommittee on subsidiarity control (e.g. in the case of the Dutch lower house). The second model, which we might call the *mainstreaming model*, focuses on

[16] Cyprus, The Netherlands, Belgian Senate.

[17] Italy, Estonia, United Kingdom, Bulgaria, Finland, Latvia, Slovenia.

[18] Bulgaria, Slovakia, Italy, Germany, France, Czech Senate, Romania.

strengthening the role of sectoral committees in scrutinizing their governments' position on EU policy-making.[19] In both cases, the timing of the scrutiny procedure is of crucial importance. While theoretically (and also technically) it would be possible to become involved at an earlier stage, all parliaments start the procedure only when the documentation knocks on the parliament's door. There are differences as to whether governments have to accompany drafts with their own documentation in order to help parliamentary staff to decide about its relevance. While the government is under obligation to do so in some member states[20], in others it can be called for if needed, but this is not initially required.[21]

Differences between different parliaments' use of subsidiarity checks reveal a deeper ongoing problem relating to the extremely vague definition of the emerging political norm of "subsidiarity" (Van Kersbergen and Verbeek 2007), which is interpreted quite differently by the legislatures (and the judiciaries) of the member states. There is also significant variation between positive and negative uses of the term among MPs from the different levels, including the EP, national and the regional level, which mostly manifest as "crude assumptions" about what the term really means (Martin 2010). We can identify at least four such "*worlds of subsidiarity*" among national parliaments (COSAC 2010). One group defines it as a dynamic principle, which is less a legal assessment but more a declaration of political will.[22] A second group tries to nail the pudding to the wall and interprets it in strict legal terms and regulates the details of the procedure.[23]A third group prioritizes a minimalist reading of the TEU and considers that it is relevant only to strictly supranational issues.[24] Finally, a fourth group does not address subsidiarity issues at all.[25]

II.3 Germany: The road to Lisbon via Karlsruhe

The German Bundestag formerly exercised scrutiny mainly through its EAC, which traditionally interpreted its own role in making the government's activities transparent. However, the Committee suffered from several shortcomings, such as information overload; reliance on late, sketchy and biased information from the government (Beichelt 2009: 256, Brosius-Linke 2009: 733); and conflicts with specialized committees over competences.

[19] Italy, Germany, Belgium, Sweden, Portugal, France, Finland, Slovenia, Romania. The extreme case of mainstreaming might be witnessed in the Swedish Riksdag, which is considering abolishing the EAC altogether in order to avoid duplication of work.

[20] Bulgaria, Slovenia, Portugal, United Kingdom, Finland.

[21] France, Cyprus, The Netherlands, Sweden.

[22] United Kingdom, France, Italy, Latvia, Slovakia

[23] Germany, The Netherlands, Portugal

[24] Czech Senate, Finland

[25] Italian Senate, Spain, Cyprus, Bulgaria, France, Belgian Senate, Belgian HoR, Luxembourg.

However, the main "problem" has been the low salience of EU policies and the logic of stable majority coalitions which protect and stabilised the government (also) in European policy-making (Holzhacker 2005). The gradually more active involvement of the German Bundestag in EU scrutiny resulted from changes in the party system, which became increasingly more competitive. This triggered an increasing differentiation of political parties on issues generally covered by the "fog" of the "permissive consensus" (cf. Buche and Buzogány 2010). Domestic deliberations about the Lisbon Treaty revealed differences even within the governing conservative coalition. The CSU objected to the transfer of national sovereignty, particularly with reference to the loss of parliamentary control and subsidiarity (Paterson 2010). In general, Art. 23 (3, 2) of the Basic Law stipulates that the government has "to take into account" the position of the Bundestag. As this does not translate into a "binding mandate", the CSU proposed on several occasions to limit the government's scope of action (Gröning-von Thüna, 2010: 326).

Adding to this, prominent cases that slipped past the attention of the Bundestag, such as the Services Directive or the European Arrest Warrant Directive, were wake-up calls for the parliament. As one member of the Bundestag administration put it: "It became clear that something needed to be changed in the way EU items were dealt with" (Schröder 2010: 1). In response, the Bundestag established new structures. It further strengthened the new unit (PA-1) that had been set up some years ago especially to deal with EU issues. While the "prioritizing part"[26] of the unit is located in Berlin, another office was established in Brussels in 2007 as the first direct representation of a national parliament (Beichelt, 2009: 257f). The parliamentary administration, the Brussels Bureau and the political fractions were empowered to deal with and manage information through a new intranet system (EUDOX) (Sach 2010). Despite some pessimistic expectations, this technical upgrade does not appear to be drowning the actors in an increased quantity of information and the system is considered to function quite well. In fact, information processing has improved a lot over the past years and prioritizing the information has become the most important task for the specialized committees as well as for administrative staff (Gröning-von Thühna 2010, Vollrath 2010).

Nevertheless, several problems remain. As mentioned above, one general dilemma in effectively organizing scrutiny concerns the role played by the other parliamentary committees. While the trend in the last two decades has clearly been the strengthening of EACs (Maurer and Wessels 2001), by now this might well have turned into a *cul-de-sac.* Two conflicting visions are held about the potential role of the committees: either they should centralize control over the government in European Affairs (this is the case for the EACs) or

[26] In 2009, the PA-1 division received 16,000 documents regarding EU affairs and this is expected to rise to 20,000 in 2010. Of these, approximately 1000 are formal documents sent to sectoral committees, 7000 are general reports and 8000 are documents by the federal government, such as protocols of council meetings (Sach 2010; cf. Schröder 2010).

rather they should "mainstream Europe" into the work of the specialized sectoral committees. The Bundestag has opted for the second approach, which might strengthen its capacity to bring in more expertise from the specialized committees. At the same time, including more committees to check for subsidiarity takes longer, and makes the time factor an increasing problem (Sach 2010). Further shortcomings relate to the possibilities of how the government might still avoid oversight of EU affairs. As noted in a motion by the Green Party,[27] Brussels-bound national bureaucrats in the Working Groups of the Council, where many policies are predetermined, rarely report back home. Another issue concerns the subsidiarity checks, for which the Bundestag is often left alone by the government. The German government rarely provides information about the legal basis, subsidiarity, proportionality or impact assessment on related issues that are relevant to the legislative drafts received from Brussels. Finally, the government still systematically withholds information from MPs about the infringements proceedings held under Art. 226 TFEU, which it receives from the Commission regarding its compliance with EU law.[28] Thus, practices witnessed "before Lisbon" regarding the exclusion of national parliaments from EU policy-making are still prevalent. The Euro rescue package is one of the most recent and critical examples where even the President of the Bundestag and EU experts of the governing coalition have repeatedly voiced criticism of the government withholding information.[29]

Opaque working structures, huge amounts of information and limited knowledge about decision-making procedures have a negative impact on the efficiency of the Bundestag's involvement in EU affairs. It was the German Federal Constitutional Court (hereinafter BVerfG) that emerged as the central player leading the way to a far-reaching strengthening of the legal position of the German Bundestag and Bundesrat vis-à-vis the Federal Government (Jancic 2010, Kiiver 2009, 2010). Building upon the famous Maastricht decision in 1993, the BVerfG concluded in its Lisbon case that German parliamentary involvement in conferring competences to the EU was insufficient and it required this situation to be remedied accordingly before Germany could ratify the Lisbon Treaty. Thus, in the wake of the Lisbon decision a new law, the IntVG (Responsibility for Integration Act)[30] was put in place and the two existing laws which regulate information flows and responsibilities between the federal government, the German Bundestag (EUZBBG)[31] and the *Länder* (EUZBLG)[32] were

[27] [http://dipbt.bundestag.de/dip21/btd/16/121/1612109.pdf]

[28] Annual Reports of the Commission make only aggregated data on infringements available.

[29] Der Spiegel, „Streit über Griechen-Milliarden", 6 May 2010.
[http://www.spiegel.de/politik/deutschland/0,1518,693472,00.html]

[30] Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, (Integrationsverantwortungsgesetz – IntVG), modified 1 December 2009 (BGBl. I 2009, p. 3022).

[31] Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union (EUZBBG), 12 March 1993 (BGBl. 1993 I, p. 311), last modified 22 September 2009 (BGBl. I 2009, p. 3026).

amended. As a result, the Bundestag must give its consent to every amendment of the Treaties, including the simplified revision procedure, the use of the flexibility clause (Art. 352 TFEU) and the possible extension of competences referred to in Art. 83(1) TFEU.

The German case is an especially intriguing one regarding the multi-level organization of EU scrutiny, as the Bundesrat is not a genuine elected second chamber but an assembly of representatives from the *Länder* executives. Hence, the regional legislative bodies (*Landtage*) have struggled to increase their say within the hierarchy of direct and indirect representative institutions. Recently, an informal group of all 16 presidents of the German regional parliaments agreed on a motion to revise the EUZBLG and improve their access to information on EU policy. In their "Stuttgart Declaration" (Bremische Bürgerschaft 2010: Appendix 3) the presidents of the *Landtage* proposed to expand the obligation of the federal government to inform the Bundesrat as well as the *Landtage*.[33] This motion mirrors the argument of national parliaments that was put forward during the Convention regarding their structural lack of timely information. Since gaining sufficient information sufficiently early is key, the *Landtage* have sought to improve their current situation, in which they feel to be "cut off" from the relevant knowledge (ibid.: 2). Beyond improving access to information, another idea has been floated: Backed by an expert report of one of the current judges of the BVerfG, the *Landtage* have considered introducing binding mandates vis-à-vis their Länder governments. Judicially, this seems to be within the realm of the constitutions of the *Länder*.[34] Beyond these judicial novelties, complemented by the Responsibility for Integration Act, the *Landtage* have tried also to improve their ongoing collaboration with the *Länder* offices in Brussels and some of the Landtage have sent their own representatives to Brussels.[35]

II.4 The Barroso initiative as an initiation to subsidiarity checks

In fact, the European Commission had done a lot in phasing-in subsidiarity control even before the Lisbon Treaty came into force. Looking at these efforts can provide some initial indications about the effective use of the new watchdog mechanisms, including under the

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[32] Gesetz über die Zusammenarbeit von Bundesregierung und Bundesländern in Angelegenheiten der Europäischen Union (EUZBLG), 12 March 1993 (BGBl. 1993 I, p. 313), last modified 22. September 2009. (BGBl. I 2009, p. 3031).

[33] Thereby changing paragraph §2 and the annex of §9 of the EUZBLG.

[34] Hans-Jürgen Papier concludes that the Lisbon Case has limited the scope of any German federal government to cede powers to the supranational level. Referring to the principle of conferral of competences, the federal set-up (Art. 79 (3) Basic Law) and the German homogeneity clause (Art. 28 (1,1) Basic Law), he sees implications for the Länder as well: Given the ongoing "mediation" of the influence of the regional parliaments in EU policy-making, they cannot be prevented from seeking compensatory initiatives (Bremische Bürgerschaft, 2010: 10-12).

[35] Interviews in Brussels, March 2011.

Lisbon Treaty. Commission President Barroso proposed testing the monitoring of subsidiarity by national parliaments on an informal basis, although the treaties made no mention of it. Launched in 2006, the "Barroso Initiative" was to shift national legislators' activity from passive policy-taking towards more active policy-shaping. The initiative systematically involved national parliaments at the early stages of policy-making. It directly provided them with EU working documents, which were received without the interference of the governments. As of September 1, 2006, the Commission directly transmitted all draft directives and regulations, consultation documents (white papers and green papers) and its annual work programme. In turn, the parliaments could send their opinions on the documents, such as legal drafts, to the Commission, allowing them to circumvent their governments. In order to facilitate the process, the IPEX database system was established. IPEX is an online-database that allows national parliaments to automatically receive data from the Commission, to upload their opinions and to follow the activities of other parliaments.[36] Technically, this implies that the Council and the European Parliament have not only to transmit their working documents to national parliaments but also must respond formally to the "reasoned opinions" they receive.[37] Beyond these technicalities, the question of the motivation of the Commission for launching the "Barroso Initiative" is perhaps more interesting. Why would the Commission initiate such a procedure which could at least theoretically strengthen national parliaments' role in EU decision-making at the expense of the established players? Probably, the answer is quite simple: the initiative can be considered as an instrument of legal fine-tuning ("Better Regulation"), which might in the end increase both the efficiency and legitimacy of the EU by involving potential veto players at an early stage in the policy-making cycle. At the same time, the possibilities for national parliaments to really block the Commission's proposals are extremely limited. Thus the Commission might only win from this procedure, while risking extremely little.

Be it as it is, the political dialogue between the Commission and the national parliaments has considerably intensified since its introduction in 2005. Up until the end of 2009, the Commission had received almost 618 opinions from 36 Chambers [out of 40][38] of 26 member states, with a clear upward trend (see figure 1) (European Commission 2010). However, most of the opinions merely state, rather briefly, their consent to the Commission document. This partly helps to explain the surprising position of the Portuguese parliament. Issuing a total 131 opinions between 2006 and 2009, the *Assembleia da República* accounts for more than

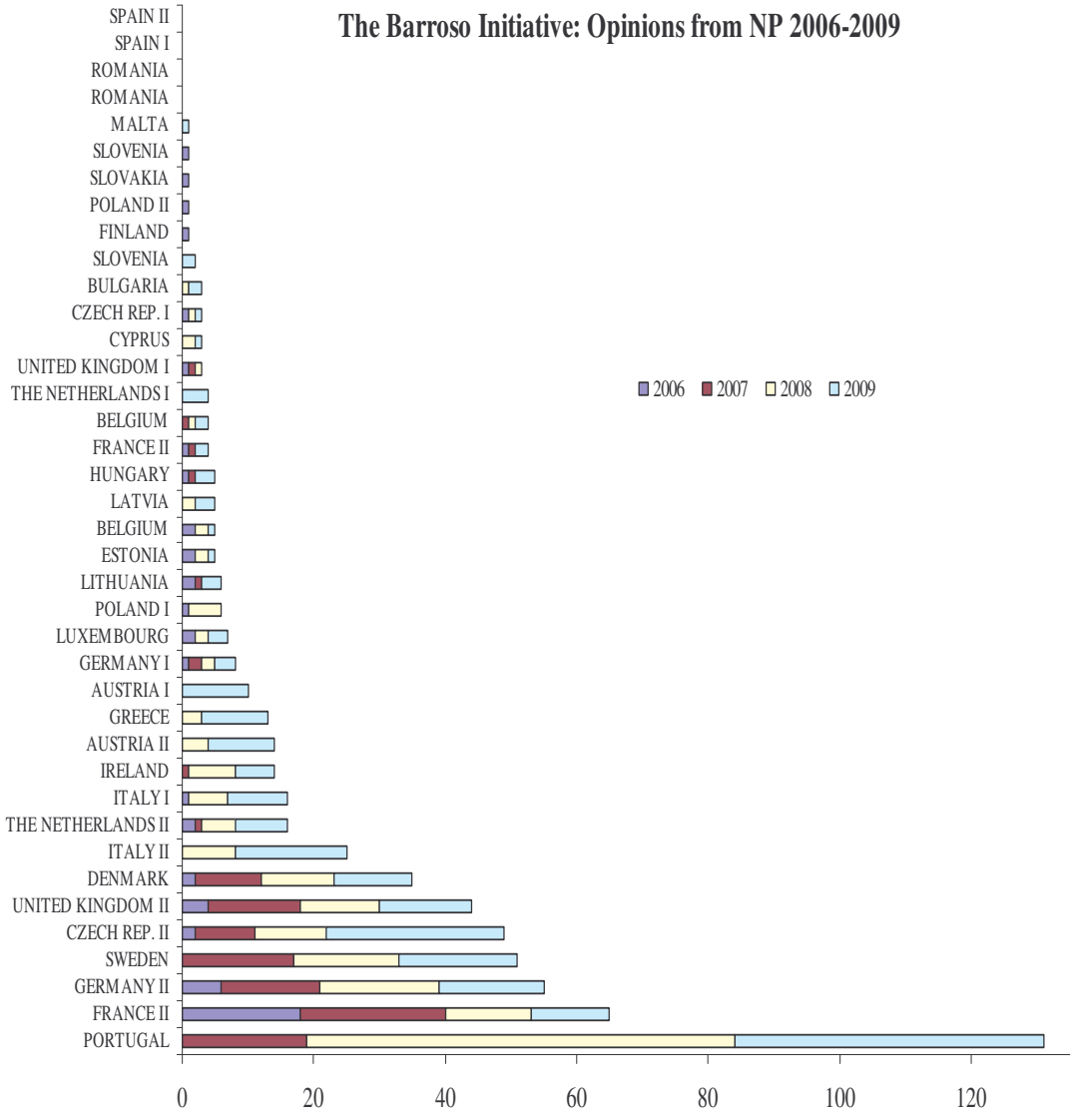
[36] Even if ironically referred to by parliamentary staff as the "Facebook of Parliaments", it should be mentioned here, that the data provided by the IPEX database are still unreliable. According to officials working with the system, it is planned to relaunch IPEX in 2011.

[37] To ease the procedure, the Commission as well as the Council use the transmission system E-Greffe to upload material to IPEX.

[38] Out of 27 member states, 14 have a unicameral and 13 a bicameral parliament, hence 40 chambers.

one fifth of all opinions. However, at least partially these outstanding numbers may be due to a "Barroso effect", given the national background of Portuguese Commission president José Manuel Barroso.[39] Aside from Portugal, second chambers seem to be more active than first chambers during this period. Taken together, the French and Czech Senates, the German Bundesrat, the House of Lords, and the Senate of Italy issued almost 40 per cent of all reasoned opinions.

Figure 1: Participation in the Barroso Initiative. Colours refer to the years 2006-2009. Data based on (European Commission 2009, 2010).



Thus far, the Commission has replied to about one-fifth of the opinions, in most of the cases without changing its view but often including further clarification on the scope of the proposed regulations (Jans and Piedrafita 2009). In fact, most of parliaments' observations

[39] Andreas Maurer, personal communication. Traditionally, the Portuguese parliament has been considered to be one of the weakest scrutinizers (cf. Buzogány 2010).

dealt not only with subsidiarity matters and also expressed opinions on market freedoms, legal subjects, the environment or economic affairs.

Since the beginning of the Barroso initiative, the number of opinions has risen steadily from 53 in the first year to 115 in 2007, 200 in 2008 and a peak of 250 in 2009. These 250 opinions issued by national parliaments concerned no less than 139 Commission documents (European Commission 2010: 3ff.). Out of these 139, only ten documents received comments by four or more assemblies (excluding the three proposals covered by the COSAC-coordinated subsidiarity trial-runs). The communications and proposals which attracted the greatest attention of national parliaments, concerned the Stockholm programme[40] (eight opinions), the cross-border healthcare directive[41] (7), the consumer rights directive[42] (6), the framework decisions on trafficking in human beings[43] (6) and on sexual abuse of children[44] (5), the Green papers on collective redress[45] (5) and on learning mobility of young people[46] (5), the communication on European financial supervision[47] (4), the directive on minimum norms for asylum seekers[48] (4), and the Annual Policy Strategy 2010[49] (4) (ibid.). Overall, the majority of opinions focussed on policy issues. In 2009 alone, the policy fields in which national parliaments focused most of their attention were Justice, Liberty and Security (83 opinions, including those issued in the context of two COSAC subsidiarity trial-runs), Health and Consumer Protection (38, including those issued in the context of one COSAC subsidiarity test), Transport and Energy (22), Education and Culture (14), Environment (12) and Enterprise (10).

[40] COM(2009) 262.

[41] COM(2008) 414.

[42] COM(2008) 614.

[43] COM(2009) 136.

[44] COM(2009) 135.

[45] COM(2008) 794.

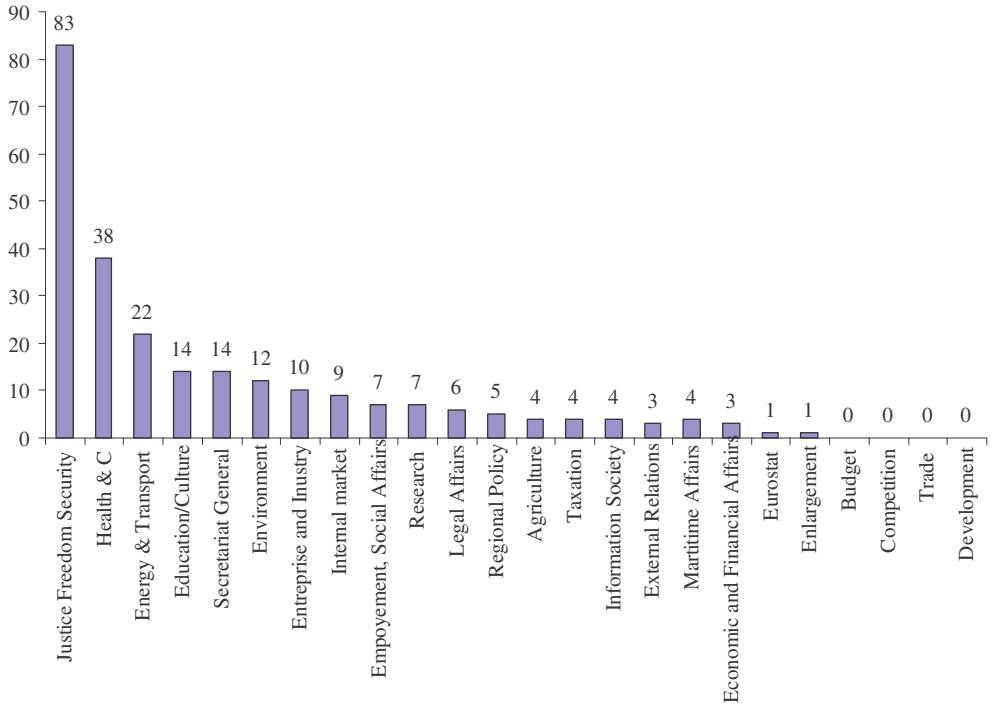
[46] COM(2009) 329.

[47] COM(2009) 252.

[48] COM(2008) 815.

[49] COM(2009) 73.

Figure 2: Number of reasoned opinions per policy field, 2009



II.5 Subsidiarity checks after Lisbon

In the end, the new protocols of the Lisbon Treaty codified the political dialogue of the Barroso initiative. Since the newly elected Commission took office only in February 2010 (and no draft legislation was issued since December 1. 2009), this marks the official start of the subsidiarity check mechanism. During 2010, 65 Commission proposals were scrutinized under the auspices of the subsidiarity check mechanism.[50] However, data availability is an issue here and comprehensive data on the first year's experiences of the new instruments are scattered: The Commission does collect all parliamentary opinions received but only those attached to the final adopted legislation[51], whereas the IPEX database lists all actions by national parliaments chronologically and not only those addressed to the Commission. Up to October 2010 the Commission sent 57 proposals to the national parliaments and received 97 opinions. Eighteen of these opinions were negative; but so far, the so-called yellow or orange card mechanisms have not been triggered.[52] "Actually, we are all eager for it to happen",

[50] See IPEX Subsidiarity list, as of 14 January 2011.

[51] [http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm].

[52] Speech of Maroš Šefčovič Vice-President of the European Commission – Responsible for Inter-Institutional Relations and Administration "New role of national Parliaments under the Lisbon Treaty", Conference organised by the C.E.P.C, Real Instituto Elcano and Fundación Manuel Giménez Abad Madrid, 22 October 2010.

noted one Commission official.[53] The subsidiarity checks mainly confirmed two expectations. First, that the eight week deadline seems to be too short and that the voting thresholds are rather difficult to reach. Second, that most of the comments actually refer to the content of the proposals rather than to subsidiarity issues.

Still, the mere number of opinions issued by parliaments is a questionable way to measure increased parliamentary influence, as discussed above (Gröning-von Thüna 2010: 325f.). For instance, the German Bundestag provided only a low number of opinions. But this only shows that other methods of oversight, such as direct involvement in the government or on the Brussels level, still seem to be more important. EU policies remain a balancing act. This is especially true for MPs from strong parliaments in important member states.[54] Opposition parties in particular can use the scrutiny procedure efficiently – the German experience shows that proposals endorsed by the opposition have increased, as has the interest of opposition parties in the EU[55], even if, according to the logic of parliamentary systems, they don't get through with them. Nevertheless, the number of opinions issued does show the level of political engagement of MPs regarding EU monitoring.

The two most controversial issues in 2010 dealt with seasonal employment and banking regulation (cf. IPEX database). First, a draft directive on conditions of entry and residence of third-country nationals for the purpose of seasonal employment[56] triggered five negative reasoned opinions which claimed the directive breached the subsidiarity principle.[57] Second, the revision of the directive on deposit guarantees[58] led to ten observations, of which four, from both German chambers, Sweden and Denmark's Folketing, were negative. Although in

[53] Speech of Carmen Preising, European Commission-SG, "Forum Subsidiaritätskontrolle", Conference organised by DHV Speyer, Bundesrat, Berlin, 18-19 October 2010.

[54] This might not be the case in small member states where MPs cannot automatically rely on the power of their government in EU decision-making (Interviews with MPs, Hungary).

[55] Personal interviews in the German Bundestag.

[56] COM(2010) 379, Council document 12208/10.

[57] As the European Scrutiny Committee of the House of Commons put it: "[…] the Treaty on the Functioning of the European Union does not empower the EU to determine how many labour migrants to admit. Decisions on the volumes of admissions remain in the hands of Member states. EU legislation on seasonal workers cannot alter that fact and so we do not accept the Commission's assertion that the draft Directive is crucial for securing effective co-operation with third countries" 13 October 2010. [http://www.parliament.uk/documents/commons-committees/european-scrutiny/13October2010.pdf]

[58] This Commission proposal led to the first use of the watchdog mechanism by the Bundesrat and the German Bundestag. See Bundesrat Decision on the "Draft Directive of the European Parliament and the Council on Deposit Guarantee Schemes (recast) COM (2010) 368 final." 437/10, 24 September 2010. [http://www.bundesrat.de/cln_152/nn_38758/SharedDocs/Downloads/EN/uebersetzungen/0437-10b-en,templateId=raw,property=publicationFile.pdf/0437-10b-en.pdf]

the end the Bundesrat's initiative did not reach the quorum required to reconsider the draft legislation, German officials stated that at least this showed that the parliament's watchdog role is operating properly.[59]

In sum, the observations above highlight two main problems regarding the effective involvement of national legislative bodies: First, effective coordination and forging majorities is difficult given the novelty of the instrument and the variety of EU salience in the member states. Second, individual MPs tend too exhibit a complex relationship when it comes to scrutinizing governmental action in EU affairs. MPs belonging to the ruling coalition will lean towards support rather than control. Therefore, we agree with Kiiver that "(…) we should not see procedures of parliamentary approval as a brake on decision-making because a stable majority cabinet is not likely to be thwarted in the plenary or a committee" (Kiiver 2009: 1293). Rather, members of the opposition will seek to exploit any procedural opportunity to voice disagreement with the government.[60]

III. Collective action problems of national parliaments: organizing subsidiarity control

We can assume the possibility to initiate a suspending veto, e.g. on a Commission proposal, is a collective good from the perspective of national parliaments (for a general theory of collective action, see Olson 1965). Reaching a blocking majority, even if only temporarily, increases the net bargaining power for all legislative bodies in the member states, irrespective of their preferences. Let us assume that on a particular topic all legislative bodies would share identical objections regarding subsidiarity. Even in this ideal type example, each chamber would be faced with an incentive to free-ride and to rely on the "reasoned opinions" of others. Adding diverging preferences to this picture only translates into higher transaction costs for those who are indifferent regarding a given draft legislation. Hence, keen promoters of subsidiarity should find it extremely difficult to lure others into collective action.

The sum of legal improvements in the national parliaments' positions that were codified in the Lisbon Treaty is faced with a variety of national scrutiny arrangements. To forge possible majorities and make effective use of the early warning mechanism procedure, legislative chambers of the member states need to foster and enhance cross-country exchange of information and cooperation. To date, the IPEX database (a "virtual" forum of national parliaments), collaboration within COSAC and interaction among liaison offices in Brussels

[59] cf. The chairman of the EAC of the German Bundestag, Gunther Krichbaum, MdB. [http://www.bundestag.de/dokumente/textarchiv/2010/32624033_kw49_lissabon/index.html]

[60] That is why the right to claim subsidiarity action before the ECJ has been created as minority right: 25 per cent in the German Bundestag or Bundesrat are sufficient (cf. Silberhorn 2010).

have aimed to facilitate such horizontal cooperation (Knutelská 2010: 8), including establishing commonly shared minimum standards.[61] But to muster a third or a quarter of 54 votes[62] may still prove difficult given different notions of involvement, including on the concept of subsidiarity, as well as the novelty of the instrument.

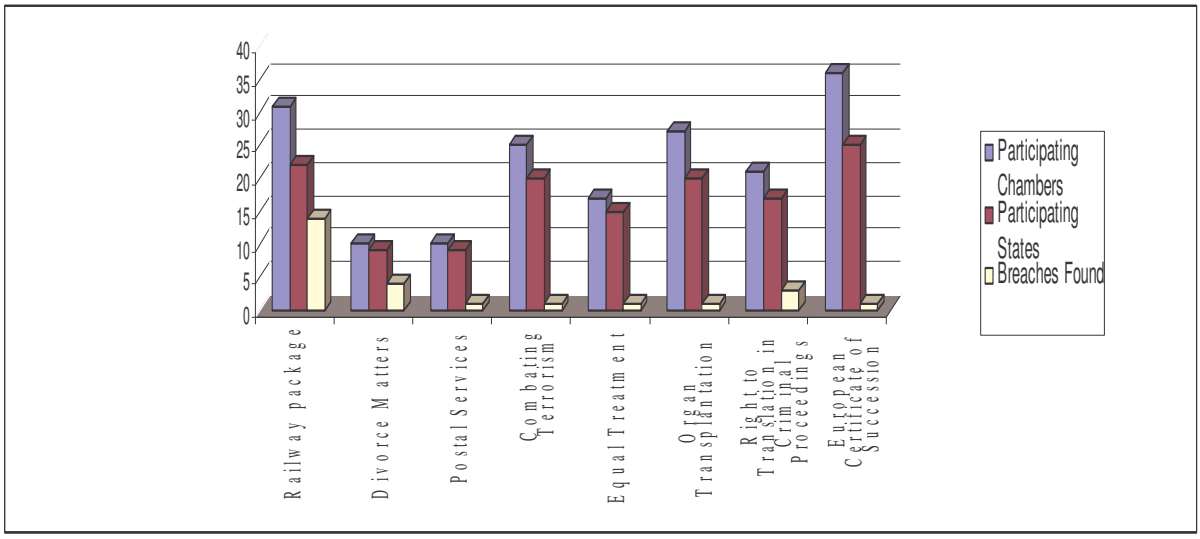
Therefore, during the run-up to the Lisbon Treaty the trial subsidiarity checks, which were set up by COSAC were an important element of trying to solve the collective action dilemma of the parliaments. From 2005 on, national parliaments conducted eight coordinated subsidiarity checks under COSAC's tutelage.[63] Participation rates were high in the beginning but decreased in 2006 and 2007. So did the number of subsidiarity breaches found by the national parliaments. During the preparations for the Lisbon Treaty – and as a result of increased peer-pressure by the COSAC Secretariat – the number of participating states and chambers climbed again, reaching an all time high level of participation during the last coordinated subsidiarity check in 2009 (which was carried out technically already under the Lisbon Treaty). The trial-runs focussed on a total of eight legislative proposals (see figure 3).

[61] "Copenhagen Parliamentary Guidelines. Guidelines for relations between governments and Parliaments on Community issues (instructive minimum standards)", COSAC, 27 January 2003, OJ C154/1, 2 July 2003.

[62] At least nine member states (equaling 18 votes) or seven member states respectively.

[63] [http://www.cosac.eu/en/info/earlywarning/]. The following subsidiarity checks were carried out by COSAC: March-April 2005 – on the 3rd Railway Package (under the Constitutional Treaty), July-September 2006 – on a Proposal for a Regulation in divorce matters (under the Treaty of Amsterdam), October-December 2006 – on a Proposal for a Directive on postal services (under the Treaty of Amsterdam), November 2007-January 2008 – on a Proposal for a Framework Decision on combating terrorism; July-September 2008 – on the Proposal for a Directive on the implementation of the principle of equal treatment; December 2008-February 2009 – on the Proposal for a Directive on human organ transplantation; July-September 2009 – on the Proposal for a Framework decision on the right to interpretation and to translation in criminal proceedings; October-December 2009 – on the Proposal for a Regulation in matters of succession.

Figure 3: COSAC subsidiarity trial-runs



The trial-runs revealed some of deficiencies in the process which might be telling also for the future. For example, the time limits established by the Treaty for conducting subsidiarity were seen by parliamentary staff as too short, especially when this included the summer holiday months.[64] Another problem was the limited availability of documents written in the languages of all member states. Adding to this, the stage before a parliament passes a reasoned opinion on non-compliance required some informal cooperation with other parliaments – but it remained notoriously difficult to bring parliamentary procedures "in sync" across national borders. In the meantime, identifying such deficiencies "on-the-go" has led to learning processes among both the Commission and parliamentary staff, with the Commission sending less conflicting proposals with subsidiarity issues into the process. The general picture emerging here highlights unsolved coordination problems both on the national level (between the legislative and the executive, as well as between the upper and lower houses of national parliaments) but also between the national parliaments themselves. The subsidiarity checks highlighted once again the differences between the various scrutiny arrangements that parliaments use to check their executives (COSAC 2010). As mentioned above, one main difference concerns the very understanding of subsidiarity and, therefore also its institutional set-up. In fact, only a few parliaments conduct a systematic analysis of compliance with subsidiarity matters. Adding to this, while in some parliaments the EACs may act on behalf of the whole legislative body, others need the plenary for approval. A third group needs to take into account the positions of sectoral committees as well. The same holds true for countries with regional parliaments. As a result, these "national flavours" of scrutiny often translate into a pressing time issue for drawing the yellow or orange card: by the time a critical number of parliaments can be a gathered, it might simply be too late.

[64] Therefore, the Commission officially excluded the month of August from the eight week period.

Despite these learning loops, in 2010 COSAC concluded that it will stop coordinating subsidiarity checks in the future (COSAC 2010). In principle, this means a loosening of future coordination. While virtually all parliaments acknowledge the necessity of coordination, there seems to be a lack of a clear vision of how to make this work in practice (ibid.). Clearly, even if the existing instruments have showed some potential, they often remain insufficient. For example, the IPEX database, maintained by COSAC and rapporteurs at the national parliaments, promises to strengthen collaboration and exchange on issues under scrutiny. While the system has its merits, its usage remains very selective and information often appears at too late of a stage. Furthermore, some of the parliamentary staff mentioned that they simply lack the resources necessary to update the online database, while the benefits of using it are often limited (Interviews, Hungarian National Assembly, December 2009). Adding to this, the online database has sometimes proven to be unreliable and will soon be subject to a major re-launch that promises to make it more user-friendly. Developing more formal and institutionalized collaboration clearly has its limits and is often very resource-intensive. Therefore, the emphasis among parliamentary staff is currently on intensifying informal contacts at the staff level. An increasing role is being played by the permanent representatives of the national parliaments, which share floors at the European Parliament in Brussels. Staffing these offices has received increased attention in the last years, with Malta and Slovakia being the only state as of 2010 without an office in Brussels. The regular MMM (*Monday Morning Meeting*) of the representatives provide space for exchanging information and testing whether ideas will "fly" in other parliaments.

IV. Roles and self-perceptions of Parliamentarians in the EU

Nonetheless, granting more formal scrutiny options, painstakingly monitoring their implementation and removing obstacles to cooperation might miss one crucial point. Such well intended initiatives may grind to a halt if individual MPs do not feel inclined to make use of their novel competences.[65] One rather simple fact relates to relationship between scarce resources and the scrutiny capacities of parliamentarians. For instance, in the new member states, interviews gathered in 2009-2010 suggest that these MPs lack both the interest and resources to work towards the envisaged "multi-level parliamentary system". Recent research on elites in Central and Eastern Europe (Lengyel and Ilonszki 2008) and our own interview material suggest that politicians have relatively low interest in getting actively involved in shaping EU policies, as well as low knowledge of how to do this. Cross-country research on the EU-15, conducted by Bernhard Wessels, indicates that role-orientations of

[65] In fact, the Lisbon improvements and increased cooperation, as shown in ch. III., may enable parliamentary administrative staff to a greater extent than those for whom it was drafted, namely MPs. We thank Thomas Christiansen for making this point.

individual MPs are important to understanding their involvement in EU affairs.[66] Even if the parliaments have obtained strong powers over and control of their governments, party political control and/or the lack of awareness of those very powers seems to keep them merely "on the books". Thus, another and possibly more complex problem for the effective oversight of EU policies is located at the level of parliamentarians themselves and relates to their self perceptions and the (usually limited) salience of EU affairs in domestic politics.

The roles of MPs are a key variable in understanding parliamentary passivity regarding EU affairs. Analyzing the attitudes of German MPs over time, Wessels found little evidence of understanding or interest in EU issues (Wessels 2005). This is, at least in part, a result of the domestic electoral system. For Germany, the literature usually identifies two main roles played by parliamentarians: a more constituency based one in the case of parliamentarians from the single-mandate districts and a stronger party based role for who joined the Bundestag via regional party lists (Patzelt 1997). German MPs conceive of themselves as representing their constituencies more so than their parties (Kropp 2010b). It comes as no surprise that "generalist" MPs working mainly for their constituency have neither sufficient time nor the required expertise to become involved in EU-level policy-making or the scrutiny thereof. However, the perceived growing importance of European issues has increasingly led to a role conflict among constituency MPs, who fear that their lack of EU-knowledge will result in disadvantages both for their constituency and for their careers. Therefore, they readily acknowledge that there is a need "to do something about Europe". More surprising is that even policy experts and high ranking members of party groups with extensive contacts on the European level also feel that the ministerial bureaucracy has an uncatchable advantage (Kropp 2010a, 2010b). At the same time, Kropp also finds some evidence for a slowly emerging new parliamentary role for the "European expert", even beyond the members of the EACs (Kropp 2010b). This type of parliamentarian engages in intensive contact on Europeanized policies not only with the national bureaucracy but also with the EU institutions, European NGOs, MEPs and MPs from other member states. The same can be seen in Sweden, where MPs often follow policy issues at multiple levels. Recent plans to abolish the Swedish EAC have to be seen as consequence of this development and highlight the successful mainstreaming of EU policies.[67]

To put it differently, despite an enormous amount of information available for interested MPs, there is still limited knowledge of the processes and procedures of EU level policy-making. For Germany, this limits the Bundestag's ability to shape its own policy positions. While MPs backing the government might find this less troubling, the situation is more

[66] On role theory in parliamentary and administrative studies, see (Saalfeld and Müller 1997, Kropp and Ruschke 2010).

[67] Interviews conducted by Jonas Buche in the Swedish Riksdag.

problematic for opposition parties. With their access to information being curbed, the effectiveness of their role in checking the government is restrained as well.

V. Conclusions – the Road after Lisbon

What happened to the good intentions of the Lisbon Treaty, which sought to address the democratic deficit through empowering national legislatures? Do we observe substantial change regarding EU policy-making or are the subsidiarity checks merely lip-service? Are the new "rights of the parliaments" not much more than an ineffective documentation procedure for parliamentarians who are already scarce of resources as well as of *capacity* and *willingness*?

This paper argued that, first of all, the improved oversight procedures of the Lisbon Treaty have met an almost Babel-like variety of scrutiny mechanisms in the member states, which display huge differences in the usage of binding mandates, may or may not have active second chambers, and so on. Also, interpretations of and the significance assigned to "subsidiarity" vary to a great extent. Whereas some legislative bodies regard the Commission's proposals to be *de lege* in compliance with EU law, others seek to confirm its legal right to act in the first place. Additionally, the reformulated Protocol itself only adds to the existing difficulties in establishing when a breach of the subsidiarity principle has occurred: The notion of "cross-country implications" as first used in the Amsterdam Treaty has been removed (cf. Koch and Kullas 2010). Hence, how to disentangle subsidiarity and proportionality remains disputed. Upcoming ECJ rulings, especially in case of subsidiarity actions of infringement[68], will necessarily have to further delineate the scope for interpretation of the current procedure.

Second, the early warning system is still in its infancy. So far, national parliaments have not agreed on whether there has been a collective breach of the subsidiarity principle. The eight-week period is considered too short and discussions about improving the exchange of cross-country information (and thereby forging majorities) are ongoing. However, it is noteworthy that the high thresholds for parliaments to get "in sync" are a "weakness by design" built in by the Constitutional Convention.[69] Nonetheless, while "reasoned opinion" technically

[68] Art. 8(1) of the Protocol on the application of the principles of subsidiarity and proportionality, 13 December 2007, C 306/150, 17 December 2007.

[69] According to the former president of the European Parliament, Klaus Hänsch, a de facto veto power for national parliaments was first discussed, but was later rejected.

implies only negative statements,[70] referring just to the watchdog function of the subsidiarity check might miss an important point: Voicing consent also seems to matter for national parliaments, as the preceding framework (the Barroso initiative) suggests.[71]

In this paper, we took a closer look at the German case for several reasons. On the one hand, the "permissive consensus" would lead one to expect a rather timid approach to the use of parliamentary watchdog mechanisms in general. On the other hand, the recent Lisbon Case of the BVerfG set absolute limits to the conferring of competences to the supranational level. At the same time, the ruling substantially empowered the German Bundestag and Bundesrat. Now the federal government "shall endeavour to reach agreement with the Bundestag", if an opinion under Art. 23 (3) Basic Law has been endorsed (cf. COSAC 2010: 185). In fact, both chambers of the German parliament institutionally increased their say vis-à-vis the federal government and the BVerfG urged them to use their new rights. However, the working structures remain complex (Gröning-von Thühna 2010) and in partly still under construction (Vollrath 2010), while the information flows between the two chambers (and the EACs) are still informal.[72]

The third section addressed some of the technical problems associated with the ex-ante control mechanism of subsidiarity monitoring. Despite attempts to promote institutional learning through the COSAC framework, the ability to draw a yellow card entails a collective action problem. Adding to this, the variety of conceptions held about subsidiarity restricts inter-parliamentary cooperation.

The fourth main argument of the paper specifically addressed the *willingness* of parliamentarians to engage in controlling EU matters. Regarding the complex interplay of MPs' self-perceptions and their inclination to engage in scrutiny, research on parliamentary roles suggests that engagement in EU policy-making remains limited. Neither knowledge nor domestic salience seems to be sufficiently high to offer incentives for effective parliamentary involvement.

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[70] "Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers." Art. 6(1) (ibid.).

[71] Though even if real policy-shaping power remains limited, the mere existence of the "political dialogue" with the European Commission might lead to an enhanced impact assessment and improved ex ante inclusion of subsidiarity matters.

[72] Of course, informality per se need not necessarily to be a disadvantage, but to date, both chambers are still seeking the best solutions (cf. COSAC 2010: 178ff., Vollrath 2010).

We suggest three "ways out" of the complex situation facing national parliaments regarding their recently granted influence on EU policy-making:

- *Strengthening interaction between parliaments and administration*. Since this is an ongoing process in many member states, this suggestion probably knocks on open doors. Procedures, parliamentary standing orders have been revised and adapted in the wake of the Barroso initiative and the COSAC trial-runs. Still, since prioritizing EU documents is crucial, the parliamentary advisory staff is becoming increasingly important, as are the liaison offices in Brussels. Furthermore, the linkages between sectoral committees and dedicated EU committees should be tightened.

- *Increased usage of informal and informational networks:* As stated above, forging majorities to trigger the yellow or orange card mechanism exhibits elements of a collective action problem among national legislatures. Hence, increasing inter-parliamentary cooperation – as is already being done within the COSAC framework or the informal networks of Permanent Representatives of the Parliaments - will remain important. Still unclear is the role of the European Parliament: it might act as a natural arbiter and help to bring together national parliaments or it may instead regard their actions as obstructive, given its role as co-decision maker with the Council.

- *Role change of subsidiarity stakeholders:* In order to enhance both the capacity and willingness of individual MPs to engage in subsidiarity monitoring, the scope for politicizing EU policy in the domestic arena will prove crucial. The recent rise of euro-skeptic parties across Europe may even help to spur this development, given the relevance of party adherence in shaping the roles and self-perceptions of MPs. Especially the right of individual chambers to take subsidiarity issues before the ECJ may eventually become an effective, albeit rare, tool for criticizing EU mainstream legal output and increasing the salience of EU policy more broadly. Put it in a more Europhile way, at the European level, the stronger role for national parliaments could foster EU-wide debates and cooperation between national and European legislators. To make use of their new prerogatives, national parliaments and even domestic political parties will have to intensify cross-border cooperation. Moreover, the enhanced involvement of national parliaments could reinforce the ties between domestic MPs and MEPs.

To conclude, the Lisbon subsidiarity control mechanisms (subsidiarity objection and infringement action) are, in terms of legal practice, still in the early stages of their development. They are neither a useless tool meant merely to keep national parliaments

occupied, nor are they a "magic bullet" for the EU's democratic deficit.[73] Whether a "Virtual Third Chamber" or not, the group of 40 chambers in the European Union may discover their new powers increase their voice and eventually also their ability to influence the European public. With the subsidiarity principle remaining, in fact, a genuine political issue, the journey itself may be the destination.

[73] Franz C. Mayer, expert hearing, subcommittee on EU law, German Bundestag, 16 June 2010, p. 11f. [http://www.bundestag.de/bundestag/ausschuesse17/a06/ua_europarecht/expertengespraech_aktuell/Wortprotokoll.pdf]

References

Auel, K. and Benz, A., 2005. *The Europeanisation of Parliamentary Democracy*. London: Routledge.

Barrett, G., 2008. *National Parliaments and the European Union*. Dublin: Clarus Press.

Börzel, T.A. and Sprungk, C., 2007. Undermining Democratic Governance in the Member States? The Europeanization of National Decision-making. *In*: Holzhacker, R. and Albaek, E. eds. *Democratic governance and European integration: linking societal and state processes of democracy.* 113.

Bremische Bürgerschaft, 2010. Demokratische Willensbildung auf der europäischen und der bundesstaatlichen Ebene legitimieren; Einwirkungs- und Teilhabemöglichkeiten der deutschen Landesparlamente stärken, 14 July.

Buche, J. and Buzogány, A., 2010. Europeanization and political-administrative relations in the Member States, *Paper presented at the Fifth Pan-European Conference on EU Politics, Porto,* Portugal, 23-26 June.

Buzogány, A., 2010. Learning from the Best. Inter-parliamentary policy learning and EU parliamentary scrutiny design in the EU-10. *Paper presented at the ECPR Joint Session Münster*, Inter-parliamentary Relations in Europe, 22-27 March.

Christensen, J.G., 2010. EU Legislation and National Regulation: Uncertain Steps towards a European Public Policy. *Public Administration,* 88 (1), 3-17.

Cooper, I., 2010. A Virtual Third Chamber for the European Union? National Parliaments Under the Treaty of Lisbon. [Paper prepared for the ECPR Joint Sessions, Munster, Germany, March 22-27, 2010.].

COSAC, 2010. Annex to the Thirteenth Bi-annual Report on Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny: Replies of National Parliaments and the European Parliament. Prepared by the COSAC Secretariat and presented to: XLIII Conference of Community and European Affairs Committees of Parliaments of the European Union, 31 May - 1 June 2010, Madrid.

Crum, B. and Fossum, J.E., 2009. The Multilevel Parliamentary Field: a framework for theorizing representative democracy in the EU. *European Political Science Review,* 1 (02), 249-271.

Dieringer, J. and Stuchlík, A., 2003. Die Europäisierung der Parlamentsarbeit in Ungarn und der Tschechischen Republik. *Südosteuropa,* 52 (7), 388-403.

Emmanouilidis, J.A. and Stratulat, C., 2010. Implementing Lisbon: narrowing the EU's 'democratic deficit'?: European Policy Centre.

European Commission, 2009. Annual Report 2008 on relations between the European Commission and National Parliaments, COM(2009) 343final, Brussels.

European Commission, 2010. *Annual Report 2009 on relations between the European Commission and National Parliaments, COM(2010) 291 final*, Brussels.

Goetz, K.H. and Meyer-Sahling, J.-H., 2008. The Europeanization of national political systems: Parliaments and executives. *Living Reviews in European Governance,* 3 (2).

Gröning-von Thühna, S., 2010. Die neuen Begleitgesetze zum Vertrag von Lissabon aus Sicht des Deutschen Bundestages – offene Fragen und neue Herausforderungen. *integration,* (4), 312-333.

Ilonszki, G., 2009. National Discontent and EU Support in Central and Eastern Europe. *Europe-Asia Studies,* 61 (6), 1041-1057.

Jancic, D., 2008. A new organ of the European Union: National Parliaments Jointly, Federal Trust for Education and Research, London.

Jancic, D., 2010. Caveats from Karlsruhe and Berlin: Whither Democracy after Lisbon? *Colum. J. Eur. L.,* 16, 337-521.

Jans, T. and Piedrafita, S., 2009. The Role of National Parliaments in European Decision-Making. *EIPAscope,* (1), 19-26.

Kessler, G., 2010. Italienische Erfahrungen. *Paper presented at Forum Subsidiaritätskontrolle.* Berlin, 18-19 October.

Kiiver, P., 2006. National and Regional Parliaments in the European Constitutional Order. Groningen: European Law Publishing.

Kiiver, P. 2009. German Participation in EU Decision□Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures. German Law Journal, 10(8), 1287-1295.

Kiiver, P., 2010. The Lisbon Judgment of the German Constitutional Court: A Court Ordered Strengthening of the National Legislature in the EU. *European Law Journal,* 16 (5), 578-588.

Knutelská, V., 2010. Cooperation of national parliaments in the European decision-making process. *Paper presented at the ECPR Joint Sessions Münster*, 22-27 March.

Koch, J. and Kullas, M., 2010. Subsidiarität nach Lissabon – Scharfes Schwert oder stumpfe Klinge? cepStudie, March. Available from: http://www.cep.eu/fileadmin/user_upload/Kurzanalysen/Subsidiaritaet/Studie_Subsidiaritaet.pdf [Accessed: 10-02-2011]

Kropp, S., 2010a. Die Ministerialbürokratie als Rollenpartner der Fachpolitiker in den Fraktionen – auf nationaler Ebene und im Mehrebenensystem der EU. Ergebnisse einer Studie über den Deutschen Bundestag. *DÖV – Die Öffentliche Verwaltung*, 63(10), 413-422.

Kropp, S., 2010b. German Parliamentary Party Groups in Europeanised Policymaking – Awakening from the Sleep? Institutions and Heuristics as MPs' Resources. *German Politics,* 19 (2), 123-147.

Kropp, S. and Ruschke, M., 2010. Parlament und Verwaltung: in Rollenpartnerschaft vereint? Ein Plädoyer für die Verknüpfung von Parlaments- und Verwaltungsforschung, in: Zeitschrift für Parlamentsfragen. *Zeitschrift für Parlamentsfragen,* 41 (3), 638-660.

Landtag Brandenburg, 2007. Sachstandsbericht über die Aktivitäten der deutschen Länderparlamente in Fragen der Subsidiaritätskontrolle sowie über den Diskussionsstand auf der Ebene der Landtagspräsidenten, Ds. 4/4015, 23.01.

Lengyel, G. and Ilonszki, G., 2008. *A magyar politikai és gazdasági elit EU-képe*. Budapest: Új Mandátum.

Martin, A., 2010. The Principle of Subsidiarity and Institutional Predispositions: Do the European Parliament, the German Bundestag, and the Bavarian Landtag Define Subsidiarity Differently? *C·A·P Working Paper, July 2010.*

Maurer, A., 2005. Post-2004 elements for comparative analysis of national parliamentary participation in EU affairs. *In*: Dieringer, J., Györi, E. and Maurer, A. eds. *Europäische Entscheidungen kontrollieren! Nationale Parlamente im Ost-West-Vergleich.* Dresden: Thelem, 49-89.

Maurer, A. and Wessels, W., 2001. *National Parliaments on their Ways to Europe: Losers or Latecomers*. Baden-Baden: Nomos.

Neuhold, C. and de Ruiter, R., 2010. Out of REACH? Parliamentary Control of EU Affairs in the Netherlands and the UK. *The Journal of Legislative Studies,* 16 (1), 57-72.

Neunreither, K., 2005. The European Parliament and National Parliaments: Conflict or Cooperation? *Journal of Legislative Studies,* 11 (3/4), 466-489.

O'Brennan, J. and Raunio, T., 2007. Introduction: Deparliamentarization and European Integration'. *National Parliaments within the Enlarged European Union. From 'Victims' of Integration to Competitive Actors*, 1-26.

Olson, M., 1965. *The logic of collective action: Public goods and the theory of groups*. Cambridge: Harvard University Press.

Papier, H.-J., 2010. Rede. *Jahreskonferenz der Präsidentinnen und Präsidenten der deutschen Landesparlamente, 21-22 June 2010.* Stuttgart: Bremische Bürgerschaft.

Passos, R., 2008. Recent developments concerning the role of national parliaments in the European Union. *ERA Forum,* 9, 25-40.

Paterson, W.E., 2010. Does Germany Still Have a European Vocation? *German Politics,* 19 (1), 41-52.

Patzelt, W.J., 1997. German MPs and their roles. *The Journal of Legislative Studies,* 3 (1), 55-78.

Raunio, T., 1999. Always One Step Behind? National Legislatures and the European Union. *Government and Opposition,* 34 (2), 180-202.

Raunio, T., 2005. Holding governments accountable in European affairs: Explaining cross-national variation*. *Journal of Legislative Studies,* 11 (4), 319-342.

Raunio, T., 2009. National Parliaments and European Integration: What We Know and Agenda for Future Research. *The Journal of Legislative Studies,* 15 (4), 317-334.

Saalfeld, T. and Müller, W.C., 1997. Roles in legislative studies: A theoretical introduction. *The Journal of Legislative Studies,* 3 (1), 1-16.

Sach, A., 2010. Die Europa-Sensoren. *Das Parlament,* (August 18).

Schröder, H. 2010. New tasks for the parliamentary administrations following from the Lisbon Treaty, taking the example of the German Bundestag, *Paper prepared for The Lisbon Treaty – Treaty of the Parliaments*, Warsaw, 22-23 February.

Seidel, M., 2010. Stärkung der parlamentarischen Komponente in der EU und in den Nationalstaaten. *In*: Rill, B. ed. *Von Nizza nach Lissabon – neuer Aufschwung für die EU.* München: Hanns Seidel Stiftung Argumente und Materialien zum Zeitgeschehen, 87-102.

Silberhorn, T., 2010. Zur Rolle des Deutschen Bundestages nach dem Lissabon-Urteil des Bundesverfassungsgerichts. *In*: Baus, R.T., Borchard, M. and Krings, G. eds. *Europäische Integration und deutsche Verfassungsidentität.* St. Augustin/Berlin: Konrad-Adenauer-Stiftung, 137-146.

Sprungk, C., 2008. *National Parliaments in the European Union: Policy-shapers or policy-takers (Book manuscript).*

Sprungk, C., 2010. Ever more or ever better scrutiny? Analysing the conditions of effective national parliamentary involvement in EU affairs. *European Integration online Papers (EIoP),* 14, 02.

Stephenson, P., 2009. Catching the Train to Europe: Executive Control of Policy Formulation inside Spain's Parliamentary European Union Affairs Committee. *South European Society and Politics,* 14 (3), 317 - 336.

Szalay, K. and Juhász-Tóth, A., 2006. Az európai uniós döntéshozatal kontrollja a nemzeti parlamentekben II. *Európai Tükör,* (3), 75-96.

Töller, A.E., 2010. Measuring and Comparing the Europeanization of National Legislation: A Research Note. *JCMS: Journal of Common Market Studies,* 48 (2), 417-444.

Tordoff, L., 2000. The conference of European affairs committees: A collective voice for national parliaments in the European Union. *The Journal of Legislative Studies,* 6 (4), 1-8.

Van Kersbergen, K. and Verbeek, B., 2007. The Politics of International Norms: Subsidiarity and the Imperfect Competence Regime of the European Union. *European Journal of International Relations,* 13 (2), 217-238.

Vollrath, S., 2010. Prüfung der Subsidiarität und Verhältnismäßigkeit nach dem Vertrag von Lissabon im Deutschen Bundestag, Division PA 1, Deutscher Bundestag, 1 October.

Wessels, B., 2005. Roles and orientations of members of parliament in the EU context: Congruence or difference? Europeanisation or not? *The Journal of Legislative Studies,* 11 (3), 446-465.