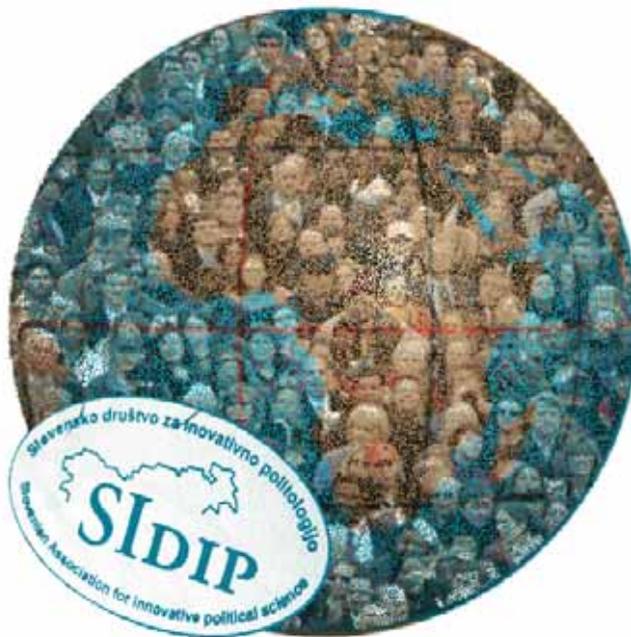


# Innovative Issues and Approaches in Social Sciences



Volume 1 Number 1 January 2008

SIDIP

ISSN 1855-0541

# Innovative Issues and Approaches in Social Sciences (IIASS)

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Slovensko društvo za inovativno politologijo - SDIP  
Slovenian Association for Innovative Political Science – SIDIP

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IIASS is exclusively electronic peer reviewed journal that is published three times a year (initially in January, May and September) by Slovenian Association for Innovative Political Science – SIDIP and it is available free of charge at [Http://www.sidip-org/iiass](http://www.sidip-org/iiass)

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# The consolidation of national parliaments within an enlarging EU

Muiris MacCarthaigh<sup>1</sup>

## Abstract

As national parliaments emerged in the context of national states rather than international organisations, fulfilling functions demanded by virtue of European Union membership challenges their traditional modus operandi, especially in the field of legislative oversight. Considerable attention has been given as to how best national parliaments might adapt and expand their oversight capacity in order to examine EU legislation and policy, thus underwriting the legitimacy of the expanding Union's work. This debate raises fundamental questions concerning the responsibilities not only of national parliaments, but also of the various other institutions employed by the Union. As well as considering this issue, this article also interrogates how best we can conceptualise the role of national parliaments within the new modes of governance inspired by the demands of EU membership. To begin, the paper considers how the contemporary analysis of European legislatures has developed.

**Keywords:** Parliaments, EU, Accountability, Committees, Legislation

## National Parliaments and the EU

Apart from their representational and law-making functions, national parliaments are the principal national forum for the deliberation and oversight of public policy in most western democracies (Wheare, 1968; Blondel, 1973); Mezey, 1979); Lijphart, 1984; Laundy, 1989; Norton, 1990; Olson and Mezey, 1991; Copeland and Patterson, 1994; Norton, 1998; Lijphart, 1999; Döring and Hallerberg, 2004). The study of national parliaments continues to be a dynamic sub-field of political science,

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<sup>1</sup> PhD. Muiris MacCarthaigh is a Research Officer at the Institute of Public Administration in Dublin, Ireland. An earlier version of this paper appeared in *Administration* Vol. 54 (3), 2006, pp. 69-94

sustained by innovative new approaches to understanding the roles, powers and functioning of legislatures. For many European states, membership of the European Union and the ensuing transfer of responsibilities has presented particular difficulties and raised fundamental questions about the future role of national parliaments in the European project (Flintermann et al., 1994; Norton, 1996; Smith, 1996; Maurer and Wessels, 2001). Coinciding with a new emphasis during the 1990s on the roles and duties of national parliaments in the European Union (Norton, 1996), significant strides have also been taken in the systematic comparative analysis of national legislatures using institutional theory drawn from a rational choice perspective (Döring, 1995(a); Döring and Hallerberg, 2004). Lijphart's seminal categorisation of parliaments into either Westminster or consensual-style remains influential, and the comparative approach has contributed significantly to our understanding of how legislatures have responded to the European project. However, recent exceptions notwithstanding (Kiiver, 2006); O'Brennan and Raunio, 2007), the paucity of comprehensive cross-national surveys of the relationship between national parliaments and the EU system of governance reflects a conceptual and practical uncertainty concerning the role of national parliaments in that system. This has not been helped by the wide variation as to what constitutes a 'national parliament' in a member state – with understandings ranging from the unicameral Danish *Folketing* to the Belgian combination of federal and regional assemblies.

Conventional wisdom has it that the project of European integration has been detrimental to the development of national parliaments. The argument goes that, already finding it difficult to adequately involve themselves in the work of their respective governments, such parliaments have witnessed a further erosion in their influence due to membership of the Union, whose Treaties they periodically ratify. Indeed, this perceived shift in law-making influence 'upwards' to the EU institutions has allowed the 'decline of parliaments' thesis, already a century old, to persist. The reason why there is concern about the role of parliaments in the EU is that membership of the Union has resulted in some of the traditional roles of member-state legislatures being impinged upon i.e. law-making and scrutiny of the executive<sup>2</sup>. Nonetheless, ensuring that national parliaments are not 'left

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<sup>2</sup> For more on challenges faced by national parliaments in their pursuit of accountability, see MacCarthaigh, M 'Accountability through national parliaments: practice and problems' in

behind' has been a pre-occupation of recent EU Treaties (below) and it has been argued that 'defining the role of national Parliaments in the European Union architecture has occupied Inter-Governmental Conferences over the past 12 years' (COSAC, 2004(b): 5).

As Maurer demonstrates, the three principal functions of national parliaments in the EU decision-making process are executive oversight, ratification of EU Treaty amendments, and implementation of EU legislation (2001: 38). As well as this, however, EU legislatures also have important roles to play in terms of legitimising the wider EU project and providing a forum for deliberation on the direction of that project. Despite its failure to win popular approval in certain member-states, the draft EU Constitutional Treaty was critical insofar as it formally recognised the role of national parliaments in the European governing architecture for the first time. It is therefore timely that our understanding of where and how national parliaments fit into the EU system of governance be advanced further. In order to achieve this understanding, it is necessary to briefly consider the historical development of national parliaments in the EU.

### **The Developing Recognition of National Parliaments**

If only belatedly recognised in an explicit manner, national parliaments have implicitly been important actors in the process of European integration. In all member-states, including those who use the referendum procedure, the ratification of EU Treaties has required the approval of the national representative body, however constituted. This assent has provided an important source of democratic legitimacy for the Union, and is complemented by the fact that one of its key organs, the Council of Ministers, is composed of representatives appointed to office by those same legislatures.

Traditionally, the European Parliament has been viewed as less influential an organ of the EU than the Council and Commission, a position not alleviated by the fact that its plenary sessions shuttle between Brussels and Strasbourg (and Luxembourg prior to 1981). In order to meet the challenges of membership and partial loss of legislative competency, all

member-state legislatures proceeded to put in place some form of mechanism to scrutinise directives and regulations emerging from 'Europe'. These ranged from the presentation of documents before a chamber to improved ex-ante oversight such as the ability of a committee to approve the actions of the government in respect of EU affairs. As we shall see, how legislatures developed this scrutiny and oversight capacity was very much predicated on existing traditions and methods of pursuing domestic parliamentary accountability. It is important to note, however, that as a consequence of this restructuring, the belief that the role of national parliaments with respect to the EU was and should be that of a 'watchdog' has dominated much of the literature on the subject since then.

While European Affairs Committees existed in all national parliaments (and in some cases each chamber), it took some years for a mechanism to emerge to co-ordinate their activities. In 1989 the Conference of European Affairs Committees (COSAC) was created on French initiative, comprising of representatives from the respective European Affairs committees<sup>3</sup> and of the European Parliament. Initially, the policy-influencing power of COSAC was limited and its discussions confined to the future of the EU after the Berlin Wall. There was great variety in how influential the constituent European Affairs Committees were within their domestic parliamentary setting and the European Parliament's delegations tended to dominate proceedings (Kiiver, 2006: 122). In 1990 an *Assizes or gathering* of national parliaments along with the European Parliament was convened in advance of the Maastricht Treaty. It was only with this Treaty on the European Union of 1992 that the contentious issue of the role of parliaments in EU governance took a significant step forward. Its 'Declaration on National Parliaments' argued that it was important to encourage the involvement of parliaments in EU decision-making and envisaged a 'conference of parliaments' which would become involved in the decision-making process and with the EP itself. It also suggested that the Commission should give individual parliaments proposals 'in good time' in order that they consider them. However, the Declaration was aspirational and did not establish any

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<sup>3</sup> The issue of regional assemblies being represented in COSAC is an interesting one. However, while COSAC is a forum for national parliaments, Regional Legislative Assemblies (RLAs) have their own body, the Committee of the Regions. Approximately one third of the 25 member-states have regional assemblies and some of them are indirectly represented on COSAC by virtue of the fact that some member states use their second Chamber to represent regional assemblies, thereby allowing RLA representatives an alternative voice at European level.

penalties for failure to sufficiently involve national parliaments in the various process of governance.

The 1997 Amsterdam Treaty was preceded by significant discussion concerning national parliaments. The final Treaty contained a 'Protocol on the role of National Parliaments in the EU', which extended the range of documents to be communicated to national legislatures, including green and white papers. It also resulted in a six-week window being created, during which time such parliaments could comment on EU legislation. The role of COSAC was also developed and it was given the right to make submissions to any EU institution, particularly in the areas of subsidiarity, freedoms, security and justice, and fundamental rights. Indeed, by this stage COSAC had consolidated its presence to the point whereby it was considered the representative body for national parliaments at EU level.

More recently, and in recognition of an emerging 'democratic deficit', the Treaty of Nice invited legislatures to participate in the debate on the future of Europe. In an annex to that Treaty, the 'Declaration on the Future of the Union' emphasised the need to examine the role of national parliaments in the process of further European integration and Treaty-making. Furthermore, in anticipation of the new EU Constitutional Treaty, the Laeken Declaration of December 2001 committed members to the establishment of a Convention, which included 2 representatives from each of 28 national parliaments<sup>4</sup>. The Convention established eleven working groups, one of which was concerned with National Parliaments, to deliberate and produce a report for the Convention's Praesidium.

The working group considered three main issues, namely, the role of national parliaments in scrutinising governments; their role in monitoring the application of the principle of subsidiarity; and the role of and function of multilateral networks or mechanisms involving national parliaments at the European level (Conv 353/02: 22 October 2002). The result of this work was the insertion of a 'Protocol on the Role of National Parliaments in the

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<sup>4</sup> These were the national parliaments of the 15 existing member states, the 10 accession states, and three candidates for the Union – Bulgaria, Romania and Turkey. The legitimacy of the delegations was enhanced by the fact that representatives of the various parliamentary oppositions were included in delegations. The other Convention members were a representative from each of the 28 states, 16 delegates from the European Parliament and 2 delegates from the Commission.

European Union' to the draft Constitutional Treaty. One of the principal demands of this protocol was to oblige the Commission to send national legislatures all EU documentation directly, rather than leaving it at the discretion of the respective governments. Also, a 'Protocol on the Application of the principles of Subsidiarity and Proportionality' was included, which provides parliaments with an oversight role in respect of the key organising principles of the EU.

Under its provisions, every national parliament would receive 2 votes (one per chamber in bicameral systems) and if one-third of the votes are submitted to claim that a Commission proposal does not comply with the subsidiarity principle, the Commission is urged to 'review' the proposal<sup>5</sup>. This 'yellow card' is a new power for national parliaments consistent with encouraging greater involvement in the activities of the EU and to enhance their ability to express their views on matters of interest to them. However, it only allows for a six week window in which this 'card' can be used – no increase on the period provided for under the Amsterdam Treaty's protocol<sup>6</sup>. Also, the Commission is not obliged to change its proposal and can choose whether it wishes to 'maintain, amend or withdraw' its proposal. If an individual parliament wishes to pursue the matter further, it can only do so with the help of its government through the Court of Justice, as parliaments do not have the right to bring actions before the Court. Also, under Part III of the proposed Treaty, there is provision for any individual legislature to block an attempt to move from unanimity to QMV voting in respect of areas such as taxation. This is known as the 'passerelle clause' and can also be traced back to the Maastricht Treaty<sup>7</sup>.

From the perspective of these Treaties and Declarations alone, there have been essential changes concerning the role and place of national parliaments in the EU. Formally, at any rate, they have gained new functions and (potential) powers, including more direct access to

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<sup>5</sup> This is reduced to one quarter on issues concerning judicial co-operation in criminal or policing affairs.

<sup>6</sup> An experiment by national parliaments on the enforcement of subsidiarity organised by COSAC in late 2004 found, amongst other issues, that the six weeks window was insufficient (see Kiiver, 2006: 150-3).

<sup>7</sup> The passerelle is akin to a 'footbridge' clause, allowing the Council (subject to a unanimous vote) to transfer responsibility, originally for some aspects of Justice and Home Affairs, from member governments to the Community and its supranational institutions. Like the *acquis communautaire*, the passerelle is a one-way passage i.e. there is no provision for the transfer of powers in the opposite direction.

documentation, as well as a say in the identification of problems and the subsequent selection of a preferred policy option. Of course, critics argue that protocols were not necessary to achieve this and national parliaments could in most instances request their governments to provide information or take particular actions. However, the intent of such protocols goes beyond simply actions and can enhance the legitimacy of national parliaments involvement in EU legislation, to the benefit of the Union as a whole.

The belief that national parliaments should be more formally recognised in the EU system of governance is reflected in the substantial change in the role of COSAC in recent years. Since 2003, it has evolved from being a platform for the exchange of views on EU issues to a forum for the exchange of best practice in respect of EU scrutiny by national parliaments. All COSAC meetings now have a session concerning the exchange of such practices and the bi-annual COSAC reports provide comparative tables on such procedures<sup>8</sup>. COSAC has also been instrumental in initiating the aforementioned ‘subsidiarity and proportionality’ checks within national parliaments, though the process to date has revealed many deficiencies and obstacles to be addressed before such checks become a routine part of the respective legislatures’ work. In particular, it was discovered that only a small number of parliaments had the ability to respond to Commission proposals within the 6-week timeframe, while others found it problematic to adequately distinguish between the two principles (COSAC, 2007).

However, the question remains that if national parliaments are really at the heart of the European project, why is their role is not more fully embedded in the main body of the EU Constitutional Treaty, as opposed to simply the protocols? The answer to this lies in the fact that national parliaments are not a homogenous group, and do not act collectively to influence the EU system of governance. As Benz argues, the participation of national parliaments in the EU is not a matter to be regulated by a European Constitution. Rather, it is for individual member states to explore how best they see their representative assembly and executive dealing with the challenges of EU governance (Benz, 2004: 897). Indeed, it would appear counterproductive for national parliaments within the Union to seek to maximise recognition and influence through the development of their ‘veto’ potential. The Constitutional Treaty’s protocols recognise that while it is the

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<sup>8</sup> This was, in part, an initiative undertaken by the Danish presidency.

wish of the EU to 'encourage greater involvement' of national parliaments in Union activities, there will of necessity always be limits to that involvement given the existence of different accountabilities and jurisdictions. For example, as already noted, it is debateable how significant a development it has been to offer national parliaments the function of ensuring that the principle of subsidiarity is adhered to. Also, while a consensus appears to have been reached to bolster the scrutiny role of national parliaments by providing them with a greater range of documentation<sup>9</sup>, this is still some distance from the development of potent agenda-setting powers.

### **National Parliaments and the European Parliament**

From the beginning of the European project, there has been an unusual relationship between national parliaments and the European Parliament, and it is worthy of comment here. Under the original agreements forming the European Economic Community, a European Assembly was provided for, consisting of members of national legislatures who were 'seconded' to the European arena. In this regard, it acted not only as an indirectly elected representative forum for European citizens, but also as a representative body for legislatures. From 1962, the Assembly became known as the European Parliament and in 1979, direct elections to that body were held for the first time. Despite the fact that the contemporary European Parliament claims not to consider national parliaments as rivals in a struggle to represent the European citizenry, for many years after 1979, the European Parliament and national parliaments co-existed in an uneasy relationship. This was a consequence of the competition for scarce democratic legitimacy and a suspicion by the parliaments that their position

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<sup>9</sup> The Protocol of the Role of National Parliaments in the EU states that the Commission shall send national parliaments all published green and white papers, annual legislative programmes, and 'any other instrument of legislative planning or policy strategy' at the same time as it sends them to the EP or Council. It also requires that all legislative proposals sent to the EP and Council shall be sent to national parliaments. Furthermore, national parliaments will receive the agendas for and outcomes of Council meetings at the same time as their respective governments. Similarly, the Protocol on the Application of the principles of Subsidiarity and Proportionality envisage that the Commission will send all legislative proposals (including amended ones) to national parliaments and that legislation resolutions of the EP and positions of the Council will be transmitted to national parliaments. The Commission will also send national parliaments an annual report on the application of Article I-9 on Fundamental Rights at the same time as it sends it to the European Council, Council of Ministers and EP. Also, Article I-58 of the Treaty states that the EP and national parliaments shall be notified of any applications to the Commission by a European State wishing to join the Union.

was being gradually undermined at this supra-national level. Indeed, the fact that there was no formal provision for national parliaments to be consulted in the decision-making process added to the feeling amongst those assemblies that their role was being diminished<sup>10</sup>.

Reflecting the evolving role of national parliaments in the EU, there has been substantial alteration in their relationship with the European Parliament in recent years. As demonstrated above, since the Maastricht Treaty introduced the co-decision procedure, and subsequent Treaties extended its application, the European Parliament has asserted its role in the legislative process, and its self-confidence has developed accordingly. As noted above, a consequence of this has been a substantial debate over the role of national parliaments.

The number of meetings between counterpart committees of the European Parliament and national parliaments has quadrupled in recent years, rising from 10 in 1998 to 40 in 2002 (COSAC, 2004(a): 16). However, the asymmetrical information which has dogged national parliaments in terms of legislative oversight arises again at this level. For while MEPs have a good understanding of how domestic politics and legislatures operate, many MPs do not feel comfortable in their understanding of the decision-making process at EU level. Since 2005, a number of 'joint parliamentary' and joint committee' meetings have taken place, with representatives of the European Parliament or its committees meeting with delegates representing national parliaments or their equivalent committees.

It is important to note that the influence of national parliaments in the EU does not begin and end with COSAC, interparliamentary bodies and the various provisions under the new Treaty. Like many other representative bodies, such as national trade unions and sectoral lobby-groups, national parliaments have themselves attempted to increase their influence in the EU decision-making process through establishing their own offices in Brussels. The national parliaments of Denmark, Finland, France, Italy, Latvia, Lithuania, Poland, Sweden, Slovakia and the UK, amongst others, are now represented in Brussels with offices in the European Parliament. These permanent offices are housed in the European Parliament building

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<sup>10</sup> Nonetheless, in most member-states, NPs did have some say as to how Directives were to be implemented.

itself and further enhance the ability of member-state legislatures to be kept informed about EU affairs and to augment their 'early-warning' systems.

This returns us to the provision in the new EU Treaty for one-third of national parliaments to have a 'yellow card' over matters which they view as contrary to the subsidiarity principle. In spite of the fact that national parliaments are not mandated to ensure oversight of EU legislation on behalf of citizens outside of their jurisdiction (Kiiver, 2006), incentives exist nonetheless to form links with each other and to adopt common positions on issues of mutual concern. Alternatively, it raises questions concerning the democratic legitimacy of a procedure whereby the national parliaments of the nine smaller member-states could veto a proposal agreed by the other more populated states.

Another factor not addressed in the literature on the European Parliament is the role played by national parliaments in recruiting, inducting and socialising future MEPs (and indeed Commissioners and Council members) into the norms of parliamentary politics and negotiating. Many MEPs have held office in national parliaments before election to the European stage, and some have been former Cabinet members. Dual membership of the European Parliament and a national assembly, though a practice in decline, is still to be found scattered amongst member-states. Membership of national parliaments provides a useful forum for learning the modus operandi of legislative oversight, bargaining and inter-party co-operation. Indeed, many of the newer activities practiced by the European Parliament, such as attending 'conciliation committees' (along with the Council – see below) are activities which occur at national level also. Furthermore, the members of the respective Committees on European Affairs provide a useful pool of talent for the European Parliament, and provide a useful forum for engaging aspiring MEPs with the issues of concern at EU level.

However, this is not a one-way process and for parliamentarians from those states which practice a majoritarian form of parliamentary politics, such as Britain and Ireland, the consensus-building approach of the European Parliament has demanded adaptation to a new form of political engagement. There are also provisions in some member states concerning the ability of their MEPs to address, attend and vote in their respective European Affairs Committees. Informally, MEPs are also accountable to their national political parties and would be expected to provide policy

advice concerning EU affairs and forthcoming legislation. MEPs therefore offer another route for national parliaments to develop their understanding of EU affairs.

Conflict between loyalties along committee or party grouping lines, which is a defining feature of modern parliamentary politics, is also replicated at the European level. All MEPs are members of both committees and parties, and the interplay between the two is part and parcel of European parliamentary politics. While committees are accepted as key to the success of the European Parliament, party membership is not to be ignored and indeed cannot be, given that the distribution of portfolios within the EP is decided by party grouping size. The principal European parliamentary party groupings, the Socialists and the European People's Party, operate whipping systems and those who remain loyal to the party line have a greater chance of gaining one of the more sought-after posts, such as committee chairmanship. Discipline is not as tightly enforced as in some domestic legislatures, however, and it is accepted that domestic realities can on occasion require MEPs to vote against the (European) party line on specific matters. Indeed, it may be argued that many of the European parliamentary party groupings are held together purely because the greater numbers offer a better chance of gaining key positions. To be a member of the smaller party groups may be important for consistency with domestic political norms, but it can lead to relative ineffectiveness at EU level.

It is not solely along the committee-party loyalty dimension that there is tension in the European Parliament. National party leaderships must exercise some modicum of control and consistency within their membership at EU level. Voting against traditional domestic party values or policy positions at EU level is often used by parliamentarians at national level to berate members of other parliamentary parties. Similarly, MEPs must obviously be kept informed of their own parliamentary parties' positions on issues. Indeed, for those political parties who do not fit comfortably with any of the European parliamentary party groupings, it can be very difficult to make one's presence felt.

However, while the European Parliament may be a representative assembly and act in a manner often resembling a national parliament, there the similarities end. The European Parliament does not elect the powerful European Council or Council of Ministers, the latter of which in fact more

closely resembles key features of a national parliament in terms of its law-making powers. Furthermore, the ability to censure either body is in the domain not of the European Parliament, but of the national parliaments who put into power those members of government who sit on them.

We turn here to consider in more detail the two functions most commonly associated with national parliaments in the EU system of governance. These are bridging the accountability or 'democratic' deficit between the Union and its citizens; and scrutinising EU legislation.

### **National Parliaments and the 'Democratic Deficit'**

One of the key functions of a parliament is to provide consent for the political system in order that the power exercised by those in control is popularly accepted. Given that the issue of further European integration is itself emerging as a significant cleavage in the political systems of many member-states, the role of national parliaments in mediating and reflecting public concerns becomes more important. Ensuring that democratic participation is enhanced within an enlarged Union has been a dominant characteristic of the current phase in EU institution-building. Since the Laeken summit in 2001 which followed the Irish 'No' to the Nice Treaty, tackling the issue of how best to link EU citizens to the institutions of the Union has resulted in a series of institutional reforms. One of the most significant of these was changing the format of Council meetings from being completely *in camera* affairs, to a situation whereby selected meetings are public.

Kiiver argues that the most important question concerning national parliaments in the European Union is not how their role should be strengthened but whether it should be augmented in the first place. He proposes that national parliaments are 'pre-existing domestic bodies...rooted in their own constitutional setting, and...should be approached with great prudence, if at all' (2006: 18). While there is merit in his argument that the wide variety in structure, method of election, history and intra-parliamentary complexity of national assemblies makes discussion of 'the' national parliaments as a unitary actor in the European hierarchy unrealistic; national parliaments are nonetheless inter-connected by the unique and national character of their work. Member state-specific differences should not preclude us from acknowledging that national

parliaments will continue to feature as important players in the European project, not least because they ratify the Treaties on which the Union is based.

While the significance of the parliamentary dimension to EU governance has been recognised as fundamental long before Laeken, great uncertainty remained as to how best to increase the role of individual legislatures. The often-debated democratic deficit is not a fault of the EU institutions alone, but also of the EU's constituent members and their respective national democratic institutions. It is accepted that national parliaments have a role in addressing this, but there seems little agreement as to how best they should set about this task. Parliaments are not simply formal institutions for ratification of EU law, but play an integral role in informing citizens on EU affairs and initiating deliberations on EU integration.

The commitment to making greater use of 'framework directives' and the Open Method of Co-ordination (OMC) provide new challenges for national parliaments in terms of scrutiny and oversight. This is because such non-binding 'soft laws' are co-ordinated by bureaucrats and governments, and not subjected to routine parliamentary examination. However, if treated in the manner of other Commission proposals, legislatures and their committees still retain the ability to develop their discretion as to how EU objectives are translated into national policies and laws (Raunio, 2005: 12).

Within the EU, the accountability gap is perceived to be at its widest with respect to the Council of Ministers. In theory this should not be the case. As Kiiver points out, the Council derives its legitimacy from the fact that individual Ministers are accountable to their respective national parliaments (Kiiver, forthcoming). However, while constitutional provisions for the accountability of members of the executive to the legislature exist in most EU states, the ability of most parliaments to fulfil their domestic scrutiny obligations leaves much to be desired. Also, the unidimensional parliament-executive dichotomy often used when discussing the role of legislatures in the EU can be misleading, and is at odds with the reality of European parliamentarism, which involves a web of interactions between government and opposition parties, frontbenchers and backbenchers<sup>11</sup>.

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<sup>11</sup> For more on this see King, 1976 and Andeweg and Nijzink, 1995.

It is therefore unrealistic to suggest that parliamentarians in member states would have the capacity or informational resources to simultaneously oversee all EU matters. Furthermore, no individual parliament is mandated to scrutinise the work of the whole Council, and there is little desire amongst EU legislatures to collectively do so. Nonetheless, many national parliaments have developed methods for providing some form of formal accountability mechanism, which is outside of the existing domestic mechanisms such as PQs and interpellations, to deal with the performance of their Ministers in the Council.

The best-known example of a new oversight mechanism is the 'parliamentary scrutiny reserve'. Originating in Britain, it is an undertaking by the Government not to agree to a measure in the Council of Ministers if Parliament has not yet completed its consideration of the proposal, unless there are specific reasons for doing so. Since the Maastricht Treaty, other parliaments such as that of France have adopted this practice but it has been used tactically in the Council by Ministers to give themselves more time to consider proposals. How the reserve is applied varies considerably between national parliaments (Maurer and Wessels, 2001). Although the debate continues as to its merits, the reserve acts as another avenue of democratic accountability by involving national parliaments more closely with the intricacies of Council meetings.

As Benz identifies, the restriction by a national parliament of its government's negotiating ability can result in that government's inability to negotiate a satisfactory compromise and the risk that a sub-optimal decision may be agreed upon (2004: 876). However, giving a government a free hand to negotiate in European affairs reduces the role of the legislature to mere symbolism and fails to address the democratic deficit. It appears to be widely accepted that the most progressive method for reducing the discretion of Ministers to act against the wishes of the legislature is to attempt to limit their 'terms of reference' in advance of negotiations. This can be done by the national parliament itself or the European Affairs Committee.

Such 'mandating arrangements' originated in Denmark and are also associated with the legislatures of Sweden, Finland and Austria. Many new EU member states have also adopted this procedure but there are differences in scope of how 'binding' the national parliament's decisions

are. In the Polish *Sejm* for example, the government must seek approval from the Foreign Affairs Committee before Council meetings. Similarly, in Latvia the EU affairs Committee must approve all official positions prior to their submission<sup>12</sup>. Naturally, a balance must be struck, as a situation whereby national parliaments could constrain governments would lead to significant difficulties in a key arena of EU governance. In other national parliaments, informal channels of influence can be as effective as formal ones, and in the cases of France, Britain and Ireland, there is a strong emphasis on the use of a documents-based system of scrutiny.

Of course, as Bergman points out, in the final analysis, individual national parliaments can choose to remove their government, thus altering the shape and even political colour of the Council itself (1997: 375). This point is also developed by Benz, who argues that parliaments can go beyond formal mechanisms of dealing with EU affairs (below) to adopting more direct forms of engagement. He cites examples such as making government proposals public, informal co-operation with particular Ministers as opposed to the government, or even a situation whereby national legislatures may by-pass government and make their own contacts at EU level (2004: 887-8).

Strong national mechanisms of scrutiny are not, however, inimical to the success of Council members and may indeed be a requisite for enhancing citizens' trust in the legitimacy of EU decisions. Furthermore, the ability of Ministers and governments to negotiate successfully may be augmented by strong levels of scrutiny in their national assembly. However, addressing the democratic deficit is not solely about censuring Ministers, but also requires legislatures to more actively engage themselves in the design and processing of EU legislation, as well as more regular discussion of EU affairs.

Recognising this, the European Council called for a period of 'reflection' in the aftermath of the rejection of the Constitutional Treaty by several member-states in 2005. At a meeting of COSAC later that year, it was proposed that 'special responsibility for this endeavour lies with national parliaments and the European Parliament' (2005(a): 5). Indeed, several parliaments proceeded to ratify the Constitutional Treaty during late-2005

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<sup>12</sup> For a more detailed account see COSAC 2004(b): 35-6.

and early 2006 and by 2007 18 of the 27 national parliaments had ratified the Treaty. Furthermore, several invited Commissioners to address them and the free-flowing nature of the debate concerning EU matters in the Irish *Dáil* with Commissioner Marion Fischer Boel was acclaimed by both parliamentarians and the Commissioner herself<sup>13</sup>. In September 2006, an important new development was initiated whereby the Commission transmits new proposals and consultation papers, including its Annual Policy Strategy to member-state parliaments and invites comments. This has been welcomed by the parliaments though the impact of the views delivered on the various policies has not yet been evaluated.

### **National Parliaments and EU Legislation**

The distinctive nature of EU business is one of the principal reasons why national legislatures have found it difficult to deal with EU matters, falling as it does somewhere between domestic and foreign policy. Traditionally, legislatures elect governments and constitutions bestow on these governments the power to conduct foreign affairs and sign Treaties. Legislative assent was not always necessary and left national parliaments 'in the dark' with respect to such matters. In part, the seemingly insatiable demand for scrutiny of EU affairs by national parliaments provides some redress for the loss of sovereignty over legislative matters experienced by parliaments within the European project. The unique nature of the *acquis communautaire* has elicited a variety of responses and institutional innovations from parliaments, particularly in respect of scrutiny of EU regulations and directives, but also with regard to EU negotiations more generally. These range from the aforementioned strict *ex ante* and *ex post* oversight powers of the Danish legislature, to the relatively free hand in EU matters granted to the Greek government by the *Vouli*.

The European Convention's Working Group on National Parliaments argued that a number of basic factors had an impact on the effectiveness of scrutiny of EU affairs in parliaments. These included:

- The timeliness, scope and quality of information received

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<sup>13</sup> For more on the activities of national parliaments in the aftermath of the rejection by France and the Netherlands of the EU Treaty, see COSAC 2006:6-16.

- The possibility for a national parliament to formulate its position with regard to a proposal for a European Union legislative measure or action
- Regular contacts and hearings with Ministers before and after Council meetings, as well as European Council meetings
- Active involvement of sectoral/standing committees in the scrutiny process,
- Regular contacts between national parliamentarians and MEPs
- Availability of supporting staff, including the possibility of a representative office in Brussels (Conv 353/02 (22 October 2002)).

Naturally, however, the Convention stopped short of recommending the ideal means of achieving and practicing these factors. The difficulty of how best to manage EU affairs generally is manifested in the different methods employed by member-states over the years in order to manage EU affairs and reduce problems arising from issues of asymmetrical information<sup>14</sup>. Indeed, the Protocol on the Role of National Parliaments in the EU recognises that the manner in which individual legislatures scrutinise their governments is a matter for themselves. In general, however, most of the 'older' states have tended to house their EU affairs division within Departments of Foreign Affairs. However, in the 'newer' accession states, there has been a marked tendency to use the office or Department of the Prime Minister for co-ordinating EU matters<sup>15</sup>.

With regard to the process of scrutinising EU affairs, national parliaments were faced with two options - adaptation and innovation. In practice, most legislatures witnessed a measure of each but in particular, those parliaments that already had well-developed sectoral committee systems had an advantage in terms of more efficient processing of legislation. This is consistent with Lane and Ersson's typology, which classifies European legislatures according to those that operate a form of 'cabinet parliamentarism' and those that practice 'committee parliamentarism' (1998: 209). In the former type of legislature, such as that of Ireland, Greece, France and Britain, the domination of the assembly and its work by the cabinet government provides an unfavourable environment for the

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<sup>14</sup> The issue of how national parliaments deal with informational disadvantage is well documented in Maurer and Wessels, 2001; Norton, 1996; and Smith, 1996.

<sup>15</sup> Naturally, there are exceptions to this. For example, the Premier's office in the UK and Finland take a lead role, while in Latvia and Malta, EU affairs are regarded as a matter for Foreign Affairs.

development of effective mechanisms of scrutiny<sup>16</sup>. The demands of EU membership required particularly strong innovations in both countries, with the House of Lords in Westminster re-inventing itself somewhat to take a stronger role in EU affairs, and a specialised committee being established in the largely committee-free Irish *Dáil* upon its accession to the EU<sup>17</sup>.

Committee parliamentarism applies to parliamentary systems where committees are traditionally well-integrated into the work of the legislature, and in such an environment, using committees to oversee EU legislation and related affairs is relatively straightforward. A good example is the German federal parliament, where both the *Bundestag* and *Bundesrat* have long-established committees to deal with EU affairs<sup>18</sup>. As with most other Lower Houses in the bicameral parliaments of the EU, the *Bundestag* has a Committee on EU Affairs. In addition, the *Bundesrat* has both a Chamber on European Affairs<sup>19</sup> and a Committee on Questions of the European Union. Of course, allied to the institutional provisions for oversight is the strong parliamentary culture of executive oversight in Germany, and EU matters are subject to more rigorous scrutiny in such an environment. Other examples of national parliaments where committees are well-developed institutions of scrutiny include Belgium, Sweden and Finland.

In parliaments where committees have an established tradition of policy-formulation, as well as the ability to alter legislation, it can be expected that a more developed level of expertise in various policy areas will be found. This also contributes to knowledge of expected policy outcomes, as well as deference among committee memberships to each other, a situation Strøm refers to as 'gains from trade' (2001). Such practices are particularly useful for managing the large volume of EU legislation which comes before parliaments each year. In short, it may be surmised that those legislatures that exercise committee rather than cabinet parliamentarism respond more easily to the challenge of scrutinising EU legislation, and overseeing their government's positions in respect of EU matters.

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<sup>16</sup> This dichotomy is largely consistent with Liphart's 'Westminster' versus 'Consensus' typology, a point identified by Maurer 2001

<sup>17</sup> This was the Committee on Secondary Legislation of the EEC.

<sup>18</sup> Article 23 of the Basic Law actually requires that both Houses 'participate in matters concerning the European Union'.

<sup>19</sup> Consisting of representatives of the Länder delegations in the Bundesrat.

This is not to say that committees have not been the mechanism of choice for all national parliaments in dealing with EU matters. As already noted, all such parliaments now have European Affairs Committees. However, just as there is great variation in the dynamics governing the executive-parliament relationship in individual member states, so too is there difference in how European Affairs Committees formally interact with other bodies within their parent chamber(s). In Portugal, for example, the Committee on European Affairs and Foreign Policy can request opinions from specialist committees and use them to present reports to government. In Italy and the Netherlands, the equivalent Committees are expected to sift through EU legislation before passing it to the relevant specialist committee or even government itself (Maurer and Wessels, 2001: 448). In Germany, members of the well-resourced Committee for European Affairs bypass government and go directly to the EU institutions for information. In Britain, the House of Commons has not only a European Scrutiny Committee but also several specialist select committees looking at different policy areas. Second chambers, where they exist, may also be involved in the oversight process, either directly as in Italy where power is divided equally between chambers, or indirectly through the European Affairs Committee as in Ireland. However, there is no consensus as to whether it is desirable to have one European Affairs Committee per bicameral national parliament, or to have one per chamber.

A distinction may be drawn here between scrutiny and oversight in respect of EU legislation. While scrutiny refers to the process of examining completed legislation and providing assent for its acceptance, oversight refers to engagement in the policy formulation stage of that legislation. The emphasis on oversight is also made in the most recent bi-annual report from COSAC, which categorises member-states into those that have adopted either document-based or else mandating systems for monitoring EU affairs. It argues that 'the principal feature of a document-based approach is a sift of EU documents at the early stages of the decision making procedure' (COSAC, 2005(b): 10). The document-based systems allow national parliaments and their MPs to inform themselves of the progress of EU legislation in its embryonic stages and where difficulties may lie. The mandating systems seek to place limits on what Ministers and government representatives can agree to in Council negotiations without first consulting with parliament. In practice, almost all member-states have a modicum of each in their processes of oversight and scrutiny. Indeed, a

successful mandating system is predicated on a good documents-based oversight capacity.

In more recent years, innovations with respect to oversight of EU affairs has cross-pollinated between jurisdictions. For example, the Slovak Republic has adapted its existing structure to reproduce as closely as possible the effective and innovative Dutch method of co-ordination and oversight. The Finnish *Grand Committee* system of legislative oversight has been embraced by Estonia, Slovenia and Hungary. Indeed, within the new EU member-states, there has been much common sharing of knowledge and best practice in how to manage EU affairs in both the parliamentary and central government arenas. This is not a new development, however, and it was no coincidence that Sweden, Finland and Austria all adopted broadly similar oversight practices to the successful Danish model upon their accession in 1995 (Kiiver, forthcoming).

There is a range of factors offered by commentators to facilitate better understanding of the processes adopted by parliaments in undertaking scrutiny of EU legislation. Maurer (2001) argues that three factors are key – the scope of documentation received, whether or not national legislatures receive proposals in good time, and the impact of scrutiny by a national parliament on its government's room for manoeuvre. Apart from the actual procedures adopted, Bergman (1997) also cites several variables for understanding the activities adopted by each member state with respect to scrutiny of EU legislation. These include:

- Whether or not the political culture of the member state pro or anti EU integration.
- Are EU affairs regarded as foreign policy matters for governments or do national institutions have a complementary role in their oversight?
- Is the member-state a federal one and if so how are the constituent parts of the federation to be involved?
- Are minority governments prevalent, thus resulting in stronger parliamentary influence on the executive?
- Is EU scrutiny an issue in the domestic struggle for power?

With regard to the first of Bergman's variables, there appears to be a strong correlation between the role of a national parliament in the oversight of EU

affairs, and the size of the EU-sceptic population in a member state. Indeed, it is no coincidence that the most lauded model of oversight in terms of EU affairs occurs in the member-state which has a very large EU-sceptic minority i.e. Denmark<sup>20</sup>. Institutional responses to EU scepticism are also to be found in Britain, where both Houses take an active part in overseeing EU affairs. In Ireland, the unexpected rejection of the Nice Treaty in 2001 resulted in unprecedented reforms at the parliamentary committee level. The 'beefing-up' of the scrutiny role of the European Affairs Committee, including the creation of a sub-committee on European scrutiny, was a direct consequence of this expression of concern by Irish citizens<sup>21</sup>. In this respect, it may be argued that national assemblies can play an 'assuaging' role in terms of popular concerns over EU integration.

Norton argues that the way in which parliaments react to the demands of EU membership varies not just according to existing constitutional arrangements, political culture, and party systems but also the parliamentary norms and practices, and even the extent of the parliamentary workload in each member-state (1996: 9-11). Related to this last factor is the issue of size. It is significantly easier for the larger legislatures in Britain, France and Germany to examine all EU documents with a greater degree of intensity than their counterparts in Malta, Luxembourg and Cyprus. In part this is due to the staffing and financial resources available within those parliaments, but also the resources employed in Brussels and Strasbourg which provide a form of early warning for them.

While EU affairs can often be the source of political conflict, it is true to say that no national parliament has been able to use scrutiny of EU affairs as a vehicle for increasing its influence over domestic matters. Indeed, the path-dependent nature of the mechanisms for scrutiny has determined that the subordinate position of legislatures to their executives in most member-states will shape the method of dealing with EU issues also. For example, in the case of the Danish *Folketing* and the Dutch *Tweede Kamer*, the legislature's agenda-setting ability in respect of legislation and scrutiny is

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<sup>20</sup> The frequency of minority governments and the inability of governments to ignore the European Affairs Committee are also often offered as reasons for the Danish system.

<sup>21</sup> Another outcome of this rejection was the creation of a 'National Forum on Europe' to hear the views of citizens and interest groups on European integration. Members of both chambers of the Irish *Oireachtas* were on the Forum.

already relatively well established (Döring, 1995(b); Döring, 2001). The issue of path-dependency is also raised by Dimitrakopoulos in his study of the French, British and Greek legislatures (2001). He argues that the reforms witnessed within legislatures varied to a large degree according to the existing institutional arrangements within those parliaments.

While national parliaments are developing their capacity to make their views known on EU legislation as it makes its way through the principal European institutions, questions remain concerning the ability of legislatures to shape that legislation in its formative stages. While they will now receive the Commission's proposed annual legislative programme, it remains the case that they have little agenda-setting influence over the Commission, its consultative and expert committees. Nor indeed do they hold much sway over the work of the European Council, or examine such issues as Council Working Group processes or COREPER meetings. These are areas which may be fruitfully exploited by national parliaments seeking to exert more authority over the progress of legislation. The fact that many national parliaments have already begun to strengthen their early-warning systems (above) demonstrates that this view is shared by member-state governments as well as legislatures.

Before leaving the issue of EU legislation, it must be recognised that the Commission is currently spearheading a drive to reduce the amount of legislation produced by the EU in favour of better regulation. In December 2003, the European Parliament, Council and Commission agreed an 'Inter-Institutional Agreement on Better Law-Making'. This agreement commits the Council and European Parliament to providing a stable framework for 'soft law' such as co-regulation and self-regulation, and to improve co-ordination and simplification. The use of EU standards in place of national regulation, as well as the application of OMC is also advocated. If these proposals are successful, it should consequently reduce the burden on national parliaments to scrutinise EU legislation. Parliaments will also be presented with greater levels of discretion concerning the domestic transposition and implementation of EU 'framework directives'.

## **Conclusions**

As detailed above, none of the EU Treaties specify what the role or place of national parliaments in respect of the EU system of governance should be.

Instead, it has been left to such assemblies to decide how best to make their presence felt in an ever-changing institutional and political environment. This has raised questions of democratic legitimacy and competence, and has ensured that for the foreseeable future they will be much debate over the issue.

There has been much analysis of how the adaptation of national parliaments to the demands of EU membership has been to a large degree predicated on existing domestic traditions. However, while there is merit to this, the increasing cross-fertilisation of ideas via communications between officials, formal and informal party links, as well as networking between MPs and MEPs cannot be dismissed. While there may be agreement on certain issues, such as the effectiveness of committees in the process of scrutinising EU legislation, convergence on a single ideal method of scrutiny, oversight and deliberation is unlikely.

One of the paradoxes of the European Union is that while national parliaments have an important role to play in connecting 'Europe' to its demos, no European Treaty can oblige national parliaments to perform tasks outside of those that fall within their individual national domains. The democratic legitimacy of the Union is arguably best expressed through the scrutiny of EU legislation and oversight of Council decisions which national parliaments are tasked with performing. National parliaments are not a unitary group and while this article has largely focussed on existing formal oversight practices, the informal influence of parliaments on their governments is worthy of further analysis. For the European Parliament in particular, partnership with national assemblies is key to its success. It can never have more democratic legitimacy than them and therefore achieving high levels of agreement through the various formal and informal channels remains essential.

The EU is not, and never was, about finding the perfect institutional arrangement for governance. It is about finding efficient and practicable solutions to common problems and the success of the institutions it employs will be measured by how well they can help achieve those means. While the EU decision-making process challenges national parliaments to constantly adapt and innovate, its evolving nature also allows such legislatures to influence it. In the final analysis, governments can no more

afford to ignore their national assemblies than they can their political parties or electorate.

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