

The European Council and National Parliaments in the EU:

The Limits of Parliamentary Scrutiny

Points of Discussion

- Political Hegemony of the European Council in the Crisis
- Four basic Models of Parliamentary Involvement
- Limits of traditional parliamentary models

Dossier on the basis of: Hoppe, Alexander and Wessels, Wolfgang (work in progress): The European Council and Parliamentary Democracy: Investigating Models of Parliamentary Scrutiny

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Introduction: Executive Dominance Reinforced?

National Parliaments and their involvement in the EU polity have been a major focus of academic and political debate in the last decades. In view of the institutional evolution of the EU system, the general assessment has been to classify national parliaments as ‘latecomers’ or even ‘losers’ in the EU multilevel arrangement (Maurer and Wessels, 2001). The Lisbon Treaty has attempted to upgrade their role in the EU by different innovations, one of the most debated being the new ‘early warning mechanism’ (EWM) allowing parliaments under certain restricted conditions to influence the EU’s ordinary legislative procedure. While the mechanism was regarded an important step to fight the democratic deficit in the EU, its re-examination in 2015 shows that it has to be considered a failure - with only six ‘reasoned opinions’ having been issued in 2015 (for evaluations of the EWM see Cooper, 2012; De Wilde, 2012; Hoppe, 2015; Bokhorst et al., 2014). National parliaments in the Eurozone have additionally seen their budgetary autonomy being even more reduced in the last decades, as they had to agree to the so-called ‘six pack’ and ‘two pack’ regulations partly amending the Stability and Growth Pact (Art. 121 & 126 TFEU) and the fiscal compact (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) (Auel and Höing, 2015, p.1185). However, the claim to reinforce the role of national parliaments remains on the political agenda. In his proposals for reforming the EU, the British prime minister has asked for a veto power for national parliaments in the ordinary legislative procedure, a wish his European colleagues seem to be ready to grant (Cameron, 2015).

In contrast to this deficit of influencing the EU legislative output and at the same time to this further loss of power most observers (see e.g. Curtin, 2014; Scharpf, 2014) and actors (see von Rompuy, 2014) acknowledge a further rise in the power of the European Council especially via its central role in the management of monetary policies. Many scholars have for long identified an executive dominance by the European Council in the political system of the EU (Wessels, 2016; Pütter, 2014; Curtin, 2014; Alexandrova et al., 2014). Especially its role as an evolving ‘gouvernement économique’ in shaping and making the economic governance has faced severe critique (see Wessels 2016: 187 -209; Curtin, 2014, p.9). Trends towards some kind of ‘post-democratic executive federalism’ (Habermas, 2012, p.12) have affected the powers of the legislative bodies of the Member States.

National Parliaments’ involvement in EU Politics: Four basic models

From the Maastricht Treaty onwards, national parliaments have reacted to the apparent losses of traditional powers. Whenever possible, they created and partly exploited institutional opportunities to scrutinize national governments and influence their positions in European Council negotiations (Maurer, 2002; Winzen, 2012; Maurer and Wessels, 2001; Rozenberg, 2012; Raunio, 2005). The

provisions of the Lisbon Treaty, especially Art.12 TEU and the subsidiarity protocol, have generated new opportunities for parliaments.

Box 1: Article 12 TEU

Article 12 TEU

National Parliaments contribute actively to the good functioning of the Union:

- (a) Through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
- (b) By seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;
- (c) By taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that treaty;
- (d) By taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;
- (e) By being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;
- (f) 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.

With these improvements of parliaments' positions in EU politics by the Lisbon provisions, national parliaments were generally perceived to have gained ground. However, with the onset of the Eurozone crisis, this situation has changed considerably as agreements of the Heads of State or Government in the European Council or in the Euro Summit have significantly weakened the budgetary and fiscal sovereignty of national parliaments. Backed by the perceived need for fast and high-level decisions in light of the sovereign debt crisis and being able to use their key position on both levels in the multi-level set-up of the EU, the national leaders have extended their power vis-à-vis the competences of national parliaments. This has provoked a wave of critique and a re-emergence of debates on a possible

democratic deficit the EU is suffering from. Four models of involvement of national parliaments in EU politics can be identified.

Model 1: National Scrutiny

The first model envisages national parliaments' profound involvement in forming and scrutinizing their governments' positions in the European Council. Scholars define a "broad range of activities by which national parliaments – each in its own way – try to increase their influence and control of their governments' positions" (Heffler and Wessels, 2012). By both, shaping governments' positions before European Council negotiations and examining the results afterwards, parliaments ensure a full involvement in the decision-making of the European Council, providing full democratic legitimacy to the HEADS OF STATE OR GOVERNMENT in this institutional setting. While national parliaments can increase their influence on EU politics, they remain settled in the national political arena in contrast to their governments.

Model 2: Multi-Level Players

In contrast to this indirect involvement via their national governments, parliaments are attributed a direct institutional involvement in the second model, turning into actual multi-level players just as the national governments. One form of this kind of involvement is the early warning mechanism (EWM) in the subsidiarity procedure; another one is offered for system making in the preparatory phase of the ordinary treaty revision procedure (see Art. 48(2) and 48(3) TFEU) and also for sensitive topics in the area of freedom, security and justice (Art. 12 c TEU, Art.70, 88, 85 TFEU).

Model 3: Parliaments as Veto-Players

The third model reminds us that for system-making each national parliament has a veto power. For ratifying treaty revisions – in both the ordinary and simplified procedure (see for the later form Art. 48(7)), for accessions (see Art.49 TEU) and for the decision on 'own resources' – the treaty formulation referring to the approval or ratification 'by the Member States in accordance with their respective constitutional requirements' implies the necessity to have the agreement by each national parliament. In these cases the heads of national government representing the 'masters of the treaty' (BVerfG, 2009, par.150) must assure the consent by their respective parliament.

Model 4: Inter-parliamentary Cooperation

The last model stipulates cooperation between national parliaments and the European Parliament (EP) to compensate for the ever more important and uncontrollable role of national governments in, and

via, the European Council: “In a coordinated division of labor, parliaments at both levels try to jointly exercise a comprehensive ex ante and ex post scrutiny and control of the work of the EU’s chief executives in the European Council” (Heffttler and Wessels, 2012). In this view, the EP and national parliaments are not, as is often argued, competitors for competences but cooperate in order to improve the Union’s legitimacy and restrict the discretion of national executives in Council negotiations. Therefore, an empowerment of both national parliaments as well as the EP would be the logical necessity in order to pursue this approach. Following treaty procedures the cooperation in a convention for treaty reform (Art. 48(3) TEU) might be a case in point. Several forms of inter-parliamentary cooperation have institutionalized in the last decades, such as the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC). Next to COSAC, which has assembled representatives of European parliaments in 56 meetings since 1989, two forms of cooperation with specific thematic foci on foreign- and security policy and on economic policy have been developed: the inter-parliamentary conferences on Common Foreign and Security Policy (CFSP) (Protocol no. 1 TEU), and on Stability and Economic Coordination and Governance in the European Union (Art. 13 TSCG). Parliamentarians have conducted seven meetings on the CFSP since the creation of the conference in 2012 and six meetings on economic governance since 2013. Stronger forms of cooperation have been envisaged during the EU’s history, such as the proposal of Valérié Giscard d’Estaing to build a ‘Congress’ of MEPs and NPs, electing the president of the European Council (Wessels, 2016, p.115).

Out of date? An assessment of the four basic parliamentary models

National Parliaments’ Scrutiny Power vis-à-vis their Governments in the European Council

Having worked on the new role parliaments need to adopt in order to effectively control their national governments in European Council meetings and Euro Summits, Heffttler et al. find that national parliaments throughout the EU differ considerably in their conduct of scrutinizing their governments. They identify seven different approaches of scrutiny throughout the EU (see Box 2). First, parliaments with ‘limited control’ are rather inactive concerning European Council meetings, “either because the Parliament has reduced rights in EU affairs in general [...] or the majorities in parliament tend to consider that the European Council should remain the only prerogative of their prime minister” (Heffttler et al., 2013, p.9). Second, parliaments which exert ex ante control through expert committees follow a ‘Europe as usual’ approach, as they have adapted the traditional procedure for scrutiny of EU legislation to European Council meetings. The third, ‘expert approach’, is different to the extent that

European affairs committees in the parliaments exert both ex ante and ex post control of the respective governments. A highly different role is pursued by parliaments following the ‘public forum approach’. These parliaments choose public discussion, both before and after European Council meetings, in order to mandate and scrutinize their governments in public. In the fifth approach, parliaments’ “involvement before the European Council meetings is limited and debates take place in the plenary afterwards” (ibid. p.10). This ‘government accountability approach’ is pursued by parliaments without strong mandating powers. In contrast, parliaments pursuing the ‘policy maker approach’ try to exert their influence before the meetings, in order to actively shape the political outcomes. Lastly, the authors identify the ‘full Europeanization approach’ in parliaments that combine all, or most, of the above mentioned different approaches, i.e. public debates and expert committee scrutiny, both before and after European Council meetings (ibid., p.10).

Box 2: Approaches of Scrutiny (based on: Hefftler et al, 2013)

Seven empirical approaches of National Parliamentary Scrutiny

1. Limited Control: Hungary; Luxemburg; Romania
2. Europe as usual: Czech Republic; Estonia; Italy; Latvia; Poland; Slovakia
3. Expert: Belgium; Finland; Lithuania; Slovenia
4. Public forum: Ireland
5. Government accountability: Bulgaria; Malta; Spain; UK
6. Policy maker: Germany
7. Full Europeanization: Denmark

Their study shows that the approaches followed by national parliaments are highly diverse. While some parliaments have truly upgraded their powers vis-à-vis their governments, others still have a weak influence only in EU-political issues, even though there is a general trend towards becoming more involved. The gap between the strongest and the weakest parliaments is still remarkable, with parliaments in Hungary, Luxemburg and Romania being the weakest and the Danish parliament the strongest regarding EU politics (Hefftler et al., p.9). The economic crisis has the potential to further enhance the differences in strength of national parliaments to control their governments. Especially in countries that are severely hit by the economic crisis, parliaments have lost ground (Auel and Höing, 2015).

Further, the democratic control in this model is by its nature not aimed at the European Council as such, but only at its single constituents, the Heads of State or Government. Parliaments can only assess and possibly sanction the own governments position, role and performance in the negotiations, but they have limited possibilities to influence these negotiations and their outcome. While it is true that mostly the European Council aims for consensus decisions and tries to incorporate all vital national interest of the MS in its decisions, especially in the crisis the power constellation within the European Council was highly unbalanced. This negatively affected the possibility of some Heads of State or Government to influence decisions, showing that the actual power of single national parliaments therefore not only depends on their power-relations to their own government, which they are able to shape and improve themselves, but also on the power-relations within the European Council, which they have no ability to affect.

Parliaments as multi-level-players

While the Lisbon Treaty has brought many fundamental changes to the EU polity, the supposed 'new role' it assigned to national parliaments has been among the most discussed innovations. The new EWM has been considered the allegedly most influential instrument of parliamentary involvement. By giving parliaments the opportunity of checking Commission proposals for their adherence to the subsidiarity principle, the EWM was characterized as an important step for democratizing the Union by some, while others have been skeptical of its impact and success from the very beginning.

From the onset, critics of the new mechanism identified several shortcomings, among others the fact that parliaments could only check for subsidiarity and not actually shape the content of proposals, the short time-span granted for reacting to proposals as well as the increased workload which many parliaments would not be able to cope with (De Wilde, 2012; Bellamy and Kröger, 2014; Christiansen, Högenauer, Neuhold, 2014). Despite these criticisms, at first parliaments indeed used the opportunity to critically assess Commission legislation and state the so-called reasoned opinions which are necessary for forcing the Commission to re-examine the own proposals. Twice since the coming into force of the Lisbon Treaty did parliaments reach the threshold of one-third of reasoned opinions, while only in one of these two cases the proposal was actually withdrawn (Cooper, 2012). However, Figure 1 shows that the number of reasoned opinions has dramatically dropped since 2013 and that especially in 2015 parliaments have made little use of their possibilities under the EWM.

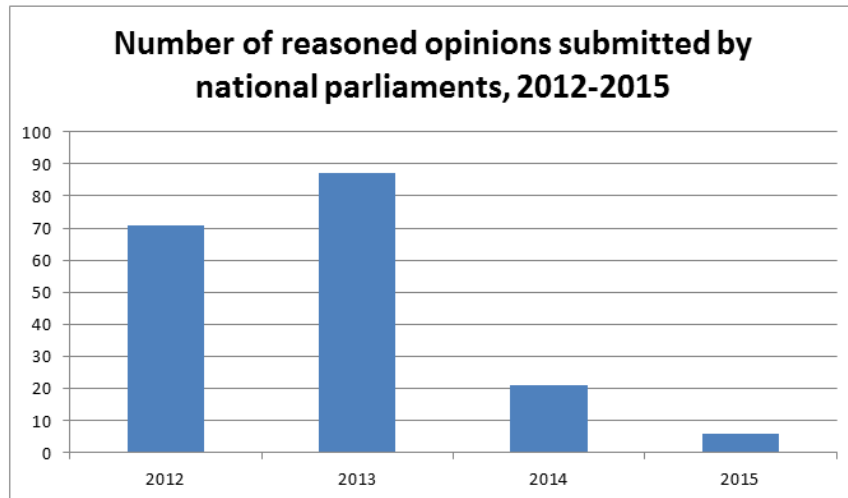


Figure-1'

It shows that the EWM has not contributed to turning national parliaments into multi-level players. While this could have been a first step towards upgrading national parliaments to a level playing field with their governments, parliaments did not substantially alter their conduct of EU affairs.

Inter-parliamentary cooperation: towards multi- level parliamentarism?

Title II of the “Protocol on the role of National Parliaments in the European Union” (Protocol no. 1 TEU) explicitly incorporates inter-parliamentary cooperation in the Treaty. It states that “a 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” but the European Council is not mentioned. For some this institutionalized cooperation between all EU parliaments, including the EP, could turn into a potential mechanism to democratically control the Heads of State or Government in the European Council. But already the formulation of the treaty indicates the limits of this cooperative set up: ‘contributions from this conference shall not bind national parliaments and shall not prejudice their positions’ (Art. 10, Protocol no. 1 TEU). Certainly, the interaction allows for a coordinated exchange of information as well as best-practices, which can help improving the scrutiny of single parliaments. However, neither forum of cooperation has so far developed scrutiny power on its own. While the last bi-annual report of COSAC proves the commitment of parliaments to cooperate, it also reveals divergent interests regarding policy content and a general reservation towards letting COSAC become too influential, both by the EP as well as several national parliaments (COSAC, 2015). These challenges become even more severe especially in the conference on Stability and Economic Coordination and Governance, in which parliaments struggle to even define the scope of policies that should be dealt with under this umbrella and it took the participants more than a

year to arrive on an agreement on something as simple as the rules of procedure (Hoppe, 2015). The current fora of inter-parliamentary cooperation can therefore, despite their uncontested use especially for the exchange of information, not be considered a truly democratizing element. Especially the lack of willingness of different parliaments to meaningfully cooperate by forming strong positions and act as a virtual institution rather than a loose network of different actors diminishes the expectations towards inter-parliamentary cooperation to become a genuine source of scrutiny for the European Council and of legitimacy for European Union politics.

Concluding Remarks

While some national parliaments have gained ground vis-à-vis their Heads of State or Government, there are structural hurdles which will not allow for a fully functional scrutiny at the national level. Governments have an institutional advantage stemming from the institutionalization of intergovernmental decision-making in this highest institution in the EU and can in many cases control the information granted to parliaments. Further, the necessity to find consensus and the necessary relative secrecy in the European Council rules out too strict mandates for the Heads of State or Government and leaves them a considerable leeway for interpreting and framing the decisions taken. Indeed, the efficiency of the European Council is, as has been emphasized by, among others, Wessels and Pütter, an essential prerequisite for a functioning Union and thus has to be incorporated in any approaches on democratic scrutiny. While parliaments, each in its own way and via inter-parliamentary cooperation, have tried to catch up, they fall short of the degree of institutionalization and routine in cooperate decision-making reached in the European Council and it is questionable whether a level playing field will ever be reached between parliaments and governments in this regard.

Given the limitations of traditional approaches to democratically legitimate the European Council, the idea of a new parliamentary chamber consisting of national MPs might be worth reconsideration. Such a chamber could be designed to exclusively scrutinize the European Council as an institution and evaluate its decisions. In this way, the institutional advantage of the European Council could be overcome. Scrutiny would become a major task of the delegates in this chamber, so that more time and, via the institution itself, administrative resources could be dedicated to controlling the Heads of State or Government. Even though this new parliamentary chamber would have to overcome considerable hurdles, as a new Treaty would be necessary and the European Parliament is a strong opponent of this idea, it might be worth bringing the discussion back on the academic and political agenda.

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