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**THE ROLE OF NATIONAL PARLIAMENTS IN THE EU:
THOUGHTS ON ITS AMBIGUITIES AND SHORTCOMINGS**

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Abstract

The Lisbon Treaty provides national parliaments (NPs) with a formal role in the European Union in order to overcome the democratic deficit. Yet, this role rests upon ambiguous grounds and has major shortcomings. After situating the democratic deficit from the perspective of representative democracy, this paper discusses the conceptual, historical and empirical ambiguities of the role of NPs.

Keywords

European Union, national parliaments, democratic deficit, representative democracy

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Abstrakt

Lisabonská smlouva poskytuje za účelem překonání demokratického deficitu parlamentům členských států formální postavení v Evropské unii. Toto postavení je nicméně založeno na nejistých základech a má zásadní nedostatky. Tento článek nejdříve nastiňuje problematiku demokratického deficitu z perspektivy reprezentativní demokracie a následně se zabývá konceptuálními, historickými a empirickými problémy postavení národních parlamentů.

Klíčová slova

Evropská unie, národní parlamenty, demokratický deficit, reprezentativní demokracie

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THE ROLE OF NATIONAL PARLIAMENTS IN THE EU: THOUGHTS ON ITS AMBIGUITIES AND SHORTCOMINGS

Simone Benvenuti

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1. Introduction

Representative democracy is undergoing a profound crisis in Europe. This crisis is not just about the rise of the executives – a typical feature of contemporary democracies since last century – neither it is only about the exceptional democratic backsliding in countries such as Hungary or Poland. Many other widespread symptoms of crisis stand in front of us: rise of populism, worrisome increased electoral abstention signalling the loss of confidence by voters in the representative system, demonization of compromise in political culture, etc. In a period of overall “societal” crisis, we also witness the apparent inability of systems of representative democracy to bring their promises, and the general, *de facto* loss of power by Parliaments as the quintessential institutions of representative democracy. While the roots and the dimensions of this crisis are many and multifaceted, one factor stands out visibly: the bearing of supranational integration, which involves the relocation of decision-making beyond national borders, notably beyond national parliamentary precincts. This is coupled with the inadequate democratic underpinning of the EU institutions as one of the dimensions of the long-discussed democratic deficit.

To overcome this and bridge the deficit, the Lisbon Treaty includes representative as the overarching democratic principle of the Union.¹ Under this umbrella, it endows the European Parliament with new powers. It also recognizes a role to NPs for the sake of re-parliamentarization.² The Treaty on the European Union (TEU) devotes five articles to NPs, the Treaty on the Functioning of the European Union (TFEU), seven, and annexed Protocols 1 and 2 deal directly with NPs.³

¹ Article 10(1) TEU.

² Article 12 TEU.

³ Article 5 TEU, which deals with the principle of conferral, bestows National Parliaments with the function of ensuring compliance with subsidiarity. Besides this important indeed, but specific function, two more articles of the TEU included in Title II on “Democratic principles” of the Union are more general in character. Article 10 underlines the relevance of democratic accountability of State Governments towards their Parliaments. According to Article 12, National Parliaments contribute to the «good functioning of the Union». The same article then lists different rights and powers (including those relating to subsidiarity) of National Parliaments according to the TEU, the TFEU and the two annexed Protocols. As to the TEU, one should also mention article 48 and 49, defining the power of National Parliaments as regards Treaty revision and membership applications.

Table 1. – National Parliaments in the Lisbon Treaty

TEU	<i>Title I Common provisions</i>	Article 5	National Parliaments ensure compliance with the principle of subsidiarity (Protocol 2)
	<i>Title II Provisions on democratic principles</i>	Article 10	Member states are represented by their executives, which are democratically accountable either to their national Parliaments or to their citizens
		Article 12	National Parliaments contribute actively to the good functioning of the Union (list)
	<i>Title VI Final provisions</i>	Article 48	Revision procedure: notification and Convention
		Article 49	Membership application: notification
TFEU	<i>Title V Area of Freedom, Security and Justice</i>	Article 69	Subsidiarity monitoring in the judicial cooperation in criminal matters and police cooperation
		Article 70	Information on evaluation of implementation of AFSJ policies
		Article 71	Information on proceedings Council committee on cooperation in internal security
		Article 81	Opposition to proposals on cross-border implications of family law
		Article 85	Evaluation of Eurojust activities
		Article 88	Evaluation of Europol activities
	<i>Part VII General and final</i>	Article 352	Information on Union implied powers
		Protocol I	Rights of information and interparliamentary cooperation (10 articles)
		Protocol II	Subsidiarity and proportionality (Early warning system) (9 articles)

This legal framework created a brand new area of EU policy engaged with the positioning of National Parliaments in the Union’s architecture. Thus, documents by the European Parliament, the European Commission, and the Council of the European Union address the relevance of National Parliaments for “democratizing” the European Union.⁴

In turn, scholars from both legal and political science fields increasingly devote attention to this topic, encouraged by its practical repercussions. They also devised theoretical typologies explaining the embedding of NPs in the European Union institutional framework.⁵ However, empirical studies able to confirm or invalidate theoretical hypothesis mostly address only certain

⁴ See for example EUROPEAN PARLIAMENT, *The Role of National Parliaments in the EU after Lisbon: Potentialities and Challenges*, March 2017.

⁵ These are the separation, the third chamber, the multilevel parliamentary field and the Euro-national parliamentary model.

jurisdictions, or specific areas or mechanisms and a systemic approach is still lacking. Furthermore, while there has been a blooming of studies on the role Parliaments play, what strikes are the still unclear conclusions on the role NPs *should* play.

Generally, there is a certain enthusiasm for making them crucial actors. To be sure, there is an increasing acknowledgment of the (until now) limited application of the relevant Treaty provisions, and some dissatisfaction even appears in this regard. Yet, it seems there is still widespread strong faith in the ability of such provisions to achieve a functioning system of representative democracy in the EU. Interestingly enough, those studies praising the role of NPs often focus on the most consolidated legal systems, or on long-standing members of the EU, that seem to perform better. A glance at the European periphery conveys a picture that is not that optimistic though. Therefore, one may wonder whether there is ground to question the validity of the Lisbon approach. Are indeed National Parliaments in the EU apt to sustain the “parliamentarization” of the European Union? Are they able to perform this function on an equal standing? If not, what are the consequences on the theorized Euro-national parliamentary system, and what conclusions should we draw?

This paper argues that something is wrong with how the role of National Parliaments in the EU is conceptualized and put into practice. The reason is that such role rests upon ambiguous grounds. On one hand, Parliaments are called to restore representative democracy within the EU. On the other hand, they are called to put into effect the principle of subsidiarity, which *per se* is a tool to safeguard the appropriation of competences – a principle about the functioning of democracy, not a principle of democracy in itself.⁶ National Parliaments are also called to go European playing a role in the supranational arena, but they are by definition the supreme (nation-) State bodies, as such they respond to a (nation-) State logic.

To support the argument that fundamental ambiguities hinder the ability of National Parliaments to actualize representative democracy in the EU, this paper follows three steps. The first is conceptual and provides a theoretical clarification why the involvement of National Parliaments is not able to *autonomously* ground the democratic character of the European polity (section 2). The Lisbon framework does not involve any shift from a centralized decision-making not fully responding representative democratic standards to a decision-making responding to democratic standards. It just achieves a shift from centralized decision-making not fully responding representative democratic standards to centralized decision-making not fully responding representative democratic standards whose deliberative process is more open than before to marginal representative bodies.

The second step is historical and provides an overview of how NPs got involved in the European decision making from the 1970s on, under the stimulus of member states traditionally sceptical towards the common market (section 3). The so-called “anti-marketeer” origins of the attention on NPs, while justified in consideration of the democratic deficiencies of the EU decision-

⁶ There is a huge literature on subsidiarity and its functional and democratic dimensions. See for example M. BARTL, *The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit*, in *European Law Journal*, 2015, 1, pp. 23-43.

making, rule out any possibility to solve the representative democratic deficit there where it stands, opting for the national safeguard of parliamentary competences.⁷

The third is empirical and presents the degree of Europeanization of NPs from the organizational and the procedural perspectives (section 4). It shows that Parliaments are unevenly Europeanized insofar the Europeanization process encounters several limits. It also illustrates how the conceptual and historical dimensions mirror in how NPs used their powers in practice, when they do.

After the three-fold explanation of the ambiguous grounds upon which the role of NPs rests, the article underlines three main downsides resulting from the analysis (section 5). The first is that NPs have little ability to play any function in the European decision-making process. Therefore, one can doubt about their ability to underpin supranational decision-making. Second, whereas they do play a function, they are unable to act “politically”,⁸ in the sense that their participation is prevalently national-oriented (i.e. based on the national-interest logic) or bureaucratic. Third, important asymmetries exist in the so-called Euro-national parliamentary system, endangering member states’ citizens’ democratic equality, which is an overarching principle in article 9 TEU. In the author’s view, the situation described in the analytical part is structural; it might even be among the causes for the electoral backslidings experienced in some European countries; it shows dependence of EU decision-making on de-structured national party systems. The analysis brings to support the possibility to reform the European institutional system towards solutions addressing the European Parliament.

2. Conceptual ambiguities: democratic deficit vs disconnect, input vs throughput legitimacy, government vs. governance

Democratic deficit vs. democratic disconnect

The apparent clarity of the term democratic deficit (within the narrow meaning *ex* section 2) conceals the ambiguous use of the expression “democratic deficit” over time. Seemingly, a document of the *Young European Federalists* association⁹ first coined it at the end of 1970s. Its use related to a political understanding of the European project. It was inspired by a federalist approach, and precisely called into question supranational bodies of the Communities only. Worried by the lack of democratic legitimacy of such bodies, federalists claimed their transformation into democratically legitimized, thus truly political bodies. This approach in part collided with Alan Milward’s thesis on the “European rescue of the Nation State”.¹⁰ For the British historian, the European project aimed at safeguarding national interests and democracies of member states. Therefore, the fact that Communities arrangement left political powers to the States was fully justified. Federalists challenged this stance, insofar they supported the achievement of a European political union. For them, the main avenue consisted in the

⁷ As will be clarified later, this is not a problem in itself, but one can question the tenability of such an approach today, after 40 years of integration developments and in an increasingly globalized world. On the limits of state-centered approaches to crucial political issues in today’s world, see J. HABERMAS, *The Crisis of the European Union: A Response*, Polity, 2013.

⁸ For a meaning of “political”, see J. H. H. WEILER, *In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messiahism of European Integration*, in *European Integration*, 2012, 7, p. 830: «The political deficit [...] is at the core of the democracy deficit. The Commission, by its self-understanding linked to its very ontology, cannot be ‘partisan’ in a right-left sense, neither can the Council, by virtue of the haphazard political nature of its composition».

⁹ B. STRATH, *Still the Europe of Milward?*, Working paper n. 1/2011, UCL, The European Institute, September 2011, p. 8.

¹⁰ A. MILWARD, *The European Rescue of the Nation State*, Routledge, 1999.

“politicization” of European supranational institutions, an approach in the wake of the attempted creation of the European Defence Community that eventually failed in 1954.¹¹ The 1976 reform introducing the direct election of the European Parliament can be seen from this perspective.¹²

After the Single European Act (1986) and the Maastricht Treaty (1992), the expression “democratic deficit” starts to be used in reaction to deepening economic integration and in relation to the introduction of the majority vote in the Council of the EU. The possible, *de facto* loss by member states of considerable portions of their traditional competences, within an institutional setting hardly responding to the requirements of representative democracy, substantially increased the democratic legitimacy gap of supranational decision-making – and the need to bridge it. This became apparent in 1992 after the negative outcome of the Danish referendum on the Maastricht Treaty ratification, which forced some adjustments, and the perilous outcome of the French referendum.

Under these new conditions, “democratic deficit” gains a rhetorical and instrumental flavour contrary to its original meaning and that go together with what Weiler termed as «political messianism» or «telos legitimacy». «[W]hereby legitimacy is gained neither by process nor output but by promise, the promise of an attractive promised land»,¹³ measures to bridge the “democratic deficit” are used to legitimize the expanding internal market (the promised land being a democratic internal market). The achievement of the internal market gains momentum and priority over the political union. Furthermore this new understanding of the concept, pruned of the ideal of a federal political union, ends up in fragmentary, incremental and inconsistent measures supposed to answer to challenges posed by the epochal 2004-2007 enlargement and the pressures of globalization, which exacerbate the internal unbalance between European economic integration and national socio-economic conditions (the so-called “social deficit”).¹⁴ The tricky nature of the post-Maastricht approach stands out from the “always one step behind” or “catching up” problems.¹⁵ Accordingly, measures aimed at democratizing the European polity *follow* the progress of European integration. Logically, this means acknowledging the shrinking role of National Parliaments from active policy-shapers to passive policy-takers.

Over forty years-long period, the expression “democratic deficit” thus lend itself to different meanings and usages from those for which it was first coined. While originally addressing supranational bodies and the need for their politicization/democratization, it ends up addressing national institutions, notably Parliaments and their “involvement” in supranational decision-making. This transformation is well shown by that line of scholarship that prefers the expression “democratic disconnect”.¹⁶ While not new, the metaphor of “disconnect” is more appropriate than “deficit” to depict the current situation in the EU polity. The latter indeed evokes a dearth (absence), whereas strong democratic dynamics (although distressed, from a representative theory

¹¹ The creation of the EDC would go along the creation of a political community provided with its own general assembly, M. ALBERTINI, *L'Europa sulla soglia dell'Unione*, in *Il Politico*, 1985, 4, p. 560.

¹² This reform obviously resulted from a compromise on some aspects. *The history of European electoral reform and the Electoral Act 1976*, pp. 13 ff, and 25 ff.

¹³ J. H. H. WEILER, *In the Face of Crisis*, cit., pp. 825-841.

¹⁴ B. STRATH, *Still the Europe of Maastricht?*, cit., p. 13.

¹⁵ T. RAUNIO, *Always One Step Behind? National Legislatures and the European Union*, in *Government and Opposition*, 1999, 2, pp. 180–202; J. E. FOSSUM, *The Crisis and the Question of De-parliamentarization in Europe*, in V. GUIRAUDON – C. RUZZA – H.J. TRENZ (eds.), *Europe's Prolonged Crisis. Europe's Prolonged Crisis. The Making or the Unmaking of a Political Union*, p. 50.

¹⁶ N. LUPO, *Parlamento europeo e parlamenti nazionali nella “costituzione composita” nell'UE: le diverse letture possibili*, in *Rivista AIC*, 2014, 3, p. 2 ss; R. BELLAMY – S. KRÖGER, *The Politicization of European Integration: National Parliaments and the Democratic Disconnect*, in *Comparative European Politics*, 2016, 2, p. 125 s.

perspective) enliven EU member states. The challenge is therefore to reconnect domestic democratic institutions with supranational decision-making *fora*.

In the same way as the term “deficit”, “disconnect” is not only descriptive, but has also a normative dimension. While “deficit” couples with a bias in favour of a political Union, “disconnect” emphasizes the concern on the State level. Exhausted the federalist momentum – an increasingly difficult perspective in an enlarged and fragmented Union indeed –, the challenge is to reconnect the supranational decision-making *loci* and the national (State) devices of democratic decision and oversight.¹⁷ While these difficulties are undisputable and the intents commendable, they raise a problem. This approach is open to criticism on conceptual grounds insofar as we pretend the democratic re-connection to solve the problem of the democratic foundation of supranational decision-making. This is clear once we relate disconnect to the concept(s) of legitimacy.

Input legitimacy vs. throughput (procedural) legitimacy

It is often concealed that the “disconnect approach” privileges a specific type of legitimacy. As we know it, and to put it bluntly, the integration process traditionally rests upon two types of legitimacy. The first is the *input* democratic legitimacy. Input legitimacy means “the probability that those being ruled have some say in the process of rule-making itself”.¹⁸ In our case, the source of this type of legitimacy is National Parliaments’ authorization to the ratification of the Treaties, preceded in some countries by the popular consultation through referendum.¹⁹ Furthermore, from its very inception the legitimacy of European integration also rests upon its ability to ensure an outcome (peace, economic growth, etc.), often termed as *output* legitimacy.²⁰ Output legitimacy often but not exclusively relates to functionalist and neo-functionalist approaches, and is reflected in Article 3 TEU: «The Union’s aim is to promote peace, its values and the well-being of its peoples».

Normally, the National Parliaments’ authorization is the typical ground for normative legitimacy of any (traditional-type-of) international organization. However, while the input democratic legitimacy channel is apt for a traditional international organization, the extremely high level of centralization achieved by the European system (one that cannot be found in any other contemporary international organization) had tremendous consequences.²¹ The 1986-1992 stage of the gradual “Transformation of Europe”²² in particular, put input democratic legitimacy under stress. In order to overcome this, two paths have been followed.

The first points at the increase of the powers of the European Parliament. After the introduction of the direct election of the European Parliament in 1976 (preceded by the 1975 Treaty of Brussels giving the Parliament the right to scrutinise the EU accounts at the end of each year, and assess whether the Commission has wisely and correctly spent the EU budget), powers’ increase

¹⁷ N. LUPO, *Parlamento europeo e parlamenti nazionali*, cit., p. 2; A. BRADLEY – C. PINELLI, *Parliamentarism*, in M. ROSENFELD – A. SAJÓ (a cura di), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, OUP, 2012, p. 668.

¹⁸ T. RISSE – M. KLEINE, *Assessing the Legitimacy of the EU’s Treaty Revision Methods*, in *Journal of Common Market Studies*, 2007,1 p. 72.

¹⁹ We can see the importance of this in articles 48 and 49 TEU.

²⁰ V. A. SCHMIDT, *Democracy and Legitimacy in the European Union Revisited: Input, Output and ‘Throughput’*, in *Political Studies*, 2012, 1, pp. 2-22.

²¹ Nowadays, even those who look at the European Union as an international (and not *sui generis*) organization under international law, admit its peculiarity among existing organizations, J.-P. DEROSIER, *Les limites constitutionnelles à l’intégration européenne. Étude comparée : Allemagne, France, Italie*, Paris, LGDJ, 2015.

²² J. WEILER, *The Transformation of Europe*, in *The Yale Law Journal*, 1991, 8, pp. 2403-2483.

was supposed to fix the lack of input legitimacy. In particular, the SEA 1986 ensured that Parliament's assent is mandatory before a new country can join the EU. The Maastricht and the Amsterdam Treaties gave a much stronger position to the Parliament in co-legislating with the Council on a whole range of areas that are subject to EU law. The Lisbon Treaty enhanced European Parliament's powers as a fully recognised co-legislator with increased budgetary powers, giving also a key role in the election of the European Commission President. Current article 10 TEU states that the functioning of the Union is founded on representative democracy and citizens are directly represented at Union level in the European Parliament. To be sure, the limits of the European Parliament are many and often discussed. There is no point to analyse them here – the conclusive chapter will get back to them – because National Parliaments are the focus of these pages.

The second path is precisely the involvement of National Parliaments. These are first mentioned in two Declarations annexed to the Maastricht Treaty.²³ The Amsterdam Treaty then devotes a Protocol to them, on information rights and inter-parliamentary cooperation.²⁴ The Lisbon Treaty refers to National Parliaments for the first time within the body of the Treaty. The relevant provisions are fundamentally different from those addressing the European Parliament. They are not about giving an institution a (share) of power in decision-making, rather aim at enhancing the (democratic) quality of the decision-making *process*, i.e. the deliberative quality. To put it differently, involvement of National Parliaments calls into question the procedural dimension: *throughput* legitimacy, not input legitimacy.²⁵ The concept of throughput legitimacy centres indeed on the process of deliberation, based on participatory mechanisms. As Schmidt puts it, “throughput is process-oriented, and based on the interactions – institutional and constructive – of all actors engaged in EU governance”. This concept includes a variety of actors in shaping and delivering EU policies: citizens, organizations, networks, associations, etc. It is an overarching principle of the European Union after Lisbon that is recognized in articles 1 and 10 TEU.²⁶ The inclusion of National Parliaments in EU-decision making processes since Maastricht, and notably after Lisbon should be interpreted under this interpretive frame.²⁷

The problem with throughput legitimacy is however that of eluding the crucial question: who decides? This is hardly surprising insofar this is not the problem it is supposed to answer. Throughput legitimacy aims just at improving the deliberative process, i.e. the process through which a decision is taken. This is not to negate the importance of the democratic quality of the deliberative process indeed; however, the crucial question is whether procedural involvement is able to answer the need to provide a sound democratic underpinning to decisions taken at a different – and *per se* not adequately democratic – level. This conundrum becomes clearer once we connect the concepts of *throughput legitimacy* and *governance*.

Government vs. governance

There is a wide body of scholarly literature on the paradigm shift from government to governance, on their respective meanings, and on their relation to the rise of the network

²³ Declaration on the role of National parliaments in the European Union and Declaration on the Conference of the Parliaments.

²⁴ Protocol on the role of national parliaments in the European Union.

²⁵ N. LUPO, *Parlamento europeo e parlamenti nazionali*, cit., p. 3.

²⁶ Article 1: «This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen»; article 10(3): «Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen».

²⁷ Indeed, National Parliaments are mentioned in the opening of the 2001 White Paper on Governance.

model.²⁸ What is important to stress here, is that this conceptual opposition is not new, and that the two concepts operate at different levels.

The problem is that there is a fundamental difference between influence as indirect power based on some kind of “prestige”, and government as direct power, “authoritative direction or control”, or in Eastonian terms “authoritative allocation of values”. This opposition substantiates that between governance and government. Indeed, far from indicating different ways to achieve a decision, they stand as two incommensurable concepts. Governance relates to the quality of the deliberative process, government indicates the decision itself. The rise of governance does not eliminate the issue of government – of who holds control of the decision-making process. The governance paradigm and its stress on the virtues of openness, vicinity to citizens, etc. often conceals the fact that in the end *someone* takes a decision and is responsible for that. In the current EU architecture, this someone is the European legislature consisting of the European Parliament and the Council of the European Union, plus the European Commission as the initiator. In the EU’s democratic deficit, the character of the legislature is mostly at stake, not just the way how it achieves a decision. But the governance paradigm, together with the concept of throughput legitimacy, is not meant to change the nature of the legislature, it only improves the democratic legitimacy of the process through which it comes to a decision. Therefore, major involvement of National Parliaments does not entail any shift from government (understood as a centralized, non-democratic decision-making) to governance (as a decision-making fully responding to democratic standards). What it achieves, is just a shift from centralized, non-democratic decision-making to centralized, non-democratic decision-making whose deliberative process is more open to marginal political actors.

Yet, one of the most important EU documents in this regard is the 2001 White Paper on Governance. While the notion of governance is there quite vague, as it happens in many policy documents, nonetheless, the document gets inspiration from the principles of openness, transparency, inclusion and participation of actors in EU decision-making processes.²⁹ As one can read at the outset, «the White Paper proposes opening up the policy-making process to get more people and organisations involved in shaping and delivering EU policy. It promotes greater openness, accountability and responsibility for all those involved. This should help people to see how member states, by acting together within the Union, are able to tackle their concerns more effectively». The underlying idea is to make the EU more legitimate by improving governance mechanisms.

Interestingly enough – and often overlooked – the White Paper explicitly mentions National Parliaments. After recalling the need for «a reinforced culture of consultation and dialogue», the document states, «the involvement of national parliaments and their specialised European affairs committees, as already practised by the European Parliament, could also be encouraged». In another passage, it also refers to the Protocol to the Amsterdam Treaty on the role of National Parliaments in the European Union. Notwithstanding the conceptual blur, this document unambiguously frames the role of National Parliaments in terms of governance.

While the concept of governance has undisputable heuristic relevance, it does not suit representative institutions in the political field, as National Parliaments are within their domestic

²⁸ F. OST – M. VAN DE KERCHOVE, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Bruxelles, 2002.

²⁹ See in particular the section on “Better involvement and more openness”.

constitutional system. In pretending that National Parliaments does indeed have a crucial role, it obscures that the real “government” *locus* is not located anymore at the national level (even less so in the periphery of the European Union). Giving them more powers does not really change the situation.

To recap, conceptually, framing the problem of the deficit of representative democracy in the European Union in terms of democratic disconnect re-centres the debate around a fragmented landscape of national institutions. These are acknowledged as crucial for enhancing the legitimacy of the European Union decision-making, by conferring them indirect powers of influence through participation, openness, etc. This very nice picture keeps in the shadow the core problem of European decision-making – that of the nature of the actor(s) who decide: the European legislator (and the European Council when it comes to defining the major political guidelines).

3. Democratizing the European Union through National Parliaments: a historical view

The previous section sketched the ambiguous conceptual framework under which National Parliaments are included in EU decision making to address the democratic deficit. A second dimension is able to disclose other aspects of the limits and significance of National Parliaments in the EU. This consists in looking at the historical development of the relationship between National Parliaments and the European Communities/Union.

Normally the role of National Parliaments as regards treaties establishing international organizations, and their participation therein is settled once they authorize the ratification. In some exceptional cases, essentially within the European context, treaties foresee a collective body (a general assembly) composed by representatives of the National Parliaments. This is the case of the NATO Parliamentary Assembly (with very limited powers indeed), or the COE Parliamentary Assembly. This is also the case of the ECSC Common Assembly and of the EEC Parliamentary Assembly, then European Parliament from 1962 on.

Yet, in the case of the European communities, the relationship between National Parliaments and the functioning of the international organization emerged in more problematic terms and at an early stage. This occurred initially in a very limited sphere of countries jealous of their sovereign status, and very proud of their parliamentary prerogatives. Only subsequently, under this stimulus and following the resistance to deeper *political* integration in the 1980s, this relationship becomes part of a broader European strategy.

The first phase: national concerns of weakened parliaments in the so-called “antimarketeers”

In the European Communities, the “presence” of the National Parliaments starts emerging as a problem in the 1970s. In 1971, German scholar Karl Kaiser drew attention on the impact of transnational relations of advanced industrial societies on the democratic process. Under this framework, he considered the European agricultural policies as a case in point and pointed at solutions calling into question the role of NPs.³⁰ Kaiser somehow anticipated Joseph Weiler’s predictions ten years later. According to Weiler, «in the European structure public accountability is retained, at least in form, through national (parliamentary) control over the respective national

³⁰ K. KAISER, *Transnational Relations as a Threat to the Democratic Process*, in *International Organization*, 1971, 3, pp. 706-720.

executive branch operating in Brussels. Whilst this control can be effective as regards issues which have immediate and sensitive national political implications, the day to day legislative process is hardly controlled. The mechanisms for supervision devised by national Parliaments have been, with some exceptions, largely unimpressive. Although it could be argued that the Treaty itself bestows the necessary legitimacy on the European programme, this argument loses much tenability given, first, the simple passage of time since the conclusion (and approval by national parliaments) of the Treaty and, secondly, the profound changes which have occurred in the operation and interpretation of that document». ³¹

In Weiler's terms, the emerging debate on the role of National Parliaments relates unmistakably to the changes in the operation of the European Communities. They concern in particular the increasing centralization-expansion of competences at the supranational level – what he after described as the second phase of the “Transformation of Europe”. What is important to stress here though, is that during those years the “deparliamentarization” challenge starts being perceived essentially in those new European member states whose political culture is characterized by resistance to (any federalist option of) the integration process, countries where *anti-market*ers had a strong hold: Denmark and the United Kingdom.

In these countries, the weakening of National Parliaments in the European architecture is raised, in fact under even more worried terms than the sovereignty issue. States could indeed play a role through their Governments. On the contrary, the dividing line between the European and the National Parliaments was much more controversial, and the loss of powers by Parliaments more apparent. According to the then secretary-general of the European Commission Emile Noël, the European and the National Parliaments entertained a competitive relationship; therefore, any scrutiny power of the latter would challenge the centrality of the former. As a consequence, National Parliaments were to be recognized merely pedagogical and informative functions. ³² On the opposite side, British historian Martin Kolinsky supported the centrality of National Parliaments: «Given the likelihood that the member states will continue to exercise a significant degree of relative autonomy, whatever the future form of their interdependence, then the role of the national parliaments in relation to the Community structure has to be reconsidered» ³³. For him, indeed, «The more serious issue is not the potential restriction of political capacity implied in the phrase ‘national sovereignty’, but the erosion of parliamentary powers as a consequence of Community membership» ³⁴. The European legislative process was indeed beyond the reach of Parliament, and the possibility that member states lose their autonomy was utterly excluded.

In line with these assumptions, the British and Danish Parliaments develop at an early stage an institutional framework for scrutinizing European decisions. ³⁵ This institutional adjustment witnesses the dominant fears within national polities where the participation in the European project is controversial. Eighteen months after the accession, the British Parliament establishes a complex monitoring system, notwithstanding resistance from the Government, who was aware of the political costs of confronting with the internal political opposition to integration. The British Government was also worried by the limitations that the new structure could pose to the negotiating freedom in intergovernmental bodies. As to Denmark, the scrutiny system was based

³¹ J. WEILER, *Community, Member States and European Integration: Is the Law Relevant?*, in *Journal of Common Market Studies*, 1982, 1, p. 51.

³² M. KOLINSKY, *Parliamentary Scrutiny of European Legislation*, in *Government and Opposition*, 1975, 1, p. 64.

³³ M. KOLINSKY, *Parliamentary Scrutiny of European Legislation*, cit., p. 66.

³⁴ M. KOLINSKY, *Parliamentary Scrutiny of European Legislation*, cit., p. 47.

³⁵ J. FRITZMAURICE, *National Parliaments and European Policy-making. The case of Denmark*, in *Parliamentary Affairs*, 1976, 3, p. 281 f.

on the binding mandate and came to existence in practice through the centralization of powers in the very important committee for trade relations, which was equalized to a *mini-Folketing*.

Among the founding members, only the Netherlands had established working parliamentary scrutiny mechanisms on EU affairs. Otherwise, in other countries such a system was either embryonic or utterly ineffective.³⁶ There, the impact of the European Communities on internal politics was underestimated, the establishment of similar scrutiny procedures delayed. Parliaments in these countries started to slowly react only after the direct election of the first European Parliament in 1979. After 1979, the NPs and the European Parliament indeed increasingly separated, as members of NPs would not be represented in the latter anymore.³⁷ This is when institutional adaptation occurs. Truly enough, adaptation did not result from the consideration that the European Parliament was an imperfect parliamentary body, in the sense political and constitutional theorists and historians assign to core representative institutions. More prosaically, it was a defense reaction that followed the loss of any ability to keep track of what is happening at the supranational level.

The second phase: the transition from national concerns to the European strategy

Until the end of the 1980s, parliamentary initiatives are of essentially individual nature, belonging to what Philip Norton considers as the first phase of institutional adjustment.³⁸ National Parliaments respond individually. Adaptation occurs through specialization in European affairs (including constitutional reforms after Maastricht), greater involvement in European affairs, and establishing relationships with the national representatives at the European Parliament.³⁹ Parliaments' aim is also to increase assertiveness towards their governmental counterparts that hold a veto power in the Council of the European Union. Yet, after the entry into force of the Single European Act (1987) addressing the completion of the internal market, the democratization of the Communities *through* the National Parliaments switches from a purely national perspective to a European one. This is due to the limitation of the unanimity voting in the Council and the subsequent ineffectiveness of any governmental scrutiny in those areas covered by qualified majority decision-making. This sparks attempts towards inter-parliamentary cooperation.

At the transnational level, in 1989 the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) is established. Notwithstanding the diverse views on the role of a similar cooperation body, its creation witnesses the widespread perception of the European dimension of the de-parliamentarization process.⁴⁰ It also displays a

³⁶ S. AUKEN – J. BUKSTI – C. L. SØRENSEN, *Denmark Joins Europe. Patterns of Adaptation in the Danish Political and Administrative Processes as a Result of Membership of the European Communities*, in *Journal of Common Market Studies*, 1975, 1, p. 22 describe parliamentary scrutiny in founding member states as very limited (France and Luxembourg), ineffective (Italy) or based on diffused mechanisms (Olanda, Germania, Belgio). See also K. NEUNREITHER, *The Democratic Deficit of the European Union: Towards Closer Cooperation between the European Parliament and the National Parliaments*, in *Government and Opposition*, 1994, 3, p. 303.

³⁷ A. MARESCA, *Il Parlamento italiano nella gestione della politica comunitaria e nei rapporti con il Parlamento europeo*, in *Rivista di Studi Politici Internazionali*, 1984, 2, p. 195.

³⁸ P. NORTON, *Conclusion: Addressing the Democratic Deficit*, in *The Journal of Legislative Studies*, 1995, 1, p. 178 ff. Thus, the Irish Parliament, remained a marginal actor notwithstanding the establishment of a committee of the two houses after accession in 1973. Greece, entering the Communities in 1981, established a specialized committee only nine years after the accessions and after the creation of the COSAC in 1989. Spain and Portugal, members since 1986, did not establish an effective scrutiny system either.

³⁹ P. NORTON, *Conclusion: Addressing the Democratic Deficit*, in *The Journal of Legislative Studies*, 1995, 1, pp. 179-183. On reforms at the domestic level, see D. JUDGE, *The failure of national parliaments?*, in *West European Politics*, 1995, 3, p. 87 f. and 91-94.

⁴⁰ At the Union level, the COSAC and National Parliaments are mentioned for the first time in two declarations annexed to the Maastricht Treaty. Subsequently, a Protocol annexed to the Amsterdam Treaty (1997-1999) impose an obligation to transmit to national parliamentary bodies Commission's consultation documents and legislative proposals. It also sets a six-week timeframe

qualitative leap from the purely national dimension to a European dimension following the adoption of the majority vote in the Council.⁴¹ These developments are a pragmatic response to the deepening of European integration and the inability to combine it with the necessary reforms providing democratic underpinning to supranational structures.

Within this framework, the relationship between the European Parliament and National Parliaments stays unresolved. The diversity of position in that regard proves the ambiguity of the overall approach. Already during the 1970s, the issue had been debated, notably in the British context. For some observers, the strengthening of National Parliaments was limited to a transitional stage preceding the politicization of the European parliamentary body, and conflicted with the deepening of integration. Some others considered on the contrary the contribution of National Parliaments necessary to overcome global challenges.⁴² This tangle reflected in the opposing views at the time of the COSAC creation. The European Parliament, while promoting the participation of National Parliaments, considered their scrutiny as purely national; National Parliaments had on the contrary a collective understanding of their scrutiny power. This approach was stirred by the British House of Commons, that debated the creation of an upper house of the European legislative body, composed by representatives of National Parliaments.⁴³ However, this view witnesses a confusion between democratic underpinning and the problem of the deliberative quality of supranational *fora*, as mentioned in the previous section. This confusion perpetuates indeed in the approach taken by the Lisbon Treaty.

The third phase: Lisbon and Post-Lisbon ambiguities

The Lisbon agreement appears to be halfway across a ford. This is apparent from the heterogeneity of the relevant legal provisions. Some of them betray the bias rooted in the protection of State competences by Eurosceptic members. It is primarily the case of subsidiarity. This principle is mentioned in Article 5 TEU, and Protocol 2 is specifically devoted to it.⁴⁴ According to article 5, “National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol”. This function is further stressed in article 12(b) as an element of the participation of National Parliaments to the “good functioning of the Union”. The rationale for such a provision lies in the dissatisfaction towards the way the Court of justice fulfils its role of guardian of the subsidiarity, owing to its restrictive approach.⁴⁵ Conferral of the guardianship role to National Parliaments is supposed to put a brake to the progressive expansion of the Union competences, facilitated by its “purposive” Constitution. Subsidiarity is indeed a principle about the functioning of democracy, and not *per se* a principle of

between the transmission of legislative proposals and the insertion in the Council agenda. The COSAC is also given the possibility to scrutinise legislative proposals in the area of Freedom, Security and Justice affecting individual rights and freedoms and to provide opinions to European bodies.

⁴¹ From the National Parliaments’ perspective, this entails the inability to determine decisional outcomes in the council through a rigid mandate to the Government or through parliamentary reserve. Therefore, there is a need to form coalitions in order to build blocks of influence against national executives.

⁴² M. KOLINSKY, *Parliamentary Scrutiny of European Legislation*, cit., p. 63 s. See also D. MARQUAND, *Parliamentary accountability and the European Community*, in *Journal of Common Market Studies*, 1981, 3, p. 235.

⁴³ P. NORTON, *Conclusion: Addressing the Democratic Deficit*, cit., p. 184 ss.

⁴⁴ Article 5 thus defines the principle: “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.”

⁴⁵ K. GRANAT, *National Parliaments as Political Safeguards of Federalism: Interparliamentary Cooperation in the EU, the US, and Switzerland*, in D. JANČIĆ, *National Parliaments after the Lisbon Treaty and the Euro Crisis. Resilience or Resignation?*, Oxford, Oxford University Press, 2017, pp. 263 s.

democracy.⁴⁶ It is indeed about the vertical allocation of competences, not about providing democratic standing to the competent authorities.

Not surprisingly, this conferral brought out its inconsistencies as soon as the relevant mechanism⁴⁷ have been put into practice. A tension arose between the technical assessment of a legal parameter and the fact that quintessential political bodies such as National Parliaments are asked to carry out such assessment.⁴⁸ Scholarly literature thus provides two opposite interpretations of the subsidiarity check. Some support a restrictive reading by criticizing the practice of grounding the reasoned opinion on substantive political considerations.⁴⁹ Others claim that a restrictive approach would underestimate the essentially political nature of Parliaments. As political institutions, they enjoy freedom in interpreting the rationale of their own activities.⁵⁰ Be it as it may, this opposition is real and is a proof of the problematic nature of the subsidiarity role of National Parliaments.

Such logical incongruity reflects on other Treaty provisions. While the subsidiarity provisions identify a very specific function exercised through a mechanism regulated in detail, other provisions have a more general character and try to link (without much success indeed) the position of National Parliaments with that of central democratic institutions. Article 10, for instance, mentions one of the main functions of National Parliaments, at least in parliamentary and semi-presidential regimes (prevalent in Europe), that of governmental scrutiny. However, this is at best a statement of good intentions and is outside any control of the Union. Article 12 provides that “National Parliaments contribute actively to the good functioning of the Union”. This general statement (and its position in Title II on democratic principles) reveal a misplaced hope on the democratic virtues of National Parliaments. It is however an unfortunate statement insofar it refers to the mere contribution to the *functioning*. The statement is followed by a restrictive list of six mechanisms through which the Parliaments contribute to such functioning. For the rest, most of the provision of the TEU and the TFEU concerns notification and information rights.

The reasons behind this ambiguous framework, which after all hides the weakness of National Parliaments or their protective rather than proactive function, lie in the flawed origins of National Parliaments’ powers as described below. Sure enough, this should not come as a surprise, because the Lisbon Treaty (whether we consider it a constitutional document or a international legal instrument), is a political document rooted on a fundamental compromise marked by a strong path-dependence effect. Yet, these ambiguities must be underlined because the risk is to believe that National Parliaments can underpin European representative democracy. The reality is that National Parliaments play a limited and ambiguous role.

⁴⁶ N. W. BARBER, *The Limited Modesty of Subsidiarity*, in *European Law Journal*, 2005, 3, p. 308.

⁴⁷ For a description of the Early Warning Mechanism, see *infra* par. 4.

⁴⁸ N. LUPO, *I Parlamenti nazionali nell’Unione europea*, cit., p. 11.

⁴⁹ F. FABBRINI - K. GRANAT, *Yellow card, but no foul: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike*, in *Common Market Law Review*, 2013, 1, pp. 124 e 135. P. KIIVER, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, London, Routledge, 2012, p. 126 s.

⁵⁰ N. LUPO, *National Parliaments in the European Integration Process: re-aligning politics and policies*, in M. CARTABIA – N. LUPO – A. SIMONCINI, *Democracy and subsidiarity in the EU National parliaments, regions and civil society in the decision-making process*, Bologna, Il Mulino, 2013, p. 126.

4. An empirical account of the Europeanization of National Parliaments

The third dimension pertains to the empirical assessment of the ability of National Parliaments to be part of the Euro-national parliamentary system. One way to look at this dimension is to assess the Europeanization of parliamentary organization and procedures. According to Ladrech, “Europeanization” means the adaptation of the organization logics and of the political process to that characterizing the European level.⁵¹ As mentioned, National Parliaments started slowly to adapt from the 1970s (Denmark and United Kingdom) and then more generally from the end of the 1980s. One can *analytically* distinguish two sides of the adaptation. One is purely internal, and regards the establishment of specialized structures (EU affairs committees, etc.) and procedures to monitor the activity of the executive and hold it to account for its positions within the Councils. The other is external, and concerns the participation in inter-parliamentary activities (COSAC, etc.) and the use of those procedures involving the ability to play a role in the European arena (political dialogue, Early Warning System, etc.). Both the internal and the external sides can be analysed in relation to the formal rules usually contained in the constitutional documents, in the parliamentary rules of procedure and the laws on the relationship between the Parliament and the Government in EU affairs and corresponding laws. They can also be assessed beyond the formal rules, against the actual use and effectiveness of structures and procedures. Here I provide a sketchy presentation of the main trends in both regards.

Scrutiny of the Government in Council

As to the procedures established the “scrutiny and oversight” of the activity of the executive in the Council of the European Union and the European Council, a classical distinction is made between the *mandate-* and the *document-based models*. In the mandate model, the Parliament binds the negotiating power of the Government with more or less precise instructions. This model focuses on the EU decision-making process, addressing the position of the Government in the Council. In the document-based model, the parliamentary influence on the Government is indirect and relates to the ability to scrutinize documents discussed at the supranational level at an early stage (even preparatory documents such as green papers etc.) and to shape the public debate on European issues.⁵²

The mandate model originates in Denmark. There, a committee for trade relations was created before the accession and was renamed EU affair committee only in 1994. The committee’s power to instruct the Government is first related to contextual elements, notably a strong Parliament and the frequency of minority or coalition governments (besides a rather low support to European integration).⁵³ These conditions first allowed the committee to have the power to issue a binding mandate insofar the main interest for governments is to know which Council’s agreements will be accepted by the fragmented government coalition in Parliament.⁵⁴ A second pre-condition for this model to be effective is a strong committee. The Danish EU committee was labelled a *minifolketing* not only because of its powers, but mostly because its seventeen

⁵¹ R. LADRECH, *Europeanization and National Politics*, Basingstoke, Palgrave Macmillan, 2010, p. 2.

⁵² See the third and eight COSAC biannual reports.

⁵³ I. COOPER, *The Nordic Parliaments’ Approaches to the EU Strategic Coordinator, Comprehensive Scrutinizer, Reluctant Cooperator and Outside-Insider*, ARENA Working Paper 1 March 2015, pp. 2 e 6; D. JUDGE, *The failure of national parliaments?*, cit., p. 84 f.

⁵⁴ F. LAURSEN, *The role of national parliamentary committees in European scrutiny: Reflections based on the Danish case*, in *The Journal of Legislative Studies*, 2005, 3-4, pp. 412-427.

members are influential representatives of each party. This entails that ministries are pushed to participate to committee meetings if so requested, while officials of the Prime minister office permanently communicate with the committee. It follows that the Government is often willing to adjust its original position.⁵⁵ In order to function effectively, the mandate system requires the ability of parliamentary bodies to closely follow the agenda of the Councils. It therefore needs to access easily and in a timely manner EU and government documents (even confidential ones) and other information. This once held only for the final phases of the process, but today information on the position of the Government is transmitted at an early stage through the so-called “grundnotater” (usually, within four weeks from the reception of the Commission proposal).

In turn, the document-based model originates in the United Kingdom. There, a complex and highly institutionalized system exists, with a “European Scrutiny Committee” having the function of filtering and reporting on the most important legal and political documents (more than five hundred per year) and three “European Committees” in charge of the detailed exam of the proposals *ratione materiae*. Most proposals are scrutinized at different stages of the process not just once in the very final stage.⁵⁶ This system developed in a context characterized by strong government majorities, which entails the pointlessness (rather than the impossibility) of a mandate.⁵⁷ As a consequence, the four committees have a pluralist membership in order to function as public *fora* for debate. This also explains the presence of experts at meetings. Yet, right after the British accession in 1973 the establishment of a mandate had been debated. The Parliament however held that this entail negative consequences on the flexibility necessary for the Government to uphold its position in the Council.⁵⁸ The very nature of the document-based scrutiny requires wide publicity and the possibility of referral to the plenary assembly, where the Government holds a certain discretion in setting the agenda. As regards the positions of the Government, monitoring happens mostly in the form of exchange of information. There is however the possibility to commit ministries to not consent to any agreement on a proposal unless the competent committee concluded the scrutiny procedure (so-called parliamentary reserve). However, there are ways for the ministries to overcome such obligation. By focusing on the early debate on EU documents and proposals, also with the contribution of experts and representatives of the civil society, the document-based system provides the Government with a well-informed picture of the stakes.

Each of the two models has pros and cons.⁵⁹ The mandate system is often considered – not necessarily rightly so – as the most effective.⁶⁰ For this reason, it spread out in the majority of EU member states, notably the other Scandinavian countries, Austria, and in seven of the ten countries acceding in 2004. One must admit that both systems tend to provide executives with a wide discretion due to the nature of the Council decision-making process. The mandate-based system theoretically restricts the negotiating powers of the Government, at a point that those

⁵⁵ In general, the position of the Government is accepted in 90% of the cases, F. LAURSEN, *The role of national parliamentary committees*, cit., p. 424.

⁵⁶ UK PARLIAMENT, *The European Scrutiny System in the House of Commons*, London, 2009, p. 6.

⁵⁷ A. BUZOGANY, *Learning from the Best. Inter-parliamentary policy learning and EU parliamentary scrutiny design in the EU – 10*, Paper prepared for 2010 ECPR Joint Sessions, Inter-parliamentary Relations in Europe 22-27 March 2010, p. 4.

⁵⁸ «National parliaments, as discrete institutional centres, are not in a position to comprehensively consider the points of view of the others in formulating common policies. They are not agencies of negotiation. The role of national parliaments in the Community is fundamentally limited to scrutiny of decisions and legislation. It is to check that the interests of their constituents are properly considered in the formulation of European policies. This is a limited role, protective rather than creative», M. KOLINSKY, *Parliamentary Scrutiny of European Legislation*, cit., p. 61 f.

⁵⁹ The British model is criticized in D. JUDGE, *The failure of national parliaments?*, cit., p. 85 f.

⁶⁰ A more proper description of this model can be found in F. LAURSEN, *The role of national parliamentary committees*, cit.

Parliaments adhering to such model softened the mandate with vague or very limited instructions. Furthermore, the system is highly constrained by the tight conditions necessary for its smooth operations: sufficient resources for the specialized committee, information symmetry between the Parliament and the Government, timeliness, etc. On the other hand, the document-based system can perhaps more effectively induce the Government to adjust its position, but this can happen in contexts characterized by a very specific political culture.⁶¹

In general, the problem lies in the transposition of the systems in other countries. To mention the example of Parliaments from the 2004 enlargement inspired by the mandate system, one can wonder how such a system can work within weak Parliaments.⁶² One can also wonder the reason for adopting such a system (for example, the willingness to adhere to what is considered an efficient solution under the stimulus of the Parliament where it originated,⁶³ or the need to formally legitimize relatively young and recently institutionalised parliaments). Whatever the reason, the transposition is imperfect on the side of the constitutive elements and on the side of the contextual elements. This explains why the adoption of the mandate model (also termed as Nordic model) was so difficult for weak Parliaments lacking strong traditions. This also explains why transposition has been often spurious, and countries such as Austria, Finland and Sweden included elements of the document-based model as well.⁶⁴ In some countries, this happened to the point that the system has been termed under the label of “mixed model”. All in all, this entailed important consequences on the (in)ability of the Parliament to achieve an effective scrutiny.

Playing in the European arena

If one turns to procedures involving the ability to play a role in the European arena, again the limits of parliamentary involvement stand out. The Treaties envisage different mechanisms for National Parliaments to contribute *directly* to the EU decision-making process.⁶⁵ This article limits to the most important ones, the Early Warning Mechanism (EWS) and the Political Dialogue.

The EWS gives the possibility to a certain number of Parliaments to intervene in the decision-making process by issuing reasoned opinions on legislative proposals. Whereas the number of negative opinions is over a certain threshold, the so-called yellow card and the orange card procedure are activated, with varying consequences on the ability of the European Commission to drive forward its proposal. According to the Treaties, the reasoned opinion can be issued on subsidiarity (and proportionality) grounds. However, different interpretations exist in that regard. Some scholars support a restrictive reading,⁶⁶ others opt for a looser one.⁶⁷ Whichever reading we accept, the problem with the EWS is the need for coordination and for uniform approach by National Parliaments for the system to be effective. Until now, National Parliaments issued three yellow cards, witnessing the possibility of inter-parliamentary coordination but also its limits.⁶⁸ The need to form alliances clashes with the fact that Parliaments tend to act individually. An

⁶¹ D. CHALMERS – DAVIES, G. – MONTI, G., *European Union Law: Text and Materials*, Cambridge, Cambridge University Press, Cambridge, Cambridge University Press, 2014, p. 131.

⁶² A. BUZOGANY, *Learning from the Best*, cit. p. 8.

⁶³ I. COOPER, *The Nordic Parliaments' Approaches*, cit., p. 6.

⁶⁴ A. BUZOGANY, *Learning from the Best*, cit. p. 17.

⁶⁵ See *supra* par. 1.

⁶⁶ F. FABBRINI - K. GRANAT, *Yellow card, but no foul*, cit., pp. 124 e 135; P. KIIVER, *The Early Warning System*, cit., p. 126 f.

⁶⁷ N. LUPO, *National Parliaments in the European Integration Process*, cit., p. 126.

⁶⁸ I. COOPER, *A Yellow Card for the Striker*, cit. C. HEFFTLER – K. GATTERMAN, *Interparliamentary Cooperation in the European Union: Patterns, Problems and Potential*, in C. HEFFTLER et al. (a cura di), *The Palgrave Handbook of National Parliaments*, cit., p. 103.

analysis of reasoned opinions shows that they are issued from a prevalingly individual, and not collective perspective.⁶⁹ The limited number of yellow cards attests the residual character of the EWS. Furthermore, the use of reasoned opinions is uneven. For example, between 2010 and 2012 National Parliaments issued 172 reasoned opinions, 4,5 per parliamentary chamber. However, more than half has been issued by seven chambers on thirty-eight.⁷⁰ One can doubt about the ability of the EWS to have a strong impact.⁷¹ One of the reason lies in the limits of inter-parliamentary cooperation, both from the quantitative and from the qualitative sides. Studies certify a generally low level of participation to inter-parliamentary activities. The limited use of inter-parliamentary cooperation is perhaps due to cultural reasons (inability of Parliaments to think themselves in a dialogic way) and organizational resilience. The limited impact of inter-parliamentary cooperation clashes with the relevance some authors recognize to it. Gattermann and Högenauer for instance hold that the degree of inter-parliamentary cooperation is an element of “mainstreaming” in EU affairs, i.e. the transformation of experimental or fragmentary rules and practices at the systemic level.⁷²

Compared to the EWS, the Political Dialogue is more widely used.⁷³ This emerged from a pre-Lisbon practice on the initiative of the Barroso Commission⁷⁴ envisaging cooperation between the Commission and National Parliaments for the elaboration of European policies.⁷⁵ The procedure is therefore informal and outside the Treaties. Within the framework of the Political Dialogue, the Commission receives opinions on legislative proposals and consultation documents, and answers within three months. From 2006, the Commission publishes annual reports that include the number of opinions per country. Between 2010 and 2015, less than eighteen parliamentary chambers transmitted less than ten opinions. In the case of some countries (for example, Slovenia or Hungary), the use of this tool is extremely limited. It seems that the scarce use in some cases is due to the lack of attention to the opinion by the Commission, which gives stereotypical answers.⁷⁶

5. The role of National Parliaments in the European Union: three main shortcomings

The previous sections dwelt from three different angles on the ambiguous role assigned to National Parliaments by the Lisbon Treaty. Apparently, one may conclude that powers of National Parliaments are just ineffective. However, the described picture tell us more. The ambiguous framing of National Parliaments – it is argued here – is not only ineffective, but can be also counterproductive under the present conditions. In particular, it has three shortcomings.

In section 2, it is argued that conceptually, Parliaments can only influence decision from the outside; they are not able to underpin the democratic nature of the decision-making itself (of

⁶⁹ N. LUPO, *I poteri europei dei Parlamenti nazionali*, cit., p. 124.

⁷⁰ I. COOPER, *A Yellow Card for the Striker*, cit., p. 4.

⁷¹ B. RITTEBERGER, *Multi-level governance and parliaments in the European Union*, in H. ENDERLEIN – S. WALTI – M. ZURN (a cura di), *Handbook of Multi-level Governance*, Cheltenham, Edward Elgar Publishing, 2011, p. 246; O. ROZENBERG – C. HEFFTLER, *Introduction*, in C. HEFFTLER *et. al.* (a cura di), *The Palgrave Handbook of National Parliaments*, cit., p. 1.

⁷² K. GATTERMANN – A.L. HÖGENAUER – A. HUFF, ‘Research note’: *Studying a New Phase of Europeanisation of National Parliaments*, in *European Political Science*, 2016, 15, p. 102.

⁷³ A. MANZELLA, *Parlamento europeo e parlamenti nazionali come sistema*, in *Rivista AIC*, 2015, 1, p. 8 f.

⁷⁴ COM(2006) 211.

⁷⁵ N. LUPO, *National Parliaments in the European Integration Process*, cit., p. 121.

⁷⁶ Questionnaires submitted to Zvonko Bergant, secretary of the EU committee of the Slovenian National Assembly, 27 July 2015, and Jelena Špiljak, adviser at the EU committee of the Croatian Parliament, 30 July 2015.

those who decide). The consequence is that, at best, Parliaments tend to participate in decision-making with a routinely approach, aware that their position will be hardly taken into account by those who decide. We can term this the bureaucratic parliamentary governance.

Furthermore, it stems from section 3 that powers recognized to National Parliaments are the outcome of a historical process whose inception can be traced back to the initiatives (and worries) of Eurosceptic member states, aimed at vindicating national parliamentary prerogatives. These initiatives are then embraced at a more general level, when deepening integration coupled with the practical impossibility/inability to “democratize” supranational institutions (i.e., providing them with adequate input democratic legitimacy). As a consequence, these powers do not head towards politicizing the European discourse, rather serve to re-appropriate some competences, are oppositive in character (without contributing to actively shape the European decision-making), and ultimately challenge the legal legitimacy of European decisions.

Lastly, the empirical overview in section 3 proves the widespread, structural inability of National Parliaments to perform a meaningful role, even though some positive examples can be attested here and there. Considering that the European decision-making is fulfilled in large part at the intergovernmental level, this means that the current framework allows for structural democratic asymmetries within the Union, which affect negatively weaker peripheral systems.

The bureaucratic parliamentary governance

The new role assigned to Parliaments does not serve as a tool to attain a real democratic politicization of the decision-making. On the contrary, it can even contribute to boost the bureaucratization of the deliberative process. This is due at a substantial degree to the complexity of the process itself and the high institutional differentiation. This is actually a classic trait of European governance and concern National Parliaments at different degree. This trend has been pointed out by the literature on the strengthening of parliamentary bureaucracies.⁷⁷ However, it takes different shapes. For instance, in the Croatian Parliament or the Slovenian National Assembly scrutiny activities are very much routine-based. Therefore, they are not able to trigger any substantive competition between political majorities and oppositions. This reflect at both the internal level (committee and plenary working) and the external level (inter-parliamentary *fora*). Finally, bureaucratic governance tend to perpetuate the institutional structure over time, without any change able to enhance scrutiny. This contradicts hypothesis of the evolution of member states’ scrutiny systems towards a “second phase of Europeanization”.⁷⁸

The national interest approach

Bureaucratic drifts do not rule out the possibility of politicization of National Parliaments. However, such politicization takes on a national interest-oriented flavour. Therefore, it does not abide by left-right criteria. Whereas a competition emerges between political majorities and oppositions, confrontation in the parliamentary debate does not occur on substantive issues, but on the righteousness (or not) of the vertical allocation of powers.⁷⁹ Some scholars observe indeed that in many cases Parliaments have a national-interest stance. This is perfectly understandable in

⁷⁷ T. CHRISTIANSEN – A.-L. HÖGENAUER – C. NEUHOLD, *National Parliaments in the post-Lisbon European Union: Bureaucratization rather than Democratization?*, in *Comparative European Politics*, 2014, p. 135 f.

⁷⁸ K. GATERMANN – A.-L. HÖGENAUER – A. HUFF, ‘*Research note*’, cit.

⁷⁹ C. SPRUNGK, *National Parliaments in the European Union: Moving Towards More ‘Cooperative’ Institutions?*, in *Comparative European Politics*, 2016, 2, p. 193; J. E. FOSSUM, *The Crisis and the Question of De-parliamentarization*, cit., p. 52.

consideration of the territoriality of national parties.⁸⁰ The Hungarian example is illustrative. There, during the refugee quota crisis the Government used the Parliament to justify its position against the decisions agreed upon at the European level. The parliamentary intervention was not directed at influencing the content of the measures (either the political decision of the European Council, or the directive approved by the EU legislature), by for example identifying political alternatives. It merely expressed an opposition, political indeed in the broader sense, but possibly contrary to the obligation of sincere cooperation stated in article 4 TEU and aimed at denying the legitimacy of the European decision-making.⁸¹

The fundamental democratic asymmetry

Lastly, one can conclude that as National Parliaments do not actively partake in EU decision-making, the problem is only one of ineffectiveness. This would require reinforcing existing mechanisms and parliamentary structures, or devising new devices such as the green card procedure that would allow National Parliaments to take on the initiative for legislative proposals. The problem with this reassuring view is that most of National Parliaments in the Union – and mostly those of weak and peripheral constitutional systems – are structurally unable to take on an assertive role.⁸² Even countries that present a formally satisfactory scrutiny model (such as Slovenia or Croatia) perform badly. The fact that only some Parliaments are able to use effectively their powers and prerogatives is problematic, insofar this situation is able to generate a democratic asymmetry. The Lisbon framework risks concealing, under the rhetoric of re-parliamentarization, the reality of the strengthening of the Parliaments of the main countries (one for all, the German Parliament) and the further weakening and marginalization of the most fragile ones.⁸³ This is what happened with the different crisis the European Union has undergone, where one can confront the role of strong and weak Parliaments: from the PIIGS financial crisis, to the Greek Debt crisis, to the migration crisis, etc.: the Council as the rubber stamp of the increasingly narrowed centre of the Union.⁸⁴ Under conditions of systemic asymmetry among the parliamentary bodies of the member states, and not just among Parliaments and Governments or Parliaments and European institutions, what is threatened are not only the democratic procedures of the European government, but also the equality of member states citizens.⁸⁵ The limits of the so-called Euro-national parliamentary system therefore touch upon a sensitive tangle that go beyond the debate on democratic deficit (or disconnect). The European Union is a system – complex indeed – or at least yearns to it. Weakness of some of its components are able to jeopardize the whole structure.

The existence itself of the European Union can be jeopardized by the existing democratic gaps.⁸⁶ According to this view, the recent electoral trends within EU member states must (also) be related to this situation. In the last year, the Netherlands had parliamentary elections in March,

⁸⁰ W. LEHMANN, *Recent Advances towards Veritable European Political Parties*, Max Weber Programme Lustrum Conference, European University Institute, Villa La Fonte, San Domenico, 8-10 June 2011, pp. 10-12.

⁸¹ M. VARJU – V. CZINA, *Hitting where it hurts the most: Hungary's legal challenge against the EU's refugee quota system*, in *VerfassungsBlog*, 17 febbraio 2016.

⁸² T. CHRISTIANSEN – A.-L. HÖGENAUER – C. NEUHOLD, *National parliaments in the post-Lisbon European Union*, cit., p. 128 ask: “In examining the degree of Europeanization of national parliaments after Lisbon, two questions arise: are all actors equally willing to adapt? And will have the actors have the capacity to adapt?”

⁸³ J. E. FOSSUM, *The Crisis and the Question of De-parliamentarization*, cit., p. 57.

⁸⁴ J. H. H. WEILER, *In the Face of Crisis*, cit., p. 830.

⁸⁵ J. E. FOSSUM, *The Crisis and the Question of De-parliamentarization*, cit., p. 57.

⁸⁶ N. LUPO, *Parlamento europeo e parlamenti nazionali*, cit., p. 4; A. MANZELLA, *Parlamento europeo e parlamenti nazionali come sistema*, cit., p. 3.

France presidential and parliamentary in April and May, Germany parliamentary in September, Austria parliamentary in October (after having elected its President in December 2016), Czech Republic had parliamentary elections October. These elections all show four relevant commonalities: de-structuring of party systems, crisis of social-democracy, rise of populism and voter abstention. Next January Czech Republic will also elect its new President, and in the spring important parliamentary elections will be held in Hungary and Italy and the prospects are no rosy. If the European Union structures of representative democracy are not perfect, representative democracy at the State level is not in very good health - euphemistically. At the same time, one cannot refrain from questioning the tenability of similar electoral cycles for the operation of European decision-making, and – following the analysis – the real ability of national representative democracy institutions to overcome the democratic deficit.

What is probably necessary is therefore not heading towards an idealistic strengthening of National Parliaments. It is rather the improvement of representative structures at the supranational level. This is obviously not about building a European state insofar «democracy is not about states[, it] is about the exercise of public power – and the Union exercises a huge amount of public power».⁸⁷ Any discussion in this regard is indeed influenced by a negative bias, following the opposition between Federation and State sovereignty. This conceptual cage must be overcome and attention put on the European system of government and the actualization of representative democracy within it, a principle that is established in article 10 TUE. Leaving for the moment aside a major reform of the institutional system, very difficult and perhaps not really necessary in this predicament, we should first turn towards reinforcing the European party infrastructures, as both a political and a legal enterprise. The main avenue to be followed is the one indicated in the European Commission's *Proposal for a regulation: Amendment on statute and funding of European political parties and European political foundations*⁸⁸ or in the political initiatives for the trans-nationalization of parties taken at both the European and the national level.⁸⁹

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⁸⁷ J. H. H. WEILER, *In the Face of Crisis*, cit., p. 829.

⁸⁸ Proposal for a regulation - COM(2017)481/945258, which is part of the *Democracy Package: Reform of Citizens' Initiative and Political Party funding*. On the reform of the European parties' legal framework, B. DONNELLY – M. JOPP, *Les partis politiques européens et la démocratie dans L'UE*, in AA. VV., *La démocratie au sein de l'UE et le rôle du Parlement européen*, in *Notre Europe. Etudes & recherches*, n. 70, Paris, 2009 e W. LEHMANN, *Recent Advances*, cit. pp. 1-15.

⁸⁹ See for example S. GOZI – N. LOISEAU – J. TOLEDO, *A vote for Europe. Italy, France and Spain are asking for transnational candidate lists for the 2019 European elections*, *El Pais*, 16 novembre 2017, and other initiatives by Members of National Parliaments taken in Italy, France and elsewhere to support transnationalization of parties.