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Parliaments, Public Opinion and Parliamentary  
Elections in Europe

Cristina Fasone, Diane Fromage and Zoe Lefkofridi



European University Institute  
**Max Weber Programme**

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## **Abstract**

The contributions collected in this Max Weber Working Papers Special Issue were first delivered at a conference held at the European University Institute and jointly organised by the Max Weber Programme for Postdoctoral Studies and the Robert Schuman Centre of Advanced Studies in March 2015 on 'Parliaments and parliamentary elections in Europe'. Following the transformations undertaken by the European and national parliaments after the Treaty of Lisbon, the 2014 European elections, the unprecedented politicization and the challenges posed to representative democracy by the Eurozone crisis, the Special Issue aims to investigate three intertwined themes. (I) Parliamentary representation: European and national at the same time?; (II) national parliaments in EU policymaking; and (III) dynamics of Euroscepticism and its effects on law-making. In particular the papers deal with the ability of parliaments to democratically represent people in the European Union today and to affect the European integration process, with the asymmetric involvement of national parliaments in the EU, their dynamics of cooperation as well as between them and the European Parliament, and finally, with the implications on EU democratic legitimacy of recent developments regarding parliamentary input provided at a very early stage of the European policymaking. Other issues, such as transposition and the representation of eurosceptics in the European Parliament are also dealt with.

## **Keywords**

Eurozone crisis, political representation, national parliaments, European parliament, Spitzenkandidaten, inter-parliamentary cooperation, EU policymaking, EU law-making, transposition, Euroscepticism.

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## **Parliaments, Public Opinion and Parliamentary Elections in Europe: Introduction**

Cristina Fasone, Diane Fromage, and Zoe Lefkofridi\*

The European Union (EU) is currently going through tough times. The outbreak of the global financial crisis (2008) triggered an economic and, eventually, a political crisis in the EU. Ever since, European integration has been on a rollercoaster of politicization: EU jargon like ‘Grexit’ or ‘Brexite’, ‘no-bailout clause’, ‘Transfer Union’, and ‘two-speed Europe’ moved beyond university lecture halls and parliaments and penetrated the national media and personal discussions around the continent. The nature and duration of the crisis have not just elicited soul-searching within the Union, but have also exposed its democratic deficits.

### **The unprecedented politicisation of Europe by the crisis**

The failure of the Union to deal with the crisis effectively has generated tensions within and between Member States, which, in turn, have ‘forced’ debates on thorny issues of European integration ‘into the open’. The rising politicisation of the European integration process is important because, despite increasing policy transfers to the EU level, and the empowering of EU-level institutions, EU policy and polity issues had, up until the crisis, been largely absent from national and the European Parliament (EP) election campaigns. For some time, the low salience of the EU translated into poor EU-related information being available, which, in turn, had a severe impact on public knowledge of the EU polity and policies. Because of the crisis, and through the crisis, vivid debates on EU issues were fostered; as a result, the media significantly increased EU-specific news’ provision to the European peoples. At the time of writing, the reasons behind the YES and the NO of the Greek referendum of 5 July 2015, as well as the parliamentary votes for and against a third Greek bailout (e.g. at the *Assemblée nationale*, the *Vouli ton Ellinon* or the *Bundestag*), constituted ‘news’ all over the continent (and beyond). Through the Europeanisation of the public sphere, European peoples have by now realised they are interdependent not just economically but also politically. Democratic events over EU issues have generated suspense, and a higher interest in EU politics, but also anxiety, and resentment.

### **Representative democracy ‘under siege’ from the crisis?**

Most crucially, during the management of the crisis, representative democracy came under strain, as parliaments (at both national and European levels) have often been side-lined by the executive power and non majoritarian, technocratic institutions (e.g. Rittberger 2014). It is the European Council, the Euro-group, the European Commission and the European Central Bank, that have been at the centre-stage of political events. To a large extent, the way the crisis has been managed seems to be in sharp contrast to the spirit of the latest treaty reforms and deliberations that date back to the Convention on the future of Europe (2001-3). Both the rejected draft Constitutional Treaty, and its subsequent, modified version, what came to be known as the Lisbon Treaty (2009), sought to strengthen parliamentary participation in EU policymaking at both national and EU levels. Democrats all over Europe welcomed the Lisbon Treaty as an unsatisfactory yet important first step towards addressing the Union’s deep democratic deficit: it made the EP an equal partner to the EU Council in most EU policy areas and granted national parliaments (NPs) a more important role in terms of subsidiarity

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check, including the possibility to require the modification, delay or prevent the adoption of EU legislative proposals. The EP and the NPs constitute vital elements of democracy in Europe, given that they are the only collective bodies whose composition can be determined directly by the people, and the only institutions with a clear mandate of citizen representation. Their empowerment and involvement have thus been conceived as a healthy counter-weight to and a democratic control of executive power at the EU level, which remains largely beyond the control of European peoples.

Indeed, drawing on the Lisbon Treaty, the EP tried to invigorate and strengthen its role: it pushed for and conducted the first-time *Spitzenkandidaten* contest for the Commission Presidency on the occasion of the latest EP elections organised in June 2014. Although Member States' governments initially challenged the link between the EP election result and the personality of the President of the Commission, they eventually acknowledged the dangers inherent in refusing to 'accept' Jean-Claude Juncker, the leading candidate of the European People's Party (EPP), the largest parliamentary group at the supranational level. One year later, in his speech of 29 June 2015 to Greek voters prior to a referendum that would prove decisive for both Greece and Europe, Juncker (2015) even claimed that 'his Commission was political' – thus challenging the traditional image of the Commission as the non-partisan, apolitical body that guards the Treaties. Perhaps, however, the EP contest was won 'less' by Jean-Claude Juncker than by...Euro-scepticism? And while Euro-sceptics on the left and right – those who either want a different Union or no Union at all – 'seized' more EP ranks in 2014, throughout the crisis national parliaments have been 'called to endorse the European decisions of their governments and simultaneously to sell the sacrifices to their constituencies' (Puntscher-Riekmann and Wydra 2015). Given their importance for the future of Europe and democracy, these developments demand attention.

### **Democracy matters – but how (much)?**

Never before was there a greater need to understand the extent and quality of parliamentary involvement in European integration, as well as the representation of Euro-sceptic peoples in both parliaments and policymaking. A series of important questions are raised: *To what extent are parliaments and the people they represent, or representative democracy more broadly, behind the curve? How and to what extent can they shape, foster or halt European integration? What are the potentials and the dynamics of cooperation between NPs, but also between NPs and the EP? To what extent is parliamentary involvement asymmetrical across the EU? What are the implications of recent innovations for parliamentary input in EU policymaking and the EU system's legitimacy?* These are the questions pursued by this Max Weber Working Papers Special Issue '*Parliaments, Public Opinion and Parliamentary Elections in Europe*'. Taken together, the contributions to this issue shed new light on the potential and quality of representative democracy in the EU. In detail, this on-going research advances our knowledge of (*ex ante* and *ex post*) parliamentary involvement in EU policymaking, and of the role played by Euro-sceptic public opinion and parties in the European integration process. The research showcased here concerns three distinct yet interrelated themes, namely:

- I. Parliamentary representation: European and national at the same time? (Goldoni; Fromage)
- II. National parliaments in EU policymaking (Fasone and Fromage; Jančić; Maatsch)
- III. Dynamics of Euro-scepticism and its effects on law-making (Williams; Brack)

The contribution by Marco Goldoni exposes why EU policymaking resists being shaped by the style and values of representative politics, despite the institutional design of the Commission and its link to the EP via the *Spitzenkandidaten*-experiment of the June 2014 EP election. Goldoni thus suggests instead a shift of focus from the EU to the national level as a potential vector of parliamentary politics. How would that work? Diane Fromage tackles this question by analysing the vertical and horizontal dynamics of interparliamentary cooperation and critically assesses the diversity of forums created for this purpose and their informal work. Relatedly, Cristina Fasone and Diane Fromage jointly evaluate the potential of parliamentary participation in EU policymaking via the Political Dialogue and the Early Warning System, which motivate NPs' proactive and reactive forms of involvement respectively. In his study, Davor Jančić focuses on a more recent innovation, namely the Juncker

Commission's 'Better Regulation Agenda' and discusses its implication for representative democracy and NPs in particular. His in-depth analysis of the Agenda's key aspects exposes the effects on NPs, whose space on the EU law-making chart, however, remains limited. On the other hand, Aleksandra Maatsch's research examines the approval of anti-crisis measures by NPs across the EU; her study of the entire universe of national legislative bodies of the Union reveals a picture of convergence and divergence patterns within the Union. She also observes that the asymmetries that emerged in the course of the European financial crisis significantly deepened previously existing discrepancies among NPs determined by different constitutional arrangements.

To be sure, negative public attitudes concerning the EU and the electoral success of Eurosceptic parties across Europe also matter for the workings of representative democracy in the EU. Christopher Williams' analysis is telling as to how public opinion towards the EU can impact the 'downloading' of EU decision making into the national sphere: when Euroscepticism is high, transposition slows down. On the other hand, transposition is accelerated when public support for the EU is higher *relative* to Euroscepticism. Euroscepticism is also the focus of Nathalie Brack's study that examines the results and trends in the 2014 EP elections. She argues that the crisis has generated a greater demand for Eurosceptic ideas, thus producing further support for right-wing radicalism. Despite being the clear winner of the 2014 European elections, the 'untidy' right has a limited impact *within* the European parliamentary chamber; the radical right parties' increasing strength, however, may have an impact on EU policymaking – and European integration more broadly – via the national level.

### Acknowledgments

This unique collection of research papers constitutes the tangible outcome of the multidisciplinary conference, which we organised on 24 March 2015 at the European University Institute (EUI) in Florence. In the spirit of the Max Weber Programme (MWP), the Global Governance Programme (GGP) and the Robert Schuman Centre for Advanced Studies (RSCAS), the aim of this conference was to bring together experts from a variety of countries, and disciplines: law, political science and history. Crucially, at this conference theory confronted practice: besides colleagues from academia, we had the great honour to discuss with experts working at regional, national and European parliaments: Costanza Gaeta (Institutional and European Union Affairs at National Conference of Regional Legislatures- Rome), Anna Ascani (Italian Chamber of Deputies) and Alfredo de Feo, Gérard Laprat, Minna Ollikainen and Eva-Maria Poptcheva (European Parliament). Academic researchers who participated in the conference (in addition to the aforementioned authors) as panel chairs, discussants, and/or paper-givers are: Brigid Laffan (RSCAS-GGP), Diego Garzia (RSCAS-EUI), Nicola Lupo (LUISS), Eric O'Connor (MWP-HEC), Thomas Raineau (MWP-HEC), Martijn Schoonvelde (MWP-SPS), Alexander Trechsel (SPS-EUI) and Bruno de Witte (LAW-EUI). The participants' diversity allowed for intensive, challenging and fruitful debates. We hope that the multidisciplinary conference and this issue will serve as starting points for further discussions and collaborations. From our side, we would like to underline how pleased we are with the results of this endeavour, and sincerely thank all contributors. Last but not least, we are most grateful to Alyson Price, Mia Saugmann and Laura Jurisevic for their availability and assistance, their valuable advice, and the timely editing and formatting of the documents of the conference and the special issue. It goes without saying that without the intellectual encouragement and the financial and administrative support generously provided by both the RSCAS and the MWP at the EUI all this could never have been possible.

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**Part I**  
**Parliamentary Representation: European and National at the Same Time?**



# **The Representativeness of EU Law-Making: Lessons from the *Spitzenkandidaten* Experiment**

Marco Goldoni\*

## **1. The *Spitzenkandidaten*: a constitutional transformation?**

The constitutional expectations developed around the European elections of May 2014 were in effect quite high. This article will make the point that they were in fact unreasonable. The agreement struck among the main political parties for the support of a candidate to be appointed as President of the European Commission – to be then approved, with the rest of the Commission, by the European Parliament (EP) – had been presented as a chance to enhance the representative quality of European politics. Among other things, this proposal was presented as an opportunity to question the current Euro-predicament based on the politics of austerity. This agreement mobilised some of the European political parties and meant that some form of electoral campaigning across Europe by the candidates to the Presidency was necessary. The intuition behind this proposal was to inject into the institution, endowed with the monopoly of legislative initiative, a democratic impulse through a contest for the appointment of its head. Leaving the selection of the President of the Commission to a contest was, first, a huge step forward towards a parliamentarisation of the relation between the European Parliament and the Commission and, second, a way to infuse some degree of representativeness in European Union (EU) law-making.

In brief, a space for the inception of an informal constitutional change seemed to be opening up once again in the history of European integration. As we know, the candidate of the party of relative majority was appointed after the elections by the European Council and his Commission was confirmed by the European Parliament. Does this appointment amount to a constitutional change? After one year, it is time for a first (not yet conclusive) assessment. To anticipate my conclusion, the Commission has not been able to translate the indirect election into a political impulse in the process of EU law-making. The analysis proposed here is based on the recognition that that hope was built on a serious misunderstanding of the nature of European integration, on a partial disregard for some of the essential features of the constitutional architecture of the Lisbon Treaty and the subsequent emergence of the New Economic Governance of the Eurozone and, last but not least, on the essential tenets of a representative form of law-making. It seems that one year after the EP elections, the momentum for an informal constitutional change has been lost.<sup>1</sup> In light of the submitted report of the ‘five presidents’ for the completion of the Economic and Monetary Union (Five Presidents 2015), it could be possible that a different route for future constitutional change will be taken up. Be that as it may, that attempt was understandable in the aftermath of the Euro-crisis. In the absence of output-based legitimacy and with the end of the resources of messianic expectation (Weiler 2012: 137-158), the search for legitimacy started moving towards input-based legitimacy. The revived focus on input legitimacy is further strengthened by proposals to elect, always in an indirect way, other European institutional figures. The point made in this paper is that the chosen engine (i.e., the Commission) for politicising EU law-making was wrongly picked and that a revival of input legitimacy ought to have looked first to other institutions. In order to put forward this argument, the next section will take a detour into normative constitutional theory to provide a normative benchmark against which to assess representative law-making. The following sections (3 and 4) will examine two interpretations of the *Spitzenkandidaten* experiment, Section 5 will sketch out why, in the absence of certain conditions, it is not possible to politicise EU law-making. Finally, section 6 will point to national parliaments (NPs) as possible forums for representative politics within the EU, but it will also emphasise that their role is mostly negative.

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<sup>1</sup> A more cautious evaluation of the effects of the *Spitzenkandidaten* saga is put forward by Hobolt (2014: 1528-1540).

## 2. The question of representative law-making: political constitutionalism

In order to assess the representativeness of a legislative process it is necessary to provide a normative standard. Most contemporary constitutional theories have focussed on the role of the judiciary and constitutional review in order to provide such a normative parameter. Political constitutionalism, as a stream of scholarship with different expressions and phases,<sup>2</sup> offers a powerful platform for thinking about law-making in a political and democratic way. Political constitutionalism advocates the central role of social and political conflicts in the development of the constitutional order in functional and normative ways:<sup>3</sup> Functionally, because constitutional orders do emerge out of the so-called circumstances of politics (Waldron 1999: 98-101); normatively, because representative law-making through a parliamentary style of politics provides a legitimate ground to the constitutional order. The two points are strictly intertwined: a political constitution arises out of a response to conflict and the normative value of a parliamentary style of law-making is the best way for recognising, respecting and managing conflicts which are immanent in society.

From the works of political constitutionalists, it is possible to distil three basic values at the core of a parliamentary style of law-making, all three intimately related (you cannot have a representative style of law-making if one of them is missing): representativeness, publicity and visibility (appearance). Briefly put, representativeness requires that there is a link (and at the same time some relative autonomy of both poles) between society and political institutions (Urbinati 2006). Representativeness makes sure that law-making by representation does not mean ‘acting in place of somebody’, but maintaining a relation between the representative and the represented. Publicity entails both that decisions ought to be taken after public deliberation and presented to be in the common interest (Waldron 2009: 336-340); in this way, publicity ties decision making to deliberative forms. Visibility, or appearance, implies the voicing of contrasting visions of the public or common interest and the essential consequence that disagreement is registered by the constitutional order and in this way memorised for the future. In other words, the tenet of visibility requires the constitutional system to avoid entrenching the position of the represented parts, and to leave open the possibility of deep contestation and disagreement (Griffith 1979). Crucially, the tenet of visibility entails the staging of the disagreement as an understandable conflict over the common good in the eyes of the general public. The institutionalisation of political conflict guarantees the on-going presence on the political stage of the outvoted point of view because the visibility of different perspectives keeps alive the memory of interests and values which have been excluded or outvoted (Mair 2007: 1-17). Finally, to avoid any misunderstanding, it must be noted that for political constitutionalists the main impulse for politicising law-making comes from political elections. These tenets mean that law-making opts in a drastic way for input over output legitimacy (Bellamy 2010: 2-22).

Overall, a representative style of law-making is one of the forms of societal self-construction that works as a legitimating factor because it connects social conflicts with institutions (Thornhill 2011). As I will discuss at length below, in the EU these features are either absent or they are often reduced to empty forms. This is the case because the preconditions that would enable the rise of representative politics and the representative qualities of EU law-making do not obtain at the European level. Subjects (parties and other organisations), spaces (the public sphere) and institutions (the European Parliament) do not provide the material basis for a solid form of representative law-making because they do not make salient forms of social or political conflict visible *as* European conflicts.

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<sup>2</sup> There is no space here to unpack these differences, but *grossomodo* there have been three different waves of political constitutionalism. The first one was markedly about function and found in Ivor Jennings its forerunner, but in John Griffith its torch-bearer. Functional political constitutionalism was focussed on how to use the constitution to realise political objectives. It proposed an instrumental and utilitarian view of the law. The second phase is marked by a normative turn which puts the emphasis on the virtues of parliamentary politics and law-making (Waldron 1999; Bellamy 2007; Tomkins 2002; Gordon 2015). A ‘third wave’ is more attentive to the reflexive dimension of political constitutionalism and investigates its presuppositions (Loughlin 2010; Gee, Webber 2010; Ewing 2013).

<sup>3</sup> Conflict is placed at the centre of the work of Griffith (2001: 176): ‘Constitutions take their shape from political upheavals, reflecting and seeking to resolve deep conflicts in society’. On this aspect of Griffith’s constitutional thought, see, recently, Webber (2014: 101-111).



This consideration does not exclude the possibility of resorting to other forms of political participation (possible avenues of exploration are, currently, the European Citizens Initiative or the use of referendums) (Shaw, Spaventa, Dougan 2013: 253-303),<sup>4</sup> but not to a full-fledged representative style of law-making. From this perspective, one can frame the attempt of electing the President of the Commission as a remedy against some of these drawbacks. Beginning with the analysis of the failure to make the appointment of the Commission President relevant for representative law-making, the rest of the article will try to highlight what makes representative law-making in the EU so difficult and why the indirect election of the President of the Commission, or even of the European Council, is not sufficient. Given that the rehabilitation of political conflict in the process of European law-making is an extremely difficult case, political constitutionalism suggests a more cautious and humble approach based primarily on the protection of Member States' domestic political systems and their contribution to the formation of EU law.

### **3. Electing the Commission's president: constitutional impact**

In the run up to the European Parliamentary elections of 2014, the most debated solution in order to enhance the representative quality of EU law-making was to elect the President of the European Commission. In a report published in 2012, three major EU scholars, Mattias Kumm, Miguel Maduro and Bruno de Witte, proposed injecting democratic legitimacy by calling European parties to propose a candidate for the European Commission, then to be endorsed by the European Council as a *de facto* decision (Kumm, B. de Witte, Maduro 2012: 3-11). The idea was based on the intuition that this would work as a sort of constitutional change in the EU political equilibrium without treaty amendment. The assumptions behind the proposal are constitutionally sensitive and their starting point is the role of the European Commission as the holder of the monopoly over legislative initiative. By injecting democratic energies into the Commission's head office one would have killed two birds with one stone: redeeming the political character of European citizenship by offering a choice between different political platforms and transforming the relation between Commission and Parliament into something much closer to a form of parliamentary government. This transformation would have turned the Commission into a politically accountable institution and would have pushed the EU towards a parliamentary government (Magnette 2001).<sup>5</sup> The 2014 elections provided an opportunity to test the available resources for representative politics at the European level (Weiler 2014: 747-753). The challenge was considerable: to bring representative politics to the heart of one of the most technocratic institutions of the EU. Such a proposal was grounded on the simple assumption that the Commission could easily be turned into a government thanks to its monopoly of the legislative initiative and, to a certain extent, its capacity to set the agenda (Pollack 2003). There has been a sense that that electoral turn could establish a rudimentary parliamentary system of government in the European Union, legitimised by electoral competition for the choice of who should run the EU and in what political direction (Antpöhler 2015). In this way, in the next electoral turn in 2019, European citizens could actually reward or punish the European parties and their candidates, enhancing both political representation and accountability. However, this postulate misses an important aspect of the current constitutional balance. The Commission's tasks are mostly dictated by the project of the internal market and its realisation. By default, its constitutional status tends to be nonpartisan according to the classic platform for staging political conflict in the European tradition (left-right). A *caveat* to these observations has to be added at this point. Not all Directorate Generals (DGs) of the European Commission operate according to the same kind of rationality. There are obviously degrees of difference among DGs and describing the Commission as a monolith is not really accurate.<sup>6</sup> But the aims of European integration are often presupposed, as is proved by the prevalent interpretations given to the idea of the internal market (Bartl 2015a). Moreover, the position of rigorous enforcer of the new

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<sup>4</sup> On direct democracy as an instrument of politicisation, see Lacey (2014: 61-82). A reflexive political constitutionalism ought to include these channels of political action, but the topic is beyond the scope of this article.

<sup>5</sup> It is important here to notice the difference between the kind of accountability which pushed the Santer Commission to resign and a stronger form of political accountability as the one envisaged by this proposal.

<sup>6</sup> I owe this observation to Bruno de Witte.

European Economic Governance adopted by the previous Commission consolidated the perception of this institution as mostly (but not exclusively) animated by the projects of the internal market and the common currency. This structural political deficit, as noted by Weiler, makes forms of political representation shallow and democratic law-making politically not salient.

Note that the Commission's relation to the EP is not one of a government towards a parliament even though the EP can vote down the Commission in its collegiality. The relation of confidence between the Commission and the EP is obstructed by many factors (S. Fabbrini 2015: 170-171): Parliament cannot vote down the Commission for purely political reasons; the EP itself has a statutory fixed mandate of five years and cannot be dissolved by any other institution; members of the Commission, according to Article 245 TFEU, 'may not, during their term of office, engage in any other occupation, whether gainful or not'. This provision is quite unusual for parliamentary governments. Finally, the letter of the Treaty seems to exclude any room for politicisation. Article 17.1 TEU states that the Commission, in ensuring 'the application of the Treaties' or in overseeing 'the application of Union law under the control of the Court of Justice', should guarantee that 'in carrying out its responsibilities ... [it] shall be completely independent' and 'shall neither seek nor take instructions from any Government or other institution, body, office or entity'. *In nuce*, the European Commission was not designed to be a government and cannot govern processes of social conflict within the European Union. Of course, institutions evolve and sometimes change their nature or their role in the framework of the constitutional system in which they are embedded. Yet, most of these changes are triggered by some form of social and political mobilisation.<sup>7</sup> The grafting of an electoral competition upon this 'neutral' constitutional position, in the absence of bottom-up popular mobilisation, is doomed to remain a sterile exercise because there is not enough traction to trigger change in the absence of Member States' political will. In other words, it is closer to a beauty contest than to a political competition; i.e., it is mere political cosmesis (Weiler 2014: 750).

Another aspect, linked to the realisation of the common currency, cannot go unnoticed here. Electing directly or indirectly the President of the Commission without the support of some form of popular mobilisation may even make the role of the Commission more complicated and controversial than it actually is. The European Commission is, among other things, the main commissarial power in the Eurozone for policing budgetary and financial constraints of Member States (Dawson, F. de Witte 2013), even more so after the enactment of the New Economic Governance.<sup>8</sup> Christoph Joerges and Florian Rödl have aptly captured the potential problem that might affect the Commission's role when the latter comes to be headed by an indirectly elected president: 'An election of its President, even if successful, would still not change the constitutional role played by the Commission and it would simply give a *prima facie* democratic legitimacy to these commissarial powers' (Joerges, Rödl 2014). In other words, electing directly or indirectly the President of the Commission is equivalent to provide a patina of democratic legitimacy to an institution whose function is not to govern the European Union nor to act as a parliamentary chamber, but to police and enforce the fiscal and economic discipline (which is a highly salient issue for representative politics!) of the New Economic Governance. The election of the President would allow the Commission's guardianship of austerity policies<sup>9</sup> to appear to be wrapped up in democratic legitimacy. Therefore, putting an exaggerated emphasis on the democratic credentials of the Commission may constitute a regrettable approach as it would give way to a potential conflict between the Commission's claim to represent the interests of European citizens and the Member State government's claim that they represent their own nationals. The risk, here,

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<sup>7</sup> Interestingly, the recent *political* stance taken by the President of the Commission on the Greek crisis has been triggered by a concrete political conflict with the government of one of the Member States.

<sup>8</sup> For an analysis of the constitutional transformation caused by the Euro-crisis see Tuori and Tuori (2014) and Joerges, (2015).

<sup>9</sup> It should be noted that the emphasis here is on the role of guardianship because the final political decision for sanctions is left to the ECOFIN council. In economic and financial policy, it is up to the ECOFIN council to decide whether or not to proceed along the lines of the Commission's proposal. The Commission's role, therefore, is still mostly technical rather than political: it monitors and controls the performances of Member States. This is not to deny that there is also room for political discretion in the Commission's decision making.

would be to put under further stress the very fabric of (some) Member States' political constitutions, in particular, within the Eurozone, those in the condition of being debtors.

#### **4. An alternative reading: constitutional re-balancing**

On top of the misunderstood interpretation of the Commission's role one ought to add the charitable reading of the election of the Commission President as a change in the balance of constitutional powers. The choice of Juncker as the new President has been read as a constitutional victory for the EP. According to this interpretation, in light of the electoral turnout, the disinterest of the general public, and the incapacity to set the electoral agenda, the democratic credentials of the Commission were not directly enhanced (Hobolt 2014: 1537). Despite all this, in the aftermath of the elections in many quarters the destiny of European democracy was associated with the appointment of the candidate selected by the party of relative majority. A group of advocates of the EP's initiative would note that any other choice rather than Juncker would further undermine the shaky democratic credentials of the EU. In particular in Germany, a media campaign to support the choice of Juncker was capable of getting the support of engaged intellectuals like Habermas, for whom it would be 'a bullet to the heart of the European project' (Habermas 2014) if the selected candidate were not going to be appointed. After recognising that so much was at stake, it is noted that the elections have yielded an important outcome: '[w]ith the nomination of Jean-Claude Juncker, the European Parliament won an important victory in the inter-institutional battle for power. By imposing one of the *Spitzenkandidaten* as the European Council's nominee for Commission President, the Parliament set an important precedent for the future which weakens the power of the European Council to select its own preferred candidates' (Hobolt 2014: 1538). According to this reading, the appointment of Juncker represents a further step towards a parliamentary federal European Union and certainly towards a parliamentary relation between the Commission and the EP with all the beneficial effects for EU law-making that are attached to it.

For all its merits, this is not the only available account of the aftermath of the 2014 elections. This reading defies political and constitutional logic, in particular if it is suggested that it entails parliamentarisation of the EU. As noted by Sergio Fabbrini 'the Commission that emerged from the 2014 EP elections confirms the political role played by the European Council in its formation, not only because the Lisbon Treaty assigns to the European Council, together with the elected Commission president, the task of composing the new Commission, but also because the rule of a commissioner per Member State has magnified the role of governmental leaders in selecting candidates expressing national, and not only partisan, preferences' (S. Fabbrini 2015: 169). In fact, immediately after the proposal of Juncker as the Commission President by the European Parliament, the European Council advanced a detailed programme for the new Commission – 'The Strategic Agenda for the Union in Times of Changes' – which set some policy priorities for the EU in the next five years and tasked the forthcoming European Commission to implement it.<sup>10</sup> As a result, the debate over the coming Commission policy programme took place not between those parties who would also later elect the Commission President, but instead in the European Council. During these negotiations, the countries with the strongest bias towards a Juncker Presidency presumably also had a higher influence than those who had supported him all along. Irrespective of the substance of the outcome of the negotiations, the ironic result of this allegedly democratic quantum leap is that the European Council was able to enhance its constitutional prerogatives. As a consequence, the Commission's political trajectory during this term is partially but significantly determined by the European Council when dealing with potentially salient political issues. According to Dawson and de Witte, the role of the European Council was already central in the definition of the political trajectory of the EU before the 2014 elections: 'it is clear that the European Council is increasingly willing both to act on its own initiative [...] and to instruct the Commission on the legislative proposals it should adopt in significant

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<sup>10</sup> This fact was openly recognised by Juncker himself when delivering his speech in front of the European Parliament (remarking that he would draw on the 'Strategic Agenda for the Union in Times of change' as adopted by the European Council).

details' (Dawson, F. de Witte 2013: 830).<sup>11</sup> Moreover, while the Commission has formally retained its monopoly on the legislative initiative, the European Council has gradually developed into a significant agenda setter of the larger developments in of the EU (Bocquillon, Dobbels 2014).

To these two aspects of the relation between the European Council and the Commission one might add, as Uwe Puetter has recently documented, the rise of the European Council as the primary agent of policing for the application of economic governance (Puetter 2012: 170-171).<sup>12</sup> This illustrates a broader point: the roles of monitoring and enforcement previously held by the Commission are often inspired and directed by the European Council itself when it comes to politically salient decisions. While executive power in the EU is shared by the Commission, the Council and a number of Agencies (Curtin 2009), the point made here is that the governing function (the function which gives a political trajectory to the government of a community) is in the hands of the national governments and, therefore, of the European Council.<sup>13</sup> In these remarks I do not want to convey the idea that the 2014 elections changed nothing. As recent research has shown (Peterson 2015), already detectable are some different traits in the current composition of the Commission (e.g., the number of Vice Presidents) and in the way the Commission perceives itself as being more political than the previous Commissions. But these changes, while clearly political, do not make the Commission the governing institution of the EU and, in terms of economic policies, they have not opened up EU law-making to strong disagreement.

In light of this analysis, one diversion from the argument is necessary. Previous considerations remarked that the governing agenda of the EU is still in the hands of the European Council. Such a consideration makes the proposal for a politicised Commission rather odd. Therefore it might be natural to turn to the European Council itself as the avenue for enhancing representativeness in EU law-making. After all, if the European Council has become, in the aftermath of the crisis, an even more assertive and powerful institutional actor, to open its presidency up to electoral competition might offer the opportunity to inject political contestation through a debate on the direction the EU ought to take. A directly or indirectly elected President of the European Council would have a representative mandate to steer future policies in a certain direction, or at least to try to convince the Member States' governments to change trajectory on the basis of an indirect popular mandate. In this case, the office of the President would be partially transformed from an arbiter to an agenda-setter who would be able to channel representativeness into legislative initiatives. In other words, this election would appeal to a mild form of political constitutionalism by presidentialisation.<sup>14</sup> Much of the viability of this proposal would hang on the design of electoral districts and the resistance of the strongest Member States.<sup>15</sup>

## 5. The missing European counter-movement

A common assumption underpinning all these proposals for enhancing representative law-making in the EU concerns the virtues of normative constitutional design. A change in the design of the formal or procedural constitution, if normatively convincing and conceived in a technically accurate way, might be enough to stimulate an authentic representative politics. It is a discourse based on a *top-down* and *formal* approach to constitutional change. This should not sound like a dismissal of constitutional engineering. But it is important to remember that it is only a partial perspective on modern constitutional dynamics. In these proposals, there is no sense of the constructive role played by political representation in connecting society to political institutions. Even less, there is no real concern for political agency, or for the social context, which might motivate some form of political action. These proposals (electing the President of the Commission or the President of the European

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<sup>11</sup> The authors point to the approval of the Six Pack, pushed forward by the Commission, as inspired by a report approved by the European Council.

<sup>12</sup> For a general overview, see the recent Puetter (2014).

<sup>13</sup> On the distinction between the executive and the governing function see Mortati ([1931] 2000, Chap. I).

<sup>14</sup> On the limits of a presidentialist reform in the European context see Glencross (2014: 1163-1180).

<sup>15</sup> Another proposal, with the aim of re-establishing Member States' equality, has been made by F. Fabbrini (2015).

Council) do not seem to take into account the underlying materiality of the European constitutional order (Wilkinson 2013).<sup>16</sup> A closer look at the functioning of the European material constitution reveals that it operates in order to hamper or empty out representative law-making of the kind outlined in section 2. While modern State constitutions are marked by the rise of public law as the medium for circulating autonomous political power (Thornhill 2011: 374) whose legitimacy was based, first of all, on the institutionalisation of a political conflict around the social question (Supiot 2009: ch. 5), the European material constitution exercises an opposite gravitational pull, that is, one towards a re-patrimonialisation of Member States' societies. The European institutional balance is conceived as a way to suffocate the rise of political conflicts and to sever off demands coming from societies. It is no surprise, then, that the social question is obscured by the dynamics of European integration and it does not find representation at the institutional level. The core of the EU material constitution is an agreement among national governments to share part of their governing faculties in order to create an internal market and (for the moment, among 19 governments) to introduce a common currency. In terms of law-making, this means that many potential political issues enter into the legislative process already under the register of market rationality or the diktats of the common currency.

As a consequence, European integration becomes a process of State and societal transformation (Bickerton 2012) whose main aim is to limit political conflict around the social question or even silence it (Dani 2012). While Polanyi saw in the rise of a certain representative politics in the modern State a movement (of closure) for governing previously unleashed market-based forces (Polanyi 2011), the centralisation of power in some key EU institutions announces a different direction. The trajectory undertaken by the European Union seems to undercut the possibility of a double movement (Christodoulidis 2013) because it entrenches preferences through a rigid form of 'intergovernmental legal constitutionalism' (Bellamy, Weale 2015: 268). These premises make any implant of representative politics onto EU law-making rather weak or even deceptive. In fact, the inclusionary virtues of representative law-making are not operative within the EU. Most importantly, two of the pillars of the economic governance of (at least) the Eurozone – i.e., the intergovernmental mode of pursuing fiscal and economic convergence and the supranational mode of setting monetary policies through an independent Central Bank – defy the very idea of a representative style of politics. Their setting up prevents the organisation of political conflict around questions of redistributive policies. A paradigmatic instantiation of the limited representative capacity of EU law-making is constituted by the ECOFIN group decisions, increasingly based on rules compliance and respect for macro-economic indicators.<sup>17</sup> The informal Eurogroup operates in the same modality: benchmarking and peer-review. In this context, no trace is left of a vibrant political discussion through deliberation over the political relevance of the group's decisions.

## **6. The contribution from the NPs**

At this stage, EU policymaking and law-making are politically constrained by the current constitutional setting where certain kinds of political conflict tend to be suffocated or tamed (possibly in favour of other kinds of conflict).<sup>18</sup> However, a different kind of governing style has emerged (Supiot 2015). Gareth Davies has recently shown how European law-making is guided by a purposive approach and how this has limited enormously its political nature (2015: 2-22). The consequence is that what used to be deemed the functional success of the European material constitution is now becoming its iron cage (Ryner 2015). The availability of options within the political system has become more limited and has often made redundant the political differences of European parties

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<sup>16</sup> The idea of the material constitution is traceable to Mortati ([1940] 1998) and, before him, to Schmitt ([1928] 2008). For an updated assessment and comparison between Mortati's and Schmitt's constitutional theories see Croce, Salvatore (2012: Ch. 8).

<sup>17</sup> For a criticism of this kind of European governance see Supiot (2015).

<sup>18</sup> For a recent example of an empirical analysis on some formations of the Council and how conflict plays out in those settings, see Bailer, Mattila, Schneider (2015) and Veen (2011). This tenet of the European constitutional order has led to finding other institutional avenues for staging conflicts, in particular around rights, as properly illustrated by Martinico (2013).

(Thomson 2009). Quite predictably, the cleavages that emerged from the recent EP elections are based more and more on two axes: (1) pro and against further Euro-integration and (2), on a less obvious and milder way, the North-South divide.<sup>19</sup> Note that these axes might constitute a pivotal point for organising forms of political conflict and they certainly might be, in the future, powerful ones. Nonetheless, they both indicate that Member States are among the primary involved actors in these conflicts. It is not by chance that the alternative to the consensus on Eurozone governance, in both cases, veers towards the rise of movements or parties supporting forms of repatriation of national sovereignty in southern Member States (Sciocluna 2014).

The previous analysis means that the space of the States, regions and the municipalities seems to represent still the most relevant political and constitutional units for an analysis based on political constitutionalism.<sup>20</sup> In this last section, for reasons of space, the level of the State will be taken into consideration. Hence, in the current situation, the focus should be twofold: on one hand, specific attention ought to be paid to how to preserve State-based representative politics from the imperatives of the European economic governance, and in a different sense, on how to make parliamentary politics more autonomous from the national governments when EU affairs are discussed. In other terms, it is the case that Member States' political constitutions ought to be protected from the functional pressures coming, in particular, from the requirements imposed by the common currency and the primacy of the economic freedoms. This is one of the possible ways (but not the exclusive one) to prevent representative politics from being completely hollowed out by market rationality.<sup>21</sup>

If the previous analysis is correct, then at this stage of development it is timely to try to reinvigorate forms of parliamentary and participatory politics, first of all at the level of the Member States, where the preconditions and the resources are, at least in some cases, still available.<sup>22</sup> Instrumentally, two main areas can still play an important defensive role and they both concern the role of NPs in EU law-making.<sup>23</sup> However, before mentioning these two tools, a reminder is in order. An evaluation of the constitutional role played by NPs ought always to be coupled with a sociological analysis of the underpinning political and party systems, otherwise the risk is to reify under one formal tag a varied set of political institutions (Kiiver 2006). Therefore, the following two remarks are offered with the awareness of an overgeneralisation on the nature and functions of parliaments.

The first channel for enhancing parliamentary politics concerns the accountability of ministers and prime ministers at the Council of Ministers and at the European Council. Both settings have proven insidious for representative politics because they do have important legislative and governing functions but they do not provide the public stage where political conflict can be enacted or disagreement among Member States can be registered (Bovens, Curtin, Het Hart 2011: ch. 6). A mid-size solution would be to strengthen public mechanisms of accountability in all Member States, arguing for, where made possible by the conditions of the political system and within the limits imposed by qualified majority voting, an unveiling of the bargaining and negotiations taking place in Brussels and obliging the government to be brought to account before and after the Council meeting

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<sup>19</sup> Before the crisis, some scholars had actually detected the rise of a left-wing cleavage: S. Hix et al (2006: 494-511).

<sup>20</sup> Streeck (2014: 179) notes that 'no European democracy can develop without federal subdivision and extensive rights of local autonomy, without group rights protecting Europe's many identities and spatially based communities'.

<sup>21</sup> Peter Mair (2013: ch. 4) has analysed the EU as a deliberate construction of national executives where policymaking can evade the constraints imposed by representative democracy at the national level.

<sup>22</sup> In an ideal sense, as noted by Anna Kocharov (2015), a perfect candidate for voicing disagreement would be the European Parliament but given its current composition (the sociology of its personnel) and the organisation of European parties, it seems unlikely it will become a seat for voicing opposition in the near future. Moreover, as Susan Watkins reminds us (2014), 'the business of the Europarliament is co-decision. It cannot, structurally, supply the one essential component a functioning democracy requires: opposition'.

<sup>23</sup> This does not mean that national parliaments are the only active bearers of forms of representative and participatory politics. There have been cases where either European citizens, through the European Citizens' Initiative, or trade unions, have effectively constrained the Commission's attempt to expand the internal market at the expense of political democracy. For the former case, see in general the volume edited by Dougan, NicShuibhne, Spaventa (2012). For the latter see Leiren, Parks (2014).

(Curtin 2014). This form of accountability should become even stricter for the Eurozone governance where the role, mostly domestic in nature, would be ‘to ensure that in negotiating budgetary rules at the EU level, the elected executives of each of the contracting Member States act on the authority of their national parliaments’ (Bellamy, Weale 2015: 270). However, in the current context, this form of accountability has to be exercised in a networked and strategic form together with the EP. A possible forum might be offered, despite its uncertain and dissatisfying beginning, by Article 13 of the TSCG, which provided the basis for the creation of the Interparliamentary Conference on Economic and Financial Governance of the European Union. A second important hurdle in the implementation of a stronger political accountability of ministers is constituted by the political system of the Member States. Governments enjoying a solid majority in parliaments are less prone to be subject to strict scrutiny whose rigour becomes even milder when the political majority is not formed by a coalition of parties. The analysis of these differences is beyond the scope of this article. Suffice here to note that the subtraction of political space from executive dominance and the publicity of EU decision-making processes are essential preconditions for preserving spaces for representative law-making (Curtin 2014: 29-31).

A second important support is offered by subsidiarity review through the Early Warning System (EWS). It is not easy to assess the impact of the EWS because it cannot only be measured by the number of yellow cards. Nonetheless, given the functional pull exercised by European institutions in the exercise of their legislative powers, a more assertive role played by national parliaments on the use of this mechanism might disrupt the link between the realisation of the internal market and the tamed character of European representative law-making (Bartl 2015b). The principle of subsidiarity has been interpreted in a functional way, that is, as a normative instrument for adjudicating on which institutional level is best suited for carrying forward the realisation of specific aims.<sup>24</sup> The EWS, however imperfect and visibly limited, still offers institutions like national and regional parliaments the possibility to challenge the logic of functional European integration and to bring back political judgments in subsidiarity-related reasoning. Subsidiarity review also offers an opportunity for disentangling parliamentary politics from the grip of executive power. In order to realise the full potential of this instrument, it will be necessary to strengthen interparliamentary cooperation in a strategic way (meaning: not only deliberative).<sup>25</sup> Obviously, this strategic use of subsidiarity review has an instrumental and negative character. Instrumental because it re-signifies subsidiarity review as a tool for preserving spaces of representative politics. Negative because by itself it does not instantiate a form of representative law-making at the European level but rather a veto mechanism for unjustified centripetal EU law-making.

For this reason, a final remark has to be devoted to the promising idea of a ‘green card’ as advocated, in three different forms, by the Dutch, the UK and the Danish parliaments and by an increasing number of other parliamentary chambers.<sup>26</sup> The ‘green card’ capitalises on a series of discontents concerning the passive role of subsidiarity watchdogs or guardians of national governments to which some NPs felt reduced (Chalmers 2013). The green card would possibly integrate the Political Dialogue and would offer, in its richest versions, a channel for communicating to the Commission the political preferences of NPs, or at least a group of them (the so-called ‘cluster of interests’) (Fasone, Fromage 2015). In the words of the House of Lords, the proposal for a ‘green card’ maintains that ‘there should be a way for a group of like-minded national parliaments to make constructive suggestions for EU policy initiatives, which may include reviewing existing legislation’ (UK House of Lords 2014: § 55-59). The mechanism would operate with a logic similar to the procedures regulating the EWS: it would be necessary to collect, within an established deadline, a certain threshold of votes by NPs to be able to grab the Commission’s attention. However, the green card would introduce some objective benefits. On the one hand, the green card avoids the limitations

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<sup>24</sup> For a fully-fledged reconstruction of the possible interpretations of subsidiarity, see Fasone (2013).

<sup>25</sup> For a different view on subsidiarity, see Cooper (2012). For an updated overview of interparliamentary cooperation Lupo, Fasone (2016). On the proliferation of interparliamentary cooperation in the EU see Fromage (2015).

<sup>26</sup> The COSAC general meeting at the end of May 2015 included in its agenda a discussion of this proposal.

of a subsidiarity-based exchange between NPs and the Commission while, on the other hand, it would constitute a contribution to the definition of the agenda of the Commission.

## 7. Conclusions

The unfolding of the Euro-crisis shows how much the EU Commission is still struggling to grab a space for political manoeuvre going beyond the implementation of economic governance. While the President of the Commission is trying to be more assertive on many issues, on key topics the Commission still operates rather as an executive power than a proper government. Trying to enhance the input legitimacy of EU law by politicising the monopoly of the legislative initiative might appear an obvious starting point. But, as this article has tried to show, neither the institutional design of the Commission nor its relation with the European Parliament allows EU law-making to be shaped by the style and values of representative politics.

The last section of the article has proposed to move the focus on the role of the NPs as a potential vector of parliamentary politics. The set of options based on NPs' involvement offers an opportunity to reclaim forms of input legitimacy into the EU law-making process and, at the same time, to protect the Member States' political constitutions.<sup>27</sup> However, it is essential to remember that this set of proposals is far from exhausting the potential avenues for injecting more political constitutionalism into EU law-making. Basically, the options previously mentioned may guarantee some of the preconditions for enabling representative law-making. Yet, even this is far from being sure. In fact, the reflexive approach to political constitutionalism reminds us that NPs are capable of representative politics only under certain conditions, that is, in the presence, at least, of a political system animated by engaging political parties, social movements and trade unions.

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<sup>27</sup> For a series of reasons, the direct activation of NPs to protect their competences and to contribute to the shaping of EU law-making is more promising and possibly more effective than the protection offered by national constitutional courts. One of these is that not all Member States have a constitutional court and not all constitutional courts have the same influence. See Wilkinson (2014).



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# A Mapping of Recent Trends in Interparliamentary Cooperation within the EU

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## 1. Introduction

Since the entry into force of the Lisbon Treaty in 2009, interparliamentary cooperation between national parliaments (NPs) and the European Parliament (EP) is specifically mentioned and promoted by the Treaties:<sup>1</sup> Article 12 TEU states that ‘National Parliaments contribute actively to the good functioning of the Union: [...] by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.’ This provision seems to be an invitation to cooperation between the national and the European legislatures, as opposed to the competition that might have existed between both types of institutions in the past (Casalena, Lupo, Fasone 2013: 1593).<sup>2</sup> Furthermore, cooperation at a horizontal level between national parliaments alone does not appear to be encompassed by Article 12 (Esposito 2014: 138), although, as we shall see, it does happen in practice. On the other hand, Articles 9 and 10 of Protocol no 1 also address the question of interparliamentary cooperation. Article 9 is more of a declaration of intention – in which the participation of both the EP and NPs is referred to – as it foresees that ‘The European Parliament and national Parliaments shall together determine the organization and promotion of effective and regular interparliamentary cooperation within the Union’, whereas Article 10 indirectly refers to COSAC (the French acronym for the Conference of Parliamentary Committees for European Affairs of Parliaments of the European Union) and its activities.

These provisions have formed the basis for the development of numerous initiatives for the reinforcement of interparliamentary cooperation. In recent years for instance, two new interparliamentary conferences among national parliaments and the European Parliament emerged in the European Union (EU): the Article 13 Conference and the Common Foreign and Security Policy (CFSP) Conference.<sup>3</sup> Together with COSAC, established in 1989, these represent the three interparliamentary conferences currently in existence in the EU. Because COSAC has been long established and is, even now, the most formal forum for interparliamentary cooperation,<sup>4</sup> and because the two newer conferences continue to be the objects of important debate with regard to their rules of procedures, all three have been the object of much academic attention.<sup>5</sup>

In contrast, other forms of interparliamentary cooperation have been developing over recent decades and, even more so, over the last few years. Outside of these three conferences, there exist, on the one hand, forums of interparliamentary cooperation equally formalized but organized on the EP’s initiative alone or on that of the NP of the Member State holding the rotating Council presidency, and, on the other, consolidated groups of national parliaments that commonly cooperate and might be geographically close.<sup>6</sup> These last initiatives amount a sort of ‘reinforced cooperation’ among national parliaments (Esposito 2014: 174). Additionally, in the last few years, NPs have also sought to cooperate on an ad hoc basis.

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<sup>1</sup> From 1979, when the EP ceased to be composed of delegated MPs, some initiatives for interparliamentary cooperation had existed. However, the participation of national parliamentarians in the European arena was still qualified as bleak before 2009. (Maurer, Wessels 2001: 453-454).

<sup>2</sup> On this relationship and how it has evolved also: (Neunreither 2005).

<sup>3</sup> It should be noted that a specific basis for the establishment of the Article 13 Conference is contained in Article 13 Treaty on Stability, Coordination and Governance (TSCG).

<sup>4</sup> For instance, because it is – indirectly – recognized in the Treaties and has its own permanent secretariat.

<sup>5</sup> See, among others, on the Article 13 Conference: (Cooper 2014), (Kreiling: 2013), (Lupo 2014); on the CFSP Conference: (Herranz-Surrallés 2014).

<sup>6</sup> Despite the importance it may have in practice, this contribution does not encompass the interparliamentary cooperation taking place at political parties or at the administrative levels.

In this context, this contribution aims to examine whether the EU and the existence of COSAC may have been motors for the development of new forums of ‘reinforced interparliamentary cooperation’, or whether, on the contrary, their existence is unrelated. If the latter is the case, I will try to explain what the elements are that may lead national parliaments to cooperate, and what the consequences are for interparliamentary cooperation in general. Indeed, while it could have been expected that the creation of new, sectoral, conferences for interparliamentary cooperation – whose organization and participation require a further mobilization of (already scarce) parliamentary resources – would have led to a concentration of parliamentary efforts, there instead seems to be an explosion of new initiatives, possibly motivated by the growing diversity and number of parliaments involved following the latest EU enlargements. A further incentive might also lie in the perceived lack of efficiency of forums such as COSAC where true debates are nonexistent because MPs read prepared contributions (Danish Parliament 2014). Also, it appears that in this framework, the cleavages are less between the European Parliament on the one hand, and national parliaments on the other, and more between national parliaments themselves, although initiatives common to the European Parliament and national parliaments are also diminishing.<sup>7</sup>

Hence, forums for interparliamentary cooperation outside conferences are currently varied and numerous. However, while some of these initiatives seem to have been designed for national parliaments to join forces in the EU framework and, more specifically, in preparation of and around COSAC meetings (2), others are the result of external dynamics and only have an incidental role in EU affairs (3).

## **2. A multiplication of interparliamentary forums oriented towards COSAC meetings and in the attempt to influence EU institutions**

### **2.1. Permanent forums**

Within this first category, some forums are more consolidated than others. For instance, the Visegrád group -composed of the Czech, Slovak, Hungarian and Polish parliaments- usually meets prior to all COSAC meetings (Lazowski 2007: 211). We can note that, although the Visegrád group has long existed – since 1991 when the Visegrád Declaration was adopted –, its parliamentary dimension at the level of president was agreed only in 2007 with the adoption of the Agreement of the presidents of parliament of V4 member countries on the institutionalization of cooperation on parliamentary level.<sup>8</sup> Meetings at EU committee level have existed almost since these countries became members of the EU in 2004 however: they started in 2005 and are currently organized on an ad hoc basis once or twice a year. According to the Polish Sejm, this and other meetings organized among sectoral committees ‘provide a forum for exchanging best practices in matters connected with membership in the European Union as well as give an opportunity to exchange views on current issues, to coordinate positions and to take common initiatives’.<sup>9</sup>

Others of these meetings take place on a more informal basis. For instance, according to a consolidated practice, committees on European affairs of the parliaments of Estonia, Latvia, Lithuania and Poland usually meet before COSAC meetings to ‘work out statements for the COSAC meetings and to take common initiatives’.<sup>10</sup>

More recently, a new initiative has been taken in order to enable an important dialogue between affected parliaments on the issues connected to the Mediterranean dimension of European

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<sup>7</sup> Joint committee meetings, and even more so joint parliamentary meetings, – both fruit of a joint initiative between the EP and the parliament of the Member State holding the EU Council’s presidency, are, indeed, becoming less frequent whereas interparliamentary committee meetings – organized on one or more EP Committee’s initiative – flourish. See, on this point, (European Parliament 2012), (European Parliament 2013) and (European Parliament 2014).

<sup>8</sup> Available at [http://oide.sejm.gov.pl/oide/en/images/files/international/porozumienie\\_wyszehrad\\_en.pdf](http://oide.sejm.gov.pl/oide/en/images/files/international/porozumienie_wyszehrad_en.pdf) last accessed 21/2/2015.

<sup>9</sup> [http://oide.sejm.gov.pl/oide/en/index.php?option=com\\_content&view=article&id=300&Itemid=30](http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=300&Itemid=30) last accessed 21/2/2015.

<sup>10</sup> Polish Sejm, [http://oide.sejm.gov.pl/oide/en/index.php?option=com\\_content&view=article&id=14737:meetings-of-the-of-the-committees-on-european-affairs-of-the-parliaments-of-estonia-latvia-lithuania-and-poland-&catid=39&Itemid=746](http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14737:meetings-of-the-of-the-committees-on-european-affairs-of-the-parliaments-of-estonia-latvia-lithuania-and-poland-&catid=39&Itemid=746), last accessed 21/2/2015.

policies: this is the case of the meeting of chairpersons of the South European Parliaments. This new forum was created in Nicosia in January 2014 and is composed of Croatia, Cyprus, France, Portugal, Slovenia and Spain – the parliaments of two candidate countries, Serbia and Montenegro, have attended some meetings in their capacity as candidate countries –. Whereas these meetings have been organized so far in parallel with the COSAC chairpersons' meetings, they serve as a preparation for the upcoming COSAC plenary meetings as illustrated by the programme of the second meeting held in Rome in July 2014 and by the declaration adopted in Riga in February 2015.

## ***2.2. Ad hoc meetings as a means for parliaments to show their political engagement or as the consequence of a growing number of parliaments?***

In addition to these permanent initiatives, national parliaments sometimes also seek an exchange with their European counterparts on an ad hoc basis. In this framework, we can differentiate between meetings organized in preparation of COSAC or other interparliamentary meetings and other thematic meetings.<sup>11</sup>

With regard to the first category, the most recent example is provided by the meeting organized by the Dutch Tweede Kamer on 19 January 2015 in order to improve interparliamentary cooperation.<sup>12</sup> This meeting gathered 14 national parliaments and the European Parliament in Brussels and permitted an exchange of views in preparation for the COSAC Chair meeting scheduled at the beginning of February 2015<sup>13</sup>. This initiative is particularly interesting as it appears to indicate that the opposition between national parliaments and the European Parliament, which had long existed, in reality is not as clear-cut as it is sometimes depicted. Additionally, while it clearly highlights the limits of the COSAC meetings organized twice a year for two days only, it also shows their importance as a forum for interparliamentary cooperation – reinforced, of course, by the possibility of interacting directly with the European Commission that COSAC meetings offer.

Prior to this recent meeting, some groups of national parliaments had already sought a first consensus at the time of negotiating the establishment of the Article 13 Conference.<sup>14</sup> For instance, the six Founding Member States met, with the European Parliament, in Luxembourg on 11 January 2013 'for an exchange of views on interparliamentary cooperation and democratic oversight in the field of Economic and Monetary Union'.<sup>15</sup> Other Member States' parliaments gathered, with the purpose of 'discuss[ing] how national parliaments could become proactive players in a more integrated financial, budgetary and economic union', in Copenhagen on 11 March 2013<sup>16</sup>; this was the second initiative of the Danish Parliament in this sense, given the fact that 11 national parliaments had already attended a meeting with a similar purpose on 26 November 2012 (COSAC 2013).<sup>17</sup> The European Parliament did not participate in either of these two meetings, illustrating the division existing between the European and the national legislatures in this domain<sup>18</sup>, whereas the EP was involved in the latest initiative for the improvement of interparliamentary participation and in the meeting of the Founding Member

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<sup>11</sup> Note that, so far, this new phenomenon has been subject to limited academic attention; therefore, the present analysis is based mostly on primary sources.

<sup>12</sup> Background paper by René Leegte, Tweede Kamer der Staten-Generaal.

<sup>13</sup> See, on the 'green card' initiative discussed at that meeting, the contribution by Cristina Fasone and Diane Fromage in this issue.

<sup>14</sup> It should be noted that the Visegrád group was also active in this framework. See, on these groups and their proposals: (Cooper 2014).

<sup>15</sup> Letter from the President of the Chamber of Deputies of Luxemburg addressed to the Speaker of the Cypriot Parliament on 18 January 2013.

<sup>16</sup> Letter from the President of the EU affairs committee of the Danish Parliament, the UK House of Lords, the Estonian Parliament, the Luxemburg Parliament, the Czech Chamber, the Irish Houses of Oireachtas, the Slovak Parliament, the Romanian Parliament, the Hungarian Parliament, the Slovenian Parliament, the Lithuanian Parliament, the Latvian Parliament, the Finnish Parliament, the Belgian Parliament, the Czech Senate and the Swedish Parliament addressed to the Speaker of the Cypriot Parliament on 8 April.

<sup>17</sup> Interestingly, not all NPs were invited to participate.

<sup>18</sup> This opposition, which relates to the role the EP should assume in this interparliamentary conference, was also visible in the negotiations of the rules of procedure of the CFSP Conference. Both initiatives for interparliamentary cooperation have provoked the resurgence of the EP's and NPs' dissenting views.

States. However, the aim of these meetings was the same and consisted in joining forces in order to influence the upcoming Speakers' Conference meetings; by the same token, they might as well be considered to have actually dealt with subject matter belonging to the competence of the Speakers' Conference.<sup>19</sup> Additionally, although the letters resulting from both of these meetings made contradictory proposals as to the form that interparliamentary cooperation in economic governance should take, they were signed both by the Chamber of Deputies of Luxembourg and the Belgian Senate, which seems to, at least, put their importance in terms of political engagement in perspective.

Other initiatives have also been organized with a more thematic focus; national parliaments sought to form 'clusters of interest'.<sup>20</sup> For instance, the French National Assembly hosted an interparliamentary meeting on the European Public Prosecutor's Office and on personal data protection in September 2014, as a consequence of a Franco-German initiative, with the aim to influence the EU Commission, and it had previously hosted a similar meeting on the financing of European cinema in June 2013. Before that, the German Bundestag organised an interparliamentary meeting on the European sale of goods law in November 2012 and, in fact, this first initiative and a videoconference organized between the French National Assembly, the EP and the EU Commission served as sources of inspiration to the National Assembly at the time of preparing its meeting on the EPPO. The Danish Folketing has also been active in this field by organizing a meeting on the free movement of workers in 2013. In these cases, the hosting parliament pre-circulates a discussion paper and the participating NPs can adopt a common declaration or a common position.

The question could be asked, however, as to the efficiency of these *ad hoc* initiatives. Indeed, the latest event hosted in Paris in September 2014 highlighted what can be considered, to a certain extent, the limit of this type of cooperation: some representatives could not commit to the joint declaration because of recent elections and subscribers to it signed only in their own names, a fact which was underlined several times as well as in the common declaration itself (National Assembly 2014). Additionally, the EP was invited to the meeting but did not take up the invitation<sup>21</sup> and, as already mentioned, the members of some national parliaments had already subscribed to two contradictory declarations. In contrast, when national parliaments and the EP adopt conclusions in the framework of COSAC they do so in the name of the conference as a whole, although as recalled in Protocol no 1 'Contributions from the conference [COSAC] shall not bind national Parliaments and shall not prejudge their positions.' Therefore, COSAC conclusions will have more legitimacy – and, hence, potentially more impact – than the contributions adopted in the framework of these interparliamentary meetings in which, additionally, only a minority of national parliaments participate, with the presence or the absence of the European Parliament. This notwithstanding, such initiatives may be motivated by a determined political will to affirm a position and find allies among the other national parliaments, as was the case of the French National Assembly in September 2014: being clearly in favour of the establishment of the European Public Prosecutor's Office, it sought to unite with like-minded counterparts. Moreover, in spite of the limited political value of such a declaration, it will undoubtedly be superior to a mere contribution submitted by one national parliament alone to the EU Commission in the framework of the Political Dialogue or even to its national government alone.

As to the rationale for the organization of these meetings, before the French initiative existed Antonio Esposito noted that 'it is significant that the organization of clusters was promoted by parliaments which, like the Danish one, exercise systematic control and influence on their respective government (also through a system based on negotiating mandates)' (Esposito 2014: 176). This counselor of the Italian Chamber added further that these assemblies may be interested in reinforcing

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<sup>19</sup> The Italian Chamber of Deputies considered it unnecessary, for instance, 'to participate in a meeting organized outside of the institutional framework for interparliamentary cooperation, in the absence of the European Parliament and dealing with decisions whose competence belong to the Speakers' Conference'. (Esposito 2014: 175, fn 113).

<sup>20</sup> A proposal to include these clusters of interest in the framework of COSAC, with the possibility to organize extraordinary COSAC meetings with this purpose, was discussed in Vilnius in October 2013. (Esposito 2014: 176).

<sup>21</sup> This is particularly interesting given the fact that the EP suggested some amendments to the proposal for the establishment of an EPPO, which seemed to be strongly inspired by the arguments NPs had raised in their reasoned opinions. However, it did not acknowledge this source of inspiration clearly and later refused to attend the meeting in Paris.



their relationship with the EU Commission because their relationship with their government is mostly circumscribed in relation to single legislative proposals put on the EU Council's agenda, and is hence rather ill-suited if it is to have some influence on the pre-legislative phase or, more in general, on the definition of the political and strategic choices of European institutions. According to this author, another motivation would potentially lie in the extending use of trilogues, which threaten the influence of those parliaments acting on the basis of a mandating system. However, the fact that the French National Assembly has been active in organizing thematic meetings seems to indicate instead that what is common to the parliaments seeking to form 'clusters of interest' is their weakness in EU affairs, be it derived from the actual institutional framework, as is the case in France, or be it due to changes that have occurred in the EU legislative process, as in Denmark. The House of Lords, on the other hand, simply justifies this thirst for informal interparliamentary meetings by the fact that NPs increasingly engage with key EU policies (UK House of Lords 2014: par. 132).

### **3. Interparliamentary cooperation with other purposes incidentally dealing with EU affairs**

In parallel to these ad hoc 'clusters of interest' and to permanent interparliamentary forums acting in preparation of larger interparliamentary meetings, some regional associations of parliaments also deal with EU affairs, although this is not necessarily their main purpose.

In this category belongs the Baltic assembly, created by the three Member States from the Baltic region – Estonia, Latvia and Lithuania – in 1991.<sup>22</sup> It is composed of parliamentary delegations from these three Member States and meets once a year. Although it has existed for over two decades, this assembly underwent an important process of reform and redefinition of its goals after its members became EU Member States.<sup>23</sup> As a result of this reform, its focus appears to be rather broad and aiming at inter-regional cooperation, with the Benelux assembly for instance, rather than aimed at creating an alliance within the EU.<sup>24</sup> EU affairs committees of the parliaments of the Weimer triangle – composed, since 1991, of France, Germany and Poland – also meet once to twice a year to discuss European matters<sup>25</sup> and although this practice was abandoned in 2004, it was resumed in 2008.

Some other interparliamentary forums, although they have a clear link to the EU, are composed of both EU and non-EU parliamentary delegations. This is for example the case of the Nordic Council. This assembly, formed in 1952, is composed of 87 elected members from Denmark, Finland, Iceland, Norway, Sweden, the Faroe Islands, Greenland and Åland and it regularly interacts with the EP, having visited the European institution twice in 2013 for instance (European Parliament 2014: 28-29). In that same region, the Baltic Sea Parliamentary Conference, founded in 1991, brings together, on a yearly basis, 11 national parliaments, 11 regional parliaments and 5 parliamentary organizations from both EU and non-EU countries. It is peculiar in that it not only includes the participation of the European Parliament but also that of the Baltic Assembly, the Nordic Council, the Parliamentary Assembly of the Council of Europe and the Parliamentary Assembly of the Organization for Security and Co-operation in Europe. Another parliamentary assembly gathering EU and non-EU MPs is the parliamentary assembly of the Union for the Mediterranean. It is composed of delegates from the 28 Member States, the EP and 15 Mediterranean countries; representatives from the Arab League also participate.

In addition to these forums, in which several Member States' parliaments come together, some bi-lateral initiatives, for instance between the French and the German parliaments, can be mentioned.<sup>26</sup>

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<sup>22</sup> However, the cooperation between these three States dates back to the 1980s. (Lunardelli 2014: 9).

<sup>23</sup> Website of the Baltic Assembly, History: <http://baltasam.org/en/history/institutional-reforms> last accessed 21/2/2015.

<sup>24</sup> Objectives as defined at <http://baltasam.org/en/history/renaissance>, last accessed 21/2/2015.

<sup>25</sup> For instance, the latest meeting organized in November 2014 contained a discussion on the Energetic Union in the EU and employment in the EU.

[http://oide.sejm.gov.pl/oide/en/index.php?option=com\\_content&view=article&id=14881:spotkanie2014&catid=11&Itemid=292](http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14881:spotkanie2014&catid=11&Itemid=292), last accessed 21/2/2015.

<sup>26</sup> Franco-German initiatives have existed for long and were underlined during the 50<sup>th</sup> anniversary of the Elysée Treaty in 2013. Declaration adopted on 22 January 2013 by the German Bundestag and the French National Assembly.

#### **4. Concluding remarks**

There appears to be a growing variety of forums for interparliamentary cooperation within the EU, some of which may actually be a reaction to the existence of COSAC. This proliferation of interparliamentary forums invites a reflection as regards the dangers it may suppose for their sustainability. Over recent years, and following Valentin Kreilinger's analysis, the interest shown by national parliaments for the bi-annual COSAC meetings has been variable, ranging from Italy, Austria and Portugal, which have systematically been represented by six MPs, while Malta, Latvia and Hungary sent, on average, only two representatives (Kreilinger 2013: 5). However, while the factor of interest surely plays a role, other elements, such as the cost of these meetings, the fact that they exist alongside numerous other parliamentary forums, as has been highlighted in this paper, and the perception of their efficiency – or lack thereof – surely play a role too.

It seems therefore that the prediction made by the House of Lords in 2014 has begun to become a reality. Indeed, as already mentioned, in its report on the role of national parliaments in the European Union, the EU Select Committee of the House of Lords underlined the fact that 'As national parliaments increasingly engage with key EU policies, it is likely that there will be informal conferences to discuss major policy issues' (UK House of Lords 2014: par. 132 ff.). As underlined by the Danish Parliament too, '[t]he number of inter-parliamentary conferences and meetings in the EU has increased significantly over the past few years. In particular new large scale Parliamentary Conferences have recently been established in the field of foreign and security policy and in economic and financial matters. But it is time to stop creating new large-scale inter-parliamentary meetings with too many participants, too many pre-prepared speeches while lacking in substantial political debate. Instead we must become more operational, innovative and solution-oriented' (Danish Parliament 2014). The Danish Parliament's assessment is particularly critical as, in its opinion, 'To this end, national parliaments should consider organizing more small scale meetings and informal contacts between members of parliaments and examine how existing large scale inter-parliamentary bodies such as COSAC, the CFSP-Conference and the Article 13 conference on budgetary policies could be reformed. A code of conduct on good inter-parliamentary meetings could lay down minimum standards for the organization of good inter-parliamentary meetings'. For this reason, they invited the Speakers' Conference to adopt such a code of conduct and, like the House of Lords, advocated the establishment of clusters of interest within whose framework 'Parliaments [would] organize small scale informal meetings along shared interests between groups of national parliaments on topical EU policy issues. Such meetings should have a clear purpose and common understanding of what their outcome should be. They could serve the purpose of either coordination, exchange of views or simply mutual inspiration on issues of particular interest to clusters of parliaments.'<sup>27</sup>

Furthermore, in trying to tackle the logistics problems, the House of Lords Select Committee suggested that 'It may be appropriate for an expanded COSAC secretariat to give a measure of logistical support to these informal conferences, subject to some simple baselines set down by COSAC.' This proposal would surely require a significant reinforcement of the COSAC secretariat – which is currently managed by one single administrator – and the question remains as to which of the national parliaments would be ready to bear the cost such an expansion would generate. However, a centralized management of the initiatives would prove useful in terms of transparency towards the citizenry, since currently the proliferation of interparliamentary forums and their sometimes punctual basis make it difficult for citizens to be fully informed of what is happening. Besides, if these initiatives were managed by one single organ, it might be possible to manage their schedule in the best possible way in order to allow the interested parliaments to make their choices while being fully informed. This could prove useful for them to manage their – sometimes scarce – resources in an efficient way. The custom according to which South European Parliaments meet around COSAC meetings seems, in this sense, to be an initiative worth examining further, although arguably national parliaments seeking to form a 'cluster of interest' may either precisely be willing to come to a

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<sup>27</sup> Note that the proposals made by the Danish Parliament were particularly far-reaching as they called for an important reform of COSAC as well as a change in COSAC's role in relation to the CFSP and the Article 13 Conferences.

previous agreement in the view of a future COSAC meeting, or to act as protagonists in organizing their meeting at home.

Further to the question of the organization of these meetings, the question of the identity of the participants, or rather, of the invited and participating national – and European – parliaments needs to be asked as well. The examples of informal meetings observed in preparation of the establishment of the Article 13 Conference by the Speakers' Conference show that one of these meetings was reserved for the Founding Member States and the EP. The two meetings organized by the Danish parliament were open only to some of the 40 chambers for the first of these events, whereas the second was indeed open to all of them – and neither of them was open to the European Parliament. The French National Assembly had invited the EP to its informal meeting on the EPPO in September 2014 but the EP did not show up. Regarding this matter, the House of Lords argued that 'One important principle might be that (unless the meeting is for a specific geographical grouping) invitations should be extended to all parliaments equally' (UK House of Lords 2014 par. 132 ff). This proposal is attractive in the sense that it would allow for all national parliaments to attend, be they in favour or not of the position defended by the hosting parliament, as happened in the meeting organized on the EPPO by the French National Assembly in September 2014. However, while this formula would probably be favoured in most cases, some leeway should be left to the initiator of the informal meeting who might pursue a precise political goal justifying the choice of certain Member States only – that is, those that might be seeking to create a real 'cluster of interest', or those that might wish to select the participants on a precise criterion, such as their experience with the European integration process. In fact, these 'clusters of interest' could contribute to the emergence of a public debate in the Member States involved or at the European level (Esposito 2014: 177). However, Antonio Esposito warns against the counterproductive effect their use as means to create "trade unions" of national parliaments with antagonistic functions with regard to the EU activities' would have (Esposito 2014: 177). According to this councillor of the Italian Chamber who referred to the Danish initiatives, the EP's systematic exclusion by the Danish parliament is the sign of an evolution in this direction, even though the EP could provide a contribution important to the knowledge and the assessment of a complex question. While a systematic exclusion of the European legislature based solely on its not being a national parliament is certainly not desirable, there may indeed be a need for national parliaments to be able sometimes to have exchanges solely among legislatures that are at the same level,<sup>28</sup> and there may also be a lack of interest from the EP in being involved.

In sum, in spite of the potential introduction of a 'secretariat for interparliamentary relationships', a balance needs to be struck between the need to create 'variable geometry' forums for interparliamentary cooperation – which, arguably, are inevitable in the context of an always larger and more diverse European Union – and the need to control this increase so that these forums remain useful and, most importantly, so that national parliaments can continue to be active participants in them. They are certainly also useful in securing some interest for the EU integration process itself on the part of MPs who, traditionally, have been neither keen on being involved in this process – or interested in it – nor very successful in cooperating with other legislatures. However, some transparency should be guaranteed, and these initiatives should not compete with the more formalized conferences or, even worse, should not replace them *de facto* as platforms of exchange. Rather, efforts of coordination and rationalization should be made so that all forms of interparliamentary cooperation co-exist in the most rational manner.

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<sup>28</sup> The problem arising from the fact that the EP is both a participant and an address among COSAC has been recorded numerous times; for instance: (European Parliament 2014: 11-12).

See on the potential need for national parliaments to have their own forum for cooperation in general: (Fromage 2015).

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**Part II**  
**National Parliaments in EU Policymaking**



# National Parliaments and the EU Commission's Agenda: Limits and Recent Developments of a Difficult Partnership

Cristina Fasone and Diane Fromage\*

## 1. Introduction<sup>1</sup>

National parliaments (NPs) were long excluded from 'European business', especially after the first direct elections of the European Parliament (EP) in 1979 (Maurer 2001; Lindseth 2010: 81-188). Not only did most NPs not have any influence on the position defended by their executives in the Community – and later European Union (EU) – instances but they long lacked information regarding the supranational negotiation and decision-making process. As a consequence, they were far from being able to be 'agenda-setters' in this field, contrary to the role they may assume at national level. Arguably, not all NPs were equally weak: some like the British, the Danish or the German legislatures were guaranteed rights of information and of participation but these were either poorly or only partially used.

With the entry into force of the Lisbon Treaty in December 2009, NPs were (finally) guaranteed a direct involvement in the European decision-making process by the Lisbon Treaty itself. They 'contribute actively to the good functioning of the Union' and have been granted a series of rights and prerogatives to this end (art. 12 TEU). Furthermore, together with national governments and the EP, they ought to ensure the functioning of the representative democracy on which the EU is founded (art. 10 TEU).

However, it appears that the powers NPs now have are strictly negative or reactive: they can, among other things, veto the use of passerelle clauses (art. 48-6 TEU and art. 81-3 TFEU) or issue reasoned opinions to contest the respect of the principle of subsidiarity by a legislative proposal (this procedure is referred to as the Early Warning System, (EWS)). Hence they are basically designed by the treaties as institutional 'veto' or 'quasi-veto players' in the EU, since they are considered to be 'individual actors who have to agree to the proposed change' (Tsebelis 2002: 2), e.g. in the simplified treaty revision procedures, or as a collective actor who can delay or impose further conditions to the carrying out of the EU legislative procedures, like in the EWS.<sup>2</sup> Indeed, a number of reasoned opinions issued by NPs at least equal to one third of the votes cast (eighteen out of fifty-six votes) obliges the Commission to review the legislative proposal at stake and to decide to withdraw, amend or eventually maintain the proposal as it stands, with due reasons.<sup>3</sup>

*Prima facie* NPs do not currently have any direct and positive influence on EU legislation as 'agenda-setters', i.e. as players who can 'present take it or leave it proposals' (Tsebelis 2002: 2). The

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<sup>2</sup> Whether, under the EWS, NPs act as a collective actor or whether the individual dimension of participation prevails is subject to discussion. For example, Cooper (2006) sees NPs as a collective actor in a 'Virtual Third Chamber'; by contrast, Lupo (2014) considers that, particularly in the framework of the EWS, NPs play the 'game' as individual actors by interpreting the principle of subsidiarity in the light of constitutional identity and national interests, although they can informally coordinate their action.

<sup>3</sup> This procedure, provided by art. 7, protocol 2, has also been named the 'yellow card procedure', with a yellow card issued against the Commission. The number of votes diminishes to one fourth for legislative proposals dealing with cooperation in criminal matters. Nonetheless NPs issue an orange card against the Commission when, in the framework of ordinary legislative procedure, the number of reasoned opinions reaches the simple majority of the votes cast. In these circumstances, if the Commission decides to keep the proposal after the review, the EP by absolute majority, or the Council by a majority of 55% of its members, can stop the procedure, should they agree with the subsidiarity concerns expressed by NPs.

Conference of Parliamentary Committees for Union Affairs (COSAC) ‘may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission’.<sup>4</sup> The submission of a contribution by this forum of inter-parliamentary cooperation, however, does not guarantee that it will be taken into account at a later stage, for example in the actual content of the EU Commission Work Programme or in EU legislative initiatives. Yet, the fact that there is no formal recognition of the agenda-setting power of NPs in the treaties does not mean that parliaments have not been able to exert such an influence, or that they are not willing to attain this possibility.

This contribution aims at showing how the Political Dialogue, launched by Commission President Barroso in 2006, has provided the conditions for a direct involvement of NPs on the legislative agenda of the EU through the scrutiny of the Commission’s Annual Work Programme (2.1.). By the same token, the EWS and the Political Dialogue may allow NPs to indirectly influence the EU Commission’s legislative proposals (2.2.).<sup>5</sup> In contrast with this *status quo*, parliaments have recently begun to advocate the introduction of a ‘green card’, that is the right for national parliaments to propose European legislation. Such a development would, indeed, be revolutionary in shifting the role of NPs in the EU from passive to active players – or ‘agenda-setters’ (3).

## **2. National parliaments today as indirect ‘agenda-setters’ for the EU Commission**

As mentioned in the introduction, since the launch of the Political Dialogue by the then Commission president, Barroso, NPs are now in direct contact with this European institution or, as Commission President Barroso and Vice-President Wallström put it, at the moment of the entry into force of the Lisbon Treaty, ‘In 2006, we set up the mechanism for Political Dialogue to put in place a privileged channel of communication between the Commission and national parliaments’ (European Commission 2009). In the name of this Political Dialogue and now of article 2 of protocol 1 annexed to the Lisbon Treaty, NPs receive the EU Commission Annual Work Programme, examine it and send their opinions back to the Commission (a). The Lisbon Treaty also formalizes a second communication channel between NPs and the EU Commission through the creation of the EWS in whose framework NPs are invited to express their opinions regarding the respect of the principle of subsidiarity of an EU legislative proposal (b).

### ***2.1. The EU Commission’s Annual Work Programme as the basis for exchanges between the Commission and national parliaments***

The EU Commission’s Annual Work Programme is the main planning document describing the fields of EU legislative action for the following year. Usually published in November each year, it is based on the Commission’s Annual Policy Strategy Decision.

Since 2006, because of the Barroso initiative, NPs have been receiving the Annual Work Programme, which is transmitted directly by the Commission (alongside any initiative national governments can take with the same purpose). Thus the Political Dialogue allows for the interplay between the Commission and NPs about the legislative priorities to be put in the following year’s agenda as the content of the Work Programme. Indeed, in its implementation, this Programme shows a degree of flexibility and is then adapted to the actual needs of the policymaking process and to the economic, political and social developments occurring in the EU context.

The Political Dialogue, as is well known, is a two-way flow of information, from the Commission to NPs and from them back to the Commission. As already stated in the first Communication launching the Political Dialogue, ‘The Commission wishes to transmit directly all

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<sup>4</sup> Art. 10, protocol 1 annexed to the Treaty of Lisbon. See Fasone (2013a: 1607-1621).

<sup>5</sup> On the Barroso’s 2006 initiative regarding the Political Dialogue, see European Commission (2006: 9). The initiative was immediately endorsed by the European Council on the occasion of its subsequent meeting: European Council’s Conclusions of 15-16 June 2006.



new proposals and consultation papers to NPs, *inviting them to react so as to improve the process of policy formulation*. [emphasis added] (European Commission 2006: 9).<sup>6</sup>

The Lisbon Treaty has codified in EU primary law only the transmission of consultation documents, draft legislative acts, the annual legislative programme as well as any other instrument of legislative planning or policy, explicitly recalled by art. 1 of protocol 1, to NPs. In contrast, these legislatures are formally allowed to send their opinions to the Commission only within the EWS, that is on draft legislative acts falling outside EU exclusive competence on the grounds of the subsidiarity principle. Hence NPs' opinions on the Annual Work Programme are addressed and delivered to the Commission in the name of the practice unilaterally established by this EU institution through the Political Dialogue and do not enjoy a clear recognition in the Treaties. In turn, the Commission does not have a Treaty-based obligation to follow these opinions. Yet, it regularly replies, although often in a very concise way, to NPs. Commission President Barroso had even committed to providing an answer within three months, which, however, the Commission failed to respect, prompting NPs to criticize its behaviour on numerous occasions.<sup>7</sup>

A first dimension of parliamentary review of the Commission Work Programme is individual. Each parliament carries out its scrutiny and interacts with the Commission on an individual basis. It has to be highlighted, however, that in this scrutiny exercise and in the selection of the EU legislative and policy priorities for the coming year, parliaments are not alone. First of all, these priorities are usually defined together, or at least in agreement with their national executive, so that this is a joint exercise, given the parliamentary or semi-presidential form of government (except for Cyprus). Secondly, in federal and regional EU Member States federal or regional entities can also be involved and, at least in Austria, Belgium, Italy and Portugal, regional parliaments with legislative powers have a say during the scrutiny of the Commission's Work Programme by the national parliament. Sometimes the standpoint of these regional legislatures is referred to in the parliamentary resolution or opinion adopted and transmitted to the Commission.<sup>8</sup> It could not be different, after all, since the review of the Annual Work Programme entails the definition of the national priorities in EU affairs and thus is a strategic exercise which is the result of 'collective work' at domestic level and led by the executives.

There is also a second dimension of review of the Commission's Work Programme which regards the horizontal cooperation among NPs, and that has developed very rapidly since 2006. Indeed, in the framework of the Political Dialogue, the opinions of NPs on this planning document are also published online on the Inter-parliamentary EU Information Exchange (IPEX) and thus are made available to all the legislatures, together with the replies of the Commission. In this way NPs know and mutually learn of each others' priorities. It is clear that there are common interests among them: for example, those parliaments that sent opinions on the 2014 Annual Work Programme detected as priorities the OLAF reform and the setting up of the European Public Prosecutor's Office (see section 2.2.), the accession of the EU to the ECHR and the internal rules, the Banking Union and the Single Supervisory and Resolution Mechanisms and, to a lesser extent, the TTIP, the VAT system and the labour mobility package.<sup>9</sup> These legislative dossiers are identified as either those on which the control of compliance with the principle of subsidiarity is accomplished on a first instance or those on which content parliaments want to exert an actual influence, even if they are not subject to the EWS, or those that raise an interest by parliaments for both reasons. Indeed, the reasons why a parliamentary scrutiny

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<sup>6</sup> However, it remains uncertain whether a real 'dialogue' has been established as, after two years of practice, many NPs noted that they do not examine necessarily the answers provided by the Commission (COSAC 2011b: 35). Others, such as the French National Assembly, send contributions without asking for any response, in a bottom-up flow only.

<sup>7</sup> For instance during the LII COSAC meeting in Rome in December 2014.

<sup>8</sup> See, for instance, Italian Senate (2014), for what concerns the flexibilisation of the rules of the Stability and Growth Pact, where resolution n. 3988, of 3 June 2013, of the regional legislative Assembly of Emilia-Romagna is cited.

<sup>9</sup> Parliaments or chambers thereof that completed the scrutiny of the 2014 Work Programme and sent their opinions were: the Croatian Parliament, the Czech Senate, the German *Bundestag* and *Bundesrat*, the Italian Senate, the Lithuanian *Seimas*, the Polish Senate and *Sejm*, the Portuguese *Assembleia da República* the Swedish Parliament, the Dutch Senate, the UK House of Lords.

on the Commission's Work Programme is accomplished – subsidiarity concerns, on the one hand, and the attempt to influence on the merits of the proposal, on the other hand – are strongly intertwined.

The results of this kind of review on the potential exercise of an 'agenda-setting' power by NPs are fairly limited. On the one hand, parliaments often identify just a list of draft legislative acts and packages they are willing to examine should the Commission table these legislative proposals. In other words, their scrutiny remains very superficial, also because of the lack of background information (unless it is provided by the national executive), and, except for very few parliaments, like the UK Parliament, does not involve any consideration of the parliaments' viewpoint on the substance of the EU policy options. This could explain why, for instance, the French National Assembly has chosen to select the proposals eligible for a tighter subsidiarity scrutiny on the basis of the content of the bi-annual Council presidency programmes rather than on that of the EU Commission Work Programme. On the other hand, the replies by the Commission remain extremely vague and do not add much to NPs in terms of awareness and more in depth understanding of the Commission's standpoint.

Based on the weaknesses experienced in this loose coordination, NPs have tried to exploit another provision of protocol 1 in combination with those on the Political Dialogue, namely the submission of contributions by COSAC on the Commission's Work Programme (art. 10). By no means is the Commission bound by these contributions, but this avenue allows NPs to discuss the Work Programme *in concreto* – and not just to virtually interact through IPEX – and to define better common priorities. Hence institutional priorities, i.e. strategic preferences of all NPs, can supplement national priorities. The added value of COSAC in this pre-selection of parliaments' priorities for the year ahead has been expressly recognised by the UK House of Lords, which, through COSAC, has drawn inspiration from the practice developed in the Dutch *Tweede Kamer* for the review of the Work Programme (UK House of Lords 2014: § 24).

COSAC's meetings, especially the meeting of COSAC's Chairpersons taking place at the beginning of the year, have turned into an arena for debate of the Annual Work Programme. In fact, COSAC's rules of procedure ask to draw on the Commission's Work Programme in order to identify one or two subjects as the focus of the annual Conference's activity for the coming year (rule 5). Operational arrangements for the joint scrutiny of the Work Programme have been under discussions on several occasions within COSAC (COSAC 2011a: Part 4). Not by chance was this issue also evoked during the meeting of COSAC's chairpersons on 1-2 February 2015, based on the result of an informal inter-parliamentary session organized on 19 January 2015 by the *Tweede Kamer*, a leading actor in this field. According to the debrief of this meeting, 'fourteen different chambers supported the idea of NPs sharing a list of their priority files in the Commission's Annual Work Programme, and submitting the results to the Commission and the EP before 1 April. For the greatest priority files, a leading ("champion") parliament would be appointed to lead the follow-up.'<sup>10</sup>

Therefore a closer cooperation among NPs on the Annual Work Programme, especially via COSAC, where they normally have the opportunity to interact directly with the Commission, is perceived by these legislatures as a key to influence the choice of the dossiers to put on the table in the coming months. This development is particularly relevant as it shows the will of NPs to be involved beyond the (limited) framework offered by the EWS.

## ***2.2. The Early Warning System and Political Dialogue as means of influence for national parliaments***

In the post-Lisbon regime NPs are entitled to receive, in particular from the Commission, any EU draft legislative act and document translated into their respective official national language. However, according to the wording of protocols 1 and 2, the procedure defined as the EWS, which gives power to NPs to signal violations of the principle of subsidiarity, applies only to legislative proposals falling outside the remit of the EU exclusive competence, that is a very small proportion of legal acts enacted

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<sup>10</sup> See the Summary record of the meeting of the Chairpersons of COSAC, 1 – 2 February 2015 in Riga, p. 2, available at [http://www.parlament.gv.at/PAKT/EU/XXV/EU/05/49/EU\\_54923/imfname\\_10528119.pdf](http://www.parlament.gv.at/PAKT/EU/XXV/EU/05/49/EU_54923/imfname_10528119.pdf).

by the EU every year.<sup>11</sup> Furthermore, the review is limited, in its scope, only to the principle of subsidiarity, and has to take place within eight weeks of the transmission, a very short period of time. In addition to that, NPs can only intervene through the EWS before the legislative procedure formally starts, which has its pros and cons.

On the positive side, the involvement of national legislatures, immediately after the transmission of a legislative proposal, enables them to exert an influence on EU law-making at a very early stage. Art. 4, protocol 1 prevents the Council from placing the relevant legislative proposal on its provisional agenda of the meetings before the eight week period elapses, and ten more days have to elapse before the Council adopts a position on the draft legislative act. Hence this time frame is designed to allow parliaments to give political directions and legal inputs to the legislative process in the form of (reasoned) opinions.

On the negative side, instead, the participation of NPs in the EWS is limited only to that precise moment – in their relationship with EU institutions at least – and prevents them from issuing reasoned opinions on amended drafts, although these are transmitted to legislatures by the Commission, the EP and the Council alongside the EP's legislative resolutions and Council's positions.<sup>12</sup> In other words, NPs cannot use the EWS to have an impact of the EU legislative process and outputs, which often develop in a very different way compared to the original draft of the Commission. This gives parliaments little or no power as 'agenda-setters' within the legislative process. Nor could such an assessment change because, according to art. 8, protocol 2, an action for infringement on the grounds of subsidiarity can now be notified to the Court of Justice by a Member State, also on behalf of its NP or a chamber thereof. It is again a negative parliamentary power, exercised depending on the national legal system to react against an *ultra vires* act which is already in force.

In order to supplement the deficiencies of the EWS, the European Commission maintained the Political Dialogue described above – which is not codified by the Treaties although it finds its legal basis there (protocols 1 and 2) –, after the entry into force of the Lisbon Treaty. Indeed, in the framework of this Political Dialogue NPs can express their opinion at any point in time and regarding any aspect of an EU legislative proposal and consultation document. Although some NPs, like the Swedish *Riksdag*, send only reasoned opinions to the Commission, i.e. no positive opinions, opinions with remarks, or opinions based on grounds other than subsidiarity are submitted, and since 2009 the use of Political Dialogue as a tool to influence the position of the Commission in law-making has grown in importance compared to that of the EWS. This is clearly shown in the statistics provided by the Commission in its yearly Reports on the relationship with NPs. In the 2014 Report, dealing with parliamentary opinions in 2013, the Commission stated that opinions have stabilised at just over six hundred per year, of which approximately 14% were reasoned opinions' (European Commission 2014a: 4).<sup>13</sup> By taking advantage of IPEX, COSAC and other inter-parliamentary meetings, NPs have also become able to coordinate their action and, based on the strategic priorities already identified through the scrutiny of the Commission's Annual Work Programme, most legislatures focus their attention on a dozen of legislative proposals per year.

In spite of this, five years after the entry into force of the Treaty of Lisbon, NPs remain largely disappointed by the functioning of both mechanisms, the EWS and the Political Dialogue, and in particular of the former, which in principle grants them the power to force the Commission to review its proposals.

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<sup>11</sup> On a number of occasions, NPs have complained for the lack of inclusion of draft delegated acts from the EWS, which can be seen as particularly problematic in the light of the Common Understanding on delegated acts agreed by the Commission, the EP and the Council, according to which a preference is given for the conferral of a delegation of undetermined duration. See European Commission (2014b: § 2).

<sup>12</sup> See art. 4, protocol 2 annexed to the Treaty of Lisbon. As underlined by Philipp Kiiver (2012: 540), this is particularly problematic if the amendments were introduced following NPs' reasoned opinions.

<sup>13</sup> It should be noted, however, that some Chambers have participated less than in the past; the evolution of this tendency should be monitored in the coming years, especially given the fact that the change to the new – and more open – Commission in 2014 may have an influence on parliamentary participation.

For example, in the 22<sup>nd</sup> COSAC bi-annual Report, by citing the comments of many parliaments,<sup>14</sup> it is said that ‘in general, the European Commission’s responses to reasoned opinions and opinions were not deemed satisfactory, in particular because of their brevity, generality and delay in their receipt. NPs and the European Commission should work together to determine appropriate guidelines for the European Commission to respond to reasoned opinions’ (COSAC 2014b: 24).<sup>15</sup> In the view of legislatures the impact, if any, of NPs on EU law-making, through their opinions, should be explicitly pointed out by the Commission. In this regard, a direction for future developments has been provided by the UK House of Lords. This parliamentary chamber has detected three main avenues to enhance the influence of Member States’ legislatures in the EWS and Political Dialogue (UK House of Lords 2014: §40). The Commission should make the link between parliamentary opinions and EU policy outputs more explicit by:

- (i) identifying national parliament contributions in summary reports on consultation exercises and in subsequent communications on the policy, including how the policy has been shaped or modified in response,
- (ii) responding promptly to national parliament contributions under the general political dialogue, usually within three months,
- (iii) using its annual report on relations with national parliaments to identify the impacts of national parliament engagement.

So far NPs have been able to withdraw an item from the legislative agenda of the Commission through the EWS just on one occasion, the ‘Monti II draft Regulation’ on the right to strike in the field of freedom of establishment and freedom to provide services, the only case showing a direct impact of Member States’ legislatures on the EU policymaking (Fabbrini and Granat 2013; Goldoni 2014).<sup>16</sup> For the first time, twelve reasoned opinions (nineteen votes on the whole) by NPs triggered the threshold for a ‘yellow card’ and, although the Commission denied that any violation of the principle of subsidiarity had occurred, it finally decided to withdraw the legislative proposal for political reasons, given the widespread opposition against such a measure (also on the part of the executives) and the required need for unanimous approval at Council level. In its letter of reply to national legislatures the Commission tried to diminish the significance of the reasoned opinions, based on which it had reviewed the proposal. Indeed, it justified the withdrawal by making reference to ‘the current state of play of the discussions on the draft Regulation among relevant stakeholders, in particular the EP and Council’ and to the fact that the ‘proposal is unlikely to gather the necessary political support within the European Parliament and Council to enable its adoption.’ Nevertheless the parliamentary reasoned opinions, which represented the viewpoint of Member States’ peoples, and the echo of the first ‘yellow card’ reached, indisputably had a weight on the final considerations by the Commission.

By contrast, the second yellow card,<sup>17</sup> on the setting up of the European Public Prosecutor’s Office did not prompt any effect in the Commission’s attitude towards the proposal.<sup>18</sup> Once reviewed, together with the reasoned opinions of NPs, the Commission decided to maintain the proposal – whose legislative procedure is still underway – without any revisions, since the compliance with the principle of subsidiarity was deemed confirmed. Hence the impact of the second yellow card on EU law-making

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<sup>14</sup> The UK House of Commons and House of Lords, French *Sénat*, Czech *Poslanecká sněmovna*, Irish Houses of the *Oireachtas*, Austrian *Nationalrat* and *Bundesrat*, Czech *Senát*, Cyprus *Vouli ton Antiprosopon*, Luxembourg *Chambre des Députés*.

<sup>15</sup> The need to agree between NPs and the Commission on guidelines to respond on reasoned opinions was particularly emphasised by the UK House of Lords and, in fact, this question is included in the COSAC questionnaire which is currently circulating among NPs.

<sup>16</sup> See the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM (2012) 130 final, 21 March 2012.

<sup>17</sup> And so far the last one. No orange card has ever been issued.

<sup>18</sup> See the Proposal for a Council Regulation on the European Public Prosecutor's Office, COM(2013) 534 final, 17 July 2013.

has been non-existent. What has changed, instead, has been the acknowledgment by the Commission of the role of parliaments; on this occasion it adopted an *ad hoc* Communication explaining more in depth than in the Monti II case the reasons for keeping the draft Regulation unchanged (European Commission 2013), although not yet satisfactorily according to many legislatures (Fromage 2015). It appears that in this second case NPs have been unable to change the agenda of the Commission, but rather they have strengthened the deliberative nature of the EWS in terms of the dialectic between institutional players and the quality of the justifications provided.

From this viewpoint, the case of the European Citizens' Initiative in the framework of the Political Dialogue represents a more concrete and positive example of parliamentary influence on EU law-making.<sup>19</sup> Rather than withdrawing items from the Commission's agenda, NPs in cooperation with the EP have contributed to shape the content of the final Regulation (Fasone 2013b). The process begun already by the Political Dialogue on the Green Paper, which allowed NPs to express their views on a number of issues, like the setting up of a centralized system of registration, the level of harmonization of procedural requirements among Member States and the time limit of the collection of the signatures. Further suggestions regarded the replies by the Commission, its powers and its admissibility review.<sup>20</sup> The Draft Regulation then followed<sup>21</sup>, which became the object of parliamentary opinions contesting the too high threshold of Member States where the signatures had to be collected, the *a priori* control on the initiatives accomplished by the Commission, and the absence of a definite deadline for the Commission to take legislative action.<sup>22</sup> Interestingly many of the concerns expressed by NPs about the uncertainties of the citizens' initiative procedure, designed by the Commission's draft Regulation and the too strict requirements to be fulfilled for an initiative to succeed, were taken up by the Committee on Constitutional Affairs (AFCO) of the EP as amendments to the legislative proposals and finally endorsed by the plenary.<sup>23</sup> For example, the lowering from one third to one fourth of the Member States for the final threshold of countries from where signatures have to be collected derives from a joint attempt of NPs and the EP – with which the Council agreed at the first reading<sup>24</sup> – to reduce as much as possible the obstacles for citizens to use this participatory tool.

Hence there is room for a more active involvement of NPs in EU law-making beyond the rigid rules of the EWS, which designs primarily a role of veto players for them, but this avenue has still been poorly used so far.

### **3. Are national parliaments about to become directly involved in the EU Commission's agenda-setting?**

As already highlighted, the EWS in particular has attracted many negative comments by some NPs who feel they have been given only a 'negative role' or that their role is ineffective<sup>25</sup> and therefore

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<sup>19</sup> Indeed the adoption of EU Regulation 211/2011 of the EP and Council of 16, February 2011, on the citizens' initiative, based on art. 11.4 TEU, falls within the exclusive competence of the EU and thus the EWS is automatically excluded.

<sup>20</sup> See, in particular, the opinions of the Austrian National Council, the Czech Senate, the Danish Parliament, the German *Bundesrat*, the Irish Parliament, *Seimas* of the Republic of Lithuania, the Luxembourg Chamber of Deputies, the Swedish Parliament, on the Green Paper on a European Citizens' Initiative, COM (2009) 622 final, 11 November 2009, available on ipex.eu.

<sup>21</sup> Proposal for a Regulation of the European Parliament and of the Council on the citizens' initiative, COM (2010) 119 final, Brussels, 31 March 2010.

<sup>22</sup> See, in particular, the opinions on the Draft Regulation issued by the Czech Senate, the Greek Parliament, and the Italian Chambers of Deputies and Senate, available on ipex.eu.

<sup>23</sup> See the AFCO Committee Report tabled for the plenary, A7-0350/2010, 3 December 2010.

<sup>24</sup> As an agreement was reached between the EP and Council at first reading, the EP's position corresponds to the final legislative act, Regulation (EU) No 211/2011.

<sup>25</sup> This is the case of the French National Assembly that regrets this negative role and believes that it would be more useful for NPs to be able to make improvements or suggest amendments to the legislative proposals or even 'criticize them when they do not go far enough in the added-value one can expect from Europe' (COSAC 2014a: 184). Others, like the Finnish parliament, clearly declare that they 'continue to have grave reservations about the effectiveness of the

have asked for its reform.<sup>26</sup> By the same token, in an analogy with the ‘yellow’ and ‘orange’ cards existing in the framework of the EWS, parliaments are becoming more numerous in their quest for the introduction of a ‘green card’. In their contribution following their meeting in Dublin in June 2013, COSAC members stated that: ‘COSAC considers that NPs should be more effectively involved in the legislative process of the European Union not just as the guardians of the subsidiarity principle but also as active contributors to that process. This goes beyond the adoption of reasoned opinions on draft legislative acts which may block those acts and would involve a more positive, considered and holistic view under which parliaments could invite the Commission to develop legislative proposals which they believe to be necessary or to review and adapt existing proposals for specific stated reasons’ (COSAC 2013: point 31). However, at least to start with, different understandings of how a ‘green card’ should be conceived have emerged among NPs. In spite of the divergent views, the commitment shown by these legislatures to propose new procedural solutions for the weaknesses of the present EWS is a proof of their willingness to constructively contribute to improve EU decision making.

The Dutch *Tweede Kamer* started to advocate the reform of the yellow card system and the introduction of a ‘late card’ and a ‘green card’, in line with COSAC’s contribution (Open Europe 2013). According to the *Tweede Kamer*, the scope of the EWS has to be broadened to proportionality and to a more careful consideration of the choice of the legal basis; the deadline has to be extended beyond the current eight weeks and the threshold to trigger the yellow card has to be lowered, even if – as acknowledged by the *Tweede Kamer* – reasoned opinions are always issued by the ‘usual suspects’ (e.g. by the same parliaments). The ‘late card’, instead, would give NPs the power to object to a legislative proposal that results from negotiations between the Commission, the Council and the EP; proposals are often heavily changed with reference to the version originally examined by NPs.<sup>27</sup> Finally, in the view of the *Tweede Kamer*, the ‘green card’ would mean the creation of ‘a group of parliaments that is gathered around a theme (cluster of interest) [and that] could propose ideas for new European policies to the European Commission, or could propose the amending or revoking of existing legislation’ (Dutch *Tweede Kamer* 2014: 14).

Regarding the ‘green card’, the Danish *Folketing* suggested that ‘national parliaments [should be allowed] to review and comment on the content of a legislative proposal within a ten-week deadline, compared to the current eight weeks of the usual EWS.’<sup>28</sup> If one third of national parliaments agree on a position to change the proposal, the Commission should take into account the position of the parliaments and explain if it does not. If NPs do not reach a common position on the proposal within the ten-week deadline, a green light to proceed with the decision-making procedure is automatically given’ (Danish *Folketing* 2014: 3). As it appears, the Danish Parliament’s proposal is strongly inspired by the functioning of the ‘yellow card’ procedure and suggests that the same number of parliamentary chambers should be in favour of a change in the proposal for the EU Commission to be obliged to take their suggestion on board. In any event, the understanding of a ‘green card’ supported by the Danish *Folketing* seems to be rather different from the one proposed by COSAC and

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subsidiarity procedure.’ Abbreviated translation of the Finnish contribution submitted regarding the Commission proposal for the establishment of a European Public Prosecutor’s Office (COM(2013) 534 final). More recently, ‘the Italian Camera dei Deputati and the Portuguese *Assembleia da República* stressed that it [subsidiarity check] should not be a priority; what really mattered was the influence on the content of the EU policies and decisions’ (COSAC 2014b: 24).

<sup>26</sup> There is a growing trend for parliaments to ask for the EWS to be reformed in order, for instance, for the eight week-deadline reserved for scrutiny to be extended to twelve weeks. See also the proposal of the Danish *Folketing* below.

<sup>27</sup> NPs receive amended drafts from the Commission and other EU institutions, but a yellow card cannot be issued on the revised documents. The EWS only takes place before the legislative process starts.

<sup>28</sup> The proposed deadline of ten weeks is, however, rather unexpected as it neither corresponds to the eight-week limit existent in the framework of the EWS – which is unsurprising as it is deemed to be too short by NPs – nor does it match the twelve-week period national parliaments ask for in their claim for a reform of the EWS, based on the traditional deadline set by the Commission for its consultation.

the Dutch *Tweede Kamer*, as it would intervene once a legislative proposal has already been made by the EU Commission and, hence, would still be reactive rather than proactive.<sup>29</sup>

The UK House of Lords in its Report on the role of the national parliaments in the European Union published in March 2014 also addressed this question and made its own proposal of what a 'green card' procedure should look like (UK House of Lords 2014: § 55-59). Its proposal is different from the Danish one in the sense that it not only suggests the possibility for NPs to make proposals to change already proposed legislation but it also foresees that 'there should be a way for a group of like-minded national parliaments to make constructive suggestions for EU policy initiatives, which may include reviewing existing legislation' – and, in this sense, it is more in the line with the COSAC contribution. At the same time, the Lords 'note the concerns raised about intruding on the Commission's formal right of initiative, and [they] would envisage a "Green Card"' as recognizing a right for a number of NPs working together to make constructive policy or legislative suggestions, including for the review or repeal of existing legislation, not creating a (legally more problematic) formal right for national parliaments to initiate legislation'. Additionally, they underline that 'A "Green Card" agreement would need to include an undertaking by the Commission that it would consider such suggestions carefully, and either bring forward appropriate legislative or other proposals (or consult on them), or explain why it had decided not to take the requested action'. The House of Lords' reading of the 'green card' procedure for NPs mirrors the post-Lisbon arrangement of art. 225 TFEU on the EP's power to submit any appropriate proposal to the Commission, which nonetheless remains free to disregard this submission and, hence, not to take subsequent legislative action by informing the parliament of its reasons.<sup>30</sup> The House of Lords' proposal would then grant both 'pillars' of representative democracy in the EU, the EP and NPs, equal rights to submit a proposal for a legislative initiative.

The idea of the introduction of a 'green card' – understood as the possibility for NPs to suggest legislation – seems to be gaining more and more attractiveness among NPs who, as a matter of fact, met in Brussels in order to discuss this initiative before the COSAC Chairs' meeting organized in Riga at the beginning of 2015.<sup>31</sup> Following an invitation of the Dutch *Tweede Kamer*, fourteen parliaments and the EP discussed this possibility together with the question of the cooperation of national parliaments in their analysis of the Commission Annual Work Programme and the question of the reform of the EWS (Dutch *Tweede Kamer* 2015a and b; UK House of Lords 2015). It should be noted that the idea of a 'green card' according to which NPs could make 'constructive suggestions for legislative proposals to the European Commission' was endorsed by nearly half the parliamentary chambers plus the EP (Latvian Parliament 2015). This idea has been examined by all NPs in preparation for the 23rd bi-annual COSAC report in the first semester of 2015 and it has to be seen whether the proposal for a 'green card' is going to convince a larger number, if not all, of them. In any case, the present context characterized by more openness of the new European Commission (2014-) towards national legislatures seems to be most favourable for the success of such a development, although Commission Vice-President Timmermans has already clearly expressed his opinion in favour

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<sup>29</sup> Such a stance on the part of the Danish *Folketing* also reflects its long standing position vis-à-vis the EWS and NPs as veto players in the EU. For instance, during the Convention on the future of Europe (2002), the Danish delegation proposed, unsuccessfully, the introduction of a 'red card', which would have allowed a majority of NPs to block a Commission's initiative.

The questionnaire submitted to NPs in preparation for the LII COSAC plenary meeting of 31 May – 2 June 2015 has taken four interpretations of the 'green card' on board: Suggestions for new legislation, suggestions to amend existing legislation, suggestions to repeal existing legislation and suggestions to amend or repeal delegated or implementing acts. It remains to be seen which interpretation(s) of the 'green card' NPs will favour or whether they will suggest yet again a new approach.

<sup>30</sup> Poptcheva (2013: 5-8), shows that since the entry into force of the Treaty of Lisbon the EP's initiative rights have not been extensively used, being the EP more focused in influencing ongoing legislative procedures rather than to initiate new ones. Nevertheless when the EP has exercised its power under art. 225 TFEU the Commission has almost always taken consistent legislative actions afterwards.

<sup>31</sup> This question received the support of several parliaments, among which the French chambers for example. See also COSAC (2015).

of an informal and non-bureaucratic approach, which does not entail a revision of existing procedures and institutional arrangements.<sup>32</sup>

In the light of this clarification by the Commission, and as recently supported by Lord Boswell, ‘the green card procedure could build on the existing Political Dialogue’ (UK House of Lords 2015: 1). Should parliaments be able to agree on a set of common formal requirements to issue a green card, this would also strengthen their political weight. However, first and foremost it will be necessary to clarify what the ‘green card’ is, that is: whether, according to the British interpretation, it is a possibility for NPs to suggest the Commission to adopt legislation in a certain area – which seems to be the predominant conception; whether it is a right for NPs to modify already proposed legislation as advocated by the Danish *Folketing*; or whether the ‘green card’ could be a possibility to amend an existing act, or even to repeal or amend implementing and delegated acts, as envisaged by COSAC’s questionnaire. In an attempt to simplify the procedures co-existing in the European institutional system, the first solution should probably prevail and be organized in such a way that it does not further complicate or delay the EU decision-making process. Furthermore, in order for NPs to be guaranteed that they will be heard by the Commission, it may be desirable for some thresholds to be defined below which the EU Commission is not obliged to consider the proposal. In this matter, a balance needs to be struck between the need for a given proposal to be representative enough and the risk of having too inflexible thresholds – as is the case in the EWS – that formally allow the EU Commission to disregard parliamentary opinions even if only a few votes are missing. Therefore, one solution to this issue would be for the EU Commission to commit to always examine thoroughly the proposals made to it with, however, a special obligation in terms of the importance granted to a proposal, and of the justification the EU Commission has to provide for not taking it on board, if a defined number of NPs supports it. In this framework, the minimum support outlined for the activation of the ‘yellow card’ procedure could be used, with two votes assigned to each parliament (UK House of Lords 2015: 3).<sup>33</sup> In addition, for the sake of representativeness, but also because it would amount to granting NPs with a right to ‘parliaments’ initiative’, one could imagine too that the minimum threshold required for the European citizens’ initiative – at least one quarter of all Member States –<sup>34</sup> would also be applied here (Kröger and Bellamy 2016).

Furthermore, for the legitimacy of the whole ‘green card’ procedure, it is desirable that the EU Commission is bound to examine the proposals carefully and justify its position in detail when it does not follow the idea put forward by national legislatures. The Commission can be asked to publish its reply to NPs by a deadline – e.g. three months, similarly to the examination of citizens’ initiatives –<sup>35</sup> and/or the relevant Commissioner can be asked to appear before the first signatory parliament of the proposal to respond to the green card, ‘with all co-signatories being invited to attend such a meeting’ (UK House of Lords 2015: 4).

Although lacking any formal acknowledgment of this new tool, on 22 July 2015 sixteen parliamentary chambers, led by the UK House of Lords and, in particular the Chairman of its European Union Committee, Lord Boswell, issued what they have named as the first ‘green card’

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<sup>32</sup> Indeed, in his response to Lolita Čigāne, Vice-President Timmermans declared ‘If there are areas where national parliaments feel that the European Union could bring real added value yet has not sufficiently addressed, I would hope these would be raised during our regular discussions at COSAC as well as in direct contacts between Commissioners and national parliaments. If national parliaments identify such issues, it is because they are reflecting the concerns they are hearing from citizens, and I hope you would agree that *rather than entering into a potential lengthy and complex discussion on procedures and new institution arrangements not foreseen by the Treaty, we should try to address this in a very pragmatic and immediate way* [emphasis added]’ (European Commission 2014b). See Minutes of the LII COSAC plenary meeting, Italian Senate, Rome, 30 November-2 December 2014.

<sup>33</sup> In bicameral systems each chamber would have one vote, like in the EWS.

<sup>34</sup> Art. 2, Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens’ initiative, OJEU L 65/1, 11 March 2011.

<sup>35</sup> Art. 10, Regulation (EU) 211/2011.



ever.<sup>36</sup> The proposal by national parliaments invites the Commission, 'when tabling a new circular economy package, to adopt a strategic approach to the reduction of food waste within the EU', according to a list of recommendations provided in the letter.<sup>37</sup> While waiting for the follow up by the Commission and despite the many uncertainties surrounding the procedure,<sup>38</sup> it can be highlighted that the 'green card' very much resembles as for its purpose and content the initial UK House of Lords' proposal of January 2015 and, significantly, has been supported by a number of chambers very close to the threshold of votes set by protocol 2 for triggering the orange card.<sup>39</sup>

#### **4. Concluding remarks**

This paper aims to highlight an ongoing development about the role of NPs in the EU, that is the growing importance they give to constructively influence the decision-making process. An excursus can be traced in the position of NPs from passive actors, to veto players – based on some post-Lisbon Treaty provisions – to 'agenda-setters', although their power to shape EU legislation is still very limited at present.

Whether it is desirable for the EU and Member States to acknowledge an agenda-setting role for NPs remains outside the scope of this paper. It goes without saying, however, that, should parliaments be given a direct power of legislative initiative, or rather just the power to submit a proposal for a subsequent Commission's legislative initiative, the effects on the balance of powers between the EU and Member States, on the one hand, and between national executives and parliaments, on the other, would be far more problematic in the first case. Indeed, the autonomy of NPs vis-à-vis their executives would increase substantially alongside the power of the Member States, through their parliaments, to define the general political directions for the EU action.

It is the Treaty of Lisbon, and in particular the Political Dialogue, which had already been launched by the European Commission in 2006, that has prompted this more active and constructive role for NPs. By reviewing individually and in cooperation, in particular within COSAC, the Commission's Annual Work Programme, they have tried to influence the selection of the key legislative dossiers for the year ahead. By the same token the EWS and the Political Dialogue on EU draft legislative acts have provided NPs with an avenue to influence EU legislation in the making and, more precisely, the development of the legislative process and the amendments. These innovations also raised their awareness and interest in EU matters in general, even fostering in some cases, like in Spain, the beginning of a systematic scrutiny of the European legislative proposals.

However, the disappointment expressed by most NPs about the replies provided by the Commission to their opinions, the perception of a scarce impact on the content of EU legislation, and the understanding of their role as mere negative-veto players in the EU has triggered a recent significant reaction: the prospective creation of a 'green card' to be issued by NPs, according to the most recent COSAC meetings and inter-parliamentary cooperation, under the UK House of Lords' leadership, in July 2015. The national parliamentary chambers that appear to support the 'green card' so far have been very careful not to emphasize it as a tool that could lead to a revolution. It has been argued, indeed, that the power (monopoly) of legislative initiative of the Commission is by no means affected, nor is the role of the EP as co-legislator. In other words, a significant group of NPs or

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<sup>36</sup> The co-signatories of the 'green card' are: the Bulgarian National Assembly, the Croatian Parliament, the Cypriot House of Representatives, the Czech Chamber of Deputies, French National Assembly and Senate, the Hungarian National Assembly, the Italian Senate, the Latvian *Saeima*, Lithuanian *Seimas*, Luxembourgish Chamber of Deputies, the Maltese House of Representatives, the Dutch *Tweede Kamer*, the Portuguese *Assembleia da República*, Slovakian National Council, the UK House of Lords.

<sup>37</sup> See UK House of Lords, European Union Committee, and co-signatories (2015), 'Letter to the European Commission', *Food waste: a proposal by national parliaments to the European Commission*, 22 July 2015, available at <http://www.parliament.uk/documents/lords-committees/eu-select/green-card/green-card-on-food-waste.pdf>

<sup>38</sup> For example, the proposal for a 'green card' has been co-signed by the chairmen of the parliamentary committees on European affairs whereas the sectoral committees have not been involved although in several NPs they directly participate in the EWS.

<sup>39</sup> 26 votes vis-à-vis 29 needed for issuing the orange card with 28 NPs.

chambers, each of them based on national procedures, can submit a proposal for a legislative initiative to the Commission, which in turn will have an obligation to respond to NPs either by adopting a legislative initiative or by justifying its decision not to take action, similarly to what art. 225 TFEU provides for the EP. Here there has to be struck a weighted balance between the representation of NPs and the efficiency of EU decision making.

The extent to which the ‘green card’ is admissible under the existing treaty provisions, which is also a condition for its feasibility today, remains to be seen and largely depends on the prospective duties of the Commission. Should the idea of a ‘green card’ be endorsed by the Commission itself, it can be regulated in the EU via Political Dialogue through institutional practice and the unilateral commitment of the Commission to a follow up of NP’s proposals. Otherwise the Treaty revision will remain the only viable, although at present highly impracticable, option.

Regardless of the implementation of a ‘green card’ and the formal recognition of a role of ‘agenda-setters’ to NPs, it is the new attitude towards the EU shown by these legislatures that is particularly important in the current context of growing anti-European sentiments across Europe (Kröger and Bellamy 2016). NPs want to ‘contribute actively to the good functioning of the Union’ by bringing the inputs of national public opinions into the EU decision-making process. They are not satisfied by the role of mere guardians of the competence boundaries between Member States and the EU, and by the role primarily of censorship that the Lisbon Treaty granted to them.

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# The Juncker Commission's Better Regulation Agenda and Its Impact on National Parliaments

Davor Jančić\*

## 1. Introduction<sup>1</sup>

After the European Parliament (EP) election of May 2014, Jean-Claude Juncker formulated ten priorities under the label of 'Agenda for Jobs, Growth, Fairness and Democratic Change' in order to underpin his candidacy for the European Commission presidency. Central to implementing his plan of reviving the economy and bringing the European Union (EU) closer to its citizens is the Better Regulation Agenda. This Agenda, which seeks to address concerns about the effectiveness and democratic nature of EU law-making, was entrusted to the First Vice-President of the Commission, Frans Timmermans (Schrefler et al. 2014). In line with previous initiatives in this domain (Radaelli 2007: 190-207), the Agenda's main objective is to improve the overall quality of EU legislation by making policy on the basis of scientific knowledge and insight gained through stakeholder consultation, by reducing red tape and bureaucratic requirements for economic activity (e.g. rules on the submission of information, labelling, monitoring, reporting), and by ridding the EU statute books of legislation that is unnecessary, overlapping, overly burdensome, excessive, obsolete, or ill-considered (Kellermann et al. 1998). There are therefore three stages of Better Regulation: pre-legislative (before the onset of the EU legislative procedure), legislative (while an EU legislative proposal is being negotiated), and post-legislative (once a piece of EU legislation has been enacted). All of this is aimed at making it easier not only for large corporations but even more so for small and medium-sized enterprises and entrepreneurs to conduct business more profitably.

Yet the Better Regulation Agenda carries significant repercussions not only for economic actors but also for political institutions, including legislatures. If observed through the lens of the principal-agent model, policy evaluation and impact assessment processes at the EU level have the capacity to modify the incentives of political actors, impose constraints on them, and thus to some extent shape the relationship between the European Commission, acting as the regulatory agent, and the Member States and their parliaments, acting as the regulatory principal (Luchetta 2012: 563). The ontology and methodology of the European Commission's legislative agenda are indeed of paramount importance for both input and output legitimacy of the EU (Scharpf 2009: 173-204; Curtin 2009: 285-286; Lindgren and Persson 2010: 449-467). The manner in which the Commission crafts its policies, assesses their prospective impact, evaluates their added value, and ensures their compliance with the founding principles of the EU are some of the key ingredients of the process whereby regulatory approaches are translated into legislative proposals that the Commission sends to the EU legislature – the EP and the Council – for adoption. Precisely because the Commission enjoys preeminence when it comes to initiating EU legislation, it has a 'special responsibility' to regulate better (European Commission 2006a: 3). This in turn raises the problem of oversight of the Commission's respect for its own better regulation requirements – such as whether it conducts impact assessments or whether it conducts them satisfactorily (Alemanno 2009: 383).

The pre-legislative dimension of EU law-making is of great pertinence for national parliaments (NPs). Since *ex ante* involvement is the most efficient way to influence the contents of EU policies, the Commission's Annual Work Programmes serve as a starting point for most NPs when they decide their annual scrutiny strategies (Fasone and Fromage 2015). As concerns the legislative dimension of EU law-making as such, NPs are excluded from this process, but the literature shows that they keep a watchful eye over it by means of political control over the executive and through a plethora of more or less formalised relations with EU institutions (Heffler et al. 2015). The post-legislative dimension of EU law-making poses a set of challenges of its own (Senden 2013: 57-75),

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because changes in the socio-economic and political circumstances that have inspired the enactment of EU legislation require the latter to be reassessed for its continued ‘fitness’ to regulate the matter at hand in an optimal and legitimate manner. If EU regulation has become redundant or otherwise ‘unfit’ for purpose, this can represent an undue encroachment or limitation of the legislative prerogative of NPs, at least in the fields of non-exclusive EU competence. Since NPs represent a significant link between the EU, the Member States, the citizens and business actors, particularly in the post-crisis period (Weiler 2012: 837), the question arises of the impact of the Better Regulation Agenda on their involvement in EU affairs. The Commission’s quest for greater leadership in EU law-making goes hand in hand with the Lisbon Treaty’s provision requiring from NPs actively to contribute to the good functioning of the EU (Article 12 TEU). Indeed, how can the EU function ‘well’, if it does not regulate ‘well’?

This paper analyses the Commission’s 2015 Better Regulation package with a view to determining its implications for NPs’ prerogatives in EU policymaking. The examination begins with the argument that the legal basis for including NPs in better regulation exists in the Treaties (2). The paper continues with a brief overview of the evolution of better regulation in the EU (3). This will pave the way for a discussion of the Juncker Commission’s Better Regulation Agenda (4), which consists of a package of reforms laid out in a Communication and implemented through a new set of Guidelines, a refurbished Toolbox for practitioners, a revised Regulatory Fitness and Performance Programme (REFIT), and a Draft Interinstitutional Agreement on Better Regulation.<sup>2</sup> Finally, the paper concludes that the Better Regulation Agenda maintains the *status quo* in the NPs’ participation in EU affairs and misses the opportunity to fortify their European embeddedness (5) (Haythornthwaite 2007: 26).

## 2. The legal basis for national parliamentary input in better regulation

In the post-Lisbon Treaty European Union, the primary tasks of NPs at the EU level relate to subsidiarity monitoring via the Early Warning System (EWS) (Cooper 2006: 281-304; Kiiver 2012). While instrumental to greater actorness and attentiveness of NPs to incoming draft EU legislation,<sup>3</sup> this procedure promotes a narrow and negative input by domestic legislatures in EU law-making (Fabbrini and Granat 2013: 115-144).<sup>4</sup> Although NPs receive consultation documents from the Commission – such as green and white papers, communications, annual policy strategies, work programmes, and other instruments of legislative planning or policy – the EWS does not permit the issuance of reasoned opinions on these documents.<sup>5</sup> NPs may only react to them within the non-binding, informal Political Dialogue called the Barroso Initiative, which was initiated in 2006 (Jančić 2012: 78-91). The Better Regulation Agenda therefore provides a possibility to remedy this discrepancy by broadening the pre-legislative cooperation between EU institutions and NPs and the legal basis for this can be found in the Protocols pertaining to NPs attached to, and having the same legal effect as, the Treaties.

First, the National Parliaments Protocol seeks to encourage their greater involvement in EU activities and enable them to express views not only on draft EU legislation but also ‘on other matters which may be of particular interest to them’.<sup>6</sup> Matters dealt with in the Better Regulation Agenda fall neatly within this category, because the tendency of virtually all NPs in the EU has been to install domestic procedures of *ex ante* scrutiny that would enable them to react upstream and as early as

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<sup>2</sup> Negotiations on this interinstitutional agreement began on 25 June 2015 on the margins of the European Council meeting.

<sup>3</sup> See one way of conceptualising this in Kiiver (2011: 98-108).

<sup>4</sup> Yet this view has been criticised by others, see Goldoni (2014: 647-663).

<sup>5</sup> Article 1 of Protocol no. 1 on the role of national parliaments in the European Union (National Parliaments Protocol) in conjunction with Article 6 of Protocol no. 2 on the application of the principles of subsidiarity and proportionality (Subsidiarity Protocol).

<sup>6</sup> Recital 2 thereof.

possible in the EU legislative procedure.<sup>7</sup> In addition, this provision could also be interpreted as encompassing EU delegated and implementing acts.<sup>8</sup>

Second, the Subsidiarity Protocol obliges the Commission to 'consult widely', unless the latter considers that circumstances of exceptional urgency mandate against consultation and gives reasons for deciding so.<sup>9</sup> Further, all draft legislative acts forwarded to NPs shall be justified not only with regard to subsidiarity but also with regard to proportionality,<sup>10</sup> which requires the content and form of EU action not to exceed what is necessary to achieve the objectives of the Treaties.<sup>11</sup> Both the content (e.g. what policy path ought to be taken) and form of draft EU legislation (e.g. whether a directive or regulation ought to be used) are the object of the Better Regulation Agenda and as such are inherently relevant for national parliamentary scrutiny of EU decision making. Moreover, there are a number of parameters that the Commission should provide in the form of a detailed statement attached to each draft EU legislative act to enable NPs to appraise their compliance with the principle of subsidiarity. This statement should include the proposal's financial impact, implications for domestic implementation in case of directives, qualitative and quantitative indicators that corroborate the conclusion that EU action is needed in order to achieve Treaty objectives, and an assessment demonstrating that any financial or administrative burdens that EU action may pose *inter alia* to 'economic operators and citizens' are kept at a minimum and are commensurate to these objectives.

These are all salient elements of EU policymaking that feature highly on the Better Regulation Agenda because they determine the political directions that the Union takes and which NPs are expected to control as democratically elected representatives of the national electorates. This is requisite because, as Weatherill rightly notes, better regulation 'rubs shoulders with some immensely sensitive choices about the trajectory of the mixed economy in the modern state and in the developing transnational European market' (Weatherill 2007: 4). However, as the following headings demonstrate, NPs are newcomers in the evolving public consultation process furthered by the Better Regulation Agenda. Unlike that of stakeholders, their involvement therein has not been formalised and they remain 'tucked away' within the EWS, whose effectiveness, based on the two yellow cards thus far flagged, is questionable (Jančić 2015).

### 3. The evolution of the EU Better Regulation Initiative

The expanding EU regulatory reach following the Euro-crisis has propelled the questions of democratic legitimacy and domestic parliamentary pre-emption to the centre stage of the European academic debate (Majone 2014: 1221). The evolution of the EU's move towards regulating better has paid relatively scant attention to these concerns.

The Commission's 2001 White Paper on European Governance addresses better regulation and foresees a role for NPs in it. One segment of its call for a 'reinforced culture of consultation and dialogue' refers to a heightened participation of NPs and their European affairs committees in stimulating public debate on EU policies, thereby raising the awareness of EU citizens and enabling them to voice their preoccupations regarding European integration (European Commission 2001: 16-17, 30 and 32). Yet this communicative and public discourse function of parliaments is only one part of the puzzle. Reducing the overall opaqueness of EU law-making is not a straightforward, cost-free task. As Kelemen and Menon warn, satisfying the democratic demands for openness, transparency and legal certainty in EU regulatory processes might necessitate a further formalisation of regulatory procedures and could thus lead to more red tape (Kelemen and Menon 2007: 184).

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<sup>7</sup> See Weiler (2012).

<sup>8</sup> Articles 290 and 291 TFEU. These types of EU legal acts have frequently been the object of complaints by NPs due to their exclusion from the EWS, while difficulties remain as to how practically to organise scrutiny of these acts due to their sheer volume.

<sup>9</sup> Article 2 thereof.

<sup>10</sup> Article 5 of the Subsidiarity Protocol.

<sup>11</sup> Article 5(4) TEU.

In 2010, the Commission upgraded Better Regulation to Smart Regulation, whereby the entire policy cycle was streamlined – from the design of a piece of EU legislation, to its implementation, enforcement, evaluation and revision (European Commission 2010: 3). Regulation was made the shared responsibility of all EU institutions and Member States and efforts were put to prolong the period for stakeholder consultations from eight to twelve weeks as of 2012 (European Commission 2010: 10). This is in harmony with the Lisbon Treaty provision on participatory democracy, which obliges EU institutions to maintain a dialogue and hold public consultations and exchanges of views with citizens, representative associations and the civil society (Article 11 TEU).<sup>12</sup> In relation to this, NPs' subsidiarity monitoring was seen as contributing to 'a higher quality of EU legislation' (European Commission 2010: 9). The correct application of the principle of subsidiarity became to some extent conflated with better regulation. This is also visible from the Commission's annual reporting on better law-making. Produced since 2001, these reports were renamed in 2007 to refer to subsidiarity and proportionality,<sup>13</sup> while better regulation as such became the object of so-called 'strategic reviews'.<sup>14</sup>

At the end of 2012, the Commission launched its REFIT programme in order to further facilitate the accomplishment of EU public policy goals on the basis of so-called 'fitness checks' carried out since 2010 (European Commission 2012: 3). This was to be attained through a regulatory mapping exercise in order to identify policy areas with the greatest potential for regulatory simplification and cost reduction. Nevertheless, while the REFIT mentions NPs as subsidiarity guardians, it does not include them within the 'national dedicated networks' whose input it deems fundamental for strengthening the evidence basis for EU policymaking (European Commission 2012: 11). Despite this, in a follow-up REFIT document of 2014, the Commission distinguished between the role of NPs in policing subsidiarity from that of 'providing input to the Commission at an early stage of the policymaking cycle' (European Commission 2014a: 17). Yet no clarification was offered as to what this implied. While the Barroso Initiative already fulfils this purpose, this differentiation shows that NPs may have an inherent stake in being more strongly associated with EU policy-formulation processes.

Indeed, an OECD survey of better regulation approaches and practices in 15 EU Member States, which was carried out between 2008 and 2011, reveals that parliaments take a growing interest in better regulation processes and are 'increasingly present' in the institutional landscape of rule-making in Europe regardless of the nature of a country's political system. Parliaments remain crucial factors in the production of legal rules, because proposals from the executive rarely become law 'without integrating the changes generated by parliamentary scrutiny'.<sup>15</sup>

#### **4. The Juncker Commission's Better Regulation agenda: keeping EU law 'fit for purpose'**

The mere 23 initiatives planned by the Juncker Commission in its Work Programme for 2015, four times less than the previous years, are somewhat of a 'cultural revolution' in the Commission (Mahony 2015). The EU's legislative initiator undertakes to build a 'closer partnership' with NPs so as to 'bring better implementation of existing policies and effectiveness of action on the ground' (European Commission 2014b: 3). In an attempt to bring about the promised democratic change, the Commission adopted on 19 May 2015 a new Better Regulation package, whose key components are examined below to discern the role of NPs therein.<sup>16</sup>

In this latest iteration of the Better Regulation Agenda, the Juncker Commission strives to further open up EU policymaking for public participation and therewith make the Union more transparent and accountable. This is to be done *inter alia* by continuing the aforesaid 12-week public

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<sup>12</sup> See further on this Alemanno (2014: 72-90).

<sup>13</sup> These reports are available at [http://ec.europa.eu/smart-regulation/better\\_regulation/reports\\_en.htm](http://ec.europa.eu/smart-regulation/better_regulation/reports_en.htm).

<sup>14</sup> See the first such review in European Commission (2006b).

<sup>15</sup> See [www.oecd.org/gov/regulatory-policy/44983092.pdf](http://www.oecd.org/gov/regulatory-policy/44983092.pdf). See further in Meuwese et al. (2015: 101-110).

<sup>16</sup> See the prior situation in Allio (2007: 72-105).



consultations on the so-called 'roadmaps' and 'inception impact assessments' when drafting new EU legislation, but this time also when carrying out fitness checks of existing EU legislation. Another eight weeks are given to citizens and stakeholders to react to legislative proposals once they are published, which is to run in parallel with the EWS.<sup>17</sup> The Better Regulation Guidelines specifically state that stakeholder consultations do not apply to opinions of NPs (European Commission 2015c: 64). Conversely, the Better Regulation Toolbox, whose purpose is to provide practical instructions on how to implement the Guidelines, does envisage contributions from public authorities, among which NPs, without providing any further information about it (European Commission 2015a: 321). This mention *en passant* of their input in public consultations refers to the Commission's informal inclusion, in May 2014 and outside the Better Regulation Agenda, of all NPs into the EU online system of automatic notifications about new roadmaps and public consultations, which 'enables national parliaments to actively contribute to the policy development process from its very beginning', should they elect to do so (COSAC 2014: 2.3; Timmermans 2015: 3). This is hence yet another faculty available to NPs to make their views known to the Commission, although the latter has not committed to giving them any particular effect.

The formal institutional position of NPs, however, remains intact and restricted to *ex ante* subsidiarity control of draft EU legislative acts (European Commission 2015b: 5). As the Commission points out, subsidiarity should be assessed at an early stage of the impact assessment process as 'a key consideration of the problem definition', which is aimed at describing and quantifying the EU relevance of both future and existing EU measures. The Toolbox thus specifically acknowledges that subsidiarity appraisals are of critical importance not only for proposing new EU initiatives but also for probing the added value of already enacted EU measures through fitness checks (European Commission 2015a: 21-22). This is precarious because, by their nature, fitness checks are excluded from both the EWS and the Political Dialogue, while potentially having a significant bearing on the social legitimacy of EU law and European integration in general. Furthermore, the Commission advises that subsidiarity compliance needs to be verified not only for legislative EU initiatives but also for non-legislative ones. The latter, however, are also excluded from the reasoned opinion procedure afforded by the EWS and might only be scrutinised by NPs through the Political Dialogue, yet without being able to create any legal consequences for the Commission and the institutional machinery of comitology.

Furthermore, the newly established body called the REFIT Platform does not include national parliamentarians within its membership. Chaired by the Commission First Vice-President, the Platform is composed of a 'government group', consisting of one high-level expert from the public administration of each Member State; and of a 'stakeholder group', consisting of up to 20 experts, among which most are drawn from the business world, social partners, and civil society organisations, and two are representatives of the European Economic and Social Committee and the Committee of the Regions (European Commission 2015d: Article 4). In this way, virtually all interested actors from the public and private sectors – except NPs – are included in this element of the better regulation process.

These considerations demonstrate that the Commission makes a separation between consulting the public at large (e.g. citizens, business, and the civil society) and consulting institutions exercising public power. This can be explained in a twofold manner. On the one hand, putting NPs on an equal footing with organisations that do not have an electoral mandate might be regarded as a degradation of the status of domestic legislatures within the EU policymaking system. On the other hand, the existence of consultative arrangements in the Treaties (like the EWS) and in political practice (the Political Dialogue) were deemed sufficient for national parliamentary pronouncement on EU policies. However, in light of the strong pressure that a large number of NPs are putting on the Commission for the latter to accept an 'enhanced political dialogue' in the form of a 'green card' for initiating or repealing EU legislation (COSAC 2015: 2.2, 2.4, 2.9-2.12),<sup>18</sup> the Better Regulation Agenda appears as a missed opportunity to address these requests. It also indirectly speaks of the Commission's wish to

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<sup>17</sup> Point 15 of the Draft Interinstitutional Agreement on Better Regulation of 2015.

<sup>18</sup> See also Boronska-Hryniewiecka (2015) and Jančić (2015).

retain the reins of its institutional power firmly in its own hands without too much interference by NPs.

Arguably, the most important, though still rather modest, novelty for NPs is contained in the Draft Interinstitutional Agreement on Better Regulation (European Commission 2015f). While neither the 2003 Interinstitutional Agreement on Better Law-Making nor the 2005 Interinstitutional Common Approach to Impact Assessment mention NPs, the 2015 Draft does (Meuwese 2007: 287-310). It lays down that the Commission will conduct impact assessments of initiatives expected to have significant economic, environmental or social consequences, during which process it will consult stakeholders.<sup>19</sup> The Regulatory Scrutiny Board, a body within the Commission Secretariat-General that replaces the Impact Assessment Board, will then check the quality of these impact assessments (European Commission 2015e).<sup>20</sup> Importantly, the final results of these impact assessments will be made available to NPs, the EP and the Council and published at the time of the adoption of a given EU legislative proposal along with the opinion of the Regulatory Scrutiny Board.<sup>21</sup> This provision, if adopted, will have a twofold meaning. On the one hand, it honours the role of NPs in scrutinising the Commission's legislative planning, not least by potentially producing more complete and more exhaustive impact assessment reports than hitherto. On the other hand, it seems to sideline NPs to a certain extent because, although they may decide to send their feedback to a public consultation on their own initiative, their reactions are only officially solicited once the impact assessment process has been completed, whereas the citizens, business and their organisations are expressly invited to send their contributions during this process. The Better Regulation Toolbox illuminates this further. Namely, it states that NPs perform subsidiarity control on the basis of explanatory memoranda appended to draft EU legislative proposals.<sup>22</sup> These explanatory memoranda contain the results of the preparatory work done in the form of impact assessments and stakeholder consultations (European Commission 2015a: 239). Yet it is at this very early and incipient stage of EU law-making that NPs are keen to have a greater say through the possibility of issuing 'green cards'.<sup>23</sup> The Commission, however, seems reluctant formally to extend its policy development process beyond the described margins (Crisp 2014). This is visible from the fact that, while the Draft Interinstitutional Agreement expressly provides for the consultation of stakeholders, it does not mention the Political Dialogue with NPs in any way, even though *ex ante* consultation is its primary purpose.

Finally, these observations show that NPs do not occupy a prominent but a fairly peripheral place in the Better Regulation Agenda. Although a stronger role for NPs in better regulation would not translate into influence, it would be a small step towards a greater presence of NPs at the EU level. It is furthermore unlikely that the reforms presented above will resolve the NPs' problems with the lack of transparency of EU decision making, which arises from the growing trend of agreeing EU legislation in informal trilogues, behind closed doors, and at first reading.<sup>24</sup> According to the estimates of the UK House of Commons European Scrutiny Committee, this 'fast-track' legislative procedure has resulted in the adoption of EU legislation in 33% of the cases in the period 1999-2004, rising sharply to 72% in the period 2004-2009, and to a staggering 81% from 2009 onward. This parliamentary chamber stresses that the unpredictable and secretive nature of first reading deals renders domestic scrutiny of EU affairs 'difficult, if not impossible' (UK House of Commons 2013: 26, §72-73). Further to this, the UK House of Lords EU Committee has argued in favour of allowing NPs to have a say also at later stages of the EU legislative procedure if a proposal under negotiation

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<sup>19</sup> Yet no indicators are foreseen as to what constitutes a 'significant' consequence. This gives the Commission additional political advantage, or even power, by leaving it considerable leeway to decide about the necessity of conducting impact assessments using the criteria over which there may be no consensus among the Member States.

<sup>20</sup> See further Radaelli and De Francesco (2011).

<sup>21</sup> Point 8 of the Draft Interinstitutional Agreement on Better Regulation of 2015.

<sup>22</sup> These memorandums have no legal effect and are not published in the Official Journal of the EU.

<sup>23</sup> See note 18 above.

<sup>24</sup> See the less negative impact of trilogues on the EP in: Roederer-Rynning and Greenwood (2015: 1148-1165).

has undergone major amendments or has seen altogether new elements inserted (UK House of Lords 2014: 31, § 101).

## **5. Concluding remarks**

Legislation, regulation and rule-making are complex multidimensional processes that affect a multitude of actors – public and private sectors and citizens alike. Commission President Juncker's new Better Regulation Agenda does justice to the need of reconciling the diversity of interests affected by EU legislative production with the good governance principles that aim to guarantee informed decision making as well as greater efficiency and accountability. The Commission does so by promoting extensive pre-legislative consultations with stakeholders and by endeavouring to increase regulatory quality at all stages of the life of EU legislation.<sup>25</sup>

Whether it is withdrawing stalled proposals (Court of Justice of the European Union 2015), or repealing, codifying or recasting existing legislation, the Commission exhibits determination in rebranding the EU legislative initiative while sharing the sense of ownership of the regulatory and legislative agendas with the wider public. Greater political inclusion, the 'fit-for-purpose' formula for EU law-making, and more 'user-friendly' legal rules represent the democratic added value of the 2015 Better Regulation Agenda. Reaping the benefits of information technology in the digital age, the Commission is reaching out to the addressees of EU legislation directly and this is a step forward in participatory democracy. However, there is also empirical evidence that a more assertive engagement in better regulation can strengthen the Commission itself (Radaelli and Meuwese 2010: 136-153; Melloni 2013: 263-290; Dunlop and Radaelli 2015: 33). So, where does this leave representative democracy, which, unlike participatory democracy, is premised on the existence of a democratic mandate for the enactment of binding legal rules?

Seemingly, nothing will change and the EU legislative apparatus will continue to operate as usual with NPs ensuring subsidiarity compliance of EU legislative proposals. However, the robust revamp of *ex ante* stakeholder consultations and *ex post* evaluations of EU policies (Smismans 2015: 6-26), while concomitantly keeping parliaments at bay in the same process, casts the Juncker Commission's Better Regulation Agenda as less favourable to NPs than one would expect from the solemn announcement of a 'new partnership' with them (Juncker 2014: 4 and 6).<sup>26</sup> But is this surprising? Parliaments typically do not possess the institutional capacity and expertise to carry out analyses and impact assessments in a way that the executive branch does. Nonetheless, as elected representatives, parliamentarians ought to have a strong voice not only on the adequacy and political implications of the outcomes of impact assessments and stakeholder consultations, which may shape the substance of EU legislation, but also on the added value of EU legislation that has already been enacted (Wiener 2007: 449). The Better Regulation Agenda does little in this regard. NPs should not lose sight of these developments in order to preserve their already limited space on the EU law-making chart.

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<sup>25</sup> There are, however, a plethora of considerations that need to be taken into account to take a fuller stock of the Better Regulation Agenda. See some indicators and signposts for this in Voermans (2009: 59-95).

<sup>26</sup> See on the Juncker Commission's approach to national parliaments in Jančić (2015), note 18 above.

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# Limited and Asymmetrical: Approval of Anti-crisis Measures (EFSF, ESM, and TSCG) by National Parliaments in the Eurozone

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## 1. Introduction<sup>1</sup>

The recent reform process of European economic governance distorted the institutional order established with the Treaty of Lisbon. The Treaty, heralded as the “Treaty of parliaments” (Rittberger 2014), strengthened law-making competences of the European Parliament (EP) as well as national legislators’ control powers in European policymaking. However, European economic governance has been reformed predominantly by means of various intergovernmental measures limiting the role of national legislators and the European Parliament (Dawson and de Witte 2013). Against that background, this paper addresses the following question: how has the intergovernmental reform process of European economic governance affected control functions of national parliaments in the Eurozone?

In the literature many authors agree that the European Parliament and national legislators have suffered a decrease of power during the recent reform of European economic governance (Crum 2013; Puetter 2012; Habermas, 2011). According to Habermas (2011), the current institutional design of European economic governance can be best described as ‘executive federalism’, meaning that while the process of economic integration has been deepened, the decision making and control remained at the executive level. Under that institutional set-up neither the European Parliament nor national parliaments were provided any substantial powers to review or amend the measures reforming European economic governance (Crum, 2013). In particular, the European Parliament has been only involved in the approval of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), the six-pack and the two-pack. However, it has not been formally involved in the establishment of the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM). This is due to the fact that the bailout mechanism has not been approved under the ordinary legislative procedure which requires consent of both the Council and the European Parliament.

Some studies have, to some extent, contradicted the “de-parliamentarisation” thesis (Rittberger 2014; Fasone 2014b; Auel and Hoeing 2014; Benz 2013). For instance, Fasone (2014b) and Benz (2013) observed that rulings of national or supreme courts have actually fostered national parliaments’ control functions. Against that background the following questions emerge: what were the tangible effects of the intergovernmental reform process on national parliaments’ control powers? If national parliaments’ control powers were indeed both fostered and limited, what were the dominant patterns? In particular, which national parliaments were empowered and which disempowered? Which institutions (both domestic and international) were responsible for empowering or disempowering parliaments? What were the implications of the dominant (dis)empowerment patterns for the legitimacy of the institutional reform in each state and in the Eurozone in general?

Although the literature dealing with patterns of parliamentary control in European economic governance is already quite extensive, there are still no studies offering a comprehensive comparison covering all legislators of the Eurozone states.<sup>2</sup> This study aims to fill that gap and contribute to the debate with a systematic analysis covering approvals of *all* major anti-crisis tools in national

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<sup>2</sup> The exception constitutes the on-going comparative research project ‘Constitutional Change through Euro Crisis Law. A Multi-Level Legal Analysis’ based at the European University Institute in Florence (EUI).

parliaments of Eurozone states: the establishment and the increase of the financial capacity of the European Financial Stability Facility (EFSF), the establishment of the permanent bailout fund, i.e. the European Stability Mechanism (ESM), and the ratification of the Fiscal Compact. For the sake of coherence, the paper analyses parliaments' activities in the approval (ratification) of legislative measures, but not their execution (management).<sup>3</sup> The analysis covers all legislators of the Eurozone. The analysis presented in this article differentiates between domestic and international asymmetries in anti-crisis measures' approvals. Domestic asymmetries concern (a) modes of approval: standard versus fast-track procedures and mergers, and (b) modes of supreme or constitutional courts' activity: empowering or disempowering parliaments. Fast-track procedures are applied in exceptional situations when a given bill has to be approved in a short period of time. Fast-track procedures shorten the legislative process and limit the involvement of national parliaments (for instance, it is a common practice in many states to accelerate the approval process by limiting the number of parliamentary readings from three to one). Mergers constitute legal packages comprising of two or more bills submitted to national parliament for discussion and vote. Parliaments only have one vote at disposal in order to approve or reject the whole legal package. Finally, national supreme or constitutional courts can confirm national parliaments' powers in their rulings; however, courts can also use their competences in order to disempower parliaments.

International asymmetries concern (i) unanimity versus special majority requirements and (ii) substantive equality standards. The first criterion stipulates conditions for international agreements' approval. Unanimity requirement grants parliaments more powers at the EU level because a veto of one parliament can block the whole legislative process. Finally, substantive equality concerns the de facto equality of institutions in the exercise of their competences (not the formalized legal powers).

The empirical findings of the article demonstrate that the impact of national parliaments on the approval of European anti-crisis measures was both *limited* and *asymmetrical*.<sup>4</sup> Parliaments in debtor states have been systematically more disempowered than those in creditor states, both through international and domestic asymmetries. Regarding domestic asymmetries, fast-track procedures or mergers were far more frequent in debtor than in creditor states. Only one constitutional court (the German Constitutional Court) empowered significantly its national parliament (Bundestag), other courts either remained neutral or actually disempowered their parliaments (for instance in Spain). Debtor states were also more affected by international asymmetries, and, more specifically, the lack of substantive equality. Unanimity versus special majority requirements affected similarly all national parliaments.

This article begins by presenting formal competences of the European Parliament and national legislators in the EU as well as their role in closing the legitimacy gap in the European Union. The third section introduces shortly the legal status of anti-crisis measures which were approved by national parliaments. Section four, mapping and classifying the variety of domestic and international asymmetries, is preceded by a short presentation of methodology and data-gathering strategy applied in the article. Section five presents in detail the empirical findings; it is followed by discussion and conclusions.

## **2. The role of parliaments in the European Union after the Treaty of Lisbon**

Article 10 TEU introduced explicit references to democratic principles aimed at reinforcing representative and participatory dimensions of democracy in the European Union. In particular, in order to improve representation, the Treaty extended the European Parliament's legislative competences and strengthened national parliaments' control powers. It has been observed that

national parliaments were not randomly picked for the job. Instead, they were selected in the hope that their review will provide legitimacy to a European political project that faces an increasing gap between a small Europeanised and Europhoric elite, and less convinced European citizens.

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<sup>3</sup> Regarding management of the European Stability Mechanism see Fasone (2014b).

<sup>4</sup> See the Table at p. 74 for more details.



Thus, national parliaments are perceived as an unexploited reservoir of legitimacy that the Union can use to counter the democratic deficit (De Witte et al. 2010: 22).

Finally, the participatory dimension has been fostered through the introduction of new mechanisms such as the European citizens' initiative (Mayoral 2011).

In general, national parliaments perform different functions in EU and national politics. While in domestic politics national parliaments enjoy the right to propose, amend, pass or reject bills, at the European level their impact is far more restricted. The Treaty has explicitly confirmed that the major functions of national parliaments in the European Union consist of, first, establishing a channel of accountability between the Council and national constituencies and second, controlling the decision-making process at the EU level.

The extension of the European Parliament's legislative competences in EU policies has clearly contributed to the democratization of decision making in the European Union. This is because the European Parliament, as a directly elected European institution, enjoys direct input legitimacy. The reform has also confirmed the basic division of competences between the European Parliament and national legislators in EU policies: accordingly, while the prior function of the European Parliament is to *legislate*, the responsibility of national parliaments is to *control*.

Already in the symbolical dimension the Treaty stressed the fact that the European Parliament constitutes a *direct* channel of representation for *EU citizens*. Under the Nice Treaty MEPs were recognized as representatives of the peoples of the *States* brought together in the Community (Article 189 TEC). In contrast, according to Article 14.2 TEU members of the European Parliament are representatives of the *Union's citizens*.<sup>5</sup> The TEU has also introduced changes to the composition of the European Parliament by increasing the number of MEPs from 736 to 751 (750 plus the President). The rules for allocating seats are (digressively) proportional to the population of each state. Furthermore, the TEU stipulates that while the maximum number of seats assigned to a member state is 96 and the minimum, the minimum is six seats.

The Treaty has empowered the European Parliament primarily through the extension of co-decision (now ordinary legislative procedure) to new policy areas. As the literature has noted, the main novelty is not the establishment of the rules of the procedure, but rather the extension of the European Parliament's legislative powers to new policy areas (De Witte et al. 2010). The already existing co-decision procedure – renamed into ordinary legislative procedure – has been extended to cover approximately 90 percent of EU legislation (De Witte et al. 2010). The areas covered by the ordinary legislative procedure are: agriculture and fisheries, common commercial policy and, with a few exceptions, police and criminal justice.

### **3. How do parliaments contribute to closing the legitimacy gap?**

The literature differentiates between input (accountability) and output legitimacy (Scharpf 2009). Whereas output legitimacy concerns the performance of institutions in delivering outcomes, input legitimacy denotes conditions for the democratic self-government and electoral accountability of governors. In short, in democratic self-governing polities, power is delegated to decision-makers (executive) whose performance is constantly evaluated by directly elected representatives (members of the national parliament). In order to remain well-informed, parliamentary parties control governments, among other things, by means of hearings or question hours. Apart from that parliamentarians are entitled to make formal suggestions to their governments by means of motions, resolutions or – in some cases – even laws. Furthermore, if parliamentarians come to the conclusion that their government is failing to perform its functions, they can raise a motion of no-confidence against a particular minister or the whole cabinet. In sum, the conditions for input legitimacy are fulfilled if a national parliament controls a government's proceedings and has powers to hold it accountable for its actions.

Voters constitute the third actor in the "accountability chain": they elect representatives (members of the national parliament) in the national general elections, and, after elections, they follow

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<sup>5</sup> Italics introduced by the author.

and control the political performance of their representatives. Finally, if voters are not satisfied with the work of elected representatives, they can manifest their dissatisfaction by voting for a different party in the next elections.

Although the institutional change introduced with the Treaty of Lisbon has contributed to minimizing the legitimacy gap in the European Union, it has been far from able to eliminate it. This is due to the fact that, first, the scope of the reform was limited. National parliaments' control powers were extended only in issues related to subsidiarity. Second, *internal* institutional limitations generated other obstacles. Namely, it has been observed that not all national parliaments have "equally generous democratic arrangements" (De Witte 2009). In Europe practices regarding parliamentary control in general are very diverse. While in some states national legislation equips parliaments with strong control powers, in other states legislators' powers can be minimal (Fasone 2014b). Furthermore, there is also variation in non-formal practices, for instance regarding the amount and quality of administrative support (Auel and Christiansen 2015). As a consequence, not all national parliaments can control EU policies equally well.

The European financial crisis distorted the institutional process oriented on minimizing the legitimacy gap in the European Union. In particular, during the reform of the European economic governance the involvement of the European Parliament and national parliaments in the decision-making processes were very limited. As a consequence, it has been widely observed that the intergovernmental nature of the economic reforms deeply eroded the principle of representative democracy (Crum 2013; Rittberger 2014). Parliaments were hardly represented in that process: the European Parliament has been basically excluded while national parliaments only played a consultative role (Fasone 2014a).

During the European financial crisis the quality of input and output legitimacy decreased. Although input legitimacy was already deficient before the crisis, the defects were profoundly experienced by citizens when decision-makers failed to meet the requirements related to output legitimacy (Scharpf 2014). In other words, voters in bailout states realized that they have very little means at disposal to influence contested decisions. That was mainly because the drafters of budgetary measures enshrined in rescue packages (including Memoranda of Understandings, loan agreements and their revisions) – namely the European Commission, the European Central Bank and the International Monetary Fund – have not been accountable to voters in the bailout states. As Mair observed, governments in bailout states were therefore no longer recognized by their voters as "governments by the people" but rather "governments against the people" (2011: 6).

Recent contributions to the debate on the institutional order of European economic governance have widely acknowledged that neither a fully-fledged federalization of the EU (the transfer Union) nor dissolution of the EMU is politically realistic. For that reason most proposals aim at improving the existing institutional order by decentralizing the executive-based decision making and control. It has been proposed to apply ordinary legislative procedure to all future legislative changes within the European economic governance as well as to grant national parliaments a stronger role in controlling the decision making (Crum 2013; Bellamy and Kröger 2014).

The concept of "republican intergovernmentalism" (Bellamy and Kröger 2014) draws on the assumption that national parliaments could re-connect the European integration process with the communal self-rule of the EU member-states. Active involvement of national parliaments in the reform process could also contribute to addressing the depoliticisation of European Union's policymaking by "domesticating" and "normalising" it. Normalisation of EU politics would imply that national parliaments re-connect EU politics to the left–right economic cleavage. In light of that proposal, the democratic deficit on the input side would be alleviated by re-establishing the channel of accountability between the European decision-making level, national parliaments and voters. There are also more specific proposals, for example, to institutionalize national parliaments' control in a form of a supranational conference of national parliaments equipped with substantial scrutiny powers (Crum 2013).

However, all normative proposals advocating the strengthening of parliamentary control should be preceded by a thorough empirical investigation of institutional conditions under which national parliaments conduct oversight of European economic governance. This is due to the fact that

parliamentary control is influenced by both domestic and international factors. These institutional developments can either have an empowering or a disempowering effect on parliaments. Furthermore, domestic and international asymmetries can have very different effect depending on where we identify the locus of legitimacy to be. In particular, whereas unilateral empowerment of a national parliament by a constitutional court fosters control powers of that particular parliament, it decreases the legitimacy of parliamentary oversight in the EU by deepening asymmetries of power among national parliaments. In the following sections this article maps the asymmetries and evaluates their impact on the input legitimacy in the European Union.

#### **4. The legal status of the analysed anti-crisis measures**

Anti-crisis measures had a very different kinds of legal status, in that they encompassed acts under international private law, intergovernmental agreements, a treaty amendment (Art. 136.3 TFEU), regulations and directives but also country-specific recommendations of a dubious legal nature. As a consequence, the procedures for their approval also differed. Furthermore, governments also influenced the approval procedures by merging two measures and submitting them in such a form for parliamentary discussion and vote. The implication was that parliaments could have one vote in order to decide on two different measures simultaneously. This section briefly presents the legal status, content and mode of approval of the measures analysed.

The EFSF was established with the EFSF framework agreement as a private company based in Luxembourg, outside the EU legal framework. Member states did not foresee its incorporation into the Treaty, although they envisaged taking this step later with its successor, the European Stability Mechanism (ESM). The legality of the EFSF has been disputed. In particular, critics questioned the legal basis for the EFSF (private company established outside the EU law). Furthermore, referring both the European Facility Stabilisation Mechanism (EFSM)<sup>6</sup> and the EFSF, critics noted that Article 122(2) refers to cases of “natural disasters or exceptional occurrences beyond its control (Ruffert 2011), whereas maintaining budgetary discipline cannot be recognized as being *beyond* governments” control.

The establishment of the European Financial Stability Facility (EFSF), as well as the increase of its budgetary capacity, required the unanimous approval of all Eurozone member states. Although the EFSF constituted an intergovernmental agreement under private law, the measure was approved by a ratification procedure, otherwise reserved for international agreements.

In contrast to the temporary EFSF, the European Stability Mechanism (ESM) has a less precarious legal basis. In particular, it was established as an intergovernmental organization with the Treaty Establishing the European Stability Mechanism. The ESM became the permanent bailout fund and continues to fulfil the same goals as the temporary EFSF. The European Council of 25 March 2011, acting by unanimity, and following the procedure of Article 48(6) adapted a decision 2011/119/EU aimed at amending Article 136(3) TFEU by inserting the following text: “The member states whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.” The new measure was introduced through the simplified treaty revision procedure, hence, with minor involvement of the European Parliament or national parliaments in the drafting process. In contrast to the EFSF, the ESM was able to enter into force after being ratified by states representing 90 percent of its capital requirements, as stipulated in the funding Treaty Establishing the European Stability Mechanism.

The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, being an international agreement outside the EU law, was signed on 2 March 2012 by all governments of the EU member states except the United Kingdom, the Czech Republic and Croatia. The Fiscal Compact is a stricter version of the previous Stability and Growth Pact. Member states bound by the treaty are required to introduce into domestic law (preferably at the constitutional level) a self-correcting mechanism which shall guarantee that their national budgets are balanced. In particular, the

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<sup>6</sup> The EFSM, established by Directive 407/2010, uses the budget of the EU as collateral (60 billion euros). In contrast, the EFSF (440 billion euros) is a fund in which capital guarantees are granted by Eurostates.

general budget deficit shall not exceed 3 percent of GDP, the structural deficit shall be less than 1 percent of GDP and the debt-to-GDP ratio shall remain below 60 percent.

According to Article 14(2) and (3), the TSCG had to be ratified by at least twelve Eurozone member states in order to enter into force among them. The objective was reached by 1 January 2013 after Austria, Cyprus, Germany, Estonia, Spain, France, Greece, Italy, Ireland, Portugal, Finland and Slovenia ratified the treaty. However, the ratification procedures varied significantly across states. In Ireland, for example, the treaty was subject to popular referendum (which took place on May 31, 2012), while in Cyprus it was ratified by an act of government, hence, without consulting the national parliament. In other states, national parliaments were requested to authorize the ratification of the Treaty.

The ratification process of the Fiscal Compact, as well as the amendment of Article 136(3), took place under conditionality pressure. According to the Memoranda of Understanding, loans can be made on condition that the debtor state ratifies the Fiscal Compact. Under those circumstances, several states – such as Greece, Italy or France – opted to combine ratification of the two treaties with amendment of Article 136(3). For national parliaments this decision implied that they had to approve or reject the three legal documents with one vote.

## **5. Asymmetries in anti-crisis measures' approvals: the analytical framework**

This section demonstrates that the patterns of anti-crisis measures differed significantly across the Eurozone states. In the reform process of European economic governance, governments faced different constraints that influenced their decisions. While in some states decision-makers opted to approve anti-crisis measures with standard procedures (usually applied in such instances), others selected the so-called special fast-track procedures. Against that background, this section systematically maps the observed patterns of approval and, in the second step, evaluates them from a normative perspective.

At the general level, this article differentiates between domestic and international asymmetries in anti-crisis measures approvals. Domestic asymmetries concern (i) modes of approval: standard or fast-track procedures and mergers, and (ii) modes of supreme or constitutional courts' activity. International asymmetries concern (i) unanimity versus special majority requirements and (ii) substantive equality standards.

### **5.1. Domestic asymmetries**

#### **5.1.1. Fast-track procedures**

Reform of European economic governance took place under unusual circumstances. First, all states involved faced a considerable time-pressure, particularly in the case of the EFSF which required very prompt entry into force. Second, most anti-crisis measures required unanimous approval in all Eurozone states. Hence, governments wanted to ensure that the measures agreed by them are also approved successfully at the domestic level. As a consequence, some governments turned to special fast-track procedures or merged the debated EU draft legislative acts in order to overcome potential difficulties.

Legislation of emergency or fast-track procedures is codified in all European states. The common feature of all special procedures is that they shorten the usual period required for approval/ratification and limit the role of national legislatures in the process. These procedures constitute a deviation from standard procedure as they allow governments to pass laws without or with only limited involvement of national parliaments. Furthermore, national legislation does not always explicitly label emergency legislation as a fast-track procedure (see for instance Article 86 of the Spanish Constitution and Article 77 of the Italian Constitution). In many states it is a decree-law which fulfills the function of a fast-track procedure.

Fast-track procedures are not un-democratic per se; on the contrary, they are necessary in order to deal with unexpected, large-scale urgencies such as for instance the management of natural disasters. These situations usually require a rapid reaction which should not be postponed unnecessarily by lengthy legislative procedures. Nonetheless, in order to prevent abuse of fast-track procedures, national legislation usually stipulates very clearly the circumstances in which these

procedures can be applied. As a result, the grade of deviation from the standard procedure depends heavily on the flexibility of domestic provisions regulating these issues. Namely, some European states usually apply fast-track procedures more frequently than other states (for more details on pre-crisis practices regarding fast-track procedures see: Cartabia et al. 2011).

Although emergency legislation is present in each state, the role of parliaments in these procedures can differ substantially. First, application of a fast-track procedure can entirely eliminate national parliaments from the legislative process, meaning that parliaments neither vote on nor debate a given bill. Second, a fast-track procedure can eliminate parliamentary debate entirely but retain voting and, third, emergency legislation can reduce the usual number of debates (for instance, from three to one reading) and retain voting. That has been, the practice in France, for example.

Approval of anti-crisis measures in Spain illustrates very well what concerns can arise from extensive application of fast-track procedures. In the Spanish system we can differentiate ordinary laws from decree-law. Royal decree-laws are envisaged for extremely urgent situations. The national parliament cannot amend the text of a decree-law, it can do so only after it has transformed it into a legislative project examined following the urgent procedure (Article 86 of the Spanish Constitution), which extends the procedure over time. According to the procedure, a decree-law becomes binding if it is voted by the parliaments, a debate is not necessary. If the vote is affirmative, the decree-law becomes an ordinary law. As comparative studies have illustrated (Coutts et al. 2015), while in the pre-crisis period royal decree-laws were applied predominantly in matters related to natural disasters or a terrorist attack, in the post-2009 period the royal decree-law has become the major tool for implementing EU legislation related to economic governance. Moreover, in 2012 the number of bills or EU draft legislative acts approved with the royal decree-laws was higher than the number of bills approved as ordinary laws. The predominance of the fast-track procedure generated a discussion on whether such an extensive application of royal decree-laws is justifiable. Among other things, critical voices pointed to the rulings of the Spanish Constitutional Court from 1982 and 2007 in which the Court has stated explicitly that governments should not apply royal decree-laws for structural issues or policies.<sup>7</sup>

### 5.1.2. Mergers

Another special practice employed by governments has been the merging of bills submitted for parliamentary discussion and vote. Governments merge two – or more – bills and present them as a legal package for parliamentary discussion and vote. That practice not only accelerates the approval process but also increases the likelihood of the bill's approval. That is particularly the case if the major element of the merger is an important piece of legislation which is in any case widely supported by parliamentary parties. Under these circumstances parliamentarians are more likely to vote in favour because they only have one vote in order to approve or reject the whole legal package. The practice of mergers varies across European states. In some states it is common practice to accompany budgetary debates with related issues; in other states mergers are not at all frequent.

In the reform process of European economic governance the most extreme instance of a merger occurred in Greece where parliamentarians had one vote to approve the following three reforms: the establishment of the European Stability Mechanism (ESM), reform of the Article 136(3) and ratification of the Fiscal Compact. Because these measures were approved through the standard procedure, plenary debates were dominated by the discussion of the implementation procedure and its democratic standard and to a lesser extent by the content of the reforms.

### 5.1.3. How should fast-track procedures and mergers be evaluated?

There are three normative issues related to fast-track procedures and mergers. First, not all fast-track procedures and mergers are undemocratic per se. Under certain circumstances it is in the interest of a self-governing polity to shorten the legislative process. For instance, if an unexpected natural disaster requires legal activity it is justifiable to sacrifice democratic procedures for the sake of efficiency. Furthermore, a merger of a minor but closely related bill with a major piece of legislation does not

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<sup>7</sup> Sentencia del Tribunal Constitucional 29/1982, Sentencia del Tribunal Constitucional 68/2007.

violate the democratic credentials of the legislative system. Second, there is internal variation within fast-track procedures; whereas in some states these procedures curtail the involvement of legislatures (i.e. by limiting the number of plenary debates from three to one, as in France), in other states emergency legislation precludes parliamentary debate or voting entirely. As a consequence, it is actually necessary to identify different *grades* of national parliaments' exclusion within fast-track procedures. Finally, assessment of the democratic quality of the process during the economic crisis depends heavily on prior national practices. In particular, if a given state systematically limited national parliaments' involvement in the legislative process already before the crisis and continues to do so during the crisis, we cannot attribute the lowering of the standard to the crisis.

This paper examines the internal variety of fast-track procedures and mergers; however, due to the high number of states under study, it does not systematically analyse pre-crisis practices. In order to evaluate the democratic quality of the approval process, the study suggests that fast-track procedures be evaluated drawing on the following criteria:

- (a) Was the usual number of plenary debates reduced?
- (b) Were plenary debates entirely limited?
- (c) Was voting eliminated as well?

Regarding mergers, the paper proposes to evaluate mergers on a case-by-case basis and to examine the internal thematic diversity of each legal package.

#### 5.1.4. Constitutional or supreme courts' activity

In parliamentary democracies governments depend on parliamentary confidence during their entire term of office. Hence, the major task of parliaments, next to law-making, is to control the activities of their governments. Although all parties are obliged to control the executive, opposition parties usually have the strongest incentive to do so. In European matters, *ex ante* control implies that parliaments interrogate governments (i.e. through question-hours) before a definite decision is taken at the European level. *Ex-post* control entitles parliaments to voice their opinion on a given European draft legislative act after the Council has taken a decision.

*Ex ante* control is recognized as a more democratic procedure than the *ex-post* control (Hefftlar 2013 and 2015). First, parliaments acquire a better overview of the initial position of their government; second, they can indirectly influence the agenda of the Council by turning their government's attention to certain issues which can be discussed with other heads of government. If parliaments are consulted before the meeting in the Council they debate details of the national position on a given matter. The government is informed more broadly because plenary discussions allow opposition parties to participate in the discussion and voice their opinion. Obviously, if the decision in the Council is taken by the qualitative majority vote, it is probable that the initial positions of the government and the national parliament are not reflected in the final decision.

The mode of legislator control can be modified in the course of judicial control. National supreme or constitutional courts can issue rulings that affect the powers of national parliaments. That is, courts can empower or disempower national parliaments but also remain neutral.

### 5.2. *International asymmetries*

International asymmetries concern (i) unanimity versus special majority requirements and (ii) substantive equality standards. The first criterion stipulates conditions for the approval of international agreements.<sup>8</sup> The unanimity requirement grants parliaments more powers at the EU level because a veto by one legislature can block the whole legislative process. If a given international agreement requires the approval of a special majority of national legislators, only a larger group of national parliaments is in a position to block the process.

From a normative perspective, the accountability of domestic decision-makers suffers if the international outcome does not conform to the vote outcome in the national parliament. Given that the

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<sup>8</sup> The criterion also concerns decision making within the ESM, unless the decision was taken under the urgency procedure.

anti-crisis measures were adopted by both unanimity and special majorities, this paper examines how national parliaments were affected by these rules.

Regarding equality, we can differentiate between *de jure* and substantive equality of parliaments. While *de jure* equality concerns the formal legal status of institutions, substantive equality is not limited to the assessment of legal competences (formal equality) but also concerns the *de facto* equality of institutions, for instance, in the exercise of their competences. According to Article 4(2) of the TEU, all member states and their self-governing institutions enjoy equal status:

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

However, it is possible that due to external or internal factors national parliaments are not entirely free in the exercise of their competences. For instance, in the course of the European financial crisis some national parliaments became more vulnerable than others. Exposure to external conditionality in national budgetary matters had a negative effect on national parliaments' sovereign powers. The empirical analysis conducted in this paper examines how the financial crisis affected the substantive equality of national parliaments and which parliaments were most affected.

## **6. Methodology and data**

The empirical enquiry in this paper is based on the original database covering various patterns of approval/ratification procedures of major anti-crisis measures introduced in the Eurozone between 2009 and 2013. The information was gathered directly from the national parliaments of Eurozone states. In most cases all the information was available on parliaments' internet pages. However, in a couple of states no information was publically available (or it was incomplete). From these states the information was acquired on written enquiry sent to research or information units of national parliaments. All the data were available in the original language. The database has been compiled by three researchers who covered particular states according to their personal language skills.<sup>9</sup>

## **7. Empirical evidence**

### ***7.1. Domestic asymmetries: fast track procedures and mergers***

The comparative empirical analysis clearly demonstrates one dominant tendency. Southern European parliaments' powers were more constrained than their Northern European counterparts. The states that approved anti-crisis measures *without* employing any fast-track procedure or merger were as follows: Belgium, Austria, Estonia, Finland, Germany, Ireland, Luxembourg, Slovakia and Slovenia. With the exception of Ireland, all the states belong to the group of the so-called creditors. The other group of states – which comprised Spain, France, Cyprus, Greece, Italy, Malta, Netherlands and Portugal – approved European anti-crisis measures either with fast-track procedures or mergers. In the second group the outliers are France and the Netherlands.

The establishment of the European Financial Stability Facility (EFSF), as well as the increase of its budgetary capacity, required unanimous approval of all Eurozone member states. Although the EFSF constituted an intergovernmental agreement under private law, the measure was usually approved with a ratification procedure, reserved otherwise only for international agreements. The states that approved the establishment of the EFSF with a standard parliamentary ratification procedure were: Belgium, Austria, Finland, Germany, Ireland, Luxemburg, Portugal, Slovakia and Slovenia (see Table 1). In Spain the EFSF was approved through a fast-track procedure (decree-law) which envisaged a parliamentary vote but no plenary debate. In France, the EFSF was approved with a special procedure that reduced the number of readings to one. Furthermore, it has been also incorporated into the budget bill and submitted to parliamentary vote as a single package. In Cyprus

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<sup>9</sup> Athena Charalamboglou (compilation of the database based on country expertise), Dr. Patricio Galella (compilation of the database as well as general legal expertise) and Dr. Aleksandra Maatsch (design and compilation of the database).

and Malta the EFSF was also introduced with a special procedure accelerating the approval process but without cancelling the voting procedure and parliamentary discussion. Estonia was not a member of the Eurozone at that time and thus did not participate in the approval process. Greece approved the EFSF with a fast-track procedure (governmental decree) without consulting the parliament in any form (there was neither debate nor vote). In Italy the EFSF framework agreement was implemented through Decree-Law (Decreto-legge) n. 78/2010 stipulating “Urgent measures on financial stability and economic competitiveness”. As a consequence, there was only a very short debate and a vote in which the Italian parliament converted the decree into a law.

Parliamentary involvement in the process of approving an increase in the budgetary capacity of the EFSF followed the same pattern across the analysed states. As a result, it was predominantly creditor states that approved the increased budgetary capacity of the EFSF with a standard procedure: Belgium, Austria, Cyprus, Estonia, Finland, Germany, Ireland, Luxemburg, Slovakia and Slovenia. The role of the relevant parliaments was limited in Spain, France and Malta. In these states parliaments voted on the increasing the budgetary capacity of the EFSF but the usual number of plenary debates was reduced. In Greece and in the Netherlands national parliaments debated and voted on a merger: in Greece the approval of the EFSF was combined with the law on a property tax and regulation of bank supervision, whereas in the Netherlands it was merged with the budgetary law. In Portugal the parliament was not consulted in any form (governmental decree).

The Treaty Establishing the European Stability Mechanism has been ratified according to the standard procedure in the following states: Belgium, Austria, Cyprus, Estonia, Finland, Germany, Ireland, Luxemburg, Slovakia and Slovenia. In the other states – namely Spain, France, Malta, Netherlands and Portugal – the ESM treaty has been merged with the ratification of Article 136(3) of the TFEU. In France the combined ratification of the ESM Treaty and the Article 136(3) was subject to a fast-track procedure that envisaged only one plenary debate. In Greece and Italy national parliaments had to ratify a triple-merger: the ESM Treaty, the Article 136(3) and the Fiscal Compact.

The ratification procedures of the Fiscal Compact varied significantly across states. The observed practices differed with respect to the degree of national parliaments’ involvement or influence. In a number of states voting on particular anti-crisis measures was eliminated: in Cyprus (Fiscal Compact), in Greece (EFSF-1), Italy (EFSF-1 and EFSF-2), in the Netherlands (EFSF-1) and in Portugal (EFSF-2). Plenary debate has been entirely eliminated in the following states: Spain (EFSF-1 and EFSF-2), Cyprus (Fiscal Compact), Greece (EFSF-1) and the Netherlands (EFSF-2). In France the usual number of plenary debates was reduced from three to one (the EFSF-1, EFSF-2, ESM and the Fiscal Compact).

Mergers have taken place in the following states: Spain (ESM and Article 136 TFEU), France (EFSF-1 was merged with the budget bill and the ESM Treaty was merged with Article 136 TFEU), Greece (EFSF-2 was merged with the law on property tax and bank supervision, the ESM Treaty was merged with Article 136 TFEU and the Fiscal Compact), Italy (Article 136 TFEU, ESM, Fiscal Compact), Malta (ESM merged with Article 136 TFEU), the Netherlands (EFSF-2 with the budgetary law, ESM with the Article 136 TFEU) and Portugal (ESM and the Article 136 TFEU).

Practices with regard to mergers differed significantly across the states under study. For instance, it was common practice to merge ratification of the ESM Treaty with the revision of Article 136(3) TFEU. Furthermore, the establishment of the EFSF or the increase of its budgetary capacity was merged in a couple of states with domestic budgetary measures. These two instances of mergers do not constitute extreme examples of limitations on national parliaments’ powers. In both cases the components of the package were closely related to each other and interdependent. This is to say, financial guarantees provided within the EFSF framework have to be envisaged in the budget. However, other instances of mergers may appear more problematic. For instance, in Greece ratification of the ESM Treaty was merged with the revision of Article 136(3) and ratification of the Fiscal Compact. Furthermore, the budgetary balanced rule has also been introduced in the national constitution. In Italy, similarly, the ESM Treaty has been merged with the revision of Article 136(3) and the Fiscal Compact. Although Italian parliamentarians voted on each component of the package separately, the whole package was debated together, which raises concerns regarding the quality of parliamentary deliberation. In Greece parliamentarians only had one plenary debate and one vote at



their disposal in order to approve – or disapprove – the whole legislative package. A further concern relates to the time available for the discussion. The qualitative analysis of parliamentary debates in Greece demonstrated that parliamentarians devoted as much attention to procedural aspects as to the very content of the package (Maatsch 2016). On one hand, the finding demonstrates parliamentarians' awareness of the problem, but on the other it implies that, due to procedural issues, debate on the content of the legislation was very limited.

The data demonstrate that, first, fast-track procedures and mergers were found in the same states. In other words, parliaments either approved anti-crisis measures with standard procedures or they deviated from that practice. Second, elimination of voting on a particular anti-crisis measure coincided with elimination of a debate. Parliaments in these states basically had no influence over the approval of a given measure. Third, the participation of parliaments has been most limited by a combination of fast-track procedures and mergers. In particular, in France the revision of Article 136(3) was merged with ratification of the ESM Treaty. These two measures were approved with a fast-track procedure reducing the standard number of plenary debates from three to one. That may appear problematic in the French context because implementation of the balanced budgetary rule has been highly contested. Eventually, in France there was not enough support among the parliamentary parties to incorporate the balanced budget rule into the constitution. Other examples concern states that approved anti-crisis measures either with fast-track procedures or mergers. For instance, in Greece, Italy and Spain the combination of fast-track procedures and mergers either prevented parliamentary debate (and sometimes even voting) or considerably affected the deliberation process by extending the agenda of the plenary debate.

## **7.2. Domestic asymmetries: courts' activity**

In EU policymaking the role of national parliaments predominantly concerns controlling their governments. In European economic governance national parliaments were consulted by their governments predominantly ex post. If consulted, parliaments were entitled to approve or disapprove of a given measure. However, they were not in the position to introduce any changes to the content: the agenda-setting stage was dominated by executives.

In the course of the European financial crisis national supreme or constitutional courts influenced relations between parliaments and legislators (Wendel 2013; Pernice 2014). Court rulings of have contributed to the generation of further asymmetries between parliaments: while some courts confirmed the importance of parliamentary control in European economic governance, others have disempowered their legislators vis-à-vis the executive.

The most prominent example of national parliaments' empowerment can be found in Germany. The German Constitutional Court has issued altogether four rulings on the institutional reform of European economic governance.<sup>10</sup> In the first ruling on the EFSF and the Economic Adjustment Programme for Greece of July 9 2011 the Court declared that neither international treaty violates the Basic Law. However, it also stressed that the Bundestag cannot transfer its budgetary powers to other actors. As a consequence, each bailout or increase of budgetary capacity of the EFSF has to be approved by the German parliament (Bundestag). In these respects, the Court's ruling precluded the approval of anti-crisis measures by means special fast-track procedures that exclude national legislators. The second ruling of 2 August 2012 precluded the possibility of delegating powers belonging to the whole parliamentary plenum to a special parliamentary committee which should decide on urgent matters related to European economic governance. According to the Court, the Bundestag has to exercise its budgetary powers in its entirety. In the third ruling on the ESM and the Euro-Plus Pact of 6 March 2012, the Court stated that the government is obliged to inform the German parliament as early as possible regarding all matters related to European economic governance. Finally, in the ruling on the ESM and the Fiscal Compact of 9 December 2012, the Court confirmed that neither the ESM nor the Fiscal Compact violate the constitution (see for instance the ruling of the German Constitutional Court of 18 March 2014, BVerfG, 2 BvR 1390/12). However, the parliament has to be consulted on each increase in the ESM budget and on new bailout decisions.

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<sup>10</sup> BVerfG 09/07/2011, BVerfG 02/28/2012, BVerfG 06/3B/2012, BVerfG 09/12/2012.

Selected courts in the Eurozone also fostered their national parliaments' powers in the institutional reform process of European economic governance. However, no other national parliament has enjoyed such a significant increase in its powers as the German Bundestag (Fasone 2014b). In Austria the national parliament acquired the right to vote every decision related to the ESM. The reform was introduced by a constitutional amendment. The French, Estonian and the Finnish parliaments were confirmed in their competence to approve new financial assistance programmes by voting. However, in France the parliament's powers remained constrained nonetheless: although the parliament voted on anti-crisis measures, the voting was preceded by only one reading instead of three. That was due to the fact that all anti-crisis measures were introduced with a fast-track procedure limiting the usual number of parliamentary readings.

Finally, there were also instances of disempowerment national parliaments vis-à-vis the executive. For instance, in Portugal and Spain constitutional courts marginalized parliaments vis-à-vis the executive (Fasone 2014b). In Spain the rulings were particularly controversial because they were based on a different reasoning than the prior rulings on royal decree law applications from 1982 and 2007. In particular, the recent rulings dismissed the action of unconstitutionality against applications of fast-track procedures (royal decree law) with regard to both European economic governance and national labor reforms introduced in 2012 (Coutts 2014).

In sum, it can be observed that the empowerment of national parliaments by national supreme or constitutional courts has remained generally limited and asymmetrical across all Eurozone states. First, with exception of the German Bundestag, national parliaments' powers were not increased significantly. Second, court rulings contributed to a deepening of asymmetries among national parliaments.

### ***7.3. International asymmetries: unanimity versus special majorities***

The major anti-crisis measures were approved either under unanimity requirement or a special majority. In particular, whereas the establishment of the EFSF and the increase of its budgetary capacity required the unanimous support of all Eurozone members, the ESM Treaty and the Fiscal Compact were approved under the special majority requirement. That discrepancy generated different implications for national parliaments.

While the establishment of the European Financial Stability Facility (EFSF) was approved without major difficulties, increasing of its budgetary capacity was more turbulent. In October 2011, when increasing the budgetary capacity of the European Financial Stability Facility (EFSF) was rejected by the Slovak parliament, European media and political actors for the first time paid adequate attention to the role of national parliaments in reforming European economic governance. In Slovakia the junior coalition partner opposed increasing the EFSF budget. Unable to reach a compromise, the prime minister combined the vote on the EFSF with a vote of confidence. That did not stop the coalition partner from voting against the EFSF, which led to the collapse of the government. A few days later the EFSF was ratified due to support from the opposition (Social Democrats). That incident generated a debate on the role of national parliaments in the reform process of European economic governance. Given the fact that the entry into force of the bailout fund was conditioned on unanimous approval of all national parliaments, many commentators observed that legislators could seize that opportunity to become active veto players.

The decision to lift the unanimity requirement prevented future instances of blocking the reform process by individual parliaments. However, the introduction of new ratification rules based on special majorities had implications for the quality of democratic deliberation.

The Treaty Establishing the European Stability Mechanism could enter into force after being ratified by states representing 90 percent of its capital requirements. This condition was met with Germany's completion of the ratification process on 27 September 2012. The only remaining state, Estonia, which had only committed 0.19 percent of the capital, completed its ratification on October 4 2012. The legal basis of the ESM-fund was established with Article 136(3), which stipulates that:

The member states whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.

The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) was signed on 2 March 2012, by all EU member states except the Czech Republic, the United Kingdom and Croatia (which joined the EU in July 2013). Similar to the ESM Treaty, the Fiscal Compact did not require unanimous ratification in order to enter into force - instead it needed to be ratified by 12 of the then 17 Eurozone states. The treaty entered into force on 1 January 2013. The new ratification rules allowed for a limited number of defections which nonetheless would not prevent an entry into force of a treaty.

Lifting the unanimity principle generated further asymmetry among national parliaments. This is due to the fact that an international agreement could become binding *before* the deliberation process has taken place in all states subject to the agreement. That was indeed the case during the ratification process of the Fiscal Compact which entered into force before the Netherlands and Belgium completed the parliamentary ratification process. Under these circumstances national parliaments can be discouraged from engaging in the debate on an international agreement which has already become binding. As a consequence, parliaments in federal states, which have more complicated or time-consuming domestic ratification procedures may not manage to contribute to the debate on a given measure before it enters into force (Fasone 2014b). In sum, the prioritization of efficiency in the legislative process generated asymmetry among national parliaments, which negatively affected parliaments' motivation to engage in the debate due to the lengthy ratification procedures.

#### **7.4. International asymmetries: substantive equality**

The European financial crisis contributed to generating an asymmetry in the substantive equality of national parliaments in debtor and creditor states. Although national parliaments *de jure* enjoy equal status with regard to European legislation, the substantive equality of national parliaments in debtor states was limited due to the conditionality accepted in exchange for financial support (Maduro 2012). Substantive equality, in contrast to formal equality, refers to parliaments' capacity to exercise formal powers.

The peculiarity of the Eurozone crisis is that two types of actors became entitled to decide on budgetary matters of debtor states: non-elected institutions (the International Monetary Fund (IMF) and the European Central Bank)<sup>11</sup> and national political actors (governments and parliaments of other Eurozone states). Before the common monetary union was established, European states applying for a loan from the IMF also had to accept some conditionalities. However, the process was not politicised to the same extent. First, in the Eurozone the establishment of the EFSF and the increase in its budgetary capacity depended on national governments' and parliaments' unanimous consent. As a consequence, a veto by one national parliament meant that Eurozone states facing liquidity problems could not obtain a bailout. The process was particularly complex given the fact that legislators of Eurozone states were approving a bailout fund knowing which states urgently needed a bailout loan or were likely to need it in the future. Against that background, it can be argued that parliaments in creditor states acquired powers to decide on southern European states' entitlement to receive a bailout loan.

The sovereign powers of the national parliaments of states that entered a bailout program became limited with regard to budgetary matters. Each bailout loan has been accompanied by a so-called Memorandum of Understanding (MoU) that stipulated the reforms that have to be undertaken by states under the program. Oversight of the Memorandum's implementation is conducted by an external body, the so-called "Troika." Indirectly, governments of creditor states were also involved in negotiations or renegotiations of the MoU. That state of affairs had consequences for national parliaments in bailout states. Usually, national legislators have the final word in approving national budgets; however, the financial crisis has eroded parliaments' powers in that policy area. Eventually, national parliaments in debtor states lost their exclusive sovereign powers both in tailoring the national budget and in controlling their government in these matters.

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<sup>11</sup> To some extent also the European Commission.

Finally, the acquisition of bailout loans has also been conditioned on completing ratification of the Fiscal Compact and introducing the balanced budget rule into domestic legislation. That condition has also constrained national parliaments in exercising their powers: practically speaking, parliaments in bailout states could neither reject the Fiscal Compact nor delay the ratification process. Otherwise they would risk losing financial aid.

## 8. Discussion and conclusions

This paper analysed how the intergovernmental reform process of European economic governance affected control functions of national parliaments in that area. The paper demonstrated that parliaments in debtor states were more constrained in their control powers than parliaments in creditor states. First, at the domestic level, governments of debtor states restricted parliaments' powers through the application of fast-track procedures and mergers which curtailed not only parliamentary control but also deliberation. Second, constitutional or supreme courts in debtor states have not actively fostered parliaments' control powers. In fact, there are examples to the contrary: for instance, in Spain the constitutional court has not declared the excessive use of fast-track legislation to be unconstitutional. The only example of a parliament whose control powers have been clearly fostered is the German Bundestag. Finally, at the international level, parliaments of debtor states have experienced a loss of substantive equality. Although formally (legally) they maintained an equal status with other national parliaments in the Eurozone, they were practically constrained in the exercise of their sovereign powers. In sum, the impact of national parliaments on approval of the EFSF (establishment and increase of its financial capacity), the ESM treaty and the Fiscal Compact has been *limited* and highly *asymmetrical*.

In order to improve the input legitimacy of decision making in European economic governance, it has been proposed to grant national parliaments stronger control powers (for example, Crum 2013). However, the empirical findings of this paper point towards various limitations in accomplishing that agenda. First, it is domestic actors (governments and courts) that can unilaterally empower or disempower their parliaments in the exercise of their control functions. Furthermore, there is a broad variety of legal practices regulating the role of parliaments in domestic and European politics. Parliamentary control powers are usually codified in constitutional law. Hence, it is national constitutions that, for instance, delineate executives' grade of freedom in scarifying parliamentary deliberation for the sake of efficiency. As a consequence, asymmetries of powers appear to be *inherent* in democratic control in the European Union as there will always be national parliaments that are "better equipped" than others to control the decision-making processes in the European Union.

It is possible that national parliaments may unilaterally demand reduction in the excessive use of fast-track procedures. For instance, it has been demonstrated that the European Parliament has been fairly successful in claiming further powers to exercise normative pressure (Rittberger 2014). However, given the fact that inter-parliamentary cooperation is still at the crawling stage, it is unlikely that parliaments will develop a *common* or at least a coordinated approach towards control of European decision making in the near future.

Second, asymmetries in national parliaments' powers have profound consequences not only for relations between a particular legislator and its executive but also for relations between national parliaments and the Council. On one hand, unilateral empowerment of a national parliament strengthens its position vis-à-vis its government. Government decisions also enjoy higher legitimacy if national parliaments are thoroughly consulted. However, if selected parliaments are empowered and others disempowered, such asymmetry of control powers rather has a negative impact on the quality of democratic control in the EU. In particular, in the European financial crisis national parliaments of debtor states were disempowered both at the domestic level – by their government, and, to some extent, by the passivity of their constitutional courts – and at the international level. Governments limited parliaments' involvement in the approval of anti-crisis measures by employing various fast-track procedures and mergers. At the international level, the conditionality enshrined in the Memoranda of Understanding limited parliaments in the exercise of their sovereign budgetary powers. At the same time, national parliaments in creditor states approved anti-crisis measures according to standard procedures. There were only isolated cases of fast-track measures, but these measures were

not as radical as the extreme cases in southern Europe. Furthermore, particular national parliaments in creditor states were additionally empowered in their control functions by constitutional courts, the most prominent example being the German Bundestag. Finally, given the unanimity and special majority requirements, decisions important for debtor states such as an increase of the bailout fund so important for the financial liquidity of southern Europe, came to depend on the consent of national legislators in creditor states. In sum, the asymmetries that emerged in the course of the European financial crisis significantly deepened previously existing discrepancies among national parliaments determined by different constitutional arrangements.

Reform of European economic governance interrupted the process of parliamentary empowerment. In southern Europe the extreme disempowerment of national parliaments has become one of the factors contributing to the de-legitimization of the new legal instruments and Memoranda of Understandings. Although the reform process of European economic governance has been completed, national parliaments – and the European Parliament – will continue to be involved in that policy area, for instance within the framework of the European Semester. Moreover, any future reform of EMU would also raise question of the legitimacy of the approval procedures. Against that background, there is a growing need to discuss policy recommendation aimed at minimizing the accountability gap.

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**Table: Approvals of anti-crisis measures**

Source: Based on own original research

Country	Anti-crisis measure	Vote	Debate	Merger	Fast-track procedure
Belgium	EFSF - 1	yes	yes	no	no
	EFSF - 2	yes	yes	no	no
	ESM	yes	yes	no	no
	FISCAL COMPACT	yes	yes	no	no
Spain	EFSF - 1	yes	no	no	yes
	EFSF - 2	yes	no	no	yes
	ESM	yes	yes	yes, with the decision to modify Art. 136 TFEU (balanced budget rule)	no
	FISCAL COMPACT	yes	yes (only one)	no	yes
France	EFSF - 1	yes	yes (only one)	yes, with the budget bill	yes
	EFSF - 2	yes	yes (only one)		yes
	ESM	yes	yes (only one)	yes (with Art. 136 TFEU)	yes
	FISCAL COMPACT	yes	yes (only one)	no	yes
Austria	EFSF - 1	yes	yes	no	no
	EFSF - 2	yes	yes	no	no
	ESM	yes	yes	no	no
	FISCAL COMPACT	yes	yes	no	no
Cyprus	EFSF - 1	yes	yes	no	yes
	EFSF - 2	no	no	no	yes
	ESM	yes	yes	no	no
	FISCAL COMPACT	no, approved with a gov decree	no	no	no
Estonia	EFSF - 1	Estonia was not in the euro-zone at that time, therefore not part of the EFSF in the beginning			no
	EFSF - 2	yes	yes	no	no
	ESM	yes	yes	no	no
	FISCAL COMPACT	yes	yes	no	no
Finland	EFSF - 1	yes	yes	no	no
	EFSF - 2	yes	yes	no	no
	ESM	yes	yes	no	no
	FISCAL COMPACT	yes	yes	yes	no
Germany	EFSF - 1	yes	yes	no	no
	EFSF - 2	yes	yes	no	no
	ESM	yes	yes	no	no
	FISCAL COMPACT	yes	yes	no	no
Greece	EFSF - 1	no	no	no	yes
	EFSF - 2	yes	yes	yes (law on property tax and regulation of bank supervision)	no
	ESM	yes	yes	yes (with the Art. 136(3) and the Fiscal Compact)	no
	FISCAL COMPACT	yes	yes	yes (with the Art. 136(3) and the Fiscal Compact)	no
Ireland	EFSF - 1	yes	yes	no	no
	EFSF - 2	yes	yes	no	no
	ESM	yes	yes	no	no
	FISCAL COMPACT	debate, vote and referendum (60,29% in favour)	debate, vote and referendum (60,29% in favour)	no	no
Italy	EFSF - 1	no (gov decree)	no	no	yes
	EFSF - 2	no (gov. decree)	no	no	yes
	ESM	yes (Art. 136(3)+ESM+Fiscal Compact)	yes	yes	no
	FISCAL COMPACT	yes (Art. 136(3)+ESM+Fiscal Compact)	yes	yes	no
Luxembourg	EFSF - 1	yes	yes	no	no
	EFSF - 2	yes	yes	no	no
	ESM	yes	yes	no	no
	FISCAL COMPACT	yes	yes	no	no
Malta	EFSF - 1	yes	yes	no	yes
	EFSF - 2	yes	yes	no	yes
	ESM	yes (with the Art 136(3) TFEU)	yes	yes	no
	FISCAL COMPACT	debate and vote, (debate with the six-pack and the two-pack)	yes	no	no
Netherlands	EFSF - 1	no	no	no	yes
	EFSF - 2	yes (with budgetary law)	yes	yes	yes
	ESM	yes (with Art 136(3) TFEU)	yes	yes	no
	FISCAL COMPACT	yes	yes	no	no
Portugal	EFSF - 1	yes	yes	no	no
	EFSF - 2	no (gov. Decree)	no	no	yes
	ESM	yes	yes	(with the Art. 136(3) TFEU)	no
	FISCAL COMPACT	yes	yes	no	no
Slovakia	EFSF - 1	yes	yes	no	no
	EFSF - 2	yes	yes	no	no
	ESM	yes	yes	no	no
	FISCAL COMPACT	yes	yes	no	no
Slovenia	EFSF - 1	yes	yes	no	no
	EFSF - 2	yes	yes	no	no
	ESM	yes	yes	no	no
	FISCAL COMPACT	yes	yes	no	no





**Part III**  
**Dynamics of Euroscepticism and its Effects on Law-making**



# Responding to Euroscepticism: The Effect of Negative Public Attitudes on Directive Transposition

Christopher J. Williams\*

## 1. Introduction

The process of legislating in the European Union is long and complex, with input in various forms from national parliaments, the European Commission, the Council of Ministers, and the European Parliament. Policymaking at the EU level can be undertaken in multiple ways, most notably through decisions, and the passage of regulations and directives. While decisions and regulations are important policy tools for the EU, directives are “the main legislative acts of the EU...and [the] most important regulatory initiatives in the EU...” (Toshkov 2011, 175). Importantly, however, directives do not immediately take the weight of law, rather they must be transposed into law by member state governments, and this process can be completed at variable speeds.

While national parliaments are variably involved in the transposition of directives, timely transposition is a phenomenon observed in EU member states with both high (e.g. Austria and Germany) and low (e.g. Ireland and Spain) parliamentary involvement (Sprungk 2013: 304-6). Since parliamentary involvement is *not* necessarily a source of transposition delay, what hinders national governments from implementing their own or their predecessors’ decisions in a timely manner? While a significant amount of previous literature examines this question (see Steunenberg and Rhinard 2010 for an overview of this literature), this study seeks to develop an understanding of the effect of public attitudes towards the EU on the speed of directives’ transposition is examined.

Since directives are such an integral part of European policymaking, and they do not carry the force of law without transposition, it is clear that “transposition is...a critical precondition for the effective implementation of European policy” (Steunenberg and Rhinard 2010). Essentially, policy integration stalls when transposition stalls. Thus, developing a clearer understanding of the determinants of transposition delay, and in particular the relationship between public opinion and transposition speed, has important implications for the study of European policymaking, implementation, and integration.

Understanding the relationship between public opinion and transposition also has implications beyond policymaking and implementation. It addresses issues of political responsiveness, policy representation, and the often-invoked democratic deficit. Democracy is predicated on the assumption that the provisions of public policy in line with the wishes of the citizens, and policy changes are linked to the changing preferences of citizens (Pitkin 1967; Dahl 1971; Powell 2000). If public opinion concerning the EU affects the transposition of directives within member states, this indicates that member state governments do respond to the public on issues concerning the EU and European integration. This further implies a degree of democratic representation in member states regarding EU policy, and suggests that the often-discussed democratic deficit may not be as pronounced as previously assumed (for more on the democratic deficit see Føllesdal and Hix 2006).

Although research concerning the relationship between public opinion and transposition has been undertaken in the past (see Lampinen and Uusikylä 1998; Mbaye 2001; Kaeding 2006; Steunenberg and Rhinard 2010), this article examines this relationship in two unique and important ways. First, this study takes a different methodological approach than previous works; accounting for the time-varying nature of public opinion as well as a number of other variables that are theorized to influence transposition speed. Second, while earlier studies of the relationship between public opinion and transposition have focused exclusively on the effect of positive public opinion of the EU (support) on transposition speed and timeliness, this piece examines the relationship between negative public opinion towards the EU (euroscepticism) and transposition speed. Utilizing this methodological approach, and focusing on negative public opinion yields results that suggest that public opinion is

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taken into account by member state governments when transposing directives. Specifically, higher levels of euroscepticism are found to slow transposition. Further, transposition is accelerated as support for the EU increases relative to euroscepticism.

## **2. Previous literature**

A fair amount of research has shown that member state transposition is often delayed (e.g. Knill and Lenschow 1998; König and Luetgert 2009; Kaeding 2008). In recent years, research on the determinants of transposition delay and non-compliance has rapidly increased (see Mbaye 2001; Börzel and Risse 2003; Mastenbroeck 2003; Thomson et al. 2007; Thomson 2007; 2009; König and Luetgert 2009; Steunenberg and Kaeding 2009; Steunenberg and Rhinard 2010, etc.). Determinants of the timeliness of transposition are, among others, a directive's policy sector (Lampinen and Uusikylä 1998; Berglund et al. 2006), a directive's status as an amendment (Mastenbroeck 2003; Kaeding 2006; Borghetto et al. 2006), the institutional body adopting the directive (Mastenbroeck 2003; Kaeding 2006; Steunenberg and Rhinard 2010), the length of time provided by the EU for transposition (Borghetto et al. 2006; Steunenberg and Rhinard 2010).

Most relevant for the present study is the literature that has examined the relationship between public opinion and transposition (see Lampinen and Uusikylä 1998; Mbaye 2001; Kaeding 2006; Steunenberg and Rhinard 2010). These works have focused on the effect of positive public opinion on transposition speed/delay; each expecting that greater support for the EU will translate into faster/timelier transposition of directives.

These studies found, generally, that aggregate support for the EU is unrelated to the transposition process. Mbaye (2001) found that higher EU approval in a member state is correlated with more instances of transposition non-compliance (the opposite of what was expected), although she concludes that this is a spurious relationship. Neither Lampinen and Uusikylä (1998) nor Kaeding (2006) found a relationship between positive opinion concerning the EU and transposition timeliness (i.e. transposition prior to the deadline). Steunenberg and Rhinard (2010) also found no effect of support for the EU on the speed of transposition (i.e. the amount of time taken for transposition).

From these findings, it appears that transposition is unrelated to public opinion, indicating that EU member states are unresponsive, at least concerning transposition, to public attitudes about the EU. However, these works suffer from an important methodological shortcoming in that they do not account for the time-varying nature of public opinion. In each of these previous studies, public attitudes towards the EU were measured at one point in time, usually at the adoption of a directive by the EU. However, public attitudes towards the EU change with time. That is, public support for the EU may be at one level at time  $t$  but may be higher or lower at time  $t+1$ , and may again change at time  $t+2$ , and so on. As transposition of a directive can last for years, measuring public attitudes at a single point in time ignores the dynamic nature of public opinion, leading to misestimation of the effects of public attitudes. The question, thus remains, what is the relationship between public attitudes towards European integration and the transposition of European directives.

## **3. Public opinion, transposition, and responsiveness**

Recent research has indicated that member state transposition is influenced by the government's preference for European integration (Toshkov 2007), with transposition occurring more quickly when the government is more supportive of the EU. From this finding, it follows that those factors that influence party support for the EU will also influence transposition speed.

Indeed, public attitudes towards the EU have been shown to influence party position on the EU (Arnold et al. 2012; Williams and Spoon 2015). It has been argued that parties vote- and office-seeking goals influence their responsiveness. Stemming from parties vote- and office-seeking goals, Myriad studies have examined political responsiveness to public opinion (e.g. Page and Shapiro 1983; Stimson et al. 1995, Erikson et al. 2002; Wlezien 2004; Soroka and Wlezien 2004; McDonald and Budge 2005; Ezrow et al. 2011, etc.), finding generally that governments and political parties react to public policy preferences both in policymaking and the policy positions that they take.

The general theoretical theme within this literature rests upon the idea that the public controls governments and parties through the threat of electoral retribution and/or the promise of electoral

victory (see Ferejohn 1986; Erikson et al. 1993; Stimson et al. 1995; Manza and Cook 2002; Hobolt and Klemmensen 2008). Governments wish to be re-elected, and fear being turned out of office. Therefore, they provide the public with policies they prefer in the hopes of gaining public support in the next election.

This basic theoretical framework can be applied to the process of transposition. Studies concerning policy responsiveness have shown that, following the theory of dynamic representation, governments and political parties are generally responsive to public opinion in both policymaking and policy positions (Stimson et al. 1995; Soroka and Wlezien 2005; Adams et al. 2004, 2006, 2009; Ezrow and Hellwig 2011). More specifically, and importantly for this study, parties have been found to take public attitudes on the issue of European integration into account when taking a position regarding integration (Arnold et al. 2012; Williams and Spoon 2015).

Causally, this responsiveness to public attitudes on European integration is due to parties' vote- and office-seeking goals. In a desire to appeal to changing public preferences, win more votes, and ultimately increase the likelihood of winning office, political parties shift their positions to become more similar to those of the public. A more positive public attitude towards the EU (Europhilia) indicates that the public prefers more integration. Conversely, when the public is more negative about the EU (Eurosceptic), this indicates that the public prefers less integration. Thus, when the public is more Eurosceptic, political parties become more Eurosceptic, and when the public is more Europhilic, political parties are more Europhilic (see Arnold et al. 2012; Williams and Spoon 2012). These changes in party position should influence party actions in the legislature, including their actions towards transposition (see Toshkov 2007).

Transposition can be viewed as a policy tool which allows member state governments to respond to public attitudes regarding integration. As Dimitrova and Rhinard (2005, 2) wrote, "Transposition [has] important consequences for the effective functioning of the internal market, the even application of Union law, and the overall depth of policy integration in the EU." Simply put, good faith transposition is imperative for deeper European integration. Good faith transposition (i.e. transposition that is done in a timely fashion) is a policy decision that implements European policies at the member state level, and thus contributes to a migration of policymaking competencies away from the member state and towards greater centralization of policymaking power in the EU institutions. Following this understanding, faster transposition of European directives can be seen as policy decision that pushes integration forward more quickly. Conversely, delaying or refusing to transpose directives can be seen as a policy decision designed to resist the Europeanization of policymaking power and to impede further integration.

Conversely, high levels of opposition to the EU, which indicate a public preference for less integration, suggest that public opinion is not with the historically pro-integration parties. Therefore, in order to avoid losing votes to more Eurosceptic challengers, parties that historically tend to be pro-integration, including government parties, should engage in actions that attempt to bring the party back in line with public attitudes. As research suggests that governments will respond to public opinion by addressing public policy, (see Stimson et al. 1995; Soroka and Wlezien 2005), one would expect that higher levels of opposition to the EU should result in governing parties making anti-integration decisions.

One anti-integration action available to governing parties is to delay transposition.<sup>1</sup> The transposition of directives is a pro-integration decision as it implements European policies into member state laws, and similarly, delaying transposition is an anti-integration decision as it is resistance to the implementation of European policy at the member state level. As governing parties should respond to public opposition to the EU by engaging in anti-integration actions, it would then follow that government parties should delay transposition when public opposition to the EU is higher.

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<sup>1</sup> Although most transposition occurs in the bureaucracy of a member state, government leaders and parties play an important role as veto players in the transposition process (for more on veto players in the process of transposition, see Steunenberg 2006). This should not be construed as to imply that governing parties are always veto players, but rather that governing parties have the power to act as a veto player on any directive.

Thus, from the above theory, it can be expected that higher levels of opposition to the EU will result in governing parties resisting transposition, and one can hypothesize:

*Hypothesis: Higher levels of aggregate Euroscepticism in an EU member state result in slower transposition of EU directives in that state.*

Importantly, this theoretical construction does not require public knowledge of government action concerning the transposition of directives. Rather, this argument only requires that the public can become aware of government action concerning directive transposition (for a similar argument see Casillas et al. 2011). Resistance to transposition provides policy-makers (i.e. government parties) an opportunity, if questioned on the issue of European integration by more Eurosceptic entities (e.g. Eurosceptic parties), to argue that they have been pragmatic in implementing European policy — resisting European policies that they deem to be detrimental to their state. In essence, by resisting transposition, governing parties can, if necessary make a viable claim of defending the member state against Europeanization, while highlighting their desire to maintain member state autonomy and sovereignty. The ability to claim both defense from Europeanization, and the protection of state autonomy and sovereignty can minimize the likelihood that these Eurosceptic entities question a government party on the issue of European integration, and if the government party is questioned, this can reduce the risk that voters accept this argument. This reduces the risk that government parties lose votes to more Eurosceptic parties. Thus, it is not necessary for the public to be aware of government action on transposition, but rather, the public only need to be able to become aware.

#### **4. Research design**

The dependent variable in this study is the time between the issuance of a directive and its transposition by each member state. The unit of analysis is the directive-state dyad. This variable is measured as the number of Eurobarometer semesters<sup>2</sup> that have elapsed between a directive's publication in the EU's official journal, and the publication in each member state's official journal of the first directive implementing measure (for other research using a similar operationalization, see Steunenberg and Rhinard 2010; Berglund et al. 2006; Berglund 2009).<sup>3</sup> The highest number of semesters to elapse between the issuance of a directive and its transposition is 29 for Council Directive 89/105/EEC in Germany. The fewest number of semesters to elapse between the issuance of a directive and its subsequent transposition is 1 for multiple directives in multiple countries. The mean number of semesters for the transposition of a directive is 6.76 and the median is 4.

##### **4.1. Independent variable**

The main independent variable of this paper is the aggregate level of euroscepticism in a country, and is derived from Eurobarometer data from 1977 through 2004.<sup>4</sup> This is operationalized as the proportion of the respondents to a survey who believe their country's membership of the EU is "a bad thing."<sup>5</sup> The range of this variable is 0.02 (October/November 1978 in the Netherlands) to 0.50 (October/November 1980 in the United Kingdom). The mean is 0.12 and the standard deviation is

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<sup>2</sup> A Eurobarometer semester is the time between the release of two Eurobarometer surveys. This is roughly equivalent to 6 months, however, in some circumstances it can be as little as 3 months and as much as 9 months.

<sup>3</sup> Following the lead of Steunenberg and Rhinard (2010), in cases in which the date of publication of a member state implementing measure is not available (276 of 1,160), the date on which an implementing measure was signed was used. For cases in which a publication date and a signature date are unavailable (75 of 1,160) the date on which an implementing measure was adopted was used.

<sup>4</sup> The survey from November 1977 is the most recent survey prior to the publication of the first directive, and the survey in March 2004 is the most recent survey prior to the transposition of the last directive. See Appendix A.1 for the dates of each survey.

<sup>5</sup> This operationalization was derived from the question "This operationalization was derived from the question membership of the European Union is a good thing, a bad thing, neither good nor bad, don't membership of the European Union is a good thing dropped from the dataset."

0.08.<sup>6</sup> It must be noted that the level of euroscepticism changes over time, meaning this variable is a *time-varying covariate*.

#### 4.2. Control variables

Research has suggested numerous other variables that influence transposition delay and speed. These factors must be controlled for in the analysis presented below. The majority of the control variables in this study fall into one of three categories, “features of the directive and Commission monitoring,” “national variables,” and “transposition process-related variables” (see Steunenberg and Rhinard 2010, 500-501).

Five variables fit within the “features of the directive and Commission monitoring” category. The first variable in this category is the length of time member states are granted to transpose a directive. If difficulties in transposing directives appear likely, member states may be granted a longer period of time to transpose a directive. Thus, one would expect directives to be transposed more slowly when member states are given a longer period of time to transpose (see Kaeding 2006; Steunenberg and Rhinard 2010). This variable is measured as the number of weeks granted between the adoption of a directive by the EU, and the directive’s transposition deadline.

A second variable within this category is the complexity of a directive. When a directive is particularly complex member states may have difficulty understanding exactly what measures are necessary to transpose it (Mastenbroek 2003; Kaeding 2006). Therefore, a greater degree of complexity should result in slower transposition. Complexity is operationalized as the number of recitals in the preface of a directive (see Kaeding 2006).

A directive’s status as either new or as an amendment to a previous directive has also been found to influence delay in and the speed of transposition. Directives that amend previous directives are simply adaptations of existing policies, and should receive less opposition from member states (Mastenbroek 2003; Borghetto et al. 2006). This leads to an expectation that amendments to previous directives will be transposed more quickly. This variable is operationalized as a dummy variable, with a 1 denoting whether the directive is new, and a 0 if it is an amendment to a previous directive.

A fourth variable in this category concerns whether a directive was issued solely by the European Commission or if the European Council and/or the European Parliament were involved. Those directives that are issued solely by the European Commission through the delegation of policymaking power tend to elaborate on existing directives, making them easier for member state governments to transpose. Therefore, directives adopted solely by the European Commission should be transposed more quickly (Mastenbroek 2003; Steunenberg and Rhinard 2010). This variable is operationalized as a dummy variable with a 1 denoting a directive that was adopted solely by the European Commission, and a 0 denoting a variable that was adopted through the legislative process.

The final variable in this category is the intensity of European Commission monitoring. Research has suggested that the degree to which the European Commission monitors and notifies member states of infringements in the transposition process can affect the speed of transposition, with greater monitoring leading to faster transposition (Börzel 2001; Tallberg 2002; Steunenberg and Rhinard 2010). This variable is measured as the “average number of formal letters of notification sent by the Commission to member states in a specific year, normalized to the [0,1]-interval” (Steunenberg and Rhinard 2010, 502). The intensity of Commission monitoring, however, changes over time, making this variable is a *time-varying covariate*.

Within the second category of “national variables,” many previous studies have included public opinion. As this is the main independent variable in this study, a measure of public opinion is already included in all models. Recent research has also included country dummy variables in the analysis (see Steunenberg and Rhinard 2010). Therefore, dummy variables for the United Kingdom, Germany, Spain, and Greece are included in this analysis with the Netherlands as the baseline category.

The first variable in the final category, “transposition process-related variables,” concerns the number of veto players in a country. The more veto players involved in the transposition process, the

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<sup>6</sup> Descriptive statistics for all independent and control variables used in this study can be found in table A.2, p. 90.



slower transposition should become (Kaeding 2006; Steunenberg and Rhinard 2010). This variable is operationalized in a similar manner to Steunenberg and Rhinard (2010), who created an index that varies by the transposition procedure being used by a member state (i.e. legislative, ministerial, or cabinet level). Originally, Steunenberg and Rhinard coded this variable as an additive variable. If the procedure being used to transpose a directive was at the ministerial level, the number of government ministries involved in transposition was used as a measure of veto players. If the procedure was at the cabinet level, an index indicating the autonomy of the prime minister (derived from scores originally developed by Bergman et al. 2003) was added to the number of government ministries involved in transposition. If the procedure being used was legislative, the measure included the number of government ministries involved in transposition, plus the prime minister's autonomy index, plus the member state's score from Tsebelis' (2002) veto player index.

A problem arises with this coding, however. Tsebelis' veto player index is missing data concerning Greece. This affects the coding of Steunenberg and Rhinard's additive veto player index for directives that are transposed under a legislative procedure. To address this issue, a new additive veto player index is created. It is nearly identical to that used by Steunenberg and Rhinard, however, Tsebelis' measure is replaced with the number of parties in government at a particular time. This new index does not appear to differ substantially from Steunenberg and Rhinard's original additive index in the Netherlands, Germany, the United Kingdom, and Spain.<sup>7</sup> This index's value changes over time, making this measure a *time-varying covariate*.

A second variable in this category is member state experience with transposition. Previous literature has shown that experience with transposition is an important factor influencing transposition speed and timeliness. As member states become more experienced with transposition, they become better at it, and it occurs more quickly (Tallberg 2002; Steunenberg and Kaeding 2009). This variable is operationalized as the length of a state's membership in the EU. This measure changes with time, thus, this variable is also a *time-varying covariate*.

As a final variable in this category, national elections are controlled for. It has been theorized that national elections can slow transposition as those involved in the transposition process hope to avoid "criticism during political campaigning" (Steunenberg and Rhinard 2010, 504). This variable is operationalized as a dummy variable with an observation being coded as a 1 if a national election is occurring during a Eurobarometer semester. This variable changes by Eurobarometer semester, thus, this is also a *time-varying covariate*.

Beyond the variables in the three categories mentioned above, a number of other control variables are also included. Differences exist in transposition delay across policy areas (Berglund et al. 2006). Therefore, dummy variables for the different directive policy sectors (food legislation, social policy, transport, and utilities regulation) are included in this study. Social policy is used as the baseline policy domain. A variable denoting the exact length of each Eurobarometer semester is also included. The Eurobarometer semester is roughly a half-year, however, the exact length of each semester can vary, thus, it is imperative to control for the exact length of each semester in months.

### 4.3. Data

The data used in this study concerning the time until transposition is the same data used by Steunenberg and Rhinard (2010). This data concerns directives adopted by the EU in the policy areas of food legislation, social policy, transport, and utility regulation between 1 January 1978 and 1 January 2003. This end date is used in order to avoid cases in which member states may still be attempting to transpose directives (see Steunenberg and Rhinard 2010).

These policy areas were chosen as they, "differ sufficiently in terms of the time at which they were developed at the European level, allowing for differences in policy characteristics and national transposition experiences" (Steunenberg and Rhinard 2010, 505).

The data further focuses on transposition by the governments of the Netherlands, Germany, the United Kingdom, Spain, and Greece. This set of countries:

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<sup>7</sup> The Pearson's R correlation between the new additive veto player index (using the number of parties in government), and Steunenberg and Rhinard's original additive veto player index is 0.97.



...includes some of the founding member states of the Union as well as more recent members (UK in 1973, Greece in 1981, and Spain in 1986). Moreover, these countries display substantial variation on transposition performance, as indicated by the Commission's transposition 'scoreboards' over the last couple of years, covering most of the variation that can be found between EU member states (Steunenberg and Rhinard 2010, 505).

In total, there are 1,160 directive-state dyads in this dataset, representing 317 distinct directives. Of the full sample, 251 of the dyads concern the Netherlands, 234 of the dyads concern Germany, 234 of the dyads concern the United Kingdom, 221 of the dyads concern Spain, and the final 220 dyads concern Greece.

The structure of the original data used by Steunenberg and Rhinard was transformed to account for the time-varying nature of euroscepticism. The level of aggregate euroscepticism in each country changes with each new Eurobarometer survey. Therefore, each observation in the original dataset is expanded by the number of Eurobarometer semesters that passed between the publication of a directive by the EU, and the subsequent transposition date of that directive in each member state.<sup>8</sup> This results in a total of 5,518 observations.

#### **4.4. Analytical strategy**

A Cox proportional hazard model is used in the analysis of the above data. The Cox model is "particularly well suited to include [time-varying covariates]," (Box-Steffensmeier and Jones 2004, 103), and this extension of the Cox model can easily be calculated in Stata 13.<sup>9</sup> Additionally, the findings could be influenced by systematic effects at the directive level, thus, standard errors were clustered on the directive.<sup>10</sup>

### **5. Analysis**

Before testing the hypothesis that aggregate euroscepticism slows transposition, it is important to test, in line with previous research, the effect of aggregate public support for the EU on transposition speed. Aggregate public support for the EU is measured using the same data sources and survey instrument as aggregate euroscepticism. It is the proportion of individuals who believe their country's membership of the EU is a "good thing." The results of this test are presented in Model 1 (see Table 1), and show, similarly to previous studies (Lampinen and Uusikylä 1998; Kaeding 2006; Steunenberg and Rhinard 2010), no statistically significant effect of support for the EU.<sup>11</sup> This suggests that public support for the EU is unrelated to transposition speed.

Model 2 (see Table 1) presents the results of the test of the above hypothesis – higher levels of aggregate euroscepticism in a member state result in slower transposition of directives in that state. Based on this hypothesis, one expects to see a statistically significant hazard ratio of less than 1.00 in Model 2.

Table 1

Indeed, the hazard ratio for the measure of aggregate euroscepticism in Model 2 is 0.23, and is statistically significant, indicating that higher levels of euroscepticism lead to slower transposition. The effect of aggregate euroscepticism when interacted with time is statistically insignificant. This

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<sup>8</sup> It is important to note, 31 of the 1,160 directive-state dyads did not include a date that could be considered a transposition date. Following the same strategy as Steunenberg and Rhinard (2010, 507) for these cases, "the average transposition period in other member states for the specific directive was used as an estimate...To check whether this method has an impact on the estimates, a dummy variable [denoting these observations] was added to [the] equation." All models in table 1 show this dummy variable is statistically insignificant, indicating no effect of this procedure.

<sup>9</sup> All time-varying covariates in this study are interacted with linear time.

<sup>10</sup> The inclusion of country dummy variables controls for the possibility of systematic effects at the country level.

<sup>11</sup> Each model in this study was checked for violations of the proportional hazard assumption. The results of these tests can be seen in table A.3.

suggests that the effect of aggregate euroscepticism on transposition speed is constant across time. Substantively, if all individuals in a country were eurosceptic the likelihood of transposition of a directive at any point in time in that country is 77% less than if all individuals support the EU. Model 2, therefore confirms the hypothesis that aggregate euroscepticism is associated with slower transposition.

As a robustness check, the main independent variables of Models 1 and 2 were replaced with the difference between the aggregate support for the EU and aggregate euroscepticism.<sup>12</sup> The results of this test (see Model 3) show a statistically significant hazard ratio of 1.72. This indicates that when aggregate support for the EU is higher relative to aggregate euroscepticism, transposition occurs more quickly (the inverse is also true).<sup>13</sup> The interaction between this variable and time is statistically insignificant, meaning that the effect of the difference in aggregate support for the EU and aggregate euroscepticism does not vary with time. This result suggests that the effect of aggregate euroscepticism on transposition speed seen in Model 2 is robust.

Turning to the control variables, all statistically significant controls are significant in all models. The finding concerning the length of transposition periods supports previous research (Mastenbroek 2003; Kaeding 2006) – directives with longer transposition periods are transposed more slowly. However, the interaction of this variable with time is positive and statistically significant showing that this effect decays over time. Further, in line with earlier literature (Kaeding 2006) the complexity of a directive, as measured by the number of recitals, is shown to slow transposition. Following numerous studies (Mastenbroek 2003; Kaeding 2006; 2008; Borghetto et al. 2006), the above models also indicate that new directives are transposed more slowly than directives that amend previous directives.

Additionally, the above tests suggest that country level factors beyond public opinion do affect transposition speed. Specifically, with all other variables in the models held constant, the United Kingdom, Spain, and Greece transpose directives more quickly than the Netherlands, whereas Germany transposes at roughly the same speed. Of course, these are dummy variables, and therefore, the exact factor(s) driving these findings cannot be ascertained from the above tests.

Also, supporting previous findings (Giulliani 2003; Kaeding 2006; 2008), the results above suggest that more veto players in a system leads to slower transposition. Based on the results in the second equation, however, this effect, erodes over time. Moreover, supporting earlier studies concerning the effect of transposition experience (Steunenberg and Rhinard 2010), the above findings indicate that a longer length of tenure in the EU leads to faster transposition. This effect, however, also disappears with time. The results reported in Table 1 further show, in line with existing studies (Kaeding 2008; Steunenberg and Rhinard 2010) that transposition is slowed by election proximity.

Finally, the policy dummy variables indicate that directives concerning food policy and transport policy are transposed more slowly than directives concerning social policy, while directives concerning utility regulation are transposed at the same speed as social policy directives. The interactions of the food and transport policy directives with time suggest that the effect of the policy area on transposition speed diminishes over time.

## 6. Conclusion

This paper sought to more thoroughly test the relationship between public opinion and the speed of transposition. Previous research (Lampinen and Uusikylä 1998; Kaeding 2006; Steunenberg and Rhinard 2010) had examined this relationship, and found positive public opinion concerning the EU to be unrelated to the process of transposition. Using a Cox proportional hazard model and accounting for the time-varying nature of public attitudes towards the EU as well as the time-varying nature of several other variables, the results of this study support the findings of this previous literature. Simply

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<sup>12</sup> Using aggregate support for the EU and aggregate euroscepticism in the same model presents a problem of multicollinearity. The Pearson's R correlation between the two variables is -0.87.

<sup>13</sup> Using a measure of aggregate euroscepticism minus aggregate support for the EU, the hazard ratio is 0.58 and statistically significant.

put, there is no evidence indicating that the aggregate level of support for the EU influences the speed of directive transposition.

This study does find, however, that higher levels of negative public opinion concerning the EU (euroscepticism) do result in slower transposition. Moreover, the difference between support for the EU and euroscepticism is also related to transposition speed, with transposition occurring more quickly as support for the EU increases relative to euroscepticism.

The findings of this work have significant implications for our understandings of policymaking, political responsiveness, and democratic legitimacy in Europe. First, this research informs our understanding of the transposition process. Building on the ample literature concerning transposition delay (Lampinen and Uusikylä 1998; Mbaye 2001; Mastenbroeck 2003; Kaeding 2006; Thomson 2007; 2009; König and Luetgert 2009; Steunenbergh and Rhinard 2010) this work offers evidence that public opinion does influence transposition, and therefore that implementation of policy in the EU is affected by the public. This suggests that transposition is not simply a bureaucratic process, but that it is also a politicized process.

Second, this study adds to a growing literature (see Adams et al 2004, 2006, 2009; Hobolt and Klemmensen 2008; Ezrow and Hellwig 2011; Spoon and Klüver 2014; Williams and Spoon *forthcoming*) concerning political responsiveness in the EU and its member states. The above results indicate that member states respond to public attitudes concerning the issue of integration, and attempt to resist integration when the public is more negative towards the EU. This finding may assuage some concerns that the EU lacks democratic legitimacy. As governmental responsiveness is a key characteristic of democratic governance (see Pitkin 1967; Dahl 1971; Powell 2000), and these results show a degree of political responsiveness in member states regarding questions of European policy and integration, they imply that the EU may suffer from less of a democratic deficit than had previously been thought.

It should be noted, this study is only one step in developing an understanding of how public opinion and policymaking in Europe relate. Specific to the transposition process, the data used in this study covers four policy areas in five EU member states from 1978-2002. Although there is no theoretical reason to believe that the above results are not generalizable, future research should increase the number of policy areas, countries, and years covered. This will aid in identifying any differences in the relationship between public opinion and transposition across different contexts. Specifically, expanding the time period and number of countries in this dataset will allow for an examination of how public opinion affects transposition in newer EU member states (i.e. the former Eastern bloc). This would also allow for study of how the institutional reforms of recent years have affected the relationship between public attitudes towards the EU and transposition.

It may also be beneficial to examine how certain factors condition the effect of public opinion on transposition speed. Research has found that greater issue salience increases the likelihood that political leaders respond to the public (Jacobs 1993; Jones 1994; Hobolt and Klemmensen 2005; 2008). Moreover, there is literature suggesting that policy-makers are more responsive to public demands as elections near (Ahuja 1994; Canes-Wrone et al. 2001; Canes-Wrone and Shotts 2004). Thus, directive salience and temporal proximity to elections may be important factors influencing the relationship between public attitudes towards integration and transposition.

Finally, it may prove fruitful to examine the relationship between aggregate euroscepticism and other aspects of European policymaking. For example, how does aggregate euroscepticism affect policy creation in the European Commission, or how do negative public attitudes towards the EU influence a member state's invocation of the "Early Warning System?" Simply put, there is a great deal of future research concerning the relationship between public attitudes towards the EU and policymaking in Europe to be conducted.

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## TABLES

**Table 1: Effect of Public Opinion on Transposition**

Variable	Model 1		Model 2		Model 3	
	HR	SE	HR	SE	HR	SE
<b>First Equation</b>						
Support for EU	2.09	0.95	.	.	.	.
Euroskepticism	.	.	0.23*	0.20	.	.
Support for EU - Euroskepticism	.	.	.	.	1.72*	0.53
Time Until Deadline	0.98***	0.002	0.98***	0.002	0.98***	0.002
Directive Recitals	0.98***	0.004	0.98***	0.004	0.98***	0.004
New Directive	0.85**	0.05	0.85**	0.05	0.85**	0.05
Commission Directive	1.00	0.14	1.00	0.14	1.00	0.14
Monitoring Intensity	0.70	0.20	0.73	0.21	0.71	0.21
UK Dummy	3.96***	0.78	4.05***	0.66	4.11***	0.77
Germany Dummy	0.97	0.11	0.92	0.08	0.97	0.11
Spain Dummy	6.62***	1.34	5.89***	1.11	6.53***	1.26
Greece Dummy	3.76***	0.68	3.40***	0.57	3.71***	0.65
Veto Players	0.84**	0.06	0.84**	0.06	0.84**	0.06
EU Membership Length	1.08***	0.01	1.08***	0.01	1.08***	0.01
Election Dummy	1.29*	0.18	1.31*	0.18	1.30*	0.18
Utility Policy Dummy	0.77	0.18	0.77	0.18	0.77	0.18
Food Policy Dummy	0.66*	0.13	0.66*	0.13	0.66*	0.13
Transport Policy Dummy	0.54***	0.11	0.54***	0.11	0.54***	0.11
Eurobarometer Semester Length	1.13***	0.04	1.13***	0.04	1.13***	0.04
Estimated Transposition Dummy	0.90	0.12	0.92	0.13	0.91	0.13
<b>Second Equation</b>						
Support for EU	0.97	0.06	.	.	.	.
Euroskepticism	.	.	0.98	0.14	.	.
Support for EU - Euroskepticism	.	.	.	.	0.99	0.05
Time Until Deadline	1.002***	0.0003	1.002***	0.0003	1.002***	0.0003
Commission Directive	1.04	0.03	1.04	0.03	1.04	0.03
Monitoring Intensity	0.97	0.06	0.97	0.06	0.97	0.06

Veto Players	1.02	0.01	1.02	0.01	1.02	0.01
EU Member Length	0.998*	0.001	0.998**	0.001	0.998**	0.001
Election Dummy	0.96	0.02	0.96	0.02	0.96	0.02
Utility Policy Dummy	1.06*	0.03	1.06*	0.03	1.06*	0.03
Food Policy Dummy	1.12***	0.04	1.12***	0.04	1.12***	0.04
Transport Policy Dummy	1.07**	0.03	1.07**	0.03	1.07**	0.03
Eurobarometer Semester Length	1.01	0.02	1.01	0.02	1.01	0.02

*Note:* The first equation reports the effect of each given variable on the dependent variable as a hazard ratio. The second equation reports the effect of each given variable interaction with linear time on the dependent variable as a hazard ratio. The dependent variable is the time to transposition. \*\*\*  $p \leq 0.001$ ; \*\*  $p \leq 0.01$ ; \*  $p \leq 0.05$  in a one-tailed test.



## APPENDIX

**Table A.1: Eurobarometer Surveys**

<b>Survey Number</b>	<b>Date</b>	<b>Survey Number</b>	<b>Date</b>
8.0	October – November 1977	35.0	March 1991
9.0	May – June 1978	36.0	October – November 1991
10.0	October – November 1978	37.0	March – April 1992
11.0	April 1979	38.0	September – October 1992
12.0	October 1979	39.0	March – April 1993
13.0	April 1980	40.0	October – November 1993
14.0	October – November 1980	41.0	March – May 1994
15.0	April 1981	42.0	November – December 1994
16.0	October – November 1981	43.0	March – April 1995
17.0	March – April 1982	44.0	October – November 1995
18.0	October 1982	45.1	April – May 1996
19.0	March – April 1983	46.0	October – November 1996
20.0	October 1983	47.0	January – February 1997
21.0	April 1984	48.0	October 1997
22.0	October 1984	49.0	April 1998
23.0	April 1985	50.0	October 1998
24.0	October 1985	51.0	March 1999
25.0	April 1986	52.0	October 1999
26.0	November 1986	53.0	April 2000
27.0	March – May 1987	54.1	November 2000
28.0	November 1987	55.1	April 2001
29.0	March – April 1988	56.2	October 2001
30.0	October – November 1988	57.1	March – April 2002
31.0	March – April 1989	58.1	October 2002
32.0	October – November 1989	59.1	March 2003
33.0	March – April 1990	60.1	October 2003
34.0	October – November 1990	61.0	February 2004

**Table A.2: Descriptive Statistics**

<b>Variable</b>	<b>N</b>	<b>Mean</b>	<b>SD</b>	<b>Min.</b>	<b>Max.</b>
Support for EU	5,518	0.63	0.15	0.24	0.91
Euroskepticism	5,518	0.12	0.08	0.02	0.50
Support for EU - Euroskepticism	5,518	0.51	0.22	-0.25	0.88
Time Until Deadline	5,518	84.23	50.80	1	310
Directive Recitals	5,518	11.71	7.73	1	52
New Directive	5,518	0.56	0.50	0	1
Commission Directive	5,518	0.29	0.45	0	1
Monitoring Intensity	5,518	0.66	0.23	0.000024	1
UK Dummy	5,518	0.20	0.40	0	1
Germany Dummy	5,518	0.20	0.40	0	1
Spain Dummy	5,518	0.18	0.39	0	1
Greece Dummy	5,518	0.21	0.41	0	1
Veto Players	5,518	1.95	0.97	1	5.47
EU Membership Length	5,518	22.74	12.75	0	47
Election Dummy	5,518	0.13	0.33	0	1
Utility Policy Dummy	5,518	0.12	0.33	0	1
Food Policy Dummy	5,518	0.31	0.46	0	1
Transport Policy Dummy	5,518	0.23	0.42	0	1
Eurobarometer Semester Length	5,518	6.07	1.14	3	9
Estimated Transposition Dummy	5,518	0.04	0.19	0	1

**Table A.3: Test for Violations of the Proportional Hazard Assumption**

Variable	Model 1		Model 2		Model 3	
	Rho	Chi	Rho	Chi	Rho	Chi
Support for EU	0.06	2.40	.	.	.	.
Euroskepticism	.	.	-0.06	2.72*	.	.
Support for EU - Euroskepticism	.	.	.	.	0.06	2.65
Time Until Deadline	0.22	77.54***	0.22	73.67***	0.22	72.90***
Directive Recitals	-0.01	0.14	-0.01	0.11	-0.01	0.13
New Directive	-0.03	1.05	-0.03	0.83	-0.03	1.00
Commission Directive	0.06	4.59**	0.06	4.45**	0.06	4.56**
Monitoring Intensity	-0.01	0.04	-0.01	0.03	-0.01	0.04
UK Dummy	0.03	0.70	0.02	0.40	0.03	0.68
Germany Dummy	0.03	0.85	0.01	0.18	0.03	0.68
Spain Dummy	-0.01	0.17	-0.03	1.04	-0.02	0.36
Greece Dummy	0.01	0.22	-0.002	0.01	0.01	0.10
Veto Players	0.11	14.71***	0.11	14.55***	0.11	14.67***
EU Membership Length	-0.04	1.47	-0.05	2.75	-0.04	1.91
Election Dummy	-0.03	0.84	-0.03	0.64	-0.03	0.76
Utility Policy Dummy	0.09	11.09***	0.09	10.77***	0.09	10.98***
Food Policy Dummy	0.15	28.14***	0.15	28.30***	0.15	28.25***
Transport Policy Dummy	0.12	17.40***	0.12	17.51***	0.12	17.46***
Eurobarometer Semester Length	0.03	1.07	0.03	0.98	0.03	1.07
Estimated Transposition Dummy	0.02	0.53	0.02	0.56	0.02	0.56

*Note:* The results above are based on a test for violations of the proportional hazard assumption using Schoenfeld residuals. In order to correct for possible violations of the proportional hazard assumption, all *time-varying covariates* and variables with a statistically significant chi were interacted with linear time in Models 1 through 3. \*\*\*  $p \leq 0.01$ ; \*\*  $p \leq 0.05$ ; \*  $p \leq 0.10$ .



# Populist and Radical Right Parties at the 2014 European Parliament Elections: Much Ado About Nothing?

Nathalie Brack\*

## 1. Introduction<sup>1</sup>

The 2014 European Parliament elections were supposed to represent an important milestone for the European Union (EU). For the first time, there was a direct link between the vote in EP elections and the nomination of the President of the European Commission (Schmitt, Hobolt, Popa, 2014). Most political groups nominated a lead candidate (*Spitzenkandidat*) and with the slogan ‘this time, it’s different’, this new opportunity was expected to rouse the public’s interest, to bridge the gap between the EU and voters and to reduce the second order nature of these elections.

However, it seems that these elections were not so different. Turnout did not increase and, in most Member States, EU elections remained second-order national contests. Although the situation differs from country to country, small and radical parties were particularly successful during these elections. As the economic and Eurozone crisis reopened the debate on European integration and the legitimacy of the EU’s intervention in economic governance, the unpopular bailouts increased the EU’s visibility in the public sphere, leading to the emergence or resurgence of opposition to Europe. Against the backdrop of the economic crisis, segments of the population are increasingly expressing their discontent with traditional parties and elites, and public confidence in democratic institutions has been undermined (Armingeon and Guthmann 2014; Albertazzi and McDonnell 2007; Mair 2011; Kröger and Friedrich 2013): more than 60% of Europeans do not trust their national governments and parliaments, most feel their voice does not count in the EU and almost half of European citizens are dissatisfied with the way democracy works at the national and EU level (Eurobarometer 80, 81, 82). This current context of democratic malaise and economic crisis has provided fertile ground for the mobilization of populist and Eurosceptic parties, which could exploit the prevailing sense of disconnect and hostility at the 2014 EP elections.

If an extensive literature has developed on Euroscepticism since the seminal article of P. Taggart (1998), the field of research tends to be the national arena and to focus on two main aspects: understanding the nature of opposition to the EU and explaining its drivers. EP specialists for their part tend to neglect Eurosceptic actors, who are considered a weak minority with very limited opportunities within the European institutional system (Neunreither 1998). Recently though, Euroscepticism at the supranational level has attracted some attention, with some research on Eurosceptic EP groups and Members of the European Parliament (Benedetto 2008; Brack 2013; Whitaker & Lynch 2014; Lynch et al. 2011). Similarly, specialists of radical right parties started examining this party family at the supranational level (Almeida 2010; Fieschi 2000; Minkenberg and Perrineau 2007; Hartleb 2012; Startin 2010).

Building on these studies, this short paper concentrates on the untidy right, i.e. Eurosceptic, radical right and sovereignist parties (Bell and Lord 1998). As predicted by polls and EU specialists, these parties achieved an unprecedented success at the 2014 EP elections. But they do not seem able to transform this electoral success into power and influence within the chamber. The aim of this paper is to examine first the increased but diverse electoral success of such parties and then to analyse the factors explaining their lack of influence at the supranational level. More precisely, it will show that it is the result of the interaction between the institutional context, the ideological heterogeneity of the untidy right and the strategies of their MEPs inside the EP.

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## 2. The untidy right and the 2014 EP elections: an unprecedented success?

Against the backdrop of the economic crisis, Euroscepticism has become increasingly mainstream, in the sense that it has become increasingly more legitimate, more salient and in many ways less contested across Europe (Brack and Startin 2015). The European elections of May 2014 attest to this trend. Euroscepticism has increasingly moved from the margins to the mainstream: it is no longer the hallmark of fringe and marginal parties as claims of the EU's non-democratic nature and need for major reforms have become commonplace among mainstream media and parties (Abbarno and Zapryanova 2013). This context has provided particularly fertile soil for Eurosceptic parties, both from the left and the right. Although the so-called Eurosceptic tsunami<sup>2</sup> must be qualified by the low turnout and the second order nature of these elections (Krouwel, Kutiyanski 2014) there has never been such a high number of dissenting voices in the EP.

The biggest gains were undoubtedly made by populist and radical right parties. Although there is no direct correlation between the crisis and the success of these parties (Mudde 2014), they were able to use the growing discontent of citizens in the context of the crisis. Indeed, they have increasingly utilised a 'hard' Eurosceptic and at times anti-globalisation discourse to bolster their traditional anti-immigrant discourse. Because of the increased salience of European issues, they have articulated a discourse linking immigration, the creation of a European super state and globalisation. As noted by Halikiopoulou and Vasilopoulou (2014: 285), these parties have adopted 'a narrative that links the salient issue of the economy with questions such as immigration, citizenship law, employment law and the EU more broadly'. They have presented themselves as the sole defenders of the welfare state and the preservation of social standards against the so-called threat of immigration. This discourse, as well as their anti-establishment rhetoric, has helped them to gain legitimacy, to become mainstream and in some cases to assist the process of 'sanitisation' or 'detoxification' within their parties, as was noticeable in the French case (Brack, 2014a). It has also helped them to expand their electorate to the working class who traditionally tended to vote for the left (Ford and Goodwin 2014; Rydgren 2013).

Table 1

As we can see in Table 1, the results of the untidy right vary greatly from country to country. The success of these parties tends to be limited to Western Europe. Although we must be cautious not to overstate the populist and Eurosceptic tsunami, it remains that three parties from the untidy right topped the polls in their respective countries, which has never happened in the EU. The FN in France has quadrupled its score from 2009, with almost 1/5 of the votes, and given the fact that France is a large country, the party gained 24 seats in the EP. The Danish People's Party ranked first in Denmark, with more than 25% of the votes and doubled its seats in the EP. And UKIP arrived first as well, with 26, 8%, and gained 11 extra seats in parliament.<sup>3</sup>

The Eurozone crisis and austerity measures had an impact on the EP election results in countries with traditionally high net-contributions to the EU budget. Europe played a more important role than before in the campaigns in Finland, Austria, the Netherland, the UK and Germany. Whereas in Southern Europe it strengthened the radical left, in Finland, Austria, the Netherland, the UK and Germany it reinforced right-wing Euroscepticism. In Austria, the FPÖ became the third party with almost 20% of the votes, and in Finland the unpopular bailouts contributed to impressive electoral results for The Finns party. In the Netherlands, although the PVV lost 4% in comparison to 2009, mainstream pro-EU parties lost ground despite the success of D66 the social/liberal Dutch party (Krouwel and Kutiyanski 2014). In addition to that, new radical and Eurosceptic parties emerged in some countries, attesting a major change in the level of support for the EU. Golden Dawn in Greece

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<sup>2</sup>See for instance D. Meacham, 'Europe needs some old ideas', Open Democracy, 24 June 2014. *The Financial Times* wrote 'Eurosceptics storm Brussels' (26 May 2014) while CNN and BBC talked about an earthquake (Eurosceptic 'earthquake' rocks EU elections, BBC News, 26 May 2014, EU elections: A far-right 'earthquake', 26 May 2014).

<sup>3</sup>It must be noted that in these 3 Member States, the timing of the EP elections increased the likelihood of protest vote as they took place more or less in the middle of the electoral cycle.

and the National Democratic Party of Germany gained access to the EP, with respectively 3 and 1 seats. Even though their electoral results cannot be compared to those of the FN or FPÖ, the arrival of two neo-Nazi parties in the EP is highly symbolic.

Notably, as mentioned, the success of the untidy right has been limited to Western Europe. Countries which have been hit the hardest by the crisis and have experienced the worst of austerity (Italy, Portugal, Spain, Ireland and Greece) have not seen a significant rise in far right parties, with the exception of Greece (Halikiopoulou and Vasilopoulou 2014, see also Halikiopoulou and Vasilopoulou 2013). Similarly, radical right parties fared less well in the Central and Eastern European countries. Only Jobbik in Hungary and the National Alliance in Latvia (which included the radical right Fatherland and Freedom Party) managed to remain stable or gain votes. Jobbik ended second at the elections, with almost 15 % and kept its 3 seats. The National Alliance 'All for Latvia' became the second party of the country, with 14% of the votes. Elsewhere in Central and Eastern Europe (CEE), in Bulgaria (Ataka), Romania (the Greater Romanian Party) and Slovakia (the Slovak National Party), radical right parties lost their seats in the EP. This shift towards Western Europe in terms of radical right representation in Strasbourg is not surprising given the general hostility of such parties towards the EU's policy of freedom of movement and, with it, the scapegoating of CEE migrants in their anti-immigrant and anti-EU discourse.

Despite the decline in the representation of radical right parties in the CEE, overall the number of right-wing Eurosceptic actors increased with 16% (if we take the ECR, EFDD and non-attached members into account) (Ivaldi 2014). More particularly, parties from the untidy right have 80 MEPs distributed in 3 political groups while radical right MEPs rose with, according to Mudde (2014) 'a record 52 MEPs, up by 15 seats since the 2009 election' (although his calculations exclude the Finns Party and the National Alliance in Latvia).

### **3. What are the implications for the European Parliament?**

The number of dissenting voices in the EP since the May 2014 European elections has grown significantly. The percentage of populist and radical right parties opposed to or questioning aspects of the European integration project could alter the dynamics of the Strasbourg chamber and their success at the last EP election certainly raises once again the issue of the linkage between citizens and European elites.

However, despite their electoral success, such parties have had a very limited impact at the supranational level so far. This is due to the interaction of three main factors: the rules and norms of the EP, the strategies developed by MEPs from the untidy right and their heterogeneity.

#### **3.1. *The institutional context***

If, in general, formal and informal rules of parliament act both as a constraint and a resource for the actions of its members, these resources and constraints are not the same for all and might depend on many elements such as the actor's previous experience, nationality or membership in a group (Costa 2001, Jacobs et al. 2007). The situation of Eurosceptic MEPs is particular in that respect. Unlike members of large groups, they are freer to act: they have to comply to a lesser extent with rules of conduct and voting instructions. In the case of the EFDD (and before that, the IND/DEM and EFD) members, the group has been constituted on the basis of an 'agreement to disagree' and members vote as they see fit. Thus, there is no voting discipline and no group's rules concerning the behaviour of its members. Furthermore, as compared to the situation of non-attached members, the rules grant members of a group more room for manoeuvre and potential for action. As a consequence, they can make greater use of the powers guaranteed to individuals by the rules of the institution, which constitute important resources for these members. The non-attached members' situation is a little different as they are even freer to act and do not have to respect any rule or norm from a group. There are coordination meetings among them but those meetings are just a platform for those who want to collaborate with no obligation to do so (interviews with parliamentary assistants and EP civil servants).

On the other hand, however, the institutional framework also acts as a constraint on the actions of Eurosceptic members. First, with the empowerment of the EP over time, the assembly tends to

focus its legislative activities. Whereas these Eurosceptics are elected on the pro/anti-integration divide, the EP core business has become its legislative tasks and except for rare exceptions, such as debates on the treaties, there is not much room for debates on whether the deepening or, rather, the loosening of European integration is desirable inside the EP. Second, the internal working of the EP is characterized by a tendency to decide by compromise. To a large extent, the institution cannot be considered as a site for political opposition (Neunreither 1998, Mair 2007): any conflict is dealt with *ex ante* by the main actors, leaving no room for constructive opposition (Neuhold and Settembri 2009; Settembri 2006). The three main groups (EPP, S&D and ALDE) work closely together and tend to dominate the legislative work. They do not need the support of fringe groups such as EFD, and therefore Eurosceptics lack any blackmail power (Benedetto 2008). Third, as a result of their Eurosceptic positions, leaders of the main EP groups make sure that these members are unable to promote their European ideas, particularly on sensitive issues. As shown by Startin (2010), there is a sort of *cordon sanitaire*, especially around populist radical right members, as the majority of the MEPs are hostile to their presence in the EP. It is therefore much more difficult for members of small and marginal groups to obtain reports (Jacobs et al. 2007: 59). They tend to be excluded from the process of report allocation as well as of responsibilities and positions within the EP (Kestel 2008; Startin 2010). For instance, even when there was a (technical) radical right group between 1984 and 1994, its members were never granted any committee's presidency or access to EP groups' cooperation (Fieschi 2000). Similarly, the ITS group formed and dissolved in 2007 was the only group whose members were never in charge of any report or (vice-) presidency of a committee (Almeida 2010). This *cordon sanitaire* seems to have been extended for the 8<sup>th</sup> parliamentary term as the EFDD group has also been excluded from the allocation of the presidency of committees and delegations.

An additional constraint has become particularly noticeable over the last few years and comes from the various reforms of the Rules of Procedure. Indeed, over time, political groups have seen their influence grow, at the expense of individual MEPs and non-attached members. At the beginning, many of the rights granted to political groups were also awarded to a small proportion of MEPs who did not belong to any group, but the situation evolved and the proportion of individual MEPs required to exercise the same rights as the groups gradually increased (Kreppel 2002, Brack et al. 2015). At the same time, the conditions to form a group have become more constraining, in terms of threshold and number of Member States represented. Moreover, in the specific case of the non-attached members, their representation in the Conference of the Presidents has decreased by half since 2007, and since the reform of 2010, they can no longer choose who will be their representative as it is now the President of the EP who appoints their delegate. As they do not have the right to vote, they cannot influence the work of the Conference of Presidents. They are also kept away from the positions of shadow rapporteurs as well as of the meetings of coordinators. Those meetings used to be informal but since they are now mentioned in the internal rules, the status of coordinators is reserved to members of political groups, the non-attached being *de facto* excluded. Finally, after repeated disruptions during plenary sessions by some Eurosceptic MEPs, EP leaders and the main political groups have attempted to regulate more rigorously members' behaviour. This has resulted in several reforms of the Rules including more strictly supervised plenary sessions and the establishment of a new code of conduct with new sanctions for disruptions (Brack et al. 2015).

Given the working mechanisms of the EP, any permanent opposition tends to have fewer resources, more limited visibility and face greater marginalization (Settembri 2006: 24-25). As noted by L. Bardi and P. Ignazi (2004: 51), 'for the individual MEP, whether he is marginal or marginalized within his own group or non-attached member, there remains only a few crumbs: the whole design of the European Parliament leaves little room for manoeuvre for free electrons, unlike what happens in national parliaments'.

### **3.2. *The strategies of populist and right-wing Eurosceptic MEPs***

MEPs from the untidy right lack influence in the EP because other MEPs do not expect them to be involved within the parliament and because the EP is an unrewarding location for fringe Eurosceptics. But also because most of them are not interested in being involved in the Parliament. They tend to restrict their actions to individual types of action, such as speeches and parliamentary questions, as



they are in a minority whose points of view have no chance of prevailing. Indeed, interviews with a sample of 33 MEPs from the untidy right (from IND/DEM and EFD groups as well as non-attached members) and the analysis of their parliamentary activities reveal that such MEPs develop three main strategies: an empty chair strategy (the Absentee), a delegitimization strategy (the Public Orator) and a constructive opposition (the Pragmatist) (Brack 2014b, Brack 2015).

The first strategy is a form of empty chair strategy. Indeed, such MEPs, which I call the Absentees, are characterized by two main indicators: comparatively low involvement in the chamber and an emphasis on the national level, especially their own voters. Considering their limited capacity for action, such MEPs believe that any activities undertaken within the institution would be futile. They do not actively participate in committee or delegation work and do not seek to be in charge of reports or have responsibility within the EP. While neglecting parliament, Absentees are very active at national and local levels. When interviewed, most Absentees acknowledge they spend most of their time at the national level and attend parliament only a few days per month. They see their role as a promoter of Euroscepticism in national public opinion through interventions in the media, dissemination of DVDs, meetings and school visits. Their (limited) presence in the EP gives them access to information about the EU, which can then be transmitted to the local or national levels. In terms of behaviour within the chamber (Table 2), they are characterized by a relatively low attendance rate and a lack of involvement in any type of parliamentary activity.

The second strategy consists in a noisy and permanent opposition. Indeed, these Eurosceptics, which I call Public Orators, have as their main objective to publicize and defend their position by all means available. They see themselves first and foremost as representatives in permanent opposition. They believe that their role is to speak on behalf of Eurosceptic citizens, who they see as neglected by European institutions, but also to delegitimize the institution through speaking in public. Therefore, the vast majority of their activities consist of general accusations concerning the failures and negative consequences of integration. Their interventions do not address the content of specific European policies but seek to break down the so-called consensus within the assembly. Contrary to the Absentees, they are much more present in the EP but they are not very interested in the 'traditional' aspects of parliamentary work. They believe their role is to oppose nearly everything since they are opposed to parliament's legislative powers and, more generally, the EU. Therefore, they vote against every text, do not draft amendments, are not interested in being in charge of writing a report or an opinion but look for any opportunity to disrupt parliamentary proceedings and get the publicity they look for.

The third type is a more pragmatic strategy. Pragmatists develop a dual strategy whereby they seek to achieve concrete results while not compromising their Eurosceptic beliefs. Guided by a desire to be efficient, such MEPs are characterized by greater investment in the EP's daily work, a tendency to follow the assembly's rules and a willingness to change, in a targeted and limited way, the system of which they are critical. They do not remain in a sterile opposition but try to find a balance between the promotion of their convictions and the pursuit of tangible results without intending to disrupt the functioning of Parliament. They also emphasize their mission of representation and believe they have a quasi-imperative mandate linking them to their constituents, fellow citizens or political party. They have developed a dual strategy, corresponding to their perception of the European mandate: as Eurosceptics they see themselves as oppositional actors, but as MEPs they wish to emphasize the constructive nature of their opposition and their willingness to get involved to make a difference through their actions. They accept the principle of negotiation with their colleagues and establish contacts with officials of EU institutions to increase the effectiveness of their actions, all the while criticizing these very same institutions. But if they are more constructive, they do not accept any compromise on their Eurosceptic convictions and their involvement is limited to the policy areas where they consider the EU has a role to play.

Table 2

In a nutshell, most MEPs from populist and right-wing Eurosceptic parties tend to adopt one of the first two strategies and remain outsiders within the chamber. And even if a few, especially among the

newly elected members, are considering a more pragmatic and constructive strategy, they remain at the margins of the assembly: they are faced with a dilemma between their interest in parliamentary work and their refusal to legitimize the EP's deliberations. And because of their position as non-attached or members of the EFD(D) group, they do not have any influence on sensitive issues or on the legislative process.

### **3.3. *The heterogeneity of the untidy right***

A final set of constraints comes from the heterogeneity among populist and radical right parties. Although they share the same opposition to the EU as it stands, the degree and nature of their euroscepticism varies greatly. As S. Vasilopoulou (2011) demonstrated, radical right representatives have different visions of the integration process and the EU.

On the basis of interviews with MEPs from the EFD group and non-attached members, it is possible to distinguish three main positions among parties from the untidy right. A first position reflects a 'hard euroscepticism' (Taggart and Szczerbiak 2008) or a 'Europhobe position' (Kopecky and Mudde 2002), i.e. a principled opposition to political integration. They openly advocate the withdrawal of their country from the EU. Their position on the EU is very hostile and EU institutions are perceived as antidemocratic and impossible to reform. The second position can be interpreted as 'intergovernmentalist'. These MEPs stress the importance of national sovereignty and do not favour the transfer of responsibilities to the supranational level under the Community method. However, they can be in favour of intergovernmental cooperation and, in their view, the EU should be reformed to enhance the role of Member States through the strengthening of the national parliaments and the Council as they are 'convinced that the legitimate level for democracy lies with the Nation States, their regions and parliaments since there is no such thing as a single European people'(interview with MEP). The last group perceives European integration as an undesirable constraint or even a necessary evil. They accept the principle of institutionalized cooperation, a more or less integrated market and some transfers of sovereignty, but they want some limits. They are similar to Kopecky and Mudde's 'Eurosceptic' category (2002) as they accept limited institutionalized cooperation and integration but are critics of the EU project and consider that the current direction of the EU is not the acceptable form of integration.

This heterogeneity goes beyond the sole issue of European integration and these parties have diverse positions on many policy areas such as the relations with the US or Russia, the economy and the effect of globalization. As a result, the ability of the untidy right to get united in a single political group is extremely limited and the cohesion of EP groups composed of parties from the untidy right is low. The current cohesion rate of the EFDD group is close to 50% whereas all the other groups have a cohesion rate above 75% (votewatch 2015). During the last parliamentary term, the cohesion rate of the EFD was even below 50%, with some variation across policy areas: members of the group managed to vote together in more than 60% of the cases in budgetary control and the internal regulation of the EP but in less than 45 % of the cases in education and culture, employment and social affairs, as well as on the internal market. Similarly, MEPs from parties that joined the European Alliance for Freedom (which was not able to form an EP group) voted together in only 51% of the cases during last parliamentary term. The FN and the PVV, which were supposed to be the core of the future group, voted together in 51% of the cases in economic and monetary affairs; in 63% of the roll call votes on civil liberties, justice and home affairs and only 43% of the votes in the internal market (votewatch 2014).

Because of this heterogeneity, but also because of the conflicting logic of nationalist transnational cooperation, Eurosceptics hardly manage to be organized at the supranational level.<sup>4</sup> They are currently scattered between the EFDD group, the new group 'Europe of the nations and liberties' and the non-attached (except for the Finns Party and the Danish People's Party that are now part of the ECR). Radical right members are typically unable or unwilling to join a group or to fulfil the conditions to form one. Usually, they do not even succeed in acting in a coordinated way, which excludes them from some rights opened to a certain number of MEPs. There were several attempts to

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<sup>4</sup> On this issue, see also Fieschi (2000) ; Startin (2010) and Zuquete (2015)

form groups among radical right representatives but they tended to be rather short-lived (Settembri 2004, Startin 2010). There were once again attempts to form a radical right group in the EP at the beginning of the 8<sup>th</sup> parliamentary term, under the leadership of the FN. But they faced the competition of UKIP, whose leader does not want to cooperate with the FN, and they have not managed to have MEPs from 7 Member States as required to form a group. The situation changed in June 2015 when Marine Le Pen announced the official establishment of a new EP group ‘Europe of the nations and liberties’, with 37 members from 7 Member States. Indeed, after almost a year of informal coordination among parties members of the European Alliance for Freedom and negotiations with potential allies, the FN was able to form a group together with the Belgian Vlaams Belang, the Italian Lega Nord, the Dutch PVV, the Austrian FPÖ as well as two members from the Polish Congress of the New Right (KPN) and one former UKIP MEP. At the time of writing, it is much too soon to examine the cohesion of this group or predict its life span. The aim of Marine Le Pen is to have a coherent and stable alliance with her partners but, given the heterogeneity of the group, it would not be surprising to see recurring tensions between its members. Other radical and populist Eurosceptic parties are found in the EFDD group, which potentially gives them more opportunities to influence the decision-making process (through their participation to the Conference of the Presidents for instance). But the group is a marriage of convenience to take advantage of available resources. It corresponds more to a minimal response to new opportunities than to a genuine political grouping. As a result, it has the lowest cohesion of all groups in the EP and it rarely belongs to the majority (it is only in 23% of the cases that the EFDD group belongs to the winning coalition in the parliament).

#### **4. Conclusion**

The EU is once again in the eye of the storm. After two decades of treaty revisions resulting in the adoption of the Lisbon Treaty in 2009, the ongoing economic and financial crisis has re-opened debates on the nature and *raison d'être* of European integration. The EU's scope of intervention as well as its legitimacy is increasingly being challenged, especially in the area of economic governance. The current context of democratic malaise and economic crisis has provided fertile ground for the increased electoral success of radical, populist and Eurosceptic parties such as the UK Independence Party, the National Front in France and the Danish People's Party. This opposition to the European project, labelled Euroscepticism, is far from new. European integration has always been a contested project: the EU is a political system in a state of quasi-permanent crisis, whose very existence is frequently questioned and in which constitutional issues are numerous, recurring and problematic (Neunreither 1998). While these oppositions to the European project have long been seen as marginal or temporary, there is a consensus today on the fact that Euroscepticism has now become a complex and persistent phenomenon all over Europe (Usherwood and Startin 2013). Indeed, almost every party system has at least one Eurosceptic party competing in elections and Europe has become an issue, if not a divider, in most European political arenas (Harmsen 2005).

Although the EP has been a bastion of Europhiles, there have been Eurosceptic MEPs since the 1970s who have used the EP as an arena to actively defend and promote their points of view. Initially dominated by socialists, Christian Democrats and liberals universally in favour of European integration, the EP has since included new political groups representing the opposition of increasing segments of the population. The European assembly has since then been divided along two main dimensions: the left-right cleavage and the pro/anti-integration axis (Hix et al. 2007).

With the current crisis, it seems that the integration process has entered a new and more difficult phase of its existence, characterized by mass Euroscepticism, the rise of radical and populist parties and the mainstreaming of anti-EU rhetoric (Vasilopoulou 2013). In this context, it is more important than ever to examine this opposition to the EU. As Y. Mény put it (2012: 62), ‘however excessive, contradictory, confusing and unpleasant are the messages, anti-EU populist rhetoric deserves our attention’. This paper examined the electoral results of parties belonging to the ‘untidy right’ and showed that despite their electoral success and their increased presence in the EP, they are not able to influence the deliberation of the institution which has been quite resilient to their presence. Indeed, because of the formal and informal rules of the EP, but also the ideological heterogeneity of

the untidy right and the strategies of their representatives at the supranational level, they remain marginal and marginalized in the chamber.

However, that does not mean that these actors do not have any influence. These parties may have an impact at the national level, by politicizing some key issues such as immigration, the reform of the welfare state and EU integration (see Kallis 2013). They could indirectly influence the mainstream parties and the agenda in Member States where they achieve their greatest results (Denmark, UK, France, but also Austria). As noted by C. Mudde recently (2015), EU elections can give far-right parties a boost in national elections and can influence the policies and discourse of mainstream parties. And even at the supranational level, the increased presence of these parties may have implications. A recent study shows that the increased presence of dissenting voices has altered the dynamics of the chamber by forcing the EPP and S&D to dilute their differences (votewatch 2015). The use of the grand coalition (EPP-S&D-ALDE) as a way to pass key legislation in the EP has increased and the EPP and S&D voted the same way in 4 out of 5 votes in the first six months. As a result, EU politics may become even less clear to EU citizens as it will be even more difficult for them to identify the agenda of mainstream parties and relate to them. At the same time, they might also have some positive impact: their presence could increase the representativeness of the EP as an institution open to society in its diversity. While citizens are increasingly willing to express dissatisfaction with the EU, the EP has failed to build effective links between the people and the EU (Farrell and Scully 2007). The presence of Eurosceptic MEPs, even from radical parties, could help enhance these links by allowing this dissatisfaction to be expressed (and engaged with) inside the EP.

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**Table 1: Results 2014 EP elections for parties from the untidy right**

Party	Country	% of vote 2014 (% in 2009)	No. of seats 2014 (seats in 2009)
<b>Dansk Folkeparti (DF) (Danish People's Party) (DPP)</b>	Denmark	26.6% (14.8%)	4 (2)
<b>Front National (FN)</b>	France	24.85% (6.3%)	24 (3)
<b>Freiheitliche Partei Österreichs (FPÖ) (Austrian Freedom Party)</b>	Austria	19.7% (12,71%)	4 (2)
<b>Jobbik (Magyarországért Mozgalom) (Movement for a Better Hungary)</b>	Hungary	14.68% (14.77%)	3 (3)
<b>Coalition Nacionālā apvienība (National Alliance 'All for Latvia!' (VL) / For Fatherland and Freedom/LNNK)</b>	Latvia	14.3% (10.26%)	1 (1)
<b>Partij voor de Vrijheid (PVV) (Party for Freedom)</b>	Netherlands	13.3% (16.97%)	4 (5)
<b>Perussuomalaiset (The Finns)</b>	Finland	12.9% (9.8%)	2 (1)
<b>Sverigedemokraterna (SD) (Sweden Democrats)</b>	Sweden	9.7% (3.27%)	2 (0)
<b>Golden Dawn (Chrysi Avyi)</b>	Greece	9.38% (/)	3 (0)
<b>La.O.S (Popular Orthodox Rally)</b>	Greece	2,7% (7,1%)	0 (2)
<b>Lega Nord (LN) (Northern League)</b>	Italy	6.15% (10.2%)	5 (9)
<b>Vlaams Belang (VB) (Flemish Interest)</b>	Belgium	4.14% (9.85%)	1 (2)
<b>Nationaldemokratische Partei Deutschland (NPD) (National Democratic Party of Germany)</b>	Germany	1% (/)	1 (0)
<b>Ataka</b>	Bulgaria	3% (12%)	0 (2)
<b>Tvarka ir teisinguma (Order and Justice)</b>	Lithuania	14,3% (11,9%)	2 (2)
<b>Partidul România Mare (PRM) (The Greater Romania Party)</b>	Romania	2,7% (8,7%)	0 (3)
<b>UK Independence Party</b>	UK	26,8% (16,6%)	24 (13)
<b>British National Party</b>	UK	1,1% (6%)	0 (2)
<b>Slovenská národná strana (SNS) (Slovak National Party)</b>	Slovakia	3,6% (5,5%)	0 (1)

**Table 2 : Parliamentary activities of MEPs from the untidy right according to the 3 strategies**

	Attendance RCV	Reports	Written declaration	Speeches	Motions	Opinions	Questions	Amendments
<b>ABSENTEES (N = 10)</b>								
<b>Mean</b>	66,22	0	0.2	32.9	0.5	0	29.8	1
<b>Median</b>	61,88	0	0	24	0.5	0	5.5	0
<b>S-D</b>	20,09	0	0.42	24.58	0.53	0	61.14	1.89
<b>PUBLIC ORATORS (N=19)</b>								
<b>Mean</b>	82.16	0	3.42	222.05	2.89	0.16	117.63	13.79
<b>Median</b>	83.66	0	0	101	2.00	0	101	2.00
<b>S-D</b>	12.94	0	7.22	319.29	3.38	0.69	129.07	30.21
<b>PRAGMATISTS (N=13)</b>								
<b>Mean</b>	91.16	2.08	5.31	317.23	20.15	0.92	165.46	52
<b>Median</b>	93.62	1	4	183	8	0	70	27
<b>S-D</b>	6.95	3.71	4.96	337.8	33.31	1.5	207.44	52.84

Source data: VoteWatch and European Parliament (author's own calculations)