

# National Parliaments in the EU: Synergy Under the Subsidiarity Principle?

Written by Donatella M. Viola

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<https://www.e-ir.info/2021/03/07/national-parliaments-in-the-eu-synergy-under-the-subsidiarity-principle/>

DONATELLA M. VIOLA, MAR 7 2021

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At its inception, the European integration project drew legitimacy from the so-called 'permissive consensus' granted by the people to their political elites (Lindberg and Scheingold 1970). Yet, over time, this has gradually turned into a 'constraining dissensus' (Hooghe and Marks 2009). Today, more than sixty years after the establishment of the Treaties of Rome, the European Union (EU) still appears as a remote, opaque and sometimes even threatening entity. As Charles Grant (2013) put it, 'EU institutions are geographically distant, hard to understand and often deal with obscure technicalities'. The EU legislative process lacks the basic rudiments of openness, transparency and legitimacy insofar as the Council of the European Union and the European Council hold their meetings behind closed doors and are unaccountable to the European Parliament (EP). In addition, despite nine subsequent electoral competitions at EU level, citizens hardly connect to their representatives sitting in the Brussels and Strasbourg arena. Against this gloomy picture, the idea of involving member state legislative chambers in EU decision-making has slowly emerged. The aim of this chapter is to trace the taken path by focusing on the new powers conferred to national legislators as watchdogs of subsidiarity.

### The Subsidiarity Principle in the EU

Prior to proceeding with this investigation, it is worth recalling the origin, meaning and introduction of the subsidiarity principle. Stemming from Catholic social thought, the doctrine holds that nothing should be pursued by a large and complex organisation that may as well be carried out by a smaller and simpler entity. Thus, subsidiarity encourages a decentralised system. Later, this tenet was used to define the sharing of powers between several levels of authority in federal states with the purpose of ensuring a degree of independence for local authorities in relation to central government.

Within the EU framework, the purpose of subsidiarity is to determine when supranational institutions are competent to legislate. More specifically, it aims to regulate the exercise of EU non-exclusive powers by ruling out its intervention when an issue can be dealt with effectively by member states at national, regional or local level. In conformity with subsidiarity, the EU may exercise its powers only if individual countries are unable to achieve satisfactorily the objectives of a proposed action which may instead be implemented successfully at supranational level. As Steiner (1994) has noticed, the notion is open to a wide range of interpretations, spanning from the view that it is an attempt to limit the EU's centralising drive to the opposite opinion that it represents a way for EU institutions to extend their reach. According to Evans and Zimmerman (2014, 223), 'the principle of subsidiarity is somewhat of a chameleon due to its ability to adapt to, and to inform scholarship across many disciplines'.

In February 1986, the Single European Act (SEA) implicitly introduced subsidiarity for the first time in the context of the European Community's (EC) environmental policy. Six years later, the Edinburgh European Council set out a global approach towards the application of this principle, which was formally enshrined in the Treaty on European Union (TEU), popularly known as the Maastricht Treaty. Subsequently in October 1997, the fifteen heads of state

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and government decided to annex to the Amsterdam Treaty a new, legally binding Protocol on the application of the principles of subsidiarity and proportionality.

Since then, the European Commission has been required to submit every year a report to the European Council, the Council of the European Union and the EP on the application of these principles in EU law-making. Given the close link between the subsidiarity control mechanism and the political dialogue between national parliaments and the EU, this document is deemed to be complementary to the Annual Report on relations with national parliaments. Finally, in December 2007, the Lisbon Treaty ensured full compliance with subsidiarity by clearly demarcating exclusive, shared and supporting competences between the EU and its member states. The new provisions set the potential as well as actual margin of action for national legislatures with the aim to enhance democratic accountability within the EU. Members of national parliaments (MPs) need to be informed directly and timely by EU institutions about new law proposals. As such, they have the opportunity to raise their concerns and exert their influence over European affairs.

## The Participation of National Parliaments in European Affairs

In the mid-1950s, member states' executive actors strengthened their hold on the EC decision-making process, often bypassing national legislatures which slowly became 'political outsiders' or even 'passive bystanders' (Crum and Fossum 2013). The European project, which involved the transfer of competences from national to supranational level, marked an unorthodox shift of legislative powers to member states' governments, acting collectively. The Council's dominance in the legislative sphere entailed a shrinking of the rights of national parliaments, casting a shadow over the democratic legitimacy of the European construct. As Pollak and Slominski maintained (2013, 144), like a 'crop duster', European integration contributed to diminish the role of national legislators, 'slowly but efficiently eroding national democracy'.

To counterbalance this loss of democratic oversight, political leaders eventually agreed to entrust the EP with greater decision-making powers, being the only directly elected EU institution. However, despite its new status of co-legislator in the post-Lisbon framework, the Strasbourg and Brussels assembly has not inherited all traditional parliamentary functions. It is still deprived of the right of legislative initiative, which remains virtually a monopoly of the European Commission. In addition, it does not enjoy the core prerogative of granting or withholding approval to government policy by issuing a motion of censure against the Council of the EU or the European Council. Furthermore, members of the EP (MEPs) are largely unknown, often invisible and widely unloved, highlighting the lack of a European *demos* and confirming that the question of the EU's democratic deficit has not yet been solved.

On the assumption that domestic legislators are closer to the people and have a better sense of their needs, the question has arisen on how to translate MPs' legitimate democratic competence in EU decision-making. While in the past there has been, to a certain extent, an antagonistic relationship between MPs and MEPs, the Strasbourg and Brussels assembly has become a strenuous supporter of close interparliamentary cooperation. In particular, with regard to the scrutiny of the executive, MEPs have called for the assistance of their counterparts in EU countries, trying to turn them into political allies. After all, the representatives of national parliaments and the EP have to deal with the same ministers either as members of governments or of the EU Council.

As a matter of fact, MPs can control the Council in an indirect and fragmented manner by asking their ministers to answer for decisions taken at EU level and, if dissatisfied, release a governing cabinet through a motion of censure. In other words, national legislators could act as vehicles for 'the domestication and normalization of EU policy making within the democratic processes of the member states' (Kröger and Bellamy 2016, 131). In sum, MPs' direct involvement may enhance the transparency of the EU legislative process, narrow the gap between citizens and EU institutions, and defuse democratic deficit claims.

## National Parliaments on the European Stage

From the outset, national parliaments carried out the task of ratifying the original Community Treaties, their successive revisions as well as all accession agreements. Beyond this competence, however, their role was often confined to rubber-stamping decisions reached by the heads of state and heads of government. Thus, MPs remained

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in the shadow, losing some of their legislative rights to the benefit of ministers represented collectively in the Council.

With the first direct elections to the EP in June 1979 and the gradual abolition of the dual mandate, representatives of national parliaments felt as if they had 'missed the European boat'. This disempowerment over European affairs went largely unnoticed in most member states, so that scholars referred to national legislators as latecomers, losers and victims of the European integration process (Maurer and Wessels 2001). It was necessary to wait until the signing of the SEA in February 1986 to awake national parliaments' interest in Community policies and institutions. As a result, European Affairs Committees were established in national legislative chambers whilst also initiating sporadic interparliamentary discussions.

Subsequently, in February 1992, a declaration on national parliaments was annexed to the Maastricht Treaty, making all EU law proposals available to them in 'good time for information and possible examination'. Another declaration established that the Conference of European Affairs Committees of the Parliaments in the European Union (COSAC), set up in November 1989, would gather twice a year to exchange experiences and best practices in the scrutiny of national government policies on EU issues. Such meetings would include a six-member EP delegation with two Vice-Presidents familiar with interparliamentary relations.

Five years later in Amsterdam, a Protocol was attached to the revised EU Treaty officially formalising all previous arrangements. Since then, the European Commission forwards all draft proposals to national legislative chambers, and the Council has to wait for six weeks after their transmission before putting them on the agenda. In February 2001, the Laeken Declaration on the future of the Union, annexed to the Treaty of Nice, stressed the need to investigate the role of national parliaments in the European framework. Almost a year later, the Constitutional Affairs Committee of the EP adopted a report on its relations with national parliaments, drafted by Giorgio Napolitano, listing a number of practical proposals. Accordingly, interparliamentary cooperation 'should be deliberative by nature, non-decisive with regard to the existing EU policy cycles and characterised by mutual recognition of parliaments and parliamentarians as mirrors of society' (Napolitano 2002). To address national legislators' concerns over the EU, it would be necessary to define better their powers vis-à-vis their respective national governments as well as their relations with EU institutions. Indeed, EU democratisation and parliamentarisation could be achieved through the broadening of EP legislative competences and the strengthening of domestic parliamentary control over governments. At any rate, cooperation is intensified between MPs and MEPs from corresponding committees in order to discuss matters of common concern.

## **National Parliaments Under the Lisbon Treaty**

In December 2007, after nearly a decade of failed institutional reforms, the EU heads of state and government signed a new Treaty in Lisbon. They agreed to include a special reference to national parliaments in the main text rather than in Protocols and Declarations. According to the new Article 10 (2),

Citizens are directly represented at Union level in the European Parliament. Member states are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national parliaments, or to their citizens.

Further provisions foresaw the involvement of national legislative assemblies to be implemented through domestic laws. In Germany and Italy, parliamentary interpretation went even beyond the terms of the Lisbon Treaty by granting member states' legislatures full rights of information, consultation and participation in EU decision-making.

Under the Lisbon framework, national parliaments receive all legislative drafts forwarded to the EP and to the Council as well as agendas and minutes of Council meetings. Most importantly, for the purpose of this chapter, MPs may review all legislative proposals in compliance with the subsidiarity principle. While the real impact of the new EU arrangements still depends on the willingness and determination of parliamentary actors, their symbolic value cannot be underestimated. As stated by the first permanent President of the European Council, Herman Van Rompuy (2012): 'maybe not formally speaking, but at least politically speaking, all national parliaments have become, in a way, European institutions'. In short, the Europeanisation of national parliaments follows a dynamic towards closer

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transnational cooperation. For this process to happen, legislative chambers rely on the technical expertise and administrative support of their internal organisational environment.

One of the most innovative tools of the Lisbon Treaty consists of the 'Early Warning Mechanism' (EWM). Originally advocated by former British prime minister Tony Blair, this mechanism invested members of national parliaments with the responsibility to monitor compliance of EU legislative acts with the principle of subsidiarity. In line with Protocol no. 2 to the Lisbon Treaty, domestic chambers can object to EU law proposals within eight weeks from their publication. For this purpose, they have to submit to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion outlining why these are considered an unwarranted trespass on national sovereignty. Frequently, this tight timeframe has not been sufficient to examine complex law drafts and to exchange cross-country information. As shown in Table 1 (*please refer to the book, pp. 46–47 to view the table*), national parliaments are entitled to two votes, one for each house in the classic bicameral system.

If at least one third of all member states' legislative assemblies submits a reasoned opinion identifying a breach of subsidiarity, a yellow card is issued. For all draft acts in the field of justice, this threshold is one fourth of national law makers. Under this procedure, the Commission has to reconsider the legislative proposal, but can maintain its original text, regardless of objections by national parliaments. By contrast, if the number of reasoned opinions reaches half of all the votes attributed to national chambers, an orange card is activated. In this case, the Commission has to review the draft and, if it still intends to proceed with its initial proposal, it must provide clear evidence of compliance with the subsidiarity principle. Only on this basis, may the Council and the EP decide whether the text goes ahead. In fact, each of the two EU institutions is entitled to block the proposal outright: the former by a majority of 55 per cent and the latter by a simple majority. In this way, national legislators have gained a degree of collective power in EU affairs since a majority of them, acting jointly, can trigger an early vote on any new proposal.

In fact, MPs can use these procedural mechanisms to comply more efficiently with their legislative, representative and deliberative functions (Cooper 2012). Even after the ratification of the Lisbon Treaty, representative institutions in the member states have tried to increase their influence over EU policy. In 2015, for example, an informal working group of MPs met in Brussels to review the Commission's annual work programme, discussing further extensions of the EWM.

While the orange card has never been initiated, the yellow card has been applied on three occasions. In May 2012, it was issued over the controversial 'Monti II regulation' dealing with domestic labour relations and the right to strike as part of the EU's economic freedoms. On this occasion, 12 out of 40 national chambers by way of 19 out of 54 allocated votes, agreed that the draft regulation was in violation of the principle of subsidiarity. In particular, rejection of this proposal came from countries such as Finland, Latvia and Sweden facing cross-border labour disputes. Their complaints received further support from Belgium, Denmark, France, Luxembourg, Malta, the Netherlands, Poland, Portugal, and the United Kingdom. Eventually, the European Commission withdrew its draft, but denying that a subsidiarity breach had occurred.

In October 2013, parliaments in Cyprus, Hungary, Ireland, Malta, the Netherlands, Romania, Slovenia, Sweden, and the United Kingdom, along with the French and Czech senates, drew a yellow card over the Commission's initiative to create an independent European public prosecution office. Despite the reasoned opinions forwarded by the above-mentioned chambers, the European Commission maintained its proposal, arguing that subsidiarity would allow for enhanced cooperation to tackle crimes.

In May 2016, a yellow card was triggered over the proposal for a revision of the directive on the posting of workers. Ten Central and Eastern European countries, notably Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia, were particularly concerned with this issue. Yet again, the Commission retained its original draft, claiming that it did not infringe subsidiarity since the posting of workers represented a truly transnational question.

The poor propensity to resort to the EWM may be connected to diverse factors rooted in domestic political tradition.

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These include the constitutional organisation of parliaments, their understanding of the legislative functions, the executive-legislative checks and balances as well as the government-opposition relationship. Moreover, the resonance given by media over specific affairs and its impact on public opinion may elicit national legislators' interest in EU draft legislation. The domestic subsidiarity check constitutes a key innovation to strengthen democratic accountability of the European legislative process. National parliaments have gained an opportunity to signal their disagreement with their own governments' stance on EU matters. As such, prior to striking deals in Brussels, parliamentary chambers, even the frequently ignored upper ones, are expected to be consulted (Brady, 2013).

## EU Scrutiny Models in National Parliaments

Since the ratification of the Lisbon Treaty in December 2009, national legislators have been faced with the challenge of playing a formal role in EU decision-making, which has posed both normative and empirical questions on how to exert such prerogatives. The response has been diverse across the EU, depending on a plurality of political, institutional and cultural factors as well as general approaches to European integration.

There is indeed no single model for the participation of national parliaments in EU affairs. Even within the same country, legislative chambers may act differently, such as the House of Commons and the House of Lords in the United Kingdom. With regard to EU decision-making, national assemblies may follow: a 'document-based system', which entails direct, in-depth examination of all legislative proposals; a 'mandating or procedural system', where government ministers receive a precise mandate from a European Affairs Committee prior to Council meetings; or an 'informal influencer system' that engages in general parliamentary dialogue with executive actors on EU policy (Kiiver 2006). Furthermore, according to Heffler et al. (2013), it is possible to distinguish seven types of parliamentary approaches to EU affairs:

- (1) The 'limited control' model where national law makers rarely monitor EU decision-making and accept a reserved domain for the executive in EU meetings.
- (2) The 'Europe as usual' model where national parliaments scrutinise EU legislation primarily through *ex ante* control pursued by specialised committees and with a truly minor involvement of the plenary.
- (3) The 'expertise' model which foresees an active involvement of European affairs committees especially to scrutinise the performance of their government at EU level.
- (4) The 'public forum' model which, in opposition to the expert model, puts emphasis on full plenary sessions and public deliberation on specific EU themes.
- (5) The 'government accountability' model where national parliaments exert an *ex post* control through plenary debate after Council meetings, focusing on the stance adopted by their prime minister.
- (6) The 'policy maker' model with national parliaments seeking, via debates at both committee and plenary levels, to influence their respective governments prior to Council meetings.
- (7) The 'full Europeanisation' model which involves a mix of expertise and publicity to prepare and de-brief Council meetings.

As shown in the above classification, member state legislative assemblies rarely address EU issues in their plenaries. In fact, most national chambers prefer delegating such a function to their EU affairs committees. This allows a confidential exchange of views between the executive and the legislative aimed at 'depoliticising' EU matters and building national consensus without risking to jeopardise the cabinet's image (Auel 2007). On the other hand, the poor involvement of plenaries in EU questions undermines the traditional debating function of national parliaments and contributes to their political marginalisation (Raunio 2009).

## A Multi-Level Parliamentary System?

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Over the years, the question regarding national legislators' participation in EU policy making was occasionally raised. In February 2003, as a member of the Convention on the Future of Europe, former British Labour MP Gisela Stuart (2003) suggested to entrust member states' parliamentary chambers with the right to block EU draft legislation. According to the so-called 'red card mechanism', an equivalent of two-thirds of national parliaments, through their reasoned opinions, could oblige the European Commission to withdraw its proposal within a standard six-week period. The Lisbon Treaty failed to introduce this procedure but redefined the space of manoeuvre for MPs, thus challenging the blame game of undesirable laws coming from Brussels.

Full implementation of subsidiarity and, more generally, a greater role of national parliaments in the EU were amongst the key demands of the UK government to renegotiate EU membership. This *de facto* veto power was widely discussed but always dismissed. For example, the Chair of the EU Affairs Committee of the Italian Senate, Vannino Chiti, declared his opposition to this proposal which risked pre-empting the EP's legislative function. In his view, it would also contradict the general expectation of parliaments to contribute to the 'good functioning' of the Union. Instead, their actions should be constructive and complementary to that of EU institutions, highlighting critical issues related to specific law drafts (Chiti 2017).

In January 2014, at the meeting of COSAC Chairs in Athens, the Danish *Folketinget* put forward the proposal that national legislators, acting as guardians of subsidiarity, should be entitled to review EU draft laws and make direct requests to the European Commission within a ten-week deadline. Under the so-called 'green card' procedure, should one third of national chambers agree to introduce an amendment, the Commission would be obliged to take it into consideration. By contrast, should national parliaments fail to reach a common position within the set timeframe, the draft legislation would get an automatic green light (Folketinget 2014).

The willingness and individual capacity of MPs to engage in the monitoring of subsidiarity crucially depends on the scope for politicising EU issues in the domestic arena. Paradoxically, both Eurosceptics and Europhiles support a greater parliamentarisation of the Union based on efficient collaboration, common vision and joint commitment among key actors at several levels. As the Belgian liberal MEP Anne-Marie Neyts-Uyttebroeck stressed in 1997 (Napolitano 2002):

The quality of relations between the European Parliament and the national parliaments is of fundamental importance for the overall democratic nature of the Union. If they became rivals democracy would definitely suffer. If, on the other hand, they recognise that they have a joint mission, democracy will win.

For this purpose, the Lisbon Treaty floated the idea of a European parliamentary system where MPs and MEPs would engage effectively and constructively over EU issues. Interparliamentary cooperation would allow the Strasbourg and Brussels assembly to adopt decisions on the basis of broad consensus and member state parliaments to transpose more swiftly European provisions into national law.

## Conclusion

Over the past two decades, subsidiarity has become an important instrument to strengthen the role of national parliaments in the European architecture. By gradually becoming aware that the EU did matter after all, member state lawmakers realised that they should recover the lost ground. Under the Lisbon Treaty, MPs' original status in the EU has been therefore upgraded to subsidiarity watchdogs, competitive actors and policy shapers. However, as this chapter has shown, representative institutions at the domestic level have to fight to obtain the political space necessary for an effective scrutiny of EU matters; and even more so, if their ambition is to become the EU's 'virtual third chamber' (Cooper 2012). National legislators' chances to affect EU policy and to become real gatekeepers of European integration strongly rely on their intense cooperation and swift synergetic action.

The loss of popular consensus over the European project, culminating in the 2016 Brexit referendum, stems from a deep sense of alienation in the face of EU imposed political decisions that appear remote and uncontrollable. An antidote could be found in further Europeanisation of national parliaments and parliamentarisation of the EU. Certainly, all this cannot be reached without the backing of the subsidiarity principle, yet bearing in mind that it is not

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a magic wand capable of dissolving the EU's democratic deficit. The President of the European Commission, Ursula von der Leyen, has expressed her commitment to boost European democracy. For this purpose, she has promised to launch a two-year Conference on the Future of Europe, which would entail, among its priorities, a positive agenda for national parliaments based on subsidiarity and fruitful cooperation with EU institutions. At the same time, it is worth highlighting that these goals may be achieved even without further revised review mechanisms, as long as the multitude of actors in national and European legislatures are willing and able to create synergies through dialogue and deliberation.

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