

Democratic Implications of the Treaty of Lisbon

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Abstract

How did the Treaty of Lisbon fare in addressing the EU's democratic deficit? The main criticism regarding the democratic implications of European integration pre-Lisbon is epitomized by the concern that merely lumping together various channels or mechanisms of democratic representation and public control will not necessarily result in adequate democratic representation. Instead, poorly coordinated organs may interfere with, and undermine, one another. I examine the degree to which the Treaty of Lisbon improves or worsens the democratic deficit by analyzing the reforms made with reference to the European Parliament, the Council, the European Council, and national parliaments. With respect to the European Parliament, the article focuses on the alleged disconnect between MEPs and the electorate, and the implications of ordinary legislative procedures on the legislative pattern and legislative behavior of the EP. With regards to the Council and the European Council, attention is directed toward the gatekeeping functions of national executives in light of the prevalence of trilogues and

the newly created position of the President of the European Council. Also, the early warning mechanism and the principle of subsidiarity provided for in the Treaty of Lisbon are examined as significant issues for national parliaments. The analysis indicates that the Treaty of Lisbon has failed to improve the EU's democratic deficit to any significant extent.

Key Words: European Union, Treaty of Lisbon, democratic deficit, trilogues, subsidiarity, ordinary legislative procedure

I. Preface

The Treaty of Lisbon was initially proposed, in part, in response to calls to address the EU democratic deficit. As such, it is not surprising that Title II TEU is devoted to “Provisions on Democratic Principles.” How has the Treaty of Lisbon fared in redressing the democratic deficit? In assessing the answer to this question, I analyze reforms concerning the European Parliament, the Council, the European Council, and national parliaments. To measure improvements introduced by the Treaty of Lisbon, two types of indicators are taken into account. Institutionally and theoretically, the logical rationale for reforms is considered. Empirically, a comparison of the situation regarding the democratic deficit before and after the Treaty of Lisbon came into effect will be presented. With respect to the European Parliament, the article focuses on the alleged disconnectedness of MEPs from the electorate, and the implications of ordinary legislative procedures on legislative patterns and the legislative behavior of the EP. With regards to the Council and the European Council, attention is directed toward the gatekeeping function of national executives in light of the prevalence of trilogues and the newly created position of the President of the European Council. As to national parliaments, the significance of the early warning mechanism with regards to the principle of subsidiarity as provided in the Treaty of Lisbon is examined. The findings of the paper show that there is very weak evidence supporting the claim that the Treaty of Lisbon has improved the EU’s democratic deficit to any substantive degree.

II. Some Essence of the Pre-Lisbon Democratic Deficit Debate

Most analysts of the EU’s democratic deficit approach the issue by focusing on individual institutions and examining their

operational logics. While the design of individual institutions doubtlessly has a direct bearing on the performance of the EU, the democratic deficit also must be understood from the perspective of changed inter-institutional relations, and domestic political institutions must be considered a part of the equation. Such inter-institutional dynamics are not easily captured in works focusing on individual institutions.

The Treaty of Lisbon is yet another example of Europe's efforts to tackle the democratic deficit, but one which overlooks the impact of altered inter-institutional dynamics on democracy. It is from this critical perspective that this article compares the situation before and after the Treaty of Lisbon. Although the article places great emphasis on inter-institutional relations, the discussion will follow the Treaty taxonomy and consider the individual institutions in turn. While the immediate focus of each section is on the particular institution, the overall discussion is informed by inter-institutional relations, with the contradiction between the reality and the belief that double-representation will result in better representation being the underlying concern. Hence, while a powerless EP was seen as a problem for European-level democracy, an empowered EP could be just as much a problem when viewed from a broader picture. According to the double-representation logic, this shortcoming could be compensated by national executives' ability to act as gatekeepers of national interests under the watchful eyes of national parliaments, which were recently empowered to probe deeper into EU affairs. As this article will demonstrate, however, these expectations can hardly be materialized under the Treaty of Lisbon.

According to the new Title of the Treaty of Lisbon on "Provisions on Democratic Principles" (Title II TEU), "(t)he functioning of the Union shall be founded on representative democracy. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in

the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens” (Art. 10.1 & 2, TEU). This form of double representation is seen by many as the main source of democratic legitimacy of the Union. As the German Federal Constitutional Court has highlighted, in democratic terms, the EU is derivative of the Member States (Eriksen & Fossum, 2011: 154). This double-representation design has citizens represented *directly* in the European Parliament and *indirectly* by national governments through the Council. The Treaty of Lisbon, however, fails to address the persisting concern that dispersing democratic accountability among the European Parliament (theme of section III), national executives (theme of section IV), national parliaments (theme of section V), and EU executives alters—often negatively—how representative democracy works. At first sight, the direct (through the EP) and indirect (through the Council and national parliaments) modes of representation may appear complementary and mutually reinforcing, reflecting a balance between the supranational and intergovernmental elements of the EU. The arrangement leaves the impression that citizens are doubly served in terms of democratic representation. That impression is problematic. The question is “whether this complexity is not as much a source of incoherence as of mutual reinforcement” (Beetham & Lord, 1998: 127).

To the extent that policy-making at the European level is dominated by executive actors, European integration has increased executive power and decreased national parliamentary control. Unlike typical policy-making at home, national executives enjoy greater liberty to ignore their parliaments when decisions are made in Brussels as domestic-executives-turned lawmakers in the Council are not accountable to the parliament (Follesdal & Hix, 2006: 534). If poorly crafted legislation that slips through the nets of national democratic scrutiny is corrected by the European Parliament, then the system of double representation system can be

considered complementary and mutually reinforcing. However, the democratic control functions of the EP are quite limited. This lack of control stems from the flimsy connection between MEPs and their electorates.

European elections are seldom about the personalities and parties at the European level, or EU policy agendas. This was confirmed yet again in the latest European elections, which will be discussed later in the article. European elections are, by and large, fought by domestic parties on national rather than European manifestoes, with candidates selected by domestic party executives. As *second-order* elections (Marsh 1998; Reif & Schmitt, 1980), European elections often function as votes of confidence on the ruling parties of individual Member States. Consistent with the mid-term election phenomenon, domestic ruling parties often fare worse than oppositional and smaller parties in EP elections (Kritzinger, 2003: 225-226; Thorlakson, 2005: 469). As candidates do not compete on European issues, voters are deprived of the opportunity to learn and be informed about European affairs through elections and election campaigns.

Without addressing this problem, decades of treaty reforms have continued to increase the legislative power of the EP in response to criticisms of the democratic deficit. As will be explained later, such reforms have hardly improved the EU's credentials on this front. As a result, the Council, which is part legislature, part executive, continues to make decisions without proper scrutiny. Although recent treaty reforms have enhanced transparency requirements with respect to Council decision-making, "one often needs the mindset of a focused private investigator to unearth relevant information both about processes and about its various (sub-) actors. . . . Moreover that secrecy has permeated the manner in which legislation is adopted at the EU level more generally especially as the European Parliament has acquired incrementally a more central role in co-decision" (Curtin, 2009: 129-130). As will be discussed later in the article, nominal

transparency does not seem to have led to *de facto* transparency on the Council. Moreover, the legislative pattern of the European Parliament has gravitated toward the Council, making informal decision-making in seclusion increasingly the norm in the European Parliament as well.

Democratic representation, thus, has functioned as intended neither at the European level nor at the national level. That said, the EU can at least draw output-oriented legitimacy from the realization of policies not achievable by Member States individually. In other words, “so long as the common project produced evident benefits in the form of prosperity, economic opportunities and job creation, voters would accept it, and even come round to welcoming it” (“An ever-deeper,” 2012). According to this view, the EU is a regulatory regime with power delegated by Member State governments to solve problems associated with globalization and interdependence. This regulatory regime is tasked with finding solutions for trans-border problems of a technical-economic nature that do not invoke moral claims or affect identities. Its legitimacy is consequentialist, based on its ability to produce substantive Pareto-optimal outcomes for technical problems (Eriksen & Fossum, 2011: 157-158; Scharpf, 1999).¹

Contrary to the view that as long as the EU delivers, citizens will consider the EU democratically legitimate, studies have shown that satisfaction with EU democracy is an important predictor of public support for EU governance. In other words, when citizens believe that they are poorly represented, their support for the EU decreases regardless of perceptions of economic performance (Rohrschneider, 2002: 463). Public opinion, therefore, appears to be something policy-performance-minded bureaucrats can neither

¹ Here, the legitimacy of the Union is thought to be “based on its ability to produce substantive outcomes in line with the principle of Pareto optimality, which states that only decisions that no one will find unprofitable and that will make at least one party better off, will be produced, and hence lend legitimacy to international negotiations” (Eriksen & Fossum, 2011: 157).

ignore nor bypass, no matter how technical they consider the issue at hand is. In line with this view, the Federal Constitutional Court of Germany stated that,

democracy, first and foremost lives on, and in, a viable public opinion that concentrates on central acts of determination of political direction and the periodic allocation of highest-ranking political offices in the competition of government and opposition. Only this public opinion shows the alternatives for elections and other votes and continually calls them to mind also in decisions relating to individual issues in order that they remain continuously present and effective in the political opinion-formation of the people via the parties. (German Federal Constitutional Court, 2009, paragraph 250, as cited in Nicol, 2012: 511)

To summarize, remedying the EU's deficit of democratic legitimacy has proven challenging. Attempt to balance executive dominance through the strengthening of the EP risks exacerbating, rather than solving, the EP's legitimacy problem. Also, empowering the EP may inadvertently shift the balance of inter-institutional power relations in the Council's advantage. In the following sections, I assess how the Treaty of Lisbon has impacted these long-standing concerns.

III. The EP

A. Democratic Legitimacy of the EP

(A) Logical Evaluation

In order to address criticisms that European integration has resulted in increased executive power and decreased in parliamentary control, and that the European Parliament is, in general, weak and toothless, the Treaty of Lisbon greatly enhanced the power of the European Parliament by expanding the scope of

the co-decision procedure, and renaming it the ordinary legislative procedure (Art. 289 & Art. 294, TFEU). The Treaty of Lisbon brought over 40 new areas under this procedure, including agriculture, services, energy policy, asylum and immigration, and the structural and cohesion funds (Art. 43.22, TFEU; Art. 56, TFEU; Art. 77-80, TFEU; Art. 177, TFEU).

The multi-faceted role of the European Parliament in the debate over the democratic deficit can sometimes be self-contradictory. On the one hand, the deficit is considered attributable to the weakness of the European Parliament—had the European Parliament enjoyed more substantial legislative power and democratic control over the Commission and the Council, concerns raised over the growth in executive power at the expense of national parliamentary control would have been eased. On the other hand, the legitimacy of the European Parliament is problematic mainly due to its remoteness and the disconnectedness of MEPs from their electorates. To the extent that this concern is valid, the empowerment of the EP risks aggravating rather than alleviating the democratic deficit.

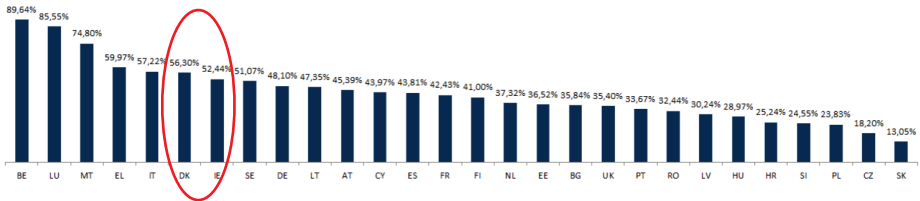
Hence, for those who are uneasy with the legislative power of the EP, parliamentary democracy has proven a flawed mechanism for tackling the EU's democratic deficit. By failing to address the European Parliament's legitimacy problem while firmly embedding the power of the EP in the ordinary legislative procedures of EU political system, the Treaty of Lisbon is likely to have negative effects on European democracy. The ruling of the Federal Constitutional Court of Germany, for instance, stresses that the Treaty of Lisbon does not change the fact that the EU lacks "a political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people." The Treaty leaves the Union in need of "a system of organization of political rule in which a will of the European majority carries the formation of the government in such a way that the will goes back to free and equal electoral

decisions and a genuine competition between government and opposition which is transparent for citizens, can come about” (Eriksen & Fossum, 2011: 159). In fact, it is astonishing how much the observation by Weiler et al. nearly two decades ago that, “[i]n its present state, no one who votes in the European elections has a strong sense at all of affecting critical policy choices at the European level and certainly not of confirming or rejecting European governance” still holds true after the Treaty of Lisbon (Weiler, Haltern, & Mayer, 1995: 9). A parliament that perfectly represents the will of the people is a utopian dream—parliaments in even the most democratic countries constantly fall short of that ideal. The problem with the EP is not that it fails to represent perfectly the will of the European people, but rather that, on the top of increasingly problematic national representative legislatures, an even less democratically representative, supra-national body possessing legislative power exceeding those of national parliaments is imposed.

(B) Empirical Assessment

Has the Treaty of Lisbon empowered an institution whose legitimacy is in serious question, particularly in relative terms compared to national parliaments? According to a survey in the UK conducted at the eve of the 2014 European Elections, over 52% of respondents could name their MP, and 31% could name their local councillors. But only 11% said they were able to name a MEP in their region (Coman & Helm, 2014). Similarly, only 9% of those surveyed in the Dublin city center could name any of their three MEPs, a figure likely above the Irish average given that Dublin is the capital (O’Connell, 2013). Even in Germany, where voters are supposedly well informed and sophisticated about EU politics, Berlin was about the only city where EU election posters could be seen along the streets. Fearing that EU politics would be too boring for the audience, German public television had to push a televised debate among top candidates for the European elections from ARD

and ZDF to a channel with a smaller audience share (“German public TV,” 2014). Such observations are significant given that Germany and Ireland have the third and fourth highest rates of voter turnout (discounting countries where voting is compulsory) in the European elections (Figure 1).²

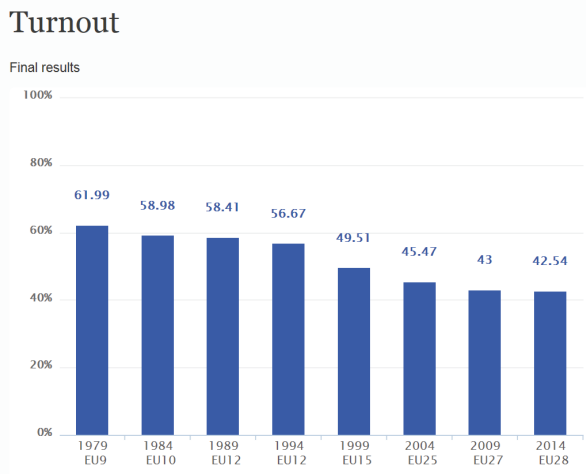


Source: European Parliament Public Opinion Monitoring Unit (2014).

Figure 1 Turnout in the 2014 European Elections

To the extent that the national medias paid attention to European elections, they spoke only of how the election results would affect domestic parties; Europe did not even enter their discussions (“Political scientist,” 2014). Voters are not to be blamed for their inability to distinguish between the political standings of political groups within the EP given that their politicians are also unable to articulate significant differences. On the eve of the 2014 European Elections, Jean-Claude Juncker, representing the center-right European People’s Party, and Martin Schulz, representing the Party of European Socialists, faced off in a TV debate. Most noticeable was how little their views differed. Headlines following the debate highlighted the awkward harmony: “Juncker and Schulz struggle to find differences” (“Juncker and Schulz struggle,” 2014). The positions presented came down to a choice between “pro-Europe” and “even more pro-Europe,” which

² For similar apathy elsewhere in the EU, see Geist (2014); Grisolia (2014); Gyárfášová (2014); Paulos (2014).



Source: TNS/Scytl in cooperation with the European Parliament (European Parliament, 2014c).

Figure 2 Voter turnout in European elections

goes a long way to explaining why so many Europeans did not bother to vote (Figure 2).

It must be noted that the EU has long faced a problem that cannot possibly be resolved by a single round of treaty reform. Fundamentally, European citizens' identities and political imaginations rest in their particular nation-states rather than Europe. Acknowledging that resolving this issue is not within the scope of the Treaty of Lisbon, this article draws attention to how further empowering the EP aggravates the effects of the identity problem. The more the EP is empowered to legislate as a co-equal with the Council, the more seriously apathetic and disconnected voters become.³ The problem is such that London mayor Boris

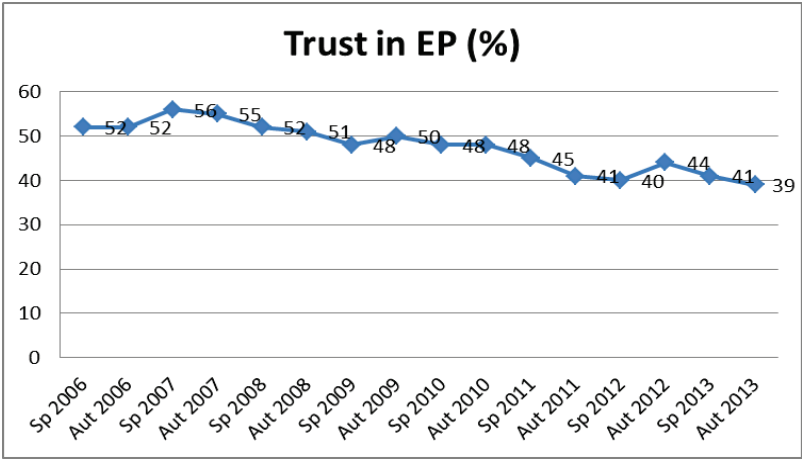
³ Once empirical evidences have demonstrated that the EP is disconnected from the people, the proposition that further empowering the EP would

Johnson has characterized European elections as “a complete sham,” and the EP as “a gigantic waste of money—and yet the real tragedy is that with every year the parliament loses public support and public interest, it gains in practical power” (Johnson, 2014). His characterization appears to be supported by polling results. As Figures 3 and 4 show, the decline in public trust of the European Parliament, and of the European Union as a whole, has been remarkably steady. Figure 5 provides a comparison of voter apathy and disillusion with the European elections. Clearly, among abstainers there is a significant drop in belief that the EP takes into consideration the concerns of European citizens, and few now care which candidates are elected to the EP. In spite of the efforts and resources dedicated to informing citizens, and the EP’s slogan, “*This time, it’s different,*” fewer respondents remember having been reached by the campaign.⁴

In short, power is being transferred from representatives voters are relatively familiar with and connected to—that is, national representatives—to distant representatives from whom they feel disconnected. In the afore-mentioned British polls, only 27% could name José Manuel Barroso as president of the Commission, while 19% believed Angela Merkel was the Commission president.

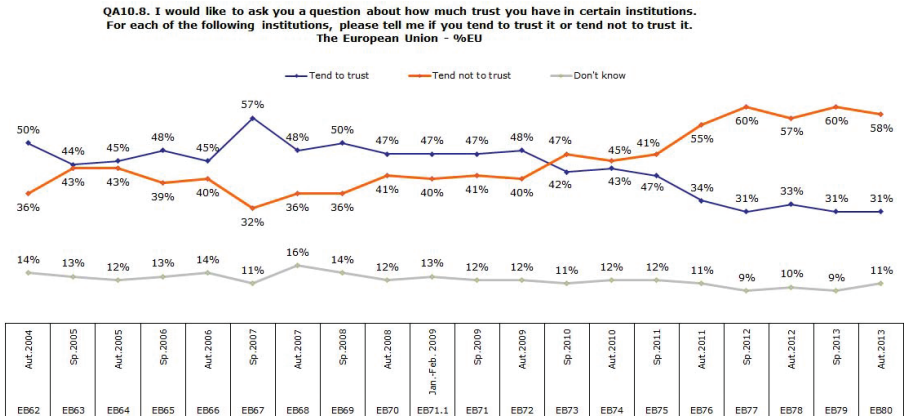
worsen the democratic deficit becomes a logical rather than empirical question.

⁴ While the euro crisis makes it more difficult to interpret survey data, the long-term trend has been clear and steady. Now that the euro crisis *has* taken place, unless we simply discard all evidence available to us, it is almost impossible to differentiate public opinions that reflect the impact of the crisis from those that do not. In addition, the euro crisis is not necessarily exogenous to the democratic deficit. If the lack of transparency and scrutiny are integral to what has led to the crisis, then utilizing the survey data here is justified.



Source: Standard Eurobarometer 80 (European Commission, 2013d: 70).

Figure 3 Trust in the EP across all Member States

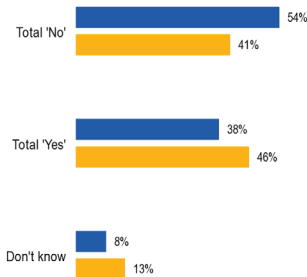


Source: Standard Eurobarometer 80 (European Commission, 2013d: 75).

Figure 4 Trust in the EU in all Member States

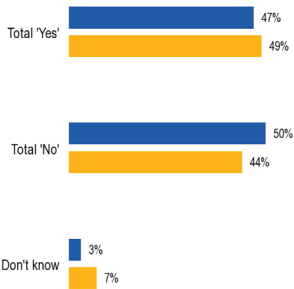
QP6.4. For each of the following statements, please tell me to what extent it corresponds or not to your attitude or opinion.

The European Parliament takes into consideration the concerns of European citizens



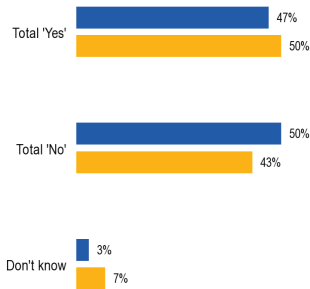
QP6.7. For each of the following statements, please tell me to what extent it corresponds or not to your attitude or opinion.

It is very important for you which particular candidates have been elected as MEPs in the European Parliament elections in (OUR COUNTRY)

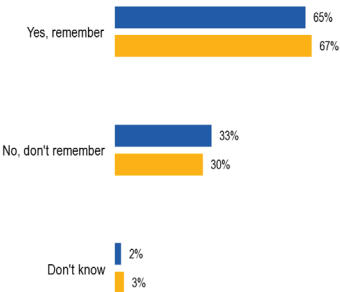


QP6.8. For each of the following statements, please tell me to what extent it corresponds or not to your attitude or opinion.

It is very important for you to know which particular political party has the most MEPs in the European Parliament elections in (OUR COUNTRY)



QP8. Personally, do you remember having seen on TV, in the Internet or on posters, read in newspapers or heard on the radio a campaign encouraging people to vote in the European elections?



■ EU post-election 2014
■ EU post-election 2009

● EU28

■ EU post-election 2014
■ EU post-election 2009

● EU28

Source: European Parliament Public Opinion Monitoring Unit (2014).

Figures 5 Voter Apathy, 2009 and 2014

B. Empowered EP and Law-Making

(A) Logical Evaluation

Under ordinary legislative procedures, the European Parliament and the Council must agree on exactly the same text for the adoption of a proposed EU law. A legislative proposal is adopted at the first reading if the Council and the European Parliament agree on the document at that stage. If the two legislative bodies fail to reach an agreement at the first reading, the Council must adopt a “common position” that provides reasons for rejecting any European Parliament first reading amendments. In case of a disagreement between the Council and the Parliament after the second reading, a Conciliation Committee will be convened.

One of the essential functions of a parliament in any democracy is the public forum function. Deliberative democracy posits that “the modern conception of representation is ultimately parasitic on deliberation,” and that “democratic legitimacy derives from the public justification of the results to those affected” (Eriksen & Fossum, 2011: 167, 169). Even before the co-decision procedure came to be used widely and early legislative conclusions strongly preferred, the public forum function of the European Parliament was already extremely weak. Among the factors that made the EP an ineffective public forum were the language problem and media disinterest (Weiler et al., 1995: 8). The expansion of co-decision making, and new provisions for ordinary legislative procedures, have further undermined this function by encouraging the EP to legislate in ever less open and public settings.⁵

⁵ In the democratic deficit debate, the question of whether it is “fair” or “adequate” to compare what democracy can function at the national level to what can be achieved at the EU level frequently emerges. Whether such comparisons are “fair” to the EU is given no consideration in this article. Taking the existence of the democratic deficit as a given, the article focuses

The mechanism through which deals may be struck at an early stage involves so-called *trilogue meetings* between the Commission, the Council, and the European Parliament. Originally, trilogue meetings were devised for the post-second reading and pre-conciliation period. By bringing together a reduced number of participants from the Council and the Parliament, these meetings allowed participants an opportunity to identify potential compromises in advance of meetings of the full conciliation committee. Over the years, the trilogue meetings have proven effective in reducing uncertainties and channeling conflicts (Shackleton, 2000: 334, 336).

Such pre-arrangements, however, have been moved up ever earlier in the process from the post-second-reading and pre-conciliation phase of the co-decision procedures. Increasingly, trilogues are being used in earlier stages, during the first and second readings (Curtin, 2009). Apart from the success in bringing about compromise between the institutions, the increasing dependence on trilogues can be explained by the time pressures under which the EP and the Council operate, needing to enter the conciliation process within a maximum of eight weeks of the Council's second reading. With the ever expanding scope of the co-decision legislative procedure with each treaty reform, relevant institutions cannot afford to be engaged in constant conciliation talks, and conciliation is increasingly seen as a measure of last resort. As a tradeoff, a growing percentage of legislation is adopted without meaningful, Parliament-wise dialogues in the plenary session. The new legislative pattern fostered by the co-decision procedure has encouraged use of the less open, less public, decision-making style of the Council by the European Parliament. Open deliberations have been increasingly replaced by small group negotiations, both within and across institutions, further distancing

only on a comparison between policy formation before and after the Treaty of Lisbon.

the EP from voters, since

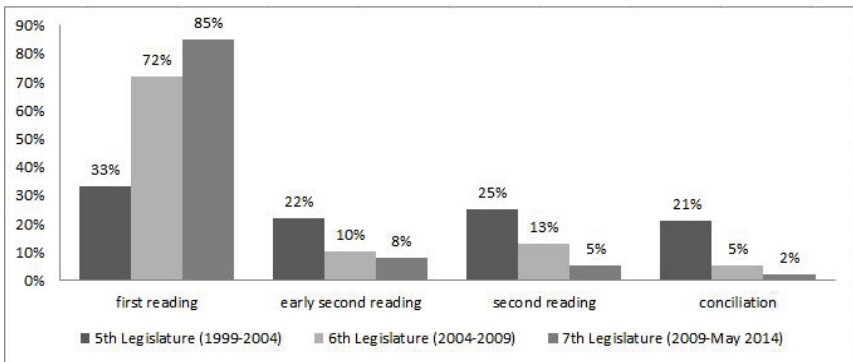
[m]ore co-decision will make it still more difficult for the electorate to differentiate between the parties and thus to have a reason to vote for one party rather than another on the basis of their behavior in the legislative process. Perhaps this difficulty helps to explain the paradox of an evident growth in Parliament power combined with a constant decline in participation at European elections. (Shackleton, 2000: 341)

An unintended consequence of excluding a majority of MEPs from participating in the law-making process is that the new process runs counter to the original purpose of Treaty reform, which was to *enhance* the participation of MEPs and *increase* transparency. While shrinking the circle of people privy to legislative proposals can be characterized as “efficiency,” it is hardly democratic. At a time when the role of special interests in EU law-making is already a cause for concern (“*New commission*,” 2014; Sabido, 2013), rushed decisions by ever smaller groups of people serve to deepen Europeans’ distrust of the Union.

(B) Empirical Evaluation

A closer look at co-decision procedures reveals that time pressures, combined with pressure from the Council, has resulted in changed behavioral and legislative patterns in the Parliament—patterns that are un conducive to legitimating the EP in the eyes of the electorate. The Treaty of Lisbon almost doubled the scope afforded codecision—from 44 policy areas to 85 (European Parliament, 2012a: 5). Mathematically, expanding the areas of co-decision is bound to create pressure for legislators to rush through legislation, and thus finalize legislation in earlier stages, i.e., during the first or second readings of the legislative procedure. As such, there is little time for the Council and the European Parliament to resolve potential differences at the conciliation stage (Shackleton & Raunio, 2003: 172-176).

Empirically, a comparison of co-decision procedures during the 5th (1999-2004), 6th (2004-2009), and 7th (2009-2014) legislatures reveals that the more frequently applied, and the more evolved the co-decision procedure, the more likely legislative acts were to be concluded in early stages. As is shown in Figure 6, the percentage of legislation adopted during the first reading increased from 33% in the 5th legislature to 72% in the 6th legislature, and reached 85% in the 7th legislature. In contrast, legislation that had to go through conciliation dropped from 21% to 5% and 2%.



Sources: European Commission (2009); European Parliament (2014b).

Figure 6 Comparison of Stages of Agreement among Legislatures

In the view of the Commission, and the Council as well, such statistical results are a source of pride.

The most important change has been further improvement in the working relationship between the three institutions. With the passing of time the three institutions have developed a relationship based on trust and pragmatism, where agreement could be reached earlier and earlier in the procedure, reducing drastically the number of conciliations and provoking and explosion of first reading agreements. (European Commission, 2009: 2)

What the Commission considers as “merits” of co-decision are precisely the same points that concern critics of European democracy.

Aware of the problems of the ordinary legislative procedure with regard to informal negotiations (European Parliament, 2009), in September 2008 the EP adopted a new set of internal rules for its Code of Conduct, aimed at tackling issues of transparency and democratic legitimacy. Rule 70 and Annex XXI of the Rules of Procedure of the EP stipulate that an early agreement should only be sought when such a step can be justified in terms of political priorities, the uncontroversial or “technical” nature of the proposal, the need to address an urgent situation, or the Presidency has made a specific file a high priority. Moreover, the rapporteur should present the case for expediting procedures to the full committee before seeking to enter into negotiations with the Council. The committee should then make the decision on whether to proceed in this manner, either by broad consensus or by vote. In response to criticisms that negotiations aimed at reaching early agreements were conducted in secret and without readily available documentation (Bunyan, 2009), the Code of Conduct was adapted to require trilogues to proceed based on one joint document indicating the positions of institutions (European Parliament, 2010).

The effectiveness of the Code of Conduct in enhancing transparency and legitimacy appears to be limited. In terms of legal effect, the document, being only a statement of the internal rules of the EP, is not a reliable instrument for ensuring that the legislative procedure, which involves not just the EP but also the Council and the Commission, remains sufficiently transparent. Apart from the document’s informal nature, its loose wording leaves intact the legislators’ discretion to opt for efficiency at the expense of democracy. Under time pressure, it will always be tempting to minimize gridlock and reach an early conclusion among a reduced number of participants, thus removing from the plenary session meaningful debate, the airing of disagreements, and open votes. In

addition, the entrenched practice of seeking an early conclusion creates a path-dependent effect and modifies expectations.

The reduction in the number of conciliations led to a situation in which conciliation is seen more and more as an exception. Actors become less used to it and it requires greater efforts to explain “the rules of the game.” The Council seems increasingly to try to avoid conciliations and Presidencies seem to feel more at ease with the flexibility of 1st and 2nd reading negotiations. Conciliation is perceived by Presidencies as a more demanding procedure which requires the presence of Ministers, has strict deadlines, translation and interpretation requirements etc. (European Parliament, 2009: 21)

Informal decision making further significantly constrains formal decision making because MEPs find themselves under considerable political pressure not to re-open deals struck in the informal arena (Reh, 2014: 826). The mechanism, however, through which the informalization of decision-making changes power distribution among actors is not limited to modified expectations. Actors who represent their institutions in informal inter-institutional negotiations—commonly known as *relais* actors—enjoy informational advantages over actors who do not participate in these negotiations. Over time, the increased use of secluded trilogue negotiations to reach early agreements has led to a redistribution of power between the *relais* actors and rank-and-file parliamentarians. Disproportionately, it is the big political parties (and their rapporteurs in particular) and largest Member States that are privileged. Such a redistribution of power renders the electorate even less relevant in the European system of representative democracy (Farrell & Héritier, 2004; Häge & Naurin, 2013: 954; Reh, 2014: 827; Reh, Héritier, Bressanelli, & Koop, 2013: 2). The far-reaching impact of this mode of early agreement prompted Martin Schulz to state in his inaugural speech that “[i]f our Parliament is to become more visible, if greater

attention is to be paid to its views, a rethink on the issue of first-reading agreements is also essential” (European Parliament, 2012b).

In sum, contrary to the expectation that ordinary legislative procedures would enhance the transparency and quality of EU law-making, the routine conclusion at first reading has led to a change in the legislative pattern that suits the Council well. What appears to be a move to legitimize the Union has led to the *de facto* disempowerment of the EP and served to deflect attention away from the expansion of the Council’s executive power (Curtin, 2007: 160). This is the theme of the following section.

IV. The Council and the European Council

The foregoing demonstrates that, by empowering the EP—an institution whose own democratic legitimacy continues to be in question, the Treaty of Lisbon does not succeed in rebalancing the executive-legislative power relations. Can the Council succeed in striking a new balance? In this section, I argue that the Treaty of Lisbon succeeds in neither subjecting the Council to greater scrutiny, nor enhancing the capacity of national executives to act as gatekeepers of national interests. I first consider the impact of expanded co-decision on the accountability of the Council, then analyze the implications of the newly created posts, i.e., the President of the European Council, for the accountability and gatekeeping function of national executives.

A. Council Accountability

(A) Logical Evaluation

The Treaty of Lisbon stipulates that the Council must meet in public when considering and voting on a draft legislative Act (Art. 15.2, TFEU). It was hoped that enhanced transparency would allow for closer scrutiny of national executives’ actions in Council by national parliaments and the public. This provision is innovative

only in a limited sense. Firstly, the practice was already established by the Council's Rules of Procedure prior to the Treaty of Lisbon, albeit applied only to legislation adopted by co-decision (Peers, 2008: 1). With the ordinary legislative procedure becoming the norm under the Treaty of Lisbon, the Council's Rules of Procedure would have had similar effects on Council transparency even in the absence of the provision in Art. 15 (2). Secondly, improving nominal transparency is a necessary, yet far from sufficient, measure for tackling the problem of Council accountability. Nominal transparency does not alter the fact that domestic voters have no effective way to influence EU policies. The resulting sense of frustration and powerlessness has reached a point where it is difficult to distinguish between "anti-incumbency feeling from anti-Brussels feeling" ("An ever-deeper," 2012).

Even without the complication of multilevel governance, representative democracy in general has been in deep crisis for at least a decade. Elections are a blunt instrument for rewarding or punishing a party or a coalition: Voters have only one vote to cast, yet the target of evaluation consists of thousands of policies made by the same government (Manin, Przeworski, & Stokes, 1999: 49-51). When such a problem-ridden representative system has to transcend national borders and operate in a multilevel environment, responsibilities become dispersed or nullified. Under such circumstances, it is unrealistic to expect voters, via national elections, to reward or punish national governments on the basis of decisions made regarding European affairs. In general, ministers are judged foremost by their ability to deal with domestic issues. Hence Council members owe their positions to election only at several removes, and if European affairs are frequently absent from European elections, they are typically even less significant in national elections (Katz, 2001: 56). As a result, it is easy for policy makers to conceal faults and difficult—if not impossible—for voters to identify which power holders should be held accountable, and for what. In fact, as was demonstrated by a recent legal dispute

between the Council and an NGO, in spite of new provisions in the Treaty of Lisbon, the Council may still conceal information from the public to protect national executives from the scrutiny of voters.⁶ In sum, nominal transparency as stipulated in Art. 15(2) of the Treaty of Lisbon has limited implications for the democratic accountability of the Council.

While ministers from Member States are the only ones with legal authority to adopt legislative decisions, only a minority of legislative proposals adopted by the Council even brought to the attention of ministers. Quite to the contrary, ministers often do not have an opportunity to decide whether or not to get involved at the beginning of the negotiation process. In fact, typically, they will not even be aware that the Commission has introduced a proposal as the default process works the other way round. National bureaucrats who do not answer directly to domestic parliaments decide whether it will be necessary to involve ministers (Häge, 2008: 534-535; Hayes-Renshaw & Wallace, 2006: 1-100).

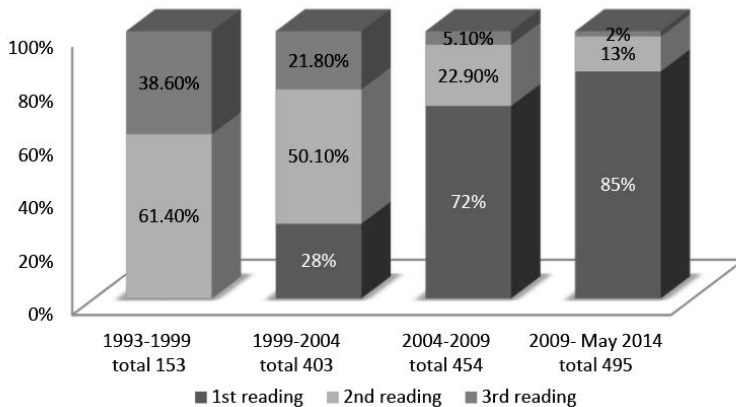
When legislative proposals adopted by the Council are not brought to the attention of ministers, but are direct results of negotiations conducted by bureaucrats in preparatory committees of the Council, policies are essentially made with little scrutiny. When the EP's involvement in legislative decision-making is increased, national bureaucrats, motivated primarily by blame avoidance, would feel less sure about reaching final agreements by themselves and come to welcome the more frequent and direct involvement of ministers (Häge, 2011: 20-26). In theory, empowering the EP should ratchet up scrutiny of, and prudence in,

⁶ In 2011 the NGO Access Info Europe challenged the Council in court for blocking out the names of Member States when answering public requests and providing documents. The court ruled in favor of Access Info Europe, and the Council appealed. The Council argued that releasing the names of Member States in the early stages of the legislative decision-making process could restrict the Member State delegations' room for maneuver as a result of public pressure. In 2013, the European Court of Justice ruled against the Council (Nielsen, 2013a).

Council decision making. An increase in public and political awareness makes it riskier for national bureaucrats to finalize deals independently, and for ministers to simply rubber stamp their decisions. The resulting increase in the direct involvement of ministers generates more scrutiny both at the European and national levels, strengthening the accountability of government representatives in the Council and the oversight of their national parliaments and electorates. To summarize, the Treaty of Lisbon, by empowering the EP, is supposed to cast greater light on Council decisions, and increase the capacity of domestic parliaments to hold national executives accountable for their actions taken in the Council.

(B) Empirical Evaluation

As was seen in the earlier discussion on the impact of co-decision on the EP, strengthening the EP's legislative power leads to an increase in the load, as well as the complexity, of legislation in the EU. Consequently, the more the EP is empowered to act as an equal co-legislator, the more heavily reliant on trilogue meetings the Commission, the EP, and the Council become as they attempt to cope with the increased complexity and work overload (Reh, 2014: 823-826). The Treaty of Lisbon may have initially had politicizing and accountability-enhancing effects on the Council, but these were quickly offset by increased reliance on trilogue meetings to deliver results. Instead of prompting ministers to become directly involved in decision-making, further empowerment of the EP by the Treaty of Lisbon has led to less ministerial involvement and more decisions being reached exclusively at lower levels of the Council hierarchy (Häge & Naurin, 2013: 954). Hence, the continual rise of legislative acts being passed after a first reading, shown in Figures 6 and 7, indicates that there has been an increase in informal and secluded decision-making in Council. Between 1999 and 2009, agreements were reached on 50% of co-decision files at the first reading (an average of the blue proportion between the second and third columns



Sources: European Parliament (2009, 2014b).

Figure 7 Percentage of co-decision files adopted at 1st, 2nd or 3rd reading

in Figure 7). Between 2009 and 2014, the percentage of early agreements peaked at 85%, indicating that since the Treaty of Lisbon came into force, 85% of the time, when the ordinary legislative procedure was applied, it was the chair of the relevant Council Working Party and the chair of COREPER who evaluated the possibility of an agreement, made contact, and launched negotiations with the EP (Kirpsza, 2013: 195).

In a Council composed of 28 member states, it is understandable that, from the view point of Council presidencies eager to accomplish more during their six-month terms, informal decision-making through trilogues would be preferred over formal channels. Not only does early input from the EP facilitate consensus-building within the Council, but negotiations during first reading are also more flexible (as they lack a fixed time limit imposed by the Treaty of Lisbon) than are later stages of the procedure (European Parliament, 2009: 11-12, 2014a: 5). Such efficiency, however, is gained at the expense of transparency and

accountability. As was discussed earlier, trilogues are restricted, inaccessible and opaque; their memberships neither officially defined nor public known. In general, a trilogue consists of the chair of the relevant Council Working Party and the chair of COREPER, who dominate and are fully involved in the process. Interaction within trilogues is not structured by codified rules, and their seclusion is neither formally stipulated, nor publicly justified (Reh, 2014: 825). This mode of operating narrows down the number of *de facto* decision makers to a very small set of key actors, allowing them to command their own sets of information, exchange views, adjust given legislative proposals at will, and build reciprocal trust, while other ministers have little possibility to learn about the course of events (Farrell & Héritier, 2004: 1200-1204; Jensen & Martinsen, 2012: 8; Kirpsza, 2013: 195).⁷

Another far-reaching effect of trilogues and reaching early conclusions on Council decision-making is the erosion of the culture of consensus, or the principle of diffuse reciprocity, which was deeply embedded in the Council. The culture of consensus and the principle of diffuse reciprocity characterizes the way Member States, in reaching legislative compromises within the Council, respect each other's vital interests and avoid creating structural minorities that are consistently overruled in decisions (Farrell & Héritier, 2004: 1195). The prevalence of trilogues quietly pushed aside that principle. During trilogue negotiations, representatives of the Presidency may already be building a coalition with some few Member States to secure the required number of votes (Kirpsza, 2013: 196). In other words, in order to secure the desired legislative results, the Council presidency may provide select

⁷ Involving increasingly limited number of key actors in policy making behind closed-doors is a problem not unique to the EU but faced by many democracies today. The ubiquity of the problem is no reason for the EU to be complacent with such kind of practices, however. If democracy is already encountering serious challenges at the national level, copying flawed practices at the supranational level only complicates the situation and renders democracy even more vulnerable.

members with access to information for use against the other Member States. Such practices are particularly detrimental to small member states and run counter to both democratic accountability and the original design of the Treaty of Lisbon.

Increased informalization in Council decision-making both contributes to, and can be partially explained by actors' socialization into norms of inter-institutional cooperation and compromise. Socialization, defined as the "process of inducting actors into the norms and rules of a given community" (Checkel, 2005: 804; Johnston, 2001: 494-506) is empirically discernible and works within, as well as across, EU institutions. Trilogues, in which a small group of actors engage in repeated and time-demanding interaction in secluded settings, provide fertile ground for socialization. Such settings facilitate mutual confidence and augment the facility of participants in striking political compromises, which in turn induce cooperative and constructive behaviors (March & Olsen, 1998: 960; Reh et al., 2013). As a consequence, contrary to the expectation that empowering the EP would lead to an enhancement of accountability in the Council, an even smaller circle of bureaucrats acquired the authority, or the acquiescence of their peers, to finalize agreements informally behind closed doors.

B. The European Council President

(A) Logical Evaluation

The European Council and the Council of the EU are where national executives act to safeguard their respective national interests. To what extent does the Treaty of Lisbon reinforce or undermine the capacity of national executives in ensuring that EU policies do not come at a cost to their national interests? Under the Treaty of Lisbon, the European Council has a semi-permanent President. Assisted by the General Secretariat of the Council, the responsibilities of the President include:

- chairing the European Council and driving forward its work;
- ensuring the preparation and continuity of the work of the European Council in cooperation with the President of the Commission;
- endeavoring to facilitate cohesion and consensus within the European Council;
- presenting a report to the European Parliament (EP) after each of the meetings of the European Council.

In addition, the president should ensure the external representation of the Union on issues concerning the Common Foreign and Security Policy (CFSP), in cooperation with the High Representative of the Union for Foreign Affairs and Security Policy (Art. 15, TEU).

The earlier analysis of the informalization of Council decision-making implies that intergovernmentalism, the signature feature of the Council, is quietly being modified into what can be termed “deliberative intergovernmentalism.” The Council used to be where national executives, with domestic mandates in mind, engaged in intergovernmental negotiation. Increasingly, national executives acquire an “autonomous executive role” not embedded in a system of parliamentary democracy and *deliberate* rather than *negotiate* in the Council (Curtin, 2009: 134; Puetter, 2012). When the European Council and the Council of the EU function simply as arenas for intergovernmental negotiations, it is neither necessary nor fitting to introduce supranational positions, such as the President of the European Council and the High Representative for Foreign Affairs and Security Policy. When the two institutions become less arenas for negotiation but more fora for deliberation, these newly created posts become important conduits for policy coordination. Gatekeeping can sometimes appear out of synch with the new design, and this is more often the case for smaller and weaker states. In the following, I focus on the position of European Council President and evaluate its implications for democratic accountability in the EU.

(B) Empirical Evaluation

When the Treaty of Lisbon came into force, Herman van Rompuy stood as the first full-time President of the European Council. His terms coincided with the outbreak, the containment, and management of the Euro-debt crisis. It is not possible to assess the implementation of the innovative institutional design of the Treaty of Lisbon without taking into account van Rompuy's performance in handling the Euro-debt crisis. Praises outweigh criticisms in assessments of van Rompuy's performance in defining and carrying out the role the European Council President. The view is widely-held that had the EU not created this position in time, and had the person filling the job not been van Rompuy, the Euro-debt crisis would have been much more serious. Many factors contributed to van Rompuy's success as the European Council President. Apart from his multilingual skills and expertise in economics, the experience of having served as prime minister in a society as fractured as Belgium's gave heads of state and government confidence that he would serve well in the job (Barber, 2010: 55; Chopin & Lefebvre, 2010; Dinan, 2013: 1266; Howorth, 2011: 10-16).

Given the composition of the European Council and the way the institution operates, it is hardly surprising that whoever serves as the European Council President would have the tendency to "serve the soup to larger Member States" ("The intergovernmental drift," 2014). An advisor of van Rompuy, Richard Corbett, described the job of cajoling 28 heads of state and government into consensus as equivalent to "herding cats" (European Policy Centre, 2011). That the stronger, bigger, and more willful cats could sometimes end up leading the herder should not come as a surprise, since while "nominally equal, some members of the European Council are more equal than others" (Dinan, 2013: 1260). This explains why, after seeing how van Rompuy performed as the European Council President, Jean-Claude Juncker, who competed for the position with van Rompuy in 2009, breathed a sigh of relief

about not having gotten the job: “If I had become president of the European Council, it might have exacerbated the conflict within the EU. I wouldn’t have been content *merely summarizing the views of the other heads of state and government*. Although I come from a small member state, I like to say what I think. I see myself as a driving force rather than *a follower*” (“Jean-Claude Juncker,” 2011; emphasis added).

In other words, the treaty design not only places the European Council even more firmly at the center of political gravity, but further enhances the influence of larger states. As much as the EP desired to scrutinize the increasingly powerful European Council (Buzek, 2011: 9), MEPs critical of the European Council’s handling of the Euro-debt crisis could only complain about van Rompuy being too deferential to Merkel; they could do nothing about it (Dinan, 2013: 1262). Former European Parliament Vice-president Isabelle Durant lamented that the old rotating presidency system would have better preserved the common interest of all Member States (“The intergovernmental drift,” 2014). In sum, there are times when the function of the new post becomes nothing more than an instrument through which informal deals struck between or among (larger) Member States could be formally placed on the agenda, and thereby be imposed on the rest of the Member States. However much the president tries to be a stateless honest broker, when the brokering is based on some blueprint pre-agreed by the larger states, the gatekeeping function of the European Council is undermined. The room for the executives of the “less relevant” states to guard their national interests has shrunk as a result of the creation of the permanent European Council President.

V. National Parliaments

At the core of the EU’s democratic deficit is the problem that national executives have grown too powerful at the expense of

national legislatures, while the European Parliament is insufficiently legitimate to redress the power shift. In the previous sections, we have seen that the Treaty of Lisbon makes the EP operate more like the Council (with more deals struck by small circles, and fewer issues subject to public, plenary debates) and the Council operates more like the Commission (by gaining more autonomy from domestic legislatures). The current section will examine the one institution that has the potential to redress the shifting balance.

A. Subsidiarity

(A) Logical Evaluation

One of the challenges faced by the EP is that of the “no European *demos*” or “no European public” problem. Since this problem is inherent to the Union and may be insurmountable, national parliaments retain the position as the ultimate institution that can make democracy work right in Europe. If national parliaments are passive with respect to engaging in European affairs, by giving national parliaments a treaty-based role in formal decision-making, the Union may nonetheless improve its own democratic legitimacy via national parliaments. In other words, if the job of national parliaments is to legislate and to hold national executive power accountable, then, when the national executive power becomes active and engaged at the European level, national parliaments should follow suit. By staying put “within their own neatly nationally fenced off compartments,” national parliaments have fallen far behind in the performance of their oversight of policy making with regard to European affairs and allowed executives to develop a robust, interwoven, and complex administrative network that operates over the horizons of national parliaments (Curtin, 2009: 134-135).

The Treaty of Lisbon empowers national parliaments to ensure compliance of EU policies with the principle of subsidiarity.

The Commission is now obliged to forward all draft legislative acts to national parliaments, which have eight weeks, instead of six as under the Nice Treaty, to scrutinize EU proposals before they are put on the Council agenda. The Treaty of Lisbon provides national parliaments with an early warning system: If one third of the votes allocated to national parliaments (each national parliament has two votes) are cast in objection to Commission proposals on the grounds that it breaches the principle of subsidiarity, the Commission must review the draft legislation (this is the so-called yellow card). If a majority of votes allocated to national parliaments are cast against a proposal under the ordinary legislative procedure, the Commission must review the draft legislation. If the Commission chooses to maintain the proposal, it has to provide a reasoned opinion justifying the decision. On the basis of this reasoned opinion and that of the national parliaments, the European legislator (by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament) shall decide whether to block the Commission proposal (the so-called orange card) (Art. 5.2 & Art. 12, TEU; Protocol on the Role of National Parliaments in the EU; Protocol on the Application of the Principles of Subsidiarity and Proportionality).

Kiiver describes the enhancement of the role of national parliaments as the “sugary coating around a bitter pill.” The pill is “the European integration process itself.” The bitter taste is “domestic decision-making autonomy draining away in the course of supranational processes.” Turning national parliaments from marginal, passive institutions into active players reminds us of “the sweetness of the days when laws were made by the people for the people, in an elected and recognizable deliberative forum, and in the cozy context of the democratic nation-state” (Kiiver, 2008: 77). From this perspective, the effects of reforms contained in the Treaty of Lisbon are merely symbolic.

First, not only are yellow card and orange card only *ex ante*,

not *ex post*, but the voices of national parliaments are also only consultative under the early warning system as the Commission need not withdraw proposals opposed by national parliaments, but may, at its discretion, decide to maintain or amend the proposal. Even with the orange card, wherein a majority of national parliament votes can ask 55% of the members of the Council to block a proposal, “it is not the national parliaments themselves that are able to stop the proposal, only to provide others with ammunition” (Kiiver, 2008: 78).

Moreover, apart from the fact that the early warning system only gives national parliaments a consultative role, the eight-week time limit allowed national parliaments to not only review, but also coordinate voting, is a factor which could discourage national parliaments from taking the reform seriously (House of Lords, 2014: 8). Within this brief period, national parliaments must

hear the views of their national government, allow for debate both in committee and in the plenary . . . possibly organize the consultation of regional parliaments, and try to liaise with the parliaments of the twenty-six other member states especially when trying to reach the ‘threshold of protest’. Furthermore, the view that a legislative proposal does not comply with subsidiarity must be reasoned, which will require some deliberation and careful drafting (de Witte, 2009: 40).

There is also the risk that, by increasing the burden of national parliaments, the early warning system diverts the attention of national parliaments from scrutinizing of the content of European policies that *do not* raise a subsidiarity issue (de Witte, 2009: 41).

Thirdly, when a national parliament fails to participate actively in the scrutiny of Commission subsidiarity proposals, the effectiveness of the voices of the other national parliaments are affected. Some see this, in effect, as interfering with national constitution orders (de Witte, 2009: 40). Individual national

parliaments should, according to the logic of parliamentary democracy, have the power to determine whether an issue stays at home or goes to Brussels independent of what other parliaments decide. Former German President Roman Herzog complained that, with 84% of the legal acts adopted by the Federal Republic of Germany stemming from Brussels, it is questionable whether Germany can still be called a parliamentary democracy (Mahony, 2007). By demanding solidarity among one-third or even a half of member state parliaments in order to raise an objection to a Commission proposal—and only with consultative effect, the Treaty of Lisbon early warning system is likely to be only rarely used. With the Commission being able to ignore up to 55% of member states, a motion by an individual national parliaments to object to a Commission proposal is likely a waste of time.

(B) Empirical Assessment

The number of reasoned opinions from national parliaments to the Commission has continued to increase since the Treaty of Lisbon came into force. In 2010, the Commission received 34 reasoned opinions raising subsidiarity concerns. In 2013, 88 such reasoned opinions were received (Table 1). Considering that there are 28 Member States with 41 legislative chambers, and 472 draft legislative acts have been forwarded to national parliaments by the Commission the Treaty of Lisbon came into force, the number of reasoned opinions appears to be remarkably low.

There is a large degree of variation in the extent to which national parliaments actively exercise their power to scrutinize the extent to which Commission's legislative proposals are in accordance with the subsidiarity principle. The national parliaments which have issued the highest number of reasoned opinions are the Swedish *Riksdag*, followed by the Netherlands, and the UK (Table 2). The fact that only a handful of chambers are particularly active in exercising this power confirms the worry that, arithmetically, it is difficult to reach the threshold for issuing a yellow card (Cooper, 2013: 2).

Table 1 Reasoned Opinions from National Parliaments to the Commission

	Number of reasoned opinions	Overall number of opinions received by Commission	Weight of subsidiarity concerns in overall opinions received by Commission
2010	34	211	16%
2011	64	622	10%
2012	70	663	10%
2013	88	621	14%

Source: European Commission (2011, 2012, 2013c, 2014).

Table 2 Reasoned Opinions by National Parliaments 2010-2013

Sweden	48	Malta	8
Netherlands	30	Ireland	6
United Kingdom	24	Czech Republic	5
Poland	22	Cyprus	5
France	17	Slovakia	5
Luxembourg	16	Greece	3
Spain	16	Portugal	3
Austria	13	Finland	3
Germany	12	Bulgaria	2
Belgium	9	Latvia	2
Denmark	9	Estonia	1
Italy	9	Hungary	1
Lithuania	9	Slovenia	1
Romania	9	Croatia	0

Source: European Commission (2011, 2012, 2013a, 2014).

Since the entry into force of the Treaty of Lisbon, 472 draft legislative acts have been sent to national parliaments for subsidiarity scrutiny (European Parliament, 2014d: 2). Thus far, the yellow card procedure under the Early Warning Mechanism of the Treaty of Lisbon has been triggered only twice. On May 2012, the procedure was triggered for the first time when 18 votes of national parliaments out of 54 in EU-27 objected to the legislative proposal regarding common EU rules on the right to strike (so-called *Monti II* proposal). *Monti II* was controversial because it restricted workers' right to strike and was seen as a case of "infiltration of competition law into national labor law," raising alarms among national parliaments that the regulation would undermine the integrity of domestic labor markets and risk a race to the bottom (Goldoni, 2014: 102-103). This yellow card resulted in the withdrawal by the Commission of the *Monti II* proposal. Several factors contributed to the success of the triggering of the first yellow card warning. The Danish parliament's early decision to oppose *Monti II* and encourage other national parliaments to do the same played a key role. Once an alliance was formed, national parliaments kept each other up to date about where the vote count stood as the deadline approached through networks such as COSAC (a twice-yearly meeting of EU affairs committees of national parliaments and the EP) and NPRs (National Parliament Representatives in Brussels) (Cooper, 2013: 2).

In September, three months after the issuance of the yellow card, the Commission withdrew the *Monti II* proposal. The manner with which the Commission withdrew the proposal, however, raised some eyebrows. Rather than addressing individually each of the 18 national parliaments which had filed reasoned opinions, the Commission sent 18 identical letters. The Commission insisted that the principle of subsidiarity had *not* been infringed upon and stressed that it was withdrawing the proposal *not* because of the yellow card, but because the proposal was unlikely to gain enough support in Parliament and the Council to

ensure its adoption (Cooper, 2013: 15).

The success of the first yellow card raised hopes that the Early Warning Mechanism would not be toothless. That success vindicated the views of some that national parliaments have become a “virtual third chamber” in the EU, capable of influencing legislative results (Cooper, 2012, 2013). Yet hopes that this would provide meaningful oversight were dashed when a second yellow card was essentially dismissed by the Commission. Far from constituting a separate third chamber, national parliaments do not act as a collective agent and the yellow and orange cards that they collectively issue do not amount to a formal veto power (Goldoni, 2014: 106).

The second yellow card was drawn on 28 October 2013, when 19 votes from 14 national chambers issued reasoned opinions on the Commission’s EPPO (the European Public Prosecutor’s Office) proposal, sharing the view that the proposal breached the principle of subsidiarity.⁸ The establishment of the EPPO was proposed by the Commission in July 2013 to probe cases of fraud against EU expenditures across the EU (European Commission, 2013a). Fraud against EU expenditures is estimated to steal at least €500 million from EU coffers every year. According to the Commission, national prosecutors in some member states are not doing enough to protect the EU, since national judicial authorities follow up on less than half of all cases transferred to them. With the proposed EPPO, a more uniform crime fighting standards would be integrated into national law systems (Nielsen, 2013b).

However, critics argue that once established the EPPO would

⁸ This was held by the Dutch Senate, Czech Senate, Dutch House of Representatives, Cyprus House of Representatives, UK House of Commons, Hungarian Parliament, Swedish Parliament, Irish Parliament, Romanian Chamber of Deputies, Slovenian Parliament, French Senate, Maltese Parliament and the UK House of Lords (Council of the European Union, 2013).

have exclusive competence to investigate and prosecute EU fraud, thereby excluding any prosecutorial discretion at national level. In other words, the EU prosecutor alone will be able to investigate and prosecute offences without the involvement of Member States (Nielsen, 2013b). This is problematic given that many offences affecting the financial interests of the EU are situated at national level and linked to other types of fraud or criminality (Franssen, 2013). Once created, however, the EPPO would have powers to search premises, seize objects, and intercept phone conversations. The image of an EU prosecutor coming to “search people’s homes, probe their computers, seize objects, intercept telephone conversations, and freeze financial transactions” (Nielsen, 2014) raised alarms among national parliaments. There is also fear that the practice would spill over to other crimes that are by nature transnational. In that case, there would emerge a continent-wide criminal justice system. Even the head of the EU’s anti-fraud office (OLAF) worries that such an expansion of power would prove likely.

Considering that criminal law is primarily a national competence, national parliaments were reluctant to support the Commission’s proposal, pointing out that the Commission had not adequately considered the option of strengthening existing (e.g. Eurojust, OLAF) or alternative mechanisms. Stressing that the Commission has failed to substantiate the need, as well as the added value of the EPPO, the national parliamentarians argued that protection of the EU financial interests could be better obtained by strengthening and deepening existing mechanisms of cross-border cooperation between criminal justice authorities (Nielsen, 2013b).

The Commission’s first reaction to this yellow card was to point out that “it is the Commission that decides if there has been a yellow card or not and what would be the consequences” (Nielsen, 2013c). Then the Commission decided to dismiss the so-called yellow card. After replying to national parliaments that “the

proposal complies with the principle of subsidiarity . . . and that a withdrawal or an amendment of that proposal is not required (European Commission, 2013b: 13), the Commission went on to press ahead with the EPPO proposal with enhanced cooperation in mind. This reaction came *after* a very public statement by Dutch Foreign Minister Frans Timmermans in the newspaper *Financial Times* that “if one-third of national parliaments raise subsidiarity objections to a legislative proposal (the yellow card procedure), the commission should not just reconsider, it should use its discretion to take the disputed proposal off the table, turning the yellow card into a red” (Timmermans, 2013). Unhindered by the “early warning,” the proposal is currently before the Council and under consideration by Member States (Council of the European Union, 2014).

VI. Conclusion

The demise of the permissive consensus heralded the emergence of an ever growing number of visions of democracy for Europe: Representative, regulatory, deliberative, cosmopolitan, rights-based, etc. Alongside the development of these competing and often incompatible models of European democracy are the recurrent treaty reforms incorporating elements of different models of democratic governance, making the Union a true hodgepodge. It would be unrealistic to expect the Europeans to ever agree upon one model of European democracy and adopt that model via a treaty. The Treaty of Lisbon, even though explicitly mandated to straighten out the democracy issue, is not an exception. As a result, to assess the democratic implications of the treaty, one can only adhere to somewhat fragmented criteria for democracy. Stressing that the democratic deficit must be understood from a perspective that takes into account the effects of altered inter-institutional dynamics resulted from treaty reforms and taking the contradiction between the reality and the belief that double-representation will result in better representation as the

underlying concern, this article compared the situation before and after the Treaty of Lisbon and made a critical assessment of the Treaty. The Treaty, it argues, has failed to address the concern that dispersing democratic accountability among the European Parliament (theme of section III), national executives (theme of section IV), national parliaments (theme of section V), and EU executives alters—often negatively—how representative democracy works.

According to conventional wisdom, the most prominent legislative reform undertaken in the Treaty of Lisbon, the ordinary legislative procedure, makes the EP a big winner, and is thus a big step forward for democratization. This paper expresses reservations on this view for two reasons. Firstly, the treaty fails to address the EP's inherent legitimacy problems, and secondly, the extension of co-decision has resulted in a change in the EP's behavioral and legislative patterns not conducive to legitimating the only EU institution directly elected by citizens. Changes made with regards to the Council enhance the autonomous executive role of national executives, rendering this supposedly purely intergovernmental institution less intergovernmental and further complicating the difficulty of holding the Council accountable to individual member state parliaments or citizens. Similarly, efforts at better coordinating Member State executives in view of efficiency in the European Council also ended up eroding the intergovernmentalist characteristics of the institution, reducing the gatekeeping function of national executives while undermining the supervisory capacities of national parliaments. As to national parliaments, they were "given" the "power" to reclaim their prerogatives if they could find sufficient support and could make their claims within a narrow window. As the EPPO proposal has demonstrated, however, such remarkable collective efforts by national parliaments remain insufficient to compel a determined Commission to reconsider a legislative proposal. Taken as a whole, this article concludes that the Treaty of Lisbon has failed to improve the Union's democratic deficit to any significant extent.

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里斯本條約的民主意涵

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摘 要

里斯本條約是否成功處理了歐盟民主赤字問題？里斯本條約簽訂前的歐盟受到之民主赤字相關批評，主要是針對多重民主代表管道及民主監督機制非但未能提升民主代表的品質，反而可能彼此抵觸侵犯。本文透過分析里斯本條約對歐洲議會、歐盟理事會、歐盟高峰會，以及會員國議會的改革，評估里斯本條約究竟是使歐盟民主赤字問題改善了還是惡化了。在歐洲議會方面，本文檢視歐洲議會議員與選民的距離以及一般立法程序 (ordinary legislative procedures) 對於歐洲議會議員立法行為模式的影響。在理事會方面，文章檢視里斯本條約對於會員國行政部門透過理事會在歐盟層次扮演國家利益守門員角色之影響；主要焦點置於在立法過程中愈來愈普遍之三方協議 (trilogues) 以及條約新設立之歐盟理事會主席一職。在會員國議會方面，里斯本條約對於輔助原則 (the principle of subsidiarity) 之調整以及新設之早期預警機制則是分析重點所在。綜合而言，里斯本條約未能就歐盟之民主赤字問題帶來實質改善。

關鍵詞：歐洲聯盟、里斯本條約、民主赤字、三方協議、輔助原則、一般立法程序