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Making Better Use of Existing Powers and Opportunities Arising from the European Constitutional Treaty

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Several national parliaments in the EU are using the ratification of the Treaty establishing a Constitution for Europe (Constitutional Treaty or TCE) as an opportunity to make their participation in EU politics more efficient. On the 12th of May, the day of the ratification of the TCE, the German Bundestag, the lower house of parliament, also intends to pass an additional, supplementary law which will strengthen the role of the German Parliament in EU affairs. Although the Bundestag possesses formal participation rights, it does not play an adequate role in the EU legislative process. By comparison, the parliamentary practices and the reform efforts of the Baltic states, Finland, France and Great Britain show that these countries in part already carry out their obligation to scrutinize and confer legitimacy to EU legislation more efficiently and are even discussing future reform proposals.

The current debate about the constitutionality of the European arrest warrant makes it clear that there is a habitual malaise when it comes how EU policy is made on a national level: many national parliaments still lack the fundamental ability to participate in and scrutinize the decisions made by their governments in the Council of Ministers. How else can one explain the fact that the German Government, with the approval of the Bundestag, agreed to an EU Framework Decision, which was then implemented into national law by the Parliament without any real difficulty and then, when the law was to be applied, its compatibility with the German Basic Law (Constitutional Law) was called into question? The ongoing debate should have started much earlier, specifically before and during the negotiations for the framework decision in the EU institutions because at those stages of the decision-making process, national parliaments can still exercise influence via their governments with respect to the content of decisions.

In the past 20 years, legislative competences of national parliaments have been steadily transferred to the Council of Ministers, especially competences in the sensitive key areas of national sovereignty such as

justice and home affairs. With this in mind, parliaments are all the more obliged to compensate for this loss of competence with proactive participation in and scrutiny of EU politics by their governments. In addition, because the Council of Ministers makes framework decisions in justice and home affairs, such as those for the European arrest warrant, using only the consultation procedure with the European Parliament, the EP members hardly have any possibilities to exercise control over the decisions. Therefore, national parliaments have an even greater responsibility to legitimize such decisions by controlling the conduct of their governments in the Council of Ministers.

A New Round of Parliamentary Adjustment

Since the Maastricht treaty came into effect an even greater number of decisions have been made by the EU institutions instead of the parliaments themselves. In response to this trend, the parliaments introduced mechanisms which enabled them to influence decision-making on the EU level and thereby, together with the European Parliament, contribute to the democratic legitimization of decisions made by the EU. All parliaments, via their EU committees or plenary assemblies, take a position on EU draft legislation. During votes in the Council of Ministers the governments are more or less strictly bound by the positions of their parliaments. Among the 25 member states the degree of *de jure* and *de facto* participation of the members of parliament varies considerably.

In many parliaments the pending ratification of the Constitutional Treaty initiated a new wave of proposed reforms. *First, the rights* and duties of national parliaments *arising from the constitution need to* be anticipated. Above all this concerns the implementation of the new procedure for subsidiarity control by the national parliaments. *Second,* the TCE—as a further step towards deepening European integration—gives those parliaments, which until now have utilized their scrutiny and participation mechanisms rather insufficiently, a fresh reason why *to examine* or, if applicable, change their *existing practices of parliamentary participation in and scrutiny of national involvement in EU politics.*

Already in February this year France changed its constitution on the basis of two comprehensive reports of its National Assembly. The British House of Commons and the Finnish Parliament have also presented extensive assessments of their previous work and their initial proposals for reform. Several parliaments of the new member states have already ratified the TCE and have introduced parliamentary practices for the scrutiny of EU politics that, at least formally, are very efficient. Upon the ratification of the Constitution on May 12, 2005 the Bundestag also wants to pass a supplementary law for the "extension and strengthening of the rights of the Bundestag and the Bundesrat in European Union affairs." Negotiations over the details, and an intended agreement between the Bundestag and the government which is contemplated in the supplementary law, are still pending.

Subsidiarity Control

Since the new rights come directly from the EU Treaties for the first time, the implementation will take place in a similar manner in most of the member states. The Constitution provides that national parliaments will examine the EU draft legislation to see if it conforms with the principle of subsidiarity. For this purpose, the EU Commission will transmit the drafts to them before they undergo the normal legislation process. Within six weeks of the transmission, each parliament (or for those countries with two-chamber parliaments, each chamber) can deliver their individual reasoned opinions to the Commission. If a third of the all parliamentary chambers in the EU raise objections, the Commission has to at least reconsider and if necessary

change or even withdraw the proposal. Should an EU law nevertheless be passed, which in the opinion of any chamber violates the subsidiarity principle, that chamber can challenge the law in the European Court of Justice (ECJ).

Whether the parliaments can make use of their new rights during the examination of subsidiarity depends entirely on the detailed provisions of the rules of procedure, portfolio arrangements or agreements between the government and parliament. Several parliaments of the new member states already anticipated the introduction of the "subsidiarity check" last year and have adjusted their intra-parliamentary procedures accordingly. In the parliaments of all three of the Baltic states, for example, the subsidiarity check has been built into the regular, existing scrutiny process for EU affairs. The EU committee is responsible for the central coordination of the subsidiarity review. The government as well as standing committees include an assessment of the question of subsidiarity in their positions on EU draft legislation which they submit to the EU committee. If on the basis of this review, the EU committee determines that a piece of draft legislation does not comply with the subsidiarity principle, the matter is submitted to the vote of plenary assembly. Many of the older member states are also installing a subsidiarity control mechanism into the existing scrutiny procedures, pursuant to which the final decision on whether legislation complies with the principle of subsidiarity is left to the vote of plenary assembly of the applicable chamber(s) of parliament.

In practice, however, this review mechanism will be of limited use. The Finnish Parliament correctly points out that there are already procedures for subsidiarity control. In the process of drafting legislation, the EU commission asserts in all of its proposals that it has complied with the principle of subsidiarity. An interinstitutional agreement also obliges the Council of Ministers and the European Parliament to examine whether a proposal complies with the principle of subsidiarity. After all, nothing now prevents national parliaments from carrying out a subsidiarity check within the scope of the customary scrutiny of the content of the EU politics of their governments and, when there is doubt, making their governments vote against the legislative plan. Thus, the new procedure plays at most a complementary role. With regard to the intra-parliamentary implementation of the subsidiarity examination, it should be recalled that a parliament as a whole and not a minority thereof should be allowed to exercise the right to sue in the ECJ because even if a baseless suit before the ECJ does not have a chance to succeed, the filing of the suit itself could be effectively instrumentalized in the media by euro-skeptical parties.

Despite these limitations, the new procedure can make a contribution to the strengthening of national parliaments in the EU institutional set up if it is used in a well thought out manner. Before the actual legislative process, the parliamentarians can now directly check whether their governments have complied with their repartition of competences between the EU and its member states which were established by the national parliaments' own ratification of the EU treaties. The issuance of reasoned opinions commenting on compliance with the principle of subsidiarity can have a disciplining effect on the EU Commission during drafting of legislation. Whether the Commission ultimately makes changes to the draft legislation clearly depends on how many parliaments express reservations. In this regard, parliaments have to seriously think about how they could share their findings following their own subsidiarity checks in order to coordinate reservations that will be submitted to the EU Commission.

A majority of parliaments believe that a parliament's taking a case to the ECJ after the passing of a draft law is the *worst case* scenario. The ECJ itself does not believe that this method will be used very frequently. Above all, the possibility of a lawsuit should

cause the Commission, as well as the Council and the European Parliament, to seriously think matters through before electing to go against the will of national parliaments and regulate matters on the EU level. Nevertheless, if some parliaments do bring cases to the ECJ, this could have the positive side effect that the Court of Justice, by means of its jurisprudence, contributes to the legal clarification of the rather vague concept of subsidiarity.

In reality, the subsidiarity examination will be intertwined with the established scrutiny procedures for EU affairs, some of which have existed for 40 years. As a result, all 25 parliaments are compelled to take a critical look at their roles within the EU legislation process. Against this background—as discussed above—many parliaments are about to examine their general participation and scrutiny mechanisms and arrange them more efficiently.

Comprehensive and Timely Scrutiny of EU politics

Since the ratification of the Treaty of Maastricht, there has been a growing trend of parliamentary participation in government policy as it relates to EU affairs. This trend can be understood as a reaction of the parliaments to deeper political integration at the EU level. Their goal is to democratically legitimize the decisions which significantly affect national interests. The Constitutional Treaty deepens European integration in additional policy areas and requires parliaments to adapt their work flows accordingly. In the center of the ongoing debates is the call for parliaments to: (1) better anticipate issues, (2) more efficiently screen EU documents for relevant information, (3) adjust to the deepening of integration in the field of justice and home affairs, and (4) improve their communication policies.

Strengthening Pre-legislative Work

The majority of the decisions in the Council of Ministers are made at the lower, working level, e.g. in working groups or the Committee of Permanent Representatives. Thus, if members of parliament want to influence the decisions made by their governments in these working level Council bodies, they must issue their reasoned opinions on draft legislation as early as possible. In practice, this means that parliaments have to be able to deliver a written opinion shortly after the submission of draft legislation by the Commission. In order to meet this short deadline, a parliament will already have to have taken a detailed look at the facts before the draft legislation was submitted. Since only a few of the mass of EU decisions affect vital national interests, appropriate screening of the documents is required as well.

It is possible to effectively screen documents and anticipate potential issues as, for example, demonstrated by the Baltic parliaments. The Lithuanian Parliament developed an efficient screening system in order to protect themselves from a flood of EU documents. All standing committees deliberate on the annual legislative program of the Commission, and then subdivide the program's legislative proposals into "very relevant", "relevant" and "not very relevant" projects. This list of projects is then submitted to the EU and the Foreign Affairs Committees. Once draft legislation is submitted by the Commission, parliament deals with it either more or less intensively, depending on the relevance assigned to it. In this way, parliament knows well in advance which drafts it will have to deal with in the course of the year. The annual legislative program is accessible on the Internet, and includes extensive explanations and statistics. This system could hardly be better for preparing parliament to deal with future legislation.

Subsidiarity control can also be simplified if the preparations for it begin before the official submission of a proposal, e.g. government ministries begin dealing draft legislation well before it is officially submitted by the Commission. The ministries could be obliged to provide the parliamen-

tary committees with relevant information in advance of the legislation's submission. In Finland, the government sends its information on planned legislation to parliament at the point in time when the EU Commission is still conducting informal consultations with its designated groups of experts, which take place before the official submission of the draft legislation. In addition, parliaments should acquire independent *non-governmental source information* to supplement their official sources of information.

In addition to the annual legislative program, there are other documents which enable the comprehensive tracking of EU affairs: the Commission publishes a working program for the upcoming five years as well as Green Books on subject areas for which there are legislation projects planned in subsequent years. These documents are excellent tools for "predicting" the direction of future proposals of the Commission. In addition, the Commission consults with civil society representatives and holds discussions on planned legislation in the pre-legislative phase—the example of the EU chemicals guideline REACH has made clear to all parliamentary actors the extent to which non-governmental and non-parliamentary institutions can participate in informal EU procedures. These procedures effectively announce EU legislative initiatives well in advance of the formal legislative process. In addition, recently the Council began writing triennial, annual and semi-annual strategy and working programs. Although these programs do not detail specific legislative projects, they do describe the planned focal points for the legislation of the Council. Moreover, they give insight into the "soft law" procedures that take place outside of the community sphere, in the context of the coordination of labor, social and economic policies. These processes should be followed more attentively by national parliaments especially given that the European Parliament is not involved in them.

Waiting until the Last Minute

After the formal submission of draft legislation by the Commission, national governments forward the text, the government position as well as—depending on the country—supplemental information to their parliaments. The earlier this occurs the greater the chance of parliamentary influence. Instead of viewing the proposal of the Commission as the earliest point in time when parliament can commence its review of draft legislation, its arrival should be considered the *latest point in time* to deal with it. The governments of the Baltic states direct all documents to the EU committees very early. In Lithuania, in the case of "very relevant" or "relevant" submissions, the government's position has to have reached the EU committee within 15 days after receiving the draft legislation (with supplemental information!). The committees thus still have the opportunity to deal with the text before the beginning of consultations within the Council working groups. The completion and further development of the positions of the government and the parliament then proceed in parallel to the negotiations of the EU institutions and they can be openly followed by all persons involved via a special electronic information system.

A New Challenge:
The Direct Transmission of Information

Several individual provisions of the Constitutional Treaty and the protocol attached to the Treaty about the role of national parliaments in the European Union contemplate the direct transmission of a multitude of EU documents through the EU institutions to the national parliaments. Up until now, EU documents are received by governments and then forwarded to their parliaments – selectively and sometimes with significant delays. The new rules are designed to make sure that all national parliaments can fully exercise their scrutiny rights in a timely manner. All parliaments will receive, among other items, draft laws, consultation documents, and law-making

programs. The forwarding is however limited to the legislative acts defined in Article I-34 of the Constitution Treaty, specifically European laws and European framework laws. Thus, parliaments will continue to rely on the goodwill of their governments, if they, for example, want to examine documents related to the Common Foreign and Security Policy or the open method of coordination. Moreover, the European Parliament will only be involved to a limit extent, if at all, in these fields: the national parliaments must therefore be aware of their special obligation to scrutinize their governments' conduct in the Council of Ministers.

Many parliaments, however, think that they will be overwhelmed by the direct transmission of documents by the EU institutions. They fear that they will be flooded with EU documents and thus hindered in the performance of their oversight function. The careful screening of documents is required in this case. Parliaments should already, without reservation, be insisting on the right to determine for themselves which documents they would like to receive. This requires using more personnel to identify documents of interest. However, given the fact that at least 50% of national legislation has its origins in EU legislation and that the legislative competence of the Union applies to almost all areas of domestic politics—including some very sensitive areas—it should be obvious that personnel and technical resources should be concentrated in this field. A parliament's refusal, pointing to tight personnel resources, to treat EU politics with the appropriate level of importance would be equivalent to it not fulfilling its democratic obligations.

Assuming that EU politics are de facto domestic politics, they require a correspondingly high amount of work. The three Baltic parliaments, for example, have filled their EU committees with a relatively high number of representatives and staff. In the Lithuanian Parliament, for example, the EU committee, which has 25 members and 9 staff workers, is by far the largest committee. Moreover, each standing committee has at its disposal at least one advisor specialized in EU affairs. All three countries have, moreover, sent one to two employees to the European Parliament Directorate for Relations with National Parliaments, in order to make their parliaments aware of developments that affect national interests as soon as possible. The high respect for EU affairs can also be seen in the staffing of the EU committees with high-ranking politicians.

The European Scrutiny Committee of the British House of Commons is composed of 16 Members of Parliament, which are supported by a staff of 16 people. Its main task is, above all, to sift through the approximately 1000 legislative and non-legislative documents from the three pillars of the Union sent to parliament by the government. Parliament gives particular importance to being well supplied with information in order to be able to relatively independently judge their relevance. In 2004, 559 documents were classified as legally or politically relevant, and 53 documents were recommended for further handling by other committees after in depth examination.

The Introgression of Justice and Home Affairs

The access to documents and the right to issue opinions in the framework of the second and third pillars—foreign and security policy and police cooperation and criminal justice cooperation—varies widely in the different parliaments. In this context, one should refer to the most dynamic field, the cooperation in justice and home affairs, which has become increasingly important since the Treaty of Amsterdam. It is thus far part of the first and third pillars and consists of traditionally key areas of national sovereignty such as the police and the judicial system, and immigration and asylum policy. With the ratification of the EU Constitutional Treaty, qualified majority decisions of the Council and the co-decision procedure will become the rule in this field

to a large extent. Moreover, the pillar structure of the EU will be removed and all the features of justice and home affairs will be integrated into one treaty title. Consequently, scrutiny by the European Parliament and the European Court of Justice will be strengthened. Initiatives in this sector should now also automatically fall under the control of those national parliaments, which today still are not authorized to issue opinions to their national governments in this policy field. However, all national parliaments should pay closer attention to the deeper integration of this highly sensitive field and use their scrutiny rights to the fullest. In particular, the integration of the various legal provisions in civil and criminal law runs the risk of conflicting with the constitutional law of the member states, as demonstrated by the case of the EU arrest warrant.

Given that the cooperation in justice and home affairs affects highly sensitive elements of the constitutions of European states, additional specific scrutiny rights for national parliaments were written into the Treaty. Accordingly, parliaments will be included in the evaluations of Europol, Eurojust, the evaluation of the implementation of an Area of Freedom, Security and Justice and informed about the operational coordination between the national ministries in this field. EU laws will specify exactly how parliaments will participate in these evaluations. Thus, parliaments should take this opportunity to work closely with their governments to shape these laws. The French Parliament is considering, at least in this field, to replace the non-binding opinions with binding negotiating mandates for the government.

Communication Policy and Europeanization

Many EU citizens are currently suffering from euroskepticism or apathy. This is illustrated by the difficult path to ratification faced by the EU Constitutional Treaty in many of the founding member states of the European Community. One of the causes for this ambivalent mood is surely the fact that parliaments simply do not fulfill their communication role with respect to their populations to the extent necessary. Unfortunately, there was only a rather brief discussion of this deplorable state of affairs at the time of the last European Parliament elections. However, it is not only the citizens, but also the parliamentarians themselves who are inadequately informed about European issues. In most parliaments, in the fifty years since the creation of the EU, there is only a small circle of well-informed specialists gathered together in the EU and the Foreign Affairs Committees. The majority of parliamentarians in standing committees are not even aware of their various ways they can influence the EU legislative process. It is time for these parliamentarians to see themselves as part of the EU legislative process. The legislative process on the national level is still too often perceived as either independent from the EU legislative process or even in conflict with it.

In order to remedy the situation, in various countries the following measures, among others, have been implemented or discussed:

- In France, Great Britain and Finland, they aim at holding regular plenary debates to discuss the most important EU topics. Although these debates are, for the most part, “legally” permissible for some time, they have been seldom used.
- Since 2003, monthly question and answer sessions with the government dedicated exclusively to EU matters are held during a plenary sitting of the French National Assembly and broadcast on television.
- French members of parliament are discussing the establishment of “Europe days”, during which, for example, the annual legislative program of the EU Commission can be discussed by the entire parliament.
- All parliaments want to strengthen their

cooperation with EU politicians.

- The Baltic states have continued the pre-accession practice of having the Prime Minister deliver an annual report on EU affairs.
- In Lithuania, the entire parliament discusses the annual legislative program of the Commission.
- Finland and France have expanded the EU-related web pages of their parliaments and placed them prominently on their homepages.
- In France, the establishment of an Internet forum is planned to serve as a platform for consulting with civil society on EU draft legislation.

The Bundestag's "Fitness" for Europe

The Bundestag is one of the chambers of parliament in Europe formally endowed with far-reaching possibilities for participation in EU affairs. However, it does not come close to exhausting these possibilities. Formally, the Bundestag has long had comprehensive information rights with respect to all three pillars of the Union. The EU Committee can issue opinions on draft legislation, which the German government has to take into account in negotiations in the Council of Ministers. However, the EU Committee rarely issues such opinions. If the Bundestag wants to weaken the repeatedly raised accusation that it is not "fit" for Europe, it must know the full details of its existing rights and make use of them more effectively. All too often, the standing committees do not discuss the content of EU draft legislation with the government. A common reason for the lack of discussions is the parliamentarians' inadequate knowledge of: (1) the possible effects of European legislation, (2) the European political process and (3) their own ability to exercise influence in this process.

The Bundestag, like all other national parliaments of EU member states, is competing for information, participation and effective access to the inner-workings of EU institutions. The fact that some of the "young" East European parliaments have already overtaken the German Parliament in this competition should be alarming.

EU legislation now affects all aspects of citizens' daily lives, without their being fully aware of the full extent of the regulations' scope. The inadequate tracking and scrutiny of EU decisions by the German Parliament and the media, as in the cases of the EU arrest warrant and the anti-discrimination directive, has a negative effect on citizens' views of both the EU and the German Parliament. More information, more frequent substantive discussions arranged in a timely manner, the involvement of civil society and the "translation" of complicated issues into comprehensible statements could stimulate the interest of both citizens and decision-makers in EU-related topics.

As with the national legislative process, the government must engage in, with respect to its European policy, a continuous negotiation process with both the opposition and, more importantly, its own factions in the Bundestag. Such a process requires the active participation of the Bundestag, whose focus should be on an anticipatory and continuous *scrutiny* of the government's EU policy. A good model is the Finnish Parliament's practice of regularly issuing opinions setting guidelines for the government in the negotiations in the Council of Ministers. The Finnish model of day-to-day parliamentary involvement in EU affairs has for a long time been favorably regarded as efficient and practical. It would be a good idea if the Bundestag would, in reassessing its own future participation rules for European politics, closely examine the Finnish model and—if possible—take inspiration from it.

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