

## Transposition of EU legislation into domestic law: Challenges faced by National Parliaments

### KEY FINDINGS

National Parliaments have emancipated themselves into the EU legislative process and – to all intents and purposes – have become more actively involved at the European level. Although National Parliaments' positions and traditions vary quite substantially, they have been able to give a voice to the Member States' electorate separate from the one of governments. Their role in the legislative process leading up to EU Directives has shifted from that of a – more or less – bystander to team player, as may be read from the amount of opinions National Parliaments have delivered to the European Commission since 2006, the way they have organized their scrutiny procedures on proposals for EU legislation, the rise of scrutiny reserves throughout post-Lisbon Europe and the practice of (formal) mandates and instructions on national positions for governments. This is helpful for the overall legitimacy and democratic underpinning of EU legislation.



## 1. Introduction: National Parliament (enter)in(g) the EU's institutional framework

Originally the European Treaties did not consider National Parliaments as a distinct entity of the institutional framework of the European Community/-ies, or European Union. They were more or less treated as part and parcel of the Member States and their role in European affairs was rather marginal and unspecified.<sup>1</sup> However, with the growing influence of the EC/EU on the lives of Member States citizens, the advent of the European Parliament (first elections in 1979) and the increasing desire of stronger democratic mandates and democratic underpinnings of EC/EU policies and laws, National Parliaments became ever more relevant both from a democratic legitimacy and a strategic point of view. Increasingly, the lack of a foothold of National Parliaments was felt as an omission in the overall institutional fabric of the EU. The situation was addressed and remedied with the adoption of the Treaty of Maastricht (1992) and the adoption of the Treaty of Amsterdam (1997).<sup>2</sup> A more significant change to the National Parliaments' position came with the adoption of the Treaty of Lisbon (2007).

The Treaty of Lisbon takes it one step further and actively involves National Parliaments into the EU legislative process and strengthens the already existing dialogue between National Parliaments and the EU institutions. The Lisbon Treaty provides national parliaments with various rights, such as the rights to information, the right to participate in various EU procedures and the right to – more or less autonomously (i.e. not in formal conjunction with the national government) to scrutinise draft legislation in the field of freedom, security and justice. A 'Lisbon'-right that stands out is the right to scrutinise compliance of draft EU legislation with the subsidiarity principle (the so-called early warning mechanism with its well-known yellow card procedure). The underlying idea of the Lisbon innovations is to emancipate National Parliaments in the EU institutional framework,<sup>3</sup> underscore their democratic significance, and thereby strengthen the democracy of and the level of citizen involvement and participation within the EU. The Lisbon Treaty also acknowledges the inter-parliamentary cooperation of the National Parliaments, notably the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) established in 1989.

The role of National Parliaments does not stop with the responsibilities and competences EU treaties provisions provide, however helpful and instrumental these provisions have already been for further engaging and committing National Parliaments in EU affairs. National Parliaments have a role in the preparation, enactment and implementation of EU policies and legislation, and the impact thereof, as well. Working together with the national government (and sometimes even other actors) they partake in preparing national positions on EU policies and legislative proposals, they inform or instruct their governments (or individual ministers) on EU-negotiations. Governments are held to account by National Parliaments as regards the negotiation results. National Parliaments have varying roles in the transposition and implementation of EU legislation into the domestic legal order and responsibilities following from that. Their role in setting the national budget makes them important for the EU

---

<sup>1</sup> According to Rozenberg 'national parliaments long appeared to be the "losers" of European integration.' Rozenberg 2017, p. 11; Dörrenbächer, Mastenbroek & Toshkov 2015, p. 1010.

<sup>2</sup> The Maastricht Treaty attached two protocols (the Declaration on the role of national Parliaments in the European Union and the Declaration on the Conference of the Parliaments ([1992] OJ C191/1), attributing a – still – very small and predominantly formal role for national parliaments in the EU's policy and law-making processes. They are more or less a recognition of existence. The role awarded to national parliaments by the protocols annexed to the Amsterdam Treaty (The Protocol on the role of national Parliaments in the European Union and the Protocol on the application of the principles of subsidiarity and proportionality ([1997] OJ 97/C 340/01) has more substance to it: it involves national parliaments in the subsidiarity and proportionality review of Commission proposals. See for further details European Parliament: Relations with the National Parliaments. Fact Sheets on the European Union 2018 (2). Brussels: European Parliament, July 2018. [www.europarl.europa.eu/factsheets/en](http://www.europarl.europa.eu/factsheets/en)

<sup>3</sup> See for instance articles 10(3) and 12 Treaty on Treaty on the European Union (TEU).

contribution and funding, and in the case of Treaty revisions they have, what effectively amounts to, vetopower. All of these latter responsibilities and powers are subject to domestic (constitutional) law, conventions and traditions rather than to EU law, even though the principle of loyal cooperation hovers over them all like an umbrella. The influence of National Parliaments extends much further than what meets the eye when reading the treaties.

This paper considers – very briefly – the role of National Parliaments in the process of *transposition* of EU legislation – a mere segment of the overall implementation process. Our aim is to give a very general idea on the different roles and responsibilities National Parliaments take on in this respect: a brief bird's eye view. The aim of the briefing is, however, to make it a representative overview raising appetite for more, because we do believe the role of National Parliaments is growing ever more critical for the EU and still is very much understudied.

## 2. National Parliaments and EU proposals

The involvement of National Parliaments in the transposition of EU directives (should) begin(s) very early on in the policy preparation process. For smooth transposition it is helpful if National Parliaments are well informed throughout the process leading up to a legislative act like a EU directive. An uninformed parliament runs the risk of becoming a 'surprised' parliament when confronted with a EU Directive it was unaware of, which may in turn lead to sentiments of imposed legislation – instead of a result of mutual cooperation – and delays in transposition and problems with full implementation. There are indications that early involvement of National Parliaments in EU policies pays off in terms of ease and speed of transposition and implementation of EU legislation (Steunenberg & Voermans c.a. 2006).

Information is key to early involvement. At the moment the European Commission sends out the actual legislative proposal to the Member States. The policies the proposal expresses and the choices held within will already – more or less – have solidified. Until quite recently it used to be quite complicated for National Parliaments to keep track of policy plans of the EU. It required knowledge and some expertise of the EU, its operation, the dynamics of the EU-policy cycle, the different policy and legislative instruments and the procedures. National and EU policy cycles tend not to be in-sync and they involve different actors and time-tables. On top of that it is, due to asymmetries, not always politically profitable to invest scarce resources like attention and time into the long running trains of (complicated) EU dossiers that are distant to domestic voters and most of them will show a yield after the term of an MP, who did only have a very slim chance of leaving a mark on the policy or proposal anyway. Domestic political forces work against early involvement of National Parliaments, not as a result of systematic euro criticism, scheming & conniving or double play of member states, but just as a result of politics being politics.

This has been a driver for the EU and especially the European Commission to change its position as regards informing National Parliaments on EU policy developments and – ever since 2006 – opting for more direct forms of informing and communicating with them.

In 2006 the Barroso-Commission expressed that "National Parliaments must be more closely involved with the development and execution of European policy." because "the increased involvement of National Parliaments can help make European policies more attuned to diverse circumstances and more effectively implemented". Consequently the Commission launched an initiative to better inform National Parliaments for instance by way of transmitting all new proposals and consultation papers directly to National Parliaments, with an invitation to respond to them in order "to improve the process

of policy formulation”.<sup>4</sup> This policy of (so-called) *political dialogue* with National Parliaments – now an obligation for the Commission<sup>5</sup> – has caught on quite well: between 2007 and 2017 National Parliaments have sent in more than 4.000 opinions. Even though the Commission is obliged to no more than merely answer to questions and comments expressed in these opinions the dialogue itself goes well beyond mere window-dressing, as Jančić found out in 2012 (Jančić 2012).

### Exerting influence on the transposition of EU Directives

National Parliaments are becoming more important in the EU legislative process; as mediators between the EU and their citizens ‘they are of key importance for the legitimacy of European politics’ as Allibrandi recently put it (Allibrandi 2018, 237).<sup>6</sup> At present there are three different moments in the policy cycle of the EU legislative process at which National Parliaments can and do exert influence on the transposition of EU Directives – to which we will limit the discussion and analysis in this paper – 1. The proposal phase, 2. The transposition phase and 3. The ‘feedback’-stage.

#### *The proposal stage leading up to the enactment of the EU directive*

The early bird catches the worm; maximizing influence means upstreaming it in the early stages of inception of policies. National Parliaments are not well equipped to engage in the early stages of negotiations - what we label the ‘informal’ stage.<sup>7</sup> They do not have a formal role, they do – as a rule - not partake in expert groups or conferences, their informal networks in EU policy preparation are nominal, their influence is predominantly indirect and institutional. Parliamentary networking is still difficult, even though inter-parliamentary conferences and inter-parliamentary meetings for specific purposes are held more frequently. Rozenberg, in a recent study for the European Parliament, observes that in the last few years, parliamentary networks have become more differentiated and clustered (Rozenberg 2017: 32). There are few cross-board political initiatives or programmes of Europe wide political parties represented in both the European Parliament and National Parliaments to rally for or oppose EU policies or legislation. The EU does not as much suffer from a democratic deficit but rather more from political asymmetry it seems (Nguyen 2018). The political dialogue set up since 2006 has brought very welcome change here – this does offer a real opportunity for National Parliaments to take a place at the negotiating table very early on, apart from the national executive who previously more or less monopolized the negotiations. The problem remaining is the one of ‘making clout’ early on. How to coordinate the efforts and where to find allies to politically beef up the point of view in the negotiations.

The phase of policy preparation leading up to a proposal for a EU Directive may vary in length and move at different speeds at different moments, making it extra hard for National Parliaments to monitor what is actually happening. EU and national legislative agendas are not in-sync which makes for difficult timing on the part of National Parliaments. The use of White papers and Green Papers – outlining general ideas and principles of policies considered before coming up with a detailed legislative proposal – are helpful for parliaments in this respect. Not only for the possibility to give input in an early stage, but also from a point of view of timing of the input. Getting the act of the National Parliament together at the moment the proposal of the EU Directive is sent out to the

---

<sup>4</sup> COM (2006) 211: *A Citizen's Agenda: Delivering Results for Europe*, notably p. 9.

<sup>5</sup> Article 1 of the Protocol (No 1) *On the Role of National Parliaments in the European Union* states that: ‘Commission consultation documents (green and white papers and communications) shall be forwarded directly by the Commission to national Parliaments upon publication. The Commission shall also forward the annual legislative programme as well as any other instrument of legislative planning or policy to national Parliaments, at the same time as to the European Parliament and the Council.’

<sup>6</sup> See also Wendler 2016: 180-186.

<sup>7</sup> It is not informal in the sense that there are no rules or procedures for the negotiations phase, but informal in the sense that national parliaments do not have a ‘formal’ institutional position at this stage: only a very marginal one.

Member States and the European Parliament is no mean feat. Especially if national MPs want to consult their constituencies and stakeholders time is a constraint; the expertise and resources of national executives give them a head start and advantage at this stage.

The scrutiny phase, in which National Parliaments are offered the opportunity to vet a proposal for a EU Directive sent out to them, constitutes the more formal part of the negotiations on a EU Directive. The European Commission sends out proposals for EU Directives to Member States pursuant to the demands of article 289 of the Treaty on the Functioning of the EU (further: TFEU). EU legislation (esp. Directives and Regulations) can only be enacted by the European legislature which consists of the European Commission, the European Parliament and the Council of Ministers. This latter Council represents the Member States, who are, in the Council itself represented by the national executive, notably ministers. 'The national scrutiny systems and practices vary according to the national context and to the constitutional provisions in place' – a recent COSAC-report points out (COSAC 2017: 5). Most Member States do not consider all proposals for EU-directives at length: some of them may be very detailed and technical, some of them politically not interesting because of the subject matter, part of ongoing processes or just outright irrelevant to a country. To decide on what proposals do need parliamentary scrutiny and which do not different *triage-systems* have been put in place (Steunenberg & Voermans c.a. 2006). Ultimately the decision to give a EU proposal full parliamentary attention or not is of course for parliaments to make, but some of the national triage-systems rely on the executive to give a first impact analysis of the proposal. Government reports on the estimated impact of – especially EU directives – for the domestic legal order, the work involved in transposition, budgetary, social and economic impacts etc. come in different sorts and sizes. Some jurisdictions, like France, Spain and the Netherlands, resort to very brief summary sheets that allow to parliaments to assess the impact of EU-proposals at a glance and to decide whether or not they should receive full parliamentary scrutiny (so-called *fiches*<sup>8</sup>). Other Member States, like the UK, have dedicated Parliamentary Scrutiny Committees put in place to advise Parliament on these matters.

Nearly all National Parliaments in the EU today have organized themselves in ways that enable them to cope with the challenges of EU legislation and policies. Most National Parliaments (and their chambers) have a European Affairs Committees (EAC) that serve as observatories and junctions for the parliamentary assessment of EU legislative proposals. They have an important role in the triage, scrutiny and referral of proposals to other (sectoral) Committees or the Floor. In most cases the EAC is not the sole responsible for scrutiny of EU legislative proposals (COSAC 2017).

Parliamentary scrutiny can amount to different outcomes (and combinations thereof): a. input for the position of the executive (Cabinet, Minister or Junior Minister) in the EU Council of Ministers as part of the national position on the EU proposal, b. a yellow or orange card (or otherwise coloured card) raised (by different parliaments) to the Commission to reconsider the proposal, c. comment or point directly addressed at the European Commission as an element of the political dialogue.

#### a. Input for the position of the executive

Typically parliamentary scrutiny of an EU legislative proposal will take place in the setting of a debate with the government on the position of the Member State in the Council of Ministers as regards the proposal put forward. The subject matter of the debate will be the position of the Member State and estimates on the impact of the EU proposal and how to accommodate the transposition and implementation further down the road (Auel, Rozenberg & Tacea 2015). Research on the practice of National Parliamentary scrutiny on EU proposals over the last two decades shows that National Parliaments hardly use their powers to control government's negotiations positions (Dörrenbächer,

---

<sup>8</sup> After the French 'fiche d'impact'.

Mastenbroek & Toshkov 2015, 1011), even though the situation seems to have changed somewhat lately (Wendel 2016: 19). A lack of attention on the part of National Parliament can lead to different negative effects. Early input and involvement on draft legislation breeds expertise and commitment and – thus – facilitates timely transposition and increases the overall legitimacy for EU legislation as well (Steunenbergh & Voermans 2006; Alibrandi 2018). This disuse of powers is not always the result of lacking commitment or attention, due to asymmetries between national and EU-agendas and procedures it is really hard for national MPs to time their input right and hold the negotiators to account once the negotiations are under way. To this end an increasing amount of jurisdictions in the EU have established procedures allowing for ‘scrutiny reserves’ that call governments to a halt on negotiations on EU proposals up until the moment the proposals and national position have been debated with the National Parliaments. Some countries combine this with strict and formal mandates for government: ministers are allowed to negotiate in the Council of Ministers only as far as their mandate is extended. And in case it runs out, they have to return to parliament to renew it (COSAC 2007).

## b. ‘Cards’

The advent of the Treaty of Lisbon brought a set of instruments that aimed to give National Parliaments both a voice and instrument in the EU’s legislative process. The idea was that National Parliaments should be given possibility to raise an alarm or to issue a warning. ‘A yellow card’ – referring with this metaphor to the one of the most popular sports in the EU: soccer. According to the Subsidiarity Protocol annexed to the Treaty of Lisbon, each National Parliament may, within eight weeks, produce a reasoned opinion stating why it considers that a European legislative draft does not comply with the principle of subsidiarity. When more than a third (or a quarter in case of draft legislative acts related to justice, freedom and security) of all National Parliaments<sup>9</sup> rejects a legislative proposal (‘negative reasoned opinions’) the proposal must be reviewed by the European Commission.

Upon this the European Commission can decide to maintain, change or withdraw its proposal under an obligation to give good reasons for the decision. If the majority of the National Parliaments, however, have given a negative response to the legislative proposal and the act to be falls under the scope of the ordinary legislative procedure of article 289 TFEU there is a possible aftermath of the yellow card: the orange card. Should in this case the Commission decide to persist and not amend or withdraw the proposal in question the Commission must justify this decision both to the European Parliament and the Council of Ministers as to why, in the view of the Commission, the proposal does comply with the principle of subsidiarity, contrary to the view National Parliaments have taken. If, after such an explanation by the Commission, a simple majority of members of the European Parliament, or 55% of Council members, is not convinced, the proposal will not be given further consideration. The yellow and orange card procedures – as parts of the Early Warning Mechanism - are very complex, time-pressed (8 weeks) and require mind-boggling coordination between National Parliaments with very different setups, procedures, dynamics, culture and so on. Taken from this perspective it is surprising that the yellow card procedure was successfully triggered three times between 2010 and 2018.<sup>10</sup> The orange card procedure was never used. Aside from this meagre result of raised cards the Early Warning Mechanism did generate 354 opinions from National Parliaments on legislative proposals all validated by the European Commission between 2010 and 2016 (Rozenberg 2017: 25).

---

<sup>9</sup> Each parliament has two votes to cast. Bicameral parliaments one for each Chamber, unicameral ones two to even out the odds. All in all 56 votes can be cast: more than 19 votes against amount to more than 1/3.

<sup>10</sup> 2012 on the right to take collective action, 2013 on the establishment of a European Public Prosecutor’s Office and 2016 on the Revision of the Posted Workers Directive. See Remáč 2017: 10-16.

Whether the Early Warning Mechanism is a success or not, remains to be debated<sup>11</sup>, but it does seem to service a lingering need (Cooper 2015). The Early Warning Mechanism even has two more procedures, the green card procedure – the idea that joint National Parliaments can make a legislative proposal themselves and offer it to the Commission – or the late, or red cards procedure, amounting to blocking power of (nearly unanimously operating) National Parliaments. Both are more or less ‘informal’ procedures that have not been used up to date. We will therefore not deal with them here.

### c. Political dialogue

Even though the political dialogue initiative is in itself not limited to the debate on legislative proposal most opinions of National Parliaments are prompted by EU legislative proposals sent out to them. Judging by the number of opinions (in excess of 4000) the opening up of the dialogue seems to be a success: it generates information, pre-empts questions and debates in the Council or at the moment of transposition and spurs due attention and commitment of National Parliaments within the grander scheme of the EU legislative process. Albeit that National Parliaments on their own do not have formal standing in the process, and the dialogue is, in a sense, unbalanced because the Commission and individual government are not on par, it is to be, for good reason, assessed as a positive development (Rozenberg 2017: 19-20), especially at a moment in time where member states and their citizens tend to take a more political and critical stance as regards the operation of the EU.

## 3. National Parliaments and the transposition of EU Directives

The role National Parliaments have, once a EU directive is adopted, depends on the transposition method and instrument a Member State opts for. Directives are binding, upon Member States as to the result to be achieved but leave to the national authorities the choice of form and methods of transposition (art. 288 TFEU). Under EU Law Member States are obliged to timely, full, effective, precise transposition of EU Directives, using appropriate measures. Transposition is typically done by either primary legislation or secondary legislation, with a noticeable preference for secondary (delegated or by use of statutory instruments), throughout the Union, since low ranking legislative instruments can be enacted quicker than instruments that involve different partners or imply more elaborate procedures. If and how a country can make use of secondary legislation – not requiring parliamentary involvement – for transposition largely depends on the constitutional setup of the legislative process of a country and the requirements it sets. Given the time constraints on transposition one would expect that most Member States would have made necessary constitutional legislative arrangements geared to the need of (the ever more frequent) transposition of EU Directives. The fact of the matter is, however, that most Member States do not have constitutionally enshrined provisions dedicated to the transposition of EU Directives. Most Member States make do with what they (constitutionally) have got. Countries like the Netherlands and Germany adhere to their normal constitutional principles at the occasion of the transposition of EU Directives. The principle of the *primacy* of the parliamentary legislature requires that the basic elements of any statutory system be regulated through Acts of Parliament. Principled matters, subject matter of which the constitution requires regulation by Act of Parliament fall under this scope as well. This of course acts as an impediment on the use of lower ranking instruments when transposing EU Directives and slows things down as well. Member States

---

<sup>11</sup> Rozenberg’s study pessimistic in this respect. ‘Regarding the EWM (Early Warning Mechanism) , the survey notes that this innovative procedure has been almost redundant (...). Rozenberg 2017: 7, 19. Cooper on the other hand believes that the yellow card initiatives between 2010 and 2016 evidences that national parliaments ‘have shown themselves to be a collective force in EU politics. While they do not, as a group, have the power to veto an EU proposal, they can intervene in the EU legislative process in a way that gives them influence over the final outcome.’ Cooper 2015: 1420-1421.

do want to be quick on their feet when transposing EU Directives and have, therefore, come up with all kinds of creative uses of generis constitutional instruments and procedures to speed up the transposition process. Some use constitutional emergency procedures and related legislative emergency-instruments to sweep up transposition backlogs (France, Spain). Other countries use emergency procedures as transposition fast lanes (Slovenia). At times omnibus laws transposing bundles of EU directives into a single (yearly) Act of Parliament were popular (Steunenberg & Voermans 2006). Only a few countries have resorted to dedicated legislation and legislative procedures to speed the transposition of EU Directives (e.g. the UK) and allow for increased use of lower ranking legislative instruments to transpose EU Directives. One could criticize this by claiming that transposition EU Directives is more or less a technical act, fitting in the already debated and duly enacted EU legislation into the national legal order. Having a debate on the merit of a EU Directive at the occasion of the debate on the transposition bill is futile: the input is too late and it does no more than frustrating the pace of transposition. On the other hand Steunenberg and Voermans c.a. have observed that most EU Member States, regardless of their constitutional system, in more or less 75% of the cases use lower ranking instruments (of secondary legislation) to transpose EU Directives and that the use of special transposition instruments or methods only marginally speed up transposition, but do tend to be controversial from a democratic point of view (Steunenberg & Voermans 2006: 31-38). Furthermore, for good reasons, Member States perceive the transposition of EU Directives not as a mere technical formality. In a lot of cases important decisions have to be made in the way EU Directives are 'woven' into the fabric and frameworks of domestic legislation that sometimes are the result of long traditions and are pathways to networks and institutions of implementation and application of domestic law. Dealing with transposition as a mere semi-automatic method, an administrative conveyor belt of implementation, would seriously undermine the legitimacy of the EU legislation in question. Transposition is an act of accommodation – transferring EU law into domestic law – making it even more your own law. National Parliaments (and Member States) still are very divergent and have (very) different traditions (Bormann & Winzen 2016).

In most cases, however, there will be hardly any substantial role for National Parliaments to play when EU Directives are transposed apart from the more technical details. But devils do rest in them. One of the more delicate ones, for instance, tends to be whether provisions of EU Directives should be copied out or rather elaborated in order to get a better fit with domestic legislation. Even though more and more Member States opt for copying out as much as possible, elaboration is still favoured on occasion. Another typical debate, that has died down somewhat over the last years, is whether Member States should do something 'extra' (gold-plating) on the occasion of transposition or refrain from that and only transpose the bare minimum of a Directive. Most Member States nowadays choose the latter position. As well as they try to avoid 'double banking' – i.e. inadvertently adopt two procedures (one EU and one domestic) for more or less the same subject matter.

We will be very brief on the role National Parliaments play in the last (but crucial) part of the EU's legislative cycle: the feedback stages. Enacting legislation is always an exercise in proving Murphy's Law that anything that can go wrong will go wrong to the test (and sometimes even right). It is, however detailed and precise an impact analysis may be, impossible to foresee what will happen with – especially transposed – EU legislation down the road. Feedback is critical for the effective operation of EU legislation. In the EU this is however, given the political dynamics and asymmetries, very difficult to do. The political dialogue and the many opinions it yields is a valuable instrument for informal evaluation and feedback. It would be, maybe, a good idea to even elaborate it.

## 4. National Parliaments & comitology

In the former paragraphs we have discussed the ways National Parliaments have emancipated themselves into the EU legislative process, in formal and more informal ways – especially on the ticket of their responsibilities in the transposition of EU Directives. The literature is clear on the outcome of this process: this has increased the democratic underpinning and overall legitimacy of EU legislation at this juncture of European integration. There is, however, an other side to this coin, a development that seems to lead away from the democratic increase and the hold of (National) Parliaments on the EU legislative procedure, and that is the persistent reality of ‘comitology’. Comitology refers to the process whereby EU legislation is modified, elaborated or adjusted by ‘comitology committees’ consisting of Member States’ expert representatives without democratic mandates and chaired by the European Commission. The official term for what these comitology committees do, is enacting *implementing acts* (under the procedure laid down in article 291 TFEU). There are many of these committees (approx. 250) and their democratic legitimacy is vulnerable if not low. Even though the Lisbon Treaty tried to come up with a new system of delegation, that would offer more democratic parliamentary control on delegated legislation, for various reasons, most of the implementation legislation managed to slip away from the strict controls of art. 290 TFEU and moved across the street to the house of art. 291 TFEU, with much less parliamentary surveillance of any kind (Voermans, Hartmann & Keating 2014). This of course presents an accountability problem and erosion of legitimacy in its wake. Neither national parliaments, nor the European Parliament are well equipped to hold comitology to account or to impose their will or mark on the process of enactment. This does pose a problem because even conservative estimates calculate that approx. 75% of EU legislation is enacted by the European Commission in or with the aid of comitology (Voermans c.a. 2014, 29-30). This lack of democratic pedigree of so-called ‘EU secondary legislation’ causes various legitimacy-related problems at the EU level and at the national level as well. Comitology is becoming a crystallization point of criticism for Europe as a technical project run by unelected bureaucrats (Glencross 2011).

## 5. Key points and observations

This report cannot do more than give a very sketchy overview of the role of National Parliaments in the process of the transposition of EU Directives. A moving target as such: European integration is ever dynamic, ever in flux. Some observations, however, are noteworthy, we believe, at this juncture. First of all the role of National Parliaments has evolved over the last decades. National Parliaments have emancipated themselves as serious players into the whole of the EU legislative process and – to all intents and purposes have become more actively involved at the European level. Although National Parliaments’ positions and traditions vary quite substantially, they have been able to give a voice to the Member State’s electorate separate from the one of governments. The role of National Parliaments in the grand scheme of the European legislative process, especially the one leading up to EU Directives, has shifted from that of a – more or less – bystander to a team player. One may read this from the amount of opinions National Parliaments have delivered to the European Commission since 2006, the way they have organized their scrutiny procedures on proposals for EU legislation, the rise of scrutiny reserves throughout post-Lisbon Europe and the practice of (formal) mandates and instructions on national positions for governments. This, the literature agrees, is helpful for the overall legitimacy and democratic underpinning of EU legislation. Another insight from the report is that some of the innovations, like the Early Warning Mechanism, did not meet with the same success as the policy of political dialogue did, and that there is no philosopher’s stone to expedient transposition

of EU Directives: quick fixes or methods of trying to bypass Parliament at the occasion of the transposition of EU Directives do not pay off in time gains, and come at a price in the overall legitimacy of EU legislation. A last observation is a concern: comitology, as a way of enacting legislation by predominantly unelected and unaccountable experts in its present volume risks undermining the ever more democratic way of legislating in the EU. The critical stance the European Parliament has taken on the post-Lisbon shift to implementing acts (and away from delegating acts under art. 290 TFEU) is to be embraced in this respect.<sup>12</sup>

## Selection of the literature

### **Alibrandi 2018**

Alibrandi, Rosamaria, Towards political integration in Europe: the involvement of National Parliaments in European Union politics and policy-making, *Parliaments, Estates and Representation*, 2018, 38:2, p. 227-238

### **Auel, Rozenberg & Tacea 2015**

Auel, Katrin; Rozenberg, Olivier & Tacea, Angela, To Scrutinise or Not to Scrutinise? Explaining Variation in EU-Related Activities in National Parliaments, *West European Politics*, 2015, 38:2, p. 282-304

### **Auel, Eisele & Kinski 2018**

Auel, Katrin; Eisele, Olga; Kinski, Lucy, What Happens in Parliament Stays in Parliament? Newspaper Coverage of National Parliaments in EU Affairs, *JCMS: Journal of Common Market Studies*, April 2018, Vol.56 (3), p. 628-64

### **Bormann & Winzen 2016**

Bormann, Nils-Christian & Winzen, Thomas, The Contingent Diffusion of Parliamentary Oversight Institutions in the European Union, *European Journal of Political Research* 2016, 55: p. 589–608

### **Cooper 2015**

Cooper, Ian, A yellow card for the striker: National Parliaments and the defeat of EU legislation on the right to strike, *Journal of European Public Policy*, 2015, 22:10, p. 1406-1425

### **COSAC 2007**

Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC), *Eighth bi-annual report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*. Estoril 2007

### **COSAC 2017**

Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC), *Twenty-seventh Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*. Valetta 2017

---

<sup>12</sup> See e.g. European Parliament resolution of 5 May 2010 on the power of legislative delegation (2010–2021 (INI)) , particularly at 11 and 12, as well as European Parliament resolution of 9 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term (P7\_TA(2010)0009).

**Dörrenbächer, Mastebroek & Toshkov 2015**

Dörrenbächer, Nora; Mastebroek, Ellen; Toshkov, Dimiter, National Parliaments and Transposition of EU Law: A Matter of Coalition Conflict? *JCMS: Journal of Common Market Studies*, September 2015, Vol.53 (5), p. 1010-1026

**Glencross 2011**

Glencross, Andrew, A Post-National EU? The Problem of Legitimising the EU without the Nation and National Representation, *Political Studies*, Vol.59(2), 2011, p. 348-367

**Granat 2018**

Granat, Katarzyna, *The principle of subsidiarity and its enforcement in the EU legal order: the role of National Parliaments in the early warning system*. Oxford: Hart Publishing 2018

**Jančić 2012**

Jančić, Davor, the Barroso Initiative: Window Dressing or Democracy Boost? *Utrecht Law Review*, Vol. 8(1) (January) 2012, p. 78-91

**Jančić 2015**

Jančić, Davor, The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue, *Common Market Law Review*, Vol. 52, 2015, p. 939–976

**Nguyen 2018**

Nguyen, Hoai-Thu, *An uneven balance? a legal analysis of power asymmetries between National Parliaments in the EU*. The Hague: Eleven International Publishing 2018

**Remáč 2017**

Remáč, Milan *Working with National Parliaments on EU affairs; European Implementation Assessment*. Brussels: European Parliamentary Research Service, October 2017

**Rozenberg 2017**

Rozenberg, Olivier, *the Role of National Parliaments in the EU after Lisbon: Potentialities and Challenges*. Bruxelles: Policy Department for Citizens' Rights and Constitutional Affairs of the European Parliament 2017

**Steunenberg & Voermans c.a. 2006**

Steunenberg, Bernard; Voermans, Wim c.a., *The Transposition of EC directives: a comparative study of instruments, techniques and processes in six member states*. Leiden 2006

**Steunenberg, VandenBogaerd & Voermans 2016**

Steunenberg, Bernard, VandenBogaerd, Stefaan, Voermans Wim, *Fit for the future: reflections from Leiden on the functioning of the EU*. The Hague: Eleven International Publishing 2016

**Voermans & Ten Napel c.a. 2012**

Voermans, W.J.M.; Napel, H.M.T.D. ten; Diamant, M; Groothuis, M.M.; Steunenberg, B.; Passchier, R.; Pack, S., *Legislative Processes in Transition. Comparative Study of the Legislative Processes in Finland, Slovenia and the United Kingdom as a Source of Inspiration for Enhancing the Efficiency of the Dutch Legislative Process*, WODC/Ministry of Security and Justice; Leiden/The Hague 2012

**Voermans, Hartmann & Keating 2014**

Voermans, Wim ; Hartmann, Josephine M.R. ; Keating, Michael, The Quest for Legitimacy in EU Secondary Legislation, *The Theory and Practice of Legislation*, Vol.2(1), 2014, p. 5-32

**Wendler 2016**

Wendler, Frank, *Debating Europe in National Parliaments: public justification and political polarization*. Palgrave Macmillan 2016

**Winzen 2012**

Winzen, Thomas, National Parliamentary Control of European Union Affairs: A Cross-national and Longitudinal Comparison, *West European Politics*, 2012, 35:3, p. 657-672

---

Disclaimer and Copyright

The content of this document is the sole responsibility of the author and any opinions expressed therein do not necessarily represent the official position of the European Parliament. It is addressed to the Members and staff of the EP for their parliamentary work. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.  
© European Union, 2018.

Contact: [poldep-citizens@europarl.europa.eu](mailto:poldep-citizens@europarl.europa.eu)

This document is available on the Internet at: [www.europarl.europa.eu/supporting-analyses](http://www.europarl.europa.eu/supporting-analyses)

Print ISBN 978-92-846-4333-2 | doi: 10.2861/329949 | QA-06-18-305-EN-C  
PDF ISBN 978-92-846-4332-5 | doi: 10.2861/891298 | QA-06-18-305-EN-N