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## RECASTING MONISM AND DUALISM IN EUROPEAN PARLIAMENTARY LAW: THE LISBON TREATY IN BRITAIN AND FRANCE

Davor Jančić

**Abstract:** This chapter analyses the relevance of international law concepts of monism and dualism in the legal and political system of the European Union through the lens of national parliaments as inescapable ingredients in giving international law effect in domestic legal orders. We inquire about the reaction of the national parliaments of the United Kingdom and France, as examples of dualist and monist states, to three aspects of the Lisbon Treaty that most affect the European role of national parliaments: the EU's call for national parliaments to monitor the EU institutions' adherence to the principle of subsidiarity, the EU's call for national parliaments to contribute to the good functioning of the Union and the extension of the scope of the codecision procedure. The main argument of this chapter is that although the EU is in many respects a monist constitutional setup that denies significance to the logic of mutual structuring of legal orders espoused in international law, the concepts of monism and dualism retain their explanatory force as regards the manner in which domestic parliaments shape their relations with the European Union.

### I Introduction: the dwindling relevance of monism and dualism in EU law and its impact on national parliaments

Many premises on which international law, conceived as law between states,<sup>1</sup> has been erected have little or no bearing on the legal regulation of interstate relations in the context of the European Union. This is because the EU has become a *sui generis* system of law with its own discrete legal postulates that separate it from the corpus of international law. The well-known case law of the European Court of Justice has immensely contributed to this evolution. In the 1963 case of *Van Gend en Loos*, this Court, in order to establish the direct effect of certain provisions contained in the founding treaties, ruled that:

<sup>1</sup> International law also encompasses relations between states and international organisations as well as between international organisations themselves.

[EEC] Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.<sup>2</sup>

The following year, in the 1964 case of *Costa v. ENEL*, the European Court of Justice complemented the above doctrine of direct effect with that of supremacy of EU law over national law. The following passage from the judgment provides authority for this:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.<sup>3</sup>

Since the citizens could invoke EU law directly in order to seek legal redress, this development spelled the monist relationship between the EU and national legal orders. They are integrated and intertwined. In 1978, the European Court of Justice further extended the outreach of its supremacy doctrine to require EU's supremacy not only over domestic statutes but also over domestic constitutions. In the Court's words:

[E]very national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside *any* provision of national law which may conflict with it, whether prior or subsequent to the Community rule.<sup>4</sup>

Furthermore, this excerpt also forces domestic judiciaries to act as agents of the EU, thus helping EU law to have effect in the Member States' legal orders. This idea of institutional agency had previously been suggested in the context of international law by George Scelle, a prominent French public international law scholar. He envisioned international law as being effective only if domestic institutions split their roles in a way that allows them to act both as agents of their

2 Case 26/62, Judgment of 5 February 1963, *Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1.

3 Case 6/64, Judgment of 15 July 1964, *Flaminio Costa v. ENEL*, [1964] ECR 585.

4 Case 106/77, Judgment of 9 March 1978, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 629, para 21 (emphasis added).

national legal orders, catering to the interests and public good of their own state, and as agents of the international legal order, enabling international law to have effect domestically.<sup>5</sup> Essentially the same reasoning applies to the functions of Member-State institutions in giving effect to EU law.

One might argue that the aforesaid doctrines that decouple EU law from international law and place it hierarchically above domestic law are merely the view of the European Court of Justice. Nonetheless, by ratifying the founding treaties, the Member States have accepted that this Court, at the request of national courts or tribunals, should *inter alia* give preliminary rulings on the interpretation of primary EU law.<sup>6</sup> Despite this, the supremacy of EU law over national constitutional law is still contested by the constitutional courts of some Member States. Possibly the most notable example thereof is the decision of the German Federal Constitutional Court on the Lisbon Treaty, in which it decided that as long as the EU is based on the principle of conferral the democratic legitimacy for European integration must first and foremost flow from national parliaments, in this particular case from the *Bundestag*, the directly elected lower house of the German Parliament.<sup>7</sup> The French *Conseil constitutionnel*, in its own judgment on the Lisbon Treaty, affirmed two important principles: (a) that the constituent power recognised the existence of a Community legal order that is integrated into domestic law and distinct from international law; but also (b) that the French Constitution remains “at the summit of the domestic legal order”.<sup>8</sup> In these forms, a smack of dualism between the EU and the Member States continues to be felt.

Notwithstanding the continuing resistance of some of the Member States to cede authority over their constitutional law, it is fairly unchallenged that in general terms the EU enjoys the kind of prevalence over national law that is unmatched in other legal systems that have spawned beyond the legal boundaries of the nation state. Even though there are some compelling arguments to the contrary,<sup>9</sup> EU law

5 Cassese, Antonio. “Remarks on Scelle’s theory of ‘role splitting’ (dédoulement fonctionnel) in international law,” *European Journal of International Law*, Vol. 1, No. 1, 1990: 213. See also: Scelle, George. *Précis de droit des gens: principes et systématique*, Paris: Recueil Sirey, 1932-1934.

6 Article 19(3)(b) of the Treaty on European Union (TEU).

7 Jančić, Davor. “Caveats from Karlsruhe and Berlin: whither democracy after Lisbon?,” *Columbia Journal of European Law*, Vol. 16, No. 3, 2010: 355. See also: Murkens, Jo Eric Khushal. “We want our identity back – the revival of national sovereignty in the German Federal Constitutional Court’s decision on the Lisbon Treaty,” *Public Law*, July 2010: 530-550; Schorkopf, Frank. “The European Union as an association of sovereign states: Karlsruhe’s ruling on the Treaty of Lisbon,” *German Law Journal*, Vol. 10, No. 8, 2009: 1219–1240; Schönberger, Christoph. “Lisbon in Karlsruhe: Maastricht’s epigones at sea,” *German Law Journal*, Vol. 10, No. 8, 2009: 1201–1218.

8 *Décision no. 2007-560 DC du 20 décembre 2007, Traité de Lisbonne*, paras 7 and 8 respectively. See further: Roux, Jérôme. “Le Conseil constitutionnel et le contrôle de constitutionnalité du Traité de Lisbonne: bis repetita? A propos de la décision no. 2007-560 DC du 20 décembre 2007,” *Revue Trimestrielle de Droit Européen*, 2008, Vol. 44, No. 1, 2008: 5–27; Chatiel, Florence. “La ratification du traité de Lisbonne par la France,” *Revue du Marché Commun et de l’Union Européenne*, No. 518, 2008: 277–280.

9 See: Hartley, Trevor C. “The constitutional foundations of the European Union,” *Law Quarterly Review*, Vol. 117, 2001: 225–246.

as a variant of international law has long been debunked and no longer represents an accurate description of Europe's juridical and constitutional reality. One of the European Union's principal merits in both ideological and pragmatic respects is the birth of the idea that individual states are not only insufficient vehicles for securing the well-being of their citizens but also that their cooperation on the basis of competing national sovereignties frequently yields suboptimal outcomes. The logic of placing the monopoly of deciding the domestic status of exogenous law in the hands of a single political community has been abandoned in favour of the logic of pluralism. The latter logic posits that both exogenous and endogenous legal sources may equally require obedience to certain behavioural prescriptions contained in law.<sup>10</sup> Translated to EU constitutionalism, this means that both the EU and its Member States may rightfully and independently claim legal authority in regulating certain aspects of life. As the 2008 *Kadi* judgment of the European Court of Justice demonstrates with the example of the EU's implementation of UN Security Council sanctions against individuals, the EU has advanced to the stage where it itself claims the right to fence itself off from international law in what could be likened to the dualist principle.<sup>11</sup>

These considerations about the diminishing relevance of viewing EU law through international law spectacles emphatically apply to the principles of monism and dualism, which states use to specify the status of international law in their legal orders. While dualism requires the intervention of parliament for international law to be incorporated in the domestic legal order, monism does not. In monist states, the very act of parliamentary approval of the ratification of a treaty suffices and no further action is requisite for international law to be applicable in such a state. Conversely, in dualist states, parliament needs to transpose international legal provisions into domestic law for them to have effect and be applied to individual legal addressees.

Although of fundamental importance in the field of international law, the concepts of monism and dualism have lost virtually any meaning in the multilevel

10 See for instance: Walker, Neil. "The idea of constitutional pluralism," *Modern Law Review*, Vol. 65, No. 3, 2002: 317–359; Sweet, Alec Stone. "Constitutionalism, legal pluralism, and international regimes," *Indiana Journal of Global Legal Studies*, Vol. 16, No. 2, 2009: 621–645; Itzcovich, Giulio. "Legal order, legal pluralism, fundamental principles. Europe and its law in three concepts," *European Law Journal*, Vol. 18, No. 3, 2012: 358–384.

11 Joined Cases C-402/05 P and C-415/05 P, Judgment of 3 September 2008, *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the European Union and Commission of the European Communities*, [2008] ECR I–6351. See different views on this issue in: Búrca, Gráinne de. "The European Court of Justice and the international legal order after Kadi," *Harvard International Law Journal*, Vol. 51, No. 1, 2010: 3; Kokott, Juliane and Sobotta, Christoph. "The Kadi case – constitutional core values and international law – finding the balance?," *European Journal of International Law*, Vol. 23, No. 4, 2012: 1017; Isiksel, Türküler. "Fundamental rights in the EU after Kadi and Al Barakat," *European Law Journal*, Vol. 16, No. 5, 2010: 559; Griller, Stefan. "International law, human rights and the European Community's autonomous legal order: notes on the European Court of Justice decision in Kadi," *European Constitutional Law Review*, Vol. 4, No. 3, 2008: 552.

legal system of the European Union. Although binding legal force has been endowed on both EU regulations and directives as two most important legislative instruments of the Union, regulations are binding directly and in their entirety without the need to transpose them, while directives are binding as to the result to be achieved leaving it to the authorities of the Member States to choose the form and method of their internalisation.<sup>12</sup> Accordingly, Member States can freely opt to transpose directives by statutory or regulatory action, of which the former type of action preserves a portion of the otherwise severely limited room for parliamentary manoeuvre. However, the necessity of transposing directives is a requirement of EU law and not of domestic law, which would be necessary for the EU to be depicted as a dualist constitutional space. The fact that it was the Member States which created primary EU law in the first place is solely an indirect argument and would not be sufficient to challenge the thesis that the legal system of the EU is predominantly monist, though dualist reflexes subsist. What is crucial here is that national parliaments have lost their legislative power in the areas where the EU is empowered to act.

## II EU Treaties under the parliamentary scanners: the case of the Treaty of Lisbon

The role of parliaments in domesticating international law is nevertheless paramount. Whether monist or dualist, national parliaments have a basic linkage with international law insofar as they are asked to approve the ratification of treaties entered into by their state. Unless a referendum is organised, the act of parliamentary approval is what equips international agreements with the democratic legitimacy necessary for their popular acceptance and the authority to regulate the agreed segments of the internal policies of a state.

The founding and amending treaties of the EU indeed have a special status, as it is possible to revise them without the Member States having to ratify such a revision in accordance with their constitutional requirements. Such simplified treaty revision procedures, also known as bridging clauses or *passerelles*, are carried out by the European Council while concomitantly leaving the possibility for each national parliament to voice their opposition and thus block such a course of action. Treaty amendments pursuant to the bridging clauses can be used to loosen the conditions applicable to secondary EU lawmaking, thus making it possible for the EU legislature to act by a qualified majority instead of by unanimity and in accordance with the ordinary legislative procedure instead of in accordance with the special legislative procedure.<sup>13</sup> However, the scope of simplified treaty amendments is restricted and they cannot exact changes of the magnitude typically produced by the ordinary treaty revision procedure, which continues to require unanimous ratification by all Member

12 Article 288(2)-(3) of the Treaty on the Functioning of the European Union (TFEU).

13 Article 48(7) TEU.

States in accordance with their respective constitutional requirements before they can become effective.<sup>14</sup> This means that the most comprehensive modifications in the European Union's juridico-political setup are still filtered through national parliaments. In truth, such parliamentary filtering is often nothing more than an act of rubberstamping the *fait accompli* negotiated and brought home by the government. Even so, all parliamentarians and legislative bodies within parliaments, including committees and the plenary, have a chance to appraise the advantages and disadvantages of the arrangements agreed to by their state in the international arena and thereby help legitimise or delegitimise them in a public forum according to the political preferences of the citizens, whom they represent.

In light of the foregoing, this chapter examines the consequences of the changed legal landscape brought about by the process of European integration for the national parliaments of the EU Member States. This landscape for the first time addresses the very actors that are called upon to approve it – national parliaments. The Lisbon Treaty has indeed introduced a host of new powers for the national parliaments' participation in EU decision making.<sup>15</sup> The most important among these powers is that of monitoring the EU's compliance with the principle of subsidiarity when drafting EU legislation in the fields of shared competences, regarding which both the EU and the Member States are entitled to act.<sup>16</sup> The subsidiarity principle calls for EU action to be undertaken “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.<sup>17</sup> The policing of this principle is carried out prior to the onset of the applicable decision-making procedure at the EU level by requesting national parliaments to sift through draft EU legislative initiatives, which are as a rule prepared by the Commission, and decide whether any such initiative infringes subsidiarity. If any

14 Article 48(1)-(5) TEU.

15 See for instance: Barrett, Gavin. “‘The King is dead, long live the King’: the recasting by the Treaty of Lisbon of the provisions of the Constitutional Treaty concerning national parliaments,” *European Law Review*, Vol. 33, No. 1, 2008: 66-84; Cygan, Adam. “The role of national parliaments in the EU's new constitutional order,” in *European Union Law for the twenty-first century: rethinking the new legal order Vol. 1*, by Takis Tridimas and Paolisa Nebbia (eds), Oxford: Hart Publishing, 2004: 153-169; Kiiver, Philipp. “European Treaty reform and the national parliaments: towards a new assessment of parliament-friendly Treaty provisions,” in *European constitutionalism beyond Lisbon*, by Jan Wouters et al. (eds), Antwerp: Intersentia, 2009: 131-146; Passos, Ricardo. “Recent developments concerning the role of national parliaments in the European Union,” *ERA Forum*, Vol. 9, No. 1, 2008: 25-40.

16 See analyses hereof in: Louis, Jean-Victor. “The Lisbon Treaty: The Irish ‘No’. National parliaments and the principle of subsidiarity – legal options and practical limits,” *European Constitutional Law Review*, Vol. 4, No. 3, 2008: 429-452; Schütze, Robert. “Subsidiarity after Lisbon: reinforcing the safeguards of federalism?,” *Cambridge Law Journal*, Vol. 68, No. 3, 2009: 525-536; Kiiver, Philipp. *The early warning system for the principle of subsidiarity: constitutional theory and empirical reality*, London: Routledge, 2012; Cooper, Ian. “The watchdogs of subsidiarity: national parliaments and the logic of arguing in the EU,” *Journal of Common Market Studies*, Vol. 44, No. 2, 2006: 281-304.

17 Article 5(3) TEU.

such infringement is detected, a reasoned opinion will be issued to the Commission, the European Parliament and the Council. Each Member State is granted two votes. The main drawback of this so-called early warning mechanism is that only the votes aggregated above the prescribed thresholds, which are commonly referred to as yellow and orange cards, will thwart the EU decision-making procedure.<sup>18</sup> Yet as a *post facto* instrument, any national parliament or a chamber thereof may request the national government to bring an action before the European Court of Justice against an already enacted piece of EU legislation if it is deemed that it violates subsidiarity.<sup>19</sup> Also of constitutional significance is the treaty provision requiring national parliaments to contribute to the good functioning of the Union,<sup>20</sup> which, due to its vagueness and seemingly imperative tone, has sparked different parliamentary reactions.

In order to assess the degree to which the monist and dualist reasonings still resonate in the EU Member States, this chapter inquires about the inherent functions of national parliaments in the European Union. This chapter tests whether parliaments oppose or embrace their inclusion under the EU umbrella as compensation for the decline of their legislative influence in areas where the Union may act. Therefore, we seek insight into whether these parliaments accept or reject their constitutional roles to be split so that besides their domestic duties, they also perform as agents of the EU. Their acceptance of role-splitting would signify that they have reconciled to the fact that the EU is a monist legal structure.

To these ends, we delve into the national parliaments' claims about their own role in EU affairs, which were made during the procedures of approving the ratification of the Lisbon Treaty. A qualitative empirical analysis is carried out by examining the arguments made by major political parties in favour or against three Lisbon Treaty provisions that carry most implications for national parliaments: (a) subsidiarity monitoring; (b) contribution to the good functioning of the Union; and (c) the extension of codecision by means of depillarisation (transfer of the former Third Pillar to the First Pillar), which benefits the European Parliament and indirectly reveals whether national parliaments perceive their newly empowered EU-level counterpart as an institutional rival or a potential partner. Such an approach reveals the role perceptions of national parliaments towards their incorporation into the Union's constitutional order as a means of rectifying the loss of powers

18 Article 7 of the Protocol on the application of the principles of subsidiarity and proportionality. See various views on this matter in: Jančić, Davor. "Representative democracy across levels? National parliaments and EU constitutionalism," *Croatian Yearbook of European Law and Policy*, Vol. 8, 2012: 227–265; Fabbrini, Federico and Granat, Katarzyna. "‘Yellow card, but no foul’: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike," *Common Market Law Review*, Vol. 50, No. 1, 2013: 115–144; Wyatt, Derrick. "Could a ‘yellow card’ for national parliaments strengthen judicial and political policing of subsidiarity?," *Croatian Yearbook of European Law and Policy*, Vol. 2, 2006: 1–17.

19 Article 8 the Protocol on the application of the principles of subsidiarity and proportionality.

20 Article 12 TEU.



suffered in successive treaty amendments, which would not have occurred had the EU been a typical international law creation.

Yet before embarking on this analysis, one is compelled to do justice to the argument that the way in which parliaments understand their position vis-à-vis the EU and vis-à-vis their own direct involvement within it may depend on the domestic constitutional idiosyncrasies, which we address in the following heading.

### **III Two distinct constitutional legacies: the British and French models**

Analysis in this chapter is limited to the national parliaments of the United Kingdom and France.<sup>21</sup> Whereas these two parliaments certainly cannot be held to represent all 27 Member-State parliaments, they do stand for two distinct systems of government, two distinct approaches to international law, and two distinct approaches to the constitutional role of parliament.

#### **1. System of government**

While Britain is a monarchy featuring a parliamentary system of government in the legal environment engendered by an uncodified constitution, France is a republic with a semi-presidential system operating under the terms of a codified constitution. Parliamentary elections in Britain directly determine the personality who will occupy the prime ministerial post, whereas in France it is the President of the Republic who decides who the Prime Minister will be.<sup>22</sup> Doubtlessly, the French President would need to pay heed to the political composition of the Lower House of Parliament, *Assemblée nationale*, so as to avoid having his Prime Minister ousted if the person appointed runs into a hostile parliamentary majority.

#### **2. Approach to international and EU law**

Britain's dualism contrasts with France's monism. For individuals to be able to rely on the legal protection afforded by international agreements acceded to by Britain, the Westminster Parliament must first transpose their provisions into British law.<sup>23</sup> With respect to the EU, this was done in 1972 by virtue of a general enabling provision brought to life by the parliamentary adoption of the European Communities Act.

21 The full name of the UK is the United Kingdom of Great Britain and Northern Ireland. The short name for the UK is Britain. Britain is therefore a more encompassing term than Great Britain.

22 Article 8 of the French Constitution.

23 Feldman, David. "Monism, dualism and constitutional legitimacy," *Australian Yearbook of International Law*, Vol. 20, 1999: 105.

This Act provides for the direct effect and enforceability of EU law throughout the United Kingdom without any further enactment.<sup>24</sup> No such thing is necessary in France, because its Constitution, subject to the condition of reciprocity, makes the provisions of treaties that have been duly ratified or approved directly applicable in the French legal order and even allows them to prevail over French statutes by giving them a higher rank (*autorité supérieure*).<sup>25</sup> In addition, The French Constitution obliges France to participate in the EU as ordained by the Lisbon Treaty.<sup>26</sup>

### 3. Constitutional role of Parliament

The prominence of the British doctrine of parliamentary sovereignty exists in stark opposition to the French doctrine of ‘rationalised parliament’ (*parlementarisme rationalisé*). In theory, the UK Parliament is omnipotent, its powers are unlimited and it can make and unmake any law whatever. Because of this legislative supremacy, Acts of Parliament may not be reviewed by any person or body outside Parliament.<sup>27</sup> To the contrary, the French Parliament may only do what the Constitution allows it to do. Among the key aspects of such a harnessing of Parliament is the fact that it may only legislate in constitutionally enumerated policy fields, that it operates under the dominance of the Government, and that its acts may be reviewed for conformity with the constitution under the conditions specified in the Constitution.<sup>28</sup> The balancing of the institutions towards a better equilibrium between the Government and Parliament was only implemented in 2008 by means of a constitutional amendment.<sup>29</sup>

Having set the theoretical and methodological stage, the headings that follow present the empirical analysis outlined above. It is important to note that the statuses of the persons and political parties mentioned refer to those that they held at the moment about which we write, which may differ from their present status.

24 Section 2(1) thereof reads: “All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable Community right’ and similar expressions shall be read as referring to one to which this subsection applies”.

25 Article 55 of the French Constitution.

26 Article 88(1) of the French Constitution reads: “The Republic *shall* participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007” (emphasis added).

27 See among many accounts: Goldsworthy, Jeffrey. *Parliamentary sovereignty: contemporary debates*, Cambridge: Cambridge University Press, 2010.

28 See a succinct account in: Avril, Pierre. “Le parlementarisme rationalisé.” *Revue du Droit Public*, Vol. 114, No. 5-6, 1998: 1507–1515.

29 Dord, Olivier. “Vers un rééquilibrage des pouvoirs publics en faveur du Parlement,” *Revue Française de Droit Constitutionnel*, No. 77, 2009/1: 99–118.

#### **IV The United Kingdom: a cautious but assiduous scrutineer**

Britain ratified the Lisbon Treaty on 16 July 2008.<sup>30</sup> Despite the insistence of the Conservative Party (Con) on a referendum, the approval was by Parliament. Court cases challenging the ratification method brought by Stuart Wheeler and William Cash were unsuccessful.<sup>31</sup> The House of Commons approved the Lisbon Treaty on 11 March 2008, followed by the House of Lords' approval on 18 June 2008.

That political accountability is a serious concern in Westminster is vindicated by an early reaction of the Chairman of the Foreign Affairs Committee of the House of Commons to the Government's failure to appear before it and give evidence clarifying its negotiation positions: "the Committee regards the refusal of the FCO [Foreign and Commonwealth Office] to provide a Minister to give oral evidence during this crucial phase of the discussions on the future of Europe as a failure of accountability to Parliament".<sup>32</sup> The reason for pressing for a prior parliamentary consultation was to enable it "to make an input into the contents of the Treaty through the Government".<sup>33</sup> The House of Commons' European Scrutiny Committee, for its part, complained about the lack of transparency of the Lisbon Treaty negotiations and held that "the process could not have been better designed to marginalise the role of national parliaments and to curtail public debate".<sup>34</sup>

##### **1. Subsidiarity monitoring**

Subsidiarity was one of the six guiding principles of the British Government in negotiations with the German Presidency on what became the Lisbon Treaty.<sup>35</sup> As shown below, the monitoring of subsidiarity has been extensively analysed by both Houses of Parliament.

30 See [http://europa.eu/lisbon\\_treaty/countries/index\\_en.htm](http://europa.eu/lisbon_treaty/countries/index_en.htm), accessed on 24 September 2010.

31 *Times Online*, "UK sidesteps courts to ratify Lisbon Treaty", <http://www.timesonline.co.uk/tol/news/politics/article4350222.ece>, accessed on 24 September 2010.

32 The Government's excuse was the difficulty of finding a mutually convenient date. The correspondence improved after this early spat. House of Commons, Foreign Affairs Committee, "Foreign Policy Aspects of the Lisbon Treaty", *HC 120-I, Third Report of Session 2007–08* of 20 January 2008, para. 32, p. 17.

33 House of Commons, Foreign Affairs Committee, "Foreign Policy Aspects of the Lisbon Treaty", *HC 120-I, Third Report of Session 2007–08* of 20 January 2008, para. 38, p. 19.

34 House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference: follow-up report", *HC 16-iii, 3rd Report of Session 2007-08* of 27 November 2007, para. 8, p. 5.

35 The remaining five principles presented by Geoffrey Hoon, the Minister for Europe, were: pursuing British interests, modernisation and effectiveness, consensus, use of existing Treaties and openness. House of Commons, Debate of 5 December 2006, Vol. 454, cols. 10-11WS.

Reacting to the Commission's communication on the Union's reform published some fortnight before the opening of the intergovernmental conference (IGC),<sup>36</sup> the House of Commons' European Scrutiny Committee doubted the possibility of any meaningful parliamentary input in subsidiarity issues without independence from Government whipping systems.<sup>37</sup> This Committee sought clarifications on the Government's White Paper on the IGC, which marked subsidiarity control as a matter of priority and argued that, since national parliaments would be given a "direct say in the EU's lawmaking procedures for the first time", the Union would assume a duty to consult national parliaments.<sup>38</sup> The Government considered it "unlikely" to whip MPs within the framework of the early warning mechanism and, instead, offered to work with Parliament "to help both Houses exercise this independent power".<sup>39</sup> More specifically, during a hearing in the House of Lords' EU Committee, Lord Rosser, a peer of the Labour Party (Lab), raised the crucial question of whether any proposal of that House would have to enjoy the support of the Government of the day if it were to have any real impact on EU legislation. Jim Murphy, the Minister of Europe, replied in the negative but warned that this 'concession' would not extend to initiating EU legislation but only to responding and objecting to it.<sup>40</sup>

Welcoming the early warning mechanism, the House of Lords' EU Committee conceded that the yellow and orange cards will seldom be invoked, but also rightly stressed that:

[T]his is true of many of the sanctions available to scrutineers in a democracy. The existence of a sanction gives scrutiny teeth, while making it less likely that the sanction will need to be deployed. The Commission can disregard adverse votes from national parliaments and maintain its proposal; but this may be politically difficult [...].<sup>41</sup>

The House of Commons' European Scrutiny Committee emphasised that, while rare, subsidiarity problems do occasionally arise.<sup>42</sup> Parliaments might also

36 European Commission, "Reforming Europe for the 21st century", COM(2007) 412, 10.7.2007, p. 5.

37 House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference", *HC 1014, 35th Report of Session 2006-07* of 9 October 2007, para. 19, p. 8. See also *ibid.*, para. 38, p. 13.

38 British Government, Foreign and Commonwealth Office, "The Reform Treaty: the British approach to the European Union Intergovernmental Conference", Cm 7174, 23.07.2007, pp. 11–12.

39 House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference: Government responses", *HC 179, First Special Report of Session 2007-08* of 17 December 2007, p. 4.

40 House of Lords, EU Committee, "Initiation of EU legislation", HL Paper 150, *Minutes of Evidence of 4 June 2008*, QQ471 and 472, Ev. p. 123.

41 House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. I: Report", *HL Paper 62-I, 10th Report of Session 2007-08* of 13 March 2008, para. 11.50, p. 244.

42 For example, the House of Commons found that the draft Decision making 2010 the European Year for combating poverty and social exclusion, proposed by the Commission in December 2007,

object to EU initiatives on the ground of sovereignty, but in such cases the early warning mechanism would not apply.<sup>43</sup> It further assessed that the possibilities offered by the early warning mechanism “add very little by way of democratic control over the Commission and the EU institutions” due to high thresholds needed to halt the Commission’s intention to proceed with a legislative proposal. If this mechanism was to have “any real utility”, the thresholds had to be much lower.<sup>44</sup> Despite these shortcomings, Lord Grenfell (Lab), the Chairman of the House of Lords’ EU Committee, reassured his fellow peers that the yellow and orange cards “enhance the direct involvement of national parliaments in EU legislative procedures”.<sup>45</sup>

Yet, in a fairly heated committee hearing, Commission Vice-President Wallström told the House of Commons that the Commission should listen to the views of national parliaments even if the number of votes did not reach the threshold.<sup>46</sup> This informal political undertaking on the part of the Commission was a product of pressure by the European Scrutiny Committee members on a range of subsidiarity-related questions, which led the Commissioner constantly to justify the extent and quality of the Union’s legislative activity. For example, when asked why the Commission unabatedly furthers initiatives that often seem remote, unnecessary and expensive, Commissioner Wallström assumed a defensive stance:

[W]e have to be more effective and spend money in a way which shows the added value of Europe. So I can only agree that you will probably find examples of this, but it does not say that we are not carrying out sort of good impact assessments, so that we are not improving things. I think we can show that we have improved

violated subsidiarity because it required the appointment of representatives of national parliaments to the National Advisory Groups for organising the Year. This prescription contravened the right of parliaments to regulate their own affairs. The House then asked the minister in charge of the matter to discuss this point with the Commission and other Member States in the Council. As a result, the problematic provision was stricken out. House of Commons, European Scrutiny Committee, “Subsidiarity, national parliaments and the Lisbon Treaty”, *HC 563, 33rd Report of Session 2007-08* of 21 October 2008, paras 29-31, pp. 9-10. As further successful invocations of subsidiarity, the British Government singled out two examples. The first one concerns tax, when Britain succeeded in arguing that the 2003 Commission proposal to abolish the British VAT zero rates on food, children’s clothing and other products was inconsistent with subsidiarity. The second one occurred in the field of labour law, when Britain successfully argued, following a 2006 Commission report to determine the steps needed to be taken in this field at the European level, that no new EU legislation was necessary. House of Lords, EU Committee, “Subsidiarity, national parliaments and the Lisbon Treaty: Government response”, *HC 197, First Special Report of Session 2008–09* of 26 January 2009, p. 3.

43 House of Commons, European Scrutiny Committee, “Subsidiarity, national parliaments and the Lisbon Treaty”, *HC 563, 33rd Report of Session 2007-08* of 21 October 2008, para. 30, pp. 10.

44 House of Commons, European Scrutiny Committee, “European Union Intergovernmental Conference”, *HC 1014, 35th Report of Session 2006-07* of 9 October 2007, para. 68, p. 23.

45 House of Lords, Debate of 5 December 2007, Vol. 696, col. 1735.

46 House of Commons, European Scrutiny Committee, “Subsidiarity, national parliaments and the Lisbon Treaty”, *HC 563, Oral evidence of 23 June 2008*, Q86, p. Ev 21.

our own impact assessment and the subsidiarity test, and this will be even better with national parliaments keeping control also over what we are doing.<sup>47</sup>

As regards the Barroso Initiative, the Commission gave a seemingly clear statement of its purpose in a hearing before the House of Lords' EU Committee. As Christian Leffler, Head of Cabinet to Commissioner Wallström, explained:

It is not an attempt to somehow circumvent established procedures, to go behind the back of the Council, of governments in the Council and enlist the support of their national parliaments, or to go behind the back of the European Parliament. It is a way of trying to offer a dialogue which will allow national parliaments to be better informed and more actively engaged at an early stage in the preparation and formation of European policy so that they are better placed to engage in the dialogue at national level with their governments [...] to make sure that they fully represent their national positions because those national positions will have been built on the input of well-informed parliaments.<sup>48</sup>

As a matter of fact, Westminster advocated the enshrinement of this broad political dialogue in the Lisbon Treaty from the very start of intergovernmental negotiations.<sup>49</sup> When this did not materialise, it was argued that the Barroso Initiative should be kept alongside the early warning mechanism, even though documents received from the Commission are “not usually used in the scrutiny process” because they only arrive shortly before the Government sends them.<sup>50</sup> Nevertheless, Lord Grenfell (Lab) stressed that the Barroso Initiative “in a certain sense could be more valuable to national parliaments than what is in the Treaty [...]”.<sup>51</sup> In addition to the Barroso Initiative, the House of Lords has also, on its own initiative, began sending to the Commission those of its reports that recommend action or restraint by the Commission, and the Commission has responded in each case.<sup>52</sup>

47 House of Commons, European Scrutiny Committee, “Subsidiarity, national parliaments and the Lisbon Treaty”, HC 563, *Oral evidence of 23 June 2008*, Q80, p. Ev 20.

48 House of Lords, EU Committee, “The EU Reform Treaty: work in progress”, *HL Paper 180, Minutes of Evidence of 19 September 2007*, Q55, pp. 14-15.

49 See the statement to that effect by Lord Grenfell (Lab) in: House of Lords, EU Committee, “Evidence from the Minister for Europe on the June European Council and the 2007 Intergovernmental Conference”, *HL Paper 142, Minutes of Evidence of 12 July 2007*, Q25, p. 6.

50 House of Lords, EU Committee, “The EU Reform Treaty: work in progress”, *HL Paper 180, 35th Report of Session 2006-07 of 1 November 2007*, paras 34 and 55, pp. 10 and 14.

51 House of Lords, EU Committee, “The Treaty of Lisbon: an impact assessment – Vol. II: Evidence”, *HL Paper 62-II, Minutes of Evidence of 6 December 2007*, Q190, p. S49.

52 House of Lords, EU Committee, “The Treaty of Lisbon: an impact assessment – Vol. I: Report”, *HL Paper 62-I, 10th Report of Session 2007-08 of 13 March 2008*, para. 11.21, p. 283. In an intervention on the floor of the House, Lord Grenfell (Lab) stated that this practice is “as yet modest”, but that the Commission’s responses are “prompt and thoughtful”. Direct correspondence is with Commission Vice-President in charge of relations with national parliaments. House of Lords, Debates of 5 December 2007, Vol. 696, col. 1734 and of 7 November 2007, Vol. 696, col. 73.

Though influence is hard to measure, this Committee received evidence from the UK Permanent Representation in Brussels that the House of Lords' reports are "well regarded" in the European Parliament, that the British Government takes them into account in formulating and developing policy, and that the Commission might be influenced "to a degree". It was duly acknowledged, however, that the voice of a single parliament, being one of many seeking to influence legislation, should not be exaggerated.<sup>53</sup> One of the suggestions that attracted attention was to concentrate on multi-annual programmes, such as Commission work programmes and policy strategies.<sup>54</sup>

## 2. Good functioning of the Union

Both Houses of the British Parliament found it rather serious that the Lisbon Treaty's provision on national parliamentary contribution to the good functioning of the Union contained the phrase "shall contribute", because this wording appeared to place a legal obligation directly on national parliaments.<sup>55</sup> They were resolute that this Treaty provision can only be understood as entitling national parliaments to act and not as obliging them to undertake any positive action. Their argument was that the British Parliament has full competence to decide whether it wishes to use the rights listed in this provision.<sup>56</sup> Any legal obligation on Westminster is out of question. In particular, two considerations ignited the concern of the House of Commons' European Scrutiny Committee: (a) national parliaments,

53 House of Lords, EU Committee, "Initiation of EU legislation", *HL Paper 150, 22nd Report of Session 2007-08* of 24 July 2008, para. 126, p. 39. When asked whether the reports of the House of Lords have impact in Brussels, Jim Murphy, the Minister for Europe, stated as an example of influence the Report on the wholesale prices of roaming charges on mobile phones: "It is now part of the established orthodoxy that your Lordships' reflections on that had an impact on the Commission, and a really effective impact". The Minister did not, however, specify what the impact consisted in. House of Lords, EU Committee, "Initiation of EU legislation", *HL Paper 150, Minutes of Evidence of 4 June 2008*, Q465, p. 122. For its part, the Commission mainly agreed with their Lordships' observations stating that they "have retained our fullest attention". See the letter by Commissioner Wallström of 30 May 2007, reproduced in: House of Lords, EU Committee, "Government and Commission responses session 2006-07", *HL Paper 199, 34th Report of Session 2007-08* of 2 December 2008, p. 78.

54 House of Lords, EU Committee, "Initiation of EU legislation", *HL Paper 150, 22nd Report of Session 2007-08* of 24 July 2008, para. 160, pp. 49. See to that effect the evidence given by Catherine Day, the Secretary General of Commission Secretariat (Q365, p. 95) and the statement by the Chairman of the Committee: "I think we would be interested to know whether there is more scope for actually influencing what proposals come forward" (Q468, p. 123) in: *ibid, Minutes of Evidence of 8 May 2008*.

55 House of Lords, EU Committee, "The EU Reform Treaty: work in progress", *HL Paper 180, 35th Report of Session 2006-07* of 1 November 2007, para. 29, p. 9; See the linguistic analysis of the "shall" in: House of Lords, EU Committee, "The Treaty of Lisbon: an impact assessment – Vol. I: Report", *HL Paper 62-I, 10th Report of Session 2007-08* of 13 March 2008, Appendix 4, p. 293.

56 House of Commons, European Scrutiny Committee, "European Union Intergovernmental Conference", *HC 1014, 35th Report of Session 2006-07* of 9 October 2007, paras 69 and 70, p. 23.

unlike the European Parliament, are not creations of the Treaties and their rights are not dependent on them; and (b) if national parliaments were to be placed under a duty to act, this would be enforceable before the Court of Justice and that would conflict with the 1688 Bill of Rights, which prevents parliamentary debates and proceedings from being questioned in any place out of Parliament.<sup>57</sup>

Besides many other parliamentarians, Gisela Stuart MEP (Lab), who was a Presidium member of and UK Parliamentary Representative to the Convention on the Future of Europe, also rejected the possibility of any EU-imposed duty on Westminster because it conflicts with parliamentary sovereignty, whereby no Parliament can bind successor Parliaments.<sup>58</sup> The same type of concern was voiced about the imperative form “shall” used in the Lisbon Treaty’s provisions providing for national parliaments to ensure compliance with the principle of subsidiarity and for the European Parliament and national parliaments jointly to determine the organisation of interparliamentary cooperation.<sup>59</sup> In response, the Government firmly assured Parliament that there was no policy intention of obliging national parliaments and that the problem was one of drafting rather than of intent.<sup>60</sup> After it had negotiated the amendment of the wording, the finally adopted Lisbon Treaty dropped the “shall” forms, albeit not in the case of interparliamentary cooperation. The House of Lords’ EU Committee then declared the matter settled, underscoring that the nature of parliamentary contribution to the Union’s good functioning is that of a “strong political obligation to take seriously” the new Lisbon Treaty powers.<sup>61</sup>

### 3. Extension of codecision

The rise in the European Parliament’s power of codecision, not least due to the transfer of the Third Pillar to the First Pillar, was embraced mainly by the Labourites and Liberal Democrats (LibDem). The Conservatives and the UK

57 House of Commons, European Scrutiny Committee, “European Union Intergovernmental Conference”, *HC 1014, 35th Report of Session 2006-07* of 9 October 2007, paras 76 and 70 (note 56), pp. 23-24. The 1688 Bill of Rights declares the freedom of speech in the following words: “That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament”.

58 House of Commons, Debate of 26 July 2007, Vol. 463, col. 1113.

59 House of Commons, European Scrutiny Committee, “European Union Intergovernmental Conference: follow-up report”, *HC 16-iii, 3rd Report of Session 2007-08* of 27 November 2007, para. 15, p. 7. See current Articles 63 TFEU and Article 9 of the Protocol on the role of national parliaments in the European Union.

60 House of Commons, European Scrutiny Committee, “European Union Intergovernmental Conference: follow-up report”, *HC 16-iii, 3rd Report of Session 2007-08* of 27 November 2007, para. 11, p. 6. See also Oral Evidence sessions of 2 October 2007 with Jim Murphy, the Minister for Europe and of 16 October 2007 with David Miliband, the Secretary of State for Foreign and Commonwealth Affairs in: *ibid.*, pp. Ev 16 *et seq.* and Ev 19 *et seq.*

61 House of Lords, EU Committee, “The Treaty of Lisbon: an impact assessment – Vol. I: Report”, *HL Paper 62-I, 10th Report of Session 2007-08* of 13 March 2008, para. 11.49, p. 244.



Independence Party (UKIP) were not as enchanted. The following two examples illustrate this very well.

In a House of Lords plenary debate preceding the European Council meeting of 13–14 December 2007, when the Heads of State and Government signed the Treaty of Lisbon, Lord Harrison (Lab) was forthright in his call that “[w]e should celebrate the extension of codecision-making [...and that] we should not hide the increasing of the democratic element of the European institutions under a bushel”.<sup>62</sup> In contrast, Lord Blackwell (Con) expressed concern about “the gradual evolution of the institutional structure of the European Union away from nation states, [which is] slowly but surely building and reinforcing the idea of democratic legitimacy exercised independently of the nation state by European-level institutions”.<sup>63</sup>

Several months later, during the House of Commons plenary debate on the European Union (Amendment) Bill held in February 2008, Labour MPs defended the standpoint that the Union’s “democratic legitimacy is improving and increasing” because directly elected MEPs gain a greater say through the extended application of codecision. The European Parliament, a consultative body in 1979, becomes “a colegislative body now, and that is a tremendous step forward in democratic terms”.<sup>64</sup> This was squarely opposed by Conservative MPs, who saw the empowerment of the European Parliament as a ‘conspiracy’ against British democracy:

The problem is that it is all part of the process of greater integration, with more centralisation and less democracy. The European Parliament is involved in certain areas of codecision, but that *only serves to lock down and contain member states’ national parliaments*. We are in the ridiculous situation of being invited to congratulate the EU on allowing national parliaments to be involved. General elections take place on a national basis, but the process of making laws is being handed over to the undemocratic procedure that I have set out. That is the system in which we are effectively imprisoned.<sup>65</sup>

Significantly, neither the Conservative nor the Labour and Liberal Democrat MPs accepted the diminution in national parliaments’ powers because of the strengthening of those of the European Parliament. The only difference is that the Labourites and

62 House of Lords, Debate of 5 December 2007, Vol. 696, col. 1764.

63 House of Lords, Debate of 5 December 2007, Vol. 696, col. 1791.

64 Interventions by Mark Hendrick MP (Lab) in: House of Commons, Debate of 26 February 2008, Vol. 472, cols. 989-990. Similarly, Lord Bach (Lab) observed that “MEPs are increasingly effective, both at raising issues of key concern – for example, climate change in recent times – and at scrutinising and improving legislation. Strengthening the European Parliament’s role increases transparency and democratic accountability”. House of Lords, Debate of 12 May 2008, Vol. 701, col. 885.

65 Intervention by William Cash MP (Con) in: House of Commons, Debate of 26 February 2008, Vol. 472, col. 990 (emphasis added). See also to this effect the statement during the same debate by his party colleague Angela Browning MP about the Lisbon Treaty: “The treaty compounds the ever-rolling forward programme of giving democratic legitimacy to the citizens’ representation through the EU Parliament, thereby bypassing more of their representation through their national parliaments” (col. 988).

Liberal Democrats espoused a two-channel scheme of European accountability, whereby EU decisions would be accounted for in both the European Parliament and national parliaments, whereas the Conservatives attached considerably less importance to the role of the European Parliament. Replying to a question by Peter Bone MP (Con) on this specific issue, Mike Gapes MP (Lab) explained:

The real question that we have as parliamentarians is how we can make the Commission and the Council of Ministers more accountable to parliaments in the 27 Member States and in the common European Parliament. It is not about centralisation or taking powers away from parliaments; if anything, it is about taking power away from unelected bureaucrats and civil servants.<sup>66</sup>

The reason why the Labourites adopted this position lies, as their member Mark Hendrick MP argued, in the principle of popular representation: “Directly elected parliaments, whether we are talking about the House of Commons or the European Parliament, contain the representatives of the people who are closest to the people”.<sup>67</sup>

Notwithstanding the European Parliament’s enhanced posture, there was a palpable consensus that the British Parliament’s performance of the constitutional function of political accountability should be preserved and burnished to accommodate the post-Lisbon decision-making environment. The House of Lords’ EU Committee corroborated this with the examples of agriculture and fisheries. It was argued that the move to codecision in these two fields in fact facilitated national parliamentary scrutiny. Namely, evidence given to Parliament by expert witnesses showed that the decisions in this field had been made opaquely, allowing agriculture ministers to operate as a “collusive club with rather little external scrutiny and in a way which was not very easy for national parliaments to get any handles on”.<sup>68</sup> With the European Parliament entering the decision-making scene, more information is expected to be available and thus domestic parliamentary scrutiny could and should be enhanced. Although one wonders whether such reasoning applies to other EU policies, the logic is clear: even the enhancement of powers of directly elected institutions entails responsibility. Effectively, the European Parliament and Westminster do not exclude each other. If the European Parliament’s increased involvement underpins that of national parliaments, then their action must be viewed as complementary and not as conflicting.

That being so, the role of national parliaments, according to Michael Connarty MP (Lab) and the Chairman of House of Commons’ European Scrutiny Committee, is not to communicate their views to the European Parliament in order

66 House of Commons, Debate of 26 February 2008, Vol. 472, col. 999.

67 House of Commons, Debate of 26 February 2008, Vol. 472, col. 1000. His fellow party member in the House of Lords, Lord Harrison seemed to concur in this assessment when he spoke of “rectifying the democratic deficit by making the European Parliament codecision-makers with the Council”. House of Lords, Debate of 1 April 2008, Vol. 700, col. 941.

68 House of Lords, EU Committee, “The Treaty of Lisbon: an impact assessment – Vol. I: Report”, *HL Paper 62-I, 10th Report of Session 2007-08* of 13 March 2008, paras 10.22 and 10.36, pp. 228 and 230.

for them to be impressed on the Commission and the Council, but to “focus on making their Governments go to the Council and agree the right thing”.<sup>69</sup> The Conservatives and Liberal Democrats share his opinion. As David Heathcoat-Amory MP (Con) stressed, “[t]he parliaments’ loss of powers is shown by the massive switch to qualified majority voting, which practically removes the veto powers of this House over such legislation”.<sup>70</sup> For Lord Teverson (LibDem), holding ministers to account for their activity in the Council is “a key way in which national parliaments can control the European Union and it is a very powerful way if they do it properly”.<sup>71</sup>

The accountability role of national parliaments was specifically underlined in the field of Common Foreign and Security Policy, where the European Parliament does not codecide with the Council. Lord Roper (LibDem), the Chairman of Subcommittee C on Foreign Affairs, Defence and Development Policy of the House of Lords’ EU Committee describes this in the following words:

I was pleased that in his introduction, the noble Lord, Lord Bowness, referred to *the presence of the High Representative and the Commissioner for External Relations at the biennial meetings of COFAC*, the meeting bringing together the foreign affairs chairmen of the national parliaments. Their presence gives a reality to those meetings and *ensures that they are held to account by the national parliaments*. That is important because, in these areas of intergovernmental cooperation, *the national parliaments have particular responsibility*.<sup>72</sup>

In a recent statement, the Government concurred in this position declaring that “[g]iven the intergovernmental nature of the EU’s Common Security and Defence Policy, we believe that this remains entirely a matter for national parliaments and coordination between them. There is no reason and no case for the European Parliament to expand its competence in this area”.<sup>73</sup>

Though primary, the political accountability of the Government is not the only and exclusive concern of the British Parliament. The accountability of the Commission is, according to Lord Astor of Hever (Con) also pertinent because:

In nation states, that power [of legislative initiative] normally belongs to elected governments, who change as voters decide. No such limit exists for the Commission. This explains why dossiers tend to keep being pushed until the other European institutions accept them. [...] Yet perhaps the unhappy disconnect between bottom-up democracy and the need for the Commission to act impartially in the general European interest is irreconcilable. If so, it

69 House of Commons, Debate of 11 December 2007, Vol. 469, col. 210.

70 House of Commons, Debate of 4 March 2008, Vol. 472, col. 1626.

71 House of Lords, Debate of 1 April 2008, Vol. 700, col. 1010.

72 House of Lords, Debate of 8 February 2007, Vol. 689, col. 860 (emphasis added).

73 See written statement by the Minister of State, Foreign and Commonwealth Office, Baroness Kinnock of Holyhead in: House of Lords, 30 March 2010, Vol. 718, col. WS225.

makes it all the more important that national parliamentarians are scrupulous in holding this power to account and making sure that scrutiny is maintained to the utmost level.<sup>74</sup>

Finally, the increasing trend in the Union towards ‘first reading deals’ alerted the House of Lords, because this practice of speedy decision making affects scrutiny of EU policy, which should not be overshadowed by the policing of subsidiarity.<sup>75</sup>

## V France: a founder with unabated zeal

France ratified the Lisbon Treaty on 14 February 2008.<sup>76</sup> Just as the Maastricht Treaty, the Lisbon Treaty had been ruled partially unconstitutional by the abovementioned *Conseil constitutionnel*'s decision of 20 December 2007. The Constitution was amended along the lines of this decision on 4 February 2008. The Houses of Parliament then swiftly proceeded to authorise the ratification of the Lisbon Treaty on 7 February 2008. Below we analyse the parliamentary proceedings that took place during the ratification approval process.

### 1. Subsidiarity monitoring

For the *Assemblée nationale*, the principle of subsidiarity is a prime factor of EU legitimacy:

The respect for the principle of subsidiarity realises the expectation of ‘added value’, expressed by many European citizens with regard to the European Union. The latter must act in the domains where its intervention brings a supplement of efficiency and solidarity. *It draws its legitimacy precisely from such action.* The capacity of European institutions to prove the necessity of their action depends, thus, on the respect for the principle of subsidiarity.<sup>77</sup>

To entrust EU institutions alone with the control of subsidiarity would be “illusory”, because a strict interpretation of subsidiarity could reduce the scope of their action and thus jeopardise their institutional interests.<sup>78</sup> As regards reasoned

74 House of Lords, Debate of 12 December 2008, Vol. 706, col. 601.

75 House of Lords, EU Committee, “The Treaty of Lisbon: an impact assessment – Vol. I: Report”, *HL Paper 62-I, 10th Report of Session 2007-08* of 13 March 2008, paras 11.53 and 11.57, p. 245.

76 See [http://europa.eu/lisbon\\_treaty/countries/index\\_en.htm](http://europa.eu/lisbon_treaty/countries/index_en.htm), accessed on 24 September 2010.

77 *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 84 (emphasis added).

78 *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 85. See also Sauron, Jean-Luc. “La mise en œuvre retardée du principe de subsidiarité,” *Revue du Marche Commun*, No. 423, 1998: 650.

opinions, they “will have real legal impact” since they may contribute to the blocking of a certain EU initiative.<sup>79</sup> Yet, as senator Jean-Luc Mélenchon, member of *Parti de gauche* (PG) warned, nine Member States must join forces to effect the blockage, while national parliaments are denied the right of amendment.<sup>80</sup>

Subsidiarity actions before the European Court of Justice were understood as a prerogative of Parliament. According to a statement made in 2005 by Dominique Perben, former French Minister of Justice, the Government could “neither oppose nor be compelled to comply” with a request to transmit these actions to the Court of Justice.<sup>81</sup> To the contrary, the *Assemblée nationale* interpreted subsidiarity actions as a “binding competence”.<sup>82</sup> Yet the consensus within the ruling *Union pour un Mouvement Populaire* (UMP) was not watertight. For instance, their MP Jacques Myard asserted that reasoned opinions and subsidiarity actions are a negation of national sovereignty, because the *Assemblée nationale*, as a sovereign assembly, is authorised merely to give non-binding opinions and is further subjugated to the Court of Justice over a principle that is political rather than juridical in nature.<sup>83</sup> However, the European Affairs Committee of the *Assemblée nationale* has rightly maintained that the real impact of Parliament’s opinions lies in their political weight rather than in their legal nature.<sup>84</sup>

In the *Sénat*, the fact that national parliaments were recognised as petitioners before the Court of Justice was seen as a grand innovation of the Lisbon Treaty.<sup>85</sup> More broadly, as senator Hubert Haenel (UMP), the Chairman of the *Sénat*’s European Affairs Committee, pointed out:

The role of parliaments will *no longer be only to control the European action of their governments [...] They will intervene in the European decision-making process itself* to ensure that the Union respects the famous principle of subsidiarity and responds thereby to the preoccupation expressed at the last referendum: Europe does too much or does it poorly.<sup>86</sup>

79 *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 91.

80 *Sénat, Compte rendu intégral, Séance du mardi 29 janvier 2008, 57e jour de séance de la session ordinaire 2007–2008*, JORF [2008], S. (C.R.) 10, 30.1.2008, p. 649. See more on the number of votes required for different stages of the early warning mechanism in: Jančić, Davor. “A new organ of the European Union: ‘National Parliaments Jointly,’” *The Federal Trust for Education and Research, London, Policy Commentary*, February 2008.

81 *Assemblée nationale, Compte rendu intégral, 2e séance du mardi 25 janvier 2005, 123e séance de la session ordinaire 2004–2005*, JORF [2005], A.N. (C.R.) 4[2], 26.1.2005, p. 304.

82 *Assemblée nationale, Commission des affaires étrangères, Avis no. 563 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 8 January 2008, rapporteur Hervé de Charette (UMP), p. 30.

83 *Assemblée nationale, Compte rendu intégral, 3e séance du mardi 15 janvier 2008, 99e séance de la session ordinaire 2007–2008*, JORF [2008], A.N. (C.R.) 4[3], 16.1.2008, pp. 231–232.

84 *Assemblée nationale, Délégation pour l’Union européenne, Rapport no. 562 sur le traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 107. Media publicity of parliamentary opinions is also a factor of their political weight.

85 *Sénat, Commission des lois, Rapport no. 175 sur le projet de loi constitutionnelle, adopté par l’Assemblée nationale, modifiant le titre XV de la Constitution* of 23 January 2008, rapporteur Patrice Gérard (UMP), p. 53.

86 *Sénat, Compte rendu intégral, Séance du mardi 29 janvier 2008, 57e jour de séance de la session ordinaire 2007–2008*, JORF [2008], S. (C.R.) 10, 30.1.2008, p. 604 (emphasis added).

He, nevertheless, regretted that the field of defence, where the Union is beginning to affirm itself, escaped democratic control of both national and European parliamentarians.<sup>87</sup> In this respect, Jean-Pierre Jouyet, the Secretary of State for European Affairs, confirmed that the ‘Europe of Defence’ is essentially intergovernmental and as such rests with the Member States, but stressed that it “will naturally be subject to the control of national parliaments”.<sup>88</sup>

Similarly to Haenel, Jean-Pierre Bel, a senator of the Socialist Party (PS), argued that for citizens to grasp European integration, Parliament needs to exercise full control over the principle of subsidiarity “with respect to the Commission and the Government”.<sup>89</sup> In fact, the direct link between national parliaments and EU institutions, formally established for the first time in the Lisbon Treaty, is a “notable progress, which means that the European Union recognises national parliaments as such, in the same way as the governments of the Member States”.<sup>90</sup> An observation made by Denis Badré, a senator of the *Mouvement démocrate* (MoDem) and member of the *Union Centriste* group, during a discussion on national parliaments in the *Sénat’s* European Affairs Committee, elucidated the meaning of subsidiarity control for the constitutional relations in France:

As for subsidiarity, we have after all managed to play our role, although it was not in our political culture to allow a direct dialogue between Parliament and an institution of the Union: hitherto everything had to pass through the Government. This proves that we can unlock our system without undermining the columns of the temple.<sup>91</sup>

This evolution should have immediate positive repercussions at the national level not least because, as senator Charles Josselin (PS) held, what cumpers the transposition process is above all Parliament’s exclusion from the process of preparing EU law.<sup>92</sup>

In the *Assemblée nationale*, the Barroso Initiative,<sup>93</sup> which enables a political dialogue between the Commission and national parliaments beyond the narrow

87 *Sénat, Compte rendu intégral, Séance du jeudi 7 février 2008, 62e jour de séance de la session ordinaire 2007-2008, JORF [2008], S. (C.R.) 15, 8.2.2008, p. 1072.*

88 *Sénat, Compte rendu intégral, Séance du jeudi 7 février 2008, 62e jour de séance de la session ordinaire 2007-2008, JORF [2008], S. (C.R.) 15, 8.2.2008, p. 1087.*

89 *Sénat, Compte rendu intégral, Séance du mardi 29 janvier 2008, 57e jour de séance de la session ordinaire 2007-2008, JORF [2008], S. (C.R.) 10, 30.1.2008, p. 605.*

90 *Assemblée nationale, Rapport no. 691 sur le projet de loi autorisant la ratification du traité de Lisbonne* of 6 February 2008, rapporteur Hervé de Charette (UMP), p. 26.

91 *Sénat, Délégation pour l’Union européenne, Rapport no. 393 les parlements nationaux et l’Union européenne après le traité de Lisbonne* of 12 June 2008, rapporteur Hubert Haenel (UMP), pp. 21-22.

92 *Sénat, Compte rendu intégral, Séance du mardi 29 janvier 2008, 57e jour de séance de la session ordinaire 2007-2008, JORF [2008], S. (C.R.) 10, 30.1.2008, p. 649.*

93 See more about this arrangement in: Jančić, Davor. “The Barroso Initiative: window dressing or democracy boost?” *Utrecht Law Review, Vol. 8, No. 1, 2012: 78-91.*

confines of subsidiarity, was deemed “not at all comparable” with the early warning mechanism, chiefly because of its informal character and lack of legal effect.<sup>94</sup> Nevertheless, the Chairman of the European Affairs Committee, Pierre Lequiller MP (UMP), praised the success of the political dialogue with the Commission, stating that: “We will exercise this control of subsidiarity not in a niggling way, but positively, in order to guarantee that Europe makes a real added value”.<sup>95</sup> In a report on the Lisbon Treaty that he prepared, he underlined that Parliament’s more resolved *ex ante* engagement in subsidiarity control would pre-empt Eurosceptics’ contestation of EU decisions to the extent that these decisions would receive prior parliamentary validation.<sup>96</sup> The *Sénat*, moreover, urged the political dialogue to continue to run in parallel with the early warning mechanism.<sup>97</sup>

## 2. Good functioning of the Union

The Committee of Laws of the *Assemblée nationale* assessed that the contribution of national parliaments to the good functioning of the Union was particularly underscored in the control of subsidiarity.<sup>98</sup> Yet Jean-Luc Warsmann MP (UMP), the Chairman of this Committee and rapporteur for the constitutional amendment that had been necessary before Parliament could authorise the ratification of the Lisbon Treaty, recalled that the French Parliament, just as its counterparts in other Member States, did not wait for this Treaty provision to establish procedures for the monitoring of EU decision making, but that they had been developed regardless of the Lisbon Treaty.<sup>99</sup> The Foreign Affairs Committee of the *Assemblée nationale* held that national parliaments “must contribute, in their own way, to further politicise the institutional functioning of the Union”, not merely by participating in conventions aimed at amending the founding treaties but also in areas where the Union has barely made any progress, such as fiscal harmonisation, European budget, social Europe, etc.<sup>100</sup> Such contribution would consist in providing political clarifications and opening new horizons of reform, not least through *ad hoc* conventions.<sup>101</sup>

94 *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), pp. 49 and 87.

95 *Assemblée nationale, Compte rendu intégral, 2e séance du mardi 11 décembre 2007, 80e séance de la session ordinaire 2007–2008, JORF [2007], A.N. (C.R.) 79[2], 12.12.2007, p. 5189.*

96 *Assemblée nationale, Délégation pour l’Union européenne, Rapport no. 562 sur le traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 112.

97 *Sénat, Commission des lois, Rapport no. 175 sur le projet de loi constitutionnelle, adopté par l’Assemblée nationale, modifiant le titre XV de la Constitution* of 23 January 2008, rapporteur Patrice Gélard (UMP), p. 52.

98 *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 48.

99 *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 78.

100 *Assemblée nationale, Rapport no. 691 sur le projet de loi autorisant la ratification du traité de Lisbonne* of 6 February 2008, rapporteur Hervé de Charette (UMP), p. 27.

101 *Assemblée nationale, Rapport no. 691 sur le projet de loi autorisant la ratification du traité de Lisbonne* of 6 February 2008, rapporteur Hervé de Charette (UMP), p. 28.

The *Sénat's* European Affairs Committee argued that, while the primary goal of the Lisbon Treaty's provision on national parliamentary contribution to the good functioning of the Union is to regroup symbolically the provisions on national parliaments, it also serves as a recognition of the collective dimension of the role of national parliaments within the EU, i.e. of the cooperation between national parliaments and the European Parliament.<sup>102</sup>

### 3. Extension of codecision

In the view of the Foreign Affairs Committee of the *Assemblée nationale*, both the extension of powers of the European Parliament and the introduction of those of national parliaments contribute to the reduction of the democratic deficit.<sup>103</sup> A salient feature of depillarisation is that it extends the scope of subsidiarity jurisdiction of the Court of Justice, and, consequently, also of the national parliaments' right of recourse.<sup>104</sup> Pierre Lequiller MP (UMP), the Chairman of the European Affairs Committee of the *Assemblée nationale*, stressed that "the European Parliament and national parliaments can, thanks to the Lisbon Treaty, jointly play an irreplaceable role in laying the democratic foundations of Europe".<sup>105</sup> In a joint meeting of the *Assemblée nationale*, *Sénat* and the European Parliament, Hans-Gert Pöttering, the President of the European Parliament, assured the gathering that national parliaments and the European parliament are not competitors, but that they serve the democracy and unity of the continent together.<sup>106</sup> There is, hence, a

102 *Sénat, Délégation pour l'Union européenne, Rapport no. 76 sur le Traité de Lisbonne* of 8 November 2007, rapporteur Hubert Haenel (UMP), p. 20; *Sénat, Commission des affaires européennes*, Report no. 24 on the development of the Senate's European role of 8 October 2009, rapporteur Hubert Haenel (UMP), p. 6; *Sénat, Délégation pour l'Union européenne, Rapport no. 393 les parlements nationaux: et l'Union européenne après le traité de Lisbonne* of 12 June 2008, rapporteur Hubert Haenel (UMP), p. 13.

103 *Assemblée nationale, Rapport no. 691 sur le projet de loi autorisant la ratification du traité de Lisbonne* of 6 February 2008, rapporteur Hervé de Charette (UMP), p. 19. See also the interventions by François de Rugy (*Les Verts*) in: *Assemblée nationale, Compte rendu intégral, 2e séance du mercredi 6 février 2008, 118e séance de la session ordinaire 2007-2008*, JORF [2008], A.N. (C.R.) 13[2], 7.2.2008, p. 16; by Nicole Ameline (UMP) in: *Assemblée nationale, Compte rendu intégral, 1e séance du jeudi 7 février 2008, 119e séance de la session ordinaire 2007-2008*, JORF [2008], A.N. (C.R.) 14, 8.2.2008, p. 828; and by Élisabeth Guigou (PS), former deputy French Minister for European Affairs and later MEP, in: *Assemblée nationale, Compte rendu intégral, 1e séance du jeudi 7 février 2008, 119e séance de la session ordinaire 2007-2008*, JORF [2008], A.N. (C.R.) 14, 8.2.2008, p. 831; and by senators Josselin de Rohan (UMP), the Chairman of the Committee for Foreign Affairs, Defence and Armed Forces (p. 1066) and his party colleague Jean Bizet (p. 1082), in: *Sénat, Compte rendu intégral, Séance du jeudi 7 février 2008, 62e jour de séance de la session ordinaire 2007-2008*, JORF [2008], S. (C.R.) 15, 8.2.2008.

104 *Assemblée nationale, Commission des lois, Rapport no. 568 sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution* of 9 January 2008, rapporteur Jean-Luc Warsmann (UMP), p. 93.

105 *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 140, Réunion conjointe avec la Commission des affaires européennes du Sénat et avec les membres français du Parlement européen, mardi 16 février 2010*, p. 9.

106 *Assemblée nationale, Délégation pour l'Union européenne, Compte rendu no. 54, Rencontre des Délégations pour l'Union européenne de l'Assemblée nationale et du Sénat avec la Conférence des présidents des groupes politiques du Parlement européen, mercredi 25 juin 2008*, p. 4.



considerable degree of agreement that the European and French parliaments fulfill mutually complementing constitutional functions and that the French Parliament is, therefore, called upon to intervene not only where the European Parliament lacks powers of decision, but also where it possesses them.

Further, Jean-Luc Warsmann MP (UMP) gave an important interpretation of the meaning of post-Lisbon relations between France and EU institutions for EU decision making:

In revising our Constitution [...] we will facilitate decision making in the European institutions by accepting more widely than in the past the principle of qualified majority and the full participation of the European Parliament in the decision-making process. [...] The legal orders of the [Member] States and the European Union improve each other [...] and] the European legal order, while remaining distinct from our internal legal order, both enriches and reinforces it.<sup>107</sup>

By the same token, Axel Poniatowski MP (UMP), the Chairman of the Foreign Affairs Committee of the *Assemblée nationale*, held that “the recognition of the legislative role of the European Parliament is a significant progress towards a more democratic Europe. It is also an essential condition for the development of EU politics, which our citizens are calling for”.<sup>108</sup> Representing the *Nouveau Centre*, Francois Sauvadet MP welcomed the strengthening of rights of both the European Parliament and national parliaments.<sup>109</sup> Not all the opposition was as optimistic, however. For Pierre Moscovici MP (PS), “national parliaments become empty shells, endowed with a single right, that of protesting. Meanwhile, the European Parliament no longer strives to represent ‘the peoples of the States’ but a perfectly mythical European people. National parliaments without powers, a European parliament without a people: the democracy is being murdered”.<sup>110</sup> Michel Vaxès MP (PCF) criticised the negative nature of parliamentary rights, because they are directed at curtailing rather than initiating EU action.<sup>111</sup> There were dissenting voices in the governing UMP, too. Jacques Myard MP, for example, asked the Government how it was possible to transfer dozens of competences to the Union, therewith taking

107 *Assemblée nationale, Compte rendu intégral, 2e séance du mardi 15 janvier 2008, 98e séance de la session ordinaire 2007–2008, JORF [2008], A.N. (C.R.) 4[2], 16.1.2008, p. 194.*

108 *Assemblée nationale, Compte rendu intégral, 2e séance du mardi 15 janvier 2008, 98e séance de la session ordinaire 2007–2008, JORF [2008], A.N. (C.R.) 4[2], 16.1.2008, p. 197.*

109 *Congres du Parlement, Compte rendu intégral, Séance du lundi 4 février 2008, JORF [2008], 5.2.2008, p. 9.* The same was argued by his party colleague in the *Sénat*, Pierre Fauchon. See *ibid*, p. 8.

110 *Assemblée nationale, Compte rendu intégral, 3e séance du mardi 15 janvier 2008, 99e séance de la session ordinaire 2007–2008, JORF [2008], A.N. (C.R.) 4[3], 16.1.2008, p. 227.*

111 *Assemblée nationale, Compte rendu intégral, 3e séance du mardi 15 janvier 2008, 99e séance de la session ordinaire 2007–2008, JORF [2008], A.N. (C.R.) 4[3], 16.1.2008, p. 238.* The same argument was used by his party colleague in the *Sénat*, Robert Bret. See *Sénat, Compte rendu intégral, Séance du mardi 29 janvier 2008, 57e jour de séance de la session ordinaire 2007-2008, JORF [2008], S. (C.R.) 10, 30.1.2008, pp. 610 and 644.*

them away from the French Parliament, and in the same time enhance the powers of that same Parliament.<sup>112</sup> Nonetheless, the Foreign Affairs Committee of the *Assemblée nationale* warned national parliaments against taking refuge in an opposition role, because the Lisbon Treaty gives national parliamentarians a political role without putting them in competition with MEPs.<sup>113</sup>

Finally, the French parliamentary approval of the Lisbon Treaty is perhaps encapsulated by the *Assemblée nationale*'s caveat that: "The quality of the contribution of a Member State to the building of the policy of the Union is very significantly linked to the strength of its Parliament's involvement in European affairs".<sup>114</sup> National parliaments are the best intermediaries between the EU and the citizens and the most disposed forum for the politicisation of European issues.<sup>115</sup>

## VI Conclusion: learning to play the monist game?

The present survey of the national parliamentary reception of the key new prerogatives introduced by the Lisbon Treaty showcases a latent evolution of their role in the intricate processes of policy and decision making of the European Union. A constitutional revolution did not occur. The Government of the day is the central target of political accountability and the pivotal element in the parliamentary scrutiny puzzle. Yet there is considerable evidence that, in spite of the variety of their constitutional bedrocks, parliaments are being gradually drawn within the Union's constitutional space.

The British Parliament's traditional forethoughtfulness translates as prudence better than as wariness. The usefulness of the early warning mechanism for the principle of subsidiarity, otherwise not winning the hearts of MPs and peers, was closely related to the possibility of acting autonomously from the Government. While addressing the results of their European scrutiny to the national government, both Houses of Parliament, and the House of Lords in particular, take due account of the actions performed by EU institutions. Influencing the European legislative process does not reside outside Westminster's European scrutiny formula. Quite frequently, information and informal non-binding commitments are secured not only from the Government but also from EU institutions directly during evidence sessions, hearings or other means of correspondence. These findings are indicative

112 *Assemblée nationale, Compte rendu intégral, 3e séance du mardi 15 janvier 2008, 99e séance de la session ordinaire 2007-2008, JORF* [2008], A.N. (C.R.) 4[3], 16.1.2008, p. 231.

113 *Assemblée nationale, Rapport no. 691 sur le projet de loi autorisant la ratification du traité de Lisbonne* of 6 February 2008, rapporteur Hervé de Charette (UMP), p. 27.

114 *Assemblée nationale, Délégation pour l'Union européenne, Rapport no. 562 sur le traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 107.

115 *Assemblée nationale, Délégation pour l'Union européenne, Rapport no. 562 sur le traité de Lisbonne: Tome 1* of 8 January 2008, rapporteur Pierre Lequiller (UMP), p. 108–109.

of Westminster's positive attitude towards acting as EU agents, despite the view generally held by the political parties that the Government is the main addressee of Parliament's democratic supervision. Yet certain aspects demonstrate the contrary. To wit, any parliamentary contribution to the good functioning of the Union as a legal obligation was resolutely outlawed and endorsed only as a political obligation. This means that even though the British Parliament did not oppose such contribution, it did oppose any possible intrusion by the Union in national constitutional matters. The rise of the European Parliament through the extension of codecision divided political parties into two camps, with the Labour and Liberal Democrats welcoming it and the Conservatives and UK Independence Party rejecting it. There was hence no consensus on the democratic profile of the European Parliament. Westminster Parliament was therefore not too enamoured with the idea of role-splitting and acting on behalf of the EU.

In the French Parliament, the MPs and senators expressed a firm understanding that the respect for the principle of subsidiarity is directly linked with the legitimacy of EU action. This is understandable not least in light of the negative outcome of the 2005 referendum on the Constitutional Treaty. Both the *Assemblée nationale* and the *Sénat* are thus fully aware of the need to immerse themselves more deeply into the 'mission' of democratic legitimisation of EU activities. The French Parliament recurrently saw the EU's call for its contribution to the good functioning of the Union as necessitating a further bottom-up politicisation of the EU policy-shaping process, in which it would play an active role as the institution most well-placed to bridge the gap between the EU and the citizens. For the majority of the parliamentarians, the Lisbon Treaty is indeed the affirmation that their status of popular representatives is relevant for a cause that is broader than their own state. Similarly, there was a sizeable consensus that the extension of codecision was essential to the Union's democratic development. As one parliamentarian argued, it is possible to 'unlock' the national legal and political order without causing the 'temple' to founder. In other words, Parliament can split its roles and be an EU agent too.

On the basis of the foregoing, we conclude that, with the Lisbon Treaty in force, the European Union has begun an experimental period of ground testing, whereby national parliaments are invited to perform constitutional functions within a more profoundly interwoven European democratic realm.

The analysis shows that the attitudes of national parliaments towards the EU were strongly inspired by the constitutional contexts in which they were established. The United Kingdom's dualist approach to international law and its doctrine of parliamentary sovereignty can easily be traced in the approval debates on the Lisbon Treaty. These two tenets were the main source of reservation among parliamentarians towards a more agile participation directly within the EU. In contrast to this, the French Parliament saw the EU as an opportunity for its own 'de-rationalisation' and power expansion. France's monist approach to international law catalyses its parliament's greater openness towards institutional agency in relation to the Union. This is also the reason why the French Parliament was more prone to accept EU institutions as partners within a single constitutional compound.

In summary, we conclude that the EU's decades-long progress has turned it into an essentially monist construct in which there are no barriers between the legal orders of the EU and the Member States. However, despite this legal borderlessness, monist and dualist reasonings inspire and underlie the way in which national parliaments approach EU affairs. The functions inherent to parliaments as constitutional actors are to a significant extent prefigured by their domestic constitutional settings, which determine the degree to which they are willing to split their roles and act as agents of the European Union. The inclusion of national parliaments within the EU umbrella therefore occurs on domestic constitutional terms. This in turn means that the ideal of unmarred monism so much coveted by the EU remains subject to the Member States' desire to shield their core constitutional processes and keep them in a form that reflects their legal and political traditions.

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