



<b>Much Ado About Nothing? National Legislatures in the EU Constitutional Treaty</b>
<b>Tapio Raunio</b>
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<b>Abstract</b>
This article analyses the impact of the EU's new Constitutional Treaty on the parliaments of its member states, with specific focus on access to information and on monitoring compliance with the subsidiarity principle. The main argument of the article is that while the Constitutional Treaty will strengthen the position of the national legislatures in the EU policy process, this empowerment does not constitute a major departure from the present situation. National parliaments will have better access to EU documents, and these information rights improve the capacity of national parliaments to control their governments. National parliaments will also gain a collective role in overseeing the implementation of the subsidiarity principle, but the effects of this mechanism will probably remain modest. While national MPs have thus stronger constitutional rights to control their governments, the increased use of the open method of coordination and other forms of intergovernmental policy coordination at least partially undermine these positive developments. The article concludes by proposing a set of reforms that would enable national legislatures to make a stronger impact on EU politics.
<b>Kurzfassung</b>
Dieser Artikel analysiert den Einfluss des neuen EU-Verfassungsvertrages auf die Parlamente der Mitgliedstaaten, mit spezifischem Fokus auf den Zugang zu Information und die Überwachung der Einhaltung des Subsidiaritätsprinzips. Hauptargument des Artikels ist, dass, während der Verfassungsvertrag die Position der nationalen Gesetzgebungen im EU-politischen Prozess zwar stärken würde, diese Übertragung von Verantwortung kein grundlegendes Abweichen von der gegenwärtigen Situation bedeutet. Nationale Parlamente würden besseren Zugang zu EU-Dokumenten erhalten, und diese Informationsrechte verbesserten die Kapazität der nationalen Parlamente, ihre Regierungen zu kontrollieren. Nationale Parlamente würden auch eine kollektive Rolle in der Überwachung der Umsetzung des Subsidiaritätsprinzips erlangen, aber die Effekte dieses Mechanismus würden wahrscheinlich bescheiden bleiben. Während nationale Parlamentsabgeordnete also stärkere verfassungsrechtliche Rechte zur Kontrolle ihrer Regierungen hätten, würde die gesteigerte Anwendung der Methode der offenen Koordinierung und anderer Formen der intergouvernementalen Politikkoordination diese positiven Entwicklungen zumindest teilweise untergraben. Der Artikel schlägt abschließend eine Reihe von Reformen vor, welche es nationalen Gesetzgebungen ermöglichen würden, einen stärkeren Einfluss auf die EU-Politik auszuüben.
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## Introduction <sup>↑</sup>

Parliaments are central institutions in European systems of government. They elect and control the government, approve legislation, and as the bodies responsible for amending the constitution hold the ultimate power in society. Yet such constitutional perspective is arguably increasingly divorced from reality. National parliaments (hereafter NPs) are usually portrayed in the academic literature as reactive institutions, casting rather modest influence on policy initiatives coming from the executive. The technicality of most legislation, strong party government, and the growing relevance of external constraints – globalisation, judicialization through the activism of national and European courts, and delegation of policy-making authority to various public or private agencies, not least central banks – all limit the real influence of parliaments, no matter how extensive their formal powers may be (Norton ed. 1998; Strøm et al. eds. 2003; Raunio and Hix 2000).(1)

There is likewise broad consensus about the impact of European integration on NPs. Most of the literature on the role of NPs in the political system of the European Union (EU) sees them as victims of European integration (e.g., Norton ed. 1996; Raunio and Hix 2000; Maurer and Wessels eds. 2001). Constitutionally, the issue is relatively straightforward. Powers which previously were under the jurisdiction of national legislatures have been shifted upwards to the European level (by national legislatures themselves – thereby signalling that the benefits accruing to member states from integration outweigh the losses to national parliamentary sovereignty). Amendments to the Treaties, the EU's "constitution", are subject to unanimous agreement between the member states. But, after the negotiations in Intergovernmental Conferences (IGC) have been completed, the only options for domestic legislatures are to accept the constitutional bargains without amendment or to reject the packages and plunge the EU into constitutional crisis. In the Council the increased use of qualified majority voting (QMV) makes it difficult for NPs to force governments to make *ex ante* commitments before taking decisions at the European level. Moreover, the extensive involvement of national ministers and civil servants in drafting and implementing EU legislation insulates or marginalises NPs, regardless of the Council decision rule.

The resulting information deficit reduces the ability of domestic MPs to control their governments in European matters. In fact, through the centrality of technical expertise in the EU policy process, the true winners of European integration have arguably been bureaucrats and organised private interests at all levels of government and not directly-elected representatives – the traditional holders of legitimacy in European systems of parliamentary government (e.g., Bergman and Damgaard eds. 2000; Kassim et al. eds. 2000; Wessels et al. eds. 2003). Not surprisingly, the overwhelming majority of both national MPs and Members of the European Parliament (MEPs) think that national parliamentary control of EU legislation is weak and needs to be strengthened (Katz 1999).

While such pessimistic conclusions might actually underestimate the influence of NPs, the challenges facing them deserve to be taken seriously. Active scrutiny by individual NPs of their governments is important in ensuring democratic input into the EU policy process, as the principal actors in the EU are still national governments that take decisions in the European Council and the Council. The main problem facing legislatures is how to reduce informational asymmetry in order to facilitate effective parliamentary accountability. This is where the constitutional rules adopted at the European level are potentially of great significance, particularly so for those member states where the legislative branch has traditionally been weak in relation to the executive even independent of European integration.

This article analyses the implications of the Constitutional Treaty for the national parliaments, with specific focus on access to information and on monitoring compliance with the subsidiarity principle. The main argument is that while the Constitutional Treaty will strengthen the position of the national legislatures in the EU policy process, this empowerment does not constitute a major departure from the present situation. National parliaments will have better access to EU documents, and these information rights improve the capacity of national parliaments to control their governments. National parliaments will also gain a collective role in overseeing the implementation of the subsidiarity principle, but the effects of this mechanism will probably remain modest. While national MPs have thus stronger constitutional rights to control their governments, the increased use of soft law instruments, such as the open method of coordination, at least partially undermines these positive developments. The article concludes by proposing a set of reforms that would enable national legislatures to make a stronger impact on EU politics.

## 1. National Parliaments In The Convention

The role of national legislatures featured prominently in the debates in the Convention, but had little prominence during the IGC that followed – largely because issues concerning national parliaments had already been resolved during the Convention.<sup>(2)</sup> This focus on national parliaments in the Convention had two different motivations: “The burgeoning interest in a larger European role for national parliaments (by no means confined only to Spain or the United Kingdom) sometimes reflected the fear of certain national parliamentarians that the evolution of the European Union’s legislative structures was condemning them to an ever more marginal role. In other quarters, by contrast, the hope was occasionally expressed that national parliamentarians would be more enthusiastic advocates of continuing European integration if they had a greater direct stake in the process.” (Donnelly and Hoffmann 2004: 1)

Indeed, while previous speeches and reform proposals about strengthening the role of NPs could often be disregarded as cheap talk aimed at domestic audiences, the increased political significance of the Union and the Laeken Declaration had taken the debate to a completely another level. Declaration no. 23 of the Treaty of Nice listed four key questions which the next IGC should address, and one of them was “the role of national parliaments in the European architecture”.<sup>(3)</sup>

And the Laeken Declaration from December 2001 set more precise questions about national parliaments: “Should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European Parliament has no competence? Should they focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?”<sup>(4)</sup>

The Convention established a separate Working Group (WG IV), entitled “The role of national parliaments”, for meeting the demands of the ‘Laeken mandate’.<sup>(5)</sup> The role of national parliaments in monitoring the subsidiarity principle was primarily discussed in WG I on “The principle of subsidiarity”. The proceedings of WG IV illustrated well both the almost unanimous desire to improve national scrutiny of governments in EU matters, and the lack of enthusiasm for the establishment of a collective organ of national MPs or for changing the functions of the Conference of the European Affairs Committees (COSAC)<sup>(6)</sup>. The WG agreed that enhancing the input of national parliaments would make the EU more democratic and legitimate, but it also recognised that “the primary role of national parliaments in European matters was carried out through effective scrutiny of their government’s action at the European level. It was also acknowledged that the different systems for national parliamentary scrutiny reflected different arrangements for the relations between governments and national parliaments in conformity with constitutional requirements in individual Member States, and that it would not be appropriate to prescribe at European level how the scrutiny should be organised” (European Convention 2002a: 4). On COSAC, the WG came out in favour of status quo: “The mandate of COSAC should be clarified to strengthen its role as an interparliamentary mechanism. It could usefully act as a platform for a regular exchange of information and best practices, not only between European Affairs Committees, but also between sectoral standing committees. It should become a stronger network for exchange between parliaments.” (European Convention 2002a: 15)

The vast majority of the recommendations of the WG on NPs were almost without any controversy endorsed<sup>(7)</sup> first by the Convention and then by the IGC. Hence they found their way into the Constitutional Treaty. However, one controversial idea related to NPs was rejected by the Convention – Giscard d’Estaing’s proposal for a Congress of the Peoples of Europe that was initially included in the first draft for the constitution published in October 2002 (European Convention 2002b). In April 2003 the Praesidium of the Convention proposed a new draft Article to be inserted in Title VI of Part One of the Constitutional Treaty (“The Union’s Democratic Life”), providing for the establishment of a Congress which would have met once every year, bringing together representatives of the EP and NPs. According to the initiative the Congress would have comprised no more than 700 members, with 2/3 of them from NPs. Its functions were to be purely consultative: the Congress would hear a ‘State of the Union’ speech by the President of the European Council and be presented with the Commission’s annual legislative programme (Rizzuto 2003: 11). Giscard d’Estaing’s idea met strong resistance, and hence it was dropped from the draft constitution.

The following two sections of the article will examine the two main changes in the Constitutional Treaty concerning NPs, improved access to information, and monitoring the subsidiarity principle.

## 2. The Good News: Improved Access To Information <sup>↑</sup>

The main sections of the Constitutional Treaty dealing with NPs are in two Protocols annexed to the Treaty: the ‘Protocol on the Role of National Parliaments in the European Union’ and the ‘Protocol on the Application of the Principles of Subsidiarity and Proportionality’. The former Protocol is designed to make national MPs better informed about the European decision-making process, while

the latter focuses specifically on monitoring the subsidiarity principle.

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Information is a fundamental prerequisite for both controlling the government and influencing policy proposals coming from the executive. Overall, the ability of parliaments to control executives has arguably declined in recent decades, and this is in no small part caused by the huge informational advantage enjoyed by the executive branch. The process of European integration is certainly one of the reasons why this has happened – providing executives an arena for action away from domestic parliamentary scrutiny, and a near-monopoly of information in an ever-larger range of public policies. However, NPs have in response to these developments introduced changes – both to national constitutions and to their own rules of procedure – that force governments to explain their EU policies and actions in the European arena to parliaments (Maurer and Wessels eds. 2001). The driving force behind this partial retrenchment is the desire by parliamentarians to redress the ‘information gap’ between governing elites and the parliamentary rank-and-file (Raunio and Hix 2000).

Nevertheless, in European matters parliaments have in most member states so far been largely dependent on information provided by the government. The problem has been worsened by the fact that most European legislatures have quite limited secretarial and research staff<sup>(8)</sup>, and therefore parliaments have not been able to produce complementary or alternative information in addition to that provided by the government. The biggest challenge facing national legislatures is thus how to reduce the informational asymmetry that is currently strongly in favour of the executive. In order to succeed in this formidable task, national parliamentarians need information about the preferences and negotiation strategies of (a) their governments, (b) the EU institutions (Commission, EP), and (c) the other member states.<sup>(9)</sup>

The Constitutional Treaty goes a long way towards remedying the existing information deficit. When comparing the new text with that included in the Protocol attached to the Amsterdam Treaty, the differences are quite significant indeed. According to the new Protocol, “Draft European legislative acts sent to the European Parliament and to the Council shall be forwarded to national Parliaments. For the purposes of this Protocol, ‘draft European legislative acts’ shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a European legislative act.” The difference between the new text and the Amsterdam Treaty is very clear, as the latter stated that national legislatures had the right to receive only “legislation as defined by the Council in accordance with Article 151. 3 of the Treaty establishing the European Community.” Secondly, these legislative documents shall be sent directly to national parliaments by the respective institutions, whereas under the present rules the “Government of each Member State may ensure that its own national parliament receives them as appropriate.”

NPs also gained improved access to non-legislative documents. According to the new Protocol, “Commission consultation documents (green and white papers and communications) shall be forwarded directly by the Commission to national Parliaments upon publication.” Here the wording is almost the same as in Amsterdam Treaty, which stipulated that these documents were to be “promptly forwarded” to national parliaments. But, there are new documents that the national parliaments are entitled to receive. These are the Commission’s annual legislative programme “as well as any other instrument of legislative planning or policy”. Moreover, NPs will also get the annual reports of the Court of Auditors.<sup>9a</sup>



Not only do NPs gain much better access to documents, they will also in the future have better opportunities to follow what actually goes on in the Council. Hitherto the Council has met behind closed doors, but according to Article I-24(6) it shall meet in public when examining and adopting a legislative proposal.<sup>(10)</sup> In addition, the Protocol on national parliaments states that the “The agendas for and the outcome of meetings of the Council, including the minutes of meetings where the Council is deliberating on draft European legislative acts, shall be forwarded directly to national Parliaments, at the same time as to Member States' governments.”<sup>(11)</sup> As a result of these changes, NPs – and indeed, the media and citizens-- have finally the chance to hear and see what the ministers actually say and how they vote in the Council.

However, the significance of these changes should not be overestimated. The Council has since 1994 published its voting records and since 1999 the records are available at the Council's website. But, while the final decisions are taken by the ministers in the Council, it has been estimated that even up to 90 % of all legislative issues are already decided by civil servants in Coreper and in the Council's working groups. As a result, actual voting in the Council is still relatively rare (Mattila 2004). This probably lessens the informational value (for example, through reducing the number of speeches made and the time spent on debating matters) of the Council's meetings. Moreover, the increased openness and access to the minutes of the Council's meetings concerns only those sessions when the Council acts in legislative capacity. This means that those meetings dealing with other than legislative issues, such as coordination of national economic and employment policies, or indeed policy-making in general, fall outside of this category.<sup>(12)</sup>

### 3. Addressing The Legitimacy Deficit: Monitoring Subsidiarity



Of the various Articles that mention NPs, by far the most talked about has been the ‘early warning system’ established for monitoring the principle of subsidiarity. In fact, while both the role of NPs and the proper application of the subsidiarity principle had been on the EU's agenda for at least a decade, the Convention was really the first time that a connection between the two was firmly established (Rittberger 2004: 26).<sup>(13)</sup> However, the argument put forward in this section is that national legislatures are unlikely to make much use of this mechanism and that it can even potentially cause more damage than good, both nationally and at the European level.

The rules of the early warning system are spelled out in the Protocol on the Application of the Principles of Subsidiarity and Proportionality. The procedure includes five steps (adapted from Donnelly and Hoffmann 2004: 2; Maurer and Kietz 2004: 3-4):

1. First the Commission must examine its legislative proposals for their conformity with the principles of subsidiarity and proportionality. Before proposing new legislation, the Commission must satisfy itself that the matter could not be better regulated at national rather than European level (‘subsidiarity’) and that the measures proposed stand in a reasonable relationship to the goals to be achieved (‘proportionality’).<sup>(14)</sup>
2. Then the Commission must forward its legislative proposals to the national parliaments at the same time as it forwards them to the Council and the EP. Within six weeks of receiving the proposal, NPs may issue their opinion on whether the initiative complies with the subsidiarity principle (but not with the related principle of proportionality). This first phase constitutes a preliminary reading involving only the national legislatures. After the six weeks have elapsed, the Commission then submits the (possibly) revised proposal for ordinary processing according to the relevant legislative procedure. Any subsequent resolutions of the EP or positions adopted by the Council on legislative proposals must equally be sent immediately to

the NPs.(15)

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3. If a chamber of a NP believes that a proposal is in breach of the principle of subsidiarity, it may then send to the Presidents of the EP, Council and Commission a 'reasoned opinion' ('the yellow card') on the proposed legislation, setting out the reasons for its concerns.
4. If these 'reasoned opinions' represent at least 1/3 of the votes (at least 1/4 in the case of Commission proposals or initiatives emanating from a group of member states under the provisions of judicial cooperation in criminal matters and police cooperation) allocated to NPs and their chambers (unicameral parliaments have two votes; each chamber of a bicameral system has one vote), the Commission must review its draft legislation. The Commission may then decide whether to maintain, amend or withdraw its proposal.(16) This means that the Commission (which can be voted out of office by the EP, not the national parliaments) remains the agenda-setter in the process, and that it can ignore the NPs' concerns and press forward with its proposal without making any amendments.(17)
5. Where a NP believes that the legislative initiative infringes the principle of subsidiarity, it may ask its national government to bring a case before the European Court of Justice (ECJ). This step, however, can only be taken retrospectively when the legislation has been adopted. This final stage does not mean any substantive changes to the existing arrangements. Already now any member state, perhaps at the request of its parliament, can bring actions before the Court if it thinks that the EU has no right to legislate on the subject matter.(18)

The 'early warning system' is not entirely without positive consequences. It can make the NPs feel that they genuinely have a say in the EU policy process, and this can produce a potentially very significant 'spill-over' effect, making them invest more resources in scrutinising EU matters. It can also force the Commission to be more detailed and explicit in its arguments for why new EU level legislation is called for.(19) However, the negative aspects of the mechanism are also worth closer examination.

Perhaps the biggest problem with the system is that through making NPs direct participants in the EU's legislative process, it goes against the very principle of parliamentary democracy. After all, the defining criterion of parliamentary democracy is that the government is accountable to the legislature and can be voted out of office by it. The parliament (the principal) delegates policy-making powers to the executive (its agent), which then rules with the support of the legislature. But now the subsidiarity control mechanism can reverse these roles.(20) If a NP rejects an initiative on the grounds of it breaking the subsidiarity principle, it will then effectively adopt a different stand from the body (the government) which it supposedly controls.(21) (Langdal 2003) This could be potentially damaging for the government that has been consulted in drafting the initiative (and has probably already discussed this initiative in the Council).

The second problem is that concerns over subsidiarity can be very difficult to separate from concerns about the policy contents of the initiative. The mechanism can be used by a parliament that simply does not agree with a certain initiative, disguising its concerns as a violation of the subsidiarity principle (Langdal 2003: 37; Vergés Bausili 2002: 16). Thirdly, the process is an entirely voluntary one, and it is very likely that NPs will use it with varying degrees of interest. If parliaments have few resources available (as is the case, for example, in most of the new member states(22)), then investing scarce resources in checking subsidiarity is probably not on top of the list for MPs. (Donnelly and Hoffmann 2004: 3) Indeed, as is the case with overall scrutiny of the government in EU matters, it is probable that only a minority of NPs will take this scrutiny process seriously, subjecting most legislative initiatives to careful examination.

This mechanism will therefore put demands on exchange of information between NPs (for example, through COSAC)(23), as each parliament will need information if the other legislatures are planning to submit opinions stating that the initiative is in breach with the principle of subsidiarity. And finally, even if NPs could muster the required amount of votes for showing the ‘yellow card’, the Commission still holds the ultimate power in the process and can ignore the NPs’ opinions. Giving NPs the power of veto (‘the red card’) would thus have provided national MPs with a considerably stronger incentive for taking the ‘early warning system’ seriously. However, it is understandable why the ‘red card’ alternative was not chosen as it could have provided national parliaments a (potentially) effective mechanism for blocking a significant amount of EU legislation.

The ‘early warning system’ is unlikely to have much significance. It may encourage the Commission to pay more attention to justifying its proposals, and it may stimulate tighter control of governments by individual NPs, but it is very probable that the mechanism will be used only very seldom.(24) It is a relatively harmless procedure, primarily designed to inject legitimacy into the EU policy process: “It was a commonly held view among member state policy makers that national parliaments were key in strengthening the democratic legitimacy of the EU by bringing it ‘closer to the citizens’. It was thus seen as a logical and widely accepted argument that the political institutions that were seen to have suffered most from ever more transfers of sovereignty to the European level – national parliaments – should be entitled to have a say regarding the application of the principle of subsidiarity, putting – if deemed necessary – a brake on the appropriation of policy-making competencies by the Commission.” (Rittberger 2004: 27)

Moreover, it must be emphasized that the proper implementation of the subsidiarity principle is only one part of the general problem of ‘creeping competence’, and hence even effective use of the ‘early warning system’ cannot alone put brakes on centralization. After all, subsidiarity applies only in the exercise of conferred powers that are either shared or complementary: the principle has no right to challenge the existing *acquis communautaire*, nor the Commission’s right of initiative.(25) Also the image of Commission, EP, and the ECJ as institutions constantly stretching and overstepping the limits of their powers is somewhat outdated. As Vergés Bausili (2002: 16) summarizes: “the early warning system can be more accurately pictured as a response to legitimacy issues than to strictly competence matters.”

Having examined the two main changes in the Constitutional Treaty that concern national legislatures, the next section shall analyse the institutional implications of the various policy instruments dubbed as ‘soft law’. While the Open Method of Coordination (OMC) and other forms of (primarily intergovernmental) policy coordination are largely separate processes from the Constitutional Treaty, their growing relevance in the EU warrants an analysis of their consequences for NPs. It will be shown that so far NPs have remained marginalized in these processes, and that the increased use of OMC and other forms of policy coordination present a serious challenge to NPs.

## 4. The Bad News: Soft Law And Policy Coordination <sup>↑</sup>

When describing how the EU works, scholars have in recent years increasingly relied on the concept of ‘multi-level governance’. The basic tenets of this approach are that (i) decision-making competencies are shared by actors at different levels, sub-national, national and the European level; (ii) collective decision-making and pooling of sovereignty among member states involves a significant loss of control for individual national governments; and (iii) the political levels or arenas are interconnected, with policy choices on one level dependent on decisions taken at other levels



(Hooghe and Marks 2001: 3). The core of multi-level governance consists of intergovernmental negotiations, with extensive policy coordination carried out between bureaucrats and ministers in the hundreds of working groups and committees<sup>(26)</sup> operating under the auspices of the Commission and the Council (Benz 2003).

While intergovernmental policy coordination has been a feature of the EU's decision-making system throughout the history of integration, such informal policy coordination has become much more prominent since the early 1990s. The European Employment Strategy (EES) adopted at the Essen European Council in 1994 and the coordination of national economic policies agreed in the Maastricht Treaty extended this coordination to two highly salient issue areas of domestic politics. And, the Open Method of Coordination became officially a part of EU jargon at the Lisbon European Council in 2000. OMC has four main components:

1. fixed guidelines set for the EU, with short-, medium-, and long-term goals;
2. quantitative and qualitative indicators and benchmarks;
3. European guidelines translated into national and regional policies and targets; and
4. periodic monitoring, evaluation and peer review, organized as a mutual learning process.

In recent years OMC (together with other forms of policy coordination) has been applied to a broad range of policies, including employment, social policy, environment, taxation, immigration, research, transport, working time, social protection, education, social infrastructure, regional cohesion, and social inclusion.

The increasing use of OMC and other forms of informal, non-binding, primarily intergovernmental 'soft law' instruments needs to be understood in the context of the sensitive question of dividing competencies between the EU and its member states. European integration has reached the stage where the core areas of welfare state, such as social policy, employment, and education are starting to be affected. In these policy areas (that are both money-intensive and touch core areas of national sovereignty) it is very difficult to build the needed consensus among national governments for transferring policy-making authority to the European level – hence the resort to intergovernmental policy coordination. The national governments want, on the one hand, to achieve highly-valued policy objectives, such as reducing unemployment and making their economies more competitive, while on the other hand, they are not willing to cede formal sovereignty to the Union. The Commission meanwhile sees these new modes of governance as a way to expand EU's competence in the face of resistance from the member states. (Héritier 2002; Borrás and Jacobsson 2004)

The literature on OMC and other forms of soft law instruments – or 'new modes of governance' – is already quite extensive.<sup>(27)</sup> This literature has so far produced two main findings. First, it is still too early to make any definitive assessments of the success of OMC. Nevertheless, while the impact of OMC varies a lot between policy areas, scholars usually point that, unlike top-down supranational legislation, it is flexible and (supposedly) respects subsidiarity and national autonomy. The downside of this flexibility and non-binding nature of outputs is that the EU has few if any means to make the national governments follow its recommendations. (Héritier 2002; Scharpf 2002; Radaelli 2003; Régent 2003; Eberlein and Kerwer 2004; Borrás and Greve eds. 2004)

However, the more important findings in terms of NPs are those concerning the input of various ‘stakeholders’ in the process. OMC has strengthened the leadership role of the Council and the European Council (where much of the policy coordination takes place), intruding thus on Commission’s right of monopoly, but on the other hand the Commission(28) has a central role to play through its role as the institution setting objectives and issuing guidelines and recommendations to national governments. The EP has until now been effectively marginalized, and, more worryingly, the contribution of local and regional actors, often identified as the main stakeholders in these processes, has so far been quite disappointing. At the national level OMC seems to be the preserve of a fairly small circle of civil servants that possess expertise on the issues. As OMC and all forms of soft law policy coordination are primarily intergovernmental in character(29), NPs are thus from a constitutional perspective in a strong position to influence the proceedings. However, this applies only if they are willing and able to control their governments in these matters (Hodson and Maher 2001; de la Porte and Pochet 2003; Jacobsson and Vifell 2003; Radaelli 2003; Régent 2003; Borrás and Jacobsson 2004; Eberlein and Kerwer 2004).

Significantly, the available evidence indicates that NPs have failed to make an impact in OMC and related processes. Examining policy coordination in employment policy, Kerstin Jacobsson and her colleagues show that National Action Plans (NAP) largely escaped parliamentary scrutiny or debates. To be sure, NPs have been informed about NAPs, but often after they have already been produced and sent off to Brussels. In some exceptional cases (Portugal, Ireland), national MPs did demand more information, and there were some examples of opposition parties using EU’s recommendations to support their own claims (Jacobsson and Schmid 2003; Jacobsson and Vifell 2005). While there are no other studies detailing the contribution of NPs, it is noteworthy that domestic legislatures are hardly even mentioned in other publications on OMC. Therefore it is easy to concur with Radaelli (2003: 50) who argues: “Although there is some preliminary evidence of limited technocratic-political learning, the potential in terms of participation, openness, real transparency, increasing visibility in the domestic media and parliaments – in a word, the democratic aspects of the process – has not been fulfilled.”

There are three main reasons why NPs have failed to make an impact under OMC. First, the whole process is by its very nature intergovernmental, with primarily civil servants responsible for drafting national programmes and presenting them in Brussels.(30) National MPs are informed of these preparations, but far too often this happens much too late. Secondly, national MPs may find it hard to follow OMC processes. Unlike normal EU legislation, OMC and other forms of policy coordination do not often have any fixed deadlines (“there is no clear beginning or end”) or even rules guiding the behaviour of the various actors. Given the intergovernmental or informal nature of OMC, there is also (at least in some NPs) procedural ambiguity about how to process these things in parliament and domestically in general (Jacobsson and Vifell 2005). For example, what are the rights of the national parliaments to receive the relevant information and documents, and how are these to be processed in the legislature. Hence it might be that NPs have simply not learned yet how to contribute to OMC issues, and that their contribution will become stronger over time. And thirdly, it appears that the actual impact of OMC and other forms of informal policy coordination has so far been relatively modest, if not even inconsequential, in many policy areas. As a result, national parliamentarians have not found it worthwhile to spend their precious time on scrutinizing such processes.

But, the challenge posed by intergovernmental policy coordination deserves to be taken very seriously. While the EU is not a fully-fledged federation, its multi-level political system resembles closely the cooperative federalism characteristic of many federal states. Indeed, OMC and other forms of policy coordination are classic examples of cooperative federalism, with common objectives defined by member states together with the Commission and/or the Council, monitoring by the EU institutions (federal level), and implementation and choice of instruments for meeting the objectives delegated to member states. Importantly, cooperative federalism is almost exclusively intergovernmental in character, and thus it is often called executive federalism.

Regardless of how effective state parliaments are in controlling their governments, executive federalism concentrates power in the executive branch (Watts 1999: 57-59). For example, in Australia cooperative federalism has resulted in a proliferation of intergovernmental committees and working groups. The ministerial meetings are characterized by low openness and transparency and reliance on informal, but still politically binding, procedures and decisions. State parliaments have often voiced complaints about being sidelined in the negotiations. Moreover, in order to make decision-making possible in the first place, decisions are increasingly taken by (qualified) majority voting which further reduces the effective sovereignty of the states. (Painter 1998) Germany provides another good example. The role of the *Länder* in the implementation of federal laws has resulted in extensive intergovernmental cooperation, with a total of over one thousand working groups and committees. Again, the *Land* parliaments have seen their role weaken due to intergovernmental cooperation (Börzel 2000, 2002). Similarities with the EU are obvious, and without more active participation of NPs, the alleged deparliamentarisation caused by EU will be reinforced through the increased use of executive federalism in the Union.

The final section of this article will summarize the main arguments and also makes a set of recommendations on how to improve the involvement of NPs in EU governance.

## Conclusion <sup>↑</sup>

While most national parliaments have been rather late adapters to integration, there is no doubt that they do now exert tighter scrutiny on their governments than still a decade ago, and that this positive trend should not be reversed. The Constitutional Treaty does its share in facilitating a stronger role for national legislatures, but in the end it is up to national MPs themselves to decide to what extent they want to become involved in EU matters.

Despite facing similar problems, and despite parliaments learning best practices from each other (as happened in the case of the enlargement in 2004 when the parliaments of the new member states studied the scrutiny systems in the 'old' EU countries), it is likely that parliaments will not produce a uniform response to the new constitutional provisions. After all, there are quite notable differences between the political systems and/or political cultures of EU member states. Some parliaments have throughout their recent history placed more emphasis on scrutinizing the government's legislative initiatives (for example, the Nordic parliaments), while in other countries the MPs understand their role quite differently (see Maurer and Wessels eds. 2001). Moreover, comparative research indicates that the level of scrutiny depends partly on non-institutional factors, such as public opinion on integration, the type and strength of the government (the share of parliamentary seats it controls, the unity of government parties, and the resulting changes in government/opposition dynamics) and the salience of issues on the EU's agenda (Holzhacker 2002; Raunio 2005).

The changes included in the Constitutional Treaty will give NPs much better access to information. National MPs shall receive more documents from the European level, and these documents will be sent directly to NPs at the same time as to national governments. Nevertheless, NPs still do not enjoy automatic access to several types of documents. As a result, the obligation to send documents to NPs could in the future be extended to cover basically all documents used in making decisions in EU institutions, including documents on Common Foreign and Security Policy (CFSP) and those prepared by member states for the European Council.

Also the decision for the Council to meet in public when acting as a legislative body is a step forward, allowing both parliamentarians and the citizens at large to witness what ministers do in Brussels. The logical extension of the new constitutional provisions would be that in the future Council would also process non-legislative items in public. In order to give NPs sufficient time to deal with issues, the Council should also make its work more systematic, with no urgency procedures or other short-track options.<sup>(31)</sup> Better organisation would increase the legitimacy of the Council and provide reassurance to the voters about how the EU institutions work and how their ministers carry out their duties.<sup>(32)</sup>

Secondly, the ‘early warning system’ established for monitoring compliance with the subsidiarity principle will increase the involvement of NPs in the EU’s policy process. It can also have a spill-over effect, with national legislators from now on paying more attention to EU matters in general. However, this mechanism was mainly introduced in response to legitimacy concerns, and it is very likely that its impact will remain modest. Indeed, if the NPs aim to make efficient use of the ‘early warning system’, they will need to invest substantially more time and resources to processing EU matters.<sup>(33)</sup>

The extended use of OMC and other forms of intergovernmental policy coordination at least partially cancel out the positive constitutional developments. The leaders of the EU need to attain desired policy objectives, such as employment, economic growth, and indeed combating terrorism, but they (and also the public) are reluctant to transfer formal decision-making authority in such matters to the European level. Hence the national governments have increasingly resorted to various types of soft law instruments for achieving their goals. But, here the EU is facing a trade-off between output and input legitimacy. In cooperative or executive federalism, civil servants and ministers are responsible for coordinating national policies. However, the decision process is removed from the public sphere to intergovernmental meetings taking place behind closed doors. As a result, cooperative federalism weakens the transparency of collective decision-making and, consequently, the accountability of the representatives. Cooperative federalism by design thus emphasises output legitimacy at the expense of transparency and parliamentary accountability.

To facilitate parliamentary involvement in OMC and other non-binding forms of intergovernmental coordination, such ‘soft law’ matters should be processed by NPs using the same procedure that is reserved for scrutinizing the Commission’s legislative initiatives. This would mean that ministers would be forced to explain their actions before parliamentary committees and in the plenary (where such a requirement exists), with MPs having the chance to put questions to the ministers or other government representatives travelling to Brussels (de Búrca and Zeitlin 2003; Jacobsson and Schmid 2003). While MPs and parliamentary civil servants may object to this by saying that their desks are already full without having to process such non-binding matters, one must keep in mind that policy coordination is to an increasing extent used in questions that are highly salient for most MPs – such as employment policy, economic policy, social policy, and pension reforms. Efficient scrutiny of such matters is thus significant also in terms of national legislation, as the policy choices adopted at the European level increasingly impact on and constrain member states’ domestic politics. Hence

parliamentarians have both an electoral incentive and a policy incentive to engage themselves in such questions.<sup>(34)</sup>

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Much of the intergovernmental coordination in the EU is carried out at the very highest political level in the European Council, particularly so in foreign policy and in fixing the EU's long-term priorities in economic policy. The 'conclusions' of the European Council have increased rapidly in length and encompass basically all conceivable policy sectors.<sup>(35)</sup> Also the Constitutional Treaty will arguably strengthen the role of the European Council. This may not appear problematic for the NPs. After all, in most issues the European Council still decides by unanimity, and hence NPs can, at least in theory, veto any proposals they do not like. However, in reality the situation is more complicated. In order for NPs to exercise meaningful *ex ante* control on their governments in the European Council, the agendas of the Summits would have to be available well before the European Council convenes, and the agendas should not be changed after they have been published.<sup>(36)</sup> Until now the agendas of the European Council have often been finalized far too late and have even changed during the course of the meetings. Particularly in such situations NPs may not want to *ex post* veto the decisions of the European Council, especially as this might jeopardize the future influence of the country in EU negotiations, and because this could embarrass the national government, both in the European context and in national media. Hence effective parliamentary scrutiny of the Summits requires that the European Council works on the basis of fixed agendas that are published well in advance of the meetings.<sup>(37)</sup>

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## Endnotes <sup>↑</sup>

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(\*\*) At the time of writing this article (June 2004), the fate of the Treaty remains unclear. All references to the Treaty here are to the 'final' version (Treaty establishing a Constitution for Europe) published in the *Official Journal of the European Union* 2004/C 310/01.

(1) Measuring the powers of parliaments is an inherently difficult task, and hence such arguments about 'the decline of parliaments' need to be treated with necessary caution.

(2) This was not surprising, given that out of the 105 members of the Convention, 56 represented NPs, 28 national governments, and 16 the European Parliament.

(3) Treaty of Nice, *Official Journal* C 80, 10 March 2001.

(4) Laeken Declaration – The Future of the European Union, The Laeken European Council, 14-15 December 2001.

(5) The WG was convened on 26 June 2002 and it submitted its report on 22 October 2002. The WG was chaired by the British Labour MP, Gisela Stuart, and it held nine meetings. For detailed information on the WG and plenary debates on the role of NPs, as well as on the activities of national parliamentarians in the Convention, see Brown (2003) and Rizzuto (2003).

(6) COSAC meets once every six months in the member state holding the Council Presidency, bringing together delegations from the national parliaments' European Affairs Committees and from the EP. Its decisions are normally taken by consensus and they are not binding on NPs or on EU institutions. However, in recent years COSAC has been reforming its organisation and decision-making. COSAC adopted its new rules of procedure in Athens in May 2003, and these allow for contributions to be passed with 3/4 of votes cast (which must also constitute at least half of all votes). As of 2004, COSAC also has a Secretariat in Brussels.

(7) See in particular the plenary debates held on 28 October 2002 and on 17-18 March 2003. The exception was the idea of “a European week”. According to the WG IV’s final report, “A European week should be organised each year to create a common window for EU-wide debates on European issues in every Member State.” (European Convention 2002a: 15)

(8) For information on research services in European legislatures, see Robinson (2002).

(9) Having too much information is – at least in some member states – part of the problem, as MPs often find it very difficult to identify the important points from the mass of documents they receive. In addition, NPs should receive information that enables them to understand the consequences of the initiatives, particularly concerning their linkage with other policy questions and their long-term effects at both national and European levels. While NPs do receive such information both from the Commission (in the text of the initiatives; particularly since 2003) and in the majority of the member states from their government (usually in the form of a memoranda or a summary accompanying the legislative proposal), national MPs do often find it difficult to grasp the broader implications of the legislation they are scrutinizing.

9a It should be emphasized, however, that these non-legislative documents are already easily available, for example from the Commission's website.

(10) “The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.”

(11) There was also a small change concerning decision-making in the Council. The Protocol attached to the Amsterdam Treaty had stated that six weeks shall elapse between a legislative proposal being made available in all languages to the EP and the Council and the date when it is placed on a Council agenda for decision (subject to exceptions on grounds of urgency). The new Protocol reads: ” A six-week period shall elapse between a draft European legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure. Exceptions shall be possible in cases of urgency, the reasons for which shall be stated in the act or position of the Council. Save in urgent cases for which due reasons have been given, no agreement may be reached on a draft European legislative act during those six weeks. Save in urgent cases for which due reasons have been given, a ten-day period shall elapse between the placing of a draft European legislative act on the provisional agenda for the Council and the adoption of a position. ”

(12) The WG on national parliaments had recommended in its final report that “Council should legislate with open doors. Policy coordination as well as other activities should also be carried out with open doors as much as possible.” (European Convention 2002a: 3-4).

(13) When addressing the French National Assembly on 3 February 1994, the Foreign Minister Alain Juppé had expressed his hope that NPs would be empowered to challenge EU laws on the grounds that they violated the subsidiarity principle. (Rittberger 2004: 26) While many of the proposals calling for a chamber of national MPs had argued that such a body should have a role in monitoring the compliance of EU legislation with subsidiarity, the kind of mechanism that emerged during the Convention was by and large a novelty.

(14) In the Protocol on Subsidiarity included in the Amsterdam Treaty, the Commission was obliged to carry out wide internal and external consultations before publishing a legislative proposal, to justify each initiative in the preambles of its documents, and to ensure that financial and administrative impacts of the initiatives are kept to a minimum.

(15) National legislatures can not issue opinions on whether the initiative infringes the subsidiarity principle after the six weeks have elapsed. Thus NPs can not act if the Council or the EP or the Conciliation Committee subsequently amends the initiative in such a way as to raise concerns about it violating the subsidiarity principle. However, it is probable that this will not constitute a serious problem.

(16) An amendment discussed in the Convention proposed a collective right of veto to NPs: if 2/3 of parliaments rejected a proposal on the grounds of subsidiarity principle ('the red card'), then the Commission would have been forced to withdraw it (Langdal 2003: 27).

(17) Moreover, according to the Protocol the Commission is only required to give 'reasons' for its decision. A more stringent wording – for example, with the Commission required to give detailed reasons for its decision – would have provided a stronger incentive for the Commission not to abuse its powers.

(18) ECJ has at least once ruled in such a case: the German government commenced an action on behalf of the Bundestag which believed that the EU did not have the competence to introduce the Tobacco Advertising Directive (Case C-376/98 *Germany v. European Parliament and Council (Tobacco Advertising Directive)* [2000] ECR I-8419). I am grateful to Adam Cygan for pointing this out to me and for providing me information on the other legal aspects of the 'early warning system'.

(19) There appears to be broad consensus, also among national parliamentarians, that the overwhelming majority of Commission's legislative proposals are not problematic in terms of the subsidiarity principle.

(20) This was also the main problem with the proposal (that was discussed in the Convention) of including representatives of NPs in national delegations when the Council acts in legislative capacity (Rizzuto 2003: 2).

(21) However, it is the Commission that publishes the initiative. Hence there is also the possibility that if the government does not agree with the actual policy contents of the initiative, and finds itself on the losing side in the Council, it will ask the parliament to contest the initiative on the grounds of subsidiarity.

(22) However, on the other hand the new member states have just completed the implementation of the *acquis communautaire*. Hence they have strong recent administrative and political experiences of dealing with EU legislation, and this might make them rather well-equipped to use the 'early warning system'.

(23) The Conference of the Speakers of EU Parliaments established in its annual meeting in Athens in May 2003 a working group ("The Athens Group") on how to strengthen interparliamentary cooperation. Another working group operating under the leadership of the Swedish parliament, IPEX (Interparliamentary EU Information Exchange), was set up to provide a platform for the electronic exchange of EU-related information between NPs, including information concerning monitoring subsidiarity.

(24) An alternative mechanism that has been suggested would bring NPs together once a year to comment on the Commission's annual legislative programme, and to decide (perhaps by QMV) which initiatives should be discarded (Maurer 2002a,b). However, this would confuse the lines of accountability at the European level as the Commission is accountable to the EP, not to the national legislatures.

(25) Article 11 (3) of the Constitutional Treaty states that "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the



objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

(26) The role of committees, or ‘committee governance’, has recently received increased attention in EU studies. Much of this work, owing a debt to the writings of Habermas, argues that governance by committees represents “deliberative supranationalism” or “democratic experimentalism”, with a common will emerging through a process of deliberation where new perspectives may be taken on board and preferences are altered. However, there is a trade-off between efficiency and democracy, as committees meet behind closed doors, with low transparency and debates insulated from the public sphere, and decision-making is limited to a narrow group of civil servants. Regardless of how one perceives the role of committees, they do indeed have a lot of influence at the European level, as their outputs are almost identical with eventual Council decisions.

(27) See in particular the material available at the homepage of the OMC Forum at the European Union Center of the University of Wisconsin-Madison (<http://eucenter.wisc.edu/OMC>) and the literature mentioned in Borrás and Greve eds. (2004).

(28) The role of the Commission in OMC and other forms of policy coordination varies considerably between policy areas, with the Council often adopting the leading function instead of the Commission.

(29) However, in addition to the central role of the Commission and/or the Council, in several instances the non-binding policy recommendations are adopted by QMV instead of unanimity.

(30) Another related and highly important question, which lies beyond the scope of this article, is the extent to which these civil servants are subject to control by their ministers or even by their immediate superiors in the ministries.

(31) See, for example House of Commons (2002).

(32) See House of Lords (2001).

(33) Effective monitoring of the subsidiarity principle also necessitates organisational adaptation within NPs. In addition to the legislatures probably needing more secretarial staff for analysing the contents of the Commission’s proposals and for producing information independent of the government, the parliaments will also have to take decisions on the division of labour. Shall monitoring subsidiarity be delegated downwards to specialized committees or will it be centralized to the committee responsible for EU matters? (Langdal 2003: 42; Maurer and Kietz 2004: 6-7) Information on the organisational solutions adopted by the national parliaments is available at COSAC’s website (<http://www.cosac.org/en/info/earlywarning/>).

(34) This way national legislators would also have the possibility to learn about developments and policy choices in other countries, hence making it possible for national parliaments to produce better laws in the future (Duina and Oliver 2005). After all, this is a key argument used in favour of OMC.

(35) However, it must be emphasized that the Summits are preceded by lengthy negotiations between sectoral ministers and civil servants from the member states. The European Council therefore actually ‘decides’ (or debates) only a minor share of the issues listed in its conclusions.

(36) The obvious exceptions could be major events, such as terrorist attacks or natural disasters that occur after the agendas have been published and require action from the European Council.

(37) The current system of the rotating Council Presidency has made the situation even worse by

introducing an element of further unpredictability and discontinuity into the work of the Union. The Presidencies tend to produce a peak of activity towards the end of each six-month period (in June and in December) as there is a pressure to reach agreement before handing the Presidency over to another member state. A further problem is that, particularly in June, the European Council convenes at a time when parliaments in some countries are not in session.

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