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# The French Parliament: A European Scrutineer or National Actor?

Davor JANČIĆ\*

*With the Treaty of Lisbon in force, the expectation for national parliaments to democratize EU decision making has risen tangibly. This raises the question of the relationship between them and the European Parliament, as two channels of EU legitimation. The main argument of this article is that, in circumstances of high political salience of EU initiatives, national parliaments can be deemed to be European actors, performing their constitutional functions within a broader EU legal order as direct counterparts of EU institutions. To demonstrate this, we delve into the French Parliament's scrutiny of the Services Directive and the European External Action Service Decision, both of which have sparked strong reactions in many parliamentary corners of Europe. We focus on the role perceptions of the French MPs and senators in their ex ante monitoring of these two dossiers. The analysis reveals that political control is not always directed only at the Government, but that EU institutions can be addressees of national parliamentary scrutiny.*

## 1 INTRODUCTION

### 1.1 NATIONAL PARLIAMENTS PAVING THEIR WAY TO THE EU ARENA: A PRICKLY JOURNEY

Ever since the Maastricht Treaty, the fear of a double democratic deficit loomed large and became palpable due to the far-reaching transfer of competences from the Member States to the Union.<sup>1</sup> Both the European and domestic parliaments were to a considerable extent debarred from exerting substantial influence on EU

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<sup>1</sup> Laprat, Gérard, *Réforme des traités: le risque du double déficit démocratique. Les parlements nationaux et l'élaboration de la norme communautaire*, 351 *Revue du Marché Commun et de l'Union Européenne* 710-721 (1991); Quinty, Danièle & Joly, Gilles, *Le rôle des parlements européen et nationaux dans la fonction législative*, 107 *Revue du Droit Public* 393-436 (1991).

decisions *ex ante*, i.e., prior to their enactment.<sup>2</sup> The bringing of national parliaments under the EU umbrella was thus catapulted into prominence. As Judge has rightly warned, domestic legislatures, as long-standing public law bodies directly elected by the citizens, furnished the ultimate legitimation frame of European integration, since most Member States may only ratify a founding or amending EU Treaty after their national parliament has approved such a course of action.<sup>3</sup>

The situation culminated with the Lisbon Treaty, which found a pragmatic solution to the problem of parliamentary decline in Europe.<sup>4</sup> National parliaments were given a set of powers that enable them to participate in the shaping of EU policies without jeopardizing the institutional balance between EU institutions.<sup>5</sup> The most important in this respect is the competence of subsidiarity policing through the early warning system, which empowers national parliaments to submit reasoned opinions to the Commission, the Council and the European Parliament where an EU initiative is considered to be in breach of the subsidiarity principle.<sup>6</sup> An informal but broader mechanism dubbed the ‘Barroso Initiative’ complements

<sup>2</sup> Although codecision was introduced as a new legislative procedure, it applied neither to all Community fields nor to the Second and Third Pillars.

<sup>3</sup> Judge, David, *The Failure of National Parliaments?*, 18(3) W. Eur. Pol. 79–100 (1995).

<sup>4</sup> *National Parliaments on their Ways to Europe: Losers or Latecomers?* (Maurer, Andreas & Wessels, Wolfgang eds., Nomos Verlagsgesellschaft 2001); Chrysochoou, Dimitris et al., *European Democracy, Parliamentary Decline and the ‘Democratic Deficit’ of the European Union*, 4(3) J. Legis. Stud. 109–129 (1998); Norton, Philip, *Does Parliament matter?* (Harvester Wheatsheaf 1993); Pélassy, Dominique, *The Evolving Role of Parliaments in Europe*, 55–71 (Flinterman, Cees et al. eds., Maklu Uitgevers 1994).

<sup>5</sup> See for instance: Casalena, Pier Giorgio, *The Role of National Parliaments in the Lisbon Treaty*, 1(3) Teoria del Diritto e dello Stato: Rivista Europea di Cultura e Scienza Giuridica, 348–361 (2008); Cygan, Adam, *European Union Law for the Twenty-First Century: Rethinking the New Legal Order Vol. I* 153–169 (Tridimas, Takis ed., Hart 2004). Delcamp, Alain, *Les parlements nationaux et l’Union européenne: de la reconnaissance à l’engagement*, 544 Revue du Marché Commun et de l’Union Européenne 7–12 (2011); Gennart, Martin, *Les parlements nationaux dans le Traité de Lisbonne: évolution ou révolution*, 46(1–2) Cahiers de Droit Européen 17–46 (2010); *National Parliaments within the Enlarged European Union: From Victims of Integration to Competitive Actors?* (O’Brennan, John & Raunio, Tapio eds., Routledge 2007); Passos, Ricardo, *Recent Developments Concerning the Role of National Parliaments in the European Union*, 9(1) ERA Forum 25–40 (April 2008); *National Parliaments and European Democracy: A Bottom-up Approach to European Constitutionalism* (Tans, Olaf et al. eds., Europa Law Publishing, 2008).

<sup>6</sup> See different perspectives in: Cygan, Adam, *National Parliaments within the EU Polity – No Longer Losers but Hardly Victorious*, 12(4) ERA Forum 517–533 (2012); Kiiiver, Philipp, *The Conduct of Subsidiarity Checks of EU Legislative Proposals By National Parliaments: Analysis, Observations and Practical Recommendation*, 12(4) ERA Forum 535–547 (2012); Kiiiver, Philipp, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge, 2012); Bermann, George, *The Lisbon Treaty: The Irish ‘No’. National Parliaments and Subsidiarity: an Outsider’s View*, 4(3) Eur. Const. L. Rev. 453–459 (2008); Cooper, Ian, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44(2) J. Com. Mkt. Stud. 281–304 (2006); Kiiiver, Philipp, *The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity*, Maastricht J. Eur. & Comp. L. 77–83 (2008); Louis, Jean-Victor, *The Lisbon Treaty: The Irish ‘No’. National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits*, 4(3) Eur. Const. L. Rev. 429–452 (2008); Wyatt, Derrick, *Could a ‘Yellow Card’ for National Parliaments Strengthen Judicial and Political Policing of Subsidiarity?*, 2 Croatian Y.B. Eur. L. & Policy 1–17 (2006).

the early warning system insofar as national parliaments may enter into a political dialogue with the Commission and submit their reactions to it not only regarding subsidiarity but also regarding the legal basis, proportionality or any other political consideration flowing from an EU initiative that might affect the national or regional interests of the Member State in question.<sup>7</sup> Through these fledgling mechanisms of cross-level institutional cooperation national parliaments become ‘not only national but also “European” bodies, occupying a position formally independent from the will of the State as expressed by the Government’.<sup>8</sup> This is what can be understood as their European mandate.<sup>9</sup>

The French scholarly debate in this area revolved around Article 88-4 of the Constitution and its implications for the restructuring of the relations between the executive and the legislature.<sup>10</sup> This process resulted in a strengthening of Parliament at the expense of the Government and forms part of a more comprehensive endeavour to mitigate the so-called *parlementarisme rationalisé*, the cardinal concept on which the French Fifth Republic was erected.<sup>11</sup> This concept was devised by President Charles de Gaulle and Prime Minister Michel Debré in order to put fetters on the omnipotent Parliaments of the Third and Fourth Republics and to entrench the pre-eminence of the executive branch in French politics.<sup>12</sup>

<sup>7</sup> See more on this mechanism and the differentiation between it and the early warning system in: Jančić, Davor, *The Barroso Initiative: Window Dressing or Democracy Boost?*, 8(1) Utrecht L. Rev. 78–91 (2012).

<sup>8</sup> Bilancia, Paola, *The Role and Power of European and National Parliaments in the Dynamics of Integration*, 19(2) Rivista Italiana di Diritto Pubblico Comunitario 282 (2009).

<sup>9</sup> Senden, Linda & Vandamme, Thomas, *Het Verdrag van Lissabon en het Europese mandaat van nationale parlementen*, 1 SEW Tijdschrift voor Europees en Economisch Recht 21–27 (2009).

<sup>10</sup> See comprehensive analyses in: Fuchs-Cessot, Alice, *Le Parlement à l'épreuve de l'Europe et de la V<sup>e</sup> République* (Librairie Générale de Droit et de Jurisprudence, 2004); Nuttens, Jean-Dominique, *Le Parlement français et l'Europe: l'article 88-4 de la Constitution* (Librairie générale de droit et de jurisprudence 2001); Roussillon, Henry (ed.), *L'article 88-4 de la Constitution française: le rôle du parlement dans l'élaboration de la norme européenne* (Presses de l'Université des Sciences Sociales de Toulouse, 1995); Saulnier, Emmanuelle, *La participation des parlements français et britannique aux Communautés et à l'Union européenne* (Librairie Générale de Droit et de Jurisprudence 2002); Culot, Marc, *La place du parlement national dans l'Union Européenne: étude comparée entre la France et le Danemark*, 56(3) Revue Internationale de Droit Comparé 677–683 (2004).

<sup>11</sup> See further in: Avril, Pierre, *Le parlementarisme rationalisé*, 114(5–6) Revue du Droit Public 1507–1515 (1998); Pezant, Jean-Louis, *Mélanges en l'honneur de Pierre Avril: la République* 465–479 (Montchrestien, 2001).

<sup>12</sup> As Michel Debré, the first Prime Minister of the Fifth Republic, pointed out on Aug. 27, 1958 in his speech on the constitutional draft before the *Conseil d'État*: '[I]n France, governmental stability cannot result primarily from electoral law, it should result at least partially from constitutional regulation [...] through four types of measures: (a) a strict regime of sessions; (b) an effort to define the legislative domain; (c) a profound reorganization of the legislative procedure; and (d) an adjustment of the legal mechanisms indispensable for the balance and good operation of the political offices'. Avril, Pierre & Gicquel, Jean, *Droit parlementaire* 5 (Montchrestien, 2004).

With the July 2008 balancing of the political institutions,<sup>13</sup> time was ripe to upgrade the ‘European’ status of Parliament, which had for long been prejudiced by meagre formal rights and, perhaps more crucially, the Government’s unwillingness to permit any meaningful parliamentary input and control.<sup>14</sup> The *Assemblée nationale* and the *Sénat* consequently gained access to all necessary EU-related information and assumed the constitutional right to issue European resolutions regarding all EU documents without restrictions and not only regarding those that fall within the ambit of the French legislative domain as was the case since 1992.<sup>15</sup> Both Houses of Parliament may also send reasoned opinions to EU institutions and file subsidiarity actions before the Court of Justice.<sup>16</sup> Thanks to the Government’s forthcoming approach, Parliament has since 1994 also been able to waive the scrutiny reserve flag and therewith delay France’s agreement to EU proposals in Brussels.<sup>17</sup>

Very little do we know, nevertheless, about the action of domestic legislatures as part of the EU constitutional apparatus and, therefore, as partners or rivals of the European Parliament in democratizing the Union.<sup>18</sup> The germ of this idea was sown in the aftermath of the first European Parliament elections of 1979, when the double mandate of national parliamentarians was discontinued.<sup>19</sup> The dynamic evolved through a series of bilateral contacts between parliamentary representatives

<sup>13</sup> Dord, Olivier, *Vers un rééquilibrage des pouvoirs publics en faveur du Parlement*, 77(1) *Revue Française de Droit Constitutionnel* 99–118 (2009); Gicquel, Jean, *La reparationarisation: une perspective d’évolution*, 126(3) *Pouvoirs* 47–60 (2008).

<sup>14</sup> Rizzuto, Francesco, *European Integration and the French Parliament: from Ineffectual Watchdog to Constitutional Rehabilitation and an Enhanced Political Role*, 10(1) *J. Legis. Stud.* 123–149 (2004); Siritzky, David, *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* 433–454 (Gavin Barrett ed., Clarus Press 2008).

<sup>15</sup> Article 88–4(2) of the Constitution. See more on the introduction of European resolutions in the French legal system in: Gaillard, Maurice, *Le retour des résolutions parlementaires. La mise en oeuvre de l’article 88-4 de la Constitution*, 16 *Revue Française de Droit Constitutionnel* 707–740 (1993); Baufumé, Bruno, *La réhabilitation des résolutions: une nécessité constitutionnelle*, 110(5) *Revue du Droit Public* 1399–1440 (1994).

<sup>16</sup> Article 88–6 of the Constitution.

<sup>17</sup> See the Government’s circular letters: *Circulaire du 19 juillet 1994 relative à la prise en compte de la position du Parlement français dans l’élaboration des actes communautaires* (by Prime Minister Edouard Balladur) and, most recently, *Circulaire du 21 juin 2010 relative à la participation du Parlement national au processus décisionnel européen* (by Prime Minister François Fillon). See a comparative overview of scrutiny reserve arrangements in Rozenberg, Olivier et al. ‘Lost in Transaction: Parliamentary Reserves in EU Bargains’ *Paper prepared for the 19th Conference of Europeanists, Boston, 22-24 March 2012*.

<sup>18</sup> See a recent analysis of this matter in: Jančić, Davor, ‘Representative Democracy Across Levels: National Parliaments and EU Constitutionalism’, *Paper prepared for the 19th Conference of Europeanists, Boston, 22-24 March 2012*.

<sup>19</sup> Kieffer, Gerard & Millar David, *The European Parliament and the National Parliaments* 32–45 (Herman, Valentine & Schendelen, Rinus van eds., Saxon House 1979) Yet the necessity was felt even before that. See for example: *Parlement européen, L’intégration européenne et l’avenir des parlements en Europe, Symposium organisé à Luxembourg les 2-3 mai 1974*, Luxembourg: Secrétariat général, Direction générale de la recherche et de la documentation, 1975.

from the national and European levels as well as through multilateral initiatives such as the Conference of Speakers of the EU Parliaments, the Conference of European Affairs Committees of Parliaments of the European Union (COSAC), joint parliamentary meetings and joint committee meetings. A host of resolutions passed by the European Parliament over the course of the past two decades testify to the ongoing calibration of the respective politico-constitutional functions of national parliaments and their EU counterpart. This was a period of parliamentary rapprochement.<sup>20</sup> It was marked by the creation of a climate of mutual trust between the European and national parliaments.<sup>21</sup> Examples thereof abound. In 1995, the European Parliament assessed that '[d]emocratic control of EU matters would be best achieved by partnership between the European Parliament and the national parliaments'.<sup>22</sup> In 2009, in the dawn of the entry into force of the Lisbon Treaty, the European Parliament reiterated its view, but this time with a clarification that parliaments should each perform their functions at their own level of governance:

[T]he necessary parliamentarisation of the European Union must rely on two fundamental approaches involving the broadening of the European Parliament's powers vis-à-vis all the Union's decisions and the strengthening of the powers of the national parliaments vis-à-vis their respective governments [...] the primary task and function of the European Parliament and the national parliaments is to take part in legislative decision making and to scrutinise political choices at, respectively, the national and the European level.<sup>23</sup>

Such declarations and solemn statements by MEPs beg the question of parliamentary interdependence in Europe.<sup>24</sup> To what extent do national parliaments shape their action in relation to that performed by the European Parliament? In how far are their mutual actions concurrent or complementary?<sup>25</sup> Do parliaments at the national level always address their scrutiny only to their

<sup>20</sup> According to one temporal classification, the pre-Maastricht relations between the European Parliament and national parliaments could be described as *stability* (1952–1976), *euphoria* (1976–1981) and *disenchantment and normalisation* (1981–1990). Tatham, Allan, *As relações entre o Parlamento Europeu e os parlamentos nacionais*, 33(132) *Revista de Informação Legislativa* 194–195 (1996).

<sup>21</sup> Neunreither, Karlheinz, *The European Parliament and National Parliaments: Conflict or Cooperation?*, 11(3) *J. Legis. Stud.* 486 (2005).

<sup>22</sup> European Parliament, Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference – implementation and development of the Union, (*OJ C 151/56* of 19.6.1995), point 24.

<sup>23</sup> European Parliament, Resolution on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon of May 7, 2009, (*OJ C 212E/94* of 5.8.2010), recitals B and I.

<sup>24</sup> Jančić, Davor, *The European Political Order and Internet Piracy: Accidental or Paradigmatic Constitution-shaping?*, 6(3) *Eur. Const. L. Rev.* 460 (2010).

<sup>25</sup> Whereas the 'complementary' thesis posits that national parliaments are called upon to act only where the European Parliament is excluded from decision making or where it does not possess the power of codecision with the Council, the 'concurrent' thesis argues that national parliaments are competent to react to draft EU initiatives in all cases regardless of the institutional position of the European

government or do they in certain circumstances also reach out to the relevant EU institutions? Despite many collaborative initiatives among parliaments in the Union, of which COSAC has proven to be a useful tool for the coordination and exchange of best practices,<sup>26</sup> the exact nature of interparliamentary cooperation has been strenuous to fathom.

## 1.2 ARGUMENT, RESEARCH QUESTION AND METHOD

In this contribution, we attempt to demonstrate with the example of France that national parliaments may at times act as direct counterparts of EU institutions, and that they can be deemed actors within a polycentric European constitutional realm that consists not only of the Union's resources of democratization but also of those of its Member States.<sup>27</sup>

To this end, we carry out a qualitative empirical analysis of the manner in which both Houses of the French Parliament scrutinized the Services Directive and the European External Action Service Decision. The former dossier sought to liberalize the Union's services market by removing the national administrative obstacles and by enshrining the freedom of establishment and the freedom of provision of services.<sup>28</sup> The latter dossier established the European External Action

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Parliament. See: Besselink, Leonard and Mourik, Brecht van, *The Roles of the National Parliament and the European Parliament in EU Decision Making: the Approval of the Lisbon Treaty in the Netherlands*, 15(3) Eur. Pub. L. 316 (2009).

<sup>26</sup> See: Tordoff, Lord, *The Conference of European Affairs Committees: A Collective Voice for National Parliaments in the European Union*, 6(4) J. Legis. Stud. 1–8 (2000). However, cooperation within COSAC is not without its own pitfalls. See more in: Latek, Marta, *Le poids des traditions parlementaires nationales dans le développement de la coopération interparlementaire. La participation française et britannique à la COSAC*, 9(1) Politique Européenne 143–163 (2003).

<sup>27</sup> See more on these constitutional models in: Besselink, Leonard, *National and Regional Parliaments in the European Constitutional Order* 117–131 (Philipp Kiiver ed., Europa Law Publishing 2006); Pernice, Ingolf & Mayer, Franz C., *De la constitution composée de l'Europe*, 36(4) Revue Trimestrielle de Droit Européen 623–647 (2000).

<sup>28</sup> Directive 2006/123/EC of the European Parliament and of the Council of Dec. 12, 2006 on services in the internal market, (OJ L 376/36 of Dec. 27, 2006). See further on different aspects of this dossier in: Gronden, Johan van de & Waele, Henri de, *All's Well that Bends Well? The Constitutional Dimension to the Services Directive*, 6(3) Eur. Const. L. Rev. 397–429 (2010); Miklin, Eric, *Government Positions on the EU Services Directive in the Council: National Interests or Individual Ideological Preferences?*, 32(5) W. Eur. Pol. 943–962 (2009); Barnard, Catherine, *Unravelling the Services Directive*, 45(2) Com. Mkt. L. Rev. 323–394 (2008); Flower, Joanna, *Negotiating European legislation: the Services Directive*, 9 Cambridge Y.B. Eur. Leg. Stud. 217–238 (2006–2007); Peglow, Kerstin, *La libre prestation de services dans la directive no. 2006/123/CE – Réflexion sur l'insertion de la directive dans le droit communautaire existant*, 44(1) Revue Trimestrielle de Droit Européen 67–118 (2008); Hatzopoulos, Vassilis, *Que reste-t-il de la directive sur les services?*, 43(3–4) Cahiers de Droit Européen 299–358 (2007); Hatzopoulos, Vassilis, *Assessing the Services Directive (2006/123/EC)*, 10 Cambridge Y.B. Eur. Leg. Stud. 215–261 (2007–2008); Pellegrino, Patrick, *Directive sur les 'services dans le marché intérieur' – un accouchement dans la douleur*, 504 Revue du Marché Commun et de l'Union européenne 14–21 (2007); Fallon, Marc & Simon, Anne-Claire, *La directive «services»: quelle contribution au marché intérieur?*, 15(136) Journal de Tribunaux Droit Européen 33–43 (2007); Derruine, Olivier, *De la proposition Bolkestein à la directive services, 1962–1963* Courrier

Service (EEAS or the Service), a new EU body charged with assisting the High Representative for Foreign Affairs and Security Policy (the High Representative) in creating and implementing the Union's external policy.<sup>29</sup> These two politically salient dossiers furnish a solid basis for probing the reaction of national parliamentarians to EU action with regard to different policy fields, different types of acts and different levels of involvement of the European Parliament. Focus is placed on the role perceptions of the MPs and senators in their performance of the constitutional function of democratic control of EU decision making. The abundance of the parliamentary output regarding these dossiers has many origins, however, and it is not rooted solely in the interinstitutional 'turf' wars that form the focal point of our investigation, but includes the influence of powerful economic and ideological interests on Parliament.

For the two EU acts selected and for both Houses of the French Parliament, we inquire in a more descriptive fashion about the legal and political claims produced by parliamentarians in the course of scrutiny. Thereupon, we centre more analytically on five elements of paramount importance for a systematic appraisal of the data gathered. These elements are: (a) the nature of the scrutiny performed; (b) the issues that have given rise to controversy; (c) the sources of information; (d) the outcome of scrutiny in terms of providing policy recommendations for EU institutions; and (e) the interdependence with the European Parliament observed in light of the significance that French parliamentarians attached to the European Parliament's negotiating positions.

The ultimate goal is to answer the question whether the *Assemblée nationale* and the *Sénat* can be understood as European and not merely as national actors. The importance of such an analysis lies in the fact that relations between domestic

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Hebdomadaire 5–63 (2007); Garabiol-Furet & Marie-Dominique, *La directive Bolkenstein, bouc émissaire d'une Europe incertaine*, 488 *Revue du Marché Commun et de l'Union européenne* 295–302 (2005); Jennar, Raoul Marc, *La proposition de directive Bolkestein, 1890–1891* *Courrier Hebdomadaire* 5–68 (2005); Lindberg, Björn, *Are Political Parties Controlling Legislative Decision-Making in the European Parliament? The Case of the Services Directive*, 15(8) *J. Eur. Pub. Pol.* 1184–1204 (2008); Crespy, Amandine & Gajewska, Katarzyna, *New Parliament, New Cleavages after the Eastern Enlargement? The Conflict Over the Services Directive as an Opposition between the Liberals and the Regulators*, 48(5) *J. Com. Mkt. Stud.* 1185–1208 (2010); Crum, Ben & Miklin, Eric, 'Reconstructing Parliamentary Sovereignty in Multilevel Politics: The Case of the EU Services Directive', *Paper presented at the ECPR Joint Sessions*, Münster, Mar. 22–27, 2010; Miklin, Eric, 'Visibility of Choices and Better Scrutiny? The Effects of a Politicization of EU Decision-Making on National Parliaments', *Paper Prepared for the 5th ECPR General Conference*, Potsdam, Sept. 10–12, 2009.

<sup>29</sup> See more in: Vooren, Bart van, *A Legal-Institutional Perspective on the European External Action Service*, 48(2) *Com. Mkt. L. Rev.* 475–502 (2011); Vanhoonaeker, Sophie & Reslow, Natasa, *The European External Action Service: Living Forwards by Understanding Backwards*, 15(1) *Eur. For. Affairs Rev.* 1–18 (2010); Duke, Simon, *Providing for European-Level Diplomacy after Lisbon: the Case of the European External Action Service*, 4(2) *The Hague J. Dipl.* 211–233 (2009); Avery, Graham, *Europe's Future Foreign Service*, 43(1) *The Intl. Spectator* 29–41 (2008); Sola, Natividad Fernández, *The New External Action Service of the EU: A European Diplomatic Entity in the Making?*, 6(8) *Miami-Florida European Union Centre of Excellence, European Union Miami Analysis, Special Series* (May 2009).



and EU political institutions are atypical and represent a constitutional ‘aberration’ of sorts, because they divert the focus of inquiry away from classical hierarchically structured relations between government and parliament towards those developing between actors established in institutionally and functionally different constitutional orders. In the present case, the French Parliament is observed not only as a controller of the French Government and an actor within the French constitutional order, but as an actor that carries out its constitutional duties as an organ of an EU Member State and, thus, as an actor called upon to execute its national tasks from a European perspective or to perform its European functions directly. This type of inquiry has not yet received the academic attention that it deserves. In this sense, building on the existing analyses of the formal scrutiny arrangements of national parliaments,<sup>30</sup> we seek to add an innovative element to the literature.

## 2 THE SERVICES DIRECTIVE: COUNTERING THE COMMISSION

### 2.1 ASSEMBLÉE NATIONALE

#### 2.1[a] *Scrutiny Claims*

The scrutiny of the Services Directive in the *Assemblée nationale* began with the adoption by the Delegation for the European Union of a report on 2 February 2005. Whereas the pursuit of a more complete internal market in services was cheered as legitimate and desirable, the Commission incurred a flurry of criticisms for the legislative solutions proposed.

First, the impact assessment was assessed as insufficient, because it failed to take account of the facts, on the one hand, that many services, due to the nature of the activity or the type of enterprise concerned, were not conducive to cross-border trade; and, on the other, that very dynamic economic sectors, such as finance and transport, were to be excluded from the scope of the Directive.<sup>31</sup>

Second, the country of origin principle was fiercely opposed for carrying a number of serious risks, such as social and legal dumping, which could lead to

<sup>30</sup> See for example: *National Parliaments and the European Union* (Norton, Philip ed., Frank Cass 1996); *National Parliaments within the Enlarged European Union: from Victims of Integration to Competitive Actors?* (O’ Brennan, John & Raunio, Tapio eds., Routledge 2007); *National Parliaments as Cornerstones of European Integration* (Smith, Eivind ed., Kluwer Law International 1996); *National Parliaments and European Democracy: A Bottom-Up Approach to European Constitutionalism* (Tans, Olaf et al. eds., Europa Law Publishing 2008).

<sup>31</sup> *Assemblée nationale, Délégation pour l’Union européenne, Rapport d’information no. 2053 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Feb. 2, 2005, rapporteur Anne-Marie Comparini (UDF), 13–14.

unfair competition, the lowering of the quality of the services offered and the diminution of the level of consumer protection. The risk of legal uncertainty was especially pronounced. In the field of penal law, the prohibition for the French judiciary to apply French penal law to a service provider from another Member State that engages in an activity that is legal in the Member State of origin but illegal in France, would violate the French principles of the territoriality of law and equality before the law, which fall under the essential conditions for the exercise of national sovereignty. A similar problem would arise in the field of private international law. While French law would apply to a French service provider offering services in another Member State, the divergences in the jurisprudence between France and the host Member State would make it unlikely that French law would be interpreted in the same fashion in the host Member State as it would in France. Moreover, the country of origin principle was judged incompatible with the existing disparities between the Member States, and any sweeping regulation of services had to be preceded by the harmonization of relevant national sectors.<sup>32</sup>

Third, the scope of the Directive needed to be limited by excluding the economic services of general interest from the application of the freedom of establishment, certain services provided by persons whose provision is only allowed upon being appointed by an official act of government (such as notaries and bailiffs), audiovisual and cultural services, healthcare services, social services and gambling.<sup>33</sup>

The draft Services Directive also gave rise to a more general appraisal of the Commission as such. While the Commission presided over by Romani Prodi displayed elements of ‘malfunctioning’, that presided over by José Barroso was praised for the introduction of new working methods. These methods include: the placement of all commissioners in the Berlaymont building; their organization in workgroups to spur exchanges of views of a more political nature as opposed to technical consultations between directorates-general favoured previously; the holding of regular internal political debates; the focusing of the Commission’s weekly meetings on crucial matters so as to allow more thorough discussion; and a more systematic recourse to impact analyses and public consultations.<sup>34</sup>

<sup>32</sup> *Assemblée nationale, Délégation pour l’Union européenne, Rapport d’information no. 2053 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Feb. 2, 2005, rapporteur Anne-Marie Comparini (UDF), 33–36.

<sup>33</sup> *Assemblée nationale, Délégation pour l’Union européenne, Rapport d’information no. 2053 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Feb. 2, 2005, rapporteur Anne-Marie Comparini (UDF), 37–39.

<sup>34</sup> *Assemblée nationale, Délégation pour l’Union européenne, Rapport d’information no. 2053 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Feb. 2, 2005, rapporteur Anne-Marie Comparini (UDF), 31.

Finally, it was underlined that French MEPs of all political affiliations were mobilized to defend numerous amendments to the proposal and that the codecision procedure, in conjunction with the increased political weight of the European Parliament after the 2004 election, gave hope that the Directive would be profoundly amended. The report concluded with a recognition of the importance of national parliamentary scrutiny for the Union:

This strong mobilisation of our colleagues from all the Member States, triggered by the Delegation for the European Union of the *Assemblée nationale*, could indeed foreshadow a lasting reinforcement of the control exercised by national parliaments over European affairs, thanks to the new impetus that the future Constitutional Treaty will bring to Europe.<sup>35</sup>

A further confirmation of this statement came from Christian Philip (UMP) during the meeting of the Delegation for the European Union at which the report was examined in the presence of several French MEPs:

The mobilisation around the Services Directive is not symptomatic of Europe's malfunctioning; it is indeed the role of the European Parliament and national parliaments to say 'no' to the Commission when it gets astray.<sup>36</sup>

The central argument at the meeting, advanced by both MPs and MEPs, was that the Commission's proposal infringed the principle of subsidiarity.<sup>37</sup> The Committee for Economic Affairs came to the same conclusion.<sup>38</sup>

Based on the Delegation's report, the *Assemblée nationale* adopted a European resolution on 15 March 2005. The resolution endorsed most of the recommendations from the report, such as those on the desirability of creating an internal market in services, on the need for prior harmonization, the exclusion of certain sectors from the scope of the Directive and the preservation of national penal and social law. Significantly, it assessed the draft Directive as 'unacceptable' and 'resolutely demanded' its reconsideration, the abandonment of the country of origin principle and the retention of the requirement of declaration for posted workers to enable the host Member State to maintain control over their service

<sup>35</sup> *Assemblée nationale, Délégation pour l'Union européenne, Rapport d'information no. 2053 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Feb. 2, 2005, rapporteur Anne-Marie Comparini (UDF), 52.

<sup>36</sup> *Assemblée nationale, Délégation pour l'Union européenne, Compte rendu no. 112, Réunion du mercredi 2 février 2005 à 16h 15, 5* (emphasis added).

<sup>37</sup> This was invoked by Jérôme Lambert (PS), Christian Philip (UMP), Pierre Lequiller (UMP), Jean-Marc Ayrault (PS) and Jacques Toubon (UMP, EPP). *Assemblée nationale, Délégation pour l'Union européenne, Compte rendu no. 112, Réunion du mercredi 2 février 2005 à 16h 15, 4–8*.

<sup>38</sup> *Assemblée nationale, Commission des affaires économiques, de l'environnement et du territoire, Rapport no. 211 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Mar. 1, 2005, rapporteur Robert Lecou (UMP), 16.

activities.<sup>39</sup> Another resolution, tabled mainly by Socialist MPs, which requested the Commission to withdraw the proposal altogether, to first draft a directive on the public services or the economic services of general interest and to respect the path of sectoral harmonization, was not adopted.<sup>40</sup> In questions to the Government, the Socialists and Communists reiterated their stance, but the Government did not go beyond agreeing that the unamended version of the Directive was unacceptable.<sup>41</sup>

The plenary debate of 15 March 2005, which preceded the adoption of the resolution, revealed a wide political consensus on the fallacies of the Commission's proposal not only among the political parties represented in the House but also among Government ranks. In fact, Claudie Haigneré, the Minister for European Affairs, recalled that European Parliament rapporteur Gebhardt largely shared the same preoccupations and assured the present MPs of the value of their effort:

Joint action by the Government, the European Parliament, but also by the *Assemblée nationale* and the *Sénat*, which have strongly reacted, for which I am grateful, has raised the awareness in the Commission of the numerous difficulties posed by this proposal for a directive.<sup>42</sup>

As examples of influence, she adduced, on the one hand, the announcement by Commission President Barroso in favour of finding a consensus regarding both the country of origin principle and the scope of application of the Directive; and, on the other, the intention of the Commissioner for Internal Market, Charlie McCreevy, to revise the text upon the European Parliament's pronouncement.

In harmony with Minister Haigneré's statement, Marc Laffineur (UMP) claimed that:

If any lesson is to be drawn from this controversy, it is the enhancement of the role of parliaments [...] The Commission has committed an error of judgment, but representative democracy, through the action of parliaments, has succeeded to make its voice heard.<sup>43</sup>

That the democratic legitimacy of the Union was a factor in the French Parliament's scrutiny of EU decision-making processes flows from the interventions of several MPs. Pierre Lequiller (UMP), the Chairman of the Delegation for the European Union, explained that the purpose of adopting a

<sup>39</sup> *Assemblée nationale, Résolution no. 402 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Mar. 15, 2005.

<sup>40</sup> *Assemblée nationale, Proposition de résolution no. 2048 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Feb. 1, 2005.

<sup>41</sup> See *Question au Gouvernement no. 1859* by Pierre Cohen (PS), JORF Feb. 3, 2005, 606 and *Question au Gouvernement no. 2005* by Alain Bocquet (PCF), JORF, Mar. 30, 2005, 2501.

<sup>42</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 mars 2005, 175<sup>e</sup> séance de la session ordinaire de 2004-2005*, JORF [2005] A.N. (C.R.) 24[2], Mar. 16, 2005, 2021.

<sup>43</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 mars 2005, 175<sup>e</sup> séance de la session ordinaire de 2004-2005*, JORF [2005] A.N. (C.R.) 24[2], Mar. 16, 2005, 2023.

European resolution was to place at the Government's disposal the support of the citizens' direct representatives for the defence of the interests not only of France but also of Europe.<sup>44</sup> Pierre Cohen (PS) submitted that it was fundamental for national parliaments to act *ex ante*, since reliance on the national and European parliaments added a democratic dimension to often secretive intergovernmental or technocratic deals.<sup>45</sup> For Léonce Deprez (UMP), the plenary debate was a sign that the French Parliament could and had to play a role in the European politics of tomorrow, as 'it is very important to be known at the European level that the representatives elected by the French nation disagree and consider this Directive unacceptable'.<sup>46</sup> Surely, due to a lack of formal accountability links with EU institutions, these claims amount to peer pressure, which, in the circumstances such as those engendered by the Services Directive, can be just as effective.

These references to cross-level interparliamentary cooperation were not empty declarations. The Delegation for the European Union held a meeting in Brussels with French MEPs and rapporteur Gebhardt on 30 November 2005, a week after the vote in the European Parliament's Committee for the Internal Market but before the plenary session. The opportunity was seized to gather first-hand information on the evolution of the dossier and to reiterate the concerns of the French Parliament. It was noted that certain of the requests made by the resolution of the *Assemblée nationale* were beginning to take shape at the European level, among which significant progress was being made towards limiting the scope of the Directive.<sup>47</sup>

On 2 March 2006, the Communist and Republican MPs, discontent with the substantive outcome of the European Parliament's first reading vote, tabled a draft resolution on the Services Directive. It primarily called for an explicit rejection of the country of origin principle and requested the Commission to withdraw its proposal.<sup>48</sup> The Committee for Economic Affairs published a report on this draft resolution a week later, concluding, on the basis of an analysis of the amendments adopted and rejected by the European Parliament, that ambiguity remained as to the consequences of refusing to enact the application of the country of destination principle, and that the list of sectoral exclusions was still incomplete and lacked

<sup>44</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 mars 2005, 175<sup>e</sup> séance de la session ordinaire de 2004-2005, JORF [2005] A.N. (C.R.) 24[2], Mar. 16, 2005, 2029.*

<sup>45</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 mars 2005, 175<sup>e</sup> séance de la session ordinaire de 2004-2005, JORF [2005] A.N. (C.R.) 24[2], Mar. 16, 2005, 2030.*

<sup>46</sup> *Assemblée nationale, Compte rendu intégral, 2<sup>e</sup> séance du mardi 15 mars 2005, 175<sup>e</sup> séance de la session ordinaire de 2004-2005, JORF [2005] A.N. (C.R.) 24[2], Mar. 16, 2005, 2036.*

<sup>47</sup> *Assemblée nationale, Délégation pour l'Union européenne, Compte rendu no. 149, Réunion du mercredi 30 novembre 2005 à 15h au Parlement européen, 4 and 11.*

<sup>48</sup> *Assemblée nationale, Proposition de résolution no. 2923 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur of Mar. 2, 2006.*

clarity, especially with regard to services of general interest.<sup>49</sup> It was, therefore, ‘more necessary than ever to rally against the Services Directive’, argued its rapporteur, Alain Bocquet (PCF).<sup>50</sup> The Committee nonetheless refused to support the draft resolution. So did the Delegation for the European Union after its own appraisal, since the dominant view was that the text adopted by the European Parliament was balanced and corresponded well to the concerns of the *Assemblée nationale*. Chairman Lequiller expressed satisfaction about the fruitful collaboration on several occasions with MEPs, praising particularly the accomplishment of Jacques Toubon in lobbying in favour of ‘the French positions’ with numerous MEPs.<sup>51</sup> After a plenary debate along the lines of the discussions held in these two committees, the draft resolution was rejected. The opposition tried to infuse the debate with the argument that the French citizens’ rejection of the Constitutional Treaty in the referendum of 29 May 2005 should also decide the fate of the Services Directive. In order to fortify its insistence that the country of origin principle could, despite its deletion, still apply by implication, the opposition also invoked the fact that an amendment tabled in the European Parliament by the European United Left/Nordic Green Left group, seeking explicitly to enshrine the country of destination principle, was straightforwardly refused.<sup>52</sup> However, none of it convinced the majority, which were adamant that the European Parliament’s achievement at first reading met the objections of the *Assemblée nationale*. Indeed, rapporteur Anne-Marie Comparini (UDF) claimed that:

The similarity between the recommendations from the report and the amendments adopted by the European Parliament show that the contribution of national parliamentarians is indispensable for the approximation of laws. [...] We are counting on the highest French authorities to defend the proposals of the European Parliament: because the majority of our demands are taken into account therein, but also because the

<sup>49</sup> *Assemblée nationale, Commission des affaires économiques, de l’environnement et du territoire, Rapport no. 2939 sur la proposition de résolution (n° 2923) de M. Alain Bocquet et des membres du groupe député-e-s communistes et républicains sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Mar. 8, 2006, rapporteur Alain Bocquet (PCF), 23–24.

<sup>50</sup> *Assemblée nationale, Commission des affaires économiques, de l’environnement et du territoire, Rapport no. 2939 sur la proposition de résolution (n° 2923) de M. Alain Bocquet et des membres du groupe député-e-s communistes et républicains sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Mar. 8, 2006, rapporteur Alain Bocquet (PCF), 38.

<sup>51</sup> *Assemblée nationale, Délégation pour l’Union européenne, Compte rendu no. 162, Réunion du mercredi 8 mars 2006 à 9h 30*, 11–13. In a plenary session a week later, he informed the members that the discussions with MEPs were of ‘remarkable quality’ and that the French MEPs have made a ‘major contribution’ to the European Parliament’s ‘true counterproposal’. *Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance du mardi 14 mars 2006, 168<sup>e</sup> séance de la session ordinaire de 2005-2006*, JORF [2006] A.N. (C.R.) 23[1], Mar. 15, 2006, 1783 and 1782.

<sup>52</sup> See the speeches by Marc Dolez (PS) & Alain Bocquet (PCF) in: *Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance du mardi 14 mars 2006, 168<sup>e</sup> séance de la session ordinaire de 2005-2006*, JORF [2006] A.N. (C.R.) 23[1], Mar. 15, 2006, 1783 and 1792.

authority acquired by the European Parliament must be supported. To affirm and reinforce that authority is to guarantee a Europe in which the voice of the people is heard.<sup>53</sup>

On 10 May 2006, the Delegation for the European Union held a meeting, which assessed that the Commission accepted some 95% of the European Parliament's amendments and, apart from minor remaining points of contestation, invited the Government to support the Commission's revised proposal.<sup>54</sup>

## 2.1[b] *Analysis*

- (a) *Scrutiny.* The *Assemblée nationale* carried out detailed substantive, policy scrutiny of the Services Directive, zooming in on the contents of the policy that the Union intended to pursue.
- (b) *Controversy.* The controversy broke out regarding the application of the country of origin principle and the wide scope of the Directive. These were vehemently opposed in order to protect French economic interests.
- (c) *Information.* To achieve this, however, the MPs did not restrict themselves to the information provided by the French Government. They placed great emphasis on establishing close contact with the European Parliament, particularly with the French MEPs but also with the European Parliament rapporteur for the Directive. The reason for this primarily lay in sharpening their scrutiny claims towards the Union.
- (d) *Outcome.* The *Assemblée nationale* provided clear and concise suggestions for the modification of the contents of the Directive. The main goal was to change the Commission-sponsored policy of the liberalization of the services market. The direction that the Union had taken was disapproved of and the Government was but one channel for communicating the House's policy preferences. The main target of criticism was the Commission, whose work was assessed both regarding this particular dossier and, more broadly, regarding its functioning as an EU institution. Since MPs passed judgments about the Commission rather than about the French Government, it could be argued that the Commission was the addressee of the scrutiny.

<sup>53</sup> *Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance du mardi 14 mars 2006, 168<sup>e</sup> séance de la session ordinaire de 2005-2006, JORF [2006] A.N. (C.R.) 23[1], Mar. 15, 2006, 1784.*

<sup>54</sup> *Assemblée nationale, Délégation pour l'Union européenne, Compte rendu no. 171, Réunion du mercredi 10 mai 2006 à 16h 15, 2 and 5.*

- (e) *Parliamentary interdependence.* The participation of the European Parliament in the moulding of the Services Directive was highly relevant for the *Assemblée nationale*, as it was seen as a suitable medium through which to vent opposition to some of the key elements of the Bolkestein proposal. The MPs joined forces with their counterparts in the European Parliament to strike out the country of origin principle. They actively and, reportedly, successfully lobbied in favour of their position through French MEPs.<sup>55</sup> Comments by a number of MPs show that this was indeed an important channel for participating in the decision-making process.

In conclusion, it should be held that the *Assemblée nationale* acted beyond the French constitutional system and understood its role as being an integral part of the Union's decision-making machinery.

## 2.2 SÉNAT

### 2.2[a] *Scrutiny Claims*

In November 2004, a cross-party working group was formed within the Delegation for the European Union to evaluate the Bolkestein proposal. In the course of its work, its members held hearings with, among others, MEPs and officials of the Commission.<sup>56</sup> Its report, published on 18 February 2005, identified largely the same pitfalls as the *Assemblée nationale* had done concerning the width of the scope of the Directive, the need to abandon the country of origin principle and the threat to the application of the French penal law and the rules of private international law. The Commission was criticized for failing to prepare an adequate impact assessment, as the only study that it did carry out merely summarized the state of affairs in the services market. It was, therefore, impossible to appraise the consequences of the future growth of this market in light of the country of origin principle and the administrative simplification envisaged. Such an appraisal was, above all, frustrated by the absence of any comparative study of

<sup>55</sup> It has also been argued that the French negative position on the Bolkestein proposal had an impact on EU politics and the codecision procedure itself. Crespy, Amandine, *When 'Bolkestein' is Trapped by the French Anti-Liberal Discourse: A Discursive-Institutionalist Account of Preference Formation in the Realm of European Union Multi-Level Politics*, 17(8) J. Eur. Pub. Pol. 1262, 1265 (2010).

<sup>56</sup> *Sénat, Délégation pour l'Union européenne, Réunion du jeudi 17 février 2005, Communication du groupe de travail présidé par Denis Badré et composé de Robert Bret, Marie-Thérèse Hermange et Serge Lagauche*, available at: <http://www.senat.fr/europe/r17022005.html>, accessed on Mar. 1, 2011.



the relevant laws and regulations of the Member States, which ‘the Commission must have undertaken before presenting its proposal for a directive’.<sup>57</sup>

On 3 February 2005, the Socialist senators tabled a draft resolution that was virtually identical to that tabled by their counterparts in the *Assemblée nationale*, demanding the withdrawal of the Directive.<sup>58</sup> About a month later, the Communists followed suit with essentially the same request in their own draft resolution.<sup>59</sup> Yet another draft resolution,<sup>60</sup> tabled by UMP, was withdrawn and retabled in an amended form as part of the report of the Committee for Economic Affairs on the three draft resolutions. This Committee urged, *inter alia*, that the gap that indisputably existed in the legal regulation of the internal market in services had to be filled by the texts debated and adopted democratically by political institutions instead of by the piecemeal and sometimes excessively liberal jurisprudence of the Court of Justice.<sup>61</sup> The rapporteur further stated that his hearings with Commission officials in Brussels allowed him ‘to fully grasp the evolution’ of the position of the Barroso Commission away from the rigid standpoint of its predecessor.<sup>62</sup>

In its answers to parliamentary questions on the Services Directive in mid-February and early March 2005, the Government concurred that the proposal was unacceptable and expressed its determination to have it modified.<sup>63</sup>

Building on the said draft resolutions, the *Sénat* adopted a consolidated resolution on 23 March 2005.<sup>64</sup> Holding that the Directive was unacceptable as it was, the resolution demanded that the primacy of sectoral Community law be

<sup>57</sup> *Sénat, Délégation pour l’Union européenne, Rapport d’information no. 206 sur la proposition de directive relative aux services dans le marché intérieur* of 18 February 2005, rapporteurs Denis Badré and others, 21–22.

<sup>58</sup> *Sénat, Proposition de résolution no. 177 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Feb. 3, 2005.

<sup>59</sup> *Sénat, Proposition de résolution no. 209 relative à la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Mar. 1, 2005.

<sup>60</sup> *Sénat, Proposition de résolution no. 182 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Feb. 9, 2005.

<sup>61</sup> *Sénat, Commission des affaires économiques et du plan, Rapport no. 230 sur les propositions de résolution nos. 177, 182 et 209* of Mar. 9, 2005, rapporteur Jean Bizet (UMP), 29 and 33.

<sup>62</sup> *Sénat, Commission des affaires économiques et du plan, Rapport no. 230 sur les propositions de résolution nos. 177, 182 et 209* of Mar. 9, 2005, rapporteur Jean Bizet (UMP), 32.

<sup>63</sup> Namely, senator Jean Louis Masson (UMP) put a written question to the Minister for European Affairs, asking whether the Government had opposed the Directive from the very beginning and, if so, how. In her reply, Minister Haigneré assured him that the Directive was unacceptable and that the difficulties had been signalled at the European level ever since the Competitiveness Council of Mar. 11, 2004. See *Question écrite no. 16090* (JO Sénat of Feb. 17, 2005, 428) and *Réponse du Ministère délégué aux affaires européennes* (JO Sénat of Apr. 21, 2005, 1131). Challenging the Government on its stance on the Directive, Gérard le Cam (PCF) also criticized the Commission claiming that its intention to maintain the Directive was a sign of its ‘omnipotence that escapes democratic control’. See *Question d’actualité au gouvernement no. 0461G* and *Réponse du Ministère délégué aux affaires européennes* (JO Sénat of Mar. 4, 2005, 1243).

<sup>64</sup> *Sénat, Résolution no. 89 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Mar. 23, 2005.

instantly affirmed, and that posted workers remain subjected to the requirement of a prior declaration of their service activities. The Directive also needed to be harmonized with the 1980 Rome Convention on the law applicable to contractual obligations, the then draft Rome II Regulation on the law applicable to non-contractual obligations and the then draft Directive on the recognition of professional qualifications. Like the *Assemblée nationale*, the *Sénat* requested the exclusion of certain enumerated types of services from the scope of the Directive. While the country of origin principle was generally refuted, its application to the professional activities sanctioned by penal law was sought to be explicitly excluded.

The two plenary sessions leading to the adoption of this resolution, besides the discussions of the merits, provided fodder for several senators to express their understanding of the boundaries of national parliamentary scrutiny of EU matters. In the first plenary debate, which took place on 15 March 2005,<sup>65</sup> Denis Badré (MoDem), who chaired the aforesaid working group for the Services Directive, described the *Sénat's* role as being not only to send their reading of the Directive to the Government and thereby bolster its negotiating position at the European level, but also:

[T]o elucidate as much as possible the discussion, by allaying the concerns of our fellow citizens when they are not founded and by taking them into account when they are, in order to present them to the Government together with our comments. It should always be remembered [...] that Europe is not an abstraction for Brussels. [...] Europe is [...] also and, above all, the Europeans, who express themselves in a regular way through their national parliaments. Such is the case today with this sensitive topic.

Senator Marie-Thérèse Hermange (UMP), a member of the working group, stressed the proactive dimension of the *Sénat's* European scrutiny:

[T]he role of our House, today and even more so tomorrow, must be [...] to suggest improvements, in collaboration and harmony with all the competent institutions, in the spirit of pragmatism and common sense, and taking into account the aspirations of the national collectivities, while pursuing the path of integration, to which the future Constitution invites us.

Similarly, senator Bernard Murat (UMP) added:

[W]e gathered this morning to acknowledge, take a position and adopt a resolution that, I hope, will feed the work ahead, particularly that of the Commission, and resonate with our colleagues in the European Parliament. [...] It is up to us formally to take charge of this dossier and support the Government's action at the European level [...].

<sup>65</sup> *Sénat, Compte rendu intégral des débats, Séance du 15 mars 2005*, available at: <http://www.senat.fr/seances/s200503/s20050315/s20050315001.html#SOM5>, accessed on Mar. 3, 2011.

None of these claims, however, runs counter to the fact emphasized by Bruno Retailleau (MPF) that while Parliament votes on resolutions, decisions are taken elsewhere. Yet the *Sénat* does not seem barred from taking action, when the opportunity arises, precisely where decisions are taken. As reported in the second plenary session on the Services Directive, a senatorial delegation attended an interparliamentary meeting in the European Parliament on the Lisbon Strategy on 17 March 2005. The senators took advantage of the presence of Commission President Barroso and asked him whether he was still attached to the idea of re-examining the Services Directive, to which he replied: 'The Commission is ready to work with the European Parliament in order to make any necessary adjustments to meet the concerns expressed in France.'<sup>66</sup>

On 16 June 2005, an unusual, indirect 'attack' was launched against the Bolkestein proposal. At the last plenary session of the *Sénat's* first reading of the Government bill bolstering the legal position of small and medium-sized enterprises, the Government introduced an amendment completing the transposition of the 1996 Directive on the Posting of Workers by inserting a chapter on the transnational posting of workers into the Labour Code (*Code du travail*).<sup>67</sup> Unlike the Bolkestein proposal, this Directive commands the application of the law of the country of destination to workers employed in one Member State but posted temporarily to work in another Member State, which safeguards workers in the host Member State from unfair competition. Initially, it was deemed that the existing French legislation fully complied with the contents of the Directive and the deadline for the transposition expired on 16 December 1999.<sup>68</sup> No action had been taken until 2000, when two Government decrees transposed an article of the Directive.<sup>69</sup> The amendment of the Labour Code, successfully finalized on 2 August 2005 in the form of the Act in Favour of Small and Medium Enterprises,<sup>70</sup> was, hence, to a great extent aimed at countering the draft Services Directive. Several parliamentarians in both Houses of Parliament explicitly affirmed this in plenary discussions.<sup>71</sup>

<sup>66</sup> *Sénat, Compte rendu intégral des débats, Séance du 23 mars 2005*, available at: <http://www.senat.fr/seances/s200503/s20050323/s20050323004.html#SOM5>, accessed on Mar. 3, 2011.

<sup>67</sup> See amendment no. 436 in: *Sénat, Compte rendu intégral, Séance du jeudi 16 juin 2005, 96<sup>e</sup> séance de la session ordinaire de 2004-2005*, JORF [2005] S. (C.R.) 52, June 17, 2005, 4309–4310.

<sup>68</sup> Bilous, Alexandre, 'Travailleurs détachés et mise en oeuvre de la directive', Sept. 28, 1999, available at: <http://www.eurofound.europa.eu/eiro/1999/09/study/tn9909233s.htm>, accessed on Feb. 28, 2011.

<sup>69</sup> See Enterprise Europe Network, *Fiche pratique – Détachement des travailleurs: Européens en France*, available at: <http://www.entreprise-europe-sud-ouest.fr/sfx/assets/documents/uploaded/general/Detachement%20des%20travailleurs%202009.pdf>, (accessed on Feb. 28, 2011).

<sup>70</sup> See Art. 89 of *Loi no. 2005-882 en faveur des petites et moyennes entreprises* of Aug. 2, 2005.

<sup>71</sup> For example, senator Bernard Dussaut (PS) said that 'the Government's amendment is manifestly the direct consequence of the mobilisation of the French around the dreadful draft Bolkestein Directive. It permits us at least to establish that the mobilisation of our fellow citizens was not pointless [...]'. *Sénat, Compte rendu intégral, Séance du jeudi 16 juin 2005, 96<sup>e</sup> séance de la session ordinaire de 2004-2005*,

The year 2006 witnessed the tabling of two draft resolutions on the Services Directive, neither of which was adopted. The first one was proposed by the Communist senators some fortnight before the European Parliament's first reading. It mirrored their previous request for the withdrawal of the Directive, this time hoping to profit from linking the Directive with the French citizens' rejection of the Constitutional Treaty.<sup>72</sup> The second one came from UMP more than a month after the Commission revised its proposal. It essentially welcomed the inclusion in the proposal of the majority of the amendments made by the European Parliament, notably the abandonment of the country of origin principle and the respect for sectoral Community legislation, but opposed the regime of tacit authorization foreseen for service providers' establishment since it was contrary to French law.<sup>73</sup>

Finally, it is noteworthy that the Delegation for the European Union convened to take stock of the evolution of the dossier at all its critical phases: (a) after the adoption of a report by the European Parliament's Committee for Internal Market and Consumer Protection;<sup>74</sup> (b) after the European Parliament's first reading;<sup>75</sup> and (c) after the Commission had revised its proposal.<sup>76</sup> As the Delegation's Chairman, Hubert Haenel (UMP), pointed out, it was necessary to react to EU initiatives as early as possible, but also to follow their development before their definitive adoption and transposition. The aim of these meetings was to establish the extent to which the *Sénat's* recommendations had been taken into account and, once it was acknowledged that they had been, the scrutiny process was terminated.

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JORF [2005] S. (C.R.) 52, June 17, 2005, 4310. Similarly, Patrick Ollier (UMP), Chairman of the Committee for Economic Affairs of the *Assemblée nationale*, declared that 'even if Mr Bolkestein is no longer involved in this matter, it is good to underline, in order to show public opinion, that these amendments testify to the will of the majority and of the Government to reject what Mr Bolkestein had then proposed'. *Assemblée nationale, Compte rendu intégral, 1<sup>re</sup> séance du mardi 14 mars 2006, 168<sup>e</sup> séance de la session ordinaire de 2005-2006*, JORF [2006] A.N. (C.R.) 23[1], Mar. 15, 2006, 1779. That such was the objective of this amendment was also maintained in: *Assemblée nationale, Commission des affaires économiques, de l'environnement et du territoire, Rapport no. 2939 sur la proposition de résolution (n° 2923) de M. Alain Bocquet et des membres du groupe député-e-s communistes et républicains sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of 8 March 2006, rapporteur Alain Bocquet (PCF), 19 and 31.

<sup>72</sup> *Sénat, Proposition de résolution no. 186 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of Jan. 31, 2006.

<sup>73</sup> *Sénat, Proposition de résolution no. 349 sur la proposition de directive du Parlement européen et du Conseil relative aux services dans le marché intérieur* of May 11, 2006.

<sup>74</sup> *Sénat, Délégation pour l'Union européenne, Réunion du mercredi 7 décembre 2005*, available at: <http://www.senat.fr/europe/r07122005.html>, accessed on Mar. 3, 2011.

<sup>75</sup> *Sénat, Délégation pour l'Union européenne, Réunion du mercredi 8 mars 2006*, available at: <http://www.senat.fr/europe/r08032006.html>, accessed on Mar. 3, 2011.

<sup>76</sup> *Sénat, Délégation pour l'Union européenne, Réunion du mercredi 12 avril 2006*, available at: <http://www.senat.fr/europe/r12042006.html>, accessed on Mar. 3, 2011.

2.2[b] *Analysis*

- (a) *Scrutiny.* Like the *Assemblée nationale*, the *Sénat* carried out a substantive, policy scrutiny of the Services Directive, concentrating on the contents of the proposal. Scrutiny was carried out through a variety of instruments, including, peculiarly, legislative activity in a different field of law with the aim of countering the essence of the Bolkestein proposal. This is notable because it signifies the *Sénat's* responsiveness to the developments in EU decision making and depicts its proactive attitude to scrutiny.
- (b) *Controversy.* The *Sénat*, above all, deplored the method of liberalizing the services market. Clashing with the Commission's approach, it argued against horizontal legal regulation and in favour of sectoral harmonization. Just as the MPs, the senators rejected the country of origin principle and requested the narrowing of the scope of the Directive. These scrutiny claims were predominantly made to safeguard the interests of French economic actors.
- (c) *Information.* Information was sought not only from the French Government, but also from MEPs and Commission officials. As in the case of the *Assemblée nationale*, it appears that the *Sénat* made these information contacts to make their scrutiny claims crisper.
- (d) *Outcome.* The senators clearly formulated recommendations for policy change. The bulk of their criticism was directed at the EU level, particularly the Commission, which was, like in the *Assemblée nationale*, reprimanded for failing to justify its legislative initiative by means of an appropriate impact assessment. Commission President Barroso was personally made aware of the *Sénat's* position during an interparliamentary meeting in Brussels. That the addressee of the scrutiny was the Commission is further evidenced by the fact that the decision-making process was followed until it was concluded that the Commission satisfactorily met the *Sénat's* concerns. The reason for terminating scrutiny was, therefore, not the performance of the French Government in the Council but the Commission's action in the EU legislative process. The senators wished, as they claimed, to feed the work of the Commission and the European Parliament in the spirit of pragmatism, while concomitantly supporting the Government's efforts at the EU level.
- (e) *Parliamentary interdependence.* The *Sénat* attached considerable importance to the relationship with the European Parliament, for which purpose a meeting was organized with MEPs. Yet a difference in

the degree of cross-level interparliamentary contact is perceptible in comparison to the *Assemblée nationale* insofar as the *Sénat* was more reserved in this respect. Namely, the senators put less effort into asserting their views within the European Parliament than did the MPs.

On the basis of the foregoing, it can be concluded that the *Sénat* took a broader approach in interpreting its role in EU decision making and acted within the European constitutional order.

### 3 THE EUROPEAN EXTERNAL ACTION SERVICE DECISION: COUNTERING THE EUROPEAN PARLIAMENT

#### 3.1 ASSEMBLÉE NATIONALE

##### 3.1[a] *Scrutiny Claims*

On 26 May 2010, a month after the High Representative published her proposal, the *Assemblée nationale* held a joint meeting on the EEAS with French MEPs and senators. This was an opportunity not only to take stock of the negotiations, but also to discuss the respective roles of the European and national parliaments in EU external relations. In this sense, Jacques Blanc, a UMP senator and the Vice-Chairman of the *Sénat's* Foreign Affairs Committee, claimed that:

The external policy of the European Union remains intergovernmental in nature. We should tell the European Parliament that each of us should stay within our competences and that we must together envisage the establishment of this Service. The Treaty of Lisbon also accentuates the competences of national parliaments. The European Parliament cannot be the sole democratic interlocutor in this debate. [...] I want to say that there is no intention in the *Sénat* to block the European Parliament but to be involved and to participate, since we believe that this is how we will progress towards the necessary coherence in the external policy of the European Union.<sup>77</sup>

Josselin de Rohan, also a UMP senator and the Chairman of the *Sénat's* Foreign Affairs Committee, agreed arguing that national parliaments have an essential role to play in the foreign and defence policies because there is as yet no European nationality. As the Union is not going down the path of federalism, he resolutely rejected the Brok-Verhofstadt approach as being in dissonance with reality. In his view, the EEAS also had to render account to national parliaments.<sup>78</sup>

<sup>77</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 152, Réunion du mercredi 26 mai 2010 à 16h 30*, 16.

<sup>78</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 152, Réunion du mercredi 26 mai 2010 à 16h 30*, 18.

Acknowledging the timeliness of the meeting, Constance Le Grip (EPP, France) further elaborated the European Parliament's position:

National parliaments must understand that the discussion on the institutional architecture of the future Service was an occasion for the European Parliament to engage in a power struggle with other institutions and to put into it all the new weight and responsibilities that the Treaty of Lisbon confers on it. [...] For us, members of the European Parliament, at this stage, the reports and resolutions of national parliaments [...] constitute very precious documents. For beyond the current debates on the intergovernmentalist conception of foreign policy and a more communitarian conception of the European Parliament, the opinion of national parliaments should, regardless of the solution adopted, be heard and taken into account, if not in the texts, then at least in practice. We should always make sure that we are connected with each other. This is why MEPs must listen to national parliaments in this area that largely remains a part of sovereign powers.<sup>79</sup>

For Arnaud Danjean (EPP, France), the fact that the action of some EU Special Representatives and policies concerning certain regions are no longer directed by the national capitals but by the Council Secretariat indicates that the political control of the EEAS cannot be exercised only by national parliaments.<sup>80</sup>

On 16 June 2010, the European Affairs Committee adopted a report on the reform of the governance of the Union's external policy, within which it presented its analysis of the EEAS. In the Committee's view, the advantages of establishing an External Action Service lay primarily in centralizing the coordination of EU external action and, concomitantly, in reducing the number of actors in charge of the external and internal representation of the Union.<sup>81</sup> Nonetheless, the EEAS proposal was assessed as being deceptive, principally because the High Representative was not to enjoy the full scope of powers that the Lisbon Treaty allowed. The reticence, however, was understandable given that the Service represented a 'true revolution for all institutions and Member States'.<sup>82</sup> On the basis of this report, a draft resolution was tabled.

The following day, the Foreign Affairs Committee published its own report on the EEAS. The Committee was content that the proposal espoused the French concept of central administration with a strong Secretary-General at the Service's

<sup>79</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 152, Réunion du mercredi 26 mai 2010 à 16h 30*, 17.

<sup>80</sup> *Assemblée nationale, Commission des affaires européennes, Compte rendu no. 152, Réunion du mercredi 26 mai 2010 à 16h 30*, 19.

<sup>81</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2631 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of June 16, 2010, rapporteurs Elisabeth Guigou (PS) and Yves Bur (UMP), 38 and 42.

<sup>82</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2631 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of June 16, 2010, rapporteurs Elisabeth Guigou (PS) and Yves Bur (UMP), 71–72.

helm.<sup>83</sup> Yet while the political orientation reached in the Council was supported, the European Parliament was seen as exceeding its Treaty powers:

It would be fallacious to purport that with the EEAS we are creating a situation in which solely the European Parliament would be competent to exercise democratic control, which national parliaments would no longer exercise at their level: this is not a case of a transfer of competences from the Member States to the European Union.<sup>84</sup>

Hostility towards the European Parliament could also be registered in discussions in this Committee. Rapporteur Nicole Ameline (UMP) was resolute that ‘the European Parliament should not feel invested with extra powers’.<sup>85</sup> In a similar vein, Jean-Michel Boucheron (PS) found it absurd to vest foreign policy prerogatives in the European Parliament, whose legitimacy, in his view, was feeble and unrecognized by the citizens.<sup>86</sup> Not all Committee members, however, were against the European Parliament’s primacy in the control of the EEAS. For example, Hervé de Charette (NC) viewed the empowerment of the European Parliament as the only way forward in shaping authentic European diplomacy, with which the EU executive should conform.<sup>87</sup> The Foreign Affairs Committee then tabled a draft resolution slightly amending that of the European Affairs Committee. In the discussion of this draft resolution, the Chairman of the Foreign Affairs Committee, Axel Poniatowski (UMP), made it plain that the objective of the resolution was to support the Government’s negotiating position.<sup>88</sup> Rapporteur Ameline feared that not reacting would lead to the European Parliament reducing even more the few gains made.<sup>89</sup> The rapporteur of the European Affairs Committee, Elisabeth Guigou (PS), agreed:

It seems important to me to make our position known to the European Parliament [...], which always wants to increase its power of control. Yet one can understand this institutional logic. In parallel, the same European Parliament takes undue credit for seeking agreements with national parliaments. If we disagree with certain of its standpoints, for

<sup>83</sup> *Assemblée nationale, Commission des affaires étrangères, Rapport no. 2633 sur la proposition de résolution européenne (no. 2632) sur la réforme de la gouvernance de la politique extérieure de l’Union européenne* of June 17, 2010, rapporteurs Nicole Ameline (UMP) and Gaëtan Gorce (PS), 15.

<sup>84</sup> *Assemblée nationale, Commission des affaires étrangères, Rapport no. 2633 sur la proposition de résolution européenne (no. 2632) sur la réforme de la gouvernance de la politique extérieure de l’Union européenne* of June 17, 2010, rapporteurs Nicole Ameline (UMP) and Gaëtan Gorce (PS), 24–25 and 29.

<sup>85</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 72, Réunion du mardi 15 juin 2010 à 18h*, 4.

<sup>86</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 72, Réunion du mardi 15 juin 2010 à 18h*, 7.

<sup>87</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 75, Réunion du jeudi 17 juin 2010 à 10h 30*, 2.

<sup>88</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 72, Réunion du mardi 15 juin 2010 à 18h*, 4.

<sup>89</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 75, Réunion du jeudi 17 juin 2010 à 10h 30*, 4.



example as regards the High Representative, this resolution can have a real effect in relaying it.<sup>90</sup>

On 21 July 2010, the Government requested the European Affairs Committee to conduct urgent scrutiny, because a political compromise had just been reached on the EEAS and the House had initiated, but not completed, the scrutiny procedure. The following day, Pierre Lequiller (UMP), the Chairman of the European Affairs Committee, lifted the scrutiny reserve to allow the Government to adopt a position in the Council.<sup>91</sup>

After the Council's passage of the EEAS Decision, the draft resolutions of the European and Foreign Affairs committees were merged and adopted on 2 November 2010. In it, the *Assemblée nationale* recognized the challenge of unifying the areas of EU external policy governed by intergovernmental and Community decision-making procedures and called for a cessation of the institutional controversies between federalists and intergovernmentalists.<sup>92</sup> As regards the scope of the Service, preference was given to a model of the EEAS that would permit the High Representative to exercise the totality of her powers, which should not be exhausted in crisis management but should instead ensure a larger coordination of the Union's external action.<sup>93</sup> Accordingly, it was regretted that neighbourhood policy, commercial policy, enlargement and development aid were left outside the High Representative's purview.<sup>94</sup> In fact, the establishment of the Service was seen as an occasion to reflect on the organization of the Member States' consular networks and to set out a process of converging national foreign and security policies under the annual supervision of the European and national parliaments.<sup>95</sup> Furthermore, in contrast to the European Parliament's standpoint, the *Assemblée nationale* supported the budgetary and administrative autonomy of the EEAS from the Commission, because the purpose of the Service was precisely to overcome the dichotomy between the CFSP and the Community's external action.<sup>96</sup>

<sup>90</sup> *Assemblée nationale, Commission des affaires étrangères, Compte rendu no. 75, Réunion du jeudi 17 juin 2010 à 10h 30, 5.*

<sup>91</sup> *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2847 sur des textes soumis à l'Assemblée nationale en application de l'article 88-4 de la Constitution du 1<sup>er</sup> juillet au 29 septembre 2010* of Oct. 6, 2010, 29.

<sup>92</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of Nov. 2, 2010, recital 1 and point 1.

<sup>93</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of Nov. 2, 2010, points 3 and 6.

<sup>94</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of Nov. 2, 2010, point 5.

<sup>95</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of Nov. 2, 2010, points 10 and 11.

<sup>96</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of Nov. 2, 2010, point 4; *Assemblée nationale, Commission des affaires européennes, Rapport d'information no. 2631 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of June 16, 2010, rapporteurs Elisabeth Guigou (PS) and Yves Bur (UMP), 46.

Importantly, the *Assemblée nationale* endorsed the Government's position in the EEAS negotiations, requesting it to lobby for a sufficient representation of France and the French language in the Service.<sup>97</sup> Finally, the *Assemblée nationale* proposed interparliamentary cooperation in guaranteeing the political monitoring of EU external relations.<sup>98</sup>

The EEAS arrangements were also debated in the plenary. For example, questions were posed to the Government on the consequences of the new Service for the organization and functioning of the French Ministry of Foreign Affairs.<sup>99</sup> Furthermore, in anticipation of the December 2009 European Council meeting, when the Swedish Presidency had already presented a set of guidelines for the Service, information was sought from the Government on its positions and recommendations on the EEAS.<sup>100</sup>

### 3.1[b] *Analysis*

- (a) *Scrutiny.* The *Assemblée nationale* scrutinized the draft EEAS Decision from both substantive and institutional perspectives. Besides the contents of the Decision, the MPs delved into the implications of the new Service for the institutional balance in the Union.
- (b) *Controversy.* The issue of greatest political concern was that of harmonizing the institutional prerogatives of the French and European parliaments in the areas of foreign, security and defence policies. As the European Parliament was viewed as trespassing into areas not covered by the Union's constitutional settlement, the *Assemblée nationale* strongly reacted in order to halt this course of action.
- (c) *Information.* Apart from Government-provided information, the MPs formally met with MEPs to exchange views on the creation of the Service. This was of particular significance in this dossier, because MPs attempted directly to raise awareness among MEPs of the *Assemblée nationale*'s disapproval of the positions furthered by the European Parliament.

<sup>97</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of Nov. 2, 2010, points 2 and 8.

<sup>98</sup> *Assemblée nationale, Résolution no. 552 sur la réforme de la gouvernance de la politique extérieure de l'Union européenne* of Nov. 2, 2010, point 12.

<sup>99</sup> See the questions by Dominique Souchet (MPF) in: *Assemblée nationale, Compte rendu intégral, 1<sup>er</sup> séance du mardi 2 juin 2009, 25<sup>e</sup> séance de la session ordinaire 2008-2009, JORF [2009] A.N. (C.R.) 67[1], June 3, 2009, 4758–4759; *Assemblée nationale, Compte rendu intégral, 1<sup>er</sup> séance du mardi 3 novembre 2009, 41<sup>e</sup> séance de la session ordinaire 2009-2010, JORF [2009] A.N. (C.R.) 127[1], Nov. 4, 2009, 8944.**

<sup>100</sup> See the questions by Michel Delebarre (PS) and Axel Poniatowski (UMP) in: *Assemblée nationale, Compte rendu intégral, 1<sup>er</sup> séance du mercredi 9 décembre 2009, 81<sup>e</sup> séance de la session ordinaire 2009-2010, JORF [2009] A.N. (C.R.) 148[1], Dec. 10, 2009, 10380 and 10382.*

- (d) *Outcome.* Although the *Assemblée nationale*'s scrutiny of the EEAS Decision yielded recommendations for substantive changes in the arrangements for the Service's establishment, these seemed to be overshadowed by the institutional squabble with the European Parliament. The primary addressee of scrutiny, therefore, appears to be the European Parliament. Crucially, the House's constitutional relationship with the Government was not seen as posing an obstacle to this. Rather, the Government was a means of communicating the MPs' disquiet to the EU level.
- (e) *Parliamentary interdependence.* The involvement of the European Parliament in the establishment of the External Action Service was of major relevance for the *Assemblée nationale*. The aforesaid consultation with MEPs was an opportunity for the MPs to claim the 'territory' and to send a signal to the European Parliament that encroachments on the French sovereign powers will not be tolerated. The *Assemblée nationale*, therefore, openly confronted the European Parliament in order to ensure respect for the delimitation of powers envisaged in the founding treaties, which favoured the former's institutional position. This reflected the actorship of the *Assemblée nationale* as a direct counterpart of the European Parliament. Moreover, the cooperation between the national and European parliaments in effecting the accountability of the Union's action in external relations was embraced, which means that this House did not wish to remain compartmentalized at the French level and be excluded from future evaluations of the Service's operation.

With these remarks in mind, it is fair to conclude that, although the projected result of the scrutiny was to materialize in the national constitutional order, the *Assemblée nationale* nevertheless acted within the European constitutional framework to accomplish it. It also explicitly accepted the role of the provider of democratic legitimacy and accountability on the Union plane.

### 3.2 SÉNAT

#### 3.2[a] *Scrutiny Claims*

On 5 May 2010, the *Sénat*'s Foreign Affairs Committee tabled a draft resolution on the EEAS.<sup>101</sup> As one of its most significant reactions to the creation of the Service,

<sup>101</sup> *Sénat, Commission des affaires étrangères, de la défense et des forces armées, Proposition de résolution européenne no. 433 sur le projet de décision du Conseil fixant l'organisation et le fonctionnement du service européen pour*

the Committee condemned the European Parliament's assertion of powers beyond the Treaties, despite an unambiguous Lisbon Treaty declaration to the contrary.<sup>102</sup> 'There is a tendency within the European Parliament to get involved in all issues and to exclude national parliaments from European matters', observed senator Robert del Picchia (UMP). For senator Jean-Pierre Chevènement (MRC), entrusting the European Parliament with control over the Service and foreign policy was out of the question, because the latter does not represent a sovereign European people.<sup>103</sup> As Josselin de Rohan (UMP), the Committee's Chairman, claimed:

This is a very political problem. The European Parliament wishes to increase its political power over the shaping and execution of the common foreign policy through its budgetary power. [...] This would give the European Parliament the right of veto of a political nature over the choice of Heads of Delegations or EU Special Representatives. However, the power of appointment belongs to the High Representative.<sup>104</sup>

In a subsequent debate in the European Affairs Committee, he held that the European Parliament's demands were abusive and could lead to negative consequences. For instance, the legitimacy and credibility of an appointee to a senior EEAS post would be harmed if he were declared incompetent in the European Parliament hearings but would nonetheless keep the post.<sup>105</sup> He therefore called for prudence and vigilance:

If national parliaments do not pay attention, they will find themselves one day before a *fait accompli* of a European defence policy crafted in Brussels, on which they would not be able to pronounce themselves.<sup>106</sup>

On 21 May 2010, the *Sénat* adopted a resolution on the EEAS.<sup>107</sup> Therein, it argued that the Treaties do not confer on the European Parliament the rights to

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*l'action extérieure et la proposition de règlement modifiant le règlement (CE, Euratom) no. 1605/2002 portant règlement financier applicable au budget général des Communautés européennes en ce qui concerne le service européen pour l'action extérieure* of May 5, 2010.

<sup>102</sup> Declaration No. 14 annexed to the Lisbon Treaty states that 'the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions *nor do they increase the role of the European Parliament*' (emphasis added).

<sup>103</sup> *Sénat, Commission des affaires étrangères, de la défense et des forces armées, Compte rendu, Réunion du mercredi 5 mai 2010*, available at: <http://www.senat.fr/compte-rendu-commissions/20100503/etr.html#toc3>, accessed on Mar. 24, 2010.

<sup>104</sup> *Sénat, Commission des affaires étrangères, de la défense et des forces armées, Compte rendu, Réunion du mercredi 12 mai 2010*, available at: <http://www.senat.fr/compte-rendu-commissions/20100510/etr.html#toc3>, accessed on Mar. 24, 2010.

<sup>105</sup> *Sénat, Commission des affaires européennes, Compte rendu, Réunion du mercredi 19 mai 2010*, 6–7, available at: <http://www.senat.fr/europe/r19052010.html>, accessed on Mar. 24, 2011.

<sup>106</sup> *Sénat, Commission des affaires européennes, Compte rendu, Réunion du mercredi 19 mai 2010*, 8, available at: <http://www.senat.fr/europe/r19052010.html>, accessed on Mar. 24, 2011.

<sup>107</sup> *Sénat, Résolution européenne no. 106 sur le projet de décision du Conseil fixant l'organisation et le fonctionnement du service européen pour l'action extérieure et la proposition de règlement modifiant le règlement*

intervene in the activities of the Service and to participate in the appointment of Heads of Delegation and EU Special Representatives. It was thus essential for national parliaments to maintain close relations with the Service. The resolution further invited the Government to ensure that the Council took into account the principles of the Service's sui generis nature, of its complete budgetary and administrative autonomy and of the widest possible scope of competences. The EEAS should also manage security and defence matters and take the lead in the elaboration of the strategic guidelines for different financial instruments of the Union. Five days later, as presented above, senators took part in a joint meeting on the EEAS organized by the *Assemblée nationale*.

The EEAS was discussed in plenary debates mostly prior to relevant European Council meetings. Before the Council adopted the EEAS decisions, the senators queried the Government about the nature, scope and composition of the Service as well as about the repercussions thereof for French embassies worldwide.<sup>108</sup> Interventions thereafter sought information on the extent to which the results achieved addressed the concerns expressed in France.<sup>109</sup>

### 3.2[b] *Analysis*

- (a) *Scrutiny.* Just as the *Assemblée nationale*, the *Sénat* carried out a mixture of substantive and institutional scrutiny of draft EEAS Decision.
- (b) *Controversy.* The most controversial and politically contentious issue was the European Parliament's excessive assertiveness in striving to extend its powers beyond the Treaties. Most of the senators judged it important to preserve their influence over the political decision making in EU external action.
- (c) *Information.* While information mostly came from the French Government, the senators, together with MPs, met with MEPs to exchange their views. The opportunity was also seized to vent their criticism of what they perceived as the European Parliament's unjustified power grabbing.

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(CE, Euratom) no. 1605/2002 portant règlement financier applicable au budget général des Communautés européennes en ce qui concerne le service européen pour l'action extérieure of May 21, 2010.

<sup>108</sup> See the interventions by Hubert Haenel (UMP), Jacques Blanc (UMP), Yves Pozzo di Borgo (NC), Jean-Pierre Chevènement (MRC) in: *Sénat, Compte rendu intégral, Séance du mardi 27 octobre 2009, 11<sup>e</sup> séance de la session ordinaire 2009-2010, JORF [2009] S. (C.R.) 107, Oct. 28, 2009, 8967, 8969, 8973 and 8976*; and by Richard Yung (PS) & Aymeri de Montesquiou (PR) in: *Sénat, Compte rendu intégral, Séance du mardi 8 décembre 2009, 45<sup>e</sup> séance de la session ordinaire 2009-2010, JORF [2009] S. (C.R.) 141, Dec. 9, 2009, 12459 and 12461*.

<sup>109</sup> See the inquiry by Robert del Picchia (UMP) in: *Sénat, Compte rendu intégral, Séance du mardi 26 octobre 2010, 18<sup>e</sup> séance de la session ordinaire 2010-2011, JORF [2010] S. (C.R.) 106, Oct. 27, 2010, 9074*.

- (d) *Outcome*. Formulating a number of requests for EU institutions, which were similar to those of the *Assemblée nationale*, the *Sénat* intended to guard France's scope of powers in foreign policy making and reaffirm that EU external action is a matter for the Member States' decision. Yet it should be underlined that although the objective was to protect national constitutional powers, the senators held the European Parliament and not the Government responsible for the evolution of the dossier.
- (e) *Parliamentary interdependence*. As for the MPs, the European Parliament's action in the decision-making process was evidently of high relevance for the senators. Even more than the *Assemblée nationale*, the *Sénat* assumed the function of a gatekeeper, chiding the European Parliament for usurping the EU constitutional setup. It did so both directly in communication with MEPs and indirectly by means of a resolution. Understanding itself as a counterpart of the European Parliament, the *Sénat* acted interdependently with the EU level.

It ought to be concluded, therefore, that the *Sénat* took a broader approach to scrutinizing the creation of the External Action Service and acted beyond the bounds of the French constitutional order.

#### 4 CONCLUDING REMARKS

The present empirical analysis shows that, with respect to the cases herein examined, both Houses of the French Parliament acted as European scrutineers. The *Assemblée nationale* and the *Sénat* used national scrutiny instruments strategically to project their preferences onto the EU level. This does not automatically mean that there was one monolithic opinion within Parliament's couloirs. On the contrary, many contrasting arguments have been made both in plenary and committee debates. The existence, evolution and, where necessary, intensification of parliamentary deliberations on EU policies and decisions are significant because they ensure that the interests of the citizens are properly represented from the point of view of a given Member State rather than merely from an aggregate point of view, that of the entire Union, which is primarily defended by the European Parliament.

Yet while the legal and political claims made in the course of scrutiny referred to the French legal order, their utilization was not restricted to this order. Parliament's scrutiny of both the Services Directive and the European External Action Service Decision demonstrates that many of the parliamentarians' policy alternatives, recommendations, objections and concerns were directed at the EU

level. Concerning the Services Directive, the French Parliament discredited the Commission's country of origin principle and bolstered the European Parliament's effort in deleting it from the Bolkestein proposal. Conversely, in the External Action Service episode, it was the European Parliament which was the object of criticism. Thus, while national parliamentary action was concurrent with that of the European Parliament in the case of the Services Directive, in the case of the External Action Service it was complementary in as much as the European Parliament nominally had no power of intervention but practically found a way to assert its role to the disapproval of French parliamentarians, who viewed such European Parliament's conduct as usurping the Treaty compact. The role perceptions of the MPs and senators are, therefore, best placed within a larger, polycentric constitutional compound of the European Union. By acting directly in relation to EU institutions, the French Parliament was a source of democratic legitimacy for the EU decisions under analysis.

Still, one might ponder whether national parliaments should only act to counter EU institutions. Whereas supportive action by national parliaments is always worthwhile for legitimacy reasons, opposition to EU action is even more a tool of legitimization. Legitimacy should not be understood as having a positive index only. Critical assessment of the political directions taken by the executive branch is the backbone of constitutionalism. Providing a check primarily on the national government but also on EU institutions, in order to undo the disbalance that intended EU action might result in, is perhaps the most valuable contribution that national parliaments can make to EU democracy. Put simply, while approval can be tacit, disapproval cannot. This is why parliamentarians ought to make their views known to those whom they have appointed and who exercise public power on behalf of the electorate. In this way, national parliaments fulfil not only their legislative and controlling functions but also those of communication and education.<sup>110</sup>

Parliamentary interdependence thus becomes obvious. When the European Parliament acts within the boundaries set by the founding treaties national parliaments are likely to focus on the substance of EU initiatives and the policy choices opted for by the Union, but when the European Parliament acts to extend the scope of the competences conferred on it by the Treaties national parliaments can be expected to assume a defensive stance and guard their own, already thin, prerogatives in EU affairs. Differences in policy fields and in the level of the European Parliament's involvement are, hence, important factors that shape the

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<sup>110</sup> Urbantschitsch, Wolfgang, *National Parliaments in the European Union – the Austrian Experience*, 30 (Karl-Franzens-Universität Graz 1998); Auel, Katrin & Raunio, Tapio, 'Debating the state of the Union? A comparative analysis of national parliamentary debates of EU affairs', *Paper prepared for the 6th ECPR General Conference*, Reykjavik, Aug. 25–27, 2011.

responsiveness of national parliaments in EU policy-making processes. In any event, such cross-level interdependencies are likely to occur only where the Union seeks to implement controversial and politically highly disputable policies that provoke stark divisions in parliaments and, naturally, where the latter are adequately equipped with formal scrutiny powers.

To conclude, from the perspective of multilevel European constitutionalism, 'it is now up to national parliaments to bear the weight of the "external" democratic legitimacy of the European Union', since they are "components" of the overall structure of European political and legal integration'.<sup>111</sup> A long way is still ahead, however, if these conclusions are to be borne out by consistent parliamentary praxis across the Member States. Even so, the praxis is already starting to exhibit signs of interdependence and transnational dialogue that transcends the rigid boundaries of the Union's founding treaties.

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<sup>111</sup> Bilancia, Paola, *The Role and Power of European and National Parliaments in the Dynamics of Integration*, 19(2) *Rivista Italiana di Diritto Pubblico Comunitario* 282 (2009).