CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

VOLUME 10

ISSUE 3
2018

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

VOL. 10, ISSUE 3, 2018

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Inter-parliamentary cooperation as a means for reinforcing joint scrutiny in the EU: upgrading existing mechanisms and creating new ones

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

This special issue develops a contextual analysis of EU inter-parliamentary cooperation in the post Lisbon Treaty framework. Indeed, it is possible to claim that there are several sources and causes for renewed EU inter-parliamentary cooperation: first, a voluntary one, i.e. the connection with the Lisbon Treaty's intent to facilitate a wider democratisation objective; second, this time more a reaction than an initiative, the need to counterbalance the institutional outcomes of the economic and financial crisis that shook the world but particularly the eurozone; and, third, the call for an improvement in existing rules and mechanisms to develop even further democratic (read: parliamentary) input in common policies.

The special issue analyses whether current inter-parliamentary mechanisms are suited to react to these challenges. It specifically assesses the practical impact of interparliamentary cooperation on the numerous democratic gaps that still exist in the EU´s multi-layered decision-making process. Its objective is to show, beyond the mere sharing of information and the comparison of best practices at a supranational and transnational level, whether existing inter-parliamentary practices contribute to joint parliamentary scrutiny by involving both the EP and the national parliaments of EU member states.

Key-words

inter-parliamentary cooperation, joint parliamentary scrutiny, EU parliamentary democracy

1. A Renewed EU inter-parliamentary cooperation in the post-Lisbon era

Inter-parliamentary cooperation is not a recent phenomenon in the European Union (EU). Since the very beginning of the integration process in Europe, structural coordination between representative assemblies has been a constitutive dimension of European integration. The original structure of the European Parliament (EP), initially composed of Member States' national parliaments' delegates, satisfied the requirement for 'dialogue' between legislatures. The EP's transformation into a directly elected assembly in 1979 did not however stifle the continuation of inter-parliamentary trends.

Indeed, the search for permanent models of inter-parliamentary cooperation started in the second half of the 1970's, with the practice of meetings of the Speakers of national parliaments. In the following decades, the development of this inter-parliamentary dimension only experienced slow progress. The establishment of Conference of the Parliamentary Committees on EU Affairs (COSAC) in 1989 represented a first attempt to provide an institutional framework for the practice of meetings between representatives of national parliaments, jointly with the EP (Rittberger 2005: 125 ff.).

The picture completely changed after the entry into force of the Treaty of Lisbon (ToL, or Lisbon Treaty). Constitutive transformations in the shape and role of parliamentary democracy created conditions for an exceptional boost in inter-parliamentary practices.

Thus, since the implementation of the ToL, there has been more, and not less, inter-parliamentary cooperation. As Ian Cooper (2017: 1) contends, there is now 'an emerging order of interparliamentary conferences' in the EU. This new impetus has materialised through new formats, mainly inter-parliamentary conferences (IPCs), based on sectorial policies, leading to an extension in both their scope and intensity (Heffler and Gatterman, 2015; Cooper 2017). In addition, the roles of the EU parliaments Speakers' Conference and that of the Conference of the Parliamentary Committees on EU Affairs (COSAC) have equally been revitalised (Cygan 2016; see also essays in Lupo and Fasone 2016: 207-344), and, if not more important, a number of new inter-parliamentary fora have been set up. First, the IPC on CFSP/CSDP (Common Foreign and Security Policy/Common Security and Defence Policy) in 2012 (Wouters and Raube 2012; 2016; Stavridis 2014; Butler 2015);

then, the one on Stability, Economic Coordination and Governance (SECG) in the European Union in 2013 (Krielinger 2015; Cooper 2016; Jancic 2016); and, finally, in 2017, the Joint Parliamentary Scrutiny Group (JPSG) on Europol (Kreilinger 2017).

Whereas the IPC on CFSP/CSDP is a direct result of the ToL (Article 10 of Protocol 1 annexed to the Treaty of Lisbon), the one on economic and financial governance stems from the Treaty that was signed by eurozone members to 'save' the single currency in 2013 (Article 13 of the Treaty on Stability, Coordination and Governance/TSCG). Finally, the JPSG on Europol was established by the Speakers Conference on the basis of Article 51 of the Europol Regulation which entered into force on 1 May 2017.[I]

The boost in inter-parliamentary cooperation may seem paradoxical given the reputation that this practice actually has, both in the literature and in parliamentary practice. Inter-parliamentary cooperation in the EU is often depicted as inefficient, dominated by disputes between the EP and the national parliaments (NPs) of EU member states (Neunreither 2005; Rittberger 2007; O'Brennan and Raunio 2007; Raunio 2009). Some analysts have even talked of the existence of an inter-parliamentary (dis-)order (Fasone 2016), or even, somewhat exaggeratedly, of a parliamentary 'battlefield', especially in CFSP/CSDP matters (Herranz Surrallés 2014). Scholars have particularly deplored the lack of real decision-making, and hence the inefficiency of inter-parliamentary dialogue (Rittberger 2007: 197 ff.; O'Brennan and Raunio 2007: 272 ff.). From a normative perspective, it has been assumed that more coordination between national parliaments and the EP 'should be considered as secondary and will not significantly improve either the delivery or the legitimacy of economic governance' (Cygan 2017: 715).

2. Contextualising recent developments

Against these recurring arguments, it is possible to claim that there are several sources and causes for renewed EU inter-parliamentary cooperation: first, a voluntary one, i.e. the connection with the Lisbon Treaty's intent to facilitate a wider democratisation objective; second, this time more a reaction than an initiative, the need to counterbalance the institutional outcomes of the economic and financial crisis that shook the world but particularly the eurozone (possibility of a Grexit, etc.); and, third, the call for an

improvement in existing rules and mechanisms to develop even further democratic (read: parliamentary) input in common policies.

It is the combination of these three arguments that the Special Issue addresses. This combination offers a contextualisation that is needed to better understand each of the contributions that will follow.

On the one hand, the new search for more democracy reflects an ongoing effort in the EU to address its numerous democratic deficits, (Chryssochoou 1998; Warleigh 2003; Moravcsik 2004; Hix and Follesdal 2006), also described as 'democratic disconnect' (Lindseth 2010). In addition, more recently, the wider uncertainty that has also characterised the international system (2008 financial and economic crisis, 2016 Brexit referendum result, election in the USA of a populist President, and similar developments in Europe, most recently in Italy), all mean that world affairs, including the European integration process, are now under increased public scrutiny that demands more democratic accountability and transparency.

It is important to differentiate between, on the one hand, fair criticisms of how the EU works, and in particular the well documented literature on the existence of democratic deficits (see above), and, on the other, different approaches that range from the Euro-sceptical to the Euro-phobic: these are basically anti-system and anti-democratic in nature and in form – even if they use democratic means to promote their goals and ideals (on populist parties and the EP, especially since the 2014 elections, see Brack 2015; Vasilopoulou 2013). This differentiation is important because, for the former, the way the EU works (or should work) is a question of constantly improving, correcting, and developing it further; for the latter, the main objective is to render it obsolete and, if this is not possible, to leave it – as the UKIP successfully proposed in the Brexit referendum in 2016. From the non-populist and non-extremist perspectives, all of the points above mean that further research is required on EU inter-parliamentary cooperation as a key instrument in achieving the goals of a more democratic, legitimate and effective Union.

And, on the other hand, there is another important reason for this special issue: the wider context of the parliamentarisation of world affairs. As substantiated in the expanding literatures on parliamentary diplomacy and on international parliamentary institutions (IPIs), it is possible to speak now of a multi-layered parliamentary field in world affairs, including in Europe (Crum and Fossum 2009; 2013; Cofelice 2012; Costa, Dri and Stavridis

2013; Jancic 2015c – see also De Puig 2008; Kissling 2011). The post-Cold War era has been characterised by globalisation and new types of (inter-)regionalisms, sometimes leading to multi-level forms of governance (MLG) (see Hooge and Marks 2001; Morata 2011). In turn, both global (Beetham 2006) and (inter-)regional governance (on the latter, see Warleigh-Lack, Robinson and Rosamond 2011; Telò, Fawcett and Ponjaert 2015) have raised a number of issues over how democratic legitimacy and control can (and should) be achieved. The EU is often presented as a model, if not a precursor for regional integration (Hooghe and Marks, 2001; Marchetti 2010; Morata 2011). But there is also a need to discuss those issues further, not only in other (inter-) regional constructs, but also at the global level, including the possibility of the need for a parliamentary dimension to the UN (see Falk and Strauss 2011; Schwartzberg 2012; Cabrera 2015). Hence, the question of EU inter-parliamentary cooperation falls within that wider context: it both draws from and contributes to it.[II] Although this Special Issue only focuses on the EU.

From the above, a **first** point is that the ToL, appropriately dubbed the 'Treaty of Parliaments' (see also Barón Crespo 2012), has greatly added to the parliamentarisation of the EU integration process. This development falls within the EP´s incremental evolution as it has consistently and continuously gained more powers (Elles 1990; Attinà 1992; Keukeleire and MacNaughtan 2008; Stavridis and Irrera 2015). What Thomas Winzen, Chrstilla Roederer-Rynning and Franck Schimmerlfennig (2015) have recently described as 'parliamentary co-evolution': a connection between simultaneous and mutually reinforcing national and European arenas of parliamentarization.

On internal integration issues, the ToL has clearly recognised the dual structure of parliamentary representation in the EU[III] through the two channels set by Article 10 TEU, one embodied by the EP and the other centred on national parliaments (Besselink 2007; Micossi 2008; Lindseth 2010). These two channels are meant to satisfy the principle of accountability as a fundamental component of democratic government. Parliamentary involvement in areas of multi-tier integration show manifold variations (Wessels 2013: 108). However, a number of factors contribute to make the existing accountability mechanisms unfit for satisfying legitimacy pushes. Since neither channel of parliamentary representation is capable of fulfilling accountability expectations alone,[IV] the issue of interconnections and mutual support becomes crucial.

Continuing from the above, a **second** implication is that the onset of the world financial and economic crises after 2008 has led to 'a massive transfer of powers to the EU level' (Dullien and Torreblanca 2012: 2), which has in turn mobilised national parliaments over the same issues. This is in itself an important development for democratic accountability (see Jancic 2015a; 2015b; 2016; 2017; Kreilinger 2015; Gattermann, Högenauer and Huff 2015). As Davor Jancic (2013) has shown with the French Parliament, it is both a 'European scrutiniser' and a 'national actor' in France. He also presented a similar case for Portugal, where he argued that its Parliament can no longer be accused of being a 'laggard' over EU affairs (Jancic 2011). Of course, not all national parliaments have necessarily responded in the same way (see the case of Greece, Sotiropoulos 2015).

Similarly, EU officials now also attend sessions of national parliaments: thus, to cite but one example, European Central Bank President Mario Draghi explained its policies to the Committee on the Affairs of the European Union of the German *Bundesbank* in September 2016.[V] In the same vein, national EU leaders address the EP if they so wish, as did Greek Premier Alexis Tsipras in July 2015.[VI] It is worth noting that as there are more than one European-wide international organisation involved, sometimes this overlap of layers concerns other such institutions extending not only to non-financial and economic issues: for instance, over security and defence issues: the NATO Secretary General often briefs the EP´s Foreign Affairs Committee.[VII]

It is equally important to note that President Emmanuel Macron of France has recently revitalised a call for the setting up of a parliamentary chamber covering the euro currency and such related governance in the EU.[VIII] This is not a new idea as similar debates took place with the setting up of the euro (Magnette 2000), but it is particularly striking that they come back to the fore now. Yet even more flexibility is undoubtedly needed as only 19 EU states use the euro and another 6 countries[IX] utilise it without being EU members. Not everyone of course agrees (see Schäfer and Schulz 2013: 3; Lupo 2018), but the mere fact that there is a debate shows that the question remains a topical issue. As the President of the *Assemblée Nationale* has declared recently, both a strengthening of the EP and the need to create a euro-dedicated parliamentary assembly are needed because 'the heart of European democracy beats' in both European and national parliaments.[X]

This new situation means that, *de facto*, national parliaments have begun to play a role in EU economic and financial governance that was not foreseen by the ToL and, perhaps more importantly, that no longer fits in the traditional 'supranational versus intergovernmental' dichotomy in integration studies.

Whereas in the past, European Political Cooperation (EPC) and the external relations of the European Economic Community (EEC), and later the Common Foreign and Security Policy (CFSP) Pillar and the 1st Pillar of the Maastricht Treaty, were seen as antithetical (at least in that they represented two extreme and opposed cases), nowadays 'differentiated integration' (see also below) appears to be the norm. Previous terms used included 'variable geometry', 'multi-speed', or 'à la carte' – but they were all seen as paradoxical as they did not fit the 'federalist' path as announced by the founding fathers and as explained by the neo-functionalists, respectively in the 1950s and the 1970s. What was an exception has not become the rule *per se*, but it no longer comes as a surprise, because there are many such exceptions, and in fact, they are becoming 'more normal' and are even institutionalised in one form or other. The current state of affairs has led some observers to argue that '[t]he economic and financial crisis which began in 2008 has undoubtedly favoured the pre-existing EU inclination to undertake forms of differentiated integration' (Griglio and Lupo 2014: 6). Thus, hybrid integration (see also Taylor 1983 on that question) reflects nowadays not only the reality of the EU but also its complexity, let alone its sophistication (Innerarity 2017).

Consequently, there is today a common public space of governance, with several, often overlapping, layers that existing individual accountability mechanisms cannot fully satisfy; this therefore establishes the justification for a collective space of action where different multilateral and multilevel arrangements of parliamentary democracy can be tested.

3. Inter-parliamentary cooperation and joint parliamentary scrutiny: what next?

As noted, in light of the above developments, there is now emerging literature on EU inter-parliamentary cooperation (Wouters and Raube 2012; Kreilinger 2013; Crum and Fossum 2013; Herranz Surallés 2014; Butler 2015, Heffler and Gattermann 2015; Fromage

2016; Lupo and Fasone 2016; Jančić 2017; Cooper 2017).[XI] But there remain a number of important points that have yet to be addressed fully.

One **first concern** is on the supranational or international nature of the inter-parliamentary phenomenon in the EU. Some articles of the Special Issue (see in particular Griglio and Lupo, and Raube and Fonck) aim at assessing whether current practices of EU inter-parliamentary cooperation have reinforced a more supranational ('federal') system of EU governance; or whether they have instead further strengthened intergovernmentalism; emphasised the dimension of a technocratic EU (Högenauer et al. 2016); or, even, if they are facilitating a new post-Brexit approach that favours 'differentiated integration' (Griglio and Lupo 2014; Bertoncini 2017)? The picture that emerges from this analysis is nuanced. Inter-parliamentary cooperation suffers strongly from ongoing ambiguities in the integration process that is facing federal pressures and international demands and is also deeply affected by existing variable geometry patterns. On the one hand, the inter-parliamentary dimension of the EU still owes many features to international parliamentary experiences. Nonetheless, it can be considered a *sui generis* model (Griglio and Lupo, this issue). On the other hand, due to the setting and non-binding format of its inter-parliamentary forums, the EU often fails to developing transnational schemes of interaction (Raube and Fonck, this issue). However, some forums are clearly pursuing rather ambitious goals that directly address the accountability challenges of the EU's architecture (Fromage, Kreilinger, Cooper, all in this issue). It is these often-unattained goals that many articles of the Special Issue address from a normative perspective, with the aim of reinforcing the peculiar contribution that inter-parliamentary cooperation can and does offer to the supranational dynamics of EU decision-making.

A **second issue** relates to the place reserved for inter-parliamentary cooperation in the wider set of interinstitutional relations within the EU, following on from the integration of European and national actors, procedures and rules (Manzella and Lupo 2014). The inter-parliamentary dimension is permeated by two parallel relationships. On the one hand, this builds on the relationship between executive and legislative actors in the EU. Originally thought of as a sort of 'parallel' parliamentary diplomacy, it is expected to discuss and potentially challenge EU public policies adopted by the executives (Griglio and Lupo, Raube and Fonck, both in this issue). On the other hand, inter-parliamentary cooperation is deeply affected by the relationship between national parliaments and the EP (Fromage,

Fasone, Pinheiro, Kreilinger, Cooper, all in this issue). The national parliaments insist on the interaction of inter-parliamentary cooperation with the transnational logic that asks for the settlement of cross-border connections that go beyond the mere parliamentary dimension to generate impact on both domestic and foreign governments (Raube and Fonck, this issue). The EP addresses the capacity of EU inter-parliamentary cooperation to cope with one of its distinctive features: the reliance on two fully fledged channels of parliamentary representation (Griglio and Lupo, this issue). The articles of the Special Issue portray different ways of tackling these relationships in the inter-parliamentary dimension. They highlight the unresolved issues still at stake, thus confirming that most of the weaknesses and constraints of the inter-parliamentary dimension originate from the failure to address these issues in an intelligent and sophisticated way. In many cases, the EU inter-parliamentary framework merely mirrors both the intergovernmental and federal dimensions in an effort to capture the complex and multifaceted requirements of collective actorness (Knutelská 2013: 35). One main inhibiting factor is the difficulty faced by parliaments in bridging from the 'domestic' (either national or European) to the 'collective' dimension as due premise for playing a proactive role in the EU decision-making.

A **third issue** deals with the goals pursued through the inter-parliamentary dimension. Is this 'dialogue' only a means for sharing information and best practices, supporting the effective exercise of national parliamentary competences in EU affairs and promoting partnerships with parliaments of third countries (Esposito 2014, 153 ff.)? Or is it supposed to go beyond the traditional aims of international inter-parliamentary cooperation? In assessing the aims of the new formats of inter-parliamentary cooperation in the EU, some scholars have clearly highlighted that, in addition to traditional objectives, these goals also give national governments the right to evaluate mechanisms implementing EU policies in those policy areas where the influence of the executive branch is overwhelming (Wouters and Raube 2012). In other words, the goals might be expected to strengthen the capacity of parliaments to fulfil the oversight function over their own executives and consequently to improve the democratic legitimacy of the European Union as a whole (Cooper 2014; Hefftler and Gattermann 2015). On this basis, existing gaps in the accountability circuit of the European Union demonstrate that there is a potential for new forms of 'joint' parliamentary scrutiny resulting from the collective action of national parliaments and the EP, activated through inter-parliamentary cooperation. Inter-parliamentary cooperation has

specifically been described as a dimension that is not expected to act as an autonomous channel for representation and oversight but rather as an instrumental dimension that could help the two ordinary channels for parliamentary representation – the EP and national parliaments – to strengthen their oversight capacity, in their respective spheres of action (Lupo and Griglio 2018: 358 ff.)

In fact, existing weaknesses in inter-parliamentary cooperation show that the post-ToL goals may sound too ambitious if compared with current practices. It is this issue that several articles (Fromage, Griglio and Lupo, Pinheiro, Kreilinger, Cooper, all in this issue) specifically address. The answer they provide is rather nuanced. The lack of effectiveness in the implementation of the joint scrutiny function is a product of multiple causes. These stem from both the procedural and organisational constraints undermining the scrutiny potential of the inter-parliamentary forums, and the lack of motivation and capacity that prevents parliamentary actors from a proactive engagement. Many proposals are therefore debated in the Issue to offer ways to overcome this situation. They deal both with the reform of the internal proceedings of single inter-parliamentary forums and with the rationalisation of the mutual relationship between them.

Within the latter set of hypotheses, alternative solutions are advanced in the Special Issue, comprising either the creation of a permanent Secretariat for all existing permanent Conferences (Fromage, this issue), or the standing invitation between the forums to host a representative from each other as to build mutual confidence and facilitate dialogue (Pinheiro, this issue). As for the role of 'coordinator' among existing forums, this is apparently only applicable to the Speakers' Conference (Fasone, this issue), although COSAC, in its capacity as Conference with a 'global picture' of inter-parliamentary cooperation, could also offer a strategic contribution (Pinheiro, this issue).

4. The Special Issue Contents

As a result, the Special Issue analyses and assesses with insights from both the theory and the practice of how inter-parliamentary cooperation deals with the democratic challenges mentioned above, featuring the EU's multi-layered decision-making process. The Issue is divided into two parts. The **First Part** offers a general overview of the state-of-the art of inter-parliamentary cooperation in the EU. The **Second Part** focuses on each

permanent forum for inter-parliamentary cooperation, thus analysing the specific features and practices of the pre- and post-Lisbon Conferences and of the Joint Parliamentary Scrutiny Group on Europol. What follows presents a summary of the main points made by each contribution.

Diane Fromage describes and assesses the 'blossoming' of inter-parliamentary conferences and other permanent forums in the EU. This process has led to the creation of several formalised permanent forums for inter-parliamentary cooperation that share both commonalities and differences. The large variety in the forums is perceived as a problematic factor insofar it creates complexity, reduces efficiency and transparency, and fosters institutional discontinuity. The recent establishment of the Joint Parliamentary Scrutiny Group on Europol is another index of the trend towards the multiplication of both forums and formats for inter-parliamentary cooperation. The creation of a Group rather than a Conference confirms that a new arrangement is being pursued, but the JPSG's capacity to depart from previous experiences will have to be assessed in its practice, beyond the formal rules of procedure. To overcome the risk of overlaps, a rationalisation of inter-parliamentary cooperation initiatives is advocated through the creation of a stronger, common, permanent secretariat.

Fotis Fitsilis unpacks the role played by parliamentary administrations as facilitators of inter-parliamentary cooperation. Parliamentary administrations are not isolated actors in this field, as they also act in several networks, such as IPEX or the European Centre for Parliamentary Research and Documentation. Acting as a structural component of the inter-parliamentary dimension, parliamentary administrative actors and their networks exercise pre-defined roles for a given set of tasks. In addition to the functions of coordination, information management and pre-selection, Fitsilis stresses that the 'new' role of the *researcher* has the potential to re-shape operations of parliamentary administrators in the context of inter-parliamentary cooperation. In order to enhance the contribution that researchers among parliamentary administrations may offer to the inter-parliamentary dialogue, some hypotheses are advocated, including the creation of guidelines for administrators specialised in EU affairs and the development of an EU Network of EU affairs parliamentary specialists.

Elena Griglio and **Nicola Lupo** draw a comparison between the inter-parliamentary cooperation framework in the European Union and those existing at the international level.

Notwithstanding a strong international imprint, inter-parliamentary relations in the EU have gradually evolved into a somewhat distinctive model, deeply embedded in the unique constitutional arrangement of the Union. What characterises inter-parliamentary cooperation in the EU is the combination of two distinctive organisational and functional features: the multi-layered nature of inter-parliamentary arrangements, consisting of a large variety of vertical formats; and the purposes attached to the most 'advanced' forums. Inter-parliamentary cooperation in the EU represents a *sui generis* model if compared to apparently similar experiences featuring transnational dialogue amongst parliaments. In theory, it is expected to find the ideal conditions for fulfilling an authentic collective dimension, instrumental to the democratic oversight of the executives. In fact, focusing on the practice, the *sui generis* nature of the EU inter-parliamentary model is not yet fulfilled due to two set of reasons: the unresolved ambiguities concerning its contribution to parliamentary democracy, and the lack of a real capacity to depart from the formats of international parliamentary institutions.

Cristina Fasone describes the 'second youth' experienced by the EU Speakers' Conference after the entry into force of the ToL. The Conference has *de facto* assumed the role of coordinator in the eyes of other EU inter-parliamentary forums by defining common guidelines and, in some cases, even by adopting their rules of procedure. The Conference does exhibit some deficiencies and gaps in fulfilling this 'quasi-constitutional' role; this is mostly explained by the structural variations in the powers and qualities of the Speakers of national parliaments. However, there are no valid alternatives to such empowerment; neither the EP nor COSAC could play such a role. From a normative perspective, the coordinating role of the Speakers' Conference is therefore primarily seen as a means for easing the relationship among the many inter-parliamentary forums in terms of timing, consistency of the respective agendas and *ex-post* supervision of the results. Although the Speakers' Conference is not directly involved in the exercise of a joint parliamentary scrutiny, this perspective could positively contribute to its fulfilment.

Bruno Pinehiro discusses COSAC as a pioneer in inter-parliamentary cooperation. COSAC is deemed to occupy a central role in inter-parliamentary cooperation because it is based on a governance model that mainstreams the importance of national parliaments as actors endowed with decisive democratic qualities and responsibilities in the EU. Through COSAC, national parliaments have been allowed to play a more effective role in the

oversight and monitoring of a system of EU governance with increasing features of intergovernmentalism. The Conference is now facing an identity crisis, due to the empowerment of other forums that have come to play the role of transmission belts between national parliaments. To maximise COSAC's unique position with the 'global picture', some proposals for reform are debated: a reconsideration of the proceedings of COSAC meetings to bring direct added-value to the scrutiny performed by national parliaments and promote coordinated assessment of different policy dossiers.

Kolja Raube and **Daan Fonck** focus on the inter-parliamentary conference on CFSP/CSDP from the point of view of transnational parliamentarism. The main question is whether the Conference's functioning reflects its constitutive intergovernmental logic or whether it is guided by a transnational logic; the latter implies an inter-parliamentary cooperation framework that does not merely support intergovernmental activity, but is capable of promoting competitive forms of interaction among parliaments. The question is approached by applying three functions to the CFSP/CSDP Conference, as promoted by transnational parliamentarism: policy making, collective accountability and cooperation. The outcome of this experiment proves that the record of the Conference on CFSP/CSDP is nuanced. On the one hand, due to the setting and non-binding format of the Conference, the transnational effects are rather limited in the fields of policy-making and accountability. However, some transnational interactions are detected in the Conference's effects on the EP's capacity to strengthen a security culture around the common foreign, security and defence policy, in cooperation with national parliaments.

Valentin Kreilinger describes the establishment and the recent activity of the Conference on Stability, Economic Coordination and Governance (SECG) as torn between three competing models of inter-parliamentary cooperation. The first model is based on the leadership of the EP, the second interprets the Conference as a COSAC-style venue and the third advocates the creation of a real collective parliamentary counterweight. The standard 'COSAC' model is the one that has prevailed in the end, thus reflecting a lowest common denominator compromise. However, two institutional peculiarities were added. First, the linkage to the European Parliamentary Week at the first annual meeting has contributed to giving the EP some additional leverage. Second, the size of the delegations is not fixed, as in the COSAC model, but attendance rates have anyway remained stable over time.

Ian Cooper chronicles the process of creation of a new Joint Parliamentary Group, highlighting that this model was introduced to enable members of national parliaments and the EP to exercise joint oversight of Europol, the EU agency for police cooperation. The comparison with the three EU inter-parliamentary conferences, with competence, respectively, on EU affairs, foreign policy and economic governance, demonstrates that there are many similarities between these forums. However, one peculiar feature of the JPSG lies in its mandate to scrutinise and in the targeted scope of scrutiny activity that does not correspond to a whole policy field. Other distinctive features include a stronger legal basis, more restrictive membership and participation rules, greater continuity of membership, stronger access to EU officials and documents, a seat on the Europol Management Board and an explicit right to ask oral and written questions. All these attributes indicate that the JPSG has a stronger mandate to act as an oversight body, rather than merely as a discussion forum.

All of the above shows that, following the ToL, a brand-new era for inter-parliamentary cooperation has (re-)emerged: in particular over its role in joint scrutiny which remains a key function for parliamentary bodies in any democratic set up. As a result, this Special Issue shows important developments as illustrated and analysed in detail here. But this publication also confirms that even more research is needed on this crucial area of European integration. It is also one of the Special Issue´s objectives to spark more interest in this important question.

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In some cases, earlier drafts of the articles published here were presented to the Workshop on *The European Union´s Inter-Parliamentary Conferences: between theory and practice*, organised by the Centre for Parliamentary Studies of the LUISS Guido Carli University on 15 May 2017 in Rome. In addition to thanking all participants, and in particular chairs and discussants, the special issue editors would like to thank several anonymous peer reviewers for their additional contribution to this publication. The usual proviso about the respective authors´ own final responsibility applies here too.
[I] https://www.parlament.gv.at/ENGL/EU2018/EUROPOL/.
[II] Furthermore, there is a growth, and a consolidation, of the literature on parliamentary diplomacy: see Stavridis and Jancic (2016). On traditional international democratic theory and on its more recent expressions, such as Cosmopolitanism, see Held and Koenig-Archibugi (2005); Marchetti (2006).
[III] Of course there are further layers of parliamentary representation especially among federal and decentralised EU member states but this Special Issue does not cover this dimension (see Abels and Eppler 2016).
[IV] No representative institution in the EU structure is endowed with the authority to adopt corrective actions or measures. Crum and Curtin (2015: 72).

[V] https://www.ecb.europa.eu/press/key/date/2016/html/sp160928_1.en.html. See also Thomas Weider, ´Le Bundestag acceuille fraîchement M. Draghi´, *Le Monde*, 30 September 2016.
[VI] https://uk.reuters.com/article/us-eurozone-greece-parliament/tsipras-pledges-reform-to-divided-european-parliament-idUKKCN0PI0WO20150708.
[VII] For instance, see 'Remarks by NATO Secretary General Jens Stoltenberg at the European Parliament Committee on Foreign Affairs and the Sub-Committee on Security and Defence' (www.nato.int), 3 May 2017.
[VIII] See Cécile Ducourtieux, 'Le nécessaire débat de la démocratisation – La piste française d´un Parlement spécifique à la zone euro ne remporte que peu de suffrages à Bruxelles, ou l´on souligne le manque d´implication des députés hexagonaux', *Le Monde*, 27 September 2017. See also, Éditorial, 'La difficile quête démocratique de l´eurogroupe', *Le Monde*, 3-4 December 2017; Collectif, 'Pour un renouveau démocratique de l´euro', *Le Monde*, 3 March 2018.
[IX] The euro is official currency in the Principality of Monaco, the Republic of San Marino, the Vatican City State, and the Principality of Andorra. It is also used de facto in Kosovo and Montenegro.
[X] *Le Monde* and *Frankfurter Allgemeine Zeitung* joint interview with François de Rugy and with the German *Bundestag* President Wolfgang Schäuble, in *Le Monde*, 25 January 2018.
[XI] The website of the IPC on CFSP/CSDP as well as other such fora is available on-line via the IPEX site: http://www.ipex.eu/IPEXL-WEB/home/home.do.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

A comparison of existing forums for interparliamentary cooperation in the EU and some lessons for the future

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

Interparliamentary conferences and other permanent forums for interparliamentary cooperation are blossoming in the European Union. Following more or less lengthy negotiations between national and European parliamentarians, two new conferences and a new joint parliamentary scrutiny group for Europol have been created since 2012. Against this background, this article examines to what extent the Joint parliament scrutiny group is comparable to the previously existing interparliamentary conferences. Beyond that, it asks the question as to whether any better-defined guidelines or procedures could be adopted to rationalise the process of creation of new forums for interparliamentary cooperation. It makes some concrete proposals in that direction.

Key-words

Interparliamentary cooperation, European Union, national parliaments, European Parliament, democratic accountability

1. Introduction

Initiatives for cooperation between national parliaments (NPs) and the European Parliament (EP) are nothing new (Maurer-Wessels 2001: 453f., Neunreither 2005). They became particularly necessary when the organic link between Member States legislatures and the European Parliamentary Assembly (largely) disappeared with the introduction of the direct European elections in 1976.[I] In fact, the oldest forum for interparliamentary cooperation, the Speakers' Conference, initiated in 1963, only started meeting regularly from 1975 onwards. Despite the fact that the EP showed willingness to tighten the relations between its sectoral committees and those of NPs (Spènale report 1975),[II] the first formalized permanent initiative in this sense was taken in 1989 when the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) was created. The first time national parliaments were ever mentioned in the Treaties, in the Declaration nr 13 on the role of national parliaments in the European Union annexed to the Treaty of Maastricht, both the exchange of information and the contacts between EP and NPs were considered to have to be 'stepped up'. Another Declaration (nr 14) was specifically dedicated to the 'Conference of the parliaments', i.e. the Assizes, but these were only ever celebrated once in 1989, i.e. before the adoption of the Declaration, so that these dispositions were never applied in practice. By contrast, in the Treaty of Amsterdam, only COSAC was mentioned in the Protocol on the role of national parliaments in the European Union (EU); interparliamentary cooperation in itself was not referred to. In the Treaty of Lisbon, interparliamentary cooperation is attributed a much more important function as it is defined as one of the means by which 'national parliaments contribute actively to the good functioning of the Union' (art. 12 Treaty of the EU (TEU)). With the Lisbon Treaty therefore, interparliamentary cooperation between NPs and EP was attributed a whole new, enhanced, status (for more details on the historical evolution, see Casalena, Fasone, Lupo 2013). In Protocol nr 1 on the role of national parliaments in the European Union, a title is specifically dedicated to interparliamentary cooperation. This Protocol not only contains a reference to COSAC (though the Protocol now indirectly refers to '[a] conference of Parliamentary Committees for Union Affairs', art. 10); it also prescribes that '[t]he European Parliament and national

Parliaments shall together determine the organisation and promotion of *effective* and *regular* interparliamentary cooperation within the Union' (art. 9, emphasis added). Regularity and effectiveness are prescribed for the first time.

In this context, interparliamentary conferences (IPCs) and permanent formalized forums of interparliamentary cooperation have been blossoming since the entry into force of the new Treaty. No less than two new conferences and one joint parliamentary group have been created since 2012: the Interparliamentary Conference on Common Foreign and Security Policy and Common Security and Defence Policy (CFSP Conference) dating from 2012, the Conference on Economic Stability, Coordination and Governance (SECG Conference) of 2013 and the Joint Parliamentary Scrutiny Group for Europol (JPSG) instituted in 2016, and which adopted its rules of procedure in March 2018. The JPSG is arguably not an interparliamentary conference as clearly stated in the conclusions adopted at the Speakers' conference meeting held in Bratislava in April 2017:[III] the JPSG 'is meant to be a scrutiny and monitoring body, as opposed to an inter-parliamentary conference'. Several of its features, such as the fact that it regularly brings together MPs and MEPs, its format or the frequency of its meetings are, nevertheless, identical to those of IPCs. Taking due account of these differences, the interparliamentary conferences and the JPSG will be referred to here as 'forums for interparliamentary cooperation'.

Other such forums could, additionally, still be established in the near future, to monitor Eurojust for example,[IV] and interparliamentary cooperation has important potential in numerous areas, such as the budgetary domain for instance (Fasone, 2018). Yet, even where a new forum is instituted little time after the creation of the previous one, rules concerning inter alia the composition and the organization of the meetings are not reproduced and are, instead, the object of sometimes heated negotiations (this happened for instance when the SECG Conference was set up: Cooper 2014). By contrast, even where the Treaty basis differs as is the case with the JPSG, differences relative to other forums for interparliamentary cooperation appear to be much less important than one could have expected given their different standings in the Treaties. This difference does not however prevent any comparison between the JPSG and interparliamentary conferences. As will be shown here, the JPSG does, in some respects, very much resemble the existing interparliamentary conferences and can thus be compared to them. Since Conferences have

been existing much longer than the JPSG, they additionally offer an interesting point of comparison for the recently created Scrutiny Group.

Against this background, this article aims at examining on which grounds the recently established JPSG really differs from the pre-existing IPCs and to what extent the IPCs are comparable to one another. Such analysis serves a more general reflection on the future of formalized permanent interparliamentary cooperation (i.e. whether for instance a model for (future) interparliamentary forums can be designed) and, more generally, whether these attempts can be rationalised (i.e. whether lengthy negotiations can be avoided by establishing some basic procedures guiding the establishment of new forums and whether the existing forums' functioning can be optimised). For the sake of comparability, the JPSG is contrasted with the three existing conferences for interparliamentary cooperation at committee level; the Speakers' Conference is hence only mentioned for reference. This comparison will fill in a gap in the literature on interparliamentary cooperation: whereas much interest has been devoted to the individual conferences, they are rarely compared with one another (Cooper, forthcoming).

In this article, the focus is set exclusively on permanent formalized forums for interparliamentary cooperation between national parliaments and the European Parliament (EP). Instances that bring together national parliaments only or that take place on an informal basis will therefore not be examined. Joint parliamentary meetings organised by the EP and national parliaments, Interparliamentary committee meetings convened by the EP, and the meetings held by the parliament of the Member State holding the presidency of the Council (presidency parliament) will not be taken into account either since they operate under a different logic. Among other things, they convene on a more ad hoc basis, i.e. there is not necessarily a continuity in the parliamentary committees involved or in the themes addressed which depend on the interests of a specific EP committee or on the presidency parliament at a certain moment in time. Additionally, the two conventions (summoned in 1999 and in 2001 to draft the Charter of fundamental right and to debate on the future of Europe respectively) are not considered either because those were punctual initiatives that also followed a different dynamic.[V]

This article is structured as follows. First, commonalities among the existing forums are examined (II). An analysis of the existing differences follows (III). This allows for an

evaluation as to whether a more rationalised framework for (future) interparliamentary conferences can and ought to be designed (IV).

A reflection as to the aim of interparliamentary cooperation in itself should be conducted prior to comparing the JPSG to the other three IPCs. Research in political science has, for instance, identified several aims of interparliamentary cooperation: the exchange of best practices and information and the 'enhanc[ement of] the democratic legitimacy of EU politics through participation and deliberation (Hefftler-Gattermann 2015: 95). The perceived function of interparliamentary cooperation largely varies among NPs though, with some of them considering that it is only suited for debates on general issues whereas others conceive of it as a potential means to ensure the democratic legitimization of EU actions (Esposito 2014: 134). In other words, interparliamentary conferences are generally perceived as assuming the functions of 'discussion forums' or those of 'oversight bodies', or a mixture thereof (Cooper forthcoming). These differences in the objectives set for those efforts for interparliamentary cooperation matter, as they shape parliamentary preferences on issues such as the adoption of conclusions or the absence thereof, the adoption procedures (consensus vs unanimity) and the aim of the cooperation (e.g. whether it is meant to enhance accountability or not) (Cooper forthcoming).

As per the Treaty, only COSAC has the clear aim to allow for the exchange of information and best practices (art. 10 Protocol 1). The generic specific legal basis – art. 9 Protocol 1 – and article 12 TEU simply set 'effective and regular' interparliamentary cooperation between NPs and the EP as a goal (art. 9). However, the conferences' rules of procedure may define their individual objectives more clearly and, as will be shown here, practice may differ slightly from those formal rules.

Cooperation can, additionally, be said to be in national and European parliaments' interest as it can help them overcome the 'informational asymmetry' they suffer from vis-à-vis their executives due to the 'executive dominance issue' (on this deficit: Curtin 2014: 15, in CFSP in particular: Huff 2015: 397). Some have argued that as per the Treaty (art. 10 TEU), NPs' main role in the EU is (still) to hold their respective government to account; instruments of direct participation attributed by the Treaty are hence ancillary to this primary role (Esposito 2014: 139). This may be true in practice where one observes that NPs' participation in EU affairs is still focused on their own government, in particular in

those Member States in which parliaments have strong means of influence on their governments' position (for instance: Denmark, Finland or German Bundestag). These parliaments are typically not interested in mechanisms such as the Political Dialogue with the European Commission or the Early Warning System for the control of the respect of the principle of subsidiarity. This, however, does not mean that interparliamentary cooperation should not be strengthened and should not offer an opportunity to parliaments to debate collectively with the Commission, thereby controlling its actions softly. Recent trends towards an intensification of attempts of interparliamentary cooperation of all sorts in fact point to a thirst for more contacts. Finally, interparliamentary cooperation has more virtues: it has contributed to the diffusion of models and best practices among parliamentary chambers (Buzogány 2013, Dias Pinheiro 2016) and has fostered cooperation at administrative level (Esposito 2014: 181; see also Fistilis in this Special Issue).

2. Commonalities between the JPSG and IPCs

Common points among these forums relate to a series of aspects: their formalization; the frequency, the size and the format of their meetings; the EP's role within them and a functioning based on consensus.

The most obvious common element among these five forums of interparliamentary cooperation considered as a whole is their *formalization* if compared to other interparliamentary meetings that take place on an ad hoc basis (inter alia, Joint parliamentary meetings, Interparliamentary committee meetings, presidency parliaments meetings). They all function on the basis of precise rules of procedure.[VI] Additionally, the Speakers' Conference also played a crucial role at the time of their establishment (Fasone 2016, Speakers' Conference 2017).

While the IPCs/JPSG convene on a regular basis, those meetings all take place only *occasionally*: once a year for the Speakers' conference, twice a year for the CFSP and the SECG conferences and the JPSG, and four times a year for COSAC, although two of these four meetings only bring together the chairpersons of the EU committees. Also, the *size* and the *formats* of these meetings is similar: they take the form of large assembly meetings where each speaker can only intervene shortly and where real debates are consequently

practically hindered (Dias Pinheiro 2016: 307), unless if for instance smaller parallel sessions are organised. The JPSG only allows NPs to send four delegates each, which is less than they can send to CFSP and COSAC plenary meetings for instance (in which cases they can send six delegates each). Still, this will make up for a large assembly of roughly 120 persons if all NPs send complete delegations. It will admittedly have to be seen whether all NPs really send as many MPs as they can as the experience of the pre-existing interparliamentary conferences tells us that they rarely do (on the CFSP Conference: Wouters and Raube 2017: 288; on the SECG Conference: Fromage 2018). The second JPSG meeting held in March 2018 was particularly important since its rules of procedure were scheduled to be adopted, after no consensus could be reached at the first meeting. This notwithstanding, neither did all national parliaments send MPs – the Finnish parliament did not and in some bicameral parliaments, only one chamber was represented –, nor did they all send the number of MPs they are allowed to send (only 75 participated out of the 112 that may attend).[VII] Additionally, given the fact that this time there is really something to gain from these interparliamentary meetings since the JPSG is a 'scrutiny and monitoring body', it could be expected that MPs would be keener on participating.No firm conclusions should be drawn on the basis of the two meetings organised thus far. Their active participation could, in fact, contribute to them pursuing an adequate exercise of their rights of scrutiny and it could lead to a potential improvement of their sometimes scarce information as they could benefit from the EP's 'higher expertise and full-time European focus' (Ruiz de Garibay 2013: 90) and from the fact that some NPs are better informed than others (on their different rights of access to EU documents: COSAC 2012). In fact, information deficits have been a concern for parliaments for long.[VIII] It will have to be seen whether MEPs, whose control over Europol has improved since it became an EU agency (Ruiz de Garibay, 2013: 88), are allowed and ready to share their knowledge with their national counterparts.

Another commonality which affects all forums for cooperation at committee level is the *prevalent role of the European Parliament*. In COSAC, its privileged position is less pronounced. It is always part of the Troika together with the previous, the current and the upcoming presidency parliaments, which gives it a more important status. However, it may only send six delegates to each of the plenary meetings – like NPs – (art. 3.1 COSAC Rules of procedure) and none of the four yearly meetings take place in its premises: they always

take place in the parliament of the Member State holding the rotating Council presidency (art. 2.1). This is also the case of the CFSP conference meetings at present, but in this case, its rules of procedure do foresee the possibility that these meetings take place in the EP's premises (art. 3.1). The IPC 'shall [also] be presided over by the Presidency Parliament, *in close cooperation with the European Parliament*' (art. 3.2, emphasis added). In the case of the SECG conference, one of the two yearly meetings must take place in the EP, and it acts as a co-convener then (art. 3.1. SECG Rules of procedure and Annex to the Bratislava Speakers' Conference conclusions point 3).[IX] In the JPSG, the second meeting of every year is organised in the EP's premises and the EP is a co-convener of all meetings. In fact, reproducing the Treaty, the new Europol Regulation[X] clearly gives a predominant role to the EP. For instance, it states that '[p]ursuant to Article 88 TFEU, the scrutiny of Europol's activities shall be carried out *by* the European Parliament *together with* national parliaments' (emphasis added, Art. 51-1 Europol Regulation). This differentiation is arguably legitimate given the status of Europol as an EU agency and given the intrinsic European nature of Europol's actions. Nevertheless, this differentiation in NPs' and the EP's status was much less clearly entailed in the principles adopted by the Speakers in April 2017 in preparation for the approval of the Conference's rules of procedure. For instance, the co-presidency between the EP and the Presidency parliament was established for all meetings. It can nevertheless be expected that the EP will play an important role and contribute to the formalization of the Group.

Finally, an important similarity exists with regard to the *functioning of these conferences*. Only COSAC may derogate from the obligation to adopt its contributions by consensus (art. 7.5 COSAC rules of procedure). Indeed, where no consensus can be found, it may proceed with a vote by qualified majority (3/4 of the vote cast). The question of the topics addressed by the CFSP and the SECG conferences could be the reasons why NPs were not ready to agree to majority voting procedures; in fact, an attempt to amend the rules of the CFSP Conference to introduce qualified majority voting failed in 2014 because it would have gone against the principles approved by the Speakers in Warsaw in 2012 (Cooper 2017: 239). Political salience is likely to be an even more important element in the setting up of the JPSG. Another explanation could also be one of generation: COSAC is an interparliamentary initiative of first generation, created at a time when Member States were much less numerous and much more homogeneous and when the idea of a second

chamber at European level was much debated. Additionally, even if opinions sometimes slightly differ, COSAC has been subject to recurrent criticism since its creation (see the part dedicated to COSAC in Lupo and Fasone 2016) so that perhaps when the CFSP and the SECG were created over the past years, one tried not to reproduce the functioning of COSAC to avoid facing the same difficulties.

In any event, the JPSG and IPCs not only present certain similarities; several differences also exist amongst them.

3. Differences between the JPSG and the IPCs

Differences between the JPSG and the IPCs exist mostly in five regards: as to their composition, their Treaty basis and their degree of formalization visible in the instruments in which the norms that govern the forums are contained, in the regularity with which the same MPs and MEPs attend meetings, and as to their (formal) purpose.

The *composition* of these Conferences and of the JPSG indeed differs largely. The Speakers Conference and COSAC establish full equality between the EP on the one hand and NPs on the other. On the contrary, the CFSP Conference counts with 16 MEPs vs 6 MPs per NP, the JPSG has 16 MEPs and 4 delegates per NP and the SECG Conference does not define any rule in this regard because no agreement could be found among its members. MEPs thus outnumbers individual NPs' delegations in all forums but COSAC. The issue of the size of the different delegations is less relevant where conclusions are adopted by consensus though (Dias Pinheiro 2017: 95).

The difference between the JPSG and the other forums can also be related to their different *Treaty bases*. NPs' role in the control of Europol (and of Eurojust) is specifically mentioned in article 12 Treaty of the European Union (TEU) on the participation of national parliaments (c)) and in article 88-2 b) Treaty on the Functioning of the EU (TFEU). Indeed, that article prescribes that 'These regulations [on Europol] shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments'. By contrast, the other conferences are based on the general reference to interparliamentary cooperation with the European Parliament (art. 12 f TEU) as developed in the Protocol on the role of national parliaments annexed to the Treaties. Article 9 of Protocol no. 1 arguably indirectly refers to COSAC (the explicit

reference contained in the Amsterdam Treaty was removed in the Lisbon Treaty) but this reference in a Protocol cannot be compared to the explicit reference to Eurojust and Europol contained in the Treaty itself and more specifically in the article dedicated to NPs' participation in the EU. Additionally, the content of the provisions differs since article 12 TEU explicitly mentions national parliaments contributing to the good functioning of the Union by 'taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and *through being involved in the political monitoring of Europol* and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty' (emphasis added). As per article 88 TEU, this regulation was adopted following the ordinary legislative procedure and was subject to the subsidiarity check of national parliaments who adopted several reasoned opinions and expressed their views on the form that interparliamentary cooperation should take. The EP was set on an equal footing with the Council during the procedure that led to the new Europol Regulation adopted in 2016. During the legislative procedure, the EP's and NPs' role was undoubtedly improved and broadened if compared to the original Commission proposal. The original proposal by the Commission[XI] indeed contained scarce dispositions for parliamentary scrutiny. Chapter IX dedicated to 'parliamentary scrutiny' provided for the direct transmission of information to both EP and NPs and for the possibility for them to ask the Chairperson of the Management Board and the Executive Director to appear before them. Furthermore, it was established, in generic terms, that 'Parliamentary scrutiny by the European Parliament, together with national Parliaments, of Europol's activities shall be exercised in accordance with this Regulation'. The EP then requested in first reading[XII] that this Chapter be dedicated to '*Joint* parliamentary scrutiny' (emphasis added) and it introduced the JPSG. It is interesting to note that despite this (generous) move which, in fact, reproduced earlier proposals for interparliamentary cooperation (Ruiz de Garibay 2013: 91), it then sought to establish its predominance by suggesting that the JPSG should be

> established within the competent committee of the European Parliament, comprising the full members of the competent committee of the European Parliament and one representative of the competent

committee of the national parliament for each Member State and a substitute. Member States with bicameral parliamentary systems [would] instead be represented by a representative from each chamber.

All meetings also always had to take place in the EP's premises and be co-chaired by the chairs of the responsible committee of the EP and the presidency parliament. After the interinstitutional negotiations that followed, it was agreed that the organisation and the rules of procedure would be defined by the EP and NPs at a later stage,[XIII] thereby conferring, once again, a constitutional function to the Speakers' Conference in this foundational moment. In parallel to this procedure, NPs also expressed their views by means of contributions to the informal Political Dialogue with the Commission and by means of reasoned opinions; those are useful to understand the different positions that later on had to be reconciled in the Speakers' Conference. For instance, the Cypriot parliament expressed its wish that 'the provisions to be finally adopted [should] ensure the role and the effective participation of the national Parliaments together with the equally important role of the European Parliament. The principle of parity should be secured by effective means'.[XIV] These questions were also debated at the Speakers' Conference of April 2014 where some speakers (Polish Senate, Irish Senate and Hungarian parliament) in fact advocated the creation of a 'full-blown interparliamentary conference for the whole policy field of JHA [Justice and Home Affairs…] modelled on the formula of the CFSP-CSDP and SECG Conferences, in that it would replace the existing meetings of chairpersons, meet twice a year, and be co-hosted and co-presided over by the EP and the Presidency Parliament' (Cooper 2017: 233). Interestingly, the EP representative firmly rejected this proposal at the time (ibid.). The formula finally agreed upon by the Speakers in 2017 therefore appears to be a compromise between the position of (some) NPs and the EP and is also the result of long-standing discussions that started in 2001.

By contrast, the other initiatives for interparliamentary cooperation are a development of the more general reference to their contribution 'by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union', as detailed in articles 9 and 10, Protocol 1. It is interesting to note however that this notwithstanding, COSAC has sought to gain a special status for itself on the basis of the (now indirect) reference to it contained in article 10 (Esposito 2014:159).

As a consequence of this different treaty basis, the rules of procedures of the other Conferences were not approved following the legislative procedure unlike what happened in the framework of the establishment of the JPSG. The Speakers have recently gained importance in this framework (Fasone 2016: 278) since they now 'oversee the coordination of interparliamentary EU activities' (Art. 2-3 Guidelines for interparliamentary cooperation), while in the process of COSAC's creation their role had been more limited (Cooper 2017:236). The question even arose as to whether the Speakers should not even approve the SECG Conference's rules of procedure (Speakers' Conference meeting of Rome, 2015). This eventually did not happen but the Speakers approved some guidelines which constrained the different forums in the definition of their rules of procedure, and will continue to do so in the future. It follows from the above that the JPSG distinguishes itself from the others most in terms of the degree of *formalization* (as opposed to permanent initiatives whose anchoring in the EU institutional framework and functioning is much less (strictly) defined) since it can rely on a clear Treaty basis developed later on in a Regulation. COSAC too is quite a formalized forum if compared to the other three conferences. It has an (indirect) recognition in the Treaties (art. 9 protocol 1) and was even directly referred to under the Treaty of Amsterdam. COSAC's rules of procedures are published in the EU Official Journal whereas the other sets of rules are not. Additionally, it has a secretariat composed of one permanent member and members delegated by the presidency parliaments for 18 months. This secretariat is hosted by the EP in Brussels, which not only contributes to the good functioning of the Conference but also allows for a good circulation of the information between the Conference and NPs thanks to their representatives in Brussels (further on this: Högenauer-Neuhold-Christiansen 2013: 51-68). Contrary to this, the secretariat of the other conferences is the responsibility of each presidency parliament which is not an ideal solution, especially as the timespan between each Member State's presidency has expanded dramatically since the latest enlargements. This means that continuity in the institutional practice and culture is missing and also that the risk exists that the topics addressed change rapidly on the basis of each Member State's priorities. Where it is involved, the EP can contribute to the smooth functioning of the Conferences but a common secretariat for the formalized initiatives for interparliamentary cooperation could in this regard prove useful (Fromage 2016) and has in fact been envisaged by (some) NPs in the past (Fryda 2016: 313). The secretariat of COSAC may not

assume this task for legal and practical reasons: COSAC's rules of procedure clearly limit its role to supporting that interparliamentary conference (art. 9 COSAC rules of procedure) and it also already has numerous tasks to fulfil. However, it could be reformed and expanded to be in a position to support all conferences and to ensure a good coordination among all these initiatives. The problem is of course the additional resources needed since not all national parliaments have always contributed to COSAC's budget (contributions take place on a voluntary basis (art. 9.5 COSAC rules of procedure)). If the EU budget were to be reformed and if it were to have larger own resources, some could be dedicated to this purpose since after all these initiatives are of general interest, whatever the function – 'discussion forum' or 'oversight body' – of those forums. Others have additionally suggested that representatives from the different forums could be permanently invited to participate in the different IPCs'/JPSG's meeting. This would avoid duplications, develop trust, and ease dialogue and exchanges of information (Dias Pinheiro 2016: 310). This idea too bears important potential: it could easily be envisaged that a representative of the common secretariat (or of the presidency parliament until its establishment) would serve as *trait d'union* between the different forums.

Beyond the question of the (large) size of the forums, and the limited time for interventions this inevitably allows, other factors such as the necessary expertise and interest, and the frequent changes in the identity of the participants naturally also play a role in allowing those forums to work effectively and potentially exercise some form of scrutiny. At COSAC and in the CFSP and the SECG Conferences, no recommendation exists in relation to the opportunity for the same delegates to participate in the meetings, and they do vary in practice. By contrast, for the first time ever *regularity in the identity of the participants* is clearly called for by the guiding principles approved by the Speakers in 2017 which read: 'Where possible, members of the JPSG should be nominated for the duration of their parliamentary mandate'.

The *overall purpose* of COSAC, the CFSP Conference and the SECG Conference is also identical, i.e. to exchange information and best practices, whereas the purpose of the JPSG differs. Despite the introduction of the practice following which the responsible Commissioner commonly participates in the conferences' meetings, according to their rules of procedure, IPCs should not serve to hold the Commission or any other body to account but, more modestly, allow for the exchange of information and best practices among

parliaments which NPs and the EP will, in turn, be able to use individually in their domestic scrutiny exercise. The SECG Conference is arguably slightly different from COSAC and the CFSP Conference in that its Rules of procedure set the specific goal of 'contribut[ing] to ensur[ing] democratic accountability' to this exchange of information and best practices:

> 'The Interparliamentary Conference on SECG shall provide a framework for debate and exchange of information and best practices in implementing the provisions of the Treaty in order to strengthen cooperation between national Parliaments and the European Parliament and *contribute to ensuring democratic accountability in the area of economic governance and budgetary policy in the EU, particularly in the EMU*' (art. 2.1, emphasis added)

It is, however, unclear how this should take place and, most importantly, who should be tasked with ensuring democratic accountability, i.e. the specific part of this provision does not refer to the Conference but to the debates and the exchange of information and best practices contributing to ensure accountability. This somewhat vague formula is, in fact, the result of a compromise between those who wanted to make the SECG an 'oversight body' and those who favoured a less ambitious 'discussion forum' (Cooper forthcoming). Art. 13 TSCG does not shed any light on this matter as it simply foresees that 'the European Parliament and the national Parliaments of the Contracting Parties will together determine the organisation and promotion of a conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments *in order to discuss budgetary policies and other issues covered by this Treaty*' (emphasis added). By contrast, COSAC shall 'promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees' (art. 10, Protocol 1, included in art. 1 COSAC Rules of procedure too). The CFSP Conference clearly excludes any accountability mechanism at EU level as its sole purpose is to 'provide a framework for the exchange of information and best practices in the area of CFSP and CSDP, to enable national Parliaments and the European Parliament to be fully informed *when carrying out their respective roles in this policy area*' (emphasis added, art. 1 CFSP Conference Rules of procedure). Hence, on the one hand, we observe a progressive change over time – the SECG Conference was created last –, i.e. a

shift from a 'first generation' (COSAC) to a 'second generation' (CFSP and CFSP Conferences; JPSG) of IPCs (Fromage 2015; Gómez Martos 2016: 322). We also notice differences depending on the policy area concerned and despite its generalist character, COSAC has recently been found to be stronger than the CFSP and the SECG Conferences, inter alia because it has a permanent secretariat and can resort to qualified majority voting (Cooper forthcoming).

The present analysis would, however, not be comprehensive if it did not take practice into account. Despite those formal rules, one can indeed observe that '[t]he [CFSP] Conference can assist national parliaments and the EP in holding CFSP/CSDP decision-makers accountable by providing throughput legitimacy' (Wouters-Raube forthcoming): the High Representative of the Union for foreign affairs and security policy is invited to participate in the Conference's meetings, which normally provides MPs and MEPs with an opportunity to interact with her thereby increasing accountability levels. Additionally, the Conference's non-binding conclusions have also been used as means of scrutiny, since parliaments have used them to pass on some judgements on policy developments (Wouters-Raube forthcoming). The SECG Conference by contrast has never adopted conclusions after its rules of procedure were approved (Cooper forthcoming) and it therefore has not used this instrument to voice a common opinion. The responsible Commissioner(s) do take part in the meetings though. Thus, the CFSP Conference and the SECG Conference offer some space for the beginning of some form of collective parliamentary oversight even if, in particular in the SECG Conference, some improvements in their functioning are still needed (Griglio and Lupo 2018).

On the other hand, we are, in any case, far from the comprehensive role the Treaty of Maastricht had attributed to the Assizes (albeit in a non-legally binding declaration) as it foresaw that 'The Conference of the Parliaments w[ould] *be consulted on the main features of the European Union*, without prejudice to the powers of the European Parliament and the rights of the national parliaments. The President of the European Council and the President of the Commission w[ould also] *report to each session of the Conference of the Parliaments on the state of the Union*.' As stated before, those far-reaching rights – potentially included to please the French who have been advocating the creation of a second EU parliamentary chamber for long–[XV] were never used in practice due to the EP's over-representation they had entailed (Gómez Martos 2016: 321). The JPSG, on the other hand, 'is meant to be a *scrutiny and*

monitoring body, as opposed to an inter-parliamentary conference and [it] must be able to exercise its rights of scrutiny efficiently' (emphasis added, Conclusions, Bratislava Speakers' Conference), whereas the Speakers' Conference duty is to 'safeguard[…] and promot[e] the role of parliaments and carry[…] out common work in support of the interparliamentary activities' and it 'shall oversee the coordination of interparliamentary EU activities' (Art. 2, Stockholm Guidelines for the Conference of Speakers of EU parliaments).

One reason for all the differences observed may be related to the different policy fields addressed: the more delicate the affected matter is, the more reluctant parliaments will be to have clearly defined rules, or decisions by qualified majority voting. This is naturally likely to vary across parliamentary parties and across Member States. The fact that the three most recent forums for interparliamentary cooperation regard intergovernmental policy areas is both a factor of increased parliamentary interest in being involved (Hefftler-Gattermann 2015: 108) and a sign that parliaments will be less willing to cooperate wholeheartedly, among other reasons because some of them have been guaranteed more rights than others at domestic level (Wouter-Raube 2018). Additionally, Member States' institutional positions vary across policy areas – not all of them are signatories of the TSCG for instance – so that it may be more difficult to reach a consensus between those who participate and those who do not. These differences may have arguably ruined the hopes for a kind of interparliamentary cooperation geared towards tight scrutiny from the very beginning.

In delicate matters in particular, parliaments may also have a different position vis-à-vis the EP's involvement and may have additionally different ideas of what the purpose of those attempts for more interparliamentary cooperation should be. The EP is more reluctant to cooperate on an equal footing with NPs in the domains in which it itself is not in a secure institutional position; this is particularly true of the economic and the CFSP domains and long held for the control of Europol too (Fromage 2015). Similar reluctance may also be found on Member States' side though, since they are less ready to cooperate when the affected matters are more closely linked to their sovereignty. In comparison, COSAC appears to be a rather (or a more) inoffensive, generalist, forum, at least at present, and it is thus easier for all, NPs and EP, to have equal rights.

4. Towards the rationalisation of interparliamentary cooperation initiatives?

It results from the above that no model for permanent formalized interparliamentary cooperation has emerged so far.

The diversity that exists among the different forums is problematic for a number of reasons. First, it may be difficult to differentiate among the different initiatives and their individual rules, which creates problems of visibility and clarity, probably even for MPs, let alone for citizens. When a new structure is created and new rules need to be defined again fully, an incredible waste of resources and time may occur, as it happened when the SECG Conference was instituted. It would be much easier if a basic model, or stronger common rules and procedures at least, were established. The Guidelines for interparliamentary cooperation approved in 2008 do exist, but they do not seem to be suitable to govern the new initiatives for interparliamentary cooperation, not least because they remain superficial and were adopted pre-Lisbon.

There are issues of efficiency too: as already noted, it would probably be more efficient if one secretariat for all conferences and the JPSG existed as this would ensure an adequate coordination of agendas and topics addressed, and continuity. Obviously, this secretariat should only assume a support function, just like the COSAC secretariat does at present. Interparliamentary cooperation in those frameworks should indeed remain an exchange among national and European politicians and the opportunity to further enhance the Europeanisation of the single presidency parliaments should not be missed. Some also called for the creation of a database containing all interparliamentary meetings, i.e. also beyond the conferences (Hefftler-Gattermann 2015:112). As indicated above, it is not only interparliamentary cooperation in the framework of the various conferences that has developed exponentially; this is a general trend that materialises in the organisation by EP committees of Interparliamentary committee meetings, in meetings organised within the parliamentary dimension of each presidency of the Council, and also in the organisation of meetings of parliaments of the same regions or around clusters of interest. Thus, while more re-centralisation by the means of a common database and a common secretariat is certainly most needed, it is arguably not sufficient.

Against this background, the case is made here for an even more drastic recentralisation. As already explained, a reform in this direction should, by no means, transform interparliamentary conferences or the JPSG in meetings orchestrated, and even attended, by administrators. Even if cooperation among administrators is certainly needed and very valuable, it cannot fully contribute to the enhancement of political debates on EU questions, or to making MPs better aware and more knowledgeable of these issues. Any new initiative should thus contribute to improve the current situation in which some delegations to the IPCs are sometimes only represented by an administrator. This is natural in electoral periods, and certainly better than no representation at all, but it is also not fully satisfactory and in line with the purpose of those forums.

A secretariat common to all forums should be instituted and it should have sufficient means to ensure the efficient coordination of the different initiatives. To this end, it should, for instance, build upon and further develop the IPEX platform.[XVI] The recent decision to foster cooperation between COSAC and IPEX is a step in the right direction which should be further expanded. The platform could, and should, entail the details of other interparliamentary meetings hosted by the EP, the presidency parliament or any other parliament. Its focus could also be shifted to depart from the current aim to allow exchanges mostly on EU documents. Crucially, the interparliamentary forums should have a permanent venue instead of always taking place in the Member State holding the Council presidency or in the EP. Admittedly, this 'travelling circus' allows parliamentarians to get a (superficial) idea of realities in different states and familiarises them with other traditions and cultures. Nevertheless, given that there is not always continuity in the identity of the participating MPs, it can be doubted that this really has a tangible impact on their knowledge of other Member States. Furthermore, some parliaments are even too small to hold the large interparliamentary conference meetings so that other venues must be arranged. By contrast, the EP has two hemicycles and it could put the one in Strasbourg at disposal for interparliamentary meetings; a similar setting was in fact advocated by an MP during the February 2018 SECG Conference meeting.[XVII]. In this scenario, the EP would only use the Brussels hemicycle for its own sessions whereas the Strasbourg hemicycle would only be devoted to initiatives of interparliamentary cooperation. No special role is thus envisaged for the EP on this ground. The infrastructures would be most suited, the new enlarged secretariat could be hosted and could work in ideal conditions and this

would, finally, put an end to the constant time-consuming and contaminating journeys by MEPs and EP staff between Brussels and Strasbourg. It can also be expected that France might be somewhat less reluctant to agreeing to the EP's sessions always being celebrated in Brussels if it gets something in return. With the recent establishment of the JPSG, five meetings of interparliamentary conferences take place each semester, seven in the first half of the year when also the meetings of the Speakers' Conference and the Secretary Generals are organised. The EP already hosts some of those; why not always hold them in Strasbourg instead. This would be efficient, save resources and contribute to develop ownership among the participating MPs especially. They would be always meeting in the same location, with the same colleagues in the case of the JPSG and perhaps also at some point in the case of the other IPCs if the added value of constant membership becomes clear to all involved. The question can be asked as to whether the interparliamentary meetings organised on the EP's and the presidency parliament's initiatives should be centralised as well. Perhaps it would be possible to try with first relocating the Conferences/JPSG and maintain the other meetings in Brussels and the presidency parliament's respectively, which would also mitigate the negative effects on MPs' knowledge of other States. These meetings take place with a different purpose in fact, they are more reduced in size and foster exchanges of views among specialists and they are, in the EP's case, events hosted by one specific committee. These reasons speak in favour of maintaining them in their current setting first, although a re-evaluation of this question should be carried out at a later point.

As for the modus operandi of the different conferences, some more detailed rules could be defined to ease the establishment of future forums for interparliamentary cooperation. The opportunity of a move towards interparliamentary cooperation by committee some have advocated (Lupo-Fasone 2016), e.g the end of large conferences to the benefit of smaller more regular meetings among committees, remains out of the scope of the present analysis. Suffice it to say here that this proposal certainly has potential and could solve some of the issues forums are currently facing. On the other hand, others have in fact considered that 'there is an emerging *order* of interparliamentary conferences in the EU after the Lisbon Treaty' (Cooper 2017: 228). Cooper bases this conclusion on three elements: the creation of interparliamentary conferences of the same kind, i.e. 'functionally specialized, focused on particular policy areas', created and evolving in the same manner,

i.e. under the Speakers' Conference watch, and operating with similar logistical arrangements 'in terms of their timing and location and which parliament acts as chair and sets the agenda' (228). However, while it can arguably be considered that there is an emergence of such 'order', important differences remain as shown above. Most importantly, even if the forums for interparliamentary cooperation could be said to present certain similarities once they start to function, it is the period that precedes that matters, i.e. the fact that negotiations around the establishment of the new bodies systematically start afresh and give rise to (heated) debates.

The defining role assumed by the Speakers' Conference in the initial phase of the creation of new interparliamentary conferences now appears to be established and recognised by all involved, despite the absence of any legal basis in this sense. It should thus remain entrusted with the definition of guidelines but should not intervene in the daily management of the forums once they have been established as pointed out by Fasone (2016). The guidelines they have adopted so far were so detailed that they practically dictated the functioning of the forums. This should only happen again if parliaments are really unable to agree, otherwise it is best for the conference(s) to agree on their own rules themselves, also to prevent future difficulties deriving from the need to have the Speakers' Conference amend previous guidelines if changes are desired at a later stage. It will have to be seen how the JPSG functions with 4 MPs per delegation, i.e. whether this leaves more scope for debates to take place. Should this be the case, perhaps smaller delegations could become the norm in other forums as well even if they make political pluralism more difficult to ensure. In any case, consistency in the identity of the participants should be strived for in all conferences. Although it might not always be a realistic aim, it would be beneficial to reproduce the voting system as it exists in COSAC, i.e. consensus by default with a possibility to resort to qualified majority voting. As to the role of the EP, it is easier to define *in abstracto* than *in concreto* as each policy area is regulated by different rules that affect its competences at EU level, but safeguards should, in any case, be put in place to ensure it is not too predominant, unless it is justified as in the case of Europol. Finally, future forums should be flexible, perhaps allowing parliaments of Member States that have specific opt-ins to (also) meet amongst themselves in parallel to other larger meetings; this could for instance be useful to Eurozone parliaments.

5. Conclusion

This article has compared the recently-established JPSG with other pre-existing IPCs and shown that despite a different (and stronger) Treaty basis, the JPSG presents important similarities with the IPCs. Determining whether these four conferences and the JPSG are more similar than dissimilar or the other way around is hence far from being straightforward. The assumption that the JPSG would be most different to the conferences due to its different Treaty basis, its different function and its clear statement that it is not an interparliamentary conference in any case does not seem to hold. It will have to be seen though whether, like it happens with the other IPCs, practice departs from the formal rules of procedure on which these conclusions are based.

Forums for interparliamentary cooperation all function on a permanent basis, on the basis of rules of procedure, meet occasionally in a large assembly setting. They operate on the basis of consensus, and the EP's has a predominant role within them. On the other hand, they also entail important differences, as each of them has a different composition. The JPSG has a clear, specific, treaty basis whereas the IPCs operate either on the basis of a general treaty basis (CFSP and SECG Conferences) or on that of an (indirect) reference in a protocol annexed to the Treaties. This then leads to the rules for their functioning being developed in different instruments (a Regulation vs rules of procedures adopted in accordance with guidelines of the Speakers (SECG and CFSP Conferences), or not (COSAC)). The regularity with which the same MPs and MEPs attend meetings also differs: in the JPSG, regularity is clearly wished for whereas no such provision exists in the framework of the other IPCs. Finally, their purpose largely varies, at least formally: only the JPSG should go beyond the mere exchange of information and best practices.

This therefore makes for a large variety in the different forums for interparliamentary cooperation, with such variety additionally sometimes being the result of lengthy, heated negotiations among European and national parliaments. The latter is problematic primarily because it is demanding on resources and delays the establishment of the different forums time and time again, whereas the former should be improved among others to reduce complexity, to enhance efficiency and transparency, and to avoid institutional discontinuity. The main solution put forward here to solve these issues is that of the creation of a stronger, common, permanent secretariat in charge of managing the schedule of all

initiatives for interparliamentary cooperation. It would additionally make sure that overlaps are avoided. Moreover, with a view to simplifying the operations of the different forums, the EP's hemicycle in Strasbourg should be devoted to interparliamentary forums meetings, while the EP would always hold its sessions in Brussels.

To shed further light on the issues examined in this article, further research on interparliamentary forums may consider examining the role of the actors involved, in particular that of the presidency parliament in place when negotiations for the establishment of a new forum are conducted. It will also be interesting to look at whether executives are involved in any way or not, and at how the different party-political interests have played out during these negotiations. Indeed, previous research has shown that higher political party contestation over the EU leads to higher participation in interparliamentary meetings (Gatterman 2014 as cited by Hefftler-Gatterman 2015:109). Opposition parties may also be keener on the development of interparliamentary cooperation (Miklin 2013). An analysis of the role played by parliamentary administrations and of their internal dynamics could also uncover the reasons for certain choices.

Annex

INTERPARLIAMENTARY CONFERENCES/FORUMS							
NAME	**Date of creation**	**Participants**	**Size of the delegations**	**Frequency of the Meetings**	**Secretariat?**	**Conclusions? Modus operandi**	**Location of the meetings**
Speakers' Conference	1963 though regular meetings came about much later	Speakers & EP President	Speaker/parliament	Once a year	No	Conclusions of the Presidency; consensus	In the parliament that held the presidency during the second half of the preceeding year
COSAC	1989	EU affairs committees	6/NP + 6 MEPs	Twice a year in plenary; twice a year with chairpersons only.	Yes	Plenary meetings: contributions adopted by Consensus, exceptionally qualified majority (can also issue conclusions)	Always in the presidency parliament
CFSP/CSDP IPC	2012 (replaced WEU assembly)	MPs & MEPs: parliaments decide who exactly	6/NP + 16 MEPs	Twice a year	No	Conclusions by consensus	In Brussels or in the presidency parliament (*de facto in the presidency parliament so far*)
SECG IPC	2013 (adoption of the rules of procedure in 2015)	MPs & MEPs: parliaments decide who exactly	No agreement could be reached on this point: free choice	Twice a year	No	Conclusions of the Presidency parliament (with the EP where it co-chairs); consensus	In autumn in the presidency parliament, in February in Brussels
JPSG for Europol	2017 (adoption of the rules of procedure in 2018)	MPs & MEPs: parliaments decide who exactly but long-term continuity is wished for	4/NP + 16 MEPs	Twice a year	No	Summary conclusions on the outcome; consensus	In first half of the year: Presidency parliament; second half: EP (always co-chaired)

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[I] In fact, the Treaty of Rome had foreseen from the beginning that the Council had to adopt a decision (by unanimity) introducing direct elections but this could not be achieved until almost twenty years later (Fromage 2017: 392f.). The mandatory dual mandate was suspended then, but it was still possible until its prohibition in 2002, unless Member States decided otherwise (like France did).

[II] Spènale Report, DOC PE 42.070 Bur. as cited by Maurer-Wessels 2001 :456-457.
[III] Annex I to the Conclusions of the Presidency. Conference of speakers of the EU parliaments. Bratislava. 23-24 April 2017.
[IV] Article 12 c) TEU refers to both Europol and Eurojust and provides for national parliaments' involvement in 'the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty'. The opportunity to create an interparliamentary forum in this field as well has been advocated for instance by the Italian Senate (Italian Senate 2013).
[V] It should, however, be noted that the two conventions have represented interesting experiences of interparliamentary cooperation; this method has now been formally anchored in the Treaties. More on this experience (Pinelli 2016).
[VI] Apart from the one of the JPSG, all of these rules of procedure are available on the IPEX website ipex.eu.
[VII] Participants' list available on the website of the parliamentary dimension of the Bulgarian presidency (https://parleu2018bg.bg/en/events/81).
[VIII] Discussions about the strengthening of interparliamentary cooperation as a means to, among others, provide a remedy to information shortage have been ongoing since 2001 at least (Ruiz de Garibay 2013: 91).
[IX] It is interesting to note that (some) NPs were not ready to give a larger role to the EP: formally granting it the right to send a larger delegation, and thereby reproducing the CFSP Conference precedent was apparently one step too far for some NPs and explains why the size of the delegations remains undefined (Esposito 2014:168).
[X] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.
[XI] COM(2013) 173 final.
[XII] European Parliament legislative resolution of 25 February 2014 on the proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA (COM(2013)0173 – C7-0094/2013 – 2013/0091(COD)) (Ordinary legislative procedure: first reading).
[XIII] Position of the Council at first reading with a view to the adoption of a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA - Adopted by the Council on 10 March 2016.
[XIV] Opinion of the Standing Committee on Legal Affairs of the House of Representatives of the Republic of Cyprus with regard to the Joint Parliamentary Scrutiny Group on Europol's activities, 19 November 2015, available at www.ipex.eu.
[XV] See for instance on this question the French Senate's dedicated webpage: 'Un Sénat européen?' http://www.senat.fr/europe/dossiers/senat_europeen.html
[XVI] The platform for EU Interparliamentary Exchange www.ipex.eu.
[XVII] The debates can be watched at: http://www.europarl.europa.eu/ep-live/en/other-events/video?event=20180220-0900-SPECIAL-UNKN.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Inter-parliamentary cooperation and its administrators

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

Parliamentary administrators have to cope with a complex and ever-changing procedural framework, as well as with conflicting demands from the policy side. Nevertheless, their role in inter-parliamentary cooperation is rather under-researched. This article focuses on the actors of Administrative Parliamentary Networks and introduces two entirely new entities: European Programmes; and networks of Parliamentary Budget Offices, which seem to have escaped scholar's attention. Administrative duties and roles are discussed in the context of inter-parliamentary cooperation and a new role is attributed to parliamentary administrators, that of the *researcher*. Existing findings from previous studies are put under a new light and analysed with the support of empirical data.

Key-words

Inter-parliamentary cooperation, parliamentary administration, inter-parliamentary conferences, networks, assemblies, EU affairs

1. Introduction

Despite the fact that parliamentary administrations are the workhorses of complex organisations, which is what Parliaments have become in recent years, little is known about their work and impact. Actors in parliamentary administrations have many names: parliamentary officials, national representatives, secretaries, focal points, national contact points etc.; hereinafter, the terms 'administrator' and 'official' will be used interchangeably. Inter-parliamentary cooperation itself has been a field of extensive study, especially after the signing of the Treaty of Lisbon (ToL) in 2007, which provided parliaments with an active role in the shaping of the European legislative framework.

Parliamentary administrations are there to facilitate inter-parliamentary cooperation, but their role is rather under-researched. For a good reason: inter-parliamentary cooperation evolves and so do parliamentary administrations too. With often unclear job descriptions, parliamentary administrators have to cope with a complex, quasi-chaotic and ever-changing procedural framework from the one side, and conflicting demands from Members of Parliament (MPs) and high-ranking parliamentary officials from the other. Nevertheless, inter-parliamentary cooperation does take place, in the shape of systematic cooperation and communication among different parliamentary administrations, through various channels and with the use of a range of instruments.

The significance of parliamentary administrators in the fulfilment of all necessary procedures and tasks within the regime of inter-parliamentary cooperation seems to be increasing, particularly within parliamentary assemblies.[I] Additionally, it is well understood that administrators, contrary to elected national MPs who often serve for one or two terms only, are usually well acquainted with the ever-changing processes within the different entities of inter-parliamentary cooperation, since they may hold the same position for years. As a consequence, not only do they gain valuable field experience, but with time they also become a crucial part of the parliaments´ own institutional memory.[II]

In the case of the European Union (EU), the member states have established a sui generis political union unlike any other in the world. The ToL provides member states' Parliaments with increased interdependency and the necessary instruments to communicate in a more efficient, consistent and cohesive manner. As a result, an EU-wide space has

evolved that allows for dense inter-parliamentary relations not only at the political (see COSAC and other inter-parliamentary conferences)[III] but also at the administrative level. The latter is gradually becoming more important as new platforms for administrative cooperation, e.g. European Programmes (Twinning and research projects) and the Parliamentary Budget Office (PBO) network, are being added to the established ones; for instance, the European Centre for Parliamentary Research and Documentation (ECPRD), the InterParliamentary EU information eXchange (IPEX) and the National Parliament Representatives (NPRs) in Brussels. Both formal and informal information exchange, regular meetings and the development and operation of state-of-the-art web-based digital platforms are employed to improve interaction between national parliaments (NPs). Henceforth we shall call these networks Administrative Parliamentary Networks (APNs).

Moreover, this article considers the conduct of administrative actors as a structural component of inter-parliamentary cooperation, in its different formats. Their work has attracted attention recently and has developed into a field of studies: as a result, a typical classification scheme assigns pre-defined roles for a given set of tasks. Furthermore, the study introduces a new role, the *researcher* role, in order to more accurately describe the work of certain actors. Parliamentary officials who work for the inter-parliamentary cooperation turn to be active in several dimensions and with different grades of involvement. It is expected from Parliamentary Research Services (PaRS) and PBOs:

- to deliver quantitative and qualitative elaboration of information and data,
- to make forecasts based on emerging political and economic trends and
- to estimate the impact assessment of legislation,

just to mention a few aspects of their core activity. However, the work of the part of the administration that deals exclusively with inter-parliamentary cooperation, e.g. the EU Affairs Units, is often seen as mere 'paper-pushing'. In several ways, this is far from the whole reality; our introduction of the *researcher* role is expected to highlight further details of the actual involvement of parliamentary actors in inter-parliamentary cooperation (cf. Högenauer et al. 2016: 92). Also, the findings of existing studies are supported by further empirical evidence gathered through a series of semi-structured interviews with Hellenic Parliament (HeP) officials (see Annex for the list of interviews).[IV] Hence, the added value of the present study is twofold:

(1) It introduces two new entities in the context of inter-parliamentary cooperation, i.e. European Programmes and PBO networks, and

(2) It introduces a new administrative role for parliamentary administrators, i.e. the *researcher* role.

The paper is structured as follows: The next section presents a review of the existing literature on parliamentary administrations, followed by a detailed discussion of the APNs in the EU (section 3). Administrative support of other existing inter-parliamentary formats is shown in section 4, which opens the discussion on the roles and responsibilities of administrative actors as displayed in section 5. The last section presents the conclusions and an outlook for future research (section 6).

2. Literature review

2.1. General literature

It has been suggested that NPs are the 'Losers or Latecomers' of Europeanisation (Maurer and Wessels 2001). The 'deparliamentarisation debate' is currently being reconsidered as parliaments fight back to tighten governmental scrutiny in EU matters through procedural reforms, while MPs are getting more active in using available control mechanisms (Raunio 2009: 328). The idea of cooperation between parliaments is neither new, nor is this concept only to be found within the European continent (Cutler 2001; Kissling 2011; Rocabert et al. 2014).[V] When discussing inter-parliamentary cooperation within the EU it is always advisable to have in mind the underlying institutional framework. This has been provided in the form of guidelines by the Conference of the Speakers of the EU Parliaments.[VI] With an apparently exploding number of entities of inter-parliamentary cooperation, Fromage (2016) posed important questions on their sustainability, visibility and practicability. As there is evidence of proliferation of inter-parliamentary cooperation entities, it might be necessary to start thinking about some form of rationalisation, although this question falls beyond the scope of this paper.

Furthermore, the link between national and supranational administrations is of particular importance: Knill (2001) underlined previous observations on the 'fusion' of supranational and national bureaucracies (see also Wessels and Rometsch 1996), but they failed to point out specific interactions between national and European administration and

proceeded with a comparative assessment of national administrations while implementing certain European policies. This inter-link between supranational and national bureaucracies was also attempted by Miklin (2011), who investigated the effect of inter-parliamentary cooperation on power relations within the Austrian parliament. The latter work belongs to a rather limited circle of contributions referring to the effects of inter-parliamentary cooperation on NPs.

2.2. Literature on parliamentary administrations

Parliamentary administrations do not exist *per se*; they are there to facilitate and support parliamentary operations. As parliaments adjust to confront changes, administrations change with them. Parliamentary administrations have been the subject of study for several decades, though not in a systematic and structured way. In addition, they have traditionally been studied within their own realm, the NP, thus isolated from external influence. This trend seems to have shifted with the publication of new studies on the contribution of parliamentary administrations to the challenges of EU integration, which sparked new interest for their 'external' action and impact.

Until recently, most studies on administrative personnel in parliaments have been either descriptive or concentrate on their legislative work. 1981, for instance, was a good year for the study of parliamentary administrations, as significant contributions to three major European Parliaments were published: on the German Bundestag (Blischke 1981), the French parliamentary assemblies (Campbell and Laporte 1981), and the House of Commons (Ryle 1981). On the other side of the Atlantic, Hammond reviewed the literature on legislative staffing research in the U.S. Congress and noted that the theoretical viewpoint may vary: role theory, organisation theory, exchange theory, etc. (Hammond 1984: 302).

The significance, and complexity, of the European Parliament (EP) has drawn scientific attention. Pegan studied the legislative staff in the EP and emphasised the lack of empirically driven research on the study of parliamentary administrations (Pegan 2011: 5). Neunreither (2002), among others, investigated the parliamentary administration of the EP in a broader study of the impact of unelected assistants to the legislative function. In a survey dedicated to parliamentary staff in EP, Egeberg et al. (2013) discussed the possibility that parliamentary administrators may affect the content of political decisions in analogous

way to governmental officials. On the parliament of Luxembourg, Spreitzer (2013) assessed the activity of the EU affairs administration, which is counted among the most active when it comes to subsidiarity and proportionality control, suggesting that this was to be attributed to political motivation rather than efficient administrative procedures. However, the most comprehensive work so far on parliamentary administrations in the EU remains the contribution by Högenauer et al. (2016) as it manages to provide state-of-the-art knowledge on administrative actors within the EP, NPs and 'Transnational Bureaucratic Networks in the EU' at the same time.

Apart from major parliaments and this time outside the European context, there are only sporadic notes on parliamentary administrations to be found, which include the case of Algeria (Amrani 2008). Amrani views inter-parliamentary cooperation mainly from the capacity building point of view, i.e. as an opportunity for the Council of the Nation to improve its organisation, operation and quality of service towards MPs. In this sense, the concept of a manual with 'case law of parliamentary administration' is introduced.

In the academic literature, there is an increasing volume of studies on Parliamentary Research Services (PaRS) as well as on Parliamentary Budget Offices (PBO). Miller et al. (2004) investigated the parts of parliamentary administration that constitute sources of parliamentary information for a number of countries, e.g. Libraries, PaRS, Institutes and PBOs. More recently, a PaRS survey in Central Europe and the Western Balkans' parliaments has been published and, recently, the impact of PaRS in the strengthening of parliamentary institutions has been investigated in a comparative analysis which included the EP, the Austrian Parliament, the National Assembly of Serbia and the Hellenic Parliament (Papazoski 2013; Fitsilis and Koutsogiannis 2017). So far, PaRS and PBO have been investigated in isolation from other parliamentary functions or processes, i.e. inter-parliamentary cooperation. Thus, a part of this contribution is dedicated to the discussion of the role of PaRS and PBO networks and their administrators in inter-parliamentary cooperation.

3. Administrative Parliamentary Networks in the EU

3.1. National Parliament Representatives

Early signs of administrative cooperation between NPs and the EP can be found in the establishment of national offices at the EP premises in the first couple of decades of European integration (Pegan and Högenauer 2016: 147). These may be considered as forerunners of the NPRs in the 1990s. Of all the APNs, the network of the NPRs is the one that has been studied in most detail by several publications from the same cluster of researchers (Högenauer et al. 2016; Neuhold and Högenauer 2016; Neuhold and Högenauer 2013). Liaison officers, as they are also called, constitute an informal but powerful administrative network, which is strategically positioned inside the EP premises in Brussels, to communicate closely with EU institutions and agencies and stay updated on major policy issues and activities. Interestingly enough, their offices are located on the same floor of the same building of the EP and not in their permanent national delegations, although there are exceptions to that rule. The German representatives, for instance, also have their own external premises, while the Belgian ones serve in their offices in the NP (interview 2). Neuhold and Högenauer (2016: 252) summarise the main functions of this network as follows: 'to enable effective scrutiny within a parliament and to enable the effective use of the EWM [Early Warning Mechanism] collectively'.

The number of delegates is generally changeable, purely dependant on national interests and each NP's practices. However, after Lisbon, there is usually one NPR per national parliamentary chamber present, meaning that most bicameral parliaments have two NPRs in place, but there are also member states which might have more: Cyprus (unicameral) has two, Belgium, like France, has a total of four NPRs, two per chamber, including a deputy for the NPR from the Sénat, a move that should be analysed with caution, since the Belgian Sénat is situated just a few blocks away. The latest data shows that each EU member state has at least one NPR in Brussels, thus surpassing the 40 mark for the first time.[VII]

There is no general rule that determines how long NPRs will be sent to Brussels. During their stay they remain closely connected with other NPRs on a daily basis. On the one hand, this high degree of socialisation within the network supports informal information exchange, a significant feature when it comes to effective coordination in the framework of the EWM (ibid.: 250-251); but, on the other hand, NPRs follow different working patterns marked primarily by their parliament's interests, thus preventing the network from becoming more than the mere sum of its members. In the course of further

development of the discussed APN, NPs could agree to develop a common job description for the NPR positions along with guidelines and a code of conduct.

In order for the Hellenic Parliament to fulfil its oversight role, the Greek NPR monitors EP activities and drafts reports on the content of plenary sessions, committee work and the various conferences. Reporting takes the form of special notes or weekly reports to the Directorate of European Affairs, with a summary of the major topics debated as well as upcoming weekly events.[VIII] In this particular case, the *Agenda-shaper* role may be attributed to the NPR. In addition to these notes, the work of the NPR may include:

- coordination with homologues on subsidiarity issues (hence the *coordinator* role),
- gathering of information on the parliamentary dimension of the Council Presidency (Czachór 2013),
- informing on the conclusions of EU Council summits,
- answering questionnaires by other parliaments, think tanks, universities, etc.

The network organises itself through regular Monday Morning Meetings (MMMs), where NPRs gather to discuss issues of common concern. MMMs have a structured agenda, which includes policy briefings from EP, EC or Council officials, topics of common interest, alerts for subsidiarity compliance under the EWM and even issues outside the spectrum of EU activities (interview 2). The COSAC secretariat also takes part in the MMMs. This close relation between the COSAC secretariat and the NPRs becomes more evident in cases where NPRs also assume a position in the EU rotating presidency (ibid.). EP officials, unless invited, are not allowed to participate, which could be seen as a persistent effort to preserve the independency of the NPRs (ibid.).

The discussion on subsidiarity issues and lobbying activities against certain legislative EU may reveal national priorities and, therefore, constitute a *de facto* alert system that informs NPs on political incentives or tendencies (ibid.). This clearly speaks for attributing a *Coordinator role* to the NPRs. MMMs and the daily exchange of information among NPRs allow for informal updates on topics of interest for NPs. Such informal communication is rare among administrative actors in digital networks, such as IPEX, as electronic communications may be monitored or logged.

3.2. IPEX

The InterParliamentary EU information eXchange, IPEX, is a unique concept in inter-parliamentary cooperation because of its multifaceted nature. It comprises an information web portal, a databank with documents concerning the EU, including reasoned opinions from NPs and a calendar of inter-parliamentary cooperation meetings and events in the EU. This information is by default publicly available via the web portal. The decision for its creation derived from the Conferences of Speakers in Rome (2000) and in The Hague (2004).[IX] At the center of IPEX there is a cooperative platform, which allows for multi-level access according to the rights granted by the system administrator (interview 9). Knutelská (2013) has been among the first to study the role of IPEX in the scrutiny of EU affairs. Cooper sees IPEX as the 'virtual third chamber' of the EU. At the same time, he assesses that IPEX did not have a substantial role in the coordination that was necessary prior to the issuing of the yellow card to the Monti II Regulation (Cooper 2011: 20; Cooper 2015).

IPEX is governed by a board which is appointed by the Meeting of the Secretaries General (SGs) of the EU Parliaments. According to the relevant IPEX guidelines, as approved by the meeting of the SGs in Rome (2015), the board does not have a fixed composition and consists of administrators representing, (1) the parliamentary troika of the Conference of Speakers, (2) the NP holding the Presidency of the Council of the EU during the first semester of the year in which the Board takes office, (3) the EP and (4) NPs that 'wish to participate […]'. Participation of the EP is not surprising given that the EP contributes significantly to the IPEX budget, which is co-financed by NPs (Pegan and Högenauer 2016: 159; interview 9). The COSAC, the ECPRD, the European Commission and the Council take part in board meetings, but other organisations may also be invited to participate by the board chair. The IPEX board convenes 2-3 times a year depending on the agenda and the significance of the topics therein (interview 9). The presence in board meetings of other inter-parliamentary cooperation entities, such as COSAC and ECPRD, is an excellent way for coordinating actions, thus avoiding possible delays and wasting of resources, without the need of an omnipresent governing organ, e.g. the Conference of Speakers, and constitutes a good practice that could find widespread application. In a recent development, COSAC encouraged its secretariat and the IPEX board to 'cooperate

towards increasing the interconnection between the COSAC website and the IPEX platform'.[X]

The underlying database contains a number of parliamentary and other European-related documents intended to facilitate the flow of information between NPs, and particularly for the scrutiny of EU draft legislation. The workforce behind IPEX is a network of national experts, the IPEX correspondents. The national correspondents are responsible for the frequent updating of the IPEX database with information from their national Parliaments. Hence, IPEX correspondents cooperate with national contact points from other inter-parliamentary cooperation entities, particularly with their respective NPRs in Brussels, in cases of EU legislative scrutiny (ibid.). NPs may also use the network of IPEX correspondents to obtain missing information on inter-parliamentary cooperation issues. From this perspective, IPEX resembles the function of the ECPRD network. However, the network of the NPRs seems more 'fit for purpose' due to its inherent proximity and permanent availability. Each NP usually appoints up to two IPEX Correspondents. The IPEX correspondents constitute an administrative network which holds annual meetings for information exchange and capacity building purposes. Their usual roles are those of administrative assistant and coordinator. IPEX also employs an Information Officer situated at the EP in Brussels, which underpins the existence of a permanent secretariat.

At the 20-21 February 2017 Meeting of the SGs, a digital strategy for the further development of IPEX was adopted, which also incorporates the result of a consultation with the IPEX Correspondents. The digital strategy is implemented through a 3-year Work Programme. According to the relevant document this very first Work Programme set three priorities: 'Enhancing the IPEX network', 'Strengthening the promotion of IPEX' and 'Improving the IPEX digital system'.[XI] User conferences constitute a new concept within the IPEX environment. These have an informal character and a non-specified frequency. They have been created in order to gain independent feedback from IPEX users on the platform's operation and development. The first user meeting took place in 2015 in Copenhagen and the next one is scheduled to take place in Stockholm in 2018 (ibid.).

3.3. ECPRD

The European Centre for Parliamentary Research and Documentation (ECPRD) is a network established in 1977 to strengthen inter-parliamentary cooperation among parliamentary administrations. Only parliamentary administrators may participate, thus constituting a pure APN. Its members go well beyond the EU and include: (1) the EU, (2) the Parliamentary Assembly of the Council of Europe (CoE) and (3) the Parliamentary Assemblies of the Member States of the EU and the CoE. This is a total of 66 parliamentary chambers from 54 countries, while there are also parliaments with observer status (ECPRD 2016: 4).[XII] According to its statutes (article 10), it is financed by the EP and the Parliamentary Assembly of the CoE (ibid.: 25). By decision of the SG of each member parliament, one national ECPRD correspondent, or simply *correspondent*, is appointed. Deputy correspondents may also be appointed (ibid.: 24).

The ECPRD network organises an annual conference. It is governed by an executive committee, which comprises two co-directors, appointed by the SGs of the EU and the CoE, respectively, and five correspondents elected by the annual conference (interview 4). Out of the latter, each one of four *coordinators* is entrusted with one of the main subjects of ECPRD: (1) Economic and Budgetary Affairs, (2) Information and Communication Technologies in Parliaments, (3) Libraries, Research Services and Archives and (4) Parliamentary Practice and Procedure (ibid.). Coordinators are responsible for organising the ECPRD seminars, usually two seminars per year and per subject. Coordinators define the agenda for the seminars, relying on personal preferences, trends and forecasts for the specific subject. These seminars promote interaction between correspondents and constitute a useful platform for the exchange of good practice, and the avoidance of bad practices (ibid.).

The network has a secretariat with two administrators, who again are drawn from the EP and the Parliamentary Assembly of the CoE, respectively. The main tasks of the secretariat are to support the co-directors in the preparation of the annual conference as well as to perform all administrative tasks necessary for the network to operate, including keeping the ECPRD database operational and up-to-date (ibid.). The agenda of their annual conference is decided by the executive committee. Apart from the annual conference, the committee meets four times per year, in order to program and effectively coordinate ECPRD activities (ibid.). ECPRD parliaments may also host seminars to

present and discuss their organisational structure, recent developments or policies and to exchange relevant good practices (ibid.).

The most significant activity of the ECPRD network takes place online via its cooperative digital platform, which also includes a resource database containing the ECPRD questions and answers archive. The platform may be used by parliamentary administrations for the retrieval of past questions or, with the consent of the SG, for requesting information by other parliaments on virtually any given matter of political or parliamentary relevance. There are 28 different general topics that can be addressed, the most popular being those relating to parliamentary practice (40%), information to projects (17%) and social affairs and health issues (14%) (ECPRD 2017: 6). Recently, the platform underwent extensive refurbishment to be used on mobile devices (ibid.: 7). This form of parliamentary cooperation using a centralised digital platform, rather than the usual peer-to-peer scheme, has a voluntary character and seems to have flourished over the past years. From 2003 to 2015 the number of ECPRD requests has grown steadily, from below 100 comparable requests in 2003 to 287 in 2015 (ECPRD 2016: 9). A request may be sent to a specific set of parliaments or to all ECPRD members; an interesting trend shows that parliaments prefer to target their requests towards a narrow set of recipients, rather than sending them out to all of them.

Parliaments that receive a request are given a certain period of time to respond. Latest data show that 72% of the responses are collected within the designated period and 85% up to five days past the deadline (ECPRD 2017: 5). As mentioned, participation in this information exchange is voluntary and there are no consequences for those who refrain from responding. However, practice has shown that parliaments tend not to respond to requests from 'repeat offenders', as a form of informal retaliation measure to 'discipline' those who frequently ignore incoming requests (interview 4).

ECPRD actors assume several roles (Högenauer et al. 2016) when exercising their duties. Correspondents and their deputies mainly act as administrative assistants, while the co-directors, the members of the secretariat as well as the coordinators take on the coordinator role. Finally, the *researcher* role may be attributed to the extent the aforementioned actors participate in the elaboration of internal reports, final summaries or deeper scientific studies.[XIII] In contrast to IPEX, ECPRD requests, responses and final summaries are only available to ECPRD members. The issue of openness was also tackled

by Pegan and Högenauer (2016: 159) in a short description of IPEX and ECPDR under the title 'information and documentation networks'. Nevertheless, in cases where information is of non-confidential nature or based on the elaboration of publicly accessible data, specific contents of the ECPRD database could be made public after a period of embargo.

3.4. PBO Networks

PBOs support the (financial) oversight function of parliaments and are part of the Independent Fiscal Institutions (IFI) which are 'independent public institutions with a mandate to critically assess, and in some cases provide non-partisan advice on, fiscal policy and performance' (von Trapp and Nicol 2017: 1). It is the independence of such offices that is of particular importance; as Anderson discusses the establishment of non-partisan, independent and objective analytic budget units is a means to counterbalance information superiority of the executive (in Stapenhurst et al. 2008: 138). PBO officials enjoy the scientific freedom to address issues around state budget implementation and fiscal discipline, which is one of the key elements for the *Researcher role* to be attributed (see also *section* ***Errore. L'origine riferimento non è stata trovata.***). In addition, the Global Network of Parliamentary Budget Officers (GNPBO) has developed guidelines for PBOs, which also include a code of conduct.[XIV]

In the EU, the first efforts for cooperation among the IFIs were initiated in 2013 by the Directorate General for Economic and Financial Affairs (DG ECFIN) of the European Commission (EC) and took the form of informal annual, and post-2015 bi-annual meetings. Later, in the third meeting of the EU IFIs in 2015, the EU Network of Independent Fiscal Institutions (EUNIFI) was established, which serves as a platform for capacity building and exchange of good practices (interview 8). Today, the network includes members from 24 EU member states.[XV] The network has a parliamentary administrator as permanent secretary and is currently negotiating the financing and the location of its permanent secretariat (ibid.). EUNIFI also interacts with the OECD Network of Parliamentary Budget Officials and Independent Fiscal Institutions (OECD PBO) by attending its annual meetings which take place since 2009.

EUNIFI is not exclusively a network for PBOs. In this regard, one needs to note that the number of PBOs in the EU is still small, but is steadily growing. In the last years the

following parliaments have established a PBO: the Hellenic Parliament in 2010, the Austrian Parliament in 2012 (Budgetdienst), the Italian Parliament in 2013 (Ufficio parlamentare di bilancio, Upb) and the House of the Oireachtas (Ireland) in 2017. To these may be added the Hungarian Fiscal Council, established in 2008, which is administratively linked to the National Assembly, and the Office for Budget Responsibility in the United Kingdom, established in 2010, which is accountable to both the Government and Parliament.[XVI] It can be no coincidence that all these PBOs have been established in the post-Lisbon era. Hence, it is safe to conclude that their number is expected to increase.

As PBOs continue to gain in significance, the networks of officials, i.e. EUNIFI, OECD PBO and GN-PBO, will continue to expand. In a field which is characterised by a high degree of diversity, inter-networking activities will become even more important in the future. On the other hand, the development of digital cooperative platforms, e.g. www.e-pbo.org, has the potential to leverage the usually scarce parliamentary resources in a more efficient way (Chohan 2013: 18-19).

3.5. European Programmes

Over decades, the EU has invested considerable resources in scientific research, i.e. the Framework Programmes for Research and Technological Development, as well as technical assistance towards candidate states and members of the European Neighbourhood Policy through the Twinning instrument. European Programmes enjoy broad visibility, but they have not yet been the subject of analysis in the context of inter-parliamentary cooperation, as attempted in this paper. The term *European Programmes* characterises research and EU Twinning projects. Both present a further opportunity for inter-parliamentary cooperation; an opportunity that attracts little attention in the literature. Regarding EU-funded research, only few EU parliaments seem to have identified the possibilities that emerge through application of recent technologies in the parliamentary domain.

Within the context of the 7th Framework Programme (FP7), the Hellenic and Austrian Parliaments have been active in research consortia, which may also be described as European research networks (Fitsilis et al. 2017).[XVII] The Seimas (Lithuania) has been also studied in the course of the LEX-IS project (ibid.). Such networks may also include a variety of non-parliamentary actors, e.g. universities, research institutes, civil society

organisations, small and medium sized enterprises etc. and the *researcher role* can be clearly attributed to the parliamentary administrators involved. Building on the know-how gained by its participation in FP7 research projects, particularly in the areas of eParticipation, Policy Modelling and Social Network Analysis, the Hellenic Parliament has been awarded a series of EU-funded IPA (Instrument for Pre-Accession Assistance) Twinning contracts (ibid.).

The EU Twinning instrument has been used for two decades to support beneficiary, i.e. candidate or partner, countries to strengthen their administrative capacity.[XVIII] Tulmets (2005) analysed the impact of the Twinning instrument within the European Enlargement Policy. In parliamentary Twinning projects, the implementing partners are EU parliaments as well as relevant mandated bodies. To date, several such projects have been implemented within the IPA and the European Neighbourhood Policy region. However, general numerical data on EU Twinning projects are not available and may be the scope of further dedicated study.

The Hellenic Parliament has been awarded three Twinning projects in Serbia, Turkey and Albania, respectively: (1) IPA-2011/SR 11 IB OT 01 'Strengthening the Capacities of National Assembly of the Republic of Serbia towards EU Integration', (2) IPA-2014/TR 14 IB JH 03 'Empowerment of the Role of Parliament in the Protection and Promotion of Human Rights by Strengthening the Administrative Capacity of Parliament', (3) and IPA-2014/AL 14 IPA JH 01 16 'Further Strengthening the Assembly of Albania in the context of EU Accession'. The project in Albania lasted 12 months (May 2017-May 2018), while the one in Turkey has not been contracted yet. The Italian Parliament is junior partner in both those projects. The parliamentary Twinning project in Serbia was successfully concluded in 2014 (January 2013 - November 2014). More than 100 experts on parliamentary affairs from 10 countries participated in the project and cooperated with numerous MPs and administrators from the National Assembly of Serbia, governmental institutions such as ministries and agencies, independent state bodies and representatives of civil society.[XIX] Due to their involvement in core parliamentary procedures within the beneficiary institution, Twinning experts may assume the role of *analyst* or *advisor*. In several cases, e.g. when conducting comparative studies, the *researcher* role may be also attributed.

Entities	NPRs	IPEX	ECPRD	PBO	European

Roles				Network	Programmes
Administrative Assistant	●	●	●	●	
Coordinator	●	●	●		
Analyst		*Roles related to interaction with national MPs & committees*			(●)*
Advisor	(●)*				(●)*
Agenda-shaper	●				
Researcher (*new*)			●	●	●

*occasional role

Table 1: Signature roles for parliamentary administrators in APNs

The above table summarises administrators' basic roles in parliamentary networks. Other administrative positions, such as the permanent member of the COSAC Secretariat, has also drawn some attention (Pegan and Högenauer 2016: 151-152). Högenauer et al. (2016: 58-62) have given a more thorough presentation of this position and a comparison with the NPR. As for the rest of the administrative positions in the scrutiny of EU affairs, the interested observer has to rely on a rather limited set of relevant contributions (Högenauer et al. 2016: 69-89; Högenauer and Christiansen 2015).

4. Administrative support of existing inter-parliamentary formats

Besides APNs, multi-level inter-parliamentary cooperation in the EU is also demonstrated in other established formats such as Inter-parliamentary Meetings and Assemblies, Inter-parliamentary Conferences (IPC) and Conferences and Meetings of the Parliamentary Leadership.[XX] When dealing with IPC and Inter-parliamentary Meetings and Assemblies, administrators of NPs seem to share a common set of characteristics, the most significant of which belong to the following triplet: (1) knowledge of procedures, (2) knowledge of the basic agenda and surrounding topics and (3) knowledge of executive mentality and organisational culture (interviews 3 & 5).[XXI] The core tasks of the relevant parliamentary administrators are: the secretarial support for national delegations, the synthesis of information around the topical agenda, the exchange of good practices and the preparation or drafting of amendments. Other tasks, though with a lower, unspecific frequency, also include occasional language support for the national delegates (interviews 2,

3 & 5; Fromage 2016: 768). Compared to other entities of inter-parliamentary cooperation, e.g. NPRs or IPEX correspondents, a significant difference is that administrators tend to remain secretaries for much longer (interviews 1 & 5).[XXII]

With time, these administrators naturally develop personal networks with secretaries from other NPs and with the members of the permanent secretariat. This high degree of socialisation with conference/assembly officials may push forward a political agenda in a more effective way (interview 5). However, in some cases, it may also have a negative effect, when administrators tend to operate within a closed circle of NPs' stakeholders, thus solely constituting the institutional memory of their parent organisation (interview 1). Without proper dissemination of information, e.g. an electronic document management system in the NP, a broad circle of officials for de-/briefing or the organisation of internal seminars for the exchange of information on inter-parliamentary cooperation, NPs are likely to face partial or even total loss of institutional memory in cases of retirement, internal rotation or the abrupt exit of the administrator. Within the Hellenic Parliament, the issue is tackled through planning of a training pipeline for new administrators (interviews 1 & 5).

From the above it may be concluded that administrators, who are entrusted with IPCs and Inter-parliamentary Meetings, take on two basic roles after Högenauer et al. (2016). First, they take up the *administrative assistant* role since they summarise and forward information. For this, they may conduct literature searches and refer to existing archived material. In some cases, access to information from relevant governmental units, ministries or agencies, is sought. Second, they equally adopt the *advisor* role since they certainly provide content-related advice, and drafts of amendments or other types of policy documents, prior to debates. In several cases, those parliamentary administrators operate in a comparable way to MPs' scientific advisors, thus they may be also characterised as *quasi-scientific advisors*. Occasionally, the agenda-shaper role may apply. The question, whether the *researcher* role may also be attributed, is related to the fulfilment of the criteria mentioned in *section* ***Errore. L'origine riferimento non è stata trovata.***, and needs to be answered on a case by case basis. The analyst role has not been visible while evaluating the set of interviews and might be only occasionally present. Ultimately, administrators from those two classes seem to be slightly more versatile than those working for APNs, who seem to specialise in a certain range of tasks.

The Conference of the Speakers and the Meetings of the SGs are regulatory organs of inter-parliamentary cooperation in the European context.[XXIII] Both entities meet on an annual basis. In contrast to classification types mentioned earlier, the entities that deal with the parliamentary leadership are presented separately from COSAC, which is classified among the other IPCs (cf. Högenauer et al. 2016: 61-62). The Conference of the Speakers sets political priorities and coordinates inter-parliamentary activities with the operational support of the Meeting of the SGs. The latter plays an important role in the implementation of political decisions. The Meetings of SGs sit astride political and administrative inter-parliamentary cooperation. In these meetings both the ECPRD and IPEX correspondents as well as the complete IPEX board are appointed. Furthermore, SGs are usually the ones who legally bind their parliaments as signatories on European Programmes' contracts. SGs, as heads of parliamentary administrations but also vested with the power to take politically binding decisions, do not seem to fit into the model of roles as presented above.[XXIV]

While both entities have the entire parliamentary administration at their disposal, administrative support is neither systematised at the national level, nor is a permanent secretariat established in order to systematically overview inter-parliamentary cooperation activities, e.g. as in the COSAC case. Administrators supporting this class are usually political advisors and although they frequently interact with the permanent parliamentary administration, the discussion on their impact falls out of the scope of the present study and may constitute a separate research topic.

5. Parliamentary administrators and their roles

5.1. Classification of parliamentary actions

Within the inter-parliamentary cooperation regime, administrators take on a number of positions which require different sets of skills. Hence, a typology of roles has been gradually derived to classify administrative actions as accurately as possible. Högenauer and Christiansen (2015) assign three functions to the parliamentary administration:

- the 'coordination function', e.g. for the NPRs in Brussels,
- the 'information management function', as administrators often appear as 'information brokers' and

- the 'Pre-selection function', when administrators may filter EU documents, thus having the ability to guide the agenda.

This distinction in functions and roles of administrators in not new. Provan,[XXV] in his analysis of the administrative support towards Members of the EP, distinguished between 'technical-administrative assistance', which is organisational in nature, 'technical-substantive assistance', which includes legal advice and support with procedures and drafting, 'research assistance', which refers to the provision of options and impact assessment to the policy makers and 'political assistance', when working with policy issues and political coordination (Neunreither 2002: 55). Another typology of roles, developed for the U.K.'s mid-level bureaucracy, is to be found in Page and Jenkins (2005: 60-75), who differentiate between a 'production role' (creation of policy-related documents), a 'maintenance role' (policy management) and a 'service role' (advisory services).

Out of these roles, only the production and service roles are likely to be found in the parliamentary context (Högenauer and Neuhold 2013: 8). The latter proceed with a definition of four roles for parliamentary administrators, each responsible for a different set of tasks and with increasing involvement around information management in the scrutiny of EU affairs: 'administrative assistant', when forwarding and/or summarising information, 'analyst', when providing legal/procedural advice and opinion drafts following debates, 'coordinator', when coordinating between NPs or between chambers in a bicameral parliament and 'advisor', when providing content-related advise and ex-ante opinion drafts (ibid.: 10). This concept is further enriched with a fifth role: 'agenda-shaper', when administrators preselect documents for parliamentary debates (Högenauer et al. 2016: 94). Undoubtedly, given current requirements, any given parliamentary administrator rarely corresponds to a single role and might include a set of roles or might even 'combine different elements from the different sets of categories.' Högenauer and Neuhold (2013: 17).

The present study leads to the extension of the roles mentioned above by a sixth one, that of the *researcher*, which is presented in the next section. This new role is closely linked to the use of scientific methods, the adoption of a code of conduct and, most importantly, the publication of elaborated material. The definition of a researcher role seems inevitable when considering that inter-parliamentary cooperation also includes newly formed networks of PBOs as well as EU Programmes, which both rely on the work of scientific

advisors in the service of financial oversight and of parliamentary research, e.g. comparative analyses, documentation and exchange of good practices, digital transparency, civic engagement etc.

5.2. Researcher: A new role for administrators?

Based on the line of thought developed in previous section, the *researcher* role is added to the five roles of parliamentary administrators that have been presented by Högenauer et al. (2016). The scientific dimension within parliaments has previously been identified; Egeberg et al. (2013: 511) mentioned that 'Giving professional, scientific and technical advice is a major part of the work for a majority of both EP-secretariat officials and administrative staff of the political groups'. Further, the participation of researchers from PaRS in the scrutiny of EU affairs has been already shown by Högenauer and Christiansen (2015: 119). Similar considerations are valid for the officials who work in the PBOs. The researcher role may equally be attributed to them too.

At the same time, there may be administrators across the parliamentary organisation (also from the EU Affairs units) who contribute to the implementation of Horizon 2020 research or to a parliamentary Twinning project, which are by default both complex and manifold EU instruments. In the case of Twinnings, administrator's assignments may include broad searches for information sources, the development and evaluation of surveys and questionnaires, the carrying out of structured interviews, and policy analysis and the derivation of recommendations. As for the participation in research programmes, the specific tasks depend on the research topic. But, if EU Affairs administrators take on a researcher role when operating within the context of European Programmes, do they have a researcher role too when operating within their designated entities of inter-parliamentary cooperation? In order to adequately respond to that question, the (parliamentary) researcher role needs to be defined in more detail.

Parliamentary research has been a field of study by the Inter-Parliamentary Union (IPU) and the International Federation of Library Associations and Institutions (IFLA). These have issued guidelines for the development of PaRS, which contain key attributes for researchers (IPU and IFLA 2015: 27). From subsequent evaluation we derive a total of four major characteristics for the researcher role. Researchers are specialists; therefore, they must have a certain field of specialisation. While general or broader knowledge is certainly

important, research is usually conducted within narrow and well defined scientific fields. A researcher possesses in-depth knowledge and the skills to apply recognised and approved research methodologies.

As technology and methods evolve, researchers need to have access to capacity building activities, if not life-long training programmes, in order to be aware of new developments in the field, to expand their skill-set or acquire new skills and techniques. However, the defining characteristic of the researcher role is the need for publication of research results, which is also stipulated in the European Code of Conduct for Research Integrity (ibid.: 28; ALLEA 2017: 6). The reporting of results is not an optional feature, but a generic element of the researcher role, which ensures that research is transparent and thus open to independent assessment. Reporting also constitutes a major difference between the researcher role and the (scientific) advisor role. The latter role is frequently assigned to parliamentary administrators who work with politicians, be it parliamentary groups or MPs.

When it comes to linking the researcher role to EU Affairs administrators in the inter-parliamentary cooperation regime, one needs to apply the aforementioned definition. Hence, (1) the field of specialisation is given, e.g. EU Affairs, (2) knowledge and application of research methodologies is present, but only in certain cases, e.g. when a parliamentary administrator is drafting a reasoned opinion (interview 2), (3) access to training is guaranteed, e.g. see specialised seminars by inter-parliamentary assemblies or the national schools of government, (4) but the publication of results does not always seem to be feasible. The latter is well understood in situations when confidentiality is a prerequisite, such as in cases when revealing critical intra-parliamentary affairs, tactical or strategic goals could lead to the weakening of negotiation positions. In these cases, publication in the form of internal reports could be considered. This issue is closely related to the scientific freedom a researcher should enjoy.

Within the bureaucracy of the EU Affairs units, administrators follow strict internal reporting rules, which rarely leave space for scientific publications or reporting (interviews 6 & 7); this leads *de facto* to a limited academic presence. In order to overcome the aforementioned shortcomings (see points 2 & 4 of the researcher role definition), we propose a set of recommendations: first, the adoption of guidelines for administrators from EU affairs units, similar to the ones the IPU and IFLA have drafted for PaRS, as well as a code of conduct. Second, one could think of developing an EU Network of EU affairs

administrators, similar to the African Network of Parliamentary Staff (RAPP).[XXVI] Finally, the institutional evolution of administrators in EU affairs can be achieved through an assimilation of the researcher role and its related attributes. The latter constitutes one of the most significant findings of this study.

6. Conclusions and outlook

The role of parliamentary administrators in inter-parliamentary cooperation is often underestimated and recent studies have started to reveal its true dimension. This article discussed the contribution of parliamentary administrators to the operation, and strengthening, of inter-parliamentary cooperation. A domain initially limited to experts from the EU Affairs units, e.g. departments, directorates etc., inter-parliamentary cooperation is now rapidly extending to other parliamentary domains of operations, such as parliamentary research and financial oversight. A set of new entities of inter-parliamentary cooperation has been introduced for the first time, i.e. European Programmes and PBO networks. These constitute purely administrative networks and are classified under APNs, which is an active and developing field, and more research is necessary to further highlight less visible entities like the PBO network.

In their daily routine, administrators take on a number of roles, be it purely administrative, advisory, analytic or other. Our study of parliamentary administrations has led to the development of the concept of the *researcher* role. In the context of inter-parliamentary cooperation, the attribution of the role to EU Affairs officials has been discussed and a number of conditions and recommendations have been provided. Most importantly, the *researcher* role has the potential to re-shape operations of parliamentary administrators in the context of inter-parliamentary cooperation. Targeted professional training would be necessary to strengthen their capacities, e.g. to develop new sets of skills for the scientific elaboration of reports and to adapt in a developing digital environment. The development of a dedicated administrative network and the adoption of a code of conduct could also contribute towards the same direction. Ultimately, strengthened administrative capacities could result in an increase of the relative power of parliamentary officials and potentially influence the voting behavior of MPs. Elsewhere it is mentioned that administrator roles may alter depending on the occasion. In challenging earlier

research, our analysis suggests that fixed roles could be attributed to specific administrative position (cf. Högenauer and Neuhold 2013). This implies that job description patterns for parliamentary administrators need to be clear, a practice followed by large intergovernmental organisations, a practice that could lead to an increased level of understanding and cooperation among homologues.

Additional findings suggest that Information Communication Technology (ICT) tools increasingly support inter-parliamentary cooperation operations. With the developing penetration of ICT technologies, even less formal assemblies without permanent secretariats could increase their visibility, sustainability and, consequently, their significance, thus elevating their status. Also, the development of virtual fora could facilitate a large part of coordination activities and increase cooperation between parliamentary administrations prior to the plenary sessions of assemblies, particularly when a permanent secretariat is not present.[XXVII] With the exception of IPEX, most inter-parliamentary cooperation entities have yet to develop a comprehensive digital strategy. The Conference of the Speakers, as the coordinator of inter-parliamentary cooperation in the EU, could promote a digital strategy towards integration of the existing digital platforms and services.

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I For instance, the Council of Europe (CoE), the Inter-Parliamentary Union (IPU) and the North Atlantic Treaty Organization (NATO) hold seminars exclusively for parliamentary administrators. These seminars aim to further educate and prepare parliamentary officials for specific conduct within the organisations, e.g. through frequent updates on structural or procedural changes. At the same time such seminars offer opportunities to contact foreign colleagues and to exchange potentially significant information.

II The term 'institutional memory' usually describes the collective knowledge and learned experiences of a group of professionals within an organisation (here the National Parliaments). Naturally, parliamentary officials who work with inter-parliamentary cooperation entities have knowledge of the underlying complex procedures as well as of good practices.

III COSAC stands for the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union. Other inter-parliamentary conferences to date are the Common Foreign Security Policy and the Common Security and Defense Policy (CFSP/CSDP) conference and the Interparliamentary Conference under Article 13 of the Treaty on Stability, Coordination and Governance (TSCG).

IV The author would like to thank Margarita Flouda, Head of General Directorate for International Relations & Communication, Paraskevi Karastergiou, Head of Directorate for International Relations and International Organisations and Anastassia Fragou, Head of Directorate of European Affairs and Bilateral Issues for fruitful discussions and suggestions. Particular thanks are due to Despoina Fola and Marina Kousta for their valuable support throughout the project.

V The entities of inter-parliamentary cooperation on the global scale are called International Parliamentary Institutions (IPIs). While reviewing the literature on IPIs, it becomes evident that the examination of networks of parliamentary administrators and well as the study of their role in inter-parliamentary cooperation is neglected, possibly due to objective difficulties to collect empirical data on the global scale. In the European context, such studies are beginning to emerge to fill a gap in the relevant literature, thus promoting our understanding of the conduct of often non-visible actors of inter-parliamentary cooperation.

VI A list of inter-parliamentary cooperation entities is contained in the Hague guidelines (2004), which have been amended by the Lisbon guidelines (2008). Interestingly, while the essence of the guidelines as well as the

total number of inter-parliamentary cooperation entities does not seem to alter, some distinct changes between the 2 versions are still to be found. First, IPEX and ECPRD are 'degraded' to 'instruments of cooperation'. Second, there is a reshuffling of the entities within the remaining list: COSAC is moved up to second position, while the meetings of the sectoral committees are moved down to 4th. Finally, the item 'Simultaneous debates in interested parliaments' is replaced by 'Joint meetings on Topics of common interest'. These changes also represent a drift in the perception of the Conference of EU Speakers of how inter-parliamentary cooperation should be structured. Also, in the Stockholm Guidelines (2010), the Conference of Speakers stated its will to 'oversee the coordination of interparliamentary EU activities' (article 2).

[VII] This value is calculated based on on-line information from the COSAC website: http://www.cosac.eu/permreps/ (accessed 16/12/2017).

[VIII] In the period from September 2015 to July 2016 the Greek NPR office drafted 66 reports and notes on issues related to EP plenary activities (18), EP committees (13), inter-parliamentary meetings (12), topics of national interest (12) and highlighted topics discussed at the MMMs (11).

[IX] According to the IPEX guidelines as approved by the meeting of the Secretaries General in Rome (2015). The IPEX website (http://www.ipex.eu/) was launched on 30 June 2006 according to the guidelines prepared by the Danish Presidency for the Conference of EU Speakers concerning the calendar for inter-parliamentary cooperation (2011).

[X] Conclusions of the 58th COSAC in Tallinn, 27 and 28 November 2017.

[XI] More information may be found in the IPEX Work Programme 2017-2020, which was adopted by the IPEX Board in Bratislava on 19 May 2017.

[XII] According to the ECPRD website: https://ecprd.secure.europarl.europa.eu (accessed 19/12/2017) the parliaments with observer status are the Knesset of Israel, the House of Commons and the Senate of Canada, and the Senado and the Cámara de Diputados of Mexico.

[XIII] Less than 25% of requests are concluded with a final summary, despite the relevant requirement in the internal guidelines for comparative requests.

[XIV] GNPBO issued its draft guidelines for 'Operationalizing a Parliamentary Budget Office' at its 2015 Annual Meeting.

[XV] The value is calculated based on data from the EU IFI website: http://www.euifis.eu/ (accessed 15/12/2017). According to it, fiscal authorities from Belgium, Croatia, Czech Republic and Poland do not participate in the EUNIFI.

[XVI] The OECD Independent Fiscal Institutions Database (2017) has been consulted: http://www.oecd.org/gov/budgeting/OECD-Independent-Fiscal-Institutions-Database.xlsx (accessed 15/12/2017).

[XVII] The mentioned contribution analysed data from five EU-funded projects: LEX-IS, +Spaces, NOMAD, ARCOMEM and METALOGUE.

[XVIII] Twinning projects are forms of administrative cooperation addressed to extra-EU countries. The cooperation between EU parliamentary administrations is therefore an indirect consequence of these projects.

[XIX] Experts from Greece, Austria, France, Germany, UK, Belgium, Slovakia, Poland, Hungary and Montenegro took part in the activities of the parliamentary Twinning project in Serbia. 752 MPs, administrators and representatives from the civil society have been trained during 40 capacity building activities.

[XX] The class 'Conferences and Meetings of the Parliamentary Leadership' includes the Conference of the Speakers and the Meetings of the Secretaries General.

[XXI] Of course, the mentioned characteristics are rather general and may also be attributed to almost any of the previously discussed actors of inter-parliamentary cooperation.

[XXII] Although plausible, there is no further empirical evidence to support this statement and more research could be conducted to spot differences between administrators.

[XXIII] The European Conference of Presidents of Parliament (ECPP) of the CoE and the Conference of the Speakers of Parliaments of the South-East European Cooperation Process may also be counted in this class. ECPP is closely related to the Parliamentary Assembly of the Council of Europe and is organised with its support.

[XXIV] While there are cases where Secretaries General belong to the permanent staff, in several other cases they are elected officials and should not to be counted among administrators. Secretaries General are vested

with the power to represent their respective parliaments even in political topics, a privilege that administrative personnel usually does not enjoy.

[xxv] James L.C. Provan has been EP Vice-President from 1999-2004.

[xxvi] The idea for the creation of RAPP, http://www.rappafrik.org/, came up in 1995, but it was created only in 2003.

[xxvii] The presence of digital fora parallel to the organisation of committee meetings is generally suggested as a good practice, even though previous attempts, such as in the case of the IPEX digital fora, have not been successful and have been terminated.

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Annex

The following interviews were conducted between 27 October and 4 December 2017:

1. Interview with official from the General Directorate for International Relations and Communication, 27/10/2017
2. Interview #1 with clerk from the Directorate of European Affairs and Bilateral issues, 1/11/2017
3. Roundtable with officials from the Directorate of European Affairs and Bilateral issues, 3/11/2017
4. Interview with ECPRD deputy representative, 3/11/2017
5. Roundtable with officials from the Directorate of International Relations and International Organizations, 7/11/2017
6. Interview #2 with clerk from the Directorate of European Affairs and Bilateral issues, 23/11/2017
7. Interview with official from the Directorate of European Affairs and Bilateral issues, 23/11/2017
8. Interview with PBO official, 29/11/2017
9. Interview with deputy IPEX correspondent, 4/12/2017.

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Inter-parliamentary Cooperation in the EU and outside the Union: Distinctive Features and Limits of the European Experience

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

The article draws comparisons between inter-parliamentary cooperation in the European Union and at the international level. It recognises that, notwithstanding a strong international imprint, inter-parliamentary relations in the EU have gradually experienced somewhat distinctive pushes, deeply embedded in the unique constitutional arrangement of the Union. On the one hand, the composite nature of EU constitutionalism, and its impact on parliaments' relationship with the democratic oversight rationale, have exercised a major influence on the aims and scope of inter-parliamentary cooperation. On the other hand, from the organisational point of view, the distinctive structure of parliamentary representation in the EU has pushed inter-parliamentary arrangements into a multi-layered design, consisting of a large variety of vertical formats. The article argues that inter-parliamentary cooperation in the EU is expected to act as a *sui generis* practice when compared to apparently similar forms of transnational dialogue amongst parliaments. In theory, at least, the EU sets ideal conditions for fulfilling an authentic collective parliamentary dimension, instrumental to the democratic oversight of the executives. Instead, focusing on the practice, the full potential of EU inter-parliamentarism is not yet fulfilled, for two set of reasons: the unresolved ambiguities over its contribution to parliamentary democracy and the lack of a real capacity to depart from the formats of international parliamentary institutions.

Key-words

inter-parliamentary cooperation in the EU, international parliamentarism, collective parliamentary oversight

1. The rise of international parliamentarism and the consolidation of inter-parliamentary cooperation in the EU

Inter-parliamentary cooperation is not an invention of the European Union. The intensification of bi-lateral and especially multi-lateral relations amongst parliaments has represented one of the main responses to challenges of globalisation developed by parliamentary assemblies.

At least until the 21st century, international relations had traditionally been conceived of as inter-governmental and grounded on diplomatic bureaucracy. For a long time, parliaments had been marginal actors in the international arena. However, some rather weak forms of international inter-parliamentary cooperation developed from the end of the XIX century, when the Inter-parliamentary Union was created. In the last three decades, these experiences have grown in number and importance (Šabič 2008; de Puig 2008; Posdorf 2008; Decaro and Lupo 2009; Arndt 2012; Cofelice 2012; Costa et al 2013; Šabič 2013; de Vrieze 2015). This outcome was the product of a variety of factors. These relate to substantial changes in the geopolitical context that, after the end of the Cold War, led to new global phenomena; and to the rise of international relations as one fundamental field of action for national parliaments. Because of these transformations, 'understanding parliaments as purely domestic institutions immune from international integrative force is no longer tenable' (Jančić 2015b: 197 ff).

To qualify the ever-increasing growth in international parliamentary relations, various terminologies have been proposed in literature. The use of the expression 'parliamentary diplomacy' (Cutler 2006; Weisglas and de Boer 2007; de Puig 2008, 22 ff.; Malamud and Stavridis 2011) has spread widely to identify the tools and procedures used to carry out the fundamental strategies of the 'external' activity of parliaments. A new term has latterly been coined, 'parlomacy' (Fiott 2011), although it has obtained hardly any success. Other metaphors, based on the idea of the 'dialogue' or 'conversation' amongst parliaments, have emerged (Inter-parliamentary Union 2003), thus implicitly coupling the inter-parliamentary dimension with apparently similar experiences of 'interjudicial' dialogue (Hogg and Bushell 1997; Tremblay 2005) or administrative cooperation (Martinico 2016: 39 ff.). In a broader perspective, the rise in international parliamentary relations has been framed within

'transnational parliamentarism'[I] (see also Raube and Fonck in this Special Issue), whose main manifestation lies in the creation of International Parliamentary Institutions (IPIs), regular forums for multilateral deliberations, either attached to an international organisation or itself constituting one, in which at least three states or transgovernmental units are represented by parliamentarians (Cutler 2006: 83).

This wide range of labels, often used to describe extremely diversified forms of inter-parliamentary relations, maximise the risk of confusion. At the same time, the temptation to approach these phenomena as a form of political or parliamentary 'tourism' is fostered by the emergence of technological solutions allowing both the organisation of long-distance meetings and easy access to information on foreign and international practices (Lupo 2016: 53 ff.), right up to the creation of an e-parliament based on 'online' voting system and loose committee structure (Johansen 2007: 319 ff.).

Beyond this semantic evolution, however, it is clear that, over the decades, this field has undergone a significant evolution from the traditional practices, based on networks of contacts and relations, mostly developed bilaterally, and mainly involving parliaments' Speakers and Committees for foreign affairs (Baiocchi 2005: 676). Parliaments have witnessed an incredible expansion of multilateral inter-parliamentary relations, on several occasions supported by the creation of permanent IPIs. These entities, with many different titles, and differing in their organisation and role performed, have significantly grown in number over the last few decades.[II]

Practices developed by national parliaments in the field of international relations have provided the catalyst for the development of the inter-parliamentary dimension which connects national parliaments of EU Member States among themselves and with the European Parliament.[III]

Since its origins, the European integration process has been based on conventional legal and practical instruments of international law. The same symbols, formats and practices of diplomatic international relations were applied to EU institutions: flags, national delegations, rotating presidencies, essentially meetings in plenary to be convened once or twice per year. The only exceptions were the supranational institutions: the Commission, the Court of Justice and, even more significantly, at least after 1979, the European Parliament. However, international formats and models continued, instead, to be

used for inter-governmental bodies (but with a strong role given to preparatory technical meetings, as in the case of COREPER) and also for inter-parliamentary cooperation.

Notwithstanding this strong international imprint, inter-parliamentary relations in the EU have found a rather distinctive institutional framework in the constitutional arrangement of the Union; this has gradually influenced the formal and informal design of the dialogue between representative assemblies.

In the first decades of European integration, inter-parliamentary dialogue was implicit in the original structure of the European Parliament (EP), composed, at it is well-known, of representatives of national parliaments. Apart from the continuous interaction within the EP, inter-parliamentary relations were mostly carried out bilaterally or through occasional (and rather 'ceremonial') multi-lateral meetings.

The introduction of direct elections for the EP, agreed in 1976 and implemented from 1979, paved the way for a different approach to inter-parliamentary relations as a multi-lateral dimension supporting precise institutional mandates. This shift was initiated by the progressive institutionalisation of the (smaller format) of the Speakers Conference started in 1975. It was then continued by the attempts to settle some kind of permanent coordination among European Affairs Committees, which concluded with the establishment of the Conference of Parliamentary Committees for Foreign Affairs of Parliaments of the European Union (COSAC) in 1989. The approach was confirmed by two subsequent inter-parliamentary experiences, settled *una tantum*: the participation of the EP and national parliaments in the European Convention, which was called in 1999 by the Cologne European Council to draft the Charter of Fundamental Rights of the European Union, and then in the Convention on the Future of Europe established by the European Council in December 2001, which drafted the Treaty establishing a Constitution for Europe.

Finally, in the last decade, new and more institutionalised formats have developed, providing the foundations for a sectoral dimension of inter-parliamentary cooperation, covering some core sectoral policy areas hitherto the subject of the executive's dominance. This is the case specifically for the inter-parliamentary 'sectoral conference' format (used both for foreign policy and economic governance) and for the innovative format of the Joint Parliamentary Scrutiny Group (thus far only applied to Europol).

It is in respect of this evolution that this paper assesses similarities and differences that feature inter-parliamentary cooperation both within and outside the EU. It confirms the influence that the unique nature of the EU's constitutional architecture has exercised on inter-parliamentary relations; and, at the same time, it assumes that the design of EU inter-parliamentary cooperation has not yet been fully implemented in all its parts, to satisfy the requirements of composite European constitutionalism. Based on this suggestion, the following Sections respectively assess the unique constitutional factors that make inter-parliamentary cooperation in the EU an essential dimension of the composite European Constitution (§ 2); and analyse how the particular structure of EU parliamentary representation has influenced the organisational and functional arrangement of inter-parliamentary cooperation in the EU (§ 3). Moving from the formal to the practical perspective, the focus shifts to the limits faced by the most recent EU inter-parliamentary formats, including the post-Lisbon sectoral Conferences; these are compared with the weaknesses experienced by IPIs (§ 4). Finally, the conclusions (§ 5) draw on the causes behind the failure in the full implementation of the European inter-parliamentary experience that do not entirely depend on the persistence of the internationally-oriented design of its formats.

2. The distinctive constitutional factors featuring inter-parliamentary cooperation in the composite European constitution

2.1. The polycentric paradigm

Inter-parliamentary cooperation is deeply embedded in the 'polycentric' paradigm (Besselink 2006: 117 ff.) that structures the composite European Constitution (Besselink 2007). According to this paradigm, the EU should be viewed not only as the result of separate 'levels' – as the 'multilevel' paradigm suggests – but mainly as a constitutional order[IV] that is more truly a composite order, a product of polycentric rather than hierarchical relationships. This is what mainly differentiates the inter-parliamentary dimension in the EU from other apparently similar transnational parliamentary practices.

International Parliamentary Institutions may have a formal legal status, however this only refers to a status that is operationalised through acts of formal recognition that institutionally connect the IPI to an international organisation (Rocabert et al 2014: 7 f.). A

far more complex arrangement supports EU inter-parliamentary cooperation: the latter cannot be explained outside the composite European Constitution, comprising not only the constitutional law of the EU treaties and of secondary legislation, but also the constitutional law of the Member States. Under the 'polycentric' paradigm (Besselink 2006: 119 ff.; Id, 2016: 23 ff.), the EU and national institutions are viewed as forming part of one constitutional order. Therefore, it has been assumed that inter-parliamentary cooperation is 'not just a marginal element of the activity of every national parliament of the EU, but a vital dimension of the Euro-national parliamentary system' (Fasone and Lupo 2016: 11).

The constitutional nature of inter-parliamentary cooperation in the EU is shaped by three quasi-unique factors, respectively dealing with its acting parties, its relationship with the executive branch of government, and its expected impact on the democratic legitimacy of the EU.

As for the acting parties, 'cooperation' within the EU involves not only national parliaments, but also the European Parliament, in its capacity as a supranational body (Steunenberg 2002; Judge and Earnshaw 2008; Corbett et al 2016).[V] The EP has been endowed with supervisory, budgetary and legislative powers that bear closer resemblance to those of national parliaments than to parliamentary assemblies of other international organisations (Rittberger 2003: 203 f.). This is why the EP has been recognised (Jančić 2015b: 211) as being 'the most advanced transnational assembly in the world'.

After the direct elections of 1979, the EP started to act on an equal footing in its relations with national parliaments, thus becoming a fully independent actor in the network of inter-parliamentary cooperation. This unique feature can be viewed as a strength from the point of view of the constitutional arrangement that makes the inter-parliamentary dimension an integral part of the EU's system of democratic representation. However, from these everyday attempts to operationalise inter-parliamentary dialogue, the presence of two rather differentiated categories of representative assemblies has paved the way for the emergence of two competing visions of the role of parliaments in the EU (Kreilinger 2013; Cooper 2014; Cooper 2016b: 196 ff.): centralised scrutiny (in which the EP prevails), assuming that democratic accountability of the EU executive is assured by the EP alone; joint scrutiny, advocating the intervention of parliaments at all territorial levels, in order to hold the EU executive accountable.

A second factor lies in the relationship of parliaments with the EU executive branch that is 'fragmented' (Curtin 2009), in that these act both at the national and at European level (Lupo 2016: 53 ff.). The European experience shows a unique interaction between executive actors, with a number of rules and procedures linking the national and the European level. The fragmented nature of the EU executive branch deeply affects the expectations made of representative assemblies as subjects responsible for the democratic oversight function. The traditional chain of control featuring international organisations, based on the interaction between each national parliament and its own government, is not enough to make the EU's fragmented executive(s) fully accountable. This explains why, when MPs travel and meet around the territory of the European Union, they are doing their job, that is representing their citizens, solving their issues and trying to hold accountable the executive(s) acting both in their national capitals and in Brussels.

Thirdly, on the ground of democratic legitimacy, neither the EP, nor national parliaments, acting alone, are able to hold the EU executive power accountable.

On the one hand, the European Parliament alone cannot provide an acceptable degree of democratic legitimacy to executive decision-making. Notwithstanding the increased competences gradually vested in the EP in the last thirty years, it still lacks the formal powers and tools to hold the executive(s) fully accountable (Crum and Curtin 2015).

On the other hand, European democracy still heavily relies on the legitimacy and democratic resources drawn from national parliaments (Bellamy and Kröger 2014: 437). The Lisbon Treaty itself recognises (article 10 TEU) the peculiar nature of the European representative democracy founded not exclusively on the EP, but also on the relationship among national governments, national parliaments and national electorates. However, an EU national parliament is no longer in a position to accomplish its own role fully when acting individually on the domestic scene. Uncoincidentally, Article 12 TEU, in listing the 'European powers' of national parliaments, provides that they are called upon to contribute to the 'good functioning' of the Union, acting directly on the EU scene, both individually and through cooperation.

2.2. The relationship with the democratic oversight rationale

Due to the insufficiency of either channel of parliamentary representation, inter-parliamentary cooperation in the EU offers a fertile theoretical ground for legitimising its

integral participation in the accountability mechanisms addressing the fragmented EU executive. This is why, compared to the international parliamentary dimension, inter-parliamentary cooperation in the EU is expected to offer three 'added values'. First, an increase in the level of information dissemination and involvement of (still mainly) national public opinions. Second, the oversight of the fragmented EU executive, which the instruments of inter-parliamentary cooperation should contribute to make more accountable. Third, the building of the precondition for a greater presence of 'political constitutionalism' in the EU (Bellamy 2007).

The first objective is probably the easiest to achieve, as participation in the different inter-parliamentary formats is in itself a way of involving national parliaments and, indirectly, public opinions in EU decision-making (Lupo 2013: 107 ff.; Hefftler et al 2015). This involvement is deemed to alleviate problems arising from the acceleration of politicisation in response to EU multiple crises: whereas the outcomes of increased politicisation at the EU and national level are still uncertain (not being clear whether this politicisation would strengthen or hinder legitimacy), inter-parliamentary cooperation may specifically help Member States in coping with recent trends of 'politics against (EU) policy' (Schmidt 2017).

The second objective affects what is now regarded as Europe's most urgent problem. To exercise their functions of oversight and political direction in regards of the EU fragmented executive, the two channels of parliamentary representation need to 'act together', on a permanent and daily basis, pooling the inputs and outputs of the relations with their own (respectively, EU and national) executives.

The third objective is undoubtedly the most ambitious and difficult to achieve, especially in the short term. The EU Constitution is the result of an elitist project and a legal construction, mainly due to the European Court of Justice (and to the Constitutional Courts of some Member States) (Weiler 2012: 268). This was possible thanks to a 'permissive consensus' that has now expired (Scicluna 2015; Glencross 2014). The failure of the Constitutional Treaty in 2005 exposed all the difficulties of a project that aimed at codifying and counterbalancing the domination of legal constitutionalism. In this context, inter-parliamentary cooperation could represent one means for having politics and politicians playing their constitutional role in designing and scrutinising EU policies.

All these challenges can be traced back to the 'democratic oversight rationale' as a distinct aim conferred on EU inter-parliamentary cooperation, and specifically on its most recent formats: the post-Lisbon Conferences and the Joint Parliamentary Scrutiny Group (see *infra* § 3) that however has just started its activity.[VI]

This rationale is not *per se* a unique prerogative of the latest inter-parliamentary formats of the European Union.

On the one hand, the democratic oversight rationale has been defined with regards to IPIs as the requirement of ensuring democratic control of executive action *vis-à-vis* increasing inter-governmentalism (Wagner 2016) and hence to provide additional democratic legitimation by operating 'in a transparent and deliberative way embedded in and responsive to the affected publics' (von Bogdandy 2012: 328). Whereas the alternative 'polemological rationale' has played a predominant role in the history of international parliamentarism (Wagner 2016),[VII] the idea of strengthening the democratic control of the governmental body through the establishment of a parliamentary body has been the real factor behind the boost in the number of IPIs (Slaughter 2004: 255). This rationale has played a certain influence at the international level where the aims of the international organisation are very broad and politically relevant, and therefore where some kind of democratic problem – a 'participatory gap' undermining the input legitimacy of policy-making (Brühl and Rittberger 2001: 22 f.) – has also been perceived (von Bogdandy 2012: 323 ff.). 'Since international organisations cannot be controlled effectively by national parliaments', it has correctly been observed that 'the only conceivable solution is the establishment of international organs with the task of exercising political control over the executive' (Schermers and Blokker 1995: 381). Accountability of international organisations is not *per se* limited to those mechanisms conventionally associated with liberal democracy, potentially counting on alternative (for instance peer or market) accountability mechanisms (Woods 2003; Benvenisti 2018). Nonetheless, mostly due to its proximity to mechanisms adopted in national constitutional systems (Habegger 2010: 188), accountability by means of the creation of a parliamentary dimension has been perceived as the most accessible and obvious solution in order to reduce the democratic problem arising from governments pooling a number of policies or delegating them to international bodies (Falk and Strauss 2001: 219; Kraft-Kasack 2008: 535). This explains why international regional organisations often have a parliamentary dimension entrusted with a democratic oversight mission,

although this dimension is sometimes described as either ineffective or useless in governance beyond the State (Bohman 2004: 315 ff.).

On the other hand, notwithstanding these international precedents, it can be argued that it is in the European Union that the democratic oversight rationale has been substantiated in inter-parliamentary relations, with the emergence of the new post-Lisbon formats. The institutional aims of these new formats do not merely coincide with those assigned to pre-existing forms of inter-parliamentary relations, that were threefold: the exchange of information and best practices between parliaments at national and European level; the effective exercise of national parliamentary competences in EU affairs (also with regard to the monitoring of the principles of subsidiarity and proportionality in the EU); the promotion of partnerships between EU parliaments and the parliaments of third countries (Conference of the Speakers 2008). In addition to these three objectives, the new inter-parliamentary formats are also entitled to evaluate the mechanisms implementing EU policies in those policy areas where the influence of the executive branch is overwhelming and oversight by representative assemblies represents a major issue of discussion (Wouters and Raube 2012). Therefore, they are expected to achieve another, more ambitious, aim: that is, to strengthen the capacity of parliaments to fulfil the oversight function and consequently to improve the democratic legitimacy of the European Union (Cooper 2014).

Both sectoral Conferences established after Lisbon show a clear connection with this institutional aim, although in rather different ways. In the case of the Conference on Stability, Economic Coordination and Governance in the European Union (SECG), based on Article 13 of the Treaty on Stability, Coordination and Governance (the 'Fiscal Compact'), the relationship with the dimension of democratic oversight is clearly stated by art. 2.1. of the RoP.[VIII] The Presidency conclusions adopted at the end of the meeting held in Vilnius on 16-17 October 2013 (para. 5) clearly highlighted that the first purpose of the Conference is '*to find the right balance between national parliaments and the European Parliament in organising the exercise of parliamentary control in the area of economic and financial governance*'. In contrast, in the case of the Conference on Common Foreign Security Policy-Common Security Defence Policy (CFSP-CSDP), based on Article 9 and 10 of Protocol No. 1 annexed to the Treaty of Lisbon, there is no formal provision that includes the oversight rationale within the institutional aims of the Conference.[IX] However, the Conclusions of the first Conference held in Pafos, 9-10 September 2012, in defining the mission of this

body, included several references to the Conference's role in assessing, reviewing and evaluating the decision-making, capacity-building and operational weaknesses of the CFSP and CSDP, therefore contributing to promoting democratic values and accountable systems of good governance.

We can therefore conclude that both Conferences have adopted the 'democratic oversight rationale' within their missions. Whereas this goal did not feature in previous inter-parliamentary practices in the EU, in the post-Lisbon era the inclusion of the democratic oversight rationale in inter-parliamentary cooperation is closely related to the launch of new sectoral formats. The novelty lies in the idea that a sectorial approach is needed to enable parliaments to collectively contribute to the democratic accountability of the decision-making process. This approach represents a real novelty, not just in the history of European parliamentarism, but also with regard to other transnational practices of international parliamentarism that rather tend to face the democratic oversight rationale in very broad and general terms.[X]

3. The organisational and functional arrangements of inter-parliamentary cooperation in the EU and its hallmarks

Inter-parliamentary cooperation in the EU is characterised by an extremely varied and numerous typology of formats supporting the 'dialogue' between the EP and national parliaments (Hefftler and Gattermann 2015; Fromage 2016a: 749 ff.; Lupo and Fasone 2016; Rozenberg 2017). The 'sheer density' of this network of relations, fostered by multiple, concurrent formats, has been identified as one distinctive feature of the EU (Crum and Fossum 2013: 252; see also Fromage in this Special Issue). This arrangement is deemed to be a direct consequence of the peculiar structure of European parliamentary representation, as defined by art. 10 TEU.

Also, international parliamentarism is not unidimensional in its various formats: it develops through multiple layers of inter-parliamentary cooperation, acting not just horizontally, between two or more parliaments, but also vertically (Jančić 2015: 214 ff.). On the one hand, in the same region parliaments find variable geometry relational arrangements: they interact in more multilateral forums at the same time, and additionally they engage in bilateral relations and forums, thus shaping an extended web of contacts and

exchanges. On the other hand, multilateral participation in IPIs is not *the* exclusive dimension, as inter-parliamentary relations take other forms as well. The increase in international parliamentary relations has contributed, over the decades,[XI] to give rise to three different inter-parliamentary dimensions, ranked according to the degree of institutionalisation (Griglio 2017: 195 ff.).[XII] The first dimension corresponds to 'occasional' dialogue which takes place with no fixed temporal deadlines and is voluntarily promoted by parliaments. The second dimension, defined as 'regular' dialogue, is instead identified by relations developed on regular basis by parliaments, but without a dedicated 'structure' fulfilling the role of a standing secretariat and, usually, specific procedures. Finally, the third dimension, covering 'institutionalised' dialogue, is characterised by the frequency of meetings, occurring on a regular basis, by the presence of a permanent secretariat or administrative structure and by the reliance of inter-parliamentary dialogue on codified procedures.

Whereas these inter-parliamentary dimensions may be found both at the international level and in the EU, what distinguishes European practice is that the multiple layers of cooperation act vertically within the same group of parliaments. In the EU, multilateral relations are conducted in multiple (vertical) layers between the same parliaments that can interact through many different formats. Parliaments find increasing and varied types of forums in which to cooperate both on general and on sectoral policy issues, either formally or informally, sometimes represented by their Speaker and most often by members of their different standing committees. Although horizontal asymmetries can develop from bilateral inter-parliamentary practices linking two national parliaments or one national parliament and the EP, it is the vertical stratification of the different inter-parliamentary layers between the 41 national assemblies (considering unicameral parliaments and each House of bicameral parliaments) and the European Parliament that makes the European arrangement incomparable to any other experience of transnational parliamentarism.

Specifically, 'occasional' dialogue is fostered in the EU through an extensive range of sporadic contacts, meetings and events. These can be carried out on informal basis, most often in order to support the exercise of a codified competence of national parliaments, or they can be promoted as single events by one or more parliaments. An example of the former type of relations is offered by the participation in the political dialogue and the early warning mechanism (Jančić 2017: 299 ff.; Cornell and Goldoni 2017; Granat 2018); as

contacts among representative assemblies evolve without predictable intervals, these can be tagged as a form of occasional cooperation, resulting from national parliaments' involvement in the *ex-ante* evaluation of EU draft legislation. In the last few years, there have been different attempts to reinforce and hold up this dimension, including the launch of the so called 'green card' initiative aiming at fostering national parliaments' cooperation in the very early stages of the legislative process (Fasone and Fromage 2016: 294 ff.; Jančić 2015a: 49) and the strengthening of administrative cooperation within the IPEX platform (Granat 2016: 85).

A second dimension of inter-parliamentary relations in the EU is represented by those forms of regular cooperation that are not supported by a dedicated secretariat or architecture, but are promoted on a regular basis by the European Parliament, either alone or jointly with the Parliament of the Member State holding the Presidency of the Council. The practice was initiated in the first half of 2005, under the Luxembourg Presidency, and continued under subsequent presidencies. Three main categories of meetings fall within this type of inter-parliamentary relations: the Joint Parliamentary Meetings (JPMs), the Joint Committee Meetings (JCMs) and the Inter-parliamentary Committee Meetings (ICMs). All three formats envisage regular meetings among the EP and national parliaments' representatives; their organisation entails a prominent role of the EP standing committees (Fromage 2016b: 113 ff.).

Finally, the most institutionalised of the existing formats of inter-parliamentary cooperation in the EU is represented by the permanent Conferences, whose legal foundation is usually settled at Treaty level:. Apart from COSAC and the Conference of the Speakers that have come to develop a cross-sectional role of coordination and mediation among inter-parliamentary relations (Cygan 2016: 207 ff.; Fasone 2016; Cooper 2017), this format include the two post-Lisbon sectoral Conferences and the Joint Parliamentary Scrutiny Group on Europol that is expected to become one of the most structured and advanced forums of inter-parliamentary cooperation (Kreilinger 2017).

In a broad perspective, the unique features of the EU's inter-parliamentary arrangement can therefore be appreciated in terms of frequency of meetings, variety of formats involving the same parliaments, capacity to penetrate quite specific sectoral issues, involvement of different components from participating parliaments, interaction with the executive decision-making.

4. On the limits faced by the post-Lisbon inter-parliamentary conferences: a comparison with IPIs

The sectoral inter-parliamentary conferences established in the post-Lisbon era rely on two apparently opposed assumptions. On the one hand, these conferences are regarded as being among the most advanced formats for inter-parliamentary cooperation that the EU has been able to develop and implement (see *infra* § 3.2.). On the other hand, if we compare the original expectations vested in the two Conferences to their practices as implemented, it is clear that the oversight rationale has not yet found its full development. The disillusionment felt with the outcomes achieved so far is reinforced by alleged weaknesses in the organisational and functional arrangements of the 'Conference model' (Cooper 2016a; Wouters and Raube 2016: 238 ff.; Lupo and Griglio 2018). Such organisational and functional weaknesses are, in the end, not too dissimilar from the ones deplored in the literature with regards to the functioning of International Parliamentary Institutions.

From the point of view of their internal composition, sectoral EU Conferences do not seem to have made many advances in countering similar restraints to those faced by delegations participating in IPIs. These are often seen as bloated, plethoric, bodies, strictly organised according to nationality and allowing for a variable composition of national delegations. In other cases, the small size of delegations, selected by parliaments on an *ad-hoc* basis that does not allow to reflect party composition, is perceived as a strong limitation (Kraft-Kasack 2008: 546). The way the CFSP-CSDP and the SECG Conferences are composed does not seem to offer a satisfactory response to the weaknesses faced by IPIs. The former is structured as a 'large' assembly, composed of 16 representatives from the EP and 6 members from each national parliament (Wouters and Raube 2016: 238 f.), although attendance figures seem to prove that NPs tend to send fewer delegates than actually allowed (Fromage 2016c: 11; Rozenberg 2017: 47 f.). The latter does not even provide a maximum number of members for each parliamentary delegation. Either way, there is no rule binding the selection of members of parliamentary delegations from committees charged with the policy area involved or providing any continuity in their attendance. The lack of specific provisions on these issues has failed to encourage the creation of

permanent delegations and therefore the entrenchment of the Conference's activity into the ordinary work of participating parliaments (see also Fromage in this Special Issue).

Another weakness regularly criticised in the practice of the two post-Lisbon Conferences relates to the frequency of their meetings, that are summoned only twice a year, based on a rather ritualistic and inflexible schedule, and to the adoption of very broad and discontinuous agendas. This arrangement does not enable the Conferences to adapt their activity to the various stages and contents of the inter-governmental decision-making process, and to structurally incorporate them in the workings of domestic parliaments (Lupo and Griglio 2018). Not too dissimilar limits have been criticised in the literature focusing on the experience of IPIs; one main shortcoming is that their work lacks in consistency and coherence and is not adequately incorporated into the activity of domestic parliaments (Jančić 2015b: 209).

Discontinuity in the presidency and the dependent arrangement of the secretariat represents another weakness of the two post-Lisbon Conferences. Their presidency is divided between national parliaments of Member States holding the rotating presidency of the EU and the EP (art. 3 RoP of the SECG Conference and of the CFSP-CSDP Conference). The lack of continuity in the presidency determines the organisation of the secretariat, that rotates between presiding parliaments, thus failing to ensure a permanent structure. This arrangement hinders the continuity in the selection of topics placed on the agenda and hence in the activity of the Conference. Likewise, the same limitations are broadly critiqued in the literature on the practice of IPIs. The deficiencies in secretariats, permanent staff and delegations are often identified as one of the reasons that prevents some assemblies and conferences from fulfilling their scrutiny potential (Kraft-Kasack 2008: 547 and 552; Habegger 2010: 195 f.).

From the functional point of view, with regard to their capacity to adopt binding decisions, exercise an influence over governmental action or capture the public interest, the CFSP-CSDP and SECG Conferences seem to replicate some of the limits faced by IPIs. Although many International Parliamentary Institutions see deliberation as their main feature, they can rarely adopt binding resolutions, and are unable to exert any pressure on the executive branch as a follow-up to their conclusions; their debates mostly go unnoticed by the public (Kraft-Kasack 2008: 548 f.). Similarly, the post-Lisbon Conferences have no other decision-making capacity beyond the adoption of non-binding conclusions that gain

little consideration, both by the executives at European and national level and by the wider public.

Focusing on the procedures, it has been noted (Lupo and Griglio 2018) that, apart from some occasional forms of 'questions and answers' with representatives of the European Commission or the Council, the post-Lisbon Conferences have mostly spent their time in debating very broad issues, deprived of any real political potential for an oversight function. Similar criticisms involve the oversight practices of many IPIs. Some tools, including the right to receive inter-governmental reports and to table questions, have been developed, either formally or informally, to support this function (Habegger 2010: 191 ff.). However, in practice, IPIs' oversight capacity is deeply affected by two external factors: namely, cooperation with other institutions and the indirect influence exercised by delegates through their domestic parliaments (Arndt 2013: par. 98).

This overview explains why, on the whole, the EU sectoral conferences have thus far not been able to fully exploit their oversight potential and to engage in a structural dialogue with the representatives of the EU fragmented executive. They have not really broken free from the general limitations faced by IPIs, which have serious difficulties in fulfilling the democratic oversight function and hardly exercise any other function apart from facilitating public debate of societal interests and strengthening transparent governance (Kraft-Kasack 2008: 552 ff.; Habegger 2010: 195 f.).

The causes of these difficulties are deep-rooted, since they lie in the persistent conflicts dividing national parliaments and the EP as to the nature, scope, and aims of the sectoral Conferences within the overall inter-parliamentary cooperation framework. We can trace these conflicting behaviours back to the competing visions inspiring, respectively, the EP and national parliaments in their approach to parliamentary scrutiny in the EU (see above § 2). Due to these competing visions, the *'multilevel parliamentary field'* (Crum and Fossum 2009) often transforms itself into a *'battlefield'* (Herranz-Surralés 2011: 29) where relations between national parliaments, on the one side, and the EP, on the other side, are driven by patterns of competition rather than of cooperation. This happens especially in those areas – such as the ones covered by the CFSP-CSDP and the SECG Conferences – falling between inter-governmental and communitarian modes of governance, in which both parliamentary levels are required to participate to hold the activity of executives to account.

This adversarial attitude has significantly influenced the organisation and functioning of the two sectoral Conferences. To prevent or alleviate conflicts, a 'damage-limitation' approach is most often embraced by the rotating Secretariats of the Conferences. In order to avoid the risk of stalemate, the latter tend to redirect agendas towards the debate of broad topics, with no clear reference to parliamentary document-based oversight (Lupo and Griglio 2018). This, therefore, explains why the sectoral Conferences have not, so far, provided the expected added value to European democracy (Fromage 2016a: 749 ff.; Maatsch and Cooper 2017: 650 f.; Rozenberg 2017: 40 f.).

5. Conclusions: unresolved ambiguities of the European parliamentary collective dimension

This article argues that inter-parliamentary cooperation in the EU represents a distinctive dimension if compared to transnational dialogue between parliaments. Two main sets of reasons have been discussed in support for this argument.

The first set of reasons is grounded in the composite European Constitution. These reasons deal with the presence of a supranational parliamentary institution, the European Parliament, the fragmented nature of the EU executive and the reliance of the EU democratic legitimacy on a double channel of parliamentary representation.

In other words, the relationship with the democratic oversight rationale is assumed as a distinctive feature of the EU inter-parliamentary dimension. The democratic oversight rationale is not *per se* an exclusive prerogative of inter-parliamentary cooperation in the EU and specifically of its latest formats. Inter-parliamentary cooperation also can be about strengthening democratic control and enhancing inter-governmental accountability outside the European Union. IPIs also have been viewed as *'correctives'* aiming at rectifying the imbalances produced by executive dominance in international affairs (Slaughter 2004: 105). However, it is only in the EU that this dimension has been approached on a sector-specific basis, with the purpose of creating more favourable conditions for the collective exercise of parliamentary oversight of executive decisions. Focusing on the criteria for collective actorness (Knutelská 2013: 35),[XIII] this arrangement is supposed to provide EU inter-parliamentary cooperation – at least in theory – with ideal conditions for activating its

transformative potential that turns collective action into something more than the sum of its constitutive parts.

A second set of reasons lies in the specific arrangement of inter-parliamentary cooperation in the EU, deeply entrenched in the unique structure of European parliamentary representation. A number of factors dealing with the multi-layered nature of the inter-parliamentary dimension contribute to give a special shape to EU practice.

Essentially, when balancing these arguments with the real practice of inter-parliamentary relations, the distinctive factors of the European experience turn out to be under-developed, compared with theoretical expectations. The capacity to fulfil an authentic collective dimension, instrumental to the democratic oversight of the executives, turns out to be a weak point. Inter-parliamentary cooperation remains inherently disunited: parliaments 'are unlikely to add up to a single coherent voice that can control the actual decisions adopted by the collective of governments that they scrutinise' (Crum and Fossum 2013: 3).

The prevalence of national, short-term, concerns over more long-term collective strategies explains why the post-Lisbon Conferences have been unable to progress much from the rather limited practice of IPIs.

From the organisational and functional points of view, it could be argued that inter-parliamentary cooperation is ill-equipped to fulfil the expectations raised by the EU constitutional arrangement, due the persistence of its internationally-oriented design. In this vein, one main reason behind the underlying dissatisfaction over results achieved so far derives from the incapacity of EU inter-parliamentary formats to substantially develop from the model derived from IPIs. This argument can be considered as partially true.

It is specifically true that, to cope with the existing gaps in the EU chain of democratic accountability, new and more advanced inter-parliamentary solutions are required. The reference is, above all, to the pragmatic formula of the 'document-based' inter-parliamentary scrutiny, advocated elsewhere (Lupo and Griglio 2018: 372), according to which inter-parliamentary cooperation within inter-parliamentary Conferences should be focused on 'micro-politics', supported by the activity of working groups and based on a close alignment of the Conferences' organisation, agenda and conclusions to the main stages of the EU decision-making. A not too dissimilar solution would be that of the '(inter)parliamentarism by committee' (Manzella 2012: 37; Lupo and Fasone 2016), whose

aim is 'to shift away from the plethoric 'Conference-based' interparliamentarism, shaped according to international assemblies' (Fasone 2018: 272) and to promote different working methods, based on more frequent and smaller inter-parliamentary meetings, attended by sectoral standing committees of the national parliaments and the EP, either in person or via the Internet. Parliamentary work in committee is indeed the main practice in many national chambers (Fasone 2012) since committees provide a strategic vehicle for overseeing the executive and facilitating public involvement in parliamentary decision-making (Norton 2005).

In fact, taking the overall picture into consideration, this argument can only account for a part of the alleged failures of inter-parliamentary cooperation. Searching for the constitutive reasons behind current trends, it should be concluded that the causes of this failure are rooted in the two still unresolved ambiguities that affect European parliamentarism.

The first ambiguity concerns the role of parliaments in the EU. The debate on the nature of European democracy still hinges on competing visions of the contribution that national parliaments and the European Parliament can offer to the scrutiny of the EU's fragmented executive. This ambiguity fosters disagreements on how to implement inter-parliamentary cooperation (Fasone and Lupo 2016b: 347). There are conflicting approaches between the EP, on the one side, and national parliaments, on the other, as well as between national parliaments, as to the nature, scope, format, scheduling, organisation, structure and final aim of the practice of inter-parliamentary cooperation. These conflicts prevent the fulfilment of the ambitious vision that supported the establishment of sectoral formats as a place where parliaments of the EU could exercise a sort of 'collective' oversight over the fragmented EU executive.

The second ambiguity concerns the contribution that inter-parliamentary cooperation can offer to existing channels of parliamentary representation and oversight. Specifically, it is not yet clear whether the collective dimension associated with inter-parliamentary cooperation in the EU can, in and of itself, offer an additional channel for democratic oversight; or whether, on the contrary, it is expected only to serve as an instrumental dimension to the fulfilment of the oversight function vested in the two ordinary representative channels (Lupo and Griglio 2018). A debate on the additional or instrumental oversight contribution associated to the work of IPIs can also be found in

international relations literature (Falk and Strauss 2000: 191 ff.). However, this argument raises additional concerns given the EU's architecture where, due to the role entrusted on national parliaments and the EP by the Lisbon Treaty, rather ambitious expectations have been made of the collective dimension (Cooper 2012, 441 ff.; Cygan 2012: 55 ff.; Hefftler and Wessels 2013; Cygan 2017: 716).

From a normative perspective, the relationship with collective actorness turns out to be a key factor for fulfilling the distinctive nature of the EU inter-parliamentary model. The original features of this model, grounded on the European composite constitution, can only be appreciated within an authentic collective dimension. This purpose can be fulfilled in many different ways, working around what should be 'collectivised' – whether it is only the dissemination of information and space for debate or in addition the exercise of crucial parliamentary functions of political direction and oversight – and defining how this collective work could be related to the domestic activity of national parliaments and the EP. In other words, the fulfilment of a collective parliamentary dimension relies on the existence of procedural links able to connect the activity carried out by each parliament, either acting individually or cooperating within the inter-parliamentary framework, with the fragmented European executive. This perspective represents the only feasible way to progress from the idea that inter-parliamentary relations often serve as 'a weapon of the weak' (Crum and Fossum 2013: 260), structuring the collective parliamentary dimension of the EU as a real system (Lupo 2014).

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Although this is the result of a joint work of the two Authors, Nicola Lupo drafted Sections 1 and 2.1. while Elena Griglio drafted Sections 2.2, 3 and 4.

[I] On the notion of transnationalism and its connection with internationalism, see Huntington 1973: 333 ff.

[II] Notwithstanding inherent problems in analysing and classifying the rather diversified phenomenon of IPIs, the rates of formation of IPIs have marked an increase from one single organisation existing in 1950 (the Inter-Parliamentary Union) to over 23 institutions recorded in 1999 (Cutler 2001: 210; Zlatko 2008: 259). According to Kissling (2011: 12), other 68 IPIs have been established between 1999 and 2011. Partially different rates are mentioned in Grigorescu 2015: 247 ff.

[III] Beside this 'internal' inter-parliamentary dimension, the EU experiences also an 'external' activity, supported by the network of relations connecting the EP and also national parliaments with representative assemblies from extra-EU countries (Cofelice and Stavridis 2014: 145 ff.; Stavridis and Irrera 2015). This 'external' dimension conforms to standard formats of international parliamentarism and is hence outside the remit of this work.

[IV] For the purposes of this article, we refer to the EU constitutional order as comprising both the constitutional law of EU Treaties and the constitutional law of the Member States; these two dimensions are seen as deeply integrated (Besselink 2007; Manzella and Lupo 2014) and not merely juxtaposed (Pernice 2002). In fact, the issue is still controversial in the literature. Against 'administrative' interpretations of EU

law (Majone 1994; Somek 2010: 267 ff.), many authors have recognised the existence of a European constitutional dimension; however, some of them argue that what the EU possesses is at best a 'weak' constitutionalism (Lindseth 2001: 145 ff.) or a 'parasitic legitimacy' derived from the more robust constitutionalism of the Member States (Tuori 2015: 4 and 36)

[V] It is not possible in this contribution to recall the long and intense debate on the EP's acting capacity as an IPI. On this point, see Cofelice and Stavridis 2014

[VI] After the first meeting, held in October, the Spring meeting is expected to adopt the RoP of the Group. For more details, see Cooper in this Special Issue.

[VII] The main driving force behind the rise of international parliamentarism lies in the idea that inter-parliamentary cooperation as a place for debate would turn out to be a 'mitigation' factor, thus contributing to peace-keeping. This 'polemological' rationale did not disappear after the second World War, but re-emerged specifically after the end of the Cold War.

[VIII] According to art. 2.1. RoP, the Conference is entitled both to provide a framework for debate and exchange of information and best practices and to *'ensuring democratic accountability in the area of economic governance and budgetary policy in the EU, particularly in the EMU, taking into account the social dimension and without prejudice to the competences of EU Parliaments'* (Art. 2.1. RoP).

[IX] See Para 1, 2, 4, 5 and 7 of the Conclusions and, in the Premise, the acknowledgement '*of the need, in respect of the EU CFSP and CSDP, to ensure parliamentary scrutiny of the political and budgetary decisions taken at national and European level'*.

[X] In some of the IPI classifications available, the supervisory function is adopted as one of the leading criteria. Specifically, Cutler, 2011, 30 f distinguishes between: congresses (occasional meetings without permanent secretariat); assemblies (regular meetings with limited secretariat or informal organisation); parliaments (a permanent body based on an institutionalised secretariat that undertakes rule-supervisory activities); legislatures (a permanent body with an institutionalised organisation that not only undertakes a variety of programmatic activities arising from rule creation and supervision but also proposes laws for adoption by member states).

[XI] Fasone 2009: 160 ff. distinguishes among two distinct forms of inter-parliamentary cooperation: the permanent forms of cooperation, summoned on regular basis, as in the case of the Conference of the Speakers and COSAC; the incidental forms of cooperation, promoted *una tantum*.

[XII] A classification according to the stages of institutional development is followed by Cutler 2011: 30.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

A 'second youth' for the EU Speakers' Conference? A critical appraisal of its 'quasi-constitutional' role

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

The EU Speakers' Conference has experienced a 'second youth' after the entry into force of the Treaty of Lisbon by playing a 'quasi-constitutional' role in inter-parliamentary cooperation, and in particular by trying to exercise a rule-making function over the many inter-parliamentary venues of the EU's system of government. The fulfilment of such a function has certainly not been made any easier as a consequence of the constitutional constraints surrounding the positions of the Speakers and Presidents of the European and Member States' (MS) Parliaments, with a considerable variety in terms of powers and decision-making capacity among the MS and the EU. Despite these limitations, the 'quasi-constitutional' role of the EU Speakers' Conference has mainly consisted of approving guidelines, if not directly rules of procedure, for other inter-parliamentary venues. It has also been argued that the coordinating function of the EU Speakers' Conference can be much more effective when looking at its 'quasi-constitutional' role, and also in its function of joint parliamentary scrutiny in the EU, if it is aimed at enhancing the rational organisation of inter-parliamentary activities in terms of timing, agendas and *ex-post* supervision of the results, in the absence of any other possible alternative to the Speakers' leadership.

Key-words

European Union, inter-parliamentary cooperation, Speakers, EU Speakers' Conference, comparative constitutional law

1. Introduction

The EU Speakers' Conference was the first inter-parliamentary conference to be set up in the EU back in 1975, when it started to meet every year on a regular basis. This conference, although lacking express acknowledgment in earlier EU Treaties and protocols,[I] has recently experienced a 'second youth' when, after the entry into force of the Treaty of Lisbon, new inter-parliamentary conferences were created (Hefftler and Gattermann 2015). Indeed, thanks to the support of most national parliaments, the EU Speakers' Conference has taken up the function of coordinating inter-parliamentary activities and directing their development, right up to that of the approval of the rules of procedures of other inter-parliamentary conferences.

The article aims to assess the current role of the EU Speakers' Conference and its potential for leading inter-parliamentary cooperation in the EU, which is currently developing without a clear rationale and has seen the growth of several inter-parliamentary venues with uncertain if not overlapping mandates and very little coordination. The article claims that, following the Treaty of Lisbon, the EU Speakers' Conference has taken up a 'quasi-constitutional role': the activity of devising and defining, in most cases, the basic rules – i.e. the 'Constitutions' – under which the new inter-parliamentary conferences operate. This role can be fulfilled through the exercise of two main functions by the Speakers' Conference, that of coordination of inter-parliamentary activities in the EU, which today is rather limited, and most of all that of ruling over the organisation and operation of inter-parliamentary venues, a function that has grown steadily so far.[II] Is this role of the Conference effective and desirable at all? This contribution questions the current ability of the EU Speakers' Conference to lead an ordered and stable development of inter-parliamentary cooperation in the EU, thus casting doubts on its effectiveness. After having explored potential alternatives to the Speakers' leadership, it concludes that the two Speakers' Conference's functions should be re-balanced. In other words, rather than focusing almost exclusively on its 'rule-making' capacity, the Conference should ground its 'quasi-constitutional' role on its coordinating function, to enhance the rational organisation of inter-parliamentary activities in terms of timing, agendas and *ex-post* supervision of the results.

The article also considers the domestic powers of the Speakers and the asymmetric position of the European Parliament's President. Here it is argued that the function performed by this conference is somewhat *sui generis* compared to other emergent inter-parliamentary conferences and venues that are normally policy-oriented, follow cluster of interests or are geographically recognisable (Fromage 2016: 749-772). Indeed, the EU Speakers' Conference is neither meant to fulfil a joint parliamentary scrutiny role on the EU's fragmented executive (Curtin 2014: 1-32), i.e. a shared and collective scrutiny by the legislatures placed at the different levels of government (Cooper 2014: 2; Griglio 2016: 586-587; Eppler and Maurer 2017: 242-243; Griglio and Lupo 2018: 358-373) nor to create a sort of 'parallel' parliamentary diplomacy in the EU.[III] Rather, it plays an overarching quasi-constitutional role in that it tries to establish order in the complex and chaotic world of inter-parliamentary cooperation in the EU by exercising both a coordinating function and a (sometimes questionable) 'rule-making' function (Fasone 2016: 269-289). In theory, this makes the EU Speakers' Conference a prominent actor in the wider set of interinstitutional relations in the EU, although in practice this potential is not fully exploited due to the peculiar features of the Conference itself.

It should be noted, in fact, that the very strength of this inter-parliamentary venue, namely its composition, is at the same time, a weakness. Indeed, while the Speakers of EU Parliaments and parliamentary chambers certainly hold the most important office within their own legislatures, they are characterised by very different powers across Member States and the European Parliament. Some Speakers must be impartial and, in theory, not affiliated to any political group: they cannot take a political stance nor vote; some others, instead, are a clear expression of the majority and tend to act in alliance with the Government. The first group of Speakers, when acting in the Speakers' Conference and, more generally, in supranational and international venues, are not entitled to vote on behalf of, or bind, their parliaments. This can prove to be a limitation to the effectiveness of the EU Speakers' Conference, which as it is dependent upon national provisions, is not easy to overcome.

In contrast, the second group comprises Speakers that, despite being able to take a political stance in both EU and foreign affairs, nevertheless are unable to give voice to the pluralistic composition of their Parliament to also encompass the representation of opposition and minorities' interests. At the same time the position of the President of the

European Parliament is side-lined compared to national Speakers. After an historical excursus of the activity of the Speakers' Conference and a comparative analysis of the powers of the Speakers, the article offers an appraisal of the EU Speakers' Conference activity with regards to the functions it performs, and its contribution to inter-parliamentary cooperation. It evaluates what alternatives are available to fulfil the 'quasi-constitutional' role of the EU Speakers' Conference and concludes that, in their absence, it is more appropriate to strengthen the Conference's coordinating function.

2. History of the Conference

The first meeting of the EU Speakers' Conference was organised in 1963 in Rome at the initiative of the then President of the Parliamentary Assembly of the European Community, Gaetano Martino, and aimed to gather together the parliaments of Europe at an apical level. More than 10 years elapsed before subsequent meetings were called in Strasbourg and Rome in 1975,[IV] as, in a few years, the European Parliament (still called Parliamentary Assembly at that time) was to become a directly elected Parliament.

In its first period (1975–79) the Conference met on an annual basis, but besides the President of the European Parliament, it also involved the Speakers of the Parliaments from all Member States of the Council of Europe, also including the President of the Parliamentary Assembly of this international organisation. Subsequently, from 1980 to 1998, this enlarged format of the Conference, also called the 'Big Conference', alternated every two years with the 'Small Conference', which only comprised the President of the European Parliament and the Speakers of the national parliaments within the European Community. Hence every year either the 'Small' or the 'Big' Conference was convened. This peculiar arrangement made the Conference a sort of unique liaison at the parliamentary level between the two principal international-supranational organisations established in post-World War II Europe.

After the Treaty of Maastricht of 1992 and, even more so after the Treaty of Amsterdam of 1997, the European Parliament and national parliaments were accorded a much more prominent 'constitutional' role at the European level than in the past. In consequence, the 'Small Conference' was transformed into an autonomous inter-parliamentary forum regularly convened, at least on an annual basis. Furthermore, informal

and extraordinary meetings were organised, in particular on the occasion of celebrations, like the fortieth and sixtieth anniversaries of the entry into force of the Treaty of Rome, or in the aftermath of Treaty revisions, to agree on common positions among the parliaments while intergovernmental conferences were taking place.[V] The latter instances, namely the extraordinary meetings of the EU Speakers' Conference, convened while intergovernmental conferences on Treaty changes were in operation, possibly represent the only case of joint parliamentary scrutiny carried out by this Conference.

The Speakers' Conference was initially seen merely as a forum for discussion on topics such as parliaments and globalisation and the role of parliaments in the EU, and in the scrutiny of their executives. However, reforms of European Treaties, especially starting from the (failed) Constitutional Treaty of 2004, triggered the construction of a new 'institutional' role for the EU Speakers' Conference, oriented towards building the foundations of a coherent and coordinated development of inter-parliamentary cooperation in the EU under the Conference's supervision.

In 2004 the Speakers' Conference adopted the Guidelines for Interparliamentary Cooperation in the European Union, subsequently amended in 2008, defining the aims, framework, fields and instruments of cooperation. These Guidelines are still observed today in respect of the relationship between the many inter-parliamentary bodies in the EU. However, they have not been updated to include the most recent, and significant, developments in inter-parliamentary cooperation, like the creation of the Interparliamentary Conferences on CFSP and CSDP (on Stability, Economic Coordination and Governance) and the Joint Parliamentary Scrutiny Group (on Europol): these were not envisaged in the Guidelines, thereby making them only partially useful.

On 15 May 2010 the EU Speakers' Conference in Stockholm adopted the Guidelines for its activity, to date the 'rules of procedure' of the Conference. The Conference, composed of Speakers of national parliaments and the President of the European Parliament, acting on an equal basis, operates by consensus, with the assurance of the simultaneous translation into the EU official languages and the circulation of written texts in French and English only. The 'rules of procedure' reiterate the coordinating role of the Conference in EU inter-parliamentary cooperation. In addition to this, the mandate of the Conference is fairly limited, as a forum for the exchange of opinions, information and experiences, on parliamentary organisation and functions, and for fostering joint research

and common action. The Conference, even nowadays, only meets once a year, under the presidency of the Parliaments of the Member States holding the EU Presidency in the second half of the previous year, and in the absence of a permanent secretariat relies on the administrative support of the coordination of secretary generals. The Presidency is responsible for preparing the final draft agenda and the conclusions of the meeting with a view to reflecting the common position emerging in the Conference. Issues addressed in the conclusions can range from the Conference's stance on the EU neighborhood policy and prospective accessions to the UK withdrawal from the EU and the development of EU military capabilities and of a defence capacity.[VI] These are viewed from a parliamentary perspective; namely, in terms of the contribution that parliaments can make on the issue at stake and, with this regard, the conclusions are formulated in terms of guidelines and directions. Speakers are allowed to express their own opinions and to make it clear that the conclusions were not accepted by the Conference as a whole:[VII] should dissenting positions emerge they can be made explicit in the conclusions, typically through footnotes.

Ad hoc working groups, established on only a few occasions, can be set up to look after specific issues – for instance the quality of legislation. These only remain in operation for a limited, and pre-determined, period, so that these share no similarity to structured committee systems, with a specialisation by subject-matter, found in the EP and national parliaments. Thus, it is clear that the Conference is not a permanent body, i.e. it is not summoned or in session beyond its yearly meeting, nor does a permanent secretariat exist, and has limited decision-making capacity given the consensus rule, its internal organisation and the frequency of its meetings.

3. Weaknesses (and strengths) of the Conference's composition

Other limitations to the decision-making capacity of the Conference derive from EU and national constitutional law. Indeed, there are constitutional constraints that restrict what the Speakers and the European Parliament's President can actually do. Those limits are fixed at the domestic level, and in principle cannot be overcome when they act in the Conference at the supranational level. In other words, the way these Speakers can perform their tasks in the EU is inevitably shaped by the institutional standing and power enjoyed in their respective constitutional systems (Longo 2014: 367-374). Indeed, this principle is

expressly acknowledged by the Conference's Guidelines, in Article 1(2): 'The activities of the Conference respect the autonomy and the constitutional position of each participating Speaker'. This provision is further emphasised in Article 2, where the objectives of the Conference are listed, and it is specified that their fulfilment cannot violate the different powers vested in its members.

When looking at the constitutional status of the Speakers and the President, as anticipated in the introduction, two main models are used, that of Speakers actively involved in politics and in political decisions, like in France or Germany, and the Speakers who aspire to be neutral and independent from party affiliation, such as in the UK.

In the two Houses of the French Parliament, for example, the Speakers are prominent politicians who are certainly expected to apply the rules of procedure and standing orders impartially, but undoubtedly pursue the interest of the majority and are allowed to vote without special restrictions (Martin 1996; Avril, Gicquel and Gicquel 2014: 70ff.).

In Germany, the Speaker of the Bundestag traditionally is not a *super partes* actor either, and is typically elected amongst prominent politicians and former Ministers. Just to provide an example, the Speaker of the Bundestag elected in the 19th parliamentary term, started in 2017, is Wolfgang Schäuble, the former powerful Minister of Finance of the German Federation. Less significant, from a political point of view, is the position of the President of the Bundesrat, in light of the intergovernmental composition of this Upper House where the executives of the Länder are represented and where each delegation casts a block vote, weighted according to the size of the Land's population. According to the German Constitutional Tribunal, when presiding over a ballot the President of the Bundesrat can only try to bring about a clarification on the results of the vote and work towards making the vote effective, but has 'no right to strive to achieve a uniform vote [in a delegation] by means of measures he took as chairperson of the session'.[VIII] Indeed, it cannot be denied that in bicameral legislatures, the case of 13 out of 28 of EU national parliaments, a further diversification may occur at the national level between the two Houses,[IX] where, in the light of their composition and powers, the two Speakers enjoy a different constitutional standing and autonomy. By contrast, the Speaker in the UK House of Commons is deemed to be an impartial arbiter of parliamentary proceedings, and cannot vote or take a stance in parliamentary and political debates in general – although sometimes the practice departs from this constitutional convention – and when running for the next Parliament the

election of the Speaker is (customarily) uncontested (with no other mainstream party fielding candidates) in her/his constituency (Torre 2000; Russell and Gover 2017: 151-152). In the Nordic countries the style of the parliamentary Speakership resembles the UK model much more than the French case (Iacometti 2001).

However, it appears that in the EU most parliaments have turned towards the French-German model of the politically active Speaker, as shown in most Eastern European countries and in Italy, possibly also as a consequence of their more frequent involvement in EU and foreign affairs, including the EU Speakers' Conference. The case of the Italian Speakers confirms this trend, in particular in the last few years: although they do not usually vote in parliament, they have considerable political (constitutional) influence and are not expected to be *super partes* (Manzella 1997: 110; Ibrido 2015: 180-193). In Italy, a constitutional convention has gradually become established that provides for the Speakers of either House, but most likely of the Chamber of Deputies, to be elected from among opposition MPs (1976–92) and, more recently (1994–2018), from among MPs elected within the second ranking party of the winning majority coalition, while the President of the Senate comes from the main ruling party of the governmental coalition.[X] In other words, the Italian Speaker's political role has definitely increased (Lupo 2010; Gianfrancesco, Lupo and Rivosecchi (eds) 2014) up to the point that towards the end of the 17th parliamentary term (2013-2018), the then Speaker of the Senate, Pietro Grasso, left the group and the party on whose lists he had been elected and announced the creation of a new political party, 'Liberi e Uguali', that would campaign for the next political election under his leadership and with the Speaker of the other House, the Chamber of Deputies, Laura Boldrini, joining the same party as a candidate.

In the EU, the President of the European Parliament, whose mandate lasts only half of the parliamentary term – hence two and a half years – is usually elected based on a political compromise between the two major European political groups, the socialists (S&D) and those of the people's party (PPE), depending on the context, with or without the support of the liberals (ALDE). While the President enjoys great visibility outside the European Parliament in the relationship with the other EU institutions and the media, inside the Parliament his role is rather weak and is overlooked by the decisions of political groups and the Conference of Groups' Chairpersons (Costa 2013: 143-162; Gianniti and Lupo 2016: 144-160).

The ability of parliamentary delegations to bind their own parliaments, through the position they adopt within inter-parliamentary conferences, is always problematic, according to whether a prior 'mandate' has been voted by the parliament to direct the delegation (which happens in few cases) or not. Normally, this 'mandate' could by no means be equated to that approved in some parliaments, like the Danish Folketing, towards their governments – i.e. there are no real accountability mechanisms among MPs, nor could their deviation from instructions be sanctioned. However, from time to time a committee competent on the subject-matter, or the plenary as a whole, expresses a certain stance on an issue to be discussed later on within an inter-parliamentary venue. For example, plenary votes or votes within the EU or constitutional affairs committees to instruct and direct the activity of national parliamentary delegations took place at the time of the Conventions on the Charter of fundamental rights and on the future of Europe, and in the European, German and Italian parliaments' committees prior to COSAC's meetings (Fasone 2009: 194-212).

Even more challenging, from a constitutional point of view, is the case of Speakers within the EU Speakers' Conference. Not only do many of them have a degree of autonomy within their parliament that prevents other MPs telling the Speaker what to do, but besides this, where Speakers are considered as *super partes* arbiters under constitutional law, they cannot take a political stance abroad, i.e. voting within the EU Speakers' Conference, that would result in a binding decision at the national level. In fact, the conclusions prepared by the Presidency of the Conference following the meeting are solely aimed at the disclosure of the content of the debates; they are by no means binding on individual parliaments (Article 5 of the Guidelines).[XI] Moreover, taking into account the fact that many Speakers do not cast votes in their own parliament, any decision in the Conference (for example, declarations) is adopted by consensus (Article 1(4) of the Guidelines).[XII]

Interestingly, and consistently with the *sui generis* status of the Speakers and the European Parliament's President compared to ordinary MPs and MEPs as discussed above, the EU Speakers' Conference is devoid of 'standing orders' or 'rules of procedure'. It is, more exactly, based on very generic 'Guidelines', equally passed and amended by consensus, that only provide guidance for the Conference organisation and procedure so as not to legally constrain their members (Esposito 2014: 157-159).

All these features of the Conference, that are dependent on the special status of the Speakers, i.e. lack of binding determinations, of standing orders and of decision-making rules going beyond consensus, amount to a brake on further development of inter-parliamentary cooperation among the Speakers. In particular, they do not allow the politicisation of the debate in the Conference and, hence, do not help to fill the gap of the democratic disconnect between the national and the European levels of government and the citizens (Bellamy and Kröger 2016: 125-130 drawing on Lindseth's theory of democratic disconnect, see Lindseth 2010: 31). The remarkable differences between the Speakers and the President participating in the EU Speakers' Conference, in terms of their functions and autonomy in their own domestic sphere, also limit the Conference's leading role in inter-parliamentary cooperation in the EU and its ability to influence inter-institutional relations in the EU's system of government. Although the Conference might seem to be the perfect candidate to undertake this role, being composed of the highest authority in each parliament of the EU, the constitutional variation between the Speakers' institutional positions, coupled with the lack of decision-making powers outside their parliament, constitute a brake on the Conference's proper performance of this task.

Despite these problematic features of the Conference, however, there are also several elements that give it considerable influence both on the individual legislatures and on inter-parliamentary cooperation in general, as shown in section 4. Indeed, it cannot be neglected that if, on the one hand, domestic rules on the speakership condition the functioning of the Conference; on the other hand, this Conference, with its debates and documents (conclusions and declarations) adopted, affects the status a Speaker is accorded in her jurisdiction by making her inevitably less *super partes* and more political, even in the case of the Speaker of the UK House Commons.[XIII] So that a sort of two-way influence, between the style of speakership and activities of the EU Speakers' Conference, can start to be detected. National rules and practices concerning the role of Speakers affect the way in which the Conference performs its role; at the same time, however, participation in the Conference has contributed to reshaping the nature and place of Speakers at the domestic level. Indeed, the Conference is also an important vehicle of socialisation among Speakers about their activity at the domestic level and engenders a sort of mimesis of their role, looking for best practices and, most of all, for strengthening individual positions. The reinforcement of the Speakers' political position in their own country as a result of

Conference membership is triggered by the fact that in this venue they are the only 'representatives' of their parliament or chamber and they enjoy a considerable autonomy on the supranational stage, which in turn leads to their more visible politicisation nationally.

Moreover, as briefly mentioned above, members of this Conference stand at the apex of the hierarchical structure of their parliament or chamber and this feature provides the EU Speakers' Conference with an institutional legitimation than all other inter-parliamentary venues probably lack. Indeed, national Speakers and Presidents lead parliamentary administrations and procedures and, thus, there is no higher authority beyond them in their own institutions and, likewise, in the development of inter-parliamentary cooperation.

A third strength of the EU Speakers' Conference is its relatively homogeneous composition. Indeed, Speakers and Presidents of parliaments, with few exceptions linked to changes of the party system and of electoral legislation, are typically well-experienced politicians, with a notable *cursus honorum* and political influence on party members and often with an international standing or, at least, with some knowledge of EU institutions and of the dynamic in foreign affairs. This implies that, although the legal constraints to which they are subject are different, as highlighted above, the political profile of Speakers are similar across EU Member States, thereby favouring the consolidation of a close and cohesive community of politicians with comparable interests and background.

Finally, a fourth strength of the Conference is its small size: in a comparative perspective, no other inter-parliamentary conference or venue in the EU is composed of just 42 members, i.e. the Speakers of the 15 unicameral and 13 bicameral parliaments in the EU plus the President of the European Parliament, unless it gathers together the representatives of some national legislatures only (Fromage 2016). The limited dimension of the EU Speakers' Conference, and thanks to the crucial support of the parliamentary Secretaries Generals meeting every year before the Speakers' Conference, allows it to work much more productively, focussing on the points on the agenda so as to reach a common conclusion, than the plethoric sectoral inter-parliamentary conferences of over one hundred MPs recently established.

To conclude on the assessment of the strengths of the Speakers' Conference, along with the significance of its peculiar memberships, the relatively homogeneous composition

and small size of the Conference are further elements that have made this body work relatively effectively compared to plethoric forums like the Interparliamentary Conference on CFSP and CDSP and the Conference on stability, economic coordination and governance.

4. The 'quasi-constitutional', though controversial, role of the EU Speakers' Conference

The 'quasi-constitutional role' taken up by the EU Speakers Conference in ruling the (dis)order of inter-parliamentary cooperation (Cooper 2017: 236), has, for some time at least, been driven by, among other things, the persistent disagreement between the European Parliament and national parliaments and amongst national parliaments on the design, organisation, scope of action and powers of the Interparliamentary Conference of CFSP and CDSP (Raube and Fonk 2018, in this Special Issue) and of the Conference on Stability, Economic Coordination and Governance of the EU (Kreilinger 2018, in this Special Issue). The clearest way through which the leadership of the EU Speakers' Conference on inter-parliamentary cooperation has manifested itself is by means of the influence exerted on the rules of procedure of new inter-parliamentary conferences.

In the case of the Interparliamentary Conference on CFSP-CDSP, the new body was set up following decisions taken at the EU Speakers' Conference in Brussels, 4–5 April 2011, and in Warsaw, on 20–21 April 2012. In the meeting of 2011 the Speakers had diverging views on some aspects of the new conference, like the size of the delegations, but did establish principles regarding, for example, the frequency of the conference's meetings, its decision-making rules, the Presidency, and the role of the High Representative for Foreign Affairs and Security Policy. Those principles were defined in the conclusions of the EU Speakers' Conference's Presidency as rules by which the new Interparliamentary Conference had to abide in adopting the rules of procedure and working methods. One year later, and as the Interparliamentary Conference for CFSP-CDSP had yet to hold its first meeting (which eventually took place in Nicosia in September 2012), the EU Speakers' Conference convened in Warsaw and supplemented those principles, by eventually defining the composition of the delegations and the arrangements for the secretariat. Furthermore, the Speakers' Conference recommended that the future CFSP-CDSP

Conference carry out a review of those principles and rules subsequently adopted, after two years, and to submit the results of such review (again) to the Speakers. The first meeting of the new inter-parliamentary conference, held a few months later, strictly followed the principles set out by the Speakers' Conference and entrenched two provisions in the rules of procedure that enhanced the rule-making authority of the Speakers. Article 8(2) affirmed that any amendment to those rules 'must be in accordance with the framework set out by the Conference of Speakers of the EU Parliaments' and Article 9 assigned to the EU Speakers' Conference the final say over the recommendations adopted within 18 months by the ad hoc review committee on the rules of procedure.

When the review took place, however, the final decision on updating and amending the rules of procedure was taken by the Interparliamentary Conference on CFSP-CDSP itself, at its meeting in Rome on 6–7 November 2014; a decision that was later on also endorsed by the EU Speakers' Conference in Rome, on 20–21 April 2015.

The fact that the new inter-parliamentary conference regained jurisdiction over its own rule-making demonstrates that this body enjoys autonomy and is able to make the choices that are more consistent with the features of the peculiar field in which it is called upon to operate and that it aims to scrutinise. The EU Speakers' Conference can help to coordinate the activity of the Interparliamentary Conference on CFSP-CDSP with the remaining inter-parliamentary activities of the Union,[XIV] but, from a normative point of view, it may not be appropriate that the Speakers 'usurp' members of the sectoral conference by ruling on its organisation and functioning years after its initial establishment.

The setting up of the Interparliamentary Conference on Stability, Economic Coordination and Governance in the EU has proved to be even more controversial.[XV] Its first meeting took place in Vilnius in October 2013 and since then the Conference has been unable to adopt its rules of procedure, causing a series of spillover effects on the performance of this body, lacking any basic standards for its operation. Because of the gridlock, the EU Speakers' Conference stepped in to try to address the problem of the delay in the adoption of the rules of procedure.[XVI] The Italian Parliament, holding the Presidency in the second half of 2014, proposed its own draft rules at the Interparliamentary Conference on Stability, Economic Coordination and Governance in the EU of October 2014, and, following the amendments submitted by other legislatures, prepared a compromise text in December 2014. At the EU Speakers' Conference in April

2015 the revised draft rules were expected to be finally adopted, since they could count on the support of the European Parliament, the French and the German Parliaments, among others. However, other parliaments – for instance, the UK, Polish and the Dutch – stood against the approval of the new conference's rules of procedure by the EU Speakers' Conference, which would have required the consensus of all the Speakers. They objected that the Speakers' Conference would have acted beyond its mandate, if it had adopted the rules of another conference. The debate on whether to defer the decision to the next Interparliamentary Conference on Stability, Economic Coordination and Governance in the EU entailed a reflection on the right balance to strike between the rule-making function of the Speakers' Conference and the sectoral inter-parliamentary conferences' autonomy; in the end the latter prevailed. In line with the conclusions of the Speakers reached in 2011 and 2012 on the Interparliamentary Conference for CFSP and CDSP, the Speakers' Conference in Rome only agreed on a set of principles to 'be transposed in detailed Rules of procedure by the next Interparliamentary Conference on Stability, Economic Coordination and Governance in the EU', as in fact happened in Luxembourg on 9-10 November 2015.[XVII] The Speakers addressed issues such as the participating parliaments (from all the Member States and not just the contracting parties of the Fiscal Compact), the focus of the Conference, the timing and the linguistic regimes, but they did not touch upon the most debated questions of the size of the delegations and the relationship between the European Parliament and the national parliaments in the new forum.

The fact that the EU Speakers' Conference is now managing with care its rule-making powers vis-à-vis other inter-parliamentary venues was confirmed by the Conclusions of the Conference of 22-24 May 2016 in Luxembourg[XVIII] and of the Conference of 23-25 April 2017 in Bratislava as pertaining to the Joint Parliamentary Scrutiny Group on Europol – JPSG (Annex I to the general Conclusions).[XIX] In fact, there were no other alternative legal options. The Europol JPSG is already regulated in part by EU legislation, Regulation 2016/794 of 11 May 2016 concerning the European Union Agency for Law Enforcement Cooperation (Europol), so the EU Speakers' Conference could not alter its mandate and powers, in particular its prospective nature of a scrutiny and monitoring body as well as the chosen format, initially in opposition to the Conference model. The Speakers' Conference's recommendation was that the constituent meeting for the Europol JPSG be held as soon as possible (which indeed happened on 9-10 October 2017). As far as the adoption of rules

of procedure is concerned, the Speakers' Conference gave some guidelines for its setting up: for example, on the maximum size of a national delegation (4 members), with up to two members per Chamber in case of bicameral legislatures, and the size of the European Parliament's delegation (up to 16 members); the joint presidency; and the frequency of the meetings, at least twice a year.

In light of the amendments proposed, in particular by the French and German Parliaments, to establish an ad hoc secretariat, create the Troika presidency and enhance the scrutiny powers of the Group, the JPSC, in its meeting in Sofia on 18-19 March 2018 adopted, first of all in compliance with the EU Regulation, its detailed rules of procedure.[xx] According to Article 6.2, these rules will be subject to review after two years, in line with the recommendations of the EU Speakers' Conference of Bratislava in 2017, and the Presidency of the EU Speakers Conference will be informed about the outcome of the review. Indeed, in the rules of procedure the Conclusions of the 2017 EU Speakers' Conference of Bratislava are regarded as a point of reference and as a standard with which to comply, although it does not appear that, despite high expectations (Griglio 2016; Kreilinger 2017), the JPSG will be shaped in a radically different manner compared to sectoral inter-parliamentary conferences (Fromage 2017). Here, the directions provided by the EU Speakers' Conference on the setting up of the JPSG seem to have decisively conditioned the future shape of this inter-parliamentary venue in a way that is consistent with the standard configuration of the sectoral conferences, the (partial) regulation of which the Speakers had already contributed. In other words, and despite the legal framework provided by EU Regulation 2016/794 on the JPSG, over the years the EU Speakers' Conference may have triggered a sort of 'harmonisation' of the configuration of inter-parliamentary forums in the EU, lacking a strong autonomous ability of these forums to independently define their structure, composition and activity.

5. The (unsatisfactory) alternatives to the leadership of the EU Speakers' Conference

Having examined the current state of affairs of the EU Speakers' Conference and at its 'quasi-constitutional' role in inter-parliamentary cooperation – its limited impact on the side of the coordination and of the joint parliamentary scrutiny in the EU, but the

significant, though controversial, rule-making and function over the other inter-parliamentary venues – it appears worth exploring if there are any real alternatives to the leadership of this Conference, both from a practical and a normative perspective, i.e. what is the appeal of other options.

First of all, neither the European Parliament nor the Parliament of the Member State holding the six-month presidency of the EU can individually play the coordinating role of the EU Speakers' Conference, both from a legal and from a political point of view.[XXI] From a legal point of view, the exclusive leadership of the European Parliament or of a national parliament (on a rotating basis) would contravene the prescription of Article 9, Protocol 1, which demands the co-determination of inter-parliamentary cooperation by the European and national parliaments. From a political point of view, the monopoly of coordination of inter-parliamentary cooperation, either by the European Parliament or by a national parliament acting autonomously, would be politically unsustainable as national parliaments would never accept the exclusive leadership of the European Parliament and the European Parliament that of national parliaments.

Second, the Conference of the Parliamentary committees on EU affairs (COSAC), once the best candidate to fit this purpose, in principle, according to Article 10, Protocol 1, would then be the main competitor of the EU Speakers' Conference in taking the lead in the coordination of inter-parliamentary cooperation in the EU; for both conferences are generalist inter-parliamentary bodies, i.e. they do not have a sectoral-policy oriented specialisation. Indeed, COSAC shall promote the exchange of information and best practices between national parliaments and the European Parliament and may organise inter-parliamentary conferences on specific topics, in particular CFSP and CDSP (Dias Pinheiro 2018, in this Special Issue). However, a 'catch-all policies venue' like COSAC, devoid of the former coordinating function on the early warning mechanism, has suffered an identity crisis from which it has not yet been able to recover (Cygan 2016; Van Keulen 2016). This has come about as a result of the strengthening of the process of European integration on many (new) policies, increasing specialisation by policy domain and the need to carry out an effective scrutiny especially in areas of shared competence (Article 4 TFEU), and fields where the EU supports, coordinates and supplements the action of the Member States (Articles 5 and 6 TFEU). Therefore, the legal basis for the setting up of new inter-parliamentary conferences has been article 9 rather than article 10 of Protocol 1,

which has further undermined the authority and prestige COSAC once enjoyed. Indeed, article 10 set out the COSAC model of inter-parliamentary cooperation, based on the participation of the European Parliament on an equal footing with national parliaments and on overcoming the strict enforcement of consensus formation and of the unanimity rule of decision-making. However, in contrast, article 9 is a more flexible legal basis only requiring national parliaments and the European Parliament to jointly determine the organisation and the promotion of effective and regular inter-parliamentary cooperation in the Union. The choice of Article 9 for the new conferences therefore strengthens the power of the European Parliament, and ultimately undermines COSAC's design and procedures as a model of inter-parliamentary cooperation.

Third, the two sectoral inter-parliamentary conferences already established, given their limited scope of action on certain policies, are not placed in the best position to play a coordinating role among the many venues and forums of inter-parliamentary cooperation.

Finally, an interesting proposal put forward recently seems to suggest that perhaps there is no need to have a sole and final authority to rule the developments of inter-parliamentary cooperation. Rather, the 'order' of inter-parliamentary cooperation relies on the internal rationalisation of the three main stances of cooperation in the EU, namely: the two inter-parliamentary conferences and the Joint Parliamentary Scrutiny Group thus far set up according to a functional specialisation; the EU Speakers' Conference; and the 'Parliamentary dimension' of the Council Presidency (Cooper 2017: 243-245). To these dimensions a third can be added as a complement: the 'hidden' coordinating role of the European Parliament. This has emerged in several instances of cooperation, from the experience of the European Assizes of 1990 to those of the two Conventions, on the Charter of fundamental rights (1999-2000) and on the future of Europe (2002-2003) (Pinelli 2016) and, more recently, the organisation of joint committee meetings; however, it has not always been well tolerated by national parliaments (Fasone and Lupo 2016: 349-351). Indeed, the European Parliament alone, as said above, could never monopolise the coordination of inter-parliamentary cooperation in the Union, should its mode of election and composition remain unaltered. It suffers from the distrust of national parliaments (and governments), it is also one of the many subjects of inter-parliamentary cooperation, and is a member of the EU Speakers' Conference, so its potential leadership could trigger a sort of 'conflict of interests' (should it become, at the same time, a member and the leader of

this cooperation). Its further strengthening in this domain would be understood through a conception of inter-parliamentary cooperation as dominated by the EU level of government and, possibly, inspired by a federalist view on the direction the European integration process should take, which does not appear close to reality today. The persistent lack of a uniform electoral procedure for the European Parliament and concrete avenues for further differentiation within the EU (Leruth, Gänzle and Trondal 2017) do not reinforce the position of this institution in the complex picture of inter-parliamentary cooperation either.

6. Conclusion

Year on year, since the entry into force of the Lisbon Treaty, the EU Speakers' Conference has taken up and been able to strengthen its 'quasi-constitutional' role in inter-parliamentary cooperation, a role that aspires to settle a well-ordered and stable development of inter-parliamentary activities in the EU. It appears that there is no effective alternative to this role sitting with the EU Speakers' Conference, especially looking at the other options at stake, and despite the potentiality of the European Parliament and COSAC in particular.

Playing a 'quasi-constitutional' role in inter-parliamentary cooperation, however, as the most recent experience of the EU Speakers' Conference reveals, should not only mean its extensive exercise of a rule-making function towards other inter-parliamentary venues, not least as not all inter-parliamentary forums are alike. Indeed, the Europol JPSG was expected to be established according to a competing model compared to the existing conferences – although this has probably not happened in practice – and finds its legal basis in a purely EU law source, in contrast, for example, to the Interparliamentary Conference on Stability, Economic Coordination and Governance in the EU. In fact, a wide use of the rule-making function by the Speakers' Conference runs against the very nature of this forum, where many of its members enjoy a special constitutional autonomy and are forbidden to bind their own parliaments when acting inside the Conference. That means that the EU Speakers' Conference cannot do much more than issue guidelines for the adoption of rules of procedures and make them subject to (light) review.

The coordinating activity of the EU Speakers' Conference should, by contrast, be strengthened. Coordination was the founding function of this Conference when it was established, in a context in which very little inter-parliamentary cooperation was in place. Thus, a renewal of the coordinating function of the EU Speakers' Conference should primarily consist of easing the contacts and the relationships between the many EU inter-parliamentary venues, in terms of timing of meetings, consistency of the respective agendas and *ex-post* supervision of the results. With this regard, a closer collaboration with the other main 'agents' of inter-parliamentary cooperation in the EU, such as the European Parliament and the 'Parliamentary dimension' of the Council Presidency, would be beneficial for the rational deployment of inter-parliamentary activities in order to avoid duplication, overlapping and confusion of tasks and activities.

Additionally, although for the reasons described above it is not directly involved in the exercise of joint parliamentary scrutiny in the EU (Griglio and Lupo 2018), the EU Speakers' Conference can indirectly and positively contribute to its fulfilment. Indeed, the closer coordination and collaboration with EU institutions just advocated, with the European Parliament, or with instances of cooperation, like the 'Parliamentary dimension' of the Council Presidency, both key actors in their own domains, of joint parliamentary scrutiny, could help to make this function more effective.

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[I] Article 9, Protocol 1, indeed, can be considered as a weak legal basis for the role taken up by this Conference. The article refers to the co-determination by the European Parliament and national parliaments of the 'organization and promotion of effective and regular interparliamentary cooperation within the Union'.

[II] As described in this paragraph, the 'role' refers to the actual operation of the EU Speakers Conference, while by 'function' it is meant a set of activities and tasks in principle ascribed or conferred to the Conference.

[III] On parliamentary diplomacy as para-diplomacy outside in the EU context see Stavridis 2017: 368-387.

[IV] On the gradual engagement of national parliamentary assemblies with European affairs through the Speakers' Conference, see the Keynote speech given by Elia (1975) and now re-published (2009: 465), alongside the editorial note by Cannizzaro (2009: 457).

[V] See, for example, Conférence informelle des Présidents des Parlements des États Membres et du Parlement Européenne, *La situation actuelle de l'Union européenne et les tâches des Parlements nationaux qui en découlent concernant la democratization et les reformes institutionelles. Rapport de L Lagendries*, 1 December 1998, 11. For an overview of the history of the EU Speakers' Conference and its meetings, see EU Speakers' Conference, *The History of the EU Speakers' Conference*, available at: www.ipex.eu.

[VI] See the Conclusions of the EU Speakers Conference held in Tallin on 23-24 April 2018, available at https://www.parleu2017.ee/sites/default/files/2018-04/Final%20Conclusions%20Conference%20of%20Speakers%20Tallinn.pdf.

[VII] This has been further confirmed by the Conclusions adopted on the occasion of the last meeting of the EU Speakers Conference held in Tallin on 23-24 April 2018, cit., under the 'Preliminary remarks'.

[VIII] See German Constitutional Tribunal, Judgment of the Second Senate of 18 December 2002, 2 BvF 1/02 - Voting procedures in the Bundesrat, 'Immigration Act (Zuwanderungsgesetz) case', § 120 and the commentary by Kommers and Miller 2012: 110-114.
[IX] On this point and, in particular, in relation to the EU, see Romaniello (2015) and Baraggia (2016).
[X] In the XVIIIth term of the Italian Parliament, started in 2018, the representation of the ruling parties and of the opposition by the Speakers of the two Houses has instead been inverted: while the Speaker of the Italian Chamber of Deputies, Roberto Fico, is a representative of the Five Stars Movement, part of the ruling coalition, the President of the Senate, Maria Elisabetta Alberti Casellati, has been elected as a senator of Forza Italia, currently in the opposition. At the moment of the election of the two Speakers, on 24 March 2018, however, the political situation was very blurred and the formation of the new government yet to come.
[XI] The conclusions are drafted in such a way as to ascribe them to the individual Speakers rather than to the Conference as a whole.
[XII] The only exception is represented by the decision to convene an extraordinary meeting of the Conference, to be proposed by one of the Speakers and to be seconded by two-thirds majority of the members (Art 3(6) of the Guidelines). Under Art 5(2) of the Guidelines, any member of the Conference is entitled to disclose their disagreement with the position endorsed by the majority of the Conference and should state clearly that that opinion has not been confirmed by the Conference as a whole. An interesting case of 'dissenting opinion' emerged in the aftermath of the EU Speakers' Conference held in Rome on 20–21 April 2015. The Speaker of the Hungarian National Assembly sent a letter to the Speakers of the Italian Chamber of Deputies and Senate contesting the fact that the conclusions of the Conference had been really adopted by consensus, according to the Conference's Guidelines. In particular this Speaker objected to the allegation contained in the conclusions addressed against Hungary of the violation of fundamental rights.
[XIII] For example, during the current speakership of Hon. John Bercow (2009-), on which see Torre (2013).
[XIV] An actual problem of coordination lies in the fact that while the Presidency of the EU Speakers' Conference is assigned to the parliament of the Member State holding the EU Presidency in the second half of the calendar year, the organisation of the new interparliamentary conference, every six months, mirrors the rotating Presidency of the EU.
[XV] The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union entered into force on 1 January 2013. Next to this Treaty, the EU legal basis for the creation of the Conference has been acknowledged in Article 9, Protocol 1, annexed to the Treaty of Lisbon. What triggered discussion was also the prospective position of the Parliaments from the non-contracting parties of the Treaty within the Conference, namely, the Czech Republic and the UK. See, at length, Kreilinger (2015 and 2018) and Cooper (2016).
[XVI] After the first meeting, three more meetings of the Interparliamentary Conference on Stability, Economic Coordination and Governance in the EU were organised under the Greek and Italian Presidencies in 2014 and the Latvian Presidency in 2015 without the rules of procedure being adopted.
[XVII] See EU Speakers' Conference, 'Conclusions of the Presidency', Rome, 20–21 April 2015, 5, available at: www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc54a393144014a4d75e8690dec. See also the Rules of procedure of the Interparliamentary Conference on Stability, Economic Coordination and Governance in the European Union available at: http://www.ipex.eu/IPEXL-WEB/conference/getconference.do?type=082dbcc5420d8f480142510d09574e02. Interestingly Article 7(2) of the Rules of procedure of this Conference mirrors Article 8(2) of the Interparliamentary Conference for CFSP and CDSP's Rules of Procedure, since, as strongly requested by the European Parliament at the meeting in Luxembourg in November 2015, it provides that any amendments to these new Rules 'must be in accordance with the framework set by' the EU Speakers' Conference.
[XVIII] The Conclusions are available here: http://www.ipex.eu/IPEXL-WEB/conference/getconference.do?id=082dbcc54d8d4eaf014d9095cb270339
[XIX] The Conclusions and their Annex I are available here: http://www.ipex.eu/IPEXL-WEB/conference/getconference.do?id=082dbcc55898c90b01589abbb37500fa
[XX] The Rules of procedures of the Joint Parliamentary Scrutiny Group on Europol are available here: https://www.senato.it/application/xmanager/projects/leg18/file/RoP%20adopted%20Sofia%20JPSG_19032018.pdf
[XXI] Despite the growing number of interparliamentary meetings promoted in the framework of the 'parliamentary dimension' of the Council Presidency: see Cooper (2017: 243-245).

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The Contribution of COSAC to Joint Parliamentary Scrutiny in the EU: A Practitioner's View

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

COSAC has played an active role in fostering and developing interparliamentary cooperation since it has proven to be an effective model that has helped shape a supranational layer of influence for NPs. The central question addressed here is to assess whether COSAC is currently structured to allow NPs to obtain more information and access to the policy and decision-making circuits at EU level and, therefore, if NPs are benefiting from COSAC or are they, on the contrary, lagging behind and lost amidst so many interparliamentary meetings?

It is argued that COSAC occupies a key role in the multipolarised system of interparliamentary cooperation, because it is the conference with the "*global picture*" and therefore in a unique position to bring coherence to the overall system. This paper therefore aims at putting forward some ideas and approaches regarding the role of COSAC in the effectiveness of interparliamentary cooperation, covering not only its present proceedings and output, but also some thoughts for further reflection on the future strengthening of COSAC.

Key-words

COSAC, interparliamentary cooperation, interparliamentary conferences, multipolarised system, COSAC reform, effectiveness in scrutiny of EU affairs, COSAC Secretariat

1. Introduction

Exactly ten years have passed since the Treaty of Lisbon was signed at the Jerónimo's monastery in the Portuguese capital, enshrining, for the first time in European Union (EU) integration, the acknowledgement of the active role and involvement of national Parliaments (NPs) in EU affairs.[I] For decades, the European Treaties neither regulated, nor envisaged, any substantive relations between NPs and the European Community/European Union institutions. Their role in EU affairs was therefore largely overlooked and considered only as far as its domestic/national dimension was concerned.

The Conference of Parliamentary Committees for Union Affairs of the Parliaments of the European Union (COSAC) has played an active role in developing the effectiveness of inter-parliamentary cooperation for it has – as we attempt to demonstrate – proved to be an effective model and, to some extent, a pioneer in inter-parliamentary cooperation, playing a decisive role in mainstreaming the importance of NPs as actors that possess certain democratic qualities and responsibilities, including the maintenance of popular legitimacy, and the scrutiny of executive power in EU affairs.

This essay is written by a practitioner and a direct observer of these phenomena for exactly ten years, which almost coincides with the moment when the Treaty of Lisbon was brought to life. This has allowed me the privilege of witnessing its entry into legal force and its operative implementation, its interpretation and the changes it produced and induced in the behaviour of a number of players in the EU institutional system, in particular NPs.[II]

Thus, the approach taken is mostly empirical and heuristic, i.e. a standard technique based on professional experience to promote and develop a more in-depth knowledge of a scientific area, oriented towards problem-solving and the identification of new patterns of behaviour of the institutional actors who operate in this environment, i.e., NPs. From a theoretical perspective, a 'broader neo-institutionalist' approach is used, assuming that *'institutions are not neutral containers fulfilling certain functional needs, but interact with, and are subject to, the behaviour of individuals working with and through them'* (Auel and Christiansen 2015: 264).

Finally, and as far as the structure of this contribution is concerned, after this introduction, a general overview of inter-parliamentary cooperation at COSAC is presented, trying to identify the main trends that have developed since the Treaty of Lisbon entered

into force. The third section is a critical evaluation of COSAC, its main achievements and current challenges. The fourth section of this contribution aims at a prospective exercise to question the place, the role and the importance that COSAC may have in inter-parliamentary cooperation. Finally, some conclusions are drawn, which also aim towards further reflection.

2. Inter-parliamentary Cooperation at COSAC: General Remarks

The role of NPs in the EU has fostered a lengthy debate at the political and institutional level and has drawn a remarkable degree of attention from the academic community, in both cases focusing the discussions on the way NPs are perceived by other actors (institutional players and academics), and less on how those parliaments (or those involved in their proceedings) see themselves.

Inter-parliamentary cooperation can be defined as a web of meetings and conferences, gathering different people at different levels (Speakers, Committees of EU Affairs, Sectoral Committees, Chairpersons), in different timeframes (annually for the Speakers' Conference, every six months for COSAC, CFSP/CSDP, EUROPOL and Economic and Financial Governance, randomly for any other format) to discuss different issues (strategic issues, European semester, topics relevant for the EP, matters of concern for NPs), without necessarily ensuring continuity and coherence along the multiple and heterogeneous lines that compose this web (Dias Pinheiro 2017).

COSAC, on its side, was established at a meeting in 16-17 November 1989 in Paris, on the initiative of Laurent FABIUS, Speaker of the French Assemblée Nationale. Fabius proposed, at the Conference of EU Speakers held in Madrid in May 1989, the creation of an inter-parliamentary body composed of members of national parliaments specialised in European affairs. Up until the first direct elections to the European Parliament (EP) in 1979, delegations to the EP were appointed by national parliaments, and parliamentarians could at the same time be members of a national parliament and the EP. The establishment of such a body was meant to re-establish the ownership of EU affairs by Parliaments, by enabling a regular exchange of information, best practices and views on European Union matters between European Affairs Committees of NPs and the EP.

COSAC holds plenary meetings every semester, preceded by a preparatory meeting of the Chairpersons of all NP EU Affairs Committees; it is the only inter-parliamentary forum mentioned in the Treaties, in Article 10 of Protocol 1 of the Treaty of Lisbon.

In fact, COSAC was formally recognised in a Protocol on the Role of National Parliaments in the European Union of the Treaty of Amsterdam, signed in June 1997. As mentioned above, and according to Article 10 of Protocol (No 1) on the Role of National Parliaments in the European Union of the Treaty of Lisbon, COSAC *'may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. The Conference shall in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy.'*

In terms of composition, each national Parliament can be represented by a maximum of six Members of its Committee for Union Affairs, and the EP also has a delegation of six Members. Moreover, three members of the Parliaments of each candidate country can be invited as observers.

Therefore, the central question we aim to answer in this paper is to assess is how NPs can increase the critical level of cooperation at COSAC, needed to address the challenges they face in their daily activity of scrutiny of EU affairs: Is inter-parliamentary cooperation at this Conference currently configured to allow NPs to obtain more information and access to the policy and decision-making circuits at EU level? Are NPs benefiting from COSAC or are they, on the contrary, lagging behind and lost amidst so many meetings?

In order to find an adequate reply to these questions, the author has developed elsewhere a taxonomy of the current range of meetings in the context of inter-parliamentary cooperation and tries to measure the influence that national parliaments exert in each one of them (Dias Pinheiro 2017: 95-102). For the sake of comparison, the most relevant examples of meetings that currently take place were chosen, leaving aside ongoing developments (e.g. the establishment of the Joint Parliament Scrutiny Group on EUROPOL), and choosing certain criteria (legal or political basis, existence of Rules of Procedure (RoP), agenda-setting, secretariat, composition and adoption of conclusions) that allow conclusions to be drawn on the added-value and influence of national parliaments in scrutiny of EU affairs. The

perspective adopted here considers that the influence that can be played by national parliaments stems from four main factors:

i) the Chairmanship and the place where the meeting is held;

ii) who takes the lead in the setting of the agenda;

iii) who provides the Secretariat, and

iv) the possibility of adopting conclusions or contributions, including the voting arrangements for this purpose.

To a lesser extent, the composition of delegations is also important, for two reasons:

i) if voting is involved, an adequate balance and compromise has to be found. In this context, COSAC is a fairly good example, because national parliaments and the EP are on equal footing in terms of delegations (six Members each), which has been deemed appropriate given the scope and mission of COSAC. If the adoption of any decision is made by consensus, numbers are less relevant in that a small number of parliaments is enough to block any decision;

ii) speaking time, because the larger the delegations, the less time is available for debate.

Concerning the place of COSAC in this matrix, the conclusion is that the Conference is the locale where the influence of NPs can be considered as relatively high, for the following reasons: the national Parliament who holds the Presidency has considerable room for manoeuvre in defining the agenda, i.e. topics and guests, and conducting the debates. Moreover, the Presidency is assisted by the COSAC Secretariat in all its tasks, which performs its duties under the political responsibility of the COSAC Presidency and the Presidential Troika, which comprises the three NPs of the trio and the EP, in each semester. The COSAC Secretariat, where NPs are preponderant, is the only Permanent Secretariat in inter-parliamentary cooperation in the EU. The results of its work are of considerable importance to NPs, not only in streamlining the procedures of COSAC itself but also the knowledge-enhancing output it produces (i.e. Bi-annual Reports of COSAC, background documents). Finally, the influence of NPs in COSAC is higher with regard to the Contribution adopted, not only because it is drafted by the Presidency of the Parliament, but also because, if consensus is not reached, a voting procedure follows in which no single delegation can alone block its adoption. Given that the Contribution adopted by COSAC is sent to the EU institutions, which are invited to react to points raised therein, NPs have been using this tool to 'gain access to' certain dossiers, calling for a reply from the institutions.

COSAC therefore occupies a central role in inter-parliamentary cooperation, especially as it is based on a governance model that gives NPs a stronger say in the running of events. As Ian Cooper also concluded in a recent work, concerning the three IPCs (IPCs),[III] *'their relative strength and effectiveness may (...) be measured by three criteria – autonomy, continuity, and decision-making. When assessed in this way, clear differences emerge; COSAC is the strongest of the three'* (Cooper 2017).

Some NPs have taken creative initiatives with the potential to strengthen their role in EU affairs, as evidenced by three 2014 reports from: the *Tweede Kamer*, 'Ahead in Europe: On the role of the Dutch House of Representatives and NPs in the European Union';[IV] the House of Lords, 'The role of NPs in the European Union';[V] or, finally, from the *Folketinget's* EU Committee 'Twenty-three recommendations to strengthen the role of NPs in a changing European governance'.[VI]

New patterns and forms of behaviour have therefore started to emerge from NPs in their adaptation to EU affairs, which might have an impact on the proceedings of COSAC; but how can they take advantage of this development, and the complex framework, to increase the critical level of cooperation needed to address the challenges they face in their daily activity of scrutiny of EU affairs? As Eva Kjaer Hansen, Chairwoman of the EU Committee of the *Folketinget* rightly states in the above-mentioned recommendations from the Folketinget: *'We must reduce these long and inefficient meetings with too many participants, redundant speeches, too little genuine political debate and few ground-breaking decisions'*.

Consequently, COSAC has to be *operational*, i.e. practical and functional, *innovative* (i.e. with the capacity to invent new approaches), and *solution-oriented* (i.e. able to identify obstacles and seek ways to overcome them), exerting an enhanced influence in the overall process of policy- and decision-making at the EU level. In this context, COSAC should be developed and strengthened as a forum where parliaments can use the institutional opportunities it provides to maximise their benefits in the scrutiny of EU affairs, motivated by the possibility of having a policy impact. In a context of asymmetric access to information (Griglio and Lupo 2014), COSAC should offer NPs access to a wide range of sources and interactions that have the potential to enhance the benefits of their involvement in EU affairs.

Against this background, this paper aims at putting forward some ideas and approaches regarding the role of COSAC in the effectiveness of inter-parliamentary cooperation. In fact, and while acknowledging that the Early Warning Mechanism (EWM) is a very important

legal tool available to NPs, for it gives them a specific role in the EU decision-making process, it should not, however, prevent them from engaging in the policy-making process. In fact, the scrutiny of EU affairs by NPs is a dynamic process that encompasses several dimensions beyond the eight-week period dedicated to subsidiarity. For that reason, COSAC also has a role to play in the context of the recent trend that sees a shift in the motivation that drives this cooperation; here we see a gradual movement from a combination of efforts to produce a negative output, by blocking proposals on the basis of a breach of the subsidiarity principle in an EWM-obsessed way, to, more importantly, an active ex ante process proposing new paths and solutions (e.g. the green card, for instance, see below).

Thus, and for the purpose of this essay, it is more prudent to refer to COSAC as the promoter of a set of practices that has contributed to the establishment of a layer of supranational exchange of information, knowledge and ways to perform scrutiny among NPs. This process has allowed them to play a more effective role in the oversight and monitoring of a system of EU governance with increasing features of intergovernmentalism (e.g. the Fiscal Compact, the role of the European Council as an institution, the influence of the Eurogroup, etc), but which also poses new challenges for COSAC in order to be relevant and effective in the system of inter-parliamentary cooperation after the Treaty of Lisbon entered into force.

3. COSAC: Current Challenges and Shortcomings

COSAC should be considered as one of the most important pillars of inter-parliamentary cooperation. In fact, and despite a recent trend to evaluate COSAC in a negative way, emphasising the difficulties it now faces and overlooking its history and importance, COSAC has had an incomparable prominence in the affirmation of NPs within the EU system of governance since the Conference's establishment in 1989. This trend is sometimes unconsciously present, as illustrated by the introductory remarks in Chapter 1 – 'Future of COSAC' of the 21st Bi-annual report, that *'whilst interparliamentary cooperation has been blossoming in importance and a number of significant for a have been created in recent years, it can be argued that COSAC has not evolved significantly'*. Even though the chapter itself subsequently goes in a different, and more positive, direction about COSAC, there is evidence of a certain mindset

at work, in referring to it by considering its recent past only and overlooking its 25 years of history.

The COSAC Secretariat published in January 2014 a historical overview of this Conference which shows that it has been, since its origins, the only forum where, for many years, parliamentarians from all Member-States, the EP and candidate countries could meet to discuss and exchange views and best practice on the most relevant issues of European integration.[VII]

It would suffice to go through the agendas of COSAC meetings to conclude how it has addressed and debated virtually every topic in EU integration, fostering an ownership of the different dossiers by NPs, promoting an exchange of views amongst them on these subjects, and bringing closer the best practice and ways of working of these Parliaments in EU affairs.[VIII]

One clear example of the above is the decisive role played by COSAC in the framework of the constitutional process which began with the European Convention and led to the Treaty of Lisbon. In fact, COSAC followed the proceedings of the Convention both closely and actively, because many parliamentarians participating at COSAC were at the same time representatives of their Parliaments in the Convention, which created a certain synergy between the two. This established a new layer at the EU level, not only because Parliaments were formally associated with the wider EU governance system that was steering the debate and taking the decisions (Convention), but also because it gave unprecedented momentum to cooperation and exchange between them, both at the two working groups at the Convention dedicated to NPs (WG 4) and to Subsidiarity (WG 1), but also in the multiple discussions that took place at COSAC from that moment onwards.[IX]

COSAC has indeed succeeded in fulfilling its mission of 'promoting the exchange of information and best practice between NPs and the EP' stated in its Rules of Procedure (Article 1.2) in several different domains. Together with the valuable *acquis* gathered in the biannual reports, COSAC has enabled Parliaments to enter into and maintain a level of exchange and cooperation amongst themselves that would not exist otherwise. Moreover, its importance is confirmed by that fact that it is explicitly mentioned by the EU Treaties.

Nevertheless, one must always bear in mind that different Parliaments expect different things from their participation in COSAC: some see the Conference playing a more active role, while others give it a lesser and more restrictive responsibility. From an empirical point

view, it would be enough to attend a COSAC plenary and to observe how difficult and controversial it always is to reach agreement between 41 Parliamentary chambers and the EP on the Contribution to be adopted by the Conference.

Observation of the evolution of COSAC, and the impact and influence it has had on the advancement of the work of NPs in EU affairs, makes it clear that it has engendered a learning process among Parliaments over the years. It has provided them with comparative information and practice on how to tackle the challenges of EU integration (e.g., subsidiarity checks) and has been especially helpful in strengthening their capacities to deal with the prerogatives enshrined in the Treaty of Lisbon. Therefore, COSAC has helped to Europeanise NPs,[X] influencing their procedures, institutional behaviours and ownership of EU affairs. It has also assisted them in streamlining their approaches to the difficulties they have been facing in adapting to the changing environment of EU multi-level governance.

On the other hand, and without detriment to the role played by the EU Speakers' Conference, COSAC has been the main forum ensuring institutional continuity and memory, coherence and stability in inter-parliamentary cooperation. To this effect, the set up and development of the COSAC Secretariat (the only permanent secretariat of inter-parliamentary cooperation at EU level) has been an outstanding landmark. It is a unique feature of COSAC and one of its most important working tools, and is of benefit to all NPs and the EP.

However, COSAC faces nowadays many difficulties and challenges. Some argue that '*COSAC has not evolved significantly*',[XI] which brings about unprecedented challenges, both external and internal.

Firstly, other than the EU Speakers' Conference, COSAC had been, until very recently, the only established and structured forum of regular meetings between parliamentarians dealing with the EU. This meant that the scope of the topics COSAC could cover was quite broad, because there was no other meeting point for Members to network and exchange best practice.

Yet, gradually, this scenario has evolved over time:

a) within the framework of the rotating EU Council Presidency, a commonly designated Parliamentary dimension of the Presidency has developed, comprising several meetings of the Chairpersons of the different sectoral Committees of all NPs;

b) the EP has widened its interaction with NPs, namely through Joint Parliamentary Meetings, Joint Committee Meetings, and meetings of corresponding Committees on specific topics;

c) after the entry into force of the Treaty of Lisbon and of the intergovernmental Treaty on Stability, Coordination and Governance (TSCG), two IPCs were established, the Conference on CFSP/CSDP and the Conference foreseen in Article 13 of the TSCG, on economic and financial governance;

d) more recently, and pursuant to Article 88 of the TFEU, the Conference of Speakers on 24 April 2017 established the Joint Parliamentary Scrutiny Group (JPSG) on the European Union Agency for Law Enforcement Cooperation (Europol).

This trend illustrates a shift in the ownership of EU issues within NPs from the sphere of the EU Affairs Committees alone towards the remit of sectoral Committees, which are more deeply involved in the monitoring of EU policies (Fromage 2017). If COSAC has played, thus far, the role of main driver, as a conduit between the elected and the electors in EU affairs, promoting more transparency and inclusiveness, it now shares the stage with multiple other Conferences that see themselves as the most appropriate forum to assure that function in the specific domains of EU integration where they operate.

This has been an interesting and positive development, because this multi-polarised system of inter-parliamentary cooperation has shaped a supranational layer of influence for NPs, where they develop ownership of matters on which their national Governments decide and negotiate at EU level, exchange information and best practice on the ways to scrutinise and monitor EU policies and gain access to information on these matters that otherwise, most likely, they would not gather in such an asymmetrical system as EU governance.

However, all of this has led to external pressure on COSAC, despite its decisive contribution to the development of tools of parliamentary scrutiny which are now of benefit to other parliamentary committees: COSAC is now faced with a certain ambiguity regarding its role and scope as a consequence of the empowerment of other forums, namely what place should it occupy in the constellation of inter-parliamentary cooperation in order to stay relevant?

Adding to this exogenous pressure, COSAC faces some internal dilemmas related to its own functioning. Firstly, many Parliaments[XII] state that the quality of the debates has been the least successful aspect of COSAC meetings, criticising the restricted time available for

debate (often one minute per member) and the lengthy presentations given by some of the speakers, which are then not followed up or which do not have any concrete impact on the work of COSAC.

Secondly, COSAC is currently structured around two main events: a meeting of the Chairpersons, which is of a 'preparatory nature' and to 'be held prior to each plenary meeting', and which is attended by the Chairs of all EU affairs Committees and the relevant member of the EP; and the COSAC plenary meeting itself. As a Conference for exchange of best practice and information, COSAC would benefit from a certain degree of streamlining and coordination between these two meetings.

Thirdly, more importance should be given to the bi-annual report that each COSAC Presidency presents, because despite the intense amount of work invested by all delegations and by the COSAC Secretariat in the drafting of each report, it attracts a very low degree of attention, and is often treated like a procedural item, instead of one of COSAC's most substantial outputs.

In fact, and salient to this paper, no other IPC collects, analyses and produces such lengthy, analytical and long-lasting documents on the most relevant topics of inter-parliamentary cooperation as COSAC. Conclusions and contributions adopted by other IPCs – if indeed adopted – are usually documents of high political relevance, but besides receiving no reply from the EU institutions, have no critical assessment, no empirical background assembled on the basis of the replies given by Parliaments and no prospective input as the COSAC biannual report and Contribution do. For this reason, if inter-parliamentary cooperation is to promote a strengthening of the link between parliamentarians and citizens, bringing procedures, rules and decisions closer to the latter, it should make better use of existing tools to achieve those goals.

Fourthly, and linked to the above, the Contribution adopted by each COSAC plenary meeting and addressed to the EU institutions is the most politically visible output produced by COSAC at present. It should however be noted that, regardless of the different views and approaches that delegations may have towards the Contributions of COSAC, their political effectiveness was clearly demonstrated in the framework of the three *yellow cards* on subsidiarity issued so far (Monti II, European Public Prosecutor's office and posting of workers). In calling on the European Commission to respond directly to the concerns raised by NPs in all three cases, COSAC used Contributions to put political pressure on the

Commission to react, which the latter failed to do at first but eventually did. Therefore, the Contribution, if used in a targeted and result-oriented way, can be a valuable tool at the disposal of COSAC.

The final remark in this section addresses the interaction between COSAC and other forums of inter-parliamentary cooperation, where COSAC should put special emphasis on setting up channels of communication. This would not only promote synergies, but also affirm its role within this new constellation of inter-parliamentary cooperation, or 'Euro-national parliamentary system'. The same applies, with particular relevance, to dialogue and contact with the EU Speakers' Conference, given the coordination and steering role the latter plays in this context. I return to this subject with concrete proposals further below.

4. The Contribution of COSAC to the Effectiveness of Inter-parliamentary Cooperation

4.1. COSAC and inter-parliamentary cooperation

From what has been outlined above, firstly regarding inter-parliamentary cooperation as a system and, secondly, characterising COSAC and its role since its inception, what assessment can be made on the contribution of the Conference to the effectiveness of inter-parliamentary cooperation? What place has been occupied by COSAC in what can be called the 'collective scrutiny' by Parliaments of the EU: how, and indeed if, has it fostered and helped NPs and the EP share, promote and develop strategies of parliamentary oversight? Can it be perceived as the virtual third Chamber to which Cooper (2012) has referred, or, instead, is it shifting its nature towards a more generalist approach in political dialogue across the board of inter-parliamentary cooperation?

COSAC indeed looks nowadays very different from its beginning: despite the influential and decisive role it has played since then, in promoting the role of NPs in the EU, it now faces unprecedented challenges. Overcoming these challenges requires boldness and creativity from COSAC to reinvent itself and affirm its position in the inter-parliamentary construct by doing what it does best: anticipating the needs of NPs (e.g. gathering information on parliamentary practice), raising awareness on issues of common concern (e.g. democratic accountability and legitimacy), and being politically assertive in those fields where Parliaments wish to show their strength (e.g., the follow-up to the yellow cards). Finally,

COSAC should strive to establish a relationship of complementarity, instead of rivalry or competition, with other IPCs.

As discussed elsewhere (Dias Pinheiro 2016: 303-310), COSAC is now facing an identity crisis, because its purpose, scope, organisation and role are currently under question. In fact, the implementation of the provisions of the Treaty of Lisbon regarding NPs and the deepening of inter-parliamentary cooperation, with new conferences (CFSP/CSDP), different topics (besides the traditional institutional issues), innovative procedures (intergovernmental Treaties) imply a profound rethinking of the role of COSAC: i) Is it a political body, aiming at steering and coordinating the role of NPs in the EU, as the only IPC foreseen in the Treaty? Or is it, instead, a forum for the mere exchange of information and best practice? ii) Where should COSAC be placed within the constellation of IPCs – is it a *primus inter pares* Conference or, nowadays, just one among many? iii) Which issues can/should COSAC cover – any salient EU issue it deems appropriate, or should it avoid addressing issues now under the remit of other IPCs? iv) Which relationship and communication channels should COSAC establish with these forums?

If COSAC wishes to exert a role in collective scrutiny it needs to regain its relevance within the existing EU multi-level parliamentary field (Crum and Fossum 2009). Firstly, COSAC still stands as the most stable, overarching and well-known forum of inter-parliamentary cooperation in the EU. One clear example of that was the fact that, within the *Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently*[XIII] established by the President of the European Commission, it was the Presidency of COSAC that was asked to appoint representatives from national Parliaments. This is a clear demonstration that the all-encompassing role the COSAC plays, plus its versatility and global approach to inter-parliamentary cooperation, are unique features that no other IPC possesses. And this is still the way that EU institutions perceive COSAC.

The flourishing of IPCs should be regarded by COSAC as a positive development: it is a decisive step towards a specialisation of inter-parliamentary cooperation, and a deepening of Parliaments' capacity for scrutiny, that COSAC should not fear. In fact, this trend corresponds to what the EP very correctly anticipated in 2014 (in the Casini report): inter-parliamentary cooperation should seek *'to bring (at all times) the right people together at the right time to address the right issues in a meaningful way, so as to ensure that the decisions taken in the various areas of responsibility benefit from the 'added value' brought by real dialogue and proper debate.*[XIV]

As far as COSAC is concerned, it has a unique advantage, as the sole body of inter-parliamentary cooperation composed only of Members that belong to the EU affairs Committees of NPs, which means that they are the ones responsible, at the national level, for dealing exclusively with EU affairs. In fact, and notwithstanding that scrutiny systems vary significantly from one Parliament to another, it is often the case that those Committees play a certain pivotal role in the EU affairs activities of each national Parliament, whereas the specialised Committees deal with EU policies but are focused narrowly within their remits. COSAC is therefore tailored for the 'big picture' of inter-parliamentary cooperation and this is what is has been doing with a remarkable success.

COSAC can currently bring a holistic approach to inter-parliamentary cooperation, to collective scrutiny by EU Parliaments, based on its streamlined structures and procedures; for it is acknowledged by the EU institutions to be the focus stakeholder with which to engage, and on the mere circumstance that it is still the only IPC with institutional continuity provided by its Permanent Secretariat.

4.2. Some proposals for the reform of COSAC towards more effective inter-parliamentary cooperation

This essay aims at putting forward some concrete ideas to release the untapped potential that COSAC still has, covering not only its current proceedings and output, but also some thoughts for further reflection on the future strengthening of COSAC.

Firstly, the choice of topics to be discussed in each meeting should focus on the issues that bring direct added-value to the scrutiny work that NPs perform: specific legislative proposals, exchange of best practice on the scrutiny of the activity of national Governments, debates on how to strengthen democratic legitimacy and accountability and exchange of views on policy fields that relate directly to the competences of NPs (e.g. criminal law, banking union, taxation). This should be done in such a way that every parliamentarian that attends a COSAC meeting goes home with a clear idea of what lessons were learnt during the meeting, which contacts, and channels of communication were established, and which are the most relevant political positions and trends regarding a certain dossier or policy field.

Secondly, the debates ought to be structured in a way that promotes and encourages the development of a parliamentary perspective around the topics chosen, i.e., for each panel

and issue to be discussed, parliamentarians should always be included as key-note speakers, alongside Commissioners and members of national Governments.

Moreover, the Presidency should attempt, wherever possible, to steer debates towards this parliamentary perspective, in a way that enriches the scrutiny of the same policy fields or specific proposals being undertaken in national capitals. For the same reason, the Contribution to be adopted should mirror the debates and exchanges that actually took place during the meeting, seeking to influence and obtain a reply from the European institutions to the issues and concerns raised by the constituent Parliaments.

If this were to be achieved, COSAC would be uniquely placed to continue promoting a 'collective ownership' by Parliaments of the EU, prior to a stage of 'collective scrutiny' *stricto sensu*. In the majority of cases the focus and priorities of Parliaments differ immensely, and the fact that those priorities are not coordinated jeopardises a more structured and collective scrutiny.

To overcome this limitation and obstacle, and to fully engage in a collective scrutiny approach, it would be worth going back to a successful practice developed by COSAC prior to the entry into force of the Treaty of Lisbon: coordinated (subsidiarity) checks. In fact, COSAC coordinated three subsidiarity checks carried out under the provisions of the Treaty of Lisbon.[XV] The selection procedure adopted was quite simple: each Parliament would put forward two proposals for scrutiny, COSAC would gather a list of them and the one or two proposals that would gather more support would be subject to a collective scrutiny.

Unfortunately, this methodology and procedure was abandoned after the Treaty of Lisbon entered into force, for various reasons: namely a conviction among some NPs that coordinated checks would became an obsolete concept after the Treaty's entry into force, while others argued that it placed too much emphasis on subsidiarity from a negative standpoint, i.e., to block proposals.

This second argument should be given further consideration, namely assessing whether the idea of choosing proposals to scrutinise collectively should be revived, not necessarily only from a subsidiarity perspective, but to promote a simultaneous check on global EU issues. These might include the future of the Eurozone and its democratic accountability (e.g. a Parliament of the Economic and Monetary Union?), developments in the field of Defence and Security (e.g. the Permanent Structured Cooperation) or the repercussions of Brexit in the EU's institutional and political system.

Some might argue that this could encroach on the remit of some of the other IPCs established recently, but the proposed perspective is that it would instead create some complementarity: COSAC would not be doing the scrutiny and oversight of these policy fields on its own behalf, but gathering information, exchanging best practice and building an acquis of knowledge and literature about these areas, via the Biannual reports and the work of its Secretariat. This could benefit the reinforcement of public policies adopted by the executives, namely the decisions they take at EU level in these domains, fostering more transparency and openness, while promoting a collective scrutiny by NPs. These would be asked at a pre-defined moment in time what are they scrutinising and planning to do on these dossiers, while simultaneously allowing COSAC to build synergies and complementarity with other IPCs.

4.3. Cooperation between COSAC and other inter-parliamentary conferences

In the relationship of COSAC with the new IPCs and with the EU Speakers' Conference, a good practice that has been implemented in the past is worth signalling: on a number of occasions, the Presidency of the EU Speakers' Conference was invited to deliver a short briefing at the COSAC Plenary, highlighting and giving notice of its main decisions and achievements. This approach should be generalised as a standing invitation between the various Conferences (namely COSAC, CFSP/CSDP and Article 13) to host a representative from each other, to give a briefing on the latest developments and achievements within their remits. This would facilitate dialogue, create synergies, and avoid duplications, besides functioning as a confidence building measure between different players.

A bolder move would be to expand the responsibilities of the COSAC secretariat so that it could share its secretarial support with other IPCs, which would ensure a permanency to the flow of information between them and would foster a sort of broader 'epistemic community' between the IPCs. It does not make much sense to have a permanent secretariat, with the acquis and knowledge gathered since 2004, serving only one Conference and leaving all others aside. This would involve a development of the role of the secretariat and its permanent members; but revitalising a perspective that dates from 2004 seems to me rather urgent.

Linked to this idea, shared secretarial support could serve a more proactive and analytical purpose, gathering at the end of each year the list of topics and conclusions/contributions

adopted by the IPCs and producing a report with the main findings of inter-parliamentary cooperation.

If NPs really want to move towards cooperation at the COSAC level, that fosters effectiveness and a collective system, they should shape their participation in the multiple *fora* through ideas of coordination, interaction and complementarity – instead of rivalry and competition. IPCs should establish a constant dialogue between them, develop permanent channels to keep each other informed of their activities and build a critical mass of what Parliaments are doing and scrutinising. Otherwise, they will be rejecting their potential for effectiveness instead of bolstering it, because they only meet twice a year, are most of the time physically apart in each capital and do not engage systematically with each other.

It is here that COSAC could play a pivot role between the multiple Conferences that have been established, because it is the only one of a generalist and broad nature and therefore not bound to a specific policy domain, but instead able and capable of promoting exchanges of information, knowledge and best practice in any of them. This would not mean that COSAC would take away the responsibility of the EU Conference of Speakers as the highest coordinating political body of Inter-parliamentary Cooperation, because it is placed at another level, akin to what Heads of State and Government in the European Council represent. Furthermore, it would not establish any hierarchy of IPCs, but instead envisage a network where one of the Conferences has a remit (generalist by definition, for EU affairs Committees are responsible for the overall participation of their respective Parliaments in EU affairs), the means (a Permanent Secretariat), the institutional continuity (two meetings per semester, one of the Chairpersons and a Plenary meeting, fixed, with clear rules of procedure and a long-standing tradition) and the tools (the Contribution addressed to the EU institutions, to which the latter are to respond). And that Conference can only be COSAC, should COSAC wish to play that role, and the others understand the benefits and synergies of it.

In fact, we often forget that this is precisely what the Treaty clearly attributed to COSAC as its main mission: according to Article 10 of Protocol (No 1) on the Role of NPs in the European Union of the Treaty of Lisbon, COSAC *'may submit any contribution it deems appropriate for the attention of the EP, the Council and the Commission. The Conference shall in addition promote the exchange of information and best practice between NPs and the EP, including their special committees. It may also organize Conferences on specific topics, in particular to debate matters of common*

foreign and security policy, including common security and defence policy.' As such, COSAC has a mandate to bring other Committees closer and the spirit of the Treaty drafters even referred to the possibility of COSAC being the one who would 'organise' other IPCs. For many reasons, it was not COSAC that would organise those Conferences – and rightly so – but it can be the one bringing together the cooperation between them.

4.4. COSAC and the choice of priorities for scrutiny: the Commission Work Programme

With the idea of promoting coordinated scrutiny exercises, either on subsidiarity or on a specific policy field, and the network of collaboration between IPCs to be developed in which COSAC has a key role to play, another very important step is inextricably linked to these two: the choice of priorities for scrutiny by NPs. While far from being a new topic, it is worth revisiting. In 2015, and at the initiative of the Dutch delegation at COSAC (the Tweede Kamer, at the time), all NPs were encouraged to set up a list of priorities for scrutiny based on the European Commission Work Programme (ECWP) for that year, which would then be compiled by the COSAC Secretariat and sent to the European Commission.

In the replies given to the 25th Biannual Report of COSAC,[XVI] the majority 'considered it either "somewhat useful" or "very useful" to produce such an annual overview to be shared with all Parliaments/Chambers and sent to the European Commission and other EU institutions'.

During the Meeting of the Chairpersons of COSAC in January 2017, the speech delivered by the Chairman of the Dutch Senate gave an interesting insight into practices and procedures regarding the ECWP, namely that: *'By identifying proposals parliaments consider most important or controversial, grouping these priorities in a table and sharing them with each other and with the European Commission, we can work together as parliaments to scrutinize the proposals and to check our governments' negotiations in the Council. This indeed is at the core of the practice that we are now following in COSAC. . . . While independent from each other, with each its own system and ways of doing things, we can and should learn from each other's practices, and see how – through coordination – we collectively can operate more effectively as NPs'* (emphasis added).[XVII]

COSAC should further develop and deepen this approach, namely by giving more visibility to this list of priorities, but also through sharing this information more formally with other IPCs and collecting input directly from them. In many cases, like in the Portuguese

Parliament, it is the European Affairs Committee which steers the process of identifying priorities, but it is up to the specialised Committees to actually choose them. For that reason, an effective and collective scrutiny of those priorities can only occur if these alternative and creative routes of parliamentary diplomacy are implemented by NPs.

Moreover, this collective scrutiny approach could also expand to dossiers and topics other that those subject to subsidiarity review, including the substance of proposals in the light of the more ownership-oriented dynamics that the political dialogue with the European Commission has fostered in recent years.

4.5. The Green Card Procedure

One of the most interesting developments of inter-parliamentary cooperation in recent years was the initiative of the 'green card' which refers to the possibility for NPs to suggest a legislative initiative to the Commission. This idea seeks to capitalise on the willingness of NPs who seek greater involvement in the legislative process; this would give them the opportunity of playing a proactive role in the EU agenda-setting process and further contribute to the good functioning of the EU, in addition to existing forms of parliamentary scrutiny and involvement.

In fact, this is also a response to criticism of the yellow card procedure and the logic behind it; this is often seen as a negative process as it gives NPs a right, under certain strict conditions, to indicate that a legislative proposal should not be proceeded with. This was one of the key findings of the report made by the House of Lords on *'The Role of NPs in the European Union*' issued in 2014, where the idea of a green card was firstly formally formulated, since it was found that there was 'scope for a group of NPs working together to make a constructive suggestion for an initiative.'[XVIII]

During the COSAC Chairpersons meeting in Riga (June 2015), a mandate was given to the Luxembourg Presidency to set up a working group to strengthen political dialogue through the introduction of a 'green card' as well as the improvement of the 'yellow card' procedure. The aim was to improve existing political dialogue and encourage NPs wishing to take a proactive role to submit constructive and non-binding suggestions on policy measures or legislative proposals to the European Commission, without prejudicing its right to initiate legislation, which it had gained from NPs.[XIX]

The 'green card' initiative has also been officially welcomed by the Commission which indicated in its 2016 report that *'recognizes that NPs (...) play an important role in bridging the gap between European institutions and the public. The Commission continues to respect the balance between the institutions (...) and is mindful of its right of initiative. However, it has demonstrated that it is ready to consider suggestions from NPs, like their joint initiative on food waste, that indicate where action at European level could bring added benefit.* [xx]

The EP adopted a resolution in February 2017 where it suggested '*complementing and enhancing the powers of NPs by introducing a 'green card' procedure whereby NPs could submit legislative proposals to the Council for its consideration.* [xxi]

In this context, the EU Select Committee of the UK House of Lords sent a letter to the NPs inviting them to sign a 'pilot green card initiative' on food waste, without a specific threshold or deadline, to be sent to the European Commission. [xxii] The 'green card' sent by 16 chairpersons of NPs and chambers on 22 July 2015 called upon the Commission to adopt a strategic approach to the reduction of food waste. The text drafted was itself quite innovative, because it was rather detailed in terms of policies to be implemented and procedures to be adopted, whereas these letters are usually vague.

On 17 November 2015 the Commission replied to the 'green card' promising to pay particular attention to NPs' suggestions. Moreover, in its report on Relations with NPs, the Commission went even further by highlighting that *'Some of the suggestions on food donation, data collection and monitoring were subsequently reflected in the circular economy package adopted in December 2015.'* Notwithstanding this comment, if we look at the five priorities identified in the green card, the new Commission proposal did not in reality reflect what NPs had intended.[xxiii]

Two other 'green cards' were initiated, one by the French *Assemblée Nationale,* on EU corporate social responsibility, signed in July 2016 by seven other parliamentary chambers, and another by the Latvian *Saeima* on the revision of the Audiovisual Media Services Directive in November 2015. However, neither gathered much support. It is still too early to assess the effectiveness of this tool, but at this stage it seems clear that, although innovative, still needs fine-tuning in its procedures, general approach, coordination of initiatives and – again – of priorities, in order to be effective.

4.6. COSAC and subsidiarity: the only way or another way forward?

At this point, it is pertinent to mention a recent article by Davor Jančić in which he analyses the *'subsidiarity guardianship function of NPs'* arguing that *'the current concept and practice of subsidiarity monitoring do not satisfactorily address the problem of competence creep and the need to safeguard domestic socio-economic and politico-legal idiosyncrasies'*. The article concludes that there should be a refocusing of *'parliamentary scrutiny towards the principle of conferral and legislative substance"* in order to alleviate *"the democratic deficit and increasing EU legitimacy'* (Jančić 2015).

The arguments put forward throughout this article are very relevant for the role of COSAC, since it acknowledges that the involvement of NPs and COSAC in the early warning mechanism *'has yielded positive results in terms of alerting NPs to the ubiquity of EU law and its legal and constitutional impact*.' and that *'many domestic parliamentary chambers have become more active in scrutinizing EU affairs thanks to subsidiarity policing.'* However, Jančić reminds us that this exercise is only effective in terms of collective scrutiny, for it *'has its greatest utility if it gives rise to a constructive argument between NPs and the Commission*' because '*the sheer existence of the institutional capacity for dialogue between NPs and the Commission does not suffice automatically to enhance the legitimacy of EU lawmaking'* (Jančić 2015: 949).

This leads Jančić to ask exactly the same question that COSAC should ask of itself in order to be relevant and contribute to the effectiveness of inter-parliamentary cooperation: *'the chief conundrum of the European role of NPs is how to strike a balance between guaranteeing an area of autonomous legislative action of EU institutions and retaining a measure of meaningful influence of domestic legislatures. The harmony between these two strategic considerations is fundamental to the democratic legitimacy of EU decision making and its outcomes because of the distinct representative function of NPs'* (Jančić 2015: 950).

Jančić then identifies what is labelled the 'straightjacket of subsidiarity', meaning that Parliaments have excessively focused their attention on the early mechanism *stricto sensu* and that therefore *'Subsidiarity may thus appear as a distraction from, and an undue limitation of, the classic parliamentary business'* (De Wilde 2012) and that '*With more and more NPs participating in the early warning mechanism, I have argued that they have bitten the subsidiarity bait*' (Jančić 2013). This author could hardly agree more, adding that COSAC should assess this reality and be the promoter of a '*shift in the motivation that drives this cooperation, ie gradually evolving from a combination of efforts to produce a negative output by blocking proposals on the basis of a breach of the subsidiarity principle in a*

"subsidiarity-obsessed" way; to a new dynamic process that actively, proposes new paths and solutions' (Dias Pinheiro 2017: 103).

As mentioned by Jančić , while some authors like Fabbrini and Granat (2013: 117) argue that a '*a misuse of the subsidiarity review'* should be avoided, advocating a narrow reading of the subsidiarity mechanism, others like Goldoni (2014: 107) and Kiiver (2012: 545; 2008: 82) argue in favour of the broadening of the early warning mechanism to put substance and content (i.e. politics) ahead of subsidiarity and procedure.

Jančić (2015: 953) then proposes that, in order to remodel this 'straightjacket of subsidiarity' approach, '*two types of reform are requisite to infuse EU law and governance with greater democratic legitimacy. One is to refocus NPs' scrutiny on the question of the existence of EU competence and the principle of conferral, and the other to endow parliaments with a more positive role as regards the substance of EU legislation. Both of these reforms would significantly contribute to the good functioning of the EU'* (emphasis added).

The EWM has been one of the most visible features of the increased role played by NPs since the Treaty of Lisbon entered into force. Moreover, COSAC has been instrumental not only in promoting a learning process among Parliaments to improve their access to information and streamline their scrutiny procedures, but also in providing the opportunity to meet and exchange views on specific legislative dossiers. Nevertheless, it can also be argued that, in order to improve its effectiveness in inter-parliamentary cooperation, Parliaments and COSAC should move away from the attraction of subsidiarity, as important as might be, towards a more positive and forward-thinking role.

In fact, COSAC is the only Conference with the membership (EU affairs Committees and a generalist and broader political approach), the institutional continuity and memory, and the means (biannual report and Contribution) to place 'Parliaments on the offensive'. Of the many proposals put forward by NPs in recent years,[XXIV] alluded to profusely in a previous work (Dias Pinheiro 2017: 103), Jančić labels the proliferation of initiatives as the 'Game of cards' of NPs, with particular emphasis not only to the green card, but also to what he calls the 'late card'. This would be a final check system, which would allow national Parliaments to re-examine EU legislative proposals at the end of the EU legislative procedure, just before their enactment, thus serving, in Jančić's view, as a *'political complement to judicial review of subsidiarity compliance. Since NPs would thus gain a ratifying rather than an enabling*

function in the EU legislative process, the late card would give their pronouncements more weight than in a purely early warning mechanism.'

This late card system, in order to be effective, would require a substantially different approach from NPs collectively. In fact, this requires focusing not only on the initial stage of the legislative procedure (the 8 week-period to issue a reasoned opinion), but also being able to follow and monitor the sometimes-lengthy negotiation process between EU institutions while at same time holding its national governments to account on the outcome of the compromises reached. In fact, even if a yellow or orange card were not triggered, this integrated scrutiny approach might even lead to Parliaments more seriously considering the activation of what is foreseen by Article 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, according to which '*The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.'*

According to this reasoning, if the 'late card' were to lead Parliaments, collectively, to consider that their requests on subsidiarity grounds had not been met, they could individually decide – in accordance with their internal constitutional and legal requirements – to take the matter to Court. It is here that COSAC, with its extensive experience with institutional matters and coordinating collective checks, would be uniquely placed to promote this joint scrutiny.

In fact, and to sum up, all of this can be steered and led by COSAC, with no need for Treaty change or a mandate given by any other Conference. Furthermore, a very recent development might just give COSAC the political and institutional push it needs.

4.7. The Timmermans task-force on subsidiarity: COSAC as the NPs' voice

In fact, expectations are high on the side of NPs, with some of them taking a more proactive lead within the framework of COSAC. Following an initiative of the Danish Parliament in tabling its twenty-three recommendations on the role of NPs in changing European Governance, a group of twenty-nine Chairpersons of EU Affairs Committees of different NPs addressed a letter to Jean-Claude Juncker, then President-designate of the European Commission, about cooperation with NPs. In this letter, sent on 30 June 2014,

the signatories '*call on the new European Commission to set up a working group, to include national parliamentarians and representatives of the EU institutions, to look at the role of NPs in the EU. The task of the working group should be to draft an action plan on ways to strengthen the role of NPs in the European Union.*'[XXV]

This clear demand by NPs for the establishment of a working group was not implemented. Nevertheless, a new possibility has opened up recently that NPs and COSAC, in particular, should embrace: the President of the European Commission announced, in his State of the Union speech on 13 September 2017, the establishment of a Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently', as part of the Commission's work towards a more united, stronger and more democratic Union. [XXVI] The Commission asked for the appointment of three members from NPs to participate, via a letter from President Juncker to the Estonian Presidency of COSAC. In spite of the predictably passionate debate held at the COSAC meeting in Tallin over the representation of NPs at this Task Force,[XXVII] ultimately COSAC will be the Conference representing NPs' views at this forum.

COSAC thus has a great opportunity, and indeed a significant responsibility, to influence the outcome of this task force – several contributions have already been tabled by NPs over the last years, assembling experience, knowledge and practice that can now finally be put on the table. COSAC should take this exercise seriously and with the most robust political assertion possible. The final result of this task-force might be a bold step in the direction that this essay calls for: inter-parliamentary cooperation benefiting from politically substantial feedback from the EU institutions which allows for NPs and the EP to share, promote and develop joint strategies of parliamentary oversight.

Some of the conclusions and proposals of the final report to this Task Force, symbolically titled 'Active subsidiarity – a new way of working'[XXVIII], point in that direction. Even though the report should, as Vice-President Timmermans puts it in the foreword to the above mentioned report, not be seen as 'an end in itself' but 'the start of a process to open up our procedures more to the local and regional level', it contains ideas which might shape the future of inter-parliamentary cooperation. Out of the nine recommendations put forward, some might have direct implications on the way NPs exert their scrutiny and will most likely require them to adapt to new responsibilities. For instance, recommendation #1 states that *'A common method ("assessment grid") should be used by the Union's institutions and bodies*

and by national and regional Parliaments to assess issues linked to the principles of subsidiarity (including EU added value), proportionality and the legal basis of new and existing legislation [capturing] *the criteria contained in the Protocol on subsidiarity and proportionality originally attached to the Amsterdam Treaty and relevant jurisprudence of the European Court of Justice.'* A concrete model is proposed and annexed the report in which it is recommended that *'During the legislative process, the European Parliament and the Council should systematically review the subsidiarity and proportionality of draft legislation and the amendments they make using the common method. They should take full account of the Commission's assessment presented in its proposals as well as the (reasoned) opinions of national Parliaments and the European Committee of the Regions.'*

This is a rather bold initiative, for it acknowledges something NPs have demanded for a long time, i.e., that the opinions could and should address issues other than subsidiarity and, at the same time, presents the idea of some streamlining on the criteria to issue those opinions.

Recommendation #6 states that the co-legislators 'should use consistently the subsidiarity grid during their negotiations' and that 'the Commission should highlight (…) any views it receives from local and regional authorities'. Moreover, recommendation #3 recognises that 'The Commission should apply flexibly the Treaty-based 8 weeks deadline for national Parliaments to submit their reasoned opinions' taking account of 'common holiday periods and recess periods' and determining that the Commission should 'respond as far as possible, within 8 weeks of receiving each opinion', which would be a positive outcome, given the delays that currently exist.

Other recommendations address issues such as: the need to raise national, local and regional authorities' awareness of the opportunities to engage at an early stage of the decision-making process; the responsibility of the Commission in ensuring that its assessments consider territorial impacts; and the linkage between platforms like REGPEX, designed to support the participation of regions with legislative powers in the early phase of the EU legislative procedure, the Early Warning System, and IPEX, the platform for the mutual exchange of information between the national Parliaments and the European Parliament concerning issues related to the European Union, especially in light of the provisions of the Treaty of Lisbon.. Finally, the report recommends that the Commission develop a mechanism to identify and evaluate legislation from the perspective of subsidiarity, proportionality, simplification, legislative density and the role of local and regional

authorities, and also calls on the next Commission, along with the EP and the Council, to reflect the need for more effective implementation, rather than initiating new legislation in areas where the existing body of legislation is mature and/or has recently been substantially revised.

COSAC should immediately take the lead in the debate in the merits and implementation of these recommendations.

5. Conclusion

Ten years after the Treaty of Lisbon was signed, a multi-polarised system of inter-parliamentary cooperation has emerged, characterised by the empowerment of other Committees in the scrutiny of sectoral EU affairs, the establishment of other IPCs and the changing role ascribed to the previous sole drivers of that cooperation, i.e. COSAC and NPs' EU Affairs Committees.

The point of view presented here is that COSAC should occupy a leading role in that system, especially as it is based on a governance model that gives NPs a stronger say in the running of events. In fact, collective scrutiny is also the capacity of IPCs to organise themselves in an open and constructive way, not narrowly focused in their specific policy domain, but with a level of awareness of the global implications of inter-parliamentary cooperation. In this respect, COSAC is the IPC with the '*global picture*' and therefore in a unique position, not only to coordinate the work of other IPCs, but also to establish a level of outreach towards them that brings coherence to the overall system.

The proposals presented in this paper point in that direction, namely with regard to a reform of the proceedings of COSAC meetings, promoting the selection of topics to address that brings direct added-value to the scrutiny work that NPs perform and that promotes a political and parliamentary perspective around those issues; this will promote a coordinated assessment of different policy dossiers (legislative and non-legislative, e.g. future of eurozone, Brexit).

Regarding cooperation between Conferences, this paper advocates that a standing invitation be established between the various Conferences (namely COSAC, CFSP/CSDP and Article 13) to host a representative from each other in order to give a briefing on the latest developments and achievements within their remits, building confidence and

facilitating dialogue. On a more ambitious note, the responsibilities of the COSAC secretariat should be expanded to support other IPCs, with a more proactive and analytical ambit, gathering at the end of each year the list of topics and conclusions/contribution adopted by the IPCs and producing a report with the main findings of inter-parliamentary cooperation.

This leads to a final remark – the effectiveness of COSAC depends not only on what NPs are capable of doing by themselves, in streamlining their procedures and scrutiny systems or even agreeing with the establishment of new inter-parliamentary fora, but also on the response, and engagement, of the European institutions to this process. In fact, a lot has been done by the EU institutions since the Treaty of Lisbon entered into force to enhance the role of NPs from a legal and procedural point of view. However, a lot remains to be done concerning their actual political response, namely from the European Commission, in taking into due consideration the contribution of Parliaments in EU public policies. Regardless of the different views that NPs have on EU issues, notwithstanding the prerogatives and responsibilities that they ought to exert at the national level, there is an EU parliamentary dimension to decision making and to the implementation of EU public policies that cannot be politically neglected by EU institutions. Hopefully, future essays of this sort will shift academic attention towards the analysis of what the EU institutions are doing to promote inter-parliamentary cooperation as a truly effective bidirectional exercise.

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* The views expressed here are strictly personal and not bind or reflect in any way the political and institutional position of the Portuguese *Assembleia da República*.

I Article 12 of the Treaty on the European Union.

II The author has also published some academic research on the topic of inter-parliamentary cooperation: see Dias Pinheiro 2012.

III CFSP/CSDP, Article 13, and COSAC

IV Published on 9 May 2014, available at https://www.houseofrepresentatives.nl/news/report-ahead-europe-adopted-house-representatives.

V Published on 24 March 2014, available at https://publications.parliament.uk/pa/ld201314/ldselect/ldeucom/151/15102.htm.

VI Published in January 2014, available at http://renginiai.lrs.lt/renginiai/EventDocument/6fa11f98-fc15-4443-8f3f-9a9b26d34c97/Folketing_Twenty-three%20recommendations_EN.pdf.

VII Available at http://www.cosac.eu/documents/History%20of%20COSAC%20NOVEMBER%202015%20EN.pdf.

VIII http://www.cosac.eu/documents/bi-annual-reports-of-cosac/.

IX The full report of the working groups and its proceedings is available at http://european-convention.europa.eu/EN/doc_wg/doc_wg2352.html?lang=EN.

X We follow the concept of Europeanisation as defined in the works of Auel and Benz (2005), Besselink (2007), Raunio and Wiberg (2010), and Kiiver (2006).

XI 21st COSAC bi-annual report.

XII For instance, the replies to the 21st COSAC bi-annual report.

XIII The press release on the set-up of this Group is available at http://europa.eu/rapid/press-release_IP-17-4621_en.htm.

[xiv] EP resolution of 16 April 2014 on relations between the EP and the NPs, available at: www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0430.
[xv] The previous two subsidiarity checks under the Treaty of Lisbon were conducted on the Proposal for a Framework Decision on Combating Terrorism COM(2007) 650 final and on the Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008) 426 final.
[xvi] Available at http://www.cosac.eu/55-the-netherlands-2016/lv-cosac-12-14-june-2016-the-hague/d1-9%2025th%20Bi-Annual%20Report%20of%20COSAC%20EN.pdf.
[xvii] Full transcript of the speech available at https://parl.eu2017.mt/en/Events/Documents/COSAC%20Speech%20session%20II%20on%20the%20CWP%20Bastiaan%20VAN%20APELDOORN.pdf.
[xviii] Full report available at https://publications.parliament.uk/pa/ld201314/ldselect/ldeucom/151/151.pdf.
[xix] Presidency of the Council of the European Union, Grand Duchy of Luxembourg, 2015. Information Note in relation to the COSAC Working Group, 'Green card' (enhanced political dialogue) http://www.eu2015parl.lu/Uploads/Documents/Doc/114_2_Information note_Green card_20151026.pdf.
[xx] Annual Report from the Commission relations with national Parliaments (2015), available at https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-471-EN-F1-1.PDF.
[xxi] Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0048+0+DOC+XML+V0//EN, paragraph 60.
[xxii] The full text of the letter is available at http://www.parliament.uk/documents/lords-committees/eu-select/green-card/green-card-letter-to-np-chairs.pdf.
[xxiii] These five priorities were: 1. EU Food Donation Guidelines for food donors and food banks; 2. An EU co-ordination mechanism to support the sharing of best practices between Member States on food waste prevention, reduction and management strategies; 3. European Commission monitoring of the business-to-business cross-border food supply chain; 4. A European Commission recommendation on the definition of food waste and on data collection; and 5. The establishment of a horizontal working group within the Commission.
[xxiv] For instance the report from the *Tweede Kamer*, 'Ahead in Europe: On the role of the Dutch House of Representatives and NPs in the European Union', 9 May 2014; From the European Union Committee of the House of Lords, 'The role of NPs in the European Union', 24 Mar. 2014, HL 151 2013–2014; or the work from the *Folketinget*, European Affairs Committee, 'Twenty-three recommendations to strengthen the role of NPs in a changing European governance', Jan. 2014.
[xxv] The full letter is available at: http://www.parliament.uk/documents/lords-committees/eu-select/Role%20of%20national%20parliaments/Joint-letter-to-President-Juncker.pdf.
[xxvi] The press release on the set-up of this Group is available at http://europa.eu/rapid/press-release_IP-17-4621_en.htm.
[xxvii] For further reading, the minutes of the COSAC meeting in Tallin are quite elucidating http://www.cosac.eu/58-estonia-2017/lviii-cosac-26-28-november-2017-tallinn/i1-9%20Minutes%20of%20the%20meeting%20of%20the%20LVIII%20COSAC%20Tallinn.pdf.
[xxviii] The full report is available at https://ec.europa.eu/commission/sites/beta-political/files/report-task-force-subsidiarity-proportionality-doing-less-more-efficiently_1.pdf.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Transnational Parliamentarism and the Dynamics of the IPC CFSP/CSDP: Policy-making, Accountability and Cooperation

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

This contribution proposes a framework of transnational parliamentarism to study inter-parliamentary cooperation, and applies it to the interparliamentary conference on CFSP/CSDP. It asks to what extent the IPC's functioning reflects its constitutive intergovernmental logic, or whether its behaviour in practice might be guided by a transnational logic, hence becoming something more than just the parliamentary mirror of an intergovernmental cooperation framework. To this end we outline three functions that are brought forward by transnational parliamentarism: policy-making, collective accountability and cooperation, and investigate to which extent these logics can be observed in the functioning of the IPC CFSP/CSDP. Applying the framework reveals a nuanced picture of an inter-parliamentary cooperation framework which to some extent goes beyond purely intergovernmental functions of domestic accountability and representation, and also includes the performance of policy-making and parliamentary cooperation functions.

Key-words

IPC CFSP/CSDP, transnational parliamentarism, intergovernmental parliamentarism

1. Introduction

In 2011, the long-awaited Interparliamentary Conference on the EU's Common Foreign and Security Policy and the Common Security and Defence Policy (IPC CFSP/CSDP) was established, succeeding earlier interparliamentary groupings overseeing the EU's foreign and security affairs. Designed to provide a parliamentary dimension for debating the intergovernmental European foreign and security policies, it brings together elected representatives from both the EU and Member state parliaments. This article turns to auditing the operative logic of the IPC CFSP/CSDP, by asking whether its functioning goes beyond mirroring its underpinning intergovernmental cooperation format by also displaying transnational interactions. In so doing, it discusses what the (potential) contribution of the IPC is, and how the IPC performs on these matters in practice.

While scholarly accounts have debated the conflicts of authority surrounding the set-up of the IPC (Herranz-Surrallés 2014), or how the IPC (potentially) addresses issues of accountability and democratic deficits in the EU's CFSP/CSDP (Wouters and Raube 2012; Buttler 2015), much less seems known about the logic underlying the *praxis* of the IPC CFSP/CSDP. Similarly, literature on inter-parliamentary cooperation that emerged over the last decade remains largely invested in democratic or legitimacy discourses on the one hand, or mapping exercises on the other hand; hence showing less interest in evaluating its actual performance as an actor. Addressing this gap, this article offers a novel framework for analysis, informed by transnationalist perspectives, to measure the operative logic of IPC.

The framework allows to audit the logic of transnational parliamentary cooperation on three different aspects: policy-making, accountability and cooperation. Applying the framework reveals a nuanced picture of an inter-parliamentary cooperation framework which to some extent goes beyond purely intergovernmental functions of domestic accountability, and also includes the performance of policy-making and parliamentary cooperation functions. In essence, while the literature has tried to make sense of this compromise and argue for and against the adequacy of institutional arrangements – none the least to fill the democratic gap of CFSP/CSDP (Cooper 2018) – our framework allows to focus on the transnational parliamentary effects and the actual institutional actorness (see Peters 2018). Time and again, we use the developments in IPC CFSP/CSDP, its documentation in primary

and secondary sources as illustrations that support our proposed framework. By looking at policy-making, accountability and cooperation as effects of transnational interactions, we are also able to focus on the question of the added-value of parliamentary cooperation. A potential role of IPC CFSP/CSFP may thus be associated with parliamentary cooperation by including and going beyond questions of scrutiny and control.

2. Inter-parliamentary cooperation and transnationalist perspectives

When studying parliamentary involvement in European foreign policy, one is confronted with a highly-segmented literature that is structured by the scattered national, intergovernmental, and supranational agency that underlies this policy area (see Wagner 2015). Rarely, parliamentary fields have been studied in relation to one another, across levels and policy areas. The neglect of these cross-border links, connecting different parliamentary actors, is problematic since they have become more interwoven over time and appear to be in constant interaction (White 2004).

Corresponding to this challenge, over the last years, attention has been yielded to the rise of inter-parliamentary cooperation or 'multilayered parliamentarism' within and beyond the EU. Thus far, their contribution remains largely devoted to debates or theories on democracy, legitimacy and sovereignty on the one hand (e.g. Crum and Fossum 2013; Wouters and Raube 2016; Herranz-Surrallés 2014; Jančić 2015a), or to mapping or classification exercises on the other (e.g. Cofelice and Stavridis 2014; Kissling, 2011; De Vrieze 2015; Marschall 2016). A similar picture emanates from the current literature on the IPC CFSP/CSDP. Existing accounts have studied the conflicts of authority and sovereignty surrounding the set-up of the IPC (Herranz-Surrallés 2014), or how the IPC (potentially) addresses issues of accountability and democratic deficits in the EU's CFSP/CSDP (Wouters and Raube 2012; Buttler 2015). Yet, much less seems known about the logic underlying the *praxis* of the IPC CFSP/CSDP[I]. To address this gap, we argue approaches are warranted that are primarily invested in identifying the operative logics that underpin cross-border parliamentary interactions, and the functions that emanate from such parliamentary cooperation networks.

To this end, this article turns to the transnationalist literature. Originally introduced to the discipline of International Relations by Nye and Keohane, transnationalism has been

described as 'contacts, coalitions, and interactions across state boundaries that are not controlled by the central foreign policy organs of governments' (Nye and Keohane 1971b: 331). The research agenda of transnationalism forced researchers to rethink which factors determined governments to take action, and to study the impact of NGOs and civil society organizations in international relations and norm-setting practices (Risse-Kappen 1997; Keck and Sikkink 1998).

Within European Studies, transnationalism has played an especially prominent role in transactionalist, intergovernmentalist, neo-functionalist and supranationalist approaches to integration (Hurrelmann 2011; Mau 2010; Fligstein and Stone Sweet 2002; Rosamond 2000), having all demonstrated how transnational forces contribute to explaining European integration. However, in terms of the actors studied, research has been limited to the study of either 'private' transnational civil society actors or transgovernmental actors. Remarkably, however, a transnational focus on interparliamentary cooperation remains underexposed (exceptions include legal approaches to transnationalism, such as von Bogdandy 2012; Jančić 2015b).

In this article, we attempt to fill this gap by studying the *trans-parliamentary dimension* of European foreign policy making. In that way, we broaden the scope of actors to parliamentary actors as a type of hybrid, societal-subgovernmental, actor (see also Peters 2018). Relying on insights from transnationalism, we ask what the nature and function of cross-border parliamentary relations mean and apply this to one specific cooperation framework: the IPC CFSP/CSDP. Established in 2011 as a cooperation framework in between EU Member State parliaments and the European Parliament, the IPC CFSP/CSDP has been meeting twice per year to debate and to exchange information or practices in the area of the Union's CFSP and CSDP. Making use of a transnational perspective, our aim is to understand if the IPC transcends its underpinning intergovernmental logic by evaluating the functions that emanate from these cross-border connections.

3. Transnational parliamentarism: a framework for analysis

This section proposes a transnational approach to the study of inter-parliamentary cooperation. Operating on the border line between governmental and non-governmental

spheres, transnational parliamentary actors or networks bear testimony to the widely acknowledged fact that clear-cut analytical distinctions between either state and non-state, public and private, or governmental and non-governmental actors, are not always mutually exclusive in reality (Agnew 1994; Josselin and Wallace 2001; Walker 1992). Instead, following Nye and Keohane, an actor's 'status' should be derived from its behaviour in practice, rather than from the formal position it occupies in a binary governmental vs. non-governmental categorization scheme (Nye and Keohane 1971a: 733). Accordingly, transnational parliamentary behaviour is essentially manifested when parliamentary actors operate (semi-)autonomously across state boundaries, while 'not [being] controlled by the central foreign policy organs of governments' (Nye and Keohane 1971b: 331).

This yields the question what the exact purpose of such transnational parliamentarism is, and how it in fact goes beyond a mere parliamentary dimension of intergovernmental cooperation. How is transnationalism able to explain to establishment of interparliamentary networks, and the functions that these cross-border connections bring about? Two observations could be made in this regard. First, transnational avenues of action are generally opted for when domestic avenues to policy influence are constrained or result in limited impact (Risse-Kappen 1997; Keck and Sikkink 1999). Instead, it becomes more effective to bypass executive foreign policy organs and establish cross-border relations with foreign actors in order to generate impact on both domestic and foreign governments. For parliamentary actors, this implies that transnational strategies provide (additional) influence, when domestic mechanisms for steering and controlling executive foreign policy are considered unsatisfactory. This especially holds for opposition forces in parliament, which compared to majority members, are confronted with limited capacities to exercise strong influence over governmental foreign policy. However, within the domain of European foreign and security policy, the overall potential for transnational parliamentary interaction is very likely, given the strong executive prerogatives on both national and EU-levels (see also Wagner 2015: 366).

Second, the type of activities performed by transnational actors is an extension of their internal or 'domestic' functions (Keck and Sikkink 1999: 99). This would imply that the functions performed by transnational parliamentarism are inextricably linked to the constitutional (or treaty-based) tasks of parliamentary actors such as debating, scrutinizing, legislating, and seeking accountability.

Further building on Jančić' (2015b), we hence define transnational parliamentarism as the cross-border investment of political capital from a parliamentary actor, while not being controlled by its domestic executive organs, with the purpose of contributing to policy-making, accountability and cooperation. Transnational parliamentarism hence goes beyond intergovernmental parliamentarism based on the functions of domestic accountability and representation, by enabling the pursuit of three distinctive functions: policy-making, accountability and cooperation (see Table 1).

Table 1: Functions of transnational parliamentarism

	What	How
Policy-making	agenda-setting strategies and direct involvement in decision-making processes	adopting recommendations or resolutions, consultation rights, proposing legislative acts, giving consent to decisions of the executive.
Accountability	monitoring governmental policies and enforcing their compliance	through direct scrutiny
Cooperation	implementation of foreign policy	supportive or competitive types of parliamentary diplomacy vis-à-vis EU diplomacy

3.1. Policy-making

A first function performed by transnational parliamentarism is that of policy-making. The involvement in a policy-making process could either occur indirectly, through agenda-setting strategies, or directly through obtained rights of involvement in the policy-making process. First, agenda-setting 'requires an ability to capture public attention, frame issues in politically powerful ways, gather and disseminate information, and formulate appropriate ways to proceed' (Abbott and Snidal 2009: 21). One of the most straightforward functions of parliamentary actors in inter-parliamentary cooperation is that of generating public debate and deliberation (Lord 2013; Crum and Fossum 2009). By the very act of publicly debating issues, speech acts are performed, issues are framed and made salient, picked up by other actors; thus the more likely they will be put on the agenda of governmental agents (Peters 2018). It most often takes place through the adoption of resolutions, statements or recommendations.

Beyond the power to set the agenda of the executive, some transparliamentary organs have obtained direct involvement in decision-making processes. This capacity could range

from the mere right to be consulted before a decision is taken, to the power to propose draft legislative acts which are then submitted to a ministerial level, or to a competence of giving consent to decisions of the executive.

3.2. Accountability

A second key function of transnational parliamentarism is that of ensuring accountability through monitoring governmental policies and enforcing compliance with declared policy engagements. One way this can be achieved, is through parliamentary scrutiny, which in principle can take place in two different ways: indirectly (domestic scrutiny) and directly (transnational scrutiny).

Indirect scrutiny, associated with intergovernmental parliamentarism, concerns the use of information derived from transnational parliamentary exchanges, in order to (better) exert scrutiny at home. Engaging with peers from other parliaments or with other foreign actors may serve as a means to overcome domestic information asymmetries between parliament and government, and especially persist in the international negotiation and decision-making (Zürn 2004). Overall, intergovernmental parliamentarism can be seen as serving input for domestic parliamentary scrutiny and control (cf. Crum and Fossum, 2013; Raunio, 2009: 322). Direct scrutiny, by contrast, occurs when trans-parliamentary exchange creates an opportunity for *collectively* controlling and overseeing the actions of overarching governance structures and decision-making in transnational fora, hence providing the means for collective accountability *beyond* domestic parliamentary settings.

3.3. Cooperation

Finally, transnational parliamentarism may also enable cooperation beyond intergovernmental networks, often labelled as parliamentary diplomacy (Stavridis 2002; Cutler 2006; Weisglas and de Boer 2007; Stavridis and Jančić 2016; Fonck, 2018b). A crucial question in that regard is whether parliamentary diplomats assist with implementing pre-defined foreign policy goals of their governments, or, rather, whether they pursue their own interests, regardless of what governmental actors desire. Accordingly, one could discern both supportive and competitive types of parliamentary diplomacy (Fonck 2018a).

Supportive parliamentary diplomacy primarily serves to contribute to the implementation of (inter-) governmental policies and interests *through* parliamentary channels of influence. It

could serve a specific (intergovernmental) policy or issue-oriented goals through mediation, trust-building or reconciliation (Beetham 2006; Malamud and Stavridis 2011), but might also be focused at wider, long-term processes of socialisation and norm diffusion through exchanging ideas or best practices (Petrova and Raube 2016). A competitive parliamentary diplomacy concerns a more independent undertaking, serving an autonomous transnational parliamentary agenda and therefore might complicate governmental foreign policy (Malamud and Stavridis 2011: 105). The strategy through which parliamentary actors operate is mostly focused at creating precedents, aimed at entrapping governmental actors and altering their degree of freedom in the making of foreign policy decisions.

4. Decision-making, accountability and cooperation in the Interparliamentary Conference on CFSP/CSDP

4.1. Applying transnational parliamentarism to IPC CFSP/CSDP

As it has been described elsewhere (Wouters and Raube 2012, 2016), the IPC CFSP/ CSDP has been established based on Article 10 of Protocol 1 annexed to the Treaty of Lisbon. Article 10 mentions that COSAC can 'also organise interparliamentary conferences on particular issues'. In fact, the establishment of the IPC CFSP/CSDP as an intergovernmental or transnational parliamentary endeavour can perhaps be best understood with the 'unfinished democratization of Europe' (Eriksen 2011).

The Lisbon Treaty did not solve if and how intergovernmental policy areas, such as CFSP/CSDP could be best legitimized and controlled. While at the outset, CSFP/CSDP is intergovernmental, the ways how national parliaments can control decisions made on the European level, greatly differ. Hence, we see an asymmetrical situation with some national parliaments having larger influences (prerogatives) than others on a horizontal playing field, while – at the same time – the European Parliament lacks formal powers that (some) national parliaments have (Raube and Wouters 2017). In such a context, three options arise institutionally: to democratize or (at least) parliamentarise CFSP/CSFP through a creeping expansion of informal (and formal) powers of the European Parliament (Rosén and Raube 2018; Lord 2016), to simply call the role of the European Parliament 'symbolic' (Ripoll-Servent 2018) and leave powers to control and oversee CFSP/CSDP to the Member State level, e.g. the national parliaments, or to look for a third way: an interparliamentary

cooperation which tries to fill the gap of unfinished democratization that the Lisbon Treaty has left behind.

Despite such theoretical considerations the actual trigger to create an interparliamentary forum in CFSP/CSFD must be seen in the ceasing of the Western European Union (WEU) Assembly whose establishing treaty was not renewed by its Member States in 2011 for financial reasons. But the Member States did not let the Paris-based WEU Assembly die before making a last wish on its behalf: 'to encourage […] interparliamentary dialogue […] in this field…' (cited in: Wouters and Raube 2016: 236). What followed has been discussed at length in the academic debate (see Peters 2018), and, basically, ended with a compromise, on how the new Interparliamentary Conference CFSP/CSFP would set-up, used and run in the context in CFSP/CSDP. In short, it allows 16 MEPs and 6 MPs from each Member State to come together and debate, to 'provide a framework for the exchange of information and best practices', to draft conclusions after consent on issues related to CFSP/CSDP, and to organise itself without a secretariat in a spirit of cooperation between the European Parliament and the respective presiding Member State parliament. In essence, while the literature has tried to make sense of this compromise and argue for and against the adequacy of institutional arrangements – none the least to fill the democratic gap of CFSP/CSDP (Cooper 2018) – we may ask what is in this compromise and the actual practice of IPC CFSP/CSFP, once we look at it through our framework of 'intergovernmental vs. transnational' parliamentarism. In fact, such a move allows us to focus on the intergovernmental and transnational parliamentary effects and the actual institutional actorness (see Peters 2018). By looking at policy-making, accountability and cooperation as effects of parliamentary interactions we are also able to steer our focus to the question of the added-value of parliamentary cooperation. A potential role of IPC CFSP/CSFP may thus be associated with parliamentary cooperation by including and going beyond questions of scrutiny and control. It is in this context that we also look at features such as policy-making and cooperation (see Peters 2018, for a similar, and yet, different framework focusing on 'actor, network, symbol').

4.2. Policy-making

We argued above that the involvement in a policy-making process could either occur indirect, through agenda-setting strategies, or directly through obtained rights of

involvement in the policy-making process. In what follows, we try to show if direct (transnational) or indirect (intergovernmental) logics apply to the IPC CFSP/ CSDP.

In our effort to find out if transnational or intergovernmental parliamentary logics apply, we have to remember that the IPC CFSP/CSDP is neither a parliamentary assembly, nor a third chamber in the EU. Its rights to be directly involved are, in fact, limited to a non-parliamentary decision-making procedure, informed by international consensual decision-making. In essence then, the IPC is run by an intergovernmental rather than a transnational logic of sovereignty-prevailing consensus-making. This element is, for example, underlined by the fact that the 'conference' drafts final conclusions, which are adopted by consensus. Furthermore, in an analogy to Declaration 13 and 14 to the Treaty of the European Union, which have been seen as the expression of intergovernmentalism par excellence in CFSP/CSDP, the rules of procedure of IPC CFSP/CSDP foresee that its conclusions 'do not bind' nor 'prejudge' any national parliament (nor European Parliament) in its position (article 1.4). Nevertheless, in contrast to these rules, we see elements of transnational parliamentary cooperation, including fixed proportionate delegation sizes, depending whether you are belong to the EP or a national parliament (16+6). As it has been argued elsewhere, the question whether such fixed and proportionate delegation sizes are really useful, as long as consensus-decision-making is in place (Wouters and Raube 2016).

The IPC CFSP/CSDP has been working with a rotating presidency. Again, IPC CFSP/CSDP copies an intergovernmental logic, which limits a transnational agenda-setting strategy from taking place. The country presidency changes every six months and is the same that presides over the rotating institutions of the rest of the European Union. There is no centrally organized secretariat that the presidency works together with, rather a cooperative mechanism between the presiding national parliaments and the European Parliament who agree on upcoming conference agendas (Cooper 2018). While CFSP/CSDP has itself established a decision-making procedure within which the HR/VP CFSP/CSDP not only presides permanently over the Foreign Affairs Council and can initiate policy-proposals within CFSP/CSDP, the IPC CFSP/CSDP is still run according to the pre-Lisbon mode, when it were the Member States which presided over the Council. The effect is that transnational interaction of parliaments may well happen in the conferences, but that inter-parliamentary coordination prior to the conferences is limited to the informal exchanges between the presiding national parliament and the European Parliament. In fact, agenda-

setting in the IPC CFSP/CSDP shows signs of compromise between the interest of the presiding national parliament to bring themes to the fore that are of crucial domestic and regional importance for the respective Member State and those topics put forward by the European Parliament, which very often tries to address themes that are currently high on the agenda of the Council (e.g. Stavridis and Gianniou 2015).

The non-existence of binding decisions, nor conclusions as well as the rotating presidencies have an effect on the 'teeth' of the inter-parliamentary conference. The transnational policy- and agenda-making function of the conference is clearly limited by its non-binding nature. On the one hand it rules out that the IPC CFSP/CSDP can become a competing 'third chamber' on the European Union level next to national parliaments and the European Parliament. On the other hand, it safeguards the sovereignty of any of the parliaments involved in the conference. Moreover, as long as the conference does not develop some kind of binding nature, it appears difficult to exert credible authority over ongoing CFSP/CSDP debates in a consistent manner over time. Its capacity to influence CFSP/CSDP decision-making by pro-active conclusions, in the same manner how the European Parliament issues own-initiative resolutions, is inhibited by a risk of undermining itself by the non-binding nature of the text. Moreover, it should be noted that, the IPC CFSP/CSDP is not able to instrumentalise its consent powers in other policy areas to get a foot in the door in the area of CFSP/CSDP, in a way the European Parliament often does. However, as practice shows the actors within the conference, including the European Parliament, have well made use of the work of IPC CFSP/CSDP by constantly referring to its conclusions in its own CFSP/CSDP related resolutions.

4.3. Accountability

As explained above, transnational parliamentarism can well contribute to democratic accountability by monitoring governmental policies and enforcing compliance with declared policy engagements. We argued that this can be achieved through direct transnational scrutiny beyond the national domestic settings. In this respect, Wagner speaks off the 'democratic rationale' of IPCs, especially in the context of multi-level governance and the inclusion of national and supranational parliaments (2018). Indeed, as shown by Peters

(2018), the number of guest speakers in the IPC CFSP/CSDP has grown considerably over the years of its existence. This could indicate in increased effort of the IPC to exercise direct scrutiny by using the forum to interrogate policy-makers of CFSP/CSDP. In fact, it was also shown that especially the HR/VP can be invited to the meetings of the conference (article 2.3). With minor exceptions, the HR/VP has taken the chance to follow the invitation of IPC CFSP/CSDP and in the review of the conference, the 'consistent participation' of the HR/VP is seen as a meaningful way to generate debate about the policy's priorities and strategies (Wouters and Raube 2016).

It should be highlighted, however, that the appearance of personnel is often related to the exchange of information rather than the scrutiny of the CFSP/CSDP related staff. One element related to this may also be the absence of a tool that would enable the IPC CFSP/CSDP to actually scrutinize decision-makers in the absence of formal control mechanisms: neither does the IPC have the opportunity to scrutinize personnel and their policies through issue-linkage (see, in the case of the EP, Rosén and Raube 2018), nor has it itself developed tools, such as binding conclusions, resolutions or policy reports, by which it can remind staff of their obligations and duties. The lack of formality can in this regard be seen as undermining transnational control and scrutiny (see also Wouters and Raube 2016).

Furthermore, the absence of a proper public sphere around the IPCs does not help the transnational scrutiny effort. Only in recent years, the IPCs are getting live-streamed, yet they do not have an active online audience, let alone an extensive social media outreach. Similar as to the interparliamentary online platform IPEX, these remain useful tools to inform experts and involved personnel in the field about agendas, speeches and conclusions, but it remains difficult to access for a wider audience.

As regards indirect scrutiny, however, the European Parliament started to use non-binding resolutions of the IPC CFSP/CSDP to back-up its own self-initiated reports as a way to scrutinize CFSP/CSDP related personnel, including the HR/VP. The presence of almost all members of the EP throughout the last sessions of IPC CFSP/CSDP can be interpreted as the EP's willingness to engage, but also to take home essential insights that can be used to its own benefit. Research still awaits to be done to prove if the same technique is used by national parliaments. However, a continuing lack of presence of certain national delegation members (see also Peters 2018) may be seen as undermining efforts to enable indirect scrutiny. Moreover, opposite to a lack of formal powers on the side of the European

Parliament, which ask the supranational body to use other means to informally scrutinize CFSP/CSDP, national parliaments present more like a 'mixed bag' and different strategies how to hold their governments accountable. And yet, while there is a large body of literature on how national parliaments try to scrutinize of foreign policy, EU policies and CFSP/CSFP in particular (Fromage 2015; Jančić 2017; Mello/Peters 2018), further research needs to be done how exactly national parliaments make use of their participation in the IPC CFSP/CSDP to hold their own governments domestically accountable.

4.4. Cooperation

Transnational parliamentarism may also enable cooperation beyond intergovernmental networks, often labelled as parliamentary diplomacy. In the context of IPC CFSP/CSDP we may look at parliamentary diplomacy within the European Union. In an analogy to what has been called as 'European Union as a Diplomatic System' (Smith et al. 2016), we may look at parliamentary cooperation as a means of parliamentary diplomacy. While IPC CFSP/CSDP to this day lacks institutionalized diplomacy with external actors, amongst others due to the lack of a secretariat that would be able to establish such global transnational ties with other parliaments, interparliamentary assemblies and conferences, it has – as Peters has shown (2018) – clearly strengthened the transnational networking effect of national parliaments. This is supported by what Wagner calls the polemological rationale of IPCs (2018), i.e. the fostering of transnational relations through mutual parliamentary understanding, eventually contributing to international peace-building.

Parliamentary diplomacy within the CFSP/CSDP IPC can be seen through its effects on problem-and awareness raising of national parliaments as well as the creation of a support culture for CFSP/CSDP. In fact, from a European Parliament perspective the overall goal was to persuade national parliaments of the need for CFSP/CSDP in the first place, that is, more strictly speaking, in the long-run the support for an ongoing cooperation of security issues on the European level and potentially the transfer of competences to the EU. The creation of a security culture and identity in CFSP/CSDP, a key-objective of the EU (Duke 2017; Howorth 2014), has also become a major ambition of the EP at the beginning of IPC CFSP/CSDP meetings (Wouters and Raube 2012). Today, the EP sees it as one of the major achievements of IPC CFSP/CSDP. Bi-annual meetings and reflections on various topics related to CFSP/CSDP have led to ongoing information exchanges in the field. While the

conferences may not follow necessarily a consistent logic of themes and issues, the 'central corrective' in combination with a regular appearance of the HR/VP in the IPC CFSP/CSDP has enabled a steady flow of information. After a rough start in a 'parliamentary battlefield' (Herranz-Surrallés 2014), information exchanges kept flowing and contributed to the meaningful implementation of the conference over the first years. More research however should look into the extent to which there is an established mechanism of mutual understanding, including the understanding and taking into account of national parliamentary positions on the side of the European Parliament.

Overall, we can see however that parliamentary cooperation in IPC CFSP/CSDP has been used by parliaments to create a forum to develop supportive measures and identities in the context of CFSP/CSDP implementation.

5. Conclusion

This contribution has proposed a conceptual framework of transnational parliamentarism to measure the effectiveness of transnational parliamentary cooperation in the area of CFSP/CSDP on three different aspects: policy-making, accountability and cooperation. Applying the transnational parliamentarism framework has in fact revealed an image of an inter-parliamentary cooperation framework that goes beyond functions of scrutiny and control in theory: it also focused on policy-making and cooperation. By looking at policy-making, accountability and cooperation as potential effects of transnational interactions we found that the transnational effects of the IPC CFSP/CSFP were rather limited in the categories decision-making and accountability, due to the partially intergovernmental-setting and non-binding-format of the conference (see table 2). However we saw that especially the European Parliament made use of these functions in its work vis-à-vis CFSP/CSDP.

Table 2: Evaluating the performance of the IPC on CFSP/CSDP

	Characteristics	**Effectiveness**
Policy-making	Non-binding	Limited, and yet used by the European Parliament
Accountability	Direct and indirect scrutiny	Limited, and yet used by the European Parliament

Cooperation	Mutual Understanding, diplomacy	Rather Effective on the side of the European Parliament

In the last category – cooperation – we also found that the IPC CFSP/CSDP has especially shown effects for the European Parliament in its effort to strengthen a security and support culture around CFSP/CSDP in cooperation with other national parliaments.

Beyond accountability, IPC CFSP/CSDP is an interesting example of transnational parliamentarism. The article showed that the concept can be useful to test the effects of transnational interactions also in the field of established institutionalized cooperation with the European Union. At the same time, more research is needed to focus especially on the effects of transnationalism parliamentarism in the national parliamentary settings.

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[I] A clear exception in this regard is Peters (2018) who studies the practice of the IPC CFSP/CSDP on three different roles.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

From procedural disagreement to joint scrutiny? The Interparliamentary Conference on Stability, Economic Coordination and Governance

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

The provision of Article 13 TSCG to create an Interparliamentary Conference was the starting point for long discussions after which national parliaments and the European Parliament eventually reached a compromise. This article pursues a two-fold objective: It first examines the different phases of interparliamentary negotiations from 2012 to 2015. On the basis of a distinction between three competing models for interparliamentary cooperation, the article shows that the two models of EP-led scrutiny and creating a collective parliamentary counterweight did not prevail: Parliaments agreed that the new Interparliamentary Conference on Stability, Economic Coordination and Governance (SECG) would follow the 'standard' interparliamentary conference (COSAC model). In terms of national parliaments' actual participation, the lowest common denominator compromise has not changed the numbers of participating MPs: Attendance records are stable over time, the size of national delegations continues to vary and participating MPs are still twice as likely to be members of Budget or Finance committees than to be members of European affairs committees.

Key-words

European Union, national parliaments, Economic Governance, interparliamentary cooperation

1. Introduction

In Europe's post-crisis Economic Governance, interparliamentary cooperation between national parliaments and the European Parliament (EP) takes place in an Interparliamentary Conference which was established on the basis of Article 13 of the Treaty on Stability, Coordination and Governance (TSCG) in 2013. Interparliamentary cooperation is a possible remedy against shortcomings in the parliamentary control of EU Economic Governance. During the negotiations about the TSCG the provision to establish an Interparliamentary Conference was included after the French Parliament, in particular, had insisted to put such a provision into the treaty. As a consequence, the TSCG did not only strengthen the coordination and surveillance of fiscal and economic policies, but also provided for the creation of an Interparliamentary Conference in order to 'discuss budgetary policies and other issues covered by this treaty.'[1]

Composed of representatives of the relevant committees of the European Parliament and national parliaments, the Conference has met twice a year since October 2013 and was named the 'Interparliamentary Conference on Stability, Economic Coordination and Governance' (SECG) in 2015. Executive dominance in fiscal and economic policies might motivate national parliaments and the European Parliament to work together and 'exert countervailing power, both individually and collectively' (Curtin 2014: 30), but in the early years of its existence the Conference has not been able to meet expectations. Due to disagreements between national parliaments and the European Parliament, the Conference was busy negotiating its Rules of Procedure for more than two years instead of addressing the fiscal and economic challenges of the EU. The challenges are similar to those encountered in other policy areas: The general relationship between the two parliamentary levels has been characterised by conflict and rivalry, rather than cooperation (Martucci 2017; see Neunreither 2005).

The Rules of Procedure adopted by the SECG Conference in November 2015 reflect a lowest common denominator compromise about the role that this Conference should play. But the compromise allows to accommodate very different parliamentary preferences about what functions and tasks the Conference should fulfil and the SECG Conference has embarked on a path to becoming a venue for the joint scrutiny of EU Economic

Governance, as the participation records and conduct of its meetings show. In EU affairs, joint scrutiny basically means that Members of national parliaments (MPs) and the European Parliament (MEPs) meet, exchange, and cooperate in order to address the information asymmetries that they have vis-à-vis other EU institutions as well as national governments, and to engage in a collective dialogue with representatives of this executive branch.

Methodologically, this article pursues a qualitative examination of the negotiations about the institutional design of the SECG Conference on the basis of a variety of written sources and participating observation (Schöne 2005) at several meetings of the Conference. In addition to that, it analyses attendance records of the Conference from 2013 to 2018.

After briefly examining the history of Article 13 TSCG (see section 2), this article puts forward three competing models for interparliamentary cooperation as the analytical framework for studying the emergence of the SECG Conference (see section 3). It asks *how and in what direction the legal basis, rules and practices shape the functioning of the SECG Conference?* and examines the parliamentary preferences and negotiations concerning the institutional design of this arena of interparliamentary cooperation. The Rules of Procedure of the SECG Conference, adopted in Luxembourg on 10 November 2015, are, for now, the basis for the functioning of the Conference (see section 4). The model that has prevailed is a COSAC-style venue (see section 5) whose attendance is stable, but unequal, and which attracts both members of Budget or Finance committees and European affairs committees (see section 6).

2. The creation of an Interparliamentary Conference under Article 13 TSCG

The theoretical rationale behind resorting to interparliamentary cooperation in EU Economic Governance can be found in the need to respond to the use of intergovernmentalism in that area: '[T]he European Council needs to be balanced with an equally strong voice of parliamentary representation' (Neyer 2014: 135) and 'the intergovernmental logic brings with it an interparliamentary balancing' (Fabbrini 2013: 12). Article 13 TSCG is the product of inter*governmental* negotiations in December 2011 and January 2012 and has undergone significant changes during the negotiating process, revealing difficulties of Member States in reaching an agreement on this point (Kreilinger 2013: 8-10).

The original objective of the provision was that national MPs meet regularly and that this would happen in close association with the European Parliament. During the negotiations, Article 13 TSCG was completely revised twice and only the later drafts of the TSCG made an explicit link to the existing interparliamentary formats and Protocol No 1 (Kreilinger 2013: 10). Article 13 TSCG was finally agreed by the Contracting Parties as follows:

> As provided for in Title II of Protocol (No 1) on the role of national Parliaments in the European Union annexed to the European Union Treaties, the European Parliament and the national Parliaments of the Contracting Parties will together determine the organisation and promotion of a conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments in order to discuss budgetary policies and other issues covered by this Treaty.[II]

This treaty article explicitly entrusted national parliaments and the European Parliament to 'determine the organization and promotion' of the Conference.

The specific legal basis for interparliamentary cooperation in the EU can be found in Protocol No 1, Title II on Interparliamentary Cooperation. The prevailing legal interpretation sees an equal involvement of the European Parliament and national parliaments on the basis of Article 9 Protocol No 1[III], taking decisions by consensus. Sector-specific conferences 'on specific topics' (as provided for in Article 10 Protocol No 1) would then be set up on the basis of principles that were agreed by the Speakers' Conference by consensus (and not by COSAC which could theoretically decide by a majority of three-quarters). Some national parliaments, in particular a group of chairpersons of European affairs committees led by the Danish Folketing (see section 4, below), however, argued that Article 10 Protocol No 1 would empower COSAC to establish sector-specific interparliamentary conferences and did not see the Speakers' Conference in such a role (see Esposito 2016: 326-327; Folketing 2013).

There is a 'small but growing body of research on inter-parliamentary cooperation between the EU's national legislatures (and the European Parliament)' (Raunio 2014: 554) which has a long tradition in the EU and evolved over time with the emergence of policy-specific formats such as the SECG Conference (Hefftler and Gattermann 2015: 95-101). From early studies on inter-parliamentary cooperation (Bengtson 2007; Costa and Latek 2001; Larhant 2005; Neunreither 1994, 2005), the literature has specialised into more detailed

analyses of interparliamentary conferences. But the 'line of argument on conflict and cooperation [between the national parliaments and the EP] has been extended' (Rozenberg and Hefftler 2015: 21), when two new policy-specific interparliamentary conferences (on CFSP/CSDP and Economic Governance) were created in 2012/2013. Setting them up 'has been all but smooth' (Fasone and Lupo 2016: 345).

3. Competing models for the relationship between national parliaments and the European Parliament in EU Economic Governance

One of the main political reasons behind promoting (inter)parliamentary involvement in EU Economic Governance is the perceived lack of national ownership of national (economic) reforms. Even though in the European Semester most national governments submit the annual National Reform Programme to their parliament before transmitting it to the European Commission (Hallerberg et al. 2018; Raimla 2016), national parliamentarians often see economic reforms as being 'imposed' by Brussels. At the same time, it is also true that they (and their governments) sometimes lose control of the different multi-level coordination and surveillance processes.

As explained below, different models for a better parliamentary input in EU Economic Governance have been debated. This article agrees that greater interaction between the national level and EU level via an Interparliamentary Conference could, for instance, help create better national ownership of the European Semester through a greater dialogue between parliamentarians and the different EU Economic Governance actors and bodies. The added value of this Conference cannot be found in decision-making powers, but in deliberation that informs and potentially legitimises the overall process (Jančić 2016: 245). Interweaving the levels of governance would also generally facilitate the coordination of economic and budgetary policies: If national parliaments were aware of indicators such as the aggregate fiscal stance of the Euro area, if they debated them at the EU level and then had the task to transpose these orientations in their respective national parliaments, one could hope for stronger coordination and convergence (Kreilinger and Larhant 2016: 7). If diverse political views are represented in an interparliamentary conference, this could also lead to greater politicisation of these topics (Hix 2014). But as long as fiscal and economic policy decisions are seen as numeric rules (such as the obligation of the balanced budget rule

of the Fiscal Compact) and not as political choices, their acceptance in national political arenas will remain greatly reduced (Schmidt 2015). In an interparliamentary setting (some of) these problems could be tackled. The implementation of the legal provision of Article 13 TSCG was, however, complicated by the existence of several competing institutional designs that different political actors had in mind for the Conference.

The European Parliament has traditionally been sceptical about enhancing the role of national parliaments, fearing that this could undermine its position (Crum and Fossum 2013a: 255). Already back in 2012 it had described the possibility of creating a mixed parliamentary body as 'both ineffective and illegitimate' and insisted that only itself, 'as parliamentary body at the Union level for a reinforced and democratic EMU governance' (European Parliament 2012: 19), had full democratic legitimacy to exercise control in that area. For the European Parliament, nobody else is able 'to stress the points of convergence and the shared interests amongst the parliamentarians and citizens of different Member States' (Fasone 2012: 18). But since the European Parliament only has very limited legislative powers in EU Economic Governance (Crum 2018: 277) and national parliaments have kept prerogatives such as the adoption of national budgets, economic reforms and holding national governments accountable, it is difficult to see how the European Parliament could be solely responsible for scrutinising the aggregate fiscal stance of the Euro area or decision-making in the ESM (respectively a European Monetary Fund), whose resources come from national sources in the form of initial capital and guarantees (Kreilinger and Larhant 2016: 9). Unsurprisingly, the European Parliament does not subscribe to arguments in favour of strong interparliamentary cooperation in EU Economic Governance.

Many national parliaments are, in return, suspicious of giving a greater role to the European Parliament (Winzen et al. 2015; Winzen 2017: 121-175) and/or of including it in interparliamentary cooperation beyond the absolute minimum. Some of them could ultimately even imagine pursuing cooperation among national parliaments in EU Economic Governance without the European Parliament (Kreilinger 2014: 67), but over time national parliaments' involvement has not developed into a direct EU role (see Winzen 2017).

The Lisbon Treaty stipulates that national parliaments 'contribute actively to the good functioning of the Union [...] by taking part in the interparliamentary cooperation between national Parliaments and with the European Parliament.'[IV] The legal provisions do not prescribe a particular institutional design for the interparliamentary cooperation. This helped

to agree on the wording of Article 13 TSCG in early 2012, but Protocol No 1, Title II on Interparliamentary Cooperation allows for two different interpretations with respect to the role of the EU Speakers' Conference and COSAC (see section 2).

Over time, the fundamental preferences of national parliaments and the European Parliament (about how the parliamentary scrutiny of Economic Governance should be organised) have not fully converged. This confirms earlier research under the lenses of the conceptual frameworks of the 'Multilevel Parliamentary Field' (Crum and Fossum 2009) and the 'Euro-national parliamentary system' (Lupo and Fasone 2016). As they tried to attribute tasks and competences to an interparliamentary conference in Economic Governance, national parliaments, the European Parliament and other actors[V] stuck to *three competing models* which are developed in the following. These models provide the framework against which this article assesses the debates and negotiations about the SECG Conference.

According to the *first model* for the relationship between national parliaments and the European Parliament in EU Economic Governance, scrutiny in the area of Economic Governance should take place under the sole and unique leadership of the European Parliament (see Fasone 2012: 18). The European Parliament would occasionally invite national parliaments to join MEPs in Interparliamentary Committee Meetings of the Committee on Economic and Monetary Affairs or at the European Parliamentary Week as part of the European Semester. National parliaments are supposed to scrutinise their national government in EU Economic Governance without playing a particular role at the EU level or intervening collectively. The provision of Article 13 TSCG would mostly be fulfilled through an expansion of the existing Interparliamentary Committee Meetings.

Under the *second model* for the relationship between national parliaments and the European Parliament in EU Economic Governance, the Interparliamentary Conference is *a COSAC-style venue* for the exchange of information and best practices (see Kreilinger 2013).[VI] Proponents of this model wanted to build upon the example of COSAC and, like in the case of the Interparliamentary Conference on CFSP/CSDP, they created a policy-specific Conference for Economic Governance. Parliamentary scrutiny would still be conducted by each national parliament at the national level and by the European Parliament at the EU level, but the Interparliamentary Conference would allow them to discuss budgetary issues and possibly parliaments would have better information for their individual scrutiny activities.

In the *third model* (*collective parliamentary counterweight*), Article 13 TSCG would provide the basis for creating a powerful interparliamentary body that could effectively scrutinise and act as a counterweight to executive decision-making in the area of Economic Governance (Curtin 2014: 30). After all, besides Article 13 TSCG, the TSCG and the ESM Treaty do 'little or nothing to anchor new regulatory functions for the Union in democratic institutions' (Dawson and de Witte 2013: 834). Establishing a *collective parliamentary counterweight* would possibly also require a more exclusive component for the Euro area, in which the national parliaments of Member States whose currency is the Euro would coordinate their activities and exercise parliamentary control at the level of the Euro area.[VII] Under this model, parliamentary scrutiny would be pooled and shared, based on Article 13 TSCG. But Ben Crum and John E. Fossum already stressed in 2013 that

> [i]nterparliamentary coordination suffers from the major limitation that it remains inherently fragmented. However much parliaments coordinate, they are unlikely to add up to a single coherent voice that can control the actual decisions adopted by the collective of governments that they scrutinise (Crum and Fossum 2013b: 3).

Many of the actors involved in the negotiations on the procedural arrangements for the SECG Conference, in particular the Rules of Procedure, have aligned with the key characteristics of one model, for instance in letters, reports or working papers. Their preferences for organising interparliamentary cooperation can therefore, in most cases, be classified as close to either *EP-led relations*, to a *COSAC-inspired conference* or to creating a *collective parliamentary counterweight*.

Some contributions have pointed out that parliamentary preferences would align along only two models: Winzen (2017: 163-164) distinguishes support for and opposition against a broad mandate of the Conference while other contributions classified parliamentary preferences as centralised versus joint scrutiny (Cooper 2016; Kreilinger 2015). But the far-reaching ideas, e.g. of the French Assemblée, that go beyond the lowest common denominator compromise underline the value of having three distinct models.

4. Negotiations about the functioning of the Conference in 2012/13 and 2015

This section tracks the negotiations between national parliaments and the European Parliament about how the Conference should function. Negotiations proceeded as follows: The first discussions took place from November 2012 onwards, in sub-groups of national parliaments (see section 4.1). The Speakers' Conference then agreed general organisational principles in April 2013 and, after little progress had been made in adopting Rules of Procedure, re-considered the issue and agreed 'principles for transposition into Rules of Procedure' in April 2015 (see section 4.2). The final round of negotiations about the Rules of Procedure took place at the meeting of the SECG Conference in November 2015 (see section 4.3).

4.1. First discussions in sub-groups of national parliaments

The Danish Folketing and the French Assemblée nationale have been particularly vocal actors in the ex-ante coordination of national parliaments' positions on their preferred institutional design of the Interparliamentary Conference of Article 13 TSCG which later became the SECG Conference (see Kreilinger 2015). These ad-hoc meetings in sub-groups among Speakers and committee chairpersons of national parliaments from November 2012 to April 2013 as well as the preparatory work at these meetings were crucial for advancing the discussion of fundamental issues concerning the arrangements of the Conference (Griglio and Lupo 2018).

On the one hand, the Danish Folketing and the chairperson of its European affairs committee, Eva Kjer Hansen, invited to two meetings on the subject in November 2012 and March 2013 (see Table 1). At their second meeting, the chairpersons of European affairs committees from 15 Member States declared their preference for 'establishing a small effective conference focused on substantial issues – to be held in the margins of the biannual COSAC-meetings' (Folketing 2013). The Conference on the basis of Article 13 TSCG would not be a separate body, but an appendage to COSAC. The 15 chairpersons stated that they had 'no desire to build new inter-parliamentary bodies. […] [E]xisting structures and resources should be exploited to their full potential' (Folketing 2013).

On the other hand, the French Assemblée nationale argued that it was 'necessary to implement this Conference as soon as possible, by taking the initiative to make specific proposals that engage in constructive negotiations with our European partners' (Assemblée nationale 2012: 65) and proposed to follow the model for CFSP and CSDP with 6 MPs per national parliament and 16 MEPs in order to accompany and control the European Semester. Inside the Conference, a specific Euro area 'component' should be established. While the entire Conference would follow the COSAC model, the French plans for the Euro area amount to creating a collective parliamentary counterweight (*third model*). In January 2013, at a meeting that took place in Luxembourg, the Speakers of the national parliaments from the other five founding Member States[VIII] endorsed the proposals to implement the provision of Article 13 TSCG in that way (see Table 1).[IX]

Table 1: Preferences on interparliamentary cooperation under Article 13 TSCG

DATE	AUTHOR(S)	KEY STATEMENT(S)
NOV. 2012	Chairpersons of European affairs committees of 11 national parliaments	"worrying lack of proposals as to how the role of national parliaments can be strengthened more concretely" (Folketing 2012)
	European Parliament	"the creation of a new mixed parliamentary body […] would be both ineffective and illegitimate on a democratic and constitutional point of view" (European Parliament 2012: 19)
JAN. 2013	Speakers of 6 national parliaments	"consider that […] a conference […] must be set up. […] [T]his conference would discuss topical issues of Economic and Monetary Union, including agreements in the framework of the European Semester, in order to reinforce dialogue between the national Parliaments and with the European Parliament" (National Parliaments 2013)
MARCH 2013	Chairpersons of European affairs committees of 15 national parliaments	"[w]e [...] have no desire to build new inter-parliamentary bodies. Instead, we believe that existing structures and resources should be exploited to their full potential" (Folketing 2013)

Source: Own elaboration.

4.2. Two years of discussions and little progress

In April 2013, the Speakers' Conference agreed on the general organisational principles for the Interparliamentary Conference of Article 13 TSCG[X] (which, as noted, later became known as the SECG Conference), but the discussions between national parliaments and the European Parliament about the Rules of Procedure for the Conference lasted for another two years. Interestingly, the German Bundestag did not articulate an institutional position about the functioning of the Conference (Deubner 2013: 48), although its President took part in the meeting in Luxembourg in January 2013 and endorsed the resulting working paper. Only at a very late stage, in the run-up to its first meeting in Vilnius in October 2013, the German position was made clear in a letter by the Bundestag's Head of Delegation, Norbert Barthle (CDU). According to him, it would be 'premature' to seek the adoption of Rules of Procedure at that point, but he welcomed the idea to discuss the aims and functions of the Conference (Deutscher Bundestag 2013).

The constituent meeting of the Conference in October 2013 failed to agree on Rules of Procedures: The draft Rules of Procedure[XI], prepared by the Lithuanian Presidency Parliament, were not endorsed by the Conference. The Speakers' Conclusions of April 2013 therefore provided the procedural basis for the meetings of the Conference from October 2013 to November 2015.

In order to overcome the stalemate, the following Presidency Parliament (Greece) asked all parliaments for input. The internal organisation was again an item on the agenda of the September 2014 meeting of the Conference (organised by the Italian parliament), but no agreement was reached either and further discussions were postponed to 2015.

When the Speakers' Conference in Rome re-examined the issue of the Rules of Procedure of the 'Article 13 Conference' in April 2015, parliaments had already discussed for two years what the Conference should do and how it should be organised. The Speakers' Conclusions then changed its provisional name from 'Interparliamentary Conference on Economic and Financial Governance' into 'Interparliamentary Conference on Stability, Economic Coordination and Governance in the European Union' (see Table 2). This made the link to the TSCG (more) obvious. In addition to that, the Speakers agreed principles for transposition into Rules of Procedure at the next SECG Conference in Luxembourg in November 2015. These guidelines arguably left 'very little discretion' (Cooper 2017: 241) to

the SECG Conference as the Speakers' Conference 'essentially dictated the terms' (ibid) of the Rules of Procedure.

Even though many of the Speakers' principles did not go beyond the common ground of previous agreements (see Table 2), two of them are noteworthy. First, the purpose of the Conference was defined more clearly: It

> should provide a framework for debate and exchange of information and best practices in implementing the provisions of the Treaty in order to strengthen cooperation between national Parliaments and the European Parliament and contribute to ensuring democratic accountability in the area of economic governance and budgetary policy in the EU, particularly in the EMU, taking into account the social dimension and without prejudice to the competences of EU Parliaments.[XII]

Second, the Speakers referred to the timing of the Conference, a long-standing issue, and stated that meetings 'should be convened before the presentation of the Annual Growth Survey and the adoption of the National Reform Programmes'[XIII]. The timing of the SECG Conference is of particular importance to make the voice of parliaments heard in the European Semester (see section 5, below). The provisions regarding the composition of delegations and meetings of the Conference remained unchanged (see Table 2).

Table 2: Evolution of the Speakers' principles related to the SECG Conference

	EU SPEAKERS CONFERENCE APRIL 2013 (NICOSIA)	INTERMEDIATE STEPS	EU SPEAKERS CONFERENCE APRIL 2015 (ROME)
NAME OF THE CONFERENCE	not defined / Conference of Article 13 TSCG	Interparliamentary Conference on Economic and Financial Governance	Interparliamentary Conference on Stability, Economic Coordination and Governance in the European Union
PURPOSE	discuss budgetary policies and other issues covered by the TSCG (Article 13 TSCG)	*[no consensus on the propose of the Conference]*	- framework for debate and exchange of information and best practices - contribute to ensuring democratic accountability in the area of economic governance and budgetary policy
COMPOSITION	Composition and size of delegations shall be determined by each Parliament.		
MEETINGS	Twice a year; first semester: in Brussels; second semester: capital of the Parliament of the Member State holding the rotating Council Presidency		
TIMING	not defined	not defined	Conferences should be convened before the presentation of the Annual Growth Survey and before the adoption of the National Reform Programmes

Source: Own elaboration.

4.3. Final negotiations on the Rules of Procedure in November 2015

The adoption of the Rules of Procedure at the fifth meeting of the Conference on 10 November 2015 was thought to be a mere formality: A draft of the Rules of Procedure had been prepared by the Presidency Parliament (Luxembourg) and circulated to all other parliaments before the meeting. The final discussion of the draft of the Rules of Procedure was therefore supposed to take place in a short session among the Heads of the delegations at the end of the Conference.

But at that session, several of the provisions in the Rules of Procedure had been modified without prior notice and without making these changes visible. To the surprise of many delegations, the European Parliament was at the origin of these changes. The dispute grew sharply when the Head of the delegation of the European Parliament, Robert Gualtieri[XIV],

made it clear that the adoption of the Rules of Procedure would fail unless the amendments of the European Parliament were accepted. The Heads of many national delegations urged the representative of the European Parliament to pave the way for the unanimous adoption of the Rules of Procedure by dropping the amendments that had quietly found their way into the document. One technical change only clarified the term 'Presidency Parliament', but the provision on possible amendments to the Rules of Procedures, stating that these 'shall be subject to a decision by consensus by the Interparliamentary Conference on SECG' (§7.2), was adjusted by adding another phrase that these 'must be in accordance with the framework set by the Conference of Speakers of the EU Parliaments' (§7.2 EP). It is clear that the European Parliament tried to consolidate and advance its legal interpretation of a SECG Conference that operates under the auspices of the Speakers' Conference (see section 2).

After the session had been suspended for 15 minutes to allow Mr Gualtieri to call his officials in Brussels (the President of the European Parliament was on an airplane to an EU summit in Valetta and could not be reached), the intensive mediation efforts succeeded in obtaining the necessary approval from the Head of delegation of the European Parliament on the Rules of Procedure. To that end, the request of the European Parliament to include a reference to the agreement on the framework for the SECG Conference reached by the Speakers' Conference in Rome in April 2015 was added in §7.2. The Rules of Procedure were then adopted unanimously. §7.2 now reads as follows:

> Any amendments shall be subject to a decision by consensus by the Interparliamentary Conference on SECG, and must be in accordance with the framework set by the Conference of Speakers of the EU Parliaments.[XV]

5. And the winner is…?

Based on the tracking of interparliamentary negotiations in the previous section, this section evaluates the compromise on the Rules of Procedure as the outcome of an interparliamentary struggle that lasted from 2012 to 2015. Although an interparliamentary compromise, it is nevertheless possible to identify how the final provisions of the Rules of Procedure align with the three competing models for interparliamentary relations that were put forward in section 3.

Profound disagreements, like the ones described in the previous section, are a common phenomenon in interparliamentary cooperation (see Fasone and Lupo 2016: 345-346). In the case of Article 13 TSCG, they concerned 'general questions of legitimacy, basic issues such as the formal weight to be given to the two parliamentary levels, and […] the competences and objectives of such a conference' (Kreilinger 2014: 58). The underlying preferences about the institutional design of a body involved in the parliamentary scrutiny of EU Economic Governance (see section 3, above) prevented a smooth implementation of Article 13 TSCG: While the European Parliament clearly favoured an institutional design in which it would lead the scrutiny (*first model*), the national parliaments were split between the *second model* of a COSAC-style conference and the *third model* of a collective parliamentary counterweight. Simon Sutour, the chairman of the European affairs committee in the French Sénat, described in 2013 that the European Parliament was putting 'pressure on other EU institutions to convince them that parliamentary oversight of the new governance is primarily ensured by itself' (Sénat français 2013).

The first-hand evidence from participating observation in the final round of negotiations about the Rules of Procedure (see section 4.3) indicates how interparliamentary relations were still characterised by conflict and rivalry rather than cooperation (see Martucci 2017; Neunreither 2005). Some have argued that, just like for the CFSP/CSDP Interparliamentary Conference, 'overlapping authority claims' (Herranz-Surrallés 2014) between the European Parliament and national parliaments can explain disagreements in Economic Governance to a great extent (e.g. Kreilinger 2015). According to Herranz Surralles' assessment of 'overlapping authority claims' (2014), the underlying explanation of the profound disagreements between national parliaments and the European Parliament is a mismatch between the daily EU policy making and formal treaty powers: an incremental and informal empowerment of the European Parliament clashes with national parliaments and their constitutional role linked to intergovernmental treaties and their domestic role in controlling national governments.

In the end, the SECG Conference has become a COSAC-style venue (*second model*), although with some institutional peculiarities. The linkage to the European Parliamentary Week at the first annual meeting of the Conference and the absence of a provision regarding the size of delegations in the Rules of Procedure of the SECG Conference (which remain at the discretion of each parliament) are the most important ones. As a consequence, the second

model did not fully prevail, but has been followed to a great extent. The SECG Conference certainly did not become a collective parliamentary counterweight against executive dominance in EU Economic Governance (*third model*).

The final version of the Rules of Procedure essentially confirmed previously existing practices (Rozenberg 2017: 47), but in terms of their actual content, organisational arrangements in Rules of Procedure are important for assessing interparliamentary cooperation (see Hefftler and Gattermann 2015: 107-112). The Conference has a rotating (and not a permanent) secretariat. This means that it lacks dedicated resources of its own and is dependent on the respective Presidency Parliaments and the administration of the European Parliament (see Cooper 2017). In addition, a 'troika' of the current, preceding and upcoming Presidency Parliaments and the European Parliament plays a coordinating role through informal meetings which take place at the margins of the Conference (§3.3, §3.4). In these respects, the Conference settled on a design similar to the cases of COSAC and the interparliamentary conference on foreign and defence policy (Winzen 2017: 26). As previously pointed out with respect to the Speakers' principles of April 2013, the new Conference

> largely follows the characteristics of the 'standard' interparliamentary conference. The Speakers' decision did not have the ambition to be innovative, but rather to duplicate a model that worked in the past. (Kreilinger 2013: 19)

The size of delegations to the SECG Conference is, as noted above, not fixed (§4.1 of the Rules of Procedure, see also section 6, below).

Furthermore, the significance of the European Parliament's last-minute amendment to §7 of the Rules of Procedure, as also explained by Ian Cooper (2017: 242), is that the SECG Conference may amend its Rules of Procedure, but must (always) adhere to the framework established by the Speakers' Conference. This strengthens the role of the Speakers' Conference which has, although it is not explicitly recognised by the EU Treaties, moved into an overall coordinating function for interparliamentary cooperation (Fasone 2016).

The real impact of the amendment remains to be seen: The current Rules of Procedure do not differ from the framework set by the Speakers' Conference in April 2015. If better working methods of the Conference (Griglio and Lupo 2018; Rozenberg 2017) can be

applied without codification in the Rules of Procedure, the amendment will have no effect. But far-reaching changes to the Rules of Procedure, as for instance proposed by Valentin Kreilinger and Morgan Larhant (2016), become more difficult to implement. In terms of decision-making, §7.2 of the Rules of Procedure represents a double-lock, as any changes to the Rules of Procedure must be adopted by consensus in the SECG Conference and, at the same time, also conform with the guidelines by the Speakers' Conference that were also adopted by consensus. Whether the European Parliament's insistence on that double-lock was necessary (or whether it has, on the contrary, led to a deterioration of interparliamentary relations) is another open question.

Regarding the timing and organisation of the meetings, in the first semester of each year, the Conference convenes in Brussels, co-hosted and co-presided by the Presidency Parliament and the European Parliament (§3.1, Rules of Procedure). In the second semester of each year, it is held in the Member State holding the EU Presidency and presided over by the Presidency Parliament (§3.1). The first of the two annual meetings of the SECG Conference is embedded into the so-called European Parliamentary Week. The creation of the European Parliamentary Week predates Article 13 TSCG and, in particular, contains a set of parallel interparliamentary sessions organised by different committees of the European Parliament and to a certain extent aligns with the *model* of EP-led scrutiny. The first meeting of the SECG Conference is therefore dominated by the European Parliament, although formally the Presidency Parliament co-chairs all sessions (§3.1. of the Rules of Procedure). Related to the overall timing of the Conference's two meetings per year, the Rules of Procedure state that they 'should be convened before the presentation of the Annual Growth Survey and the adoption of the National Reform Programmes' (§3.2). Here, the provisions in the Rules of Procedure also fully adhere to the Speakers' principles of April 2015 (see Table 2, above). The relevant stages of the European Semester are programmed for April (national governments must submit their Stability or Convergence Programme and National Reform Programme, in which they put forward their fiscal and economic policy, by the end of April) and November (the European Commission usually presents the Annual Growth Survey, which sets the overall economic priorities for the EU, by the end of November).[XVI]

If one looks at the issues that are put on the agenda of the SECG Conference, they have moved beyond budgetary policies and other issues covered by the TSCG, narrowly defined. In this respect, the Danish Folketing and its allies (see section 4.1) did not get their way. In

February 2017, for instance, structural reforms, conditionality and the ESM programmes were addressed in one session; economic policy, social affairs, growth and jobs were covered at other meetings. Many centre-left parties, like the French Socialists (initially opposed to tighter budgetary surveillance), had supported the TSCG back in 2012 in exchange for a symbolic 'Pact for Growth and Jobs' that did not alter the fiscal rules (Rozenberg 2015: 7) and subsequently wanted to use the provision for creating the Interparliamentary Conference as a vehicle to counterbalance the dominant pro-austerity discourse in EU Economic Governance. This hope has not been fulfilled, but is still the reasoning behind some ideas to create a Parliamentary Assembly of the Euro area, e.g. in Thomas Piketty et al.'s 'Pour un traité de démocratisation de l'Europe' (Hennette et al. 2017).

Finally, according to the Rules of Procedure, '[t]he Presidency Parliament may present non-binding conclusions on the outcome of the meeting […]. In the first semester of each year the latter may be presented together with the European Parliament' (§6.1). The respective Presidency Parliaments have usually only presented a 'Presidency Summary' after the second meeting of the SECG Conference recapitulating the issues discussed in the different sessions. No conclusions have been issued after the meetings co-presided by the European Parliament. This means that the SECG Conference is not producing the same amount and the same type of written documentation as other interparliamentary conferences (e.g. COSAC and CFSP/CSDP).

The Conference thus suffers from some organisational and functional weaknesses. These realities must be taken into account in order to understand how the SECG Conference works on the basis of the status-quo in terms of its organisation. The institutional design of the Conference mostly corresponds to the *second model* of a COSAC-style venue. The interparliamentary compromise of November 2015 did not assign a direct European role to national parliaments (Winzen 2017: 121-175), but provides a possibility for undertaking joint scrutiny that is examined in the following section on the basis of attendance records at the Conference.

6. An assessment of the SECG Conference on the basis of attendance records

The SECG Conference has, by now, met ten times in total. Since the adoption of the compromise on the Rules of Procedure of the SECG Conference in November 2015, five meetings of the SECG conference have taken place (from February 2016 to February 2018). This allows taking stock of how the Interparliamentary Conference has worked in practice so far. On the basis of the previous findings, it is clear that the COSAC-inspired institutional design (*second model*) prevailed, but attendance patterns can shed additional light on its development. After all, neither the size of national delegations, nor the affiliation of participants to certain parliamentary committees have been fixed; they remain the responsibility of each parliament. Article 13 TSCG, the Conclusions of the Speakers' Conference and §4.1 of the Rules of Procedure only mention representatives of 'relevant committees':

> The Interparliamentary Conference on SECG shall be composed of delegations from the relevant committees of the national Parliaments of EU Members States and the European Parliament. The composition and size of delegations shall be determined by each Parliament.[XVII]

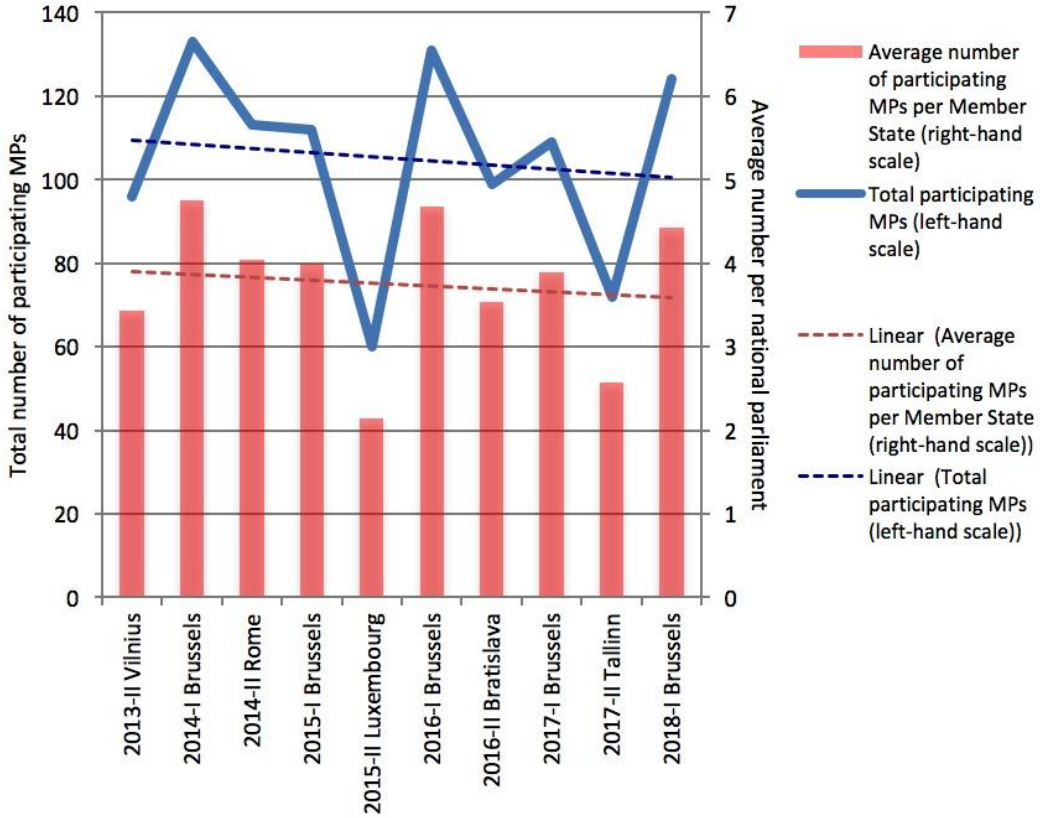
In the early years of its existence, the Conference was not able to meet far-reaching expectations by some actors and thus confirmed the difficulties encountered by all interparliamentary initiatives since 1989 (see Larhant 2005). But if assessed by the objective set in §2.1 of its Rules of Procedure, according to which the Conference 'shall provide a framework for debate and exchange of information and best practices' and 'contribute to ensuring democratic accountability in the area of economic governance and budgetary policy in the EU, particularly in the EMU' (§2.1, Rules of Procedure), then the Conference actually does what it is supposed to do. After the procedural disagreements are resolved, national parliaments and the European Parliament could still embark on jointly scrutinising the executive decision-makers of EU Economic Governance.[XVIII]

Meeting with colleagues from other EU Member States is a firmly established part of the work of parliamentarians (see Wagner 2013: 195). In the following, this section examines variation over time (section 6.1), across Member States (section 6.2) and across committees (section 6.3). For each of the three dimensions, the attendance records from 2013 to 2018 are examined. The data have been extracted from the lists of participants.

6.1. Variation over time

SECG Conferences are usually attended by around 120 MPs when they take place in Brussels (as it is the case for the first meeting in connection with the European Parliamentary Week) and by around 90 MPs when they take place in the national capital of the Presidency Parliament (as it is the case for the second meeting).[XIX] From 2013 to 2018 a total of ten meetings of the Conference took place. There has been a slight decrease in the total number of participating MPs and in the average number of participants per national parliament (see Figure 1).

Figure 1: Overall attendance at the SECG Conference from 2013 to 2018



Source: Own elaboration. Data: Fromage (2016a), Annex I, for 2013(II)-2015(I); own data collection from lists of participants for 2015(II)-2018(I).

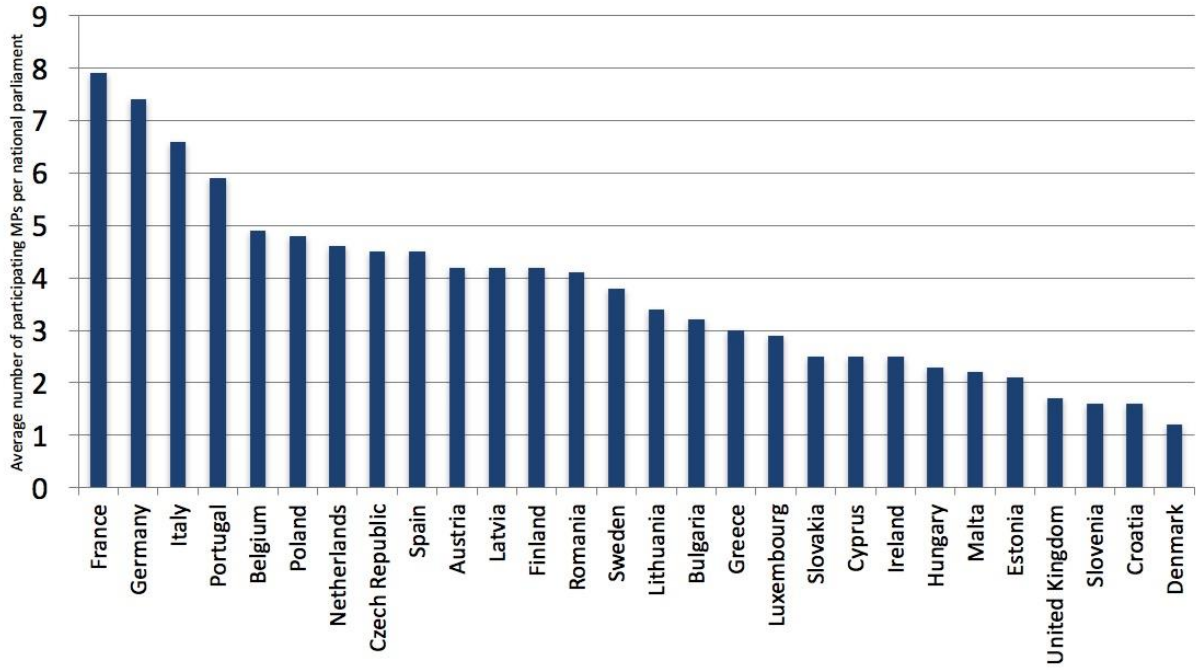
In general, however, the attendance can be considered stable. After an all-time low at the meeting in Luxembourg in November 2015 (60 MPs), the number of participants has recovered at the following meetings (see Figure 1). This means that despite struggles about

the Rules of Procedure, attendance has not declined. Parliamentarians thus remain attached to the Conference that corresponds to the *second model*. They dedicate time and resources to it.

6.2. Variation across member states

The data also confirm that over the years interparliamentary relations between national parliaments have 'not develop[ed] into a balanced multilateral interplay including parliaments from all member states on the same footing' (Benz 2011: 11). Similar to the case of COSAC (Kreilinger 2013: 4), national parliaments' participation in the early years of the SECG Conference was unequal (Fromage 2016a) and the great variation in the number of MPs attending the SECG Conference has persisted (see Figure 2). If the average participation is below two MPs (as for Denmark, Croatia, the United Kingdom, Slovenia and Bulgaria), the delegation of a national parliament does not allow for representation of governing parties and opposition parties – not to mention representation of both chambers in case of bicameral systems. At the same time, it is clear that MPs have limited time and resources for the SECG Conference. They may also already feel well-informed. Since the creation of the Conference in 2013, only 13 out of 28 national parliaments have had average delegation sizes of four or more MPs. Four MPs is generally considered the ideal number of MPs in order to have a 'solid foundation for a genuine network of high flyer specialists' (Rozenberg 2017: 50), where the chair and deputy chair of the Budget or Finance committee, belonging to different political camps (and assemblies in case of bicameral systems), would be represented. Unsurprisingly, the national parliaments of the biggest Euro area members (France, Germany and Italy) have, on average, sent large delegations of seven or more MPs to the SECG Conference (see Figure 2).

Figure 2: Attendance per national parliament at the SECG Conference from 2013 to 2018



Source: Own elaboration based on data collection from lists of participants.

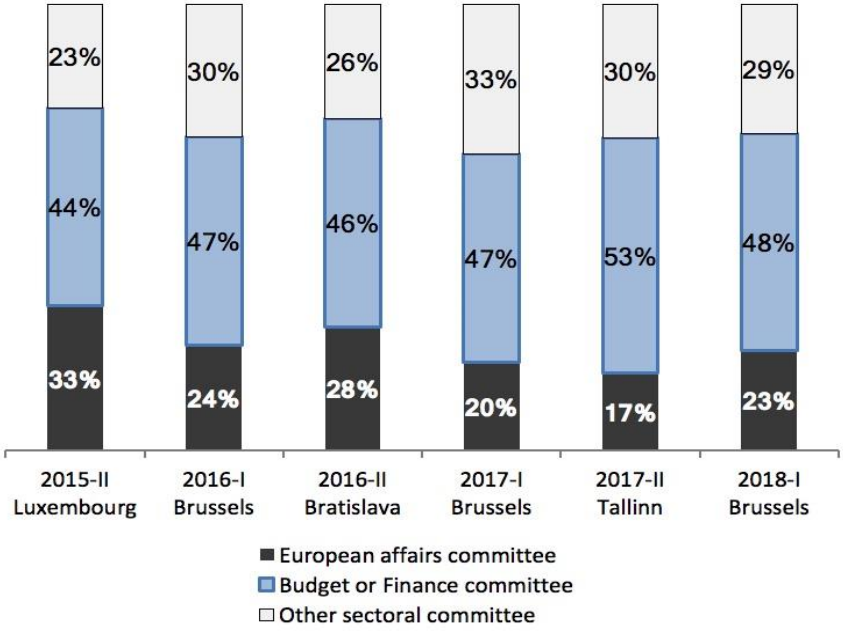
Delegation sizes also vary in other interparliamentary settings. As long as the SECG Conference is not asked to take binding decisions, such a variation is not a problem. If, at some point, the SECG Conference evolved into this direction, different delegation sizes (or voting powers) might be necessary in order to ensure an equal representation of citizens from EU member states.

6.3. Variation across committees

Finally, one interparliamentary struggle in the early negotiations about the institutional design of the Conference concerned the role of European affairs committees. The institutional self-interest of European affairs committees was to keep control over Economic Governance and possibly avoid an empowerment of their fellow MPs who are most likely to come from Budget or Finance committees. They did not succeed, although in 2012/2013, the Danish Folketing was able to build a large coalition among the chairpersons of European affairs committees (see section 4.1).[XX]

The lists of participants allow examining the committee affiliation of participating MPs and whether MPs affiliated to sectoral committees (e.g. Budget or Finance committees) or MPs affiliated to European affairs committees attend the Conference. This has evolved over time (see Figure 3): At the constituent meeting of the Conference in Vilnius in October 2013, roughly 50% of the participating MPs belonged to the Budget or Finance committees of their national parliament, 28% were affiliated to the European affairs committee and the remaining participants (over 20%) were members of other sectoral committees such as Economic or Social affairs.[XXI] In November 2015, about 33% (+5 percentage points compared to the constituent meeting in 2013) of the MPs attending the Conference were members of European affairs committees, 44% (-6) were members of Budget or Finance committees and 23% (+3) of participating MPs did not belong to either of these two committees (Kreilinger 2016: 49). More recently, at the meeting in Tallinn in October 2017, only 17% of participating MPs belonged to the European affairs committee of their national parliament (-16 compared to the meeting in Luxembourg, two years earlier); 83% of them were affiliated to other sectoral committees. This proportion of European affairs committee members has recovered slightly to 23% at the most recent meeting in Brussels in February 2018 (see Figure 3).

Figure 3: Committee-affiliation of MPs at the SECG Conference from 2015 to 2018



Source: Own elaboration based on data collection from lists of participants.

This suggests that the euro crisis has not only affected the power balance within national parliaments (Fasone 2018), but also interparliamentary cooperation and a 'mainstreaming' of EU affairs (see Gattermann et al. 2016) has taken place at the SECG Conference through a greater involvement of MPs from sectoral committees (Fromage 2016b; Rozenberg 2017: 48): If MPs who cover budget or finance issues become involved in interparliamentary cooperation, the domestic experts on the topic become active at the EU level (and not primarily MPs from European affairs committees that are already quite Europeanised). This strengthens what has been called 'interparliamentarism by committee' (Fasone and Lupo 2016: 355) and exposes MPs from sectoral committees to the positions and views of parliamentarians from other EU countries.

7. Conclusion

This article has examined the difficulties in making interparliamentary cooperation work. The Rules of Procedure of the SECG Conference reflect a lowest common denominator compromise about the role that this new body should play in EU Economic Governance. In that respect, the findings are in line with previous theoretical assumptions about and practical examples for challenges in interparliamentary cooperation (Crum and Fossum 2013a; Lupo and Fasone 2016).

National parliaments and the European Parliament agreed that the institutional design of the SECG Conference would follow the model of COSAC, although with two institutional peculiarities: The linkage to the European Parliamentary Week at the first annual meeting gives the European Parliament some additional leverage and there is no provision regarding the size of delegations. Thus, the *second model* did not fully prevail, but it has been followed to a great extent. The SECG Conference certainly did not become a collective parliamentary counterweight to executive dominance in Economic Governance (*third model*). Despite this, the number of participants is stable over time, the size of national delegations continues to vary and MPs are still twice as likely to be members of Budget or Finance committees than to be members of European affairs committees.

After two years of procedural disagreements, the Rules of Procedure are the current basis on which the Conference works and interparliamentary cooperation in the post-crisis

Economic Governance is now characterised by a high degree of stability. The SECG Conference could still become a venue for joint scrutiny in EU Economic Governance in which national parliaments and the European Parliament cooperate in order to remedy the information asymmetries that they have vis-à-vis the executives. MPs and MEPs would then engage in a real dialogue with representatives of the EU's executive and jointly scrutinise those actors and bodies who are responsible for EU Economic Governance. But despite proposals for creating some kind of joint parliamentary body, there is currently little momentum in that direction.

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I Article 13 TSCG.

II Article 13 TSCG.

III 'the organisation and promotion of effective and regular inter-parliamentary cooperation within the Union shall be determined by the European Parliament and National Parliaments.'

IV Article 12 TEU. The crisis thus only accelerates a process that was already foreseen in the Lisbon Treaty.

V E.g. the Four Presidents' Report (2012) and the Five Presidents' Report (2015) on completing EMU.

VI COSAC is the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU which was established in 1989.

VII This would be less far-reaching than a 'Eurozone Parliament' (see Kreilinger and Larhant 2016).

VIII Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

IX Working Paper of the meeting of the Speakers of Parliament of the Founding Member States of the European Union and the European Parliament in Luxembourg on January 11th, 2013. The Chamber of Deputies of the Republic of Italy did not participate in the meeting and did not endorse the document.

X Presidency conclusions of the Speakers Conference, Nicosia, April 2013.

XI Parliament of Lithuania, Draft Rules of Procedure of the Interparliamentary Conference on Economic and Financial Governance of the European Union, 2013.

XII Presidency conclusions of the Speakers Conference, Rome, April 2015, p. 5.

XIII Presidency conclusions of the Speakers Conference, Rome, April 2015, p. 6.

XIV Chairman of the Committee for Economic and Monetary affairs in the European Parliament.

XV Rules of Procedure of the Interparliamentary Conference on Stability, Economic Coordination and Governance in the European Union.

XVI The SECG Conference could also be linked to different stages of the European Semester by taking place 'in November or December after the Annual Growth Survey is presented and in June after country-specific recommendations are issued' (Rozenberg 2017: 47-48).

XVII §4.1 of the Rules of Procedure.

XVIII Joint scrutiny means that national parliaments and the European Parliament cooperate in order to remedy the information asymmetries that they have vis-à-vis the executives.

XIX Own calculation on the basis of lists of participants.

XX Chairpersons from 15 national parliaments/chambers (Czech Republic, Denmark, Estonia, Ireland, Hungary, Latvia, Lithuania, Luxembourg, Slovakia, Slovenia, Sweden, the UK House of Lords, the Belgian Senate and the Romanian Senate signed a letter in April 2013 arguing that the Article 13 Conference should meet at the margins of COSAC (Folketing 2013, see also Table 1).

XXI Own calculation on the basis of the list of participants.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

A New Form of Democratic Oversight in the EU: The Joint Parliamentary Scrutiny Group for Europol

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

In 2017, a new Joint Parliamentary Scrutiny Group (JPSG) was created to enable members of the national parliaments of the EU and the European Parliament to exercise joint oversight of the EU agency for police cooperation (Europol). This paper chronicles and explains the lengthy legal and political process leading up to the first meeting of the Europol JPSG in October 2017, and the establishment of its Rules of Procedure at its second meeting in March 2018. In addition, the Europol JPSG is compared to the three EU inter-parliamentary conferences (IPCs) which meet twice-yearly to discuss EU affairs, foreign policy and economic governance. While there are many similarities, the JPSG differs from these others in that it has an explicit mandate to scrutinize, and the target of its scrutiny is a specific EU agency rather than a whole policy field. The JPSG is also distinctive in a number of key respects, including a stronger legal basis, more restrictive membership and participation rules, greater continuity of membership, stronger access to EU officials and documents, a seat on the Europol Management Board and an explicit right to ask oral and written questions. Taken together, these attributes indicate that the JPSG is designed to be an oversight body, rather than merely a discussion forum. Finally, the paper considers the likely future UK role in relation to the Europol JPSG after Brexit.

Key-words

European Union, Europol, Inter-Parliamentary Conferences, Joint Parliamentary Scrutiny Group, Parliamentary Scrutiny

1. Introduction

The Joint Parliamentary Scrutiny Group (JPSG) was created in 2017 to exercise oversight over the European Police Agency (Europol). It is the first of its kind, insofar as it is an interparliamentary body made up of members of the European Parliament (EP) and the national parliaments of the European Union (EU), with a legal mandate to scrutinize the activities of an EU agency. These attributes set it apart from the other EU interparliamentary bodies with a comparatively weaker legal mandate and a broader field of policy concern. It is also a unique arrangement in comparison to other EU agencies, which do not enjoy treaty recognition and are subject to weak oversight from the EP and individual national parliaments but not joint scrutiny from both.

The key question of this paper, particularly in the context of this special issue, is whether the JPSG for Europol represents a new form of democratic oversight in the EU. More specifically, is it essentially similar to or qualitatively different from other forms of interparliamentary cooperation in the EU, in particular the three major Inter-Parliamentary Conferences (IPCs) – the COSAC Plenary, the CFSP-CSDP Conference and the SECG Conference. Early scholarly analysis is of varying opinion as to whether the JPSG 'represents a major step forward for interparliamentary scrutiny' (Kreilinger 2017: 15) or that 'it is to be expected that Europol does not have to fear direct consequences of this parliamentary scrutiny' (Gless and Wahl 2017: 353). Suspecting that the JPSG may be merely 'old wine in new bottles,' one observer noted that 'it may not be as different from the pre-existing interparliamentary conferences as one could have expected' (Fromage 2017).

Certainly, the Europol JPSG shares structural similarities with the three IPCs. The author has previously argued that the three IPCs share three attributes – they are *EU-specific* (in membership and policy focus), *large* (involving multiple participants from each parliament) and *permanent* (meeting twice-yearly rather than on an *ad hoc* basis) – which set them apart from other forms of inter-parliamentary cooperation such as the NATO Parliamentary Assembly (which is not EU-specific), the EU Speakers Conference (which is small) or Inter-Parliamentary Committee Meetings (which are *ad hoc*) (Cooper 2019 (forthcoming)). By this measure, the Europol JPSG belongs in the same category of

institution as the IPCs: its membership is comprised of EU parliaments meeting to discuss EU-related issues, it is large (albeit somewhat smaller than the three IPCs), and it meets on a regular, twice-yearly basis. However, a close examination of the Europol JPSG reveals a number of key differences from the three IPCs, all of which attest to the fact that it is explicitly mandated and designed not as a talking shop but as a scrutiny body. Taken together, these make the Europol JPSG different in kind from the IPCs. The argument here is that the Europol JPSG represents a genuinely new form of interparliamentary cooperation within the EU, based on an innovative model of joint parliamentary scrutiny. This model need not be confined to the scrutiny of Europol or even the policy field of Justice and Home Affairs, but could serve as a template for the parliamentary oversight of other agencies and policy fields. It is a genuine innovation in the EU's system of multilevel parliamentary democracy (Cooper 2013).

The paper is structured as follows. It begins (Section 2) with a discussion of the meaning of 'joint parliamentary scrutiny' that emphasizes the distinctions between parliamentary scrutiny and parliamentary control, and between joint scrutiny and dual scrutiny. With these distinctions in mind, it continues (Section 3) with a historical overview of how the debate over the parliamentary scrutiny of Europol has developed over time, from the moment of Europol's creation in 1999 up to the passage of the Europol Regulation in 2016. Next (Section 4) it describes the process that brought the JPSG into being, detailing the consultations that led to the establishment of the parameters for the JPSG at the EU Speakers Conference in Bratislava in April 2017, up to the final adoption of its Rules of Procedure at the second meeting of the JPSG in Sofia in March 2018. This is followed by a close comparison (Section 5) of the Europol JPSG to the three major IPCs. It is argued that while there are a number of structural similarities, the Europol JPSG is a qualitatively different kind of interparliamentary body, with an explicit mandate to scrutinize and a specific object of scrutiny. In addition, it has a number of attributes each of which gives it stronger powers of scrutiny than those of the three IPCs. It has a stronger legal basis, more restrictive membership and participation rules, greater continuity of membership, the power to summon responsible EU officials, stronger access to documents, a non-voting seat on the executive body it oversees (the Europol Management Board), and an explicit right to ask oral and written questions. The paper continues with a brief note (Section 6) on the likely relationship between the post-Brexit UK parliament and

the Europol JPSG. In conclusion (Section 7), the paper explores whether the Europol JPSG could serve as a template for other institutions of joint parliamentary scrutiny.

2. What is Joint Parliamentary Scrutiny?

It will be argued below that what sets the Europol JPSG apart from the three IPCs is that it has an explicit mandate to conduct 'joint parliamentary scrutiny' of an EU agency. But what does this mean, exactly? To explain, we must have a clear definition of 'parliamentary scrutiny,' which here is synonymous with 'parliamentary oversight' but very different from 'parliamentary control.' After that we must have an understanding of 'joint scrutiny,' as distinct from 'dual scrutiny.'

Parliamentary scrutiny may be defined as the actions taken by a parliamentary body when monitoring the activities of an executive authority within a political system. This deliberately loose definition employs generic terms – 'parliamentary body' rather than 'parliament,' 'executive authority' rather than 'government,' 'political system' rather than 'state' – in order to make them applicable not only to domestic parliaments but also to inter-parliamentary bodies within an international organization such as the EU. By this definition the pre-1979 EP, which was not yet a proper 'parliament' as it was not directly elected and lacked substantial legislative power, nevertheless engaged in scrutiny activities vis-à-vis the European Commission that deserved the label 'parliamentary scrutiny.' Whereas some scholars define 'parliamentary scrutiny' more narrowly, this definition is deliberately broad in that it includes all actions taken by a parliamentary body in the course of monitoring all aspects and phases of the executive authority's activities, whether legislative or non-legislative, whether it involves policy-formulation or policy-implementation, or whether or not it involves public expenditure.[I]

Probably the single most important scrutiny tool wielded by a parliamentary body is its right to put a *question* to the executive authority and, under normal circumstances, receive an answer. Such questions may be intended simply to extract information, but quite often their true purpose is to make a comment regarding a current policy issue. Parliamentary questions may be written or oral. Written questions, often submitted by rank-and-file backbench MPs, will generally receive an answer in writing; oral questions may be put directly to the representative of the executive, such as a government minister, during a

parliamentary session. Often this representative will appear in the parliament, either in plenary session or before a committee, to make a policy statement followed by *questions and debate*, in which parliamentarians may ask about and/or state their views on the policy. In addition, the parliamentary body may pass a non-binding *resolution* in order to communicate its opinion to the executive body. Or it may issue a more formal *report*, a written document that investigates a policy question in greater depth, but the ultimate purpose of which is to exert influence over the executive authority.

Parliamentary control, by contrast, is the power to appoint, censure or remove the executive; whereas some analysts consider this to be an aspect of parliamentary scrutiny, here, following Wouters and Raube (2012), scrutiny and control are treated as two separate functions. Parliamentary scrutiny is the power to monitor the actions of the executive while it is in office; parliamentary control is the power to determine whether the executive authority holds office at all. In general, the tools of parliamentary control are 'hard' (e.g. votes of investiture, votes of confidence) whereas the tools of parliamentary scrutiny are 'soft' (e.g. questions and debates, resolutions). Often there is a close relation between the two, insofar as the parliament's power of scrutiny may be strengthened by the fact that it holds in reserve the power to sanction the executive. However, these two functions are separable, and they do not always coincide. A parliamentary body may exercise a scrutiny function even if it lacks a control function, such as is frequently the case for the upper house within a bicameral parliamentary system. In the same way, the inter-parliamentary bodies of the EU – including the three IPCs and the Europol JPSG – may conduct parliamentary scrutiny vis-à-vis EU executive authorities even though they lack powers of control over them.[II]

It should be stated that the scrutiny function of any inter-parliamentary body vis-à-vis the EU executive is only supplemental to that performed by the EP and, to a lesser extent, individual national parliaments. Within the EU, the function of both parliamentary control and scrutiny is exercised mainly by the EP. Certainly, the function of control – the power to appoint, censure or remove the executive – is exercised largely by the EP, along with the Council and the European Council (Corbett et al. 2011). In addition, the EP is also by far the dominant parliamentary body in terms of the exercise of scrutiny of the EU executive, for which it has a broad array of scrutiny tools at its disposal – written questions, oral questions and debates, resolutions and reports – which it uses extensively. National

parliaments, in contrast to the EP, have no direct role in the control of the executive authority of the EU, except insofar as they control their own governments and oversee their actions within the Council and the European Council. On an individual basis, national parliaments' direct scrutiny of the EU executive is limited. Aside from the occasional visit of EU officials to national parliaments, their interaction is largely confined to written correspondence with the Commission: they may raise specific subsidiarity-based objections to EU legislative proposals through the Early Warning Mechanism (Cooper 2012, 2017b), or other, more broad-based concerns through the 'political dialogue' (Rasmussen and Dionigi 2018).

What, then, is 'joint scrutiny'? A system of joint parliamentary scrutiny is one in which two or more parliaments together monitor the actions of an executive authority. In the EU, this is when the EP and national parliaments together scrutinize the actions of an executive authority of the EU. This may be contrasted with a system of 'dual parliamentary scrutiny' characterized by a division of labour between the scrutiny function of various parliaments, in which the EP oversees the EU executive and, separately, national parliaments oversee their respective national governments. The role of an inter-parliamentary body is quite different within these two scrutiny systems. In the former, the inter-parliamentary body has a direct scrutiny function in that it is the instrument through which participating parliaments directly scrutinize the executive, whereas in the latter its scrutiny function is indirect, in that it merely a forum in which the various parliaments can exchange information and best practices to enable them to carry out their separate scrutiny functions. In broad terms, in a system of joint scrutiny the inter-parliamentary body is an *oversight body*, whereas in a system of dual scrutiny it is a *discussion forum* (Cooper 2019 (forthcoming)).

This distinction between joint and dual scrutiny helps to explain the qualitative difference between the Europol JPSG and the three IPCs. Only the Europol JPSG is explicitly mandated and deliberately designed to be an oversight body, whose express purpose is joint parliamentary scrutiny. The three IPCs do not have an explicit scrutiny mandate; instead, their purpose, as set out in their respective Rules of Procedure, is generally to facilitate the exchange of information and best practices in keeping with a system of dual, rather than joint, scrutiny.[III] In reality, the role of the IPCs is ambiguous in this regard, in that they all to varying degrees function as oversight bodies as well as

discussion forums.[IV] But as will be seen below, the Europol JPSG differs from these in that it has an explicit mandate to scrutinize.

3. The Question of the Parliamentary Scrutiny of Europol, 1999-2016

The Treaty of Lisbon identifies the policy field of Justice and Home Affairs (JHA) as one in which national parliaments ought to be particularly involved. Arguably there is a stronger Treaty basis for national parliaments to have an oversight role in JHA than in foreign and security policy or economic governance, the other specific policy fields for which there are IPCs. The Treaty of Lisbon states that national parliaments have both a general role overseeing the whole policy field, and a specific oversight role in relation to two agencies – Europol and Eurojust. One of the ways national parliaments contribute to the 'good functioning of the Union' is in part by 'taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area', and, more specifically, 'through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities' (Article 12(c) TEU). Europol and Eurojust are the only two EU agencies with an explicit Treaty basis under the Treaty of Lisbon (Rijpma 2014: 64). More generally, the EU Treaty singles out JHA as a policy field subject to enhanced scrutiny under the Early Warning Mechanism, requiring that national parliaments 'ensure' that new proposals in this area are compliant with subsidiarity, and the voting threshold for a 'yellow card' is lowered from one-third to one quarter for EU legislative proposals in the fields of police cooperation and judicial cooperation in criminal matters (Van Keulen 2014: 18-19).

Europol was established in 1999 as an international organization under the EU's 'Third Pillar', subject to very limited oversight from the EP and only indirect oversight from national parliaments, via their government ministers in the Council. While the EP has long sought greater oversight powers vis-à-vis Europol, there have also been various proposals for some form of joint scrutiny involving national parliaments. For example, in 2001 an interparliamentary conference held in the Hague (the city where the headquarters of Europol are located) proposed the creation of 'Parlopol,' a network for information-sharing between national parliaments and the EP to help facilitate oversight of Europol (Fijnaut 2002); and in 2002, the Commission suggested the creation of a joint supervisory

committee in relation to Europol, to be made up both of members of national parliaments and MEPs (Ruiz de Garibay 2013: 89-90). The Treaty of Lisbon, which entered into force in December 2009, made Europol subject to regulation in accordance with the ordinary legislative procedure (i.e. co-decision): the EP and the Council 'shall determine Europol's structure, operation, field of action and tasks', including 'the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments' (Art. 88 TFEU). In anticipation of the Treaty of Lisbon entering into force, Europol was made an EU agency by a Council Decision of 2009. This decision actually reduced the influence of national parliaments over Europol, because it removed their powers of budgetary control and ratification; previously, any amendment to the Europol Convention had to be ratified by national parliaments – a process which took, on average, five years (Ruiz de Garibay 2013: 92). As an EU agency, Europol would henceforth be financed from the EU budget and governed by ordinary EU legislation.

Around this time there were exploratory discussions about what form the parliamentary scrutiny of Europol and Eurojust should take. In 2009, COSAC canvassed the opinions of national parliaments on this question, and reported that there was a variety of views but no real consensus, with some seeing COSAC itself as a possible venue, others seeing it as a matter for JHA committees, and others reluctant to create a new inter-parliamentary forum.[V] In 2010, the Commission issued a consultative document which proposed the setting up of a 'permanent joint or interparliamentary forum' for the scrutiny of Europol.[VI] There was further discussion of the question at the meeting of the EU Speakers Conference in Brussels in April 2011, led by Per Westerberg, speaker of the Swedish *Riksdag*.[VII] The EP, for its part, periodically hosted Interparliamentary Committee Meetings (ICMs) on this and related topics in order to establish the practice of interparliamentary cooperation regarding Europol. Even so, plans for the JPSG only began to take shape after the Commission formally proposed the Europol regulation in 2013. In the meantime, two new IPCs were created, in the fields of foreign and security policy (the CFSP-CDSP Conference) in 2012 and EU economic governance (SECG Conference) in 2013, even as the Treaty mandate to create an interparliamentary mechanism to oversee Europol's activities lay dormant for years.

In March 2013, the Commission proposed the Europol Regulation, which would finally bring the agency into line with the Treaty of Lisbon. The proposal stated that Europol's

activities would be subject to 'parliamentary scrutiny by the European parliament, together with national parliaments', but left it open as to what form this should take.[VIII] The EP, for its part, responded with very specific proposals of its own in February 2014. In its amendments to the draft Regulation, the EP proposed the creation of a specialized body to be called the Joint Parliamentary Scrutiny Group (JPSG), made up of the all sixty MEPs in the EP's Justice and Home Affairs (LIBE) Committee in addition to two members from each national parliament, drawn from the relevant committees.[IX] This body would exercise something close to a traditional parliamentary oversight function with respect to Europol, in that executive officials would appear before it at its request, and key documents related to the agency's activities and performance would be presented and debated. It would review the appointment (and re-appointment) of the Executive Director of Europol, and hold hearings with the Chairperson of the Europol Management Board, Commission representatives, the European Data Protection Supervisor, and other relevant officials.

This issue was discussed at the EU Speakers Conference in Vilnius in April 2014. The Speaker of the Italian *Camera dei Deputati* proposed that the EU Speakers Conference should endorse the 'prompt adoption' of the Europol Regulation, including the EP's proposed amendments with respect to the JPSG. However, some participants resisted this proposal in part on substantive grounds – seeing the JPSG as proposed by the EP as little more than an adjunct of the LIBE committee – but also on procedural grounds, saying that any new mechanism should be established by the parliaments themselves, rather than through the EU legislative process in which national parliaments are not direct participants. A very different proposal was put forward by Eva Kopacz, Speaker of the Polish *Sejm*, with the support of the Polish Senate, the Irish Senate and the Hungarian Parliament. The speakers of these chambers proposed the creation of a full-blown interparliamentary conference for the whole policy field of JHA, including scrutiny of the activities of Europol and Eurojust. The new IPC would be modelled on the formula of the CFSP-CSDP and SECG Conferences, in that it would replace existing meetings of chairpersons of relevant committees (interior/ home affairs), meet twice a year and be co-hosted and co-presided over by the EP and the Presidency Parliament. This new body, it was suggested, could also exercise oversight over the European Public Prosecutor's Office, whenever it came into being. However, the idea of a new interparliamentary conference was rejected as unnecessary by the EP representative at the meeting (Cooper 2017a: 233).

Legislative negotiations continued between the EP and the Council, which reached an agreement on the Europol regulation in late November 2015; it was adopted in May 2016. The Regulation endorsed the establishment of a JPSG, but left it to the EU Speakers Conference and the JPSG itself to decide how the body should be established and structured.

4. The Establishment of the Europol JPSG: 2016-2018

The Europol Regulation was formally adopted on 11 May 2016 and was set to come into force on 1 May 2017. The regulation stated that scrutiny of Europol's activities would be carried out by a specialized JPSG, but it did not specify the structure of this body. Rather, it stated that the organization and the Rules of Procedure of the JPSG would be 'determined together by the European Parliament and the national parliaments in accordance with Article 9 of Protocol No 1' of the Treaty of Lisbon. Article 9 merely states, under the heading of 'interparliamentary cooperation,' that

> The European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union.

What this meant in practice was that decisions regarding the organizational parameters for the JPSG would be made by the EU Speakers Conference (EUSC). While in the early years after the Treaty of Lisbon entered into force there was a debate over whether another interparliamentary body – e.g. COSAC – should assume this organizational task (Casalena et al. 2013, Esposito 2016), the EUSC prevailed, as seen in the fact that it effectively set the parameters for the CFSP-CSDP Conference (in 2012) and the SECG Conference (in 2013). Yet determining the organization of the JPSG presented a logistical challenge for the EUSC, which only meets once a year, because there was less than a year between the passage of the law (11 May 2016) and its entry into force (1 May 2017). Nevertheless, the EUSC largely succeeded, by instigating a consultative process delegated to a small group of parliaments (the *troika*), which eventually yielded a compromise text.

The EUSC customarily takes place in spring, hosted and chaired by the parliament of the member state that held the Council presidency in the previous autumn. The 2016

meeting took place in Luxembourg on 22-24 May, just days after the passage of the Europol Regulation. At that meeting, the EUSC established a Working Group that consisted of the EUSC troika – composed of the parliaments of Luxembourg, Slovakia, and Estonia, and the European Parliament[X] – to consider possible scrutiny mechanisms and consult with all the EU parliaments/chambers in order to prepare a preliminary draft. The Troika Working Group produced a first draft in November 2016, which was discussed at an interparliamentary committee meeting (ICM) hosted by the LIBE committee in Brussels on 28 November 2016. In light of the discussions at that meeting, the Troika Working Group produced a second draft in December 2016. Numerous parliaments proposed further amendments to this second draft, which was discussed on 20-21 February 2017 at the meeting of the Secretaries-General of the EU parliaments – a group that meets annually prior to, and in preparation for, the annual meeting of the EUSC. Finally, the Slovak Parliament put forward its own 'presidency compromise' on 11 April, which provided the basis for the agreement at the 2017 EUSC meeting in Bratislava on 23-24 April. The final agreement regarding the modalities for the JPSG was included as an Annex to the Bratislava Conclusions.

The Working Group consultation on the modalities for the JPSG was an orderly process, more systematic and less contentious than the processes that had recently led to the creation of the CFSP-CSDP Conference and the SECG Conference (Herranz-Surrallés 2014, Cooper 2016a). In September 2017, the Working Group surveyed the opinions of the EU parliaments by having them fill out an online multiple-choice questionnaire eliciting their preferences regarding three modalities for the JPSG which were (1) its membership, (2) its numerical composition, and (3) the frequency, location and chairing and of its meetings. There was also an open-ended question looking for best practices in the parliamentary scrutiny of law enforcement at the national level. This survey received responses from 34 parliaments/chambers representing 25 member states and the EP.

Overall, the results were indecisive. Regarding (1) who should be members of the JPSG, opinion was split over whether it should be chairs (6%) or members (40%) of the relevant committees, persons selected individually by each parliament (31%) or other (23%). Concerning (2) the numerical composition of the JPSG, there was little support for any of the five options based on existing models of parliamentary meetings within EU-28, including the 42-member EUSC (4%), a 172-member ICM (4%), the 174-member COSAC

Plenary (12%), the 184-member CFSP-CSDP Conference (6%) or the unspecified number (approx. 200 members) of the SECG Conference (14%); rather, the large majority of respondents (60%) opted for none of these, instead preferring that the JPSG should have a new, yet-to-be-determined format. On (3) the question of the frequency, location and chairing of its meetings, opinion was also split over whether the JPSG should have one regular annual meeting in the EP, jointly chaired by the Presidency Parliament (PP) and the EP (22%), two jointly-chaired meetings per year, one in the EP and one in the PP (36%) two meetings per year hosted and chaired by the PP (20%), or other (22%). However, despite these indecisive results, the survey was a useful exercise in that it helped parliaments to eventually come to a consensus – as was the case, for example, regarding the frequency of meetings (two per year), as seen below.

Based on the results received in this consultation, the Troika Working Group produced a draft proposal setting out the following modalities for the JPSG: (1) its membership should be selected individually by each parliament/chamber, bearing in mind the need for substantive expertise or relevant committee membership; (2) the JPSG should be composed of 2 members per national parliament (one per chamber in bicameral parliaments) and six 6 MEPs, for a total of 62 members in EU-28; and (3) it should meet regularly once per year in the EP, co-chaired by the EP and the PP, with the possibility that an additional extraordinary meeting could be held in the PP if the co-chairs agree.

This draft proposal was debated at the ICM hosted by the LIBE committee in November 2016. Much of the debate, in particular concerning the second and third questions, raised the contentious question of whether the EP should enjoy an equal or a special status vis-à-vis national parliaments, an issue that had hindered the establishment of previous IPCs (Herranz-Surrales 2014; Cooper 2016a). Some national parliament representatives complained that two members per national parliament was too few, in particular because it only allowed for one representative per chamber in bicameral systems, making no allowance for party diversity. Many others argued that there should be at least two meetings per year, pointing out, rightly, that the majority of respondents to the survey had expressed this preference.

In light of this debate, the Troika Working Group produced a new draft text in December 2016 proposing a slightly larger JPSG with two members from each national parliament and ten from the EP, for a total of 66 members in EU-28, which would meet

twice per year, in the PP in the first half and in the EP in the second half of a given year. (The proposal to alternate meetings between the PP and the EP, which was eventually adopted, was similar to the arrangement for the SECG Conference, in which the EP and the PP respectively host the meetings in the first and second halves of the year.)

Table 1. Comparison of Various Plans for Constitution, Frequency, Location of JPSG

	MPs/ NP	MEPs	Total	Frequency	Location
EP Amendments Feb. 2014	2	60	116	1/ yr.	EP
Troika Working Group Nov. 2016	2	6	62	1/ yr.	EP
Troika Working Group Dec. 2016	2	10	66	2/ yr.	PP1, EP2
EUSC Conclusions April 2017	4	16	128	2/ yr.	PP1, EP2

This draft text received a number of further comments and suggested amendments. Eventually, there was a final agreement on a text that was included as an Annex to the EUSC Bratislava Conclusions. This endorsed a much larger JPSG, with four members from each national parliament and 16 from the EP, making for a total of 128 in EU-28; this body would meet twice per year in the PP (first half) and the EP (second half). In addition, extraordinary meetings could be convened upon the agreement of the PP and the EP, or if requested by one third of the parliaments/chambers (i.e. even without the agreement of the EP).

It was commonly understood that the EUSC would establish the 'modalities' for the JPSG, but it would be up to the JPSG itself to establish its own Rules of Procedure. Thus it was that the Bratislava Conclusions settled many of the basic organizational questions regarding the JPSG – i.e. *who* would meet and *where* and *when* would they do so – but left many of the procedural 'what' and 'how' questions unanswered, such as 'What does it do?' and 'How is it going to work?' Many of these questions had been raised previously, but they came to the fore in particular after the Bratislava Conclusions had settled the modalities for the JPSG.

Debate and Adoption of the Rules of Procedure, September 2017-March 2018

The first, 'constituent' meeting of the Europol JPSG took place in October 2017 in the EP in Brussels, which was co-chaired by the EP and the Estonian parliament. Prior to the first meeting, in September 2017, the co-chairs produced a draft Rules of Procedure as a basis for further discussions and circulated it to all the national parliaments, many of which

submitted amendments to the draft text – most notably, the German Bundestag (see below). Among the most important points discussed were: the status of the Troika and the Secretariat, the meaning of consensus 'in principle,' delegates' speaking time, oral and written questions (and replies), language interpretation (and costs), the reporting tasks of the JPSG representative on the Management Board, the status of subgroups, and the 'Danish question' – i.e. whether the parliament of an EU member state that is not a member of Europol may participate in the JPSG. The co-chairs of the constituent meeting, Claude Moraes, Chair of the LIBE Committee of the EP, and Raivo Aeg of the Legal Affairs Committee of the Estonian Parliament, strove to find a consensus. Oral agreement was in fact reached on most of these issues, but a few remained unresolved, and so the meeting ended without the adoption of the Rules of Procedure. It was feared that the JPSG could go through a similar ordeal as the SECG Conference, which had not adopted its Rules of Procedure until its fifth meeting, after more than two years of debate (Cooper 2017a: 240-243). But such fears proved unfounded, and the Rules of Procedure were adopted at the second meeting of the Europol JPSG in Sofia in March 2018.

Space does not permit the description here of all the varying positions of the national parliaments in these debates, but one in particular stands out. The German Bundestag was the parliamentary chamber that proposed the greatest number of amendments to this draft, and most of these were intended to increase the Europol JPSG's capacity to conduct effective scrutiny. The Bundestag proposed to amend the draft with the addition of wholly new provisions that would mandate the creation of a Presidency Troika and a Secretariat for the JPSG, and codify the option of creating subgroups, an explicit right to ask questions and to receive forwarded documents, and to revise its Rules of Procedure by absolute majority rather than consensus; it also proposed amendments that would strengthen existing provisions in the draft with respect to the JPSG's access to top EU officials and its ability to adopt conclusions by a decision rule other than consensus. The robustness of this set of proposals is notable because the Bundestag had taken a very different approach the last time an inter-parliamentary body was established. During the extensive debate over the Rules of Procedure for the SECG Conference between 2013-2015, the Bundestag had maintained that this new IPC should be no more than a discussion forum. For example, the Bundestag argued that the SECG Conference should not adopt conclusions at all:

> The German delegation regards the Conference as a forum for parliaments to share views and experience. The German delegation is therefore opposed to Conclusions which could be viewed as a political statement.[XI]

Why, then, did if take a dramatically different approach in the case of the JPSG? The simple explanation from the Bundestag is that the JPSG is different from the IPCs: under the terms of the treaty and the new Europol Regulation,

> the European Parliament and national parliaments are to exercise joint oversight of a European executive authority for the first time. *Interparliamentary cooperation in permanent bodies has hitherto been confined to exchanges of best practice.* Article 51(1) of the new Europol Regulation goes much further by laying the foundations for *permanent interparliamentary scrutiny of Europol* (emphasis added).[XII]

These interventions from the parliament of the EU's largest member state were evidently very influential, as many were incorporated into the final text of the legislation.

One final issue which vexed the JPSG was the 'Danish question' – i.e. should the parliament of an EU member state which does not apply the Europol Regulation be a full member of the JPSG? Some parliaments, in particular the EP, took a hard line on this question, insisting that because the Danish populace voted against participating in Europol (in a December 2015 referendum) then it must categorically be excluded from the JPSG. The Danish parliament, for its part, argued (correctly) that it is unprecedented for an EU member state's parliament to be excluded from EU interparliamentary cooperation, pointing out that even the parliaments of non-signatories of the Fiscal Compact Treaty (TSCG) – Croatia, Czech Republic, and the UK – participated in the SECG Conference as full members (Cooper 2017c: 665-669). Interestingly, the Europol JPSG delegation from the LIBE committee requested an opinion from the EP legal service regarding the participation of the Danish parliament in the JPSG. The legal service produced a 'non-paper' which concluded that the law does not provide a determinate answer:

> - The issue is not comprehensively envisaged or legislated for by the Treaties nor by the Europol Regulation;

- There is an obligation on all actors to act in good faith, and in line with the logic of the Treaties, and in line with the purpose of Article 88 TFEU and the Europol Regulation but there is no black-letter authority that absolutely rules in or rules out the full participation of the Danish Parliament in the JPSG.[XIII]

The implication of this opinion is that the participation of the Danish parliament is a political decision to be made by the JPSG itself. Eventually, a compromise was reached at the second meeting of the JPSG, which adopted the Rules of Procedure that effectively excluded Denmark, but also agreed to create a working group within the JPSG to study the question of Danish participation. This working group was scheduled to meet during the third meeting of the Europol JPSG in Brussels on 24-25 September 2018; at the time of writing no decision had been made.

5. Comparing the JPSG with the Three IPCs: Stronger Powers of Scrutiny

At first glance, the JPSG has many structural attributes that make it similar to the three major IPCs (see Table 2). Each of the four is a large, twice-yearly meeting of members of EU national parliaments and the EP, that is chaired or co-chaired by the Presidency Parliament (PP) as part of a series of events known as the Parliamentary Dimension of the Council Presidency (Cooper 2017a: 243-245). The participants are usually – but not necessarily – members of the relevant sectoral committee for the policy field under discussion at the meeting, i.e. EU affairs, foreign and defense policy, finance and economic policy, or justice and home affairs. In organizational terms, there is a certain variation among the four; in some respects the JPSG is an outlier, but not in a way that makes it qualitatively from the IPCs. For example, while there was initial discussion about making the JPSG dramatically smaller than the IPCs (about one-third the size) it has ended up being only somewhat smaller (about two-thirds). Another example is the role of the EP, which enjoys a special status in all four interparliamentary bodies, but to varying degrees. Of the four, the EP probably has greatest influence within the JPSG: not only does the EP host of one of the two yearly meetings of the JPSG (like in the SECG Conference) but it is co-chair of *both* (including the one held in the PP), and MEPs are numerically over-

represented within it vis-à-vis national MPs (16 to 4) to a greater extent than in other IPCs (e.g. 16 to 6 in the CFSP-CSDP Conference).[XIV]

Table 2: Comparing the JPSG with the Three Major Interparliamentary Conferences (IPCs)

Inter-Parliamentary Body	**COSAC Plenary**	**CFSP-CSDP Conference**	**SECG Conference**	**JPSG**
Year established	1989	2012	2013	2017
Parliamentary Committee(s)	European Affairs	Foreign Affairs, Defense	Finance/ Budget, Economics	Justice and Home Affairs
Legal Basis	Amsterdam Protocol; Treaty of Lisbon: Protocol 1	Treaty of Lisbon: Protocol 1	Treaty of Lisbon: Protocol 1; Article 13 TCSG	Treaty of Lisbon: Protocol 1, Art. 12(c) TEU; Art. 88 TFEU; Europol Regulation
Delegation size	6 per NP, 6 for EP	6 per NP, 16 for EP	Unspecified	4 per NP, 16 for EP
Location	PP Member State	PP Member State (may be held in EP)	Jan-June: EP July-Dec: PP	Jan-June: PP July-Dec: EP
Chair/ Co-Chairs	PP	PP ('in close cooperation' with EP)	Jan-June: EP and PP co-chair July-Dec: PP	EP and PP co-chair both meetings
Troika	Strong	Weak	Weak	Strong
Secretariat	Provided by Troika, w/ Perm. Member	Provided by PP	Provided by PP	Provided by Troika
Concluding Document	*Contribution* by Consensus/QMV	*Conclusions* by Consensus	*Presidency Summary*	*Summary Conclusions* by Consensus 'in principle'

In other measures of its institutional strength and autonomy, the JPSG could be said to occupy a middle ground among the IPCs. The RoP explicitly endows the JPSG with a Presidential Troika, and that this should in turn provide the Secretariat for the JPSG. These provisions regarding the Presidential Troika and the Secretariat are stronger than similar provisions for the CFSP-CSDP Conference and the SECG Conference, and as such give the JPSG a greater degree of institutional continuity, but weaker than the provisions for COSAC, whose Secretariat also includes a Permanent Member. In addition, the RoP also recognizes that the JPSG may debate and adopt Summary Conclusions by consensus 'in principle,' which may be used as an oversight tool with respect to Europol; this puts the JPSG on a par with the CFSP-CSDP Conference, which adopts Conclusions by consensus, in a weaker position than COSAC, which can adopt its Conclusions (formally, the 'Contribution') by QMV when consensus is unobtainable, but in a stronger position than the SECG Conference, which rarely adopts Conclusions (Cooper 2019 (forthcoming)).

However, there are other aspects of the JPSG which clearly set it apart from the three IPCs. These are notable, in that they all point in the same direction: they all, to some extent, have the effect of increasing the effectiveness of the JPSG as an oversight body. Nine such contrasting attributes may be identified and enumerated here.

5.1. A Mandate to Scrutinize

Unlike the IPCs, the JPSG has a mandate specifically to conduct 'scrutiny' of Europol. This is evident not only in the fact that 'scrutiny' is in the body's name and that the treaty specifies that its purpose is 'scrutiny of Europol's activities.' The Europol Regulation states that the JPSG '…shall politically monitor Europol's activities in fulfilling its mission, including as regards the impact of those activities on the fundamental rights and freedoms of natural persons.' By contrast, the Rules of Procedure of the three IPCs do not state that their role is the direct scrutiny of EU institutions, but rather to provide a framework for 'the exchange of information and best practice(s).' They also state variously that the Conference's purpose is to enable 'a regular exchange of views' (COSAC RoP, Art. 1.1) and to 'contribute to ensuring democratic accountability' (SECG Conference RoP, Art. 2.1) in their respective policy fields.

The implication is that purpose of the IPCs is not direct scrutiny, but to assist individual parliaments in the separate performance of their scrutiny function, e.g. '…to enable national Parliaments and the European Parliament to be fully informed when carrying out their respective roles in this policy area' (CFSP-CSDP RoP, Art. 1.1). By comparison, the JPSG has a very specific mandate to directly scrutinize that is set out not in its RoP but in the Europol Regulation. In the terms set out in Section 2, above, the JPSG exercises 'joint scrutiny' whereas the IPCs facilitate a system of 'dual scrutiny'.

5.2. A More Focused Target of Scrutiny

The JPSG is unlike the three IPCs in that the target of its scrutiny is an EU agency rather than a policy field. COSAC's remit is broadest, as it is a forum for the general discussion of EU affairs. But even the other two IPCs have a much wider remit than the JPSG, because they are concerned with the broad policy fields of foreign and security policy (CFSP-CSDP Conference) and economic governance (SECG Conference), and the outer edges of these policy fields are not well defined (Cooper 2017a: 234-235). There is

not currently an IPC for the whole field of justice and home affairs, even though, as noted above, such a body was proposed at the EUSC in 2014. Rather, the only new interparliamentary body in this whole policy field is the JPSG, despite the fact that the EU treaties call for interparliamentary scrutiny of at least one other EU agency (Eurojust).

5.3. Stronger Legal Basis

As mentioned above, the JPSG enjoys a stronger legal basis than the three IPCs, both in terms of its basis in the EU treaties and in ordinary EU law. The three IPCs and the JPSG all rest on the Treaty of Lisbon's general recognition of 'interparliamentary cooperation' between national parliaments and the EP in Art. 12(f) TEU and Protocol 1, Art. 9 TEU (Casalena et al. 2013). The three IPCs also enjoy partial legal recognition and/or authorization in various other treaty provisions, including the Amsterdam Treaty's protocol on the role of national parliaments (COSAC), Protocol 1, Art. 10 TEU (COSAC, CFSP-CDSP Conference) and Article 13 of the TSCG (SECG Conference). By contrast, the Treaty of Lisbon specifies that national parliaments contribute to the good functioning of the EU by their involvement in the political monitoring of Europol (Art. 12(c) TEU), and authorizes that procedures be laid down in EU regulations whereby national parliaments and the EP can engage in scrutiny of Europol's activities (Art. 88 TFEU). It was under the latter provision that the Europol Regulation (2016/794) was passed, which specifically authorized/mandated the creation of the JPSG. Probably it is this latter provision, which gives the JPSG not just a vague treaty basis but a specific legal basis in ordinary EU legislation, that most sets the JPSG apart from the three IPCs.

5.4. More Restrictive Membership and Participation Rules

The JPSG has more restrictive rules of participation and membership than the three IPCs. It has already been noted that the size of the body is smaller (although not as small as earlier proposals would have had it), limited to four members per national parliament, as compared to six per NP in the COSAC plenary and the CFSP-CSDP Conference. In addition, the rules regarding which parliaments can participate are more restrictive. The parliaments of all EU member states (and the European Parliament) are full members of the three IPCs;[XV] members of parliaments of EU candidate countries have the right to attend as observers, while guests from other non-EU parliaments may also be invited to do

so.[XVI] The RoP of the JPSG, by contrast, makes clear that full membership and participation is only possible for those EU member states 'applying the Europol Regulation' (JPSG RoP, Art. 2.1). The parliament of an EU member state not applying the Europol Regulation cannot send four members to the JPSG, nor can it act as co-chair of the JPSG when its government holds the Council presidency; in such circumstance, the previous Presidency Parliament must act as co-chair (Art. 3.1). This is the only instance of an EU member state parliament being formally excluded from full membership in an EU interparliamentary body; currently the only EU member state not applying the Europol Regulation, and therefore excluded by this rule, is Denmark.[XVII] The RoP of the JPSG are also more restrictive with respect to observers: candidate countries do not have a right to attend in this capacity, but only 'observers from the list of EU Member States that have concluded an Agreement on Operational and Strategic Cooperation with Europol' (Art. 2.2). While many countries have concluded such agreements, only one EU member state has done so – Denmark. As for non-EU member states, the RoP state the following:

> The JPSG may also decide to invite, on an ad hoc basis and for specific points on the agenda, observers from the list of international organisations or third countries with which Europol has concluded agreements.

Even in the case of third countries with an extremely close working relationship to Europol, such as Norway, their parliamentary representatives can only attend on an ad hoc, non-voting basis. Under the current rules, this will be also be the position of the post-Brexit UK, once it has concluded an agreement with Europol.

5.5. Continuity of Membership

In order to fulfill its scrutiny function, the individual members of the JPSG should be experts in their field who attend on a regular basis. This would be an improvement on the IPCs, which are often attended by a somewhat haphazard collection of members from the participating parliaments – usually but not always from the relevant committees – who may or may not have participated in the last meeting. To this end, the RoP specifies:

> Members of the JPSG shall be selected individually by each Parliament/Chamber, bearing in mind the necessity to ensure substance matter expertise as well as long-term continuity. Where possible, members of the JPSG shall be nominated for the duration of their parliamentary mandate.

There is no equivalent requirement in the RoP of the three IPCs. Ultimately it is up to each parliament to decide, by its own rules, who it chooses to send as representatives to international fora; therefore it is difficult for an interparliamentary body to set uniform rules of participation. At most, the RoP can only set out guidelines in this regard. Even so, the idea here is that the individual members of the JPSG would have substance matter expertise and be nominated and serve for long periods of time – which, if successful, would greatly enhance the effectiveness of the JPSG as a scrutiny body and its members' sense of collective identity.

5.6. Power to Summon Responsible EU Officials

It is customary for the three IPCs to be attended and addressed by top EU officials. Normally each IPC will be attended by a representative of the Commission (typically, the Commissioner responsible for the policy field under discussion) and the Council (typically a senior minister of the member state holding the Council presidency) who will address the body and answer questions. However, sometimes for various reasons the officials in question will not attend or will send a video message; when this happens it annoys the assembled parliamentarians, who consider it of great importance that top EU officials appear before them in person. But according to their RoP, the IPCs can only request – not demand – their attendance. For example, the RoP of the CFSP-CSDP Conference merely state that the EU's High Representative for CFSP-CSDP 'shall be invited' to address the conference (Art. 2.3) and the RoP of the SECG Conference state that the 'representatives of EU Institutions' responsible for EU economic governance 'should be invited' to appear before it (Art. 4.2). By contrast, the RoP of the JPSG state unequivocally that the relevant EU officials (or their deputies) 'shall appear':

> Pursuant to the Europol Regulation, and in particular Article 51, the Chairperson of the Management Board, the Executive Director or their Deputies, and the European Data Protection Supervisor (EDPS) shall appear before the JPSG at its request (Art 2.3).

These rules were mostly respected at the first two meetings of the JPSG. The three key officials named above – the Chairperson of the Management Board, the Executive Director, and the EDPS – all appeared before the JPSG at its first meeting in October 2017. Appearing before the JPSG at its second meeting, in March 2018, were the Chairperson of the Management Board, the Executive Director, but the EDPS was absent and sent a video message (the deputy EDPS appeared in his place). While the rules do not require it, the relevant representatives of the Commission and the Council also frequently appear before the JPSG. At the first meeting the Council was represented by the Estonian minister of the interior, but the responsible Commissioner (Julian King, Commissioner for the Security Union) was absent, sending a video message instead. Attending the second meeting were the Bulgarian minister of the interior, for the Council, and the responsible Commissioner (Julian King).

5.7. Access to Documents

Another way that the JPSG differs from the three IPCs is that it has explicit rights regarding access to documents. While Protocol 1 of the Treaty of Lisbon entitles national parliaments to receive consultative, legislative and policy documents from the EU institutions, the IPCs as institutions have no such rights. The JPSG, by contrast, must receive from Europol a number of specific documents listed in the Europol regulation. These include 'threat assessments, strategic analyses and general situation reports related to Europol's objective as well as the results of studies and evaluations commissioned by Europol,' as well as documents concerning administrative arrangements and multiannual programming, the annual work programme and annual activity report, and the evaluation report drawn up by the Commission. Europol must transmit these to the JPSG 'for information purposes… taking into account the obligations of discretion and confidentiality' (Art. 51(3)). This list of documents is not exclusive; the JPSG may also request other relevant documents '…necessary for the fulfilment of its tasks relating to the political monitoring of Europol's activities' (Art. 51(4)).

5.8. A Seat on the Management Board

Another novel feature of the JPSG in comparison to the IPCs is that it can occupy a non-voting seat on the executive body that it is overseeing, i.e. the Management Board of

Europol, which is otherwise made up of one representative of each member state and of the Commission. According to Article 5 of the RoP,

> The JPSG shall appoint, from its full Members, a representative who will be entitled to attend, in accordance with Article 14 of the Europol Regulation and for a duration determined by the JPSG, meetings of the Management Board of Europol as a non-voting observer. The representative shall report back to the JPSG after each meeting of the Management Board on his/her main findings in writing.

While the RoP states that the JPSG representative will be 'entitled to attend' all such meetings – of which there are at least two per year – the language of the Europol regulation is more equivocal. It states that the Management Board '… *may invite* any person whose opinion may be relevant for the discussion, including, *where appropriate*, a representative of the JPSG, to attend its meeting as a non-voting observer' (Art. 14(4), emphasis added). However, even if it is still uncertain exactly what level of access the JPSG representative will have to Management Board meetings, it is nevertheless an important innovation in the parliamentary scrutiny of an executive body of the EU.[XVIII]

5.9. The Right to Ask Oral and Written Questions

It is a normal occurrence at IPCs that EU officials will address the meeting and take oral questions from the assembled parliamentarians. However, this is not a formal requirement and the encounter is often styled as a 'debate' or 'exchange of views.' The JPSG formalizes the requirement that EU officials must answer the questions put to them by its members. Crucially, it also adds the proviso that representatives of Europol must also answer written questions that are addressed to them outside the framework of the meeting itself:

> Members of the JPSG may address both oral and written questions to Europol. Written questions may also be asked outside the meeting framework and independently of items listed on the agenda and shall be answered within an appropriate timeframe. […] A further written reply can be requested in case the answer to an oral question is deemed insufficient.

This provision creates a mechanism for the oversight of Europol on an ongoing basis rather than merely during the twice-yearly meetings of the JPSG. This is important because

the right of a parliamentary body to put questions to an executive authority and to receive an answer is arguably the most essential tool of parliamentary scrutiny.

6. Brexit and the Europol JPSG

The Europol regulation was negotiated and adopted prior to the UK's Brexit referendum, and it does not address the unforeseen circumstance of an EU member state becoming a 'third country.' The UK had enjoyed a unique outside-inside relationship with the AFSJ: in 2014 it exercised its block opt-out from police and criminal justice measures but selectively opted back in to many of them, including participation in Europol and Eurojust (Curtin 185). After the Brexit referendum, the UK government announced that it would opt in to the new Europol regulation and maintain its current access until it leaves the EU. However, the UK's future relationship with Europol after Brexit remains entirely unresolved: whereas the UK hopes to negotiate a new security treaty through which it will remain in Europol, the EU's chief negotiator, Michel Barnier, has remarked that it is a 'logical consequence' of Brexit that the UK must leave Europol.[XIX]

The UK's prospects appear difficult when compared to the countries in the closest analogous situation, Norway and Denmark. As a 'third country,' Norway's position in Europol is limited in comparison to that of EU member states, and the limited access it does enjoy is conditional on its continued close association with the EU through Schengen and the EEA. By contrast, Denmark is an EU member state but it ceased to be a member of Europol after a referendum in December 2015; Denmark managed to negotiate a continued close association with Europol but it does not have full membership – it no longer has a voting seat on the Management Board, for example – and even the 'third country' access it enjoys is conditional on its continued EU membership, Schengen participation and recognition of ECJ jurisdiction (Curtin 187-193). By the same standard, it will be difficult for the UK to retain the level of access enjoyed by Denmark or even Norway, given that it is already outside Schengen and it has pledged to leave not only the EU but also the EEA and the jurisdiction of the ECJ.

The UK's level of access to the JPSG is analogous to and dependent on its access to Europol itself, and the positions of Denmark and Norway are instructive. Even though Denmark is a member state, under the current RoP it is excluded from full membership in

the JPSG and is relegated to the status of a non-voting observer and cannot act as co-chair. Yet even this status is privileged in comparison to that of Norway because, as an EU member state with an Agreement on Operational and Strategic Cooperation, Denmark at least has an automatic right to attend, whereas Norway must be invited on an ad hoc basis. If the rules remain the same, the post-Brexit UK would be in the same position as Norway, needing to receive an invitation in order to attend. This would be similar to the COSAC plenary, which is routinely attended by observers from the Norwegian parliament after they routinely send a letter requesting an invitation (Cooper 2015: 116). It differs from the CFSP-CSDP conference, to which the Norwegian parliament has a right to send up to four observers – as will the UK parliament post-Brexit – because Norway is a European NATO member.

The likely exclusion of the UK from the JPSG is an unfortunate outcome, given the UK's extensive involvement in cross-border police cooperation; it is, for example, the second largest contributor to Europol information systems.[XX] Ironically, three of the top EU officials at the March 2018 meeting of the JPSG were British – Rob Wainwright, the Executive Director of Europol, Julian King, the Commissioner for the Security Union, and Claude Moraes who, as chair of the EP's LIBE committee, co-chaired the meeting. Wainwright left in April 2018 after nine years in the position; King and Moraes are set to leave their posts when Brexit occurs in early 2019.

After the referendum, the UK surrendered the influence it might have had over the formation of the JPSG. In July 2016, Theresa May removed the UK from holding the rotating Council presidency in late 2017, and Estonia took its place. This also meant that the UK parliament no longer acted as the chair of interparliamentary meetings (Presidency Parliament), resulting in two lost opportunities. First, the UK parliament was replaced by the Estonian parliament in the Troika working group (along with the EP and the parliaments of Luxembourg and Slovakia) which was leading the consultative process that set the modalities for the JPSG in the Bratislava conclusions. And second, it was the Estonian parliament rather than the UK parliament that co-chaired the first meeting of the JPSG in the fall of 2017 when the Rules of Procedure were first debated; if the UK had been the Presidency Parliament it is likely that the person acting as co-chair would have been Yvette Cooper, the Labour MP who is the chair of the Home Affairs Committee of

the House of Commons, who would have been a forceful voice for the interests of the UK parliament.

7. Conclusion

The final adoption of the Rules of Procedure for the Europol JPSG at its second meeting in March 2018 was acclaimed as an historic moment. It is the first body of its kind, grounded in the EU treaty and mandated by EU law as an instrument through which the EP and national parliaments would together scrutinize the activities of an EU agency. It introduced the first formal mechanism of joint parliamentary scrutiny into modern EU politics (if one excludes the pre-1979 EP) and was thus an innovation in the EU system of multinational parliamentary democracy.

Even so, while the formal scrutiny powers of the Europol JPSG are in many ways considerably stronger than those of the IPCs, their effectiveness will ultimately depend on how they are used. The right to ask questions is the most basic tool of parliamentary oversight, but its effectiveness depends on what questions are asked (and aggressively followed up) and what answers are given: for example, the JPSG's role in the 'political monitoring' of Europol should not preclude its scrutiny of operational matters (Kreilinger 2017: 13). In addition, it remains to be seen whether the parliaments can forge a cooperative working relationship; it is a good sign that, even if it was previously less favourable in the case of the three IPCs, the EP is now positively disposed to joint parliamentary scrutiny as exercised by the JPSG over Europol.

The final question to ask is, can the model of the Europol JPSG be exported to other interparliamentary bodies to oversee different agencies and policy fields? Certainly the possibility of applying this template to other agencies in the area of Justice and Home Affairs should be explored, given that this is a sensitive policy field over which national parliaments will wish to continue to exercise scrutiny (Cooper 2017a). The most obvious candidate is Eurojust, the European agency for judicial cooperation in criminal matters, which is in many ways Europol's institutional 'twin,' as the two are given special recognition in the Treaty of Lisbon. Like Europol, Eurojust is expected to subject to some form of joint parliamentary scrutiny in that the EP and national parliaments are to be involved in 'the evaluation of Eurojust's activities.' However, early drafts of the Eurojust

regulation, which has not yet been adopted, only foresaw a very minimal role for national parliaments, whose 'involvement' would be limited to receiving certain documents such as the Eurojust annual report, rather than some new mechanism of joint parliamentary scrutiny (Briere 2017; Gless and Wahl 2017). Other possible targets for joint parliamentary scrutiny could include the newly established European Public Prosecutor's Office (EPPO), which is closely related to Eurojust, or other agencies in the field of Justice and Home Affairs such as Frontex, the EU's border security agency. However, if such joint scrutiny bodies were to proliferate in this policy field, it might be suggested that they should consolidated into a full-blown IPC for the Justice and Home Affairs, as was proposed at the EU Speakers Conference in 2014. Another possibility is that, if the JPSG proves to be a success, it could provide a model for the three IPCs, prompting them to reorganize their efforts away from being discussion forums and more to being oversight bodies engaged in joint parliamentary scrutiny of the EU executive.

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I For a comparison of different definitions of parliamentary oversight, and an exhaustive list of parliamentary oversight tools, see Pelizzo and Stapenhurst (2012).

II It is interesting to note that a previous draft of the Europol Regulation would actually have given the JPSG an element of parliamentary *control* – not just scrutiny – of the executive. The version of the legislation as amended by the EP in 2014 would have given the JPSG a say in, albeit not a veto over, the appointment/ approval of the Executive Director of Europol. It would have required that, in the case of a new appointment, candidates for the post of Executive Director appear before the JPSG at its request, and the same would apply to a sitting Executive Director whose term of office is to be extended. In addition, the Chairperson of the Management Board would have had to inform the JPSG before removing the Executive Director from office, as well as to the reasons for such a decision. However, these provisions were removed from the final version of the legislation, so that in the end the JPSG only received powers of scrutiny, not control, vis-à-vis Europol. European Parliament legislative resolution of 25 February 2014 on the proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA (COM(2013)0173 – C7-0094/2013 – 2013/0091(COD)). 25/02/2014, Amendment 200 (Art. 53).

III The reasons for this are complicated, but it is due in part to the fact that the EP frequently fights the creation of any new inter-parliamentary body that could challenge its position as the pre-eminent parliamentary scrutiny body at the EU level, whereas national parliaments for their part take varying positions on this question (Cooper 2016b: 261-265). It is notable that the EP took a much more positive position in this case, advocating that the Europol JPSG should have substantial scrutiny powers (Kreilinger 2017).

IV For a comparative analysis of the three IPCs in this regard, see Cooper 2019 (forthcoming).

V COSAC *Eleventh Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*, 11-12 May 2009, p.10-15.

VI Communication from the Commission to the European Parliament and the Council on the procedures for the scrutiny of Europol's activities by the European Parliament, together with national Parliaments, COM(2010) 776 final, 17.12.2010. National parliaments' responses to this document are available at: <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20100776FIN.do>.

VII Some national parliaments submitted written contributions to this debate, which are available at: <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc530b1bef60130b64f909f0023>.

VIII Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency

for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA (COM/2013/0173), 27/03/2013, Art. 53(2), p.51. National parliaments' responses to this document are available at: <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20130173.do>.

[IX] European Parliament legislative resolution of 25 February 2014 on the proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA (COM(2013)0173 – C7-0094/2013 – 2013/0091(COD)). 25/02/2014, Amendment 200 (Art. 53).

[X] Initially, the troika included the UK parliament, which was replaced by the Estonian parliament when the UK dropped out of the Council presidency rotation after the Brexit referendum of 23 June 2016. Conclusions of the EU Speakers Conference, Luxembourg, 22-24 May 2016, paras. 34 and 35. (See Section 6.)

[XI] *Amendments of the German Delegation to the Rules of Procedure of the SECG Conference*, 9 March 2015, p. 8.

[XII] *Amendments of 26 September 2017 to the draft Rules of Procedure of 6 September 2017 for the Joint Parliamentary Scrutiny Group on Europol*, 26 September 2017, p.1.

[XIII] Non-paper on the Draft Rules of Procedure of the Joint Parliamentary Scrutiny
Committee on Europol as regards participation of the Danish Parliament

[XIV] According to its rules, the CFSP-CSDP Conference may be held in the EP, but this has never happened.

[XV] Even the SECG Conference is open to all EU national parliaments, even though its treaty basis (Art. 13 TSCG) implied that only the 25 'contracting parties' should take part (Cooper 2017c: 665-669).

[XVI] Parliaments of European non-EU NATO member countries (e.g. Norway) can attend the CFSP-CSDP Conference as observers. This rule would also apply to the post-Brexit UK.

[XVII] As mentioned above, an agreement was reached to set up a working group to review the rules of participation, and so these are subject to change.

[XVIII] The Europol regulation also requires the Management Board to consult the JPSG regarding its multiannual programming (Art. 12(1)).

[XIX] Speech by Michel Barnier at the Berlin Security Conference, Berlin, 29 November 2017. Available at: <http://europa.eu/rapid/press-release_SPEECH-17-5021_en.htm>.

[XX] 'Europol head fears loss of UK influence after Brexit,' *BBC News*, 31 January 2018, <https://www.bbc.com/news/uk-42874985>.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Federalism and constitution: States' participation in constitutional reform as a guarantee of the *federalisation process*. (A study of Spain's unique model)

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

The aim of involving state members in reforming federal constitutions is to guarantee them the autonomy that they have been constitutionally granted. It also prevents reform from being carried out unilaterally by the central government and means the structure of competences can be modified as necessary. In this study, we will consider how federations manage, to a greater or lesser extent, regional intervention in constitutional reform. However, we will see how recently, in Spain, the anticipated routes for territorial participation in the constitutional text have proved to be clearly insufficient, and have developed into the recent crisis in this 'State of Autonomies', which is now facing the breakdown of national unity.

Key-words

federalism, autonomy, constitutional reform, regional participation

1. Introduction: federalism and constitutional reform

If, according to Ackerman (1998: *passim*), the greatest constitutional changes often take place as a response to extraordinary situations or in deep crisis periods in which there is a great social movement to foster constitutional change, it can be said that in Spain, we are immersed in such a certain 'constitutional moments'. The territorial issue, worsened by the economic crisis and the pro-independence challenge in Catalonia, is probably the central matter regarding the large amount of reform proposals to the Spanish Constitution and it justifies the analysis in depth on the constitutional reform in Spain. However, unlike it seems to be usual among Spanish academics[I], we are not going to focus on the reform contents but on the subjects involved; specifically we are going to try to settle whether the Autonomous Communities' participation in the reform is appropriately guaranteed or not in such a way that there are certain mechanisms that allow to update and improve the competences granted by the Constitution to these subnational entities.

This participation, as we will show in this section I, is a constituent element of Federal States and we, along with many other authors (for instance, Watts 2006: 92 and 129-131, Anderson 2008: 20, Elazar 1995: X), Agranoff 1996: 385-401, La Pergola 1979: 279, Aja 2014: 25, Solozábal Echevarría 2004: 10-13 and Alberti 1993: 229), think that Spain can be included within this model. Next, and in light of comparative law, we will classify and describe the various methods for involving the territorial entities in constitutional reform so as to find out which of them implies the greatest guarantee of federalisation (section II). Finally, we will focus on the Spain's unique model. In this case, the formal channels for the Autonomous Communities involvement in constitutional reforms are clearly unsatisfactory, as we will see in section III.

The individual states' involvement in constitutional reform is considered as one of the greatest contributions of the United States to the constitutional experience; this along with the fact the constitution is *rigid* and *written*, as well as the federal structure itself (La Pergola 2016: 188 and Blanco Valdés 2012: 107-112). What's more, if, as Loewenstein said, all the legitimate holders of power need to participate in constitutional reform because 'the wider this involvement, the broader the consensus of constitutional reform and the greater its legitimacy' (Loewenstein 1986: 172), this hypothesis is at its strongest in federal countries.

Here, the regional governments' contribution to constitutional reform has been described as one of the *defining* elements of this phenomenon by many authors[II]. Groppi has gone so far as to say that a federal constitution that only allowed itself to be revised through centralised procedures would be 'a contradiction in terms' (Groppi 2001: X).

It is with good reason that 'we have *federalism* only if a set of political communities coexist and interact as autonomous entities, united in a common order with an autonomy of its own' (Friedrich 1968b: 11). For this reason, a federal constitution must fulfil precisely the function of defining each of these singular identities and integrating them into State organisation, placing at their disposal areas of wider or narrower autonomy. Regardless of to whom sovereignty must be attributed in this State model, a matter on which there has much debate in the past[III], and of the way it should be established, be it by aggregating pre-existing sovereign states (*integrative* or *aggregative* federalism) or by breaking down a unitary State (*devolved* or *disaggregative* federalism)[IV], the basic structural principle of a federation is the existence of separate autonomous spaces of the common order. Here, the constitution attributes each of these regional governments (federative entities), their own sphere of competence. This is the only rule that governs the political existence of them all. This principle of autonomy, as shown by González Encinar, is defined as a compromise between centrifugal and centripetal trends in which a set of relations of coordination, participation, supraordination and subordination occur between the State organs (González Encinar 1985: 89 and 95). The form this takes is a type of collaboration and vertical division of power (Cámara Villar 2004: 211).

Beyond this structural principle of autonomy, the federation is an indefinable truth[V] (unless, like Wheare, we reduce it to the American federal model[VI]) because of the huge organisational differences between the different federal countries. The pitfalls of case selection can be particularly a problem in the comparative study of federalism. The number of federal states is not very large and it can diverge depending upon how one counts (for instance, 4 according Wheare[VII] or 25, in Watts' opinion – see Watts 2008: 24-28). With Abat and Gardner (2016: 382-383), we can agree that a rigorous working definition of federalism helps assure the similarity of states compared but can reduce the validity of inferences because of the small size of both the sample and the universe. A more inclusive definition allows more powerful and far-reaching inferences, but carries a risk of inaccuracy by sweeping in sample variation that the analysis may not take into account. In this work,

we have opted for a generous criterion. We expect that the limited objects we are comparing, only the rules relative to the amendment of federal constitutions, could minimise the risks. We are going, therefore, to include in our sample the *classic federal states* (United States, Switzerland, Austria, Australia, Canada or Mexico), the new democracies refounded on formal principles of federalism after the II World War (Germany and India) or emergent federations like Spain, Brazil, Argentina, Belgium, Russia, South Africa or Nigeria. We have consciously exclude Venezuela due to the authoritarian and centralist drift that the Bolivarian Constitution of 1999 implies. Even though Italy is classified as a Regional State, we have included it because of its similarities with the Spanish system in this issue[VIII].

Before we continue, we must emphasise that autonomy must be enjoyed by the common entity as well as by the regional governments. But, precisely because of this common scope, in every federation, there must be a guarantee that the individual governments will be involved in forming the unitary will of that federation. This may be through ordinary (legislation or enforcement) or extraordinary (constitutional reform) procedure. To understand member states' involvement in constitutional reform, we need to discuss the legal relationships surrounding regional participation. The intention, as we know, is that the states are integrated into the federation and take a meaningful share of the federal power (as noted by García Pelayo 1993: 239-241).

The idea put forward by a large number of authors that the justification of this involvement could be attributed to the *contractual* origin of federal countries, and the fact they were formed by a confederation of independent sovereign states[IX], no longer makes sense. Logically, this idea would only stand in *aggregation federalism*, where federative entities have replaced unanimity by majority rule (nearly always qualified) for any changes to be made to the constitutional pact. It cannot currently offer a satisfactory explanation to individual governments' requirements for involvement in constitutional reform.

A federation does not arise from a pact between previous communities, but from constituent power. That is, from the joint decision by the sovereign population to equip themselves with a federal organisation (González Encinar 1985: 84) that, as we have said, comprises their different identities and guarantees their autonomy. Participation in reform assures, therefore, that regional governments can express their own natures while incorporating part of their political life into the group as a whole; not as contrasting

components, but as part of a united front[X]. As we have emphasised, this is an important element in forming the State's unitary will, but also ensures the regional governments' very survival, as it prevents their constitutionally guaranteed sphere of autonomy from being modified unilaterally by the central authority (Ruipérez 1994: 99, Ventura 2002: 14 and Groppi 2001: 109).

However, in order for these roles of integrating and defending autonomy to be fulfilled, various methods for involving the individual identities in constitutional reform have been foreseen in comparative law.

2. Methods for territorial involvement in constitutional reform in comparative law

From an overview of the different constitutional texts, we can conclude that in comparative law there are two main ways for regional governments to participate in constitutional reform[XI]: The first, which is clearly inspired by the US, is characterised by member governments participating in the reform procedure in a *direct* way (2.1). In the second (2.2), involvement takes place in an *indirect* way, when the said reform is approved by the federal parliament's second chamber. This is always defined as the House of territorial representation.

Before proceeding, we need to clarify several points. Firstly, outside of these methods, the involvement of territorial entities in constitutional reform does not always cover all the constitution's contents. Sometimes it is restricted to matters affecting relations between the centre and the periphery[XII]. Such is the case in Austria, where the Federal Council (*Bundesrat*) only becomes involved in constitutional reform if the amendment affects how the states' legislative and executive competences are distributed[XIII]. It is also the case in India, where State ratification is only needed for precepts regulating the State's essential nature as a federation, such as the distribution of competences, the election of the president, the states' representation in parliament, constitutional regulation of the judicial power and reform of the constitution itself[XIV]. Lastly, in South Africa, the constitution states that any amendment to the constitutional text must have the support of at least six provinces in the second chamber (*National Council of Provinces*) if it affects the bill of rights, the National Council of Provinces itself or any matter relating to the provinces[XV].

Looking at federalism's origins, we can see that the direct involvement of states in constitutional reform is a common method in the initial federations, which arose when independent states merged (*integrative federalism)*. Meanwhile, in federal countries that arose as a result of the decentralisation of a unitary State (*devolved federalism*); participation usually takes place through the second chamber[XVI].

One last point that must be made, albeit a well-known one, is that *indirect participation* is generally included in all federal jurisdictions. Unsurprisingly, the second chamber is always defined as the chamber of territorial representation. For this reason, we shall limit ourselves to describing federal countries where this is federal entities' only mechanism for intervening in constitutional reform.

2.1. The direct involvement of sub-state entities

Returning to the different methods for participation, we have already said that systems featuring mechanisms for *territorial entities' direct involvement* in constitutional reform are inspired by the United States Constitution, whose article V contains two procedures for amendment[XVII]. The first, which is the only one to have been used since the approval of fundamental rule in 1787, puts Congress in charge of approving amendments to the Constitution. This requires a two-thirds majority in each chamber, and ratification by three-quarters of the states, either through their legislative assemblies or through Conventions created with this objective in each state. Congress also chooses the mode of ratification. Only one amendment – number 21 of the 33 that exist currently – has been ratified through state Conventions. The second procedure is a specific national Convention proposed by two-thirds of the states that approves constitutional amendments. These also must be ratified by three-quarters of the states in one of the ways we have seen previously. However, the greatest problem with this route for initiating reform is that it would require the proposal to be approved by a two-thirds majority in both Congress houses. This explains why this procedure – which, incidentally, was that used to ratify the Constitution in 1787 – remains unused.

As can be clearly deduced from our study of the American system, there are two instances during reform where the states may participate: either to propose a reform, where states call a national Convention; or, following a reform's approval by the national parliament, its ratification by the states. One of these methods for intervention from the

states can be found in the remaining systems that include this mode of direct participation in constitutional amendment.

2.1.1. During the initial reform phase

The Constitutions of Canada, Mexico, Brazil, Russia and Italy state that federal entities can be involved in the *initiative phase* of reform by presenting a proposal to the federal parliament. There are, however, vast differences in the number of federal entities required for this.

The Canadian Constitution specifically states that it should be one provincial legislative assembly (article 46.1). However, in Russia, Mexico and Italy, a minimum number is not stated; meaning the rules of ordinary legislative procedure apply. It would suffice, therefore, for the proposal to come from a single territorial collectivity. For that reason, it would be enough for one regional council in Italy[XVIII], a single legislature of any Mexican state[XIX] or a single legislative assembly of the different entities that form the Russian Federation to present a proposal for constitutional reform[XX].

Lastly, in Brazil, any proposal must be endorsed by at least half of the federative units' legislatures, each of which must be expressed by a *relative majority* of its members (article 60)[XXI].

2.1.2. Through approval of the final text

Direct intervention by states during a reform's *ratification phase*, once it has been approved by the federal parliament, occurs either through the states' legislative organs or through their individual electorates, by means of a referendum. In the latter, the federation's own mechanisms for reform are thus interlaced with those of the democratic State (Groppi 2002: 124). The former case applies to Canada, Mexico, Russia, Nigeria and India and the latter to Australia, Switzerland and, in its own way, Italy.

The case of the Canadian Constitution (1867) is very unusual, because up until 1982 no procedure for constitutional reform had been established, because amendments were understood to be within the remit of the British Parliament, which had originally passed it. The *1982 Constitution Act* lays out two reform procedures that we will call *general* as they are intended for matters affecting the Federation and all the Provinces. Because of this, they require approval from both the federal Parliament and the Provinces. The first called '7/50

formula' would apply to all constitutional amendments for which there is no specific procedure, as well as to matters contained in article 42 of the Constitution[XXII]. It requires the approval of two-thirds of the provincial legislative assemblies (7 provinces) whose populations represent at least half (50 per cent) of that of them all (article 38). There is a second, *more aggravated*, general procedure that refers to matters affecting, among other things, the right of each province to have an equal number of House of Commons members to senators, the Constitution's bilingualism, the composition of Canada's Supreme Court and constitutional reform itself. In this procedure, any modification of the constitutional text requires unanimous approval by all the provinces' legislative assemblies (article 41). Along with these general procedures, there are three additional processes that we will call *unusual* for the following reasons: the first because it only applies to one or more provinces, in which case only approval by the legislative assemblies of the provinces concerned would be required (article 43); the second because it refers only to aspects affecting the parliament and executive itself – except for matters covered in articles 41 and 42 which, as we just saw, regulate general procedures – where approval by the federal parliament would suffice and concurrence from the provinces is not required (article 44); and the last because it refers to amendments to the of the provinces' constitutions, and specifically the parts that are considered to concern the federal constitution[XXIII], whose reform would be a matter for the provincial assemblies through ordinary law (article 45).

Amendments to the Mexican Constitution can also not be finalised without approval from the territorial entities. In that regard, article 135 establishes that, following a vote by a two-thirds majority of the Congress of the Union members present, any addition to or amendment of the federal constitution must be approved by the majority of the legislatures of the states. The rule does not establish the majority by which local parliaments must support or reject the amendments and, for that reason, authors have stated that this should be determined in the constitutions of the states, and if it is not, a simple-majority approval should apply (Carbonell 2006: 229 and 233, and Carpizo 2011: 561-562).

The most unusual thing about constitutional reform in the Russian Federation is that approval by the Constitution's territorial entities is only required for one of the three amendment procedures. The first of the three applies to any change in the dogmatic part of the constitution when it affects the basis of the constitutional system, human and civil rights and freedoms or the procedure for reform (Chapters 1, 2 and 9 respectively). Article

135 specifically indicates that these provisions should be revised not by the Federal Assembly, but by a Constitutional Assembly. This is composed in accordance with the law, and will either approve the proposal by a majority of two-thirds of the total number of its members or refer the matter to a referendum. A referendum would require support from an absolute majority of its voters, under the condition that over half of the electorate participates in it. The second process, which applies to any change to the organic part of the constitution (Chapters 3 to 8), would follow the procedure of a federal constitutional law – which, as stated in article 108, requires approval by a majority of three-quarters of the Council of the Federation and two-thirds of the *State Duma*, and in addition approval by the legislative authorities of two-thirds of the subjects of the Russian Federation (article 136). Lastly, changes to the members of the Federation or to their status only requires approval through a federal constitutional law, without needing to be ratified by the Federation's subjects. What is surprising about this legislation is that changing the essential principles of the federal constitutional order does not require ratification from the territories. Also, although their approval is expected by referendum, this takes into account the Federation's entire electorate rather than the partial electorates of each of the Federation's subjects, which would have been the appropriate procedure had they wanted to introduce an element of federal legitimacy into the constitutional review process, rather than just democratic legitimacy through a referendum which, incidentally, is not even mandatory.

Finally, changes to the Constitutions of India – although, as we have seen, only in matters affecting relations between the centre and the periphery[XXIV] – and Nigeria also require approval from the states' legislative assemblies. However, for India, it suffices for an absolute majority of the states to pronounce themselves in favour, whereas in Nigeria[XXV] the support of two-thirds of them is needed.

In Switzerland and Australia, we have said that the mechanisms for federal reform are interlaced with those of *semi-direct* democracy, given that there is a direct appeal to the territorial entities' citizens to conform to constitutional modifications through referendums. In this sense, although the Swiss Constitution's procedure for reform changes significantly if its objective is the total or partial amendment of the said reform, in all cases, in order for the reform bill to take effect, it must be approved by the Swiss people and the people of the cantons that the country is made up of (article 195)[XXVI].

The Australian Constitution states that, following a reform bill's parliamentary approval by an absolute majority, there is a period between two and six months for the citizens in each state to vote for the reform[XXVII]. For this to happen, it must be approved by the majority of the voters in the majority of the states, on the condition that they represent the majority of the voters in the federation as a whole. This means that in order for the reform to come into force, a double majority has to be reached: firstly, that of the states, and secondly, that of the whole of the federal country (article 128). Furthermore, if the reform aims to alter the representation of any state in the Houses or the limits of the state, a favourable vote is required from the majority of the voters of that state or the state affected by the reform.

The Italian Constitution assigns a very limited role to the regions for carrying out constitutional reform. They are not given the power to approve it; only to request a referendum for it to be approved by their citizens (article 138). Furthermore, such a referendum is not mandatory. It only takes place if, after the reform has been approved by an absolute majority, it is requested by either 500,000 citizens, a fifth of the members of one of the Houses or five Regional Councils. In addition, that option is declined and the referendum request not granted if the reform is approved by two-thirds of the Houses.

In the scenarios described up to this point (with the exception of Italy), the guarantee of federalisation of constitutional reform is clear in that it cannot be performed without the vote of a more or less qualified majority of each federation's constituent territorial entities – an absolute majority in Mexico, Australia, Switzerland and India; a two-thirds majority in Russia, Nigeria and Canada (generally speaking); a three-quarter majority in the United States; and unanimity in Canada (for certain matters). However, is there enough guarantee of sufficient intervention from regional governments when constitutional review occurs through the House of territorial representation?

2.2. Indirect participation through the House of territorial representation

In Germany, Austria, Belgium and South Africa, the Senate is the only route for participating in constitutional reform. But, in these cases, since members' State origin does not usually have much effect on the operation of the territorial chamber, the guarantee of federalisation is *quite weak*.

The reform procedure in the Basic Law for the Federal Republic of Germany is relatively simple; the only requirements specified are that reform be carried out expressly, and that both the Federal Council (*Bundesrat)* and the parliament (*Bundestag)* should support the reform text by a two-thirds majority (article 79 of the Basic Law for the Federal Republic of Germany)[XXVIII]. The *Bundesrat*'s unique model entails greater guarantees for federalisation, given that its members are designated by the *Länder* governments, who whip them into all voting a certain way. However, this does not mean that this model has avoided partisan logic. When the political orientation of the federal government is not in accord with that of the territorial governments, partisan interests have, at times, turned the *Bundesrat* into an *opposition chamber* through which *Länder* representatives, governed by minority parties from the opposition[XXIX], have prevented or delayed the approval of federal laws because of difficult negotiations in the two chambers' joint commission. To a large extent, the 2006 constitutional reform, which considerably reduced the number of laws requiring the *Bundesrat*'s assent, was brought about by this partisan use of the second chamber which, in some ways, changed its constitutional function as a national parliament (Arroyo Gil 2009: 83).

In Austria, as we have seen, the participation of the *Länder* in constitutional reform through the Federal Council *(Bundesrat)* is very limited. This is because it only occurs when there is a change in relations between the centre and the periphery, which affects the executive or legislative powers of the *Länder* (article 44). For other proposals, agreement from the National Council (the *Nationalrat)* suffices. As for as the majorities needed, the presence of at least half of the members of the National Council is required (and, where necessary, the *Bundesrat*), as well as a two-thirds majority vote. In addition, when the change affects the composition of the *Bundesrat,* approval from the majority of the representatives from at least four *Länder* in that Federal Council is required (article 35).

Although their members are appointed by the legislative assemblies of the *Länder* in a number that is proportional to their composition, and renewed at each state election, research has shown how poorly territorial interests are represented in the Austrian *Bundesrat*. This is because of a relative social homogeneity and the almost entire dominance of the national parties, which leads to there being little difference between their activity and that of the National Council (de Cueto Nogueras 2001: 111 and 120, and Virgala Foruria 2011: 110). However, to compensate for the weak position of the *Länder* in the adoption of

common decisions, parallel instruments of *cooperative federalism* have been created. This has occurred particularly in the area of intergovernmental collaboration, through conferences that are either of a general nature, such as the Conference of Presidents, Ministers or Directors of Bureaux of the *Länder*, or on European subjects, such as the Integration Conference of the *Länder*, or sectorial, whose preparation and follow-up is dealt with by the Liaison Office for the *Länder* (*Verbindungsstelle der Bundesländer*). Other informal meetings, work groups and joint conferences have also taken place between several *Länder*[XXX].

Rigidity is a characteristic of the Belgian Constitution (which, incidentally, is comparable to that of the Spanish Constitution's article 168). Its reform procedure is comprised of three stages. In the first, the House of Representatives and the Senate make a joint declaration on the need to revise the Constitution and the articles to be amended. Then comes the early dissolution of Parliament and the consequent announcement and holding of elections. Lastly, the newly elected reform legislator draws up the amendment, which cannot include laws other than those indicated in the initial declaration, and which in order to be passed requires a two-thirds majority vote in each House, as well as a *quorum* of two-thirds of the members of each House. As this brief description of the procedure suggests, the Senate and the Parliament participate in reform on equal terms (article 195)[XXXI]. However, despite the fact that the Belgian political system does not feature State-level political parties, since it is monopolised by Flemish and French ethnic-linguistic groups, territorial interests have never been well represented in the Belgian Senate. The selection of members therein has not ensured that all the sub-state entities have been able to express themselves fully. Up until the constitutional reform of 6 January 2014, the Senate was made up solely of representatives from the ethnic-linguistic communities (Flemish, French and German), and not of those from the regions (Flanders, Wallonia and Brussels). It therefore neglected its mission to give a voice to all territorial interests. With this reform, which accentuated the role of the regions, the aim has been to introduce mechanisms to mitigate the dualist and conflictual nature of Belgian federalism. More time is needed, however, to determine whether this has been effective[XXXII].

Also in South Africa, the participation of territorial entities in constitutional reform occurs solely through the chamber of territorial representation – although, as we have seen, this is limited to certain matters. Specifically, article 74 of the South African Constitution establishes that, when amendments to the Constitution affect the Bill of Rights or relations

between the centre and the periphery, after being approved by the National Assembly, they must be accepted by the National Council of Provinces with a supporting vote of at least six of the provinces[XXXIII]. South Africa's National Council of Provinces consists of ten delegates from the government or parliament of each province. Notably, each province has one single vote for the adoption of most decisions, including any reforms to the constitution (article 65).

Lastly, Argentina is a special case, because while in order for an amendment to be passed a constitutional convention has to be formed, the decision to approve the reform requires a two-thirds majority from the Senate. This Senate is made up of three members from each province, who are elected by a system of limited majority, and operates following a logic that is more partisan than territorial (Carnota 2016: 53). We must ask, then, whether the constitutional convention is formed according to the federalising criteria of the Provinces having equal representation, as was the case in the 1787 United States Constitutional Convention – that is, whether or not there is an equal number of members for each province. Nothing is said in the Constitution of Argentina's article 30 about the convention's composition. However, the Argentine constitutional system has stated that it should be made up of representatives chosen in proportion to the population. The same population criterion is used for the formation of the lower house, the House of Deputies (Díaz Ricci 2004: 455). Hence, as Tania Groppi has indicated (2002: 111), the provinces only participate in constitutional reform through the Senate in the initiative phase.

From what has been said so far, it seems that the greater or smaller participation of regional governments in constitutional reform through the house of territorial representation is not distinguishable from that arising in the legislative procedure. In principle, greater guarantees of federalisation occur when the Senate is formed of representatives from State organs (governmental or parliamentary delegates) and when the provinces enjoy a joint position through equal representation in the chamber. However, *cleavages* or social fractures also have a significant impact and an effect on the party system, as we have seen in each case[XXXIV]. But it must not be forgotten that the second chambers' role of representing territorial interests is currently highly disputed because of political parties' prominence in the way they are operated (see Garrido López 2016 and Sáenz Royo 2014: 47-66).

What does not differ between them is the majority by which they must approve constitutional change; in all the cases we have studied, this is a qualified majority of two-thirds: Germany, Austria, Belgium (without forgetting that at least two-thirds of the members from each chamber must be present) and South Africa (six provinces out of a total of nine).

Whichever form it takes, be it *direct* or *indirect*, the truth is that when there are inadequate mechanisms for regional government to participate in constitutional reform, ordinary legislation is usually favoured, where meaningful ways of participating[XXXV] are planned or developed. Outside the Constitution, these may even alter spheres of autonomy that are constitutionally guaranteed. This may partially explain the limited success Spain's Autonomous Communities have had participating in constitutional reform.

3. Spain: shortfalls in the formal channels for the Autonomous Communities' involvement in constitutional reform

The Spanish Autonomous Communities' participation in constitutional reform is part of the general issue of constitutional reform in Spain, but has thus far played a minor role. In this sense, the shortage of reform experiences in Spain's constitutional text should be noted. Except for some very specific aspects which occurred, even more worryingly, not on Spain's own initiative, but were imposed from the outside because of the country's membership within the European Union, amending Spain's basic rule has been impossible. Some even speak of Spanish *differential fact* to describe the fact that it is impossible to turn to reform as a means of changing the constitutional text into a shifting reality (Rey Martínez 2014: 144)[XXXVI]. This demonstrates that Spain's parties are incapable of reaching fundamental political agreements, and perhaps even circumstantial ones; which could intensify with the new political situation. After the general election of 20 December 2015, they proved to be incapable of forming a government, which launched a new electoral process, and after the 26 June 2016 election had difficulties securing an investiture.

Without this essential basic consensus, the concept of constitutional reform is non-viable. This is not only because of the struggle to obtain the sufficient parliamentary and electoral majorities anticipated in the Spanish Constitution's articles 167 and 168 – both in the mid-elections and in optional or mandatory referendums – which, according to the

recent developments in our party system, the first two political parties are incapable of. It is also because of the lack of legitimacy that would come from imposing a reform that had been *cobbled together* in the context of *national integration crisis*[XXXVII].

But, on the other hand, there are several risks associated with having a Constitution that fails to change in order to adapt to reality. Firstly, if the legislator has an exaggerated interpretation of the constitutional text, or constitutional case-law is too detached from it, this may lead to the constitutional rules losing normative power, and to also non-compliance, disaffection on the part of the people or, sometimes, the direct violation of constitutional rules.

In recent years, this has resulted in the rupture of the approval model for next-wave Autonomy Statutes, for whom the constitutional framework had become obsolete, and the STC (Constitutional Court ruling) 31/2010 on the Statute of Catalonia, as we will see. Attempts have been made, through statutory reforms, to constitutionally transform the distribution of power between the centre and the periphery so as to limit the authority of the central State[XXXVIII]. This forgetting that the constitution remains the highest law and that an Autonomy Statute could end up being declared unconstitutional, even after having been approved in a referendum (Aja 2014: 78)[XXXIX].

At first glance, we might be surprised that the Autonomous Communities took this course of action since they could have carried this new layout to fundamental rule, and suggested constitutional reform directly. If we add to this the Autonomous Communities' lack of influence in the constitutional reform procedure through the Senate (or rather, in any decision made by the chamber), and this State of Autonomies' marked structural crisis, we have the full reasoning for the lack of participation. Let us now break this down.

3.1. Formal channels for the involvement of Spain's Autonomous Communities in constitutional reform

The two mechanisms by which Spain's Autonomous Communities can participate in constitutional reform are, firstly, by presenting a constitutional reform proposal and, secondly, having the Senate act as a chamber for territorial representation.

In the Spanish Constitution, direct participation in the initiative phase of constitutional reform is not actually fixed directly, but through article 166, under the provisions of articles 87.1 and 87.2, which refer to the ordinary legislative procedure. This excludes popular

initiative from matters of constitutional reform and allows the Autonomous Communities' legislatures to directly present a proposal for constitutional reform to the *Cortes Generales* (the Spanish parliament).

In the almost forty years of our Constitution being in effect, on only two occasions has anybody tried to put the above procedure into action. For the moment, neither has resulted in the text being altered. The first originated in a popular legislative initiative in 1990 in which the Basque parliament was urged to present a proposal of constitutional reform to the *Cortes Generales*, suggesting the right to self-determination be included in the Constitution's second additional provision. But that is where it stopped because the Autonomous Community's legislature did not even consent to the matter being discussed in the Basque parliament itself, deciding that it was a matter that popular legislative initiatives were not permitted to deal with.

The second occasion was much more recent, and consisted of a constitutional reform proposal made by the Asturias Parliament. This initiative originated in a proposal made by the *Izquierda Unida* (coalition formed by Communist Party and Republican Left Party) parliamentary group which had gathered requests from different social movements to stimulate mechanisms for direct democracy in Spain's constitutional system. However, the proposal has been pending consideration by the Congress of Deputies since February 2016.

By contrast, the mechanism through which the Autonomous Communities can be indirectly involved in constitutional reform through the Senate fits awkwardly into Spain's constitutional model. The Spanish Constitution only designates a tiny number of senators to the Autonomous Communities. Each of their legislatures is allocated one senator, plus another per million citizens, as laid out in the Statutes of Autonomy. This makes up a quarter of the chamber's members, with the other senators being chosen in provincial constituencies. Furthermore, the senators shall not be bound by any compulsory mandate since they just represent the Spanish people as a whole, not only their particular territories similarly to the way it happens in the Congress of Deputies. Finally, this chamber does not have a vital role in the legislative procedure when the interests of the territorial entities are at stake.

For all these reasons, the second chamber practically doubles congressional representation, but at the second reading and with a restricted role in the legislative

procedure (except in the case of the aggravated reform procedure described in article 168 of the Spanish Constitution, in which the powers of both chambers are equalled). For this reason, despite the literal wording of the Spanish Constitution's article 69.1, the Senate does not amount to a channel of expression for the territorial interests. Which, whether or not this initially made sense because of the compromise that was reached in the constituent process to not close the territorial model, it should have been corrected once the autonomous map was fixed at the beginning of the 1980s.

Lastly, it should be highlighted the fact that, the Spanish constitutional framework does not provide any other channels for intergovernmental collaboration relations that favour the participation of the different Autonomous Communities in the central State's decision-making process. It has been tried to make up for this absence of channels by means of several techniques and logics with a really uneven performance due to their lack of institutionalisation or even because of an uncertain legislative development thus, showing clearly the absence of any type of political interest in their implementation in some cases. Just only, the Conference for EU-Related Affairs (*Conferencia de Asuntos relativos a la Unión Europea, CARUE*) or the recently reactivated Presidents Conferences (*Conferencia de Presidentes*) provide some instances of collaborative practices attempts[XL].

3.2. The uniqueness of the State of Autonomies: changing autonomous powers outside of constitutional reform

We have seen that when territorial entities intervene in the constitutional reform process, one of the main problems associated with the organisation of compound states is resolved: the sphere of autonomy constitutionally guaranteed to the different bodies or levels of government (that is, the territorial and functional breakdown of powers) is ensured. At the same time, the structure of competences can be modified as required (La Pergola 2016: 16-24). It is a distinguishing feature of this State model, then, that the definition of its own sphere of interests cannot be made unilaterally by any of its parts, but requires consent from all the agencies involved.

However, as authors have emphasised[XLI], what distinguishes the Spanish Constitution from others is that it does not determine the State's territorial model. In fact, it does not establish the autonomous map, or require the State's territory to be fully decentralised, and nor does it establish the territorial breakdown of powers between the State and the

Autonomous Communities. The factors that led to this solution arise from the difficult political circumstances that surrounded the constituent process, and which led to a delicate balance being struck between the different forces. The development of this solution was deferred to a later stage through extra-constitutional rules. However, the unconstitutionalisation was not total, because in the Constitution there is a structural frame and basic principles on the subject that would have to be observed when determining the territorial structure (Aragón Reyes 2006: 75 and 78-79). Ultimately, as Bustos Gisbert rightly says, the territorial design conducted in the Spanish Constitution is of the *procedural* type; it is restricted to allowing the decentralisation process, indicating the access routes for autonomy, the limits of competence and the control and closing clauses that allow conflicts to be resolved and guarantees harmony in the system (Bustos Gisbert 2006: 73).

Nevertheless, although the Constitution does not establish the State's and the Autonomous Communities' spheres of powers, these cannot be identified unilaterally by any of the government bodies, because within the framework established by fundamental rule, agreement is needed between all parties. The most salient feature of the Spanish Constitution, which is also one of its essential characteristics, is that it has attributed to the territorial entities, which have a right to access autonomy (the 'nationalities and regions' in article 2), a decisive capacity in the set-up of the territorial structure. This has been made through the *dispositive principle*, which grants them at all times the powers of impetus and codecision in the *federalising process*[XLII]. This covers as much the initial part of the decentralisation process as its amendment.

At the initial stage, the dispositive principle grants representatives from the territorial entities the authority to decide whether they want to achieve autonomy (unless, for reasons of general interest, it is decided through an organic law that an autonomous initiative be taken over, as per article 144) and the authority to define, with the State, the territorial entity's power by functionally and materially determining its powers within the framework established by articles 148 and 149 of the Constitution. All of this must be contained in the Statutes of Autonomy as the basic institutional rule of each of the Autonomous Communities (article 147).

In the successive phases, the dispositive principle means that it is the Autonomous Communities who can propose and agree on changes to the defining elements of their autonomy through reform of the respective Statute of Autonomy, by means of a special

procedure. This begins with the Statute reform proposal being approved in the Autonomous Community's legislature, but also must have been approved by the *Cortes Generales* as an organic act.

The constitutional framework's second characteristic is *asymmetry*. The Spanish Constitution established a territorial structure featuring Autonomous Communities which, from the outset, could access the highest competences, taking on all those powers that were not reserved to the State by article 149.1 (using article 151, or the *fast track*) and others that, at least for an initial five-year period, had to conform to having just competences within the narrow scope of article 148 (the *ordinary route*). There was, however, nothing to prevent the degree of autonomy becoming equal after the period driving the reform of its respective Statutes had passed (González Encinar 1985: 156).

Nevertheless, the seed of that which would later result in the main problems with Spain's autonomous system can be found in the Constitution's original framework. Firstly, although the dispositive principle ensures that the Autonomous Communities can intervene by defining the sphere of control, at the same time it establishes a system of bilateral relations between the centre and the periphery. This generates a high degree of competition between the Autonomous Communities and a complete lack of stability rather than contributing to integration[XLIII]. Secondly, the general nature and, in many cases, ambiguity of the constitutional rules means there is a high potential for unrest during the lengthy and complex development of the model. This has meant the Constitutional Court has become a referee for political conflict, litigating excessively and assuming a role that goes beyond that of a negative legislator[XLIV]. Lastly, by allowing changes to the territorial distribution of power through reform of the Statutes of Autonomy, without the need to trigger the procedure for Constitution review, the constituent process has left itself open indefinitely. Tomás y Valiente has warned of the risks of this (1993: 205): 'The constituent process must be finalised. A State cannot stay indefinitely in the constitutional process without risking the unity of the underlying political society; the unity of the nation. If this break is not consciously sought, it is unwise to trigger forces that may lead to that result'.

In addition, although when Tomás y Valiente wrote those words at the beginning of the 1990s there was virtually a general consensus that the State of Autonomies had succeeded, the new millennium was to bring with it a process of statutory reforms that supported its failure (Valencia, Catalonia, Balearic Islands, Andalusia, Aragon and Castilla

and León). These statutory reforms did not address the need to widen the Autonomous Communities' scope of power, because they had already reached the limits of competence described in article 149.1 (that is, responsibilities reserved to the central State by the Constitution). What they did respond to was the need to restrict the scope of State competences, through identifying transverse State responsibilities such as coordinating general economic planning (article 149.1.13), or basic equality in the exercising of rights (149.1.1ª) and the scope of basic State regulation[XLV].

While all the statutory reforms up to that point had a shared focus that of Catalonia began with a principle that, as we will see in the next section, had already been alluded to in the Basque Statute's proposal, which encroached on the foundations of Spain's territorial model: the unilateral nature of reform. This left the Cortes with no other option than to accept the autonomous proposal without discussion[XLVI]. And although that was not to be the case finally, because some changes agreed on by the PSOE (the central Socialist party) and the CiU (the Catalan Convergence and Union party) were introduced during their parliamentary process as organic law, it was more a last concession of nationalism than a negation of basic principle, so an *Estatut* being declared unconstitutional would not have been accepted by the people.

Needless to say, the STCs (Constitutional Court rulings) on the *Estatut* had a significant effect on the statutory reforms' content[XLVII]. And although except in very exceptional circumstances this did not result in the texts being declared unconstitutional, through *interpretation*, the Autonomous Communities' attempts to define the allocation of competences reserved to the State by article 149.1 were disabled, which would result in only one thing: constitutional reform.

3.3. The road to constitutional breakdown in the Basque Country and Catalonia

Until this point, we have focused on attempts made by the Autonomous Communities to make informal changes to the constitutional system based on interpretations by political stakeholders, the legislator and constitutional case-law. But we are currently experiencing a drift, driven by Basque and Catalan nationalism, for which the constitutional framework is no longer sufficient. These movements are not interested, however, in constitutional reform, because they have chosen the secessionist route, therefore manifesting a clear determination for the unilateral breakdown of the constitutional order.

The first attempt at constitutional breakdown arose after the failure of the so-called *Plan Ibarretxe*. This was a Statute of Autonomy proposal that was based on premises that were completely contrary to the Constitution, such as the national character of the Basque people, the original legitimacy of their power and the right to unilaterally establish a new relationship with the Spanish State that would grant the Basque Country 'commonwealth' status[XLVIII]. The autonomous proposal was rejected, so the Basque authorities tried to consult the Basque people on their relationship with Spain. This process was halted by the Constitutional Court, which declared that the Basque country did not have any power on the matter of referendums (STC 108/2003, Fjs. 2º and 3º).

The process in Catalonia is following a different course. As Aja reminds us, the climate generated in Catalonia by the economic crisis, autonomous financing and the long delay of the ruling on the *Estatut* generated an atmosphere that was favourable to independence. This drove the autonomous powers to a secessionist process in which the first step would have to be a sustained consultation on the Catalan people's right to decide.

The Constitutional Court denied that the 'right to decide', understood as a right to self-determination or the right to consult on Catalonia's relationship with Spain, conformed with the Spanish Constitution. However, it did not reject the possibility of reaching independence, provided that was carried out within the framework of constitutional reform procedures, given the fact there are no intangibility clauses within Spanish basic rule. It even indicated the route that must be used for this and which, as we have seen in this study, is for the Autonomous Community's legislature to present a constitutional reform proposal[XLIX]. The Constitutional Court bears no relation to the informed opinion of Pedro de Vega, the strongest advocate in this field that there are implicit limits to constitutional reform, and for whom the power to revise must be exercised without breaking legal continuity, given that bringing out a revolution, which would be an act of constituent power in itself, is not permitted (de Vega 1985: 68-69). In his words, if 'all constitutions are identified by a certain political regime and a political formula that materially defines, and socially legitimises, the legal framework, it is clear that any attempt to change the basic values making up the political formula, through the mechanism of reform, would not simply imply the substitution of articles by others, but the creation of a different political regime and the establishment of a new constitutional system' (de Vega 1985: 285-286)[L].

However, the *Generalitat de Catalunya* completely bypassed these decisions from the Constitutional Court and, following the *illegal* and unguaranteed referendum held on 1 October 2017, chose to take the route of a Unilateral declaration of independence. This declaration, to try to force the Spanish State into a negotiated exit, which was made by Carles Puigdemont, the Generalitat's President, was suspended in the first instance (although later approved by the Catalan Parliament on 27 October). Before which, the national government's response was to activate proceedings laid out in the Spanish Constitution's article 155 for state intervention in an Autonomous Community to force Catalonia to fulfil its obligations. Some of the measures authorised by the Senate on 27 October were: the removal of Carles Puigdemont as Catalonian president, the dissolution of the Catalan Parliament and the calling of autonomous elections on 21 December 2017. This situation has still not been resolved.

4. Conclusion

Involving regional governments in constitutional reform has the aim of guaranteeing the autonomy that has been granted to them constitutionally. It prevents reform from being carried out unilaterally by central governments and, at the same time, allows the structure of competences to be modified as necessary.

At the comparative level, two routes of intervention are envisaged: a) *direct*, the initiation of reform through a proposal that originates at the territorial assembly, or through a reform being approved by the assemblies or electoral bodies of the sub-state entities; or b) *indirect*, through the house of territorial representation. In our view, only direct participation is a sufficient guarantee of federalisation, because in reality the lower chambers are unable to function without being affected by partisan interests.

In Spain, the only way the Autonomous Communities can participate in constitutional reform is if their legislative assemblies present a constitutional reform procedure; this is especially true given that despite what is stated in article 69.1 of the Constitution, the Senate cannot be considered a genuine house of territorial representation. The Autonomous Communities have hardly ever gone down this direct route. Throughout the almost forty years the Constitution has been in vigour, there has been just one attempt to initiate reform in this way, through a popular legislative initiative in the Basque Country

that was not processed by its parliament. A proposal by the Asturian Parliament is currently pending processing in the Congress of Deputies.

However, that does not mean that the Autonomous Communities have not had the opportunity to participate, along with the State, in defining their autonomous scope. Spain's unique constituent process has meant that the distribution of the spheres of power for each of the government levels has been deferred to a later point in time and made using extra-constitutional rules. These have, nonetheless, had to respect the procedures and the limits of competence laid out in the Constitution. Because of that, the Autonomous Communities' route for defining the State's territorial structure has not been constitutional reform; but instead approving and reforming its Statutes of Autonomy through the *dispositive principle*. This principle grants to them a decisive capacity in the *federalising process* through the faculties of impetus and codecision.

Once the highest level of competence in article 149.1 had been reached, reforms by the so-called new-wave Statutes tried to jump the constitutionally established hurdles, creating a constitutional mutation in order to limit the intervention of the State in the sphere of competences, through the use of cross-sectional titles (149.1.1 and 149.1.13) as well as the scope of basic State rule. The mechanism they should have used is constitutional reform. In addition, attempts have been made in the Basque Country and Catalonia to break down the constitutional regime unilaterally, outside the procedures laid out in the Constitution.

Anyway, it must be recognised that the Autonomous Communities' involvement in constitutional reform is not sufficiently guaranteed. As we have seen, their role in reform consists of merely submitting a proposal that will later be processed by the *Cortes Generales*, and in which they will have no involvement. For this reason, we believe it's imperative that this power of initiative be supplemented by other additional channels for the Autonomous Communities' participation.

According to what we have stated in this paper, we think it is essential to involve the Autonomous Communities at least in the parliamentary procedure in constitutional reform[11]. For that purpose, a *consultations phase* could be established in the parliamentary proceedings so as to facilitate a greater degree of agreement in the inclusion of the territorial interests in the *Cortes Generales*. It could be carried out by means of intervention of the Autonomous Communities Presidents or several Autonomous Deputies appointed by territorial Parliaments in the Senate's General Committee on Autonomous Communities

(*Comisión General de Comunidades Autónomas*). It is also possible to send the Autonomous Executive or their parliaments' opinions regarding their position about constitutional reform. Another possibility is to summon an intergovernmental forum such as the Presidents' Conference.

The greatest federalisation guarantee would be achieved if, once passed the constitutional reform by the *Cortes Generales*, it was passed by at least the majority of the Autonomous Parliaments or, another possibility would be a referendum approved by a double majority: the majority of the Spanish people and the majority of the Autonomous Communities' voters. But the establishment of a second *ratification phase* requires a constitutional reform in any case.

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I See Castellà Andreu (2018a: 11), about the main contributions to the Spanish Constitutional amendment.

II Please see, among many others, Bryce (1988: 72 and 119-120), Mouskheli, (1931: 301); Carré de Malberg, (1948: 121-122), Livingston (1956: 281 et seq.), Durand (1965: 204-205), Wheare (1997: 120-127), Friedrich (1968a: 637), Burdeau, (1967: 492) and, to highlight some within our field, García Pelayo (1993: 240), Ruipérez (1994: 79-80) and Blanco Valdés (2012: 27).

III Manuel García Pelayo (1993: 220-231) recognises the different viewpoints.

IV For more detail on the evolution of federalism, from the initial unifying federalism (e.g. the United States, Switzerland, Canada, Germany and Australia) to the most recent cases of decentralised federalism (Austria, India, Belgium, Spain, Russia or South Africa) please see Biglino Campos (2010) and Mastromarino (2010: 79-156).

VIn our field, it is emphasised that the federation cannot be boiled down to one concept that describes the full range of organisational structures that are defined as federations, since each case is a response to specific historical or social circumstances. It is, as such, only possible to establish a series of *common* or *minimum* structural criteria González Encinar (1985: 86-89), Aja (1999: 25-33), Ruipérez (2012: 7-32) or Blanco Valdés (2012: 21).

VI On this matter, see Wheare (1997: 81).

VII *Ibidem*. He describes as federations those nations whose systems mimic the characteristics of American federalism (Switzerland, Canada and Australia). The rest he has labelled *quasi-federal* (not even Germany falls within his definition of a federation).

VIII However, Gianfrancesco 2017's study on the need to develop reform in the federal sense to improve the regions' routes for participation in decisions taken by the state (see Gianfrancesco 2017)

IX See Schmitt (1982: 118), La Pergola (2016: 313) and Wheare (1997: 40-41) or more recently, Groppi (2001: 83).

X As demonstrated convincingly by Smend, and his concept of the constitution's integrating role. The quote is taken from Smend (1985: 178).

XI Authors, however, usually resort to Durand's classification, which distinguishes between models featuring a) parliamentary approval and state ratification, b) just parliamentary approval and c) parliamentary approval plus ratification by the states and the electoral body. See Virgala Foruria (2011: 111-112) and Ruipérez (1994: 104-115).

XII The Constitution of the Russian Federation is an interesting case; it states that intervention by *subjects of the Federation* is not merely for relations between the centre and the periphery, but all the organic parts of the Constitution, as we will see.

XIII Article 44.2 of the Austrian Constitution: 'Constitutional laws or constitutional provisions contained in

simple laws *restricting the competence of the provinces in legislation or execution* require furthermore the consent of the Federal Council which must be imparted in the presence of at least half the members and by a majority of two-thirds of the votes cast', consulted on the Austrian Parliament's website http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erv&Dokumentnummer=ERV_1930_1 (1/11/2017), (italics ours).

[XIV] Specifically, in the second paragraph of article 368 of the Indian Constitution – consulted on the Ministry of Justice webpage, http://ltowmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf (1/08/2017) – it states that any amendment to the following articles must be ratified by the legislative assemblies of at least half of the States: articles 54 and 55, on the election of the President of India by the electoral college (which also comprises the states' members of parliament as well as the members of both houses); articles 73 and 162 (in which it is expressed that the executive power of the Union and the states must extend to matters on which they have legislative powers); article 241 (the States' High Courts); Chapter IV of Part V (judicial power); Chapter I of Part XI (legislative powers of the Union and the States); any of the Lists of the Seventh Schedule (where the exclusive and concurrent competences of the Union and the states are detailed); as well as the representation of states in Parliament or any amendments of the article itself.

[XV] Indeed, the South African Constitution states that reforms to the constitution need only be approved by the National Council of Provinces, with the support of at least six of them, if they relate to article 1, which describes the values on which the Republic is based (article 74.1) or Chapter 2, the Bill of Rights (article 74.2); or if the amendment relates to a matter affecting the National Council of Provinces, alters provincial boundaries, powers, functions or institutions or amends a provision that deals specifically with a provincial matter (article 74.3). It should be borne in mind that in this second chamber, which is formed by provincial delegates, each province has one vote (article 65). The Constitution was viewed on the Constitutional Court of South Africa website, http://www.constitutionalcourt.org.za/site/constitution/english-web (1/08/2017).

[XVI] Similarly, Groppi (2002: 120-122).

[XVII] Article V of the US Constitution: 'The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate'. The US Constitution text was consulted at https://www.usconstitution.net/const.pdf (7/2/2018).

[XVIII] Article 138 of the Italian Constitution does not state who can make constitutional reform proposals, so article 121 (which establishes the regions' institutional organisation) along with article 71 (which governs legislative action) need to be referred to in order for the regional councils to submit bills to the chambers. The Constitution was consulted on the Italian Senate of the Republic's website https://www.senato.it/1024 (4/8/2017).

[XIX] Although the Mexican Constitution's short article 135 does not address constitutional reform proposals made by the states' legislative assemblies, this right can be found in article 71, which regulates legislative initiative. On this matter, please see Jorge Carpizo (2011: 543 and 560). The following version of the Constitution was consulted: http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm (5/8/2017).

[XX] Article 134 of the Russian Constitution permits the legislatures of the Federation's subjects (republics, *óblasts*, *krais, autonomous óblasts,* autonomous districts or federal cities) to initiate constitutional reforms. The version on Russia's Constitutional Court website was consulted http://www.ksrf.ru/en/INFO/LEGALBASES/CONSTITUTIONRF/Pages/default.aspx (5/8/2017).

[XXI] However, this confirms that the federative units' great difficulty in launching the constitutional reform procedure is balanced out with the need to ratify them, as is the case in the United States. This, as authors have demonstrated, would give the Brazilian federal system greater legitimacy. Please see Almagro Castro (2015: 225, 263-264). The version on the Senate website was referred to http://www.senado.gov.br/atividade/const/con1988/con1988_18.02.2016/ind.asp (5/8/2017).

[XXII] These are: the principle of proportionate representation in the House of Commons; the number of senators for each province, their election procedure and the powers of the Senate; the Supreme Court of Canada and, lastly, the creation of the provinces and their current limits. The version on the Ministry of

Justice website was consulted http://laws.justice.gc.ca/PDF/CONST_F.pdf (5/8/2017).

[XXIII] We must bear in mind that there is no formal concept for a provincial Constitution in Canada. Rather, there is a material concept (a Constitution that has not been compiled into one fixed document), from which the laws relating to the organisation and operation of a province's governing bodies, as well as the powers, prerogatives and mandate period of its legislative assembly, are formed. These laws can be found, in part, in the federal Constitution itself. Castellà provides an extensive study of this matter; please see Castellà Andreu (2014: 287-298).

[XXIV] On matters requiring State approval, see endnote XIV.

[XXV] The Nigerian Constitution also stipulates two procedures for constitutional reform. The first is general, and requires approval from two-thirds of each House of the National Assembly. The second is more aggravated and refers to changes to section 8 of the Constitution (which regulates the creation of new States and boundary adjustment) and fundamental rights (Chapter IV), and would need a four-fifths majority in each House. However, ratification by the territories in all cases requires approval from two-thirds of the territories (Chapter 1, Part 2, Section 9). The fundamental law text can be consulted here, on the National Assembly website: http://nass.gov.ng/document/download/5820 (7/8/2017)

[XXVI] Please see the Constitution on the Swiss Government website https://www.admin.ch/opc/fr/classified-compilation/19995395/index.html (6/8/2017). The subject of Swiss constitutional reform is dealt with in more depth by Lopez Castillo (2014: 372-375).

[XXVII] The Constitution can be found on the Australian Parliament's websitehttp://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution (7/8/2017).

[XXVIII] The Constitution was consulted on the *Bundestag* website https://www.btg-bestellservice.de/pdf/80201000.pdf (7/08/2017).

[XXIX] We must, however, consider the insights of Aja, who plays down the *Bundesrat*'s partisan orientation. He considers that, in Germany, the Federal Council's opposition stance is not systematic and is only apparent during periods where *Länder* elections indicate a future political change in the federal government, and that harmony is restored after the federal elections. See Aja (2006: 728-729).

[XXX] For more in-depth study on this, see Vidal Prado (2014: 277-278).

[XXXI] The text available on the House of Representatives website was consulted:https://www.lachambre.be/kvvcr/pdf_sections/publications/constitution/GrondwetFR.pdf (8/08/2017).

[XXXII] For more in-depth study on this matter, see Mastromarino (2015: 80-82).

[XXXIII] Please see endnote XV.

[XXXIV] On the different factors having a greater or lesser effect on how representative the second chambers are of the territories, please see Alberti (2004: 296-314).

[XXXV] As we have seen, this is the case in Austria where legislation has created several formulae for intergovernmental collaboration as a driving force for territorial interests when shaping and implementing decisions taken by the Federation. Also in Belgium, through the so-called special laws for institutional reforms (*lois spéciales*) that, in order to be approved, require majority votes from the linguistic groups that are present in each chamber. See Groppi (2002: 125) and, particularly for Belgium, Verdussen (1998: 62, 66-67).

[XXXVI] Similarly, Pérez Royo (2003: 215 and 217 and, more recently, 2015: 28).

[XXXVII] Terminology taken from Tudela Aranda (2016: 209).

[XXXVIII] Similarly, see Tajadura Tejada (2005: 70-72).

[XXXIX] To avoid tensions between the decision made by the electoral body and that of the constitutional judge, the Organic Law 12/2015, of 22 September, reintroduced into the constitutional court's Organic Law a prior appeal of constitutionality for the Autonomy Statues.

[XL] See Expósito (2017), a detailed analysis of this matter.

[XLI] In this sense, the expression coined by Pedro Cruz Villalón (1981: 53 and 59) 'unconstitutionalisation of the state form' has been hugely successful.

[XLII] On this principle, Enric Fossas' consultation must be considered. See Fossas Espadaler 2008: 151-173.

[XLIII] See the reflections of Javier Ruipérez (2012: 83-84), on the need to end the dispositive principle and to close the Constitution's territorial model of the distribution powers between the State and the Autonomous Communities.

[XLIV] Similarly, see García Fernandez (2012: 301 and 313). If to this we add politicians' tendency to unload their responsibilities onto the Constitutional Court, we can understand in even more depth the current level

of political unrest and delegitimisation reached by the institution.
[XLV] See for more information on this Jaúregui (2009: 120-138).
[XLVI] Similarly, see Blanco Valdés (2005: 60).
[XLVII] See STCs 31/2010, Fjs. (fundamentos jurídicos, or Grounds) 16º, 17º, 57, 58, 111, 115 and 135; 137/2010, Fjs. 5º, 8º and 9º and 138/2010, Fjs. 5º and 6º.
[XLVIII] For more information on this, see Virgala Foruria 2005: 403-440.
[XLIX]Among other many Constitutional Court decisions, STC 103/2008, Fj 4º; 42/2014, Fj. 4.c; 31/2015, Fj. 6.B.a); 138/2015, Fj. 3º; 259/2015, Fj. 7º; 90/2017, Fjs. 6-9; 114/2017, Fj. 5º; 120/2017, the only Fj. and 124/2017, Fjs. 7º and AATC 141/2016, Fj. 5º; 170/2106, Fj. 6º; 24/2017, Fj. 8º; 126-2017, Fjs. 5-10 and 127/2017, Fjs. 5-8. An in-depth analysis of constitutional case-law on the Catalan process of secession can be found in Castellà Andreu (2016: 561-592).
[L] This theory is applied to the Catalan and Basque cases by Javier Tajadura Tejada (2009: 363 and 381), Javier Ruipérez (2013, 126-135) and Jordi Jaría i Manzano (2015: 192-197).
[LI] See also Castellá Andreu (2018b: 52).

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Bi-Ethnic Federalism and the Question of Sovereignty: Understanding the Competitive Security Postures in Cyprus

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

When ethnic groups negotiate self-government arrangements, 'ethnic sovereignty' lies boldly at the heart of their security considerations. The constitutional nature of self-determination and the extent of territorial control can determine the degree of ethno-territorial sovereignty attributed to groups. However, in competitive contexts influenced by fear and mistrust, groups interpret these pillar elements in ways that increase their own sense of security. The present study argues that legal and political positions on sovereignty in Cyprus are largely built around the competitive security assumptions held by the Greek and Turkish Cypriot leaderships, and explains how the divergent viewpoints and understandings of sovereignty reflect the underlying security fears and suspicion of parties. The analysis finds that the two ethnic leaderships in Cyprus have sought to accumulate a distinct 'sovereignty capital' in an effort to safeguard their own and overpower each other's perceived security intentions in the event of federal collapse, making thus the attainment of settlement in Cyprus particularly elusive.

Key-words

federalism, territory, sovereignty, security, conflict, Cyprus

1. Introduction

In most ethnic conflicts, the nature and expressions of sovereignty represent part of the conflicting interests and objectives held by groups. The inextricable link that associates sovereignty with power, territory and international status is generally acknowledged since rules defining the nature and extent of sovereignty help in facilitating or even shaping the political, economic, security or ideological objectives pursued by actors (Krasner 1999). Yet, as Richmond puts it, 'the notion of sovereignty is especially flawed in the case of ethnic groups within states in their attempts to gain (and preserve) status and security in the international system' (Richmond 2002: 381).

In the case of Cyprus, subsequent failures to achieve a 'fair, viable and functional' solution signify the increasingly diverging 'visions and expectations' held by the Greek and Turkish Cypriot communities (Koktsidis 2017; Sözen & Özersay 2007). However, interethnic competition in Cyprus is not merely expressed through the obvious security concerns related to effective governance, third-party guarantees and intervention rights, which noticeably create a problematic situation, but it is also manifested through notions of 'constitutional security', linked primarily to the groups' ethnic, political, and territorial standing in a conceivable ethno-federal state.

As realised by Denisson Rusinow in 1981, the question of sovereignty and legitimacy in Cyprus is 'intrinsically important for its underlying political and security dimensions' (Rusinow 1981: 15). Rusinow recognized that 'the nature of sovereignty and legitimacy in a proposed Federal Republic of Cyprus is one among those difficult issues which at first glance seems highly abstract but oddly important' (Ibid). This is a sign that more is involved here than a sterile and unnecessary debate over the concepts of sovereignty and federal statehood (Ibid). Again, according to Rusinow's early remarks, 'it is in the superficially symbolic question of sovereignty and legitimacy that conflict values, emotive interests, and deep-seated mutual distrust and fear are most "real" and hard to reconcile' (Ibid: 13). Two decades later, Oliver Richmond recognized that disputing parties in Cyprus have engaged in inter-communal talks with a view to trump each other's sovereignty claims (Richmond 1999).

The present study suggests that alongside to the prominent military aspects of security, there is another, perhaps equally important facet of political security related to the legitimate source of self-determination and sovereignty. The analysis attempts to review the divergent notions of self-determination and sovereignty as underlying sources of tension through the lens of an adapted security framework according to which 'one party's security, increases the other party's insecurity' (Snyder & Jervis 1999: 15; Posen 1993). The present study scrutinizes how competitive security concerns give birth to different 'readings' of the rules and context of sovereignty and self-determination in Cyprus. The analysis argues that sovereignty-related contrasts are linked to and in service of both sides' distinct security perceptions, impeding thus the attainability of a settlement. The study begins with a theoretical description of the way in which contested notions of sovereignty embolden insecurity and strengthen competition and sheds some light on the unjustly sidelined influence of 'security perceptions' reflected on the legalistic and political attitudes adopted by negotiating parties in Cyprus. Essentially, the analysis attempts to present the competitive security environment as reflected on the distinct interpretations of the origin and nature of state sovereignty shaped over years of conflict, fear, and mistrust. The analysis develops with a view to understanding the antagonistic security perceptions that shape and affect the legal and political standing of groups during the conflict resolution process.

2. A competitive security framework

Similar to interstate relations, ethnic groups appear to be influenced by deep-cutting security considerations that become particularly intense when questions of 'fear and trust' and the perception that there is no 'credibility of commitment' predominate amongst politicians and their ethnic constituencies. Elements of fear, mistrust and systemic uncertainty can decisively influence the formulation of attitudes (Butt 2011: 13; Fearon 1995; Posen 1993).

As security dilemma theorists put it, the indistinguishability of one party's malign (offensive) and benign (defensive) intensions heightens the level of uncertainty (Posen 1993; Rose 2000; Roe 1999). What one party does, claims or demands for increasing or protecting its security status may be sufficient to making another party less secure and

encourage a competitive reaction (Posen 1993). Parties may often feel that 'what seems sufficient to one's defence, will seem, or will often be offensive to its neighbours…and because neighbours wish to remain autonomous and secure, they will react by trying to strengthen their own positions, even if they have no explicit evidence of expansionist (or aggressive) inclinations' (Ibid: 104-106).

Booth and Wheeler (2008) suggest that under conditions of uncertainty 'parties involved in conflict are faced with the difficult choice to decide if they should interpret the intentions or statements of another actor as threatening or aggressive, and thus adopt a stronger security posture in response, or if they should view them as defensive and thus exercise restraint to assuage their neighbour's security fears' (Booth & Wheeler 2008: 30). Ethnic parties involved in competitive political frameworks are faced with a similarly difficult choice of interpreting intentions. Notions of self-help, fear and mistrust, as well as the indistinguishability of offensive over defensive intentions conveyed by groups will usually come into play (Saideman & Zahar 2008; Rose 2000). For example, provisions related to self-government powers can drastically affect the attractiveness of a compromise, presuming that the security of one party is seen to be working at the expense of the other. Most often, rival ethnic parties enter negotiations with the whole load of bitterness, suspicion, and fear built at length during the conflict. In Cyprus, the incurring fear over each other's real intensions has cultivated an evolving trust deficit over vital security matters reflected during negotiations (Koktsidis 2017). More precisely, fear of deception, abuse, or misuse of provisions set by an agreement prompts parties to overpower each other in an attempt to buttress their security defences at the event of a federal break down. Hence, the fear of a specified constitutional status allowing or preventing the projection of a viable claim for 'distinct ethno-territorial sovereignty' constitutes the non-military epicentre of contention.

Group negotiators evaluate the security provisions of a proposed settlement and parallel assess the costs of disloyalty and defection. Ethnic group representatives calculate what the future will look like according to their own set of incentives, fears and constrains. Calculations also focus on gaining and maintaining access to political power, territorial control, and resources, or imposing the constitutional restrictions that would help bridle the opponent. Hence, parties assess the quality of compromise on the supposed security conditions it entails, and then compare these to their current security status. Fear,

insecurity, and distrust will normally continue to cast their shadow over efforts to resolve conflict and cost-benefit calculations will continue to influence decisions to act (Putnam & Wondolleck 2003). This fosters the adoption of competitive strategies during negotiations akin but not similar to an ethnic security dilemma (ibid). Parties interpret behaviour and objectives with mutual fear and suspicion, turning the negotiation process into a firm contest for ensuring that a settlement would not impinge against their defined security interests.

Cooperation to mute these competitions can be difficult because someone else's 'betrayal' may leave one in a weakened position since no side can credibly assure that it would not take undue advantage of its gains (Posen 1993; Butt 2011). According to Posen (1993), this is particularly true with respect to the future of the state and its territorial coherence. For example, both parties in Cyprus are well aware that every sector-related arrangement, which is to come about following a comprehensive agreement, will tie parties to a certain security framework. First, both parties have been pressing to create or alter those military-related security parameters (third party military forces, guarantees, and intervention rights) that will permit them to instil a sense of communal security. Secondly, judging from their stated positions, both parties are deliberately seeking to promote secure living conditions that will address their distinct 'security needs' in a post-agreement environment through mechanisms contained in a robust and secure constitutional framework. In every single attempt to resolve outstanding issues, security lies boldly at the centre of concern for both ethnic communities.

3. Ethnic sovereignty: self-determination and territory

Perceptual disharmony on the nature and extent of sovereign control in ethno-federal state-building processes increases fear and suspicion. Ethno-federal power-sharing arrangements between equally suspicious parties are often marked by political and legal contestations on sovereignty relevant to the distinct security interests held by parties (O'Leary & McEvoy, 2003). Defining the nature and extent of the right to self-determination and setting the legal rules under which territorial entities can predictably function are of pivotal importance in the construction of ethno-federal states.

When it comes to defining multitier sovereignty arrangements of federal states in international law, a common concern arises: do federal sub-state units possess a separate legal international personality? Moreover, how are they to be regarded as distinct subjects in international law following a federal collapse? A well-defined notion of sovereignty is a *sine qua non* for a credible and workable ethno-federal arrangement, one in which all rights and constrains of federated entities are stipulated clearly in the federal constitution. In principle, according to Crawford (2006), when states choose to federate, they lose their standing as entities of international law. Instead, the federal union as a single entity becomes the sovereign state for purposes of international law. Nevertheless, in legal international practice, federal components can possess a *limited measure* of distinct international personality, which although separate, it must be in accordance to the federal state's constitutional provisions. For example, federated territorial entities with the power to contract internationally binding legal obligations such as in the form of treaty making powers, may qualify as legal persons in international law.

However, even such constitutionally endowed treaty-making powers remain controversial in international law. On the one hand, some authors support that when federated entities enter into treaties, they are only acting on behalf of, or as agents of the federal state, since only the latter possesses international legal personality (Fitzmaurice 1958: 84; Brownlie 1998: 59-60). According to Wouters and De Smet (2001: 4), 'the defenders of this so-called 'organ theory' underpin their view mainly with two arguments: first, they refer to Articles 1 and 6 of the 1969 Vienna Convention on the Law of Treaties, which deal with the treaty-making power of states under international law' (Wouters & De Smet 2001: 4). Secondly, 'they revert to the 'sovereignty principle' according to which only states as such can be subjects of international law, since they alone have full and indivisible sovereignty, and unlike international organizations, any attribution of treaty-making powers to federated entities would be an unacceptable impairment of sovereignty' (ibid: 4).[I] Besides, a constituent state in federation is a territorial and constitutional entity forming part of a sovreign state (Shaw 2017: 178).

On the other hand, although states continue to be seen as primary subjects of international law, this status is nowadays no longer exclusively reserved to them (Steinberger 1967: 5). Wouters and De Smet argue that the idea that non-sovereign entities can also be endowed with international legal personality follows the International Court of

Justice statement that 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, opening the door for the recognition of other actors, including federated entities of states as international legal persons' (Wouters & De Smeet 2001: 5-6). In addition, empirical practice of attributing treaty-making competencies to federate or autonomous territorial entities supports this position (e.g. Catalonia, Basque Country, Scotland, Wales, Bavaria, and Flanders).

Be it as it may, the principal criterion for component states to be considered as subjects of international law rests on the provision of competencies in accordance with the federal constitution and their capacity to exercise them (Kelsen 2003: 170). In practice, federal entities can be considered as subjects of international law only after they have concluded at least one international treaty and thus they have become bearers of rights and responsibilities under international law. As accurately put by Stern, this means that 'by attributing treaty making powers to federated entities, federal constitutional or other legal documents only give them a potential status of subjects to international law' (Kovziridze 2008: 254).

In this way, the attitude of the international community essentializes the rights given by domestic constitutional law to the federated entities, but also determines willingness to acknowledge a federated entity as a legal subject of international law (ibid: 127-129). In any case, the recognition of the international legal personality of federated entities remains limited within the range of its competencies. Thus, it is confined within international law as a corollary to the relevant constitutionally defined prerogatives provided by the federal constitution to the entity and hence federated entities can only be *partially* and *conditionally* separate subjects of international law and always within their respective sectors of competence in relation to the federal state (Hernadez 2013: 509). However, it is feared that the status and capacity of federated or autonomous entities to regulate treaty-making powers and pursue independent foreign transactions provided by domestic law, may open the door for entities to acquire a degree of 'stand-alone' international legal personality. This testifies to an expression of statehood, such in which at the event of federal dissolution would lead to the assumption or acknowledgement of broader external sovereignty rights (Alen & Peeters 1998: 122-124). Hence, this limited exercise of external sovereignty brings us back to the core of the security question: following the dissolution of an ethno-federal

state, what are the possible constitutional and political grounds of an ethnic federated entity to claim independent statehood?

Again, this cannot be firmly answered since ethno-federal states and autonomous entities vary in constitutional form. Federated entities can have different capacities (*effectivité*) and different prospects of recognition. Sceptics on the suitability and viability of ethno-federal arrangements argue that the depth and breadth of ethno-territorial self-government arrangements determine the capacity and prospects of recognition and the willingness to secede. In fact, research on the viability of ethnic-federations, which is the type of ethno-territorial self-government arrangement that interests us most, has produced contradictory results. Roeder's empirical evidence suggests that ethno-federalism approximates both a necessary and sufficient condition for a variety of pathologies, but mainly secession (Roeder 2009). According to Roeder, ethno-federal arrangements 'privilege some identities and interests and distribute coercive and defensive capabilities in a way that increases the likelihood of escalation of conflict into acute nation-state crises' (Ibid: 203-219). Cornell suggests that the perceived susceptibility of ethno-federations to secessions may be due to an 'intuitively plausible causal logic focused on how ethno-federalism increases both the capacity and willingness of ethnic groups to secede from the common state' (Cornell, 2002: 245-276). Secession would appear to result from an interactive combination of enhanced capacity and desire that is uniquely present in ethno-federations, and absent in other system types (Ibid: 252).

A real-world picture shows that *full ethno-federations* do indeed have a low success rate (33 percent) relative to other territorial self-government arrangements (Anderson 2014: 197-202). Beyond full ethno-federations, the success rate including more centralised federal arrangements, quasi-federations or other variant autonomy arrangements other than full ethno-federations increases significantly (79 percent) (ibid). The data suggests that some self-government systems have failed, but many more have not, whereas those that have failed are almost exclusively full ethno-federations in contrast to other autonomy arrangements or ethnic federacies (non-territorial).

In any case, the extent to which statehood claims may flourish depends largely on the constitutional, organizational and legitimacy capital ethnic groups have succeeded to garner in conjunction with international norms and subjective practices on state recognition. For example, European ethno-federalists such as Guy Héraud advocated in favour of federated

entities having a specific "ethnic value" while possessing their own sovereign powers and capacities to arrange their living space independently, ideally with regard to their given socio-cultural and regional characteristics (Héraud 1963; Visone 2018: 30). Negotiations involving ethnic groups in search of ethno-federal solutions often degenerate into arguments over status in order to attain or confirm a degree of sovereignty and legitimacy that will allow some space for manoeuvre in the future (Richmond 1999: 396). The present analysis agrees that these levels of capacity and willingness depend upon two fundamental constitutional pillars that provide ethno-federated entities with the armoury to exert sovereignty and assert statehood. These are namely: a constitutionally recognized right to a *distinct self-determination*, as separate peoples, and the extent and type of *territorial self-government*. These two elements combine to determine the nature and degree of 'ethnic sovereignty' (ibid). In fact, we would argue that the constitutional depth and extent of ethnic sovereignty reflected on the exercise of absolute and exclusive political authority over a designated territorial domain determines the efficacy of independent statehood.

Ethno-federal constitutions must primarily define the composition and self-determination rights of the national constituency (*the people*) and then specify the legal nature of the territorial-administrative status (*national homeland*) of the federated entities. First, ethnic self-rule ranging from autonomy to independent statehood stems from a recognized, although often limited, *right to self-determination*. Yet this remains an essentially contested political concept (Kurtulus 2005). In elementary international law, sovereignty means that a government possesses full control over affairs within a geographical area. Yet it is crucial to identify and agree on the constituency or political body that legitimizes sovereignty claims in the first place and define by what right does a government exercise authority, and who possesses rightful ultimate authority over territory in an ethnically layered federal state. The right of self-determination i.e. the politically expressed will of a political collective to self-govern itself constitutes the basis for asserting a degree of ethnic sovereignty. Although according to the UN Charter, 'people have the right to freely choose their sovereignty and political status with no interference', the principle does not state the delimitation between peoples nor what constitutes the 'people', other than its goal of decolonisation (Del Mar 2013: 97; Richmond 1999: 389).

In general, this vague demand for self-determination leading to sovereignty must be both defined and recognized as the rightful exercise of independent communal will by an

internationally valid legal framework or at least through recognition by other legal entities on a bilateral basis. Hence, the prospect of ethnic federated entities becoming independent depends on the preceding constitutional provisions determining the right of self-determination and the political competence in exerting it.

The extent and type of territorial self-governance within federations is primarily a matter of assigned constitutional status to the federated entities coalescing with a distinct right to self-determination, and with the power to establish or give organized existence (enact) to the federal state. The status of constituent units in ethnic federations is either determined by the right to allow sovereign and non-retractable constitutional powers to the units, while retaining the original legitimate source of power or residue (top-down federalization) at the centre, or by attributing the original source of legitimate power and authority to order, establish and enact a new state of affairs to the ethno-territorial units or communities themselves (bottom-up federalization). In fact, the constitutional process by which a federation comes to life (*holding together vs coming together*), could possibly assist asserting international recognition. The distinction lies on the legal understanding of the federal units, which either emphasizes the sovereign primacy of the community that decides to concede voluntarily some powers to the federal centre or highlights the predominance of the federal centre's sovereign power that provides component units, and their people, with constitutionally protected rights to exercise sovereign powers.

Nonetheless, the relationship between ethnic groups and territory is fraught by conflicting claims, between normative, historical and strategic interpretations of territorial possession and rights of autonomy implying a degree of ethnic sovereignty (Richmond 1999: 386). For ethnic groups in particular, territory is not just a geographical focal point. Territory is conceptualized more appropriately as a place, bearing significance in relation to the group's history, collective memories, and 'character' but also because territory can become a valuable tangible asset or commodity as it provides resources and a potential power base (Wolff 2010: 18). Asserting, enforcing and solidifying territorial claims makes concrete power relations and therefore territoriality i.e. control of space, becomes inextricably tied to questions of power, authority and security, since traditionally only through control over its own territory can an ethnic group achieve full political freedom and cultural expression (Murphy 1996). As pointed out by Murphy, the problem of territorial heterogeneity or rival ethno-territorial claims, and the purity and ownership of

land, is usually resolved by a group's capacity to manage or enforce violently or non-violently some degree of control over territory (ibid). For that reason, ethnic groups often strive to control territory and make it an indivisible condition for claiming sovereignty and recognition (Toft 2001). This fusion of territory with ethnic politics created by a merging of an ethnic group's identity and spatial control is usually described as 'ethno-territoriality' (Moore 2015: 4).

Although norms of international law do not root themselves in territorial claims, but rather whether the aggrieved group constitutes a distinct people, territory continues to play an important part in asserting sovereignty claims (Storey 2001: 14; Sack 1986: 26). Yet it is typically acknowledged that regardless the constitutional arrangement, 'there is no contradiction between the right of self-determination and a state's territorial integrity, with the latter taking precedence while the prevalence of legality over unilateral secession is generally accepted (Constantinides & Christakis 2017).[II] Although the sanctity of the state's overarching territorial and political sovereignty as a single and indivisible legal entity is formally confirmed, it is nevertheless challenged by the 'sovereignty capital' accumulated by parties in legal specifications regulating self-determination and territorial control in ethno-federal states. Uncertainty, and the politics rather than criteria of state recognition can create tension between the state's overarching sovereignty, the internal right to self-determination and territorial self-rule, prompting parties to compete over provisions that reinforce the one over the other. Insecurity and the loss of sovereign status stem from the belief that the constitutional basis which recognizes a distinct ethnic right to self-determination attributed to the will of separate peoples, facilitates a partial re-entry of ethno-territorial entities into the international system, and paves the way for recognition. To put it more succinctly, although secession is rarely viewed with sympathy (Gudeleviciute 2005; Buchanan 1997; Pavković & Radan 2007), a constitutionally recognized right to internal ethnic sovereignty signifies a right to self-determination manifested through the expressed consent and 'will of a separately defined people' that make a state truly legitimate.[III]

Clearly, at least within the framework of ethnic federations, there is an inextricable link between the source of self-determination (*constituency*) and territorial self-rule as a reflection of it. For example, in the case of former Yugoslavia, nationalities were typically equipped with a constitutionally protected right to distinct self-determination corresponding with the

national territories (Republics) that comprised the federation despite the geographical dispersal of ethnic groups, which created tensions between territoriality and self-determination.[IV] It was widely accepted that based on constitutional provisions Yugoslav republics had the right to independent statehood by asserting their distinct national self-determination rights within their demarcated borders. A more glaring prevalence of self-determination over state sovereignty and territorial integrity appeared in the case of Kosovo. Germany recognized Kosovo's 2008 declaration of independence even though it has not constituted a federated unit within Yugoslavia by referring to the right of 'self determination by the people of Kosovo' to rule over a designated territorial compound (ICJ Hears further Kosovo arguments: *Balkan Insight*. 2 December 2009). By contrast, Russia has officially positioned herself against the case of Kosovo's declaration of independence claiming that 'agreement is the only means of legal partition or secession and therefore recognition of external sovereignty...while stressing the obligation to respect the territorial integrity of Serbia which precedes over the principle of self-determination' (Ibid).[V]

Although we recognize the major constitutional and structural differences between Kosovo and the proposed federal settlement for Cyprus, it is still important, as Eike Berg has rightly observed, to consider that the Kosovo case has created 'a self-determination precedent for states-within-states for which we still do not exactly know its ensuing effects' (Berg 2009: 219). Despite the differences, the case of Kosovo has empowered the unresolved antithesis between the 'will of the people' as the basic element in determining the final sovereign status of an entity, against the principle of the territorial integrity of states. It has also demonstrated that the congruity between a recognized right to self-determination and territoriality builds a robust case for supporting sovereignty claims despite the protection of a state's territorial integrity in international law and despite prohibitions of secession by domestic law. Taking into account the determinative role of political decisions on the right of independent statehood, competing ethnic groups strive to promote constitutional arrangements that do or do not provide a sufficient legal basis for claiming independent statehood in the event of state collapse.

4. Sovereignty: a reflection of security postures

This part of the study examines the articulation of security concerns reflected on the legal and political positions held by the conflicting parties in Cyprus. A disharmony between the two communities in Cyprus revolves around the question of which entity generates the primal legal rights of statehood: will the new federal state of Cyprus be made up of two sovereign constituent units (and their people), or a structurally reformed state will grant the two Cypriot communities with constitutionally protected territorial self-government powers? Turkish Cypriots suggest that the two ethno-territorial entities will be coming together voluntarily to concede powers to a newly founded federal structure whereas Greek Cypriots suggest that the legal state i.e. the RoC, will be structurally transformed into a federal state by incorporating and granting two constituent units with constitutionally guaranteed self-government powers (Sözen & Özersay 2006: 127).

The active phase of the interethnic conflict in Cyprus emerged during the 50s, at a time when Cyprus still existed under British colonial rule and in a political context within which Greek and Turkish communities had developed their own nationalist and competitive understandings of their right to freedom and self-determination. Greek Cypriots (approx. 80% of the population) pressed the British administration to allow them self-determination through *Enosis* - that was union with Greece, - whereas Turkish Cypriots (approx. 18% of the population) reacted to this prospect and called for *Taksim* (partition). In 1960, both communities were forced to compromise by accepting the creation of a partnership state. In 1963, however, the partnership state paralyzed. Turkish Cypriot officials withdrew from state institutions and a series of violent events forced the two communities to grow further apart. In 1974, following a coup orchestrated by the Greek military junta, Turkish military forces invaded the island and occupied its northern part. The invasion resulted in the forceful expulsion of thousands of Greek and Turkish Cypriots from their original settlements and brought about the end of the island's ethnically mixed configuration through establishing a clear-cut territorial division between the two communities.

The territory over which Turkish Cypriots have declared their own independent state (1983) has ever since remained internationally unrecognized. Nevertheless, its demarcated areas correspond, almost identically, with the territorial dominion of a prospective Turkish Cypriot constituent state as designated in subsequent peace plans. Discussions to resolve the interethnic dispute and terminate the island's division have since then evolved under

the auspices of the UN with a view of creating a federal consociational state. Despite progress over the years, a final settlement has not been achieved.

Characterised by a severe lack of common national belonging (beyond ethnic denominations), Greek and Turkish Cypriot perceptions have been shaped by experiences of the past, current insecurities, and strategic considerations, which altogether continue to shape preferences and subjective interpretations. Essentially, Turkish Cypriots fear that they would be cast out of the common institutions as they were in 1963, and the Greek Cypriots fear that the Turkish Cypriot gameplan is to negotiate a deal that consolidates the territory gained in 1974 and then secede, this time with international recognition. During negotiations, the primary concern is to ensure that both communities will safeguard their prospective security and rights in a new federal consociation, so that 'no community would be able to dominate over the other or take the other one hostage' (Ergün & Rochtus 2008: 114). Parties seek to obtain mutual reassurances that will advance or maintain their current security status. Thus, the two parties are faced with a security challenge related to the question of sovereignty.

Most Greek Cypriots understand that by sharing sovereignty with the Turkish Cypriot community, they will be asked to abolish their exclusive legal right to statehood as a means to reunifying the island. (Burgess 2007: 135). However, shocked by the violent expulsion of more than 160.000 Greek Cypriots from their original settlements, where in most areas they constituted the majority population, most Greek Cypriots have difficulties in accepting the conversion or elevation of the secessionist entity into a constituent federal state. Furthermore, affected by the Turkish Cypriot minority's withdrawal (known among Greek Cypriots as the 'Turkish mutiny') from the 1960 consociational state, and traumatised by the ensuing forceful territorial division, Greek Cypriots fear that a bottom-up process will equip ethnic constituencies with an original, distinct and self-emanating right to self-determination-cum-sovereignty. In the occurrence of federal collapse, Greek Cypriots are weary that official partition may be legally sanctioned and that both entities will have an equal chance to assert their independent statehood. According to the Greek Cypriot viewpoint, legitimacy to independent statehood must be held at the federal centre, and legitimacy must be denied for whichever of the two constituent entities withdraws or secedes from the federal consociational structures. Considering the *ad libitum* political aspects that determine the recognition of states, Greek Cypriots strive to preserve legal

international recognition at the federal centre in order to avoid falling into a legal international limbo, alongside with their Turkish Cypriot counterparts.

Turkish Cypriots are faced with a somewhat different question. Equally embittered by the Greek Cypriot's majoritarian logic (known among Turkish Cypriots as 'the Greek usurpation of state') during the 60s, they seek to ensure that legitimacy and sovereignty emanate from the ethnic groups contained within the constituent states. Hence, they need to ensure that a new federal constitution equips constituent states with self-emanating sovereign rights, which are to be 'rightfully' reclaimed in the event of dissolution, paving the way for claiming independent statehood. For the Turkish Cypriot leadership, a bi-zonal and bi-communal arrangement in Cyprus derives from 'an equally shared dual source of legitimacy' according to which entities retain sovereign control within their boundaries and voluntarily concede parts of it to the federal centre. According to this line of argumentation, executive and legislative powers are not conferred to the units by the centre but by the two people that willingly agree to share sovereignty by conferring competencies to the federal centre. Thus, in case either side wishes to withdraw from the federal structure it may rely on its self-emanating right to sovereignty with a capacity to retrieve powers that were voluntarily bestowed to the federal centre.

For the Turkish Cypriots, the original right and source of power-delegation does not emanate from within the federal centre (a top-down federalization of the RoC) but stems from the afresh willingness of two separate people and their constituent units to grant legitimacy to a new political centre (bottom-up federalization). This deprives the federal centre of its self-emanating sovereign powers and conditions its existence on the shared legitimacy and commitment granted by the two co-sovereign units. At the event of federal collapse, where one or both constituent units decide to call off the legitimacy granted to the federal centre, the two politically equal constituent states and their respective people must enter into a trail to de jure sovereignty by reclaiming the legislative and executive powers that were previously conferred to the federal centre. It is partially for this reason that Turkish Cypriots vested their support for the UN Comprehensive Settlement Plan for Cyprus in 2004 upon their insistence to ensure prior to any agreement that residual sovereignty stays with the Turkish Cypriot constituent state should a new federal state breaks down as in the 1960s (ICG 2014: 6).

According to Burgess's accurate ascertainment, 'what is at stake here is more than

divergent perceptions: it is a matter of context and point of departure' (Burgess 2007: 135). As noted, ethnic groups develop their own perceptions of what sovereignty entails and how this is connected to their security (Richmond 1999: 394). The crux of the constitutional-security problem relates to the conditions under which Greek Cypriots, following a federal collapse due to Turkish Cypriot withdrawal, will return to the safety of the internationally recognized RoC, without legally sanctioning partition. On the opposite, Turkish Cypriots do not want to return to pariah status and hope a better deal on their status would ensure future universal recognition (Tocci & Kovziridze 2004; Schlicher 2008).

The formal Turkish and Turkish Cypriot view on the matter starts from the premise that before a new partnership becomes a viable project, Greek Cypriots, as a first step, should acknowledge constitutionally and in practice the sovereign equality of the Turkish Cypriot people and territorial unit (Ministry of Foreign Affairs of the Republic of Turkey).[VI] In letter addressed to the *Washington Times* newspaper on 30 September 2014, Özdil Nami, the Turkish Cypriot Minister of Foreign Affairs and later Chief Negotiator for the Turkish Cypriot side, stated that:

> The Turkish Cypriot and Greek Cypriot peoples, in their respective capacities as two political equals, entered into a partnership in 1960. The legitimacy of the 1960 republic lay in the joint presence and effective participation of both peoples in all organs of the state. (In 2004) the separate simultaneous referenda confirmed the fact that there exist two equal peoples on the island, neither of which represents the other…(hence) any solution in Cyprus requires the consent of both sides and both peoples (Özdil Nami, 'Turkish Republic of Northern Cyprus, Minister of Foreign Affairs', *The Washington Times*, 30 September, 2014)[VII]

The Turkish viewpoint on state building is lucidly explained by adviser to the Turkish Cypriot side at the inter-communal talks back in 1999, as follows:

> ...taking into consideration the basic reality of the island by accepting the existence of equally sovereign peoples with different ethnic and religious identities entails a political structure that will ensure a new relationship between the two entities based on mutual respect and political equality on a specified range of functions between the two constituent peoples. It should be noted that *both sides would bring their separate sovereign rights to self-determination and statehood* on their respective territories to the process of settlement. *As sovereign peoples, they have the inherent right to determine their destiny separately* and to arrive

> together at an agreement for the future of Cyprus as a whole. As such, their relationship is not one of majority and minority (Soysal 1999: 6).

For the Greek Cypriots, however, 'reference to two constituent states does not form the starting point of the process, but the conclusion of the process' (Ministry of Foreign Affairs of the Republic of Cyprus).[VIII] Their point of departure starts with the federalization of the legal state, and as such, the organization of the federal system cannot be based on the pre-existence of two distinct states because such do not exist (Burgess 2007: 136). The Greek Cypriot chief negotiator in the Cyprus peace talks, Andreas Mavrogiannis, explained the leap towards a federal state as an

> 'Evolution and continuation' of the existing legal state, i.e. the RoC, albeit under a largely modified constitutional form. The new structure will be introduced in order to reintegrate the lost territories into a reunified bi-zonal federal republic formed by two politically equal ethnic groups, a term mainly understood as a constitutionally protected right to self-govern and co-govern, and not as a separate provision for self-determination and independent statehood (Mavrogiannis 2016).

Therefore, the new state of affairs will be a continuation of the previous legally existing state of affairs, which is the RoC (Anastasiades 2016; Morelli 2017: 22).[IX] By contrast, the Turkish Cypriot position holds that the new consensual partnership will involve an entirely new state structure, which will be created from scratch by two equal and sovereign constituent peoples and their territorial entities, replacing the RoC in all its respects (*successor state thesis*) (Berg 2007: 213).[X] Turkish and Turkish Cypriot diplomats have repeatedly emphasized that the new federal state will be product of mutual consent, granted by the two politically equal co-founding people, thus implying the recognition of sovereignty by the exercise of constitutionally guaranteed self-government and territorial control. Successive Turkish Cypriot leaders (Mehmet Ali Talat, Derviş Eroğlu and Mustafa Akinci) have consistently referred to a new partnership state founded by the constituent peoples and their respective territorial entities and rejected any idea of regarding the new federal structure as a continuation or transformation of the RoC (Morelli 2017: 22).[XI] In a formal announcement, Turkish Cypriot leader Mustafa Akinci has made it clear that he does not accept the idea of transforming or evolving the RoC into a federal state and stressed that the new federal structure will be made up by the two constituent states that

will replace the 'defunct' RoC in all participating institutions.[XII] The new entity must not simply be a reformed RoC, but a new partnership. Besides, this is a firm and long-standing position expressed formally by the former adviser to the Turkish Cypriot side, Mümtaz Soysal:

> A federation can only be based on the creation of a mutually agreed level of shared authority that results from the transfer of some parts of the sovereignty already possessed by the component political entities...and to bear no trace of supremacy of one entity over the other(s)... it is absolutely necessary that the partial transfer of power be made by entities that are equally sovereign, equally capable of *transmitting part of their sovereignty to the federal authority* (Soysal 1999: 5).

As rightly pointed out, 'obviously the issues involved go well beyond semantics' (Sözen & Özersay 2006: 127). Security precautions and the fear of failure motivate the positions of both communities. There is little doubt that Cypriots in both communities profoundly suspect and therefore fear that the other side, through its attitude to the definition of sovereignty is betraying an undiminished but now secret adherence to an ultimate goal that has been now publicly renounced for temporary tactical reasons. These suspected goals are still partition for the Turkish Cypriots and for the Greek Cypriots, a 'Greek island' with a Turkish minority (Rusinow 1981: 15). These long-standing mutual bias, real or perceived, is driven by security considerations concerning sovereignty and state survival in a context of conflicting interests, uncertainty, suspicion, and fear emanating from their mutually distrustful attitudes. In their efforts to buttress their future prospects, both parties' claims are, perhaps even inadvertently, targeted against each party's core insecurities and are therefore viewed mainly as aggressive rather than defensive. Security concerns reflect the crude conflict over core state-building aspects, such as self-determination and territorial self-governance, which if not explicitly addressed, could serve as playground for dodgy political practices.

5. Bridging the gap

In a previous effort to bridge the two positions and appease the security fears of secession and/or domination, the former UN General Secretary's special envoy and

mediator for Cyprus, Alvaro De Soto, 'crafted a 'constructively ambiguous' compromise to address competing views of where sovereignty for the new post-solution state would emanate, coined as "virgin birth"' (Ker Lindsay 2011: 82). The so-called 'virgin birth' model, although it presupposed the inauguration of an entirely new federal state, it would nevertheless represent a continuation of two pre-existing states, which may be interpreted as a partnership between two presumptively existing states i.e. the de jure rump state of Cyprus, and the de facto breakaway Turkish Cypriot entity (ibid). Although this implied that the rump state is not 'defunct', it nonetheless accepted that the Turkish Cypriot breakaway state is separate and equal in the creation of the new federal state, providing communities with an implied right to leave the partnership and claim independent statehood (Ibid). The Annan Plan, however, was rejected by the vast majority of Greek Cypriots.

In a renewed effort to resolve the Cyprus Question, on 11 February 2014 President Nicos Anastasiades and Turkish Cypriot leader Derviş Eroğlu publicly presented a Joint Declaration. In some measure, the 2014 Declaration reaffirmed the same rough framework of those shared principles contained in the Annan Plan regarded by the two communities as a common *acquis*.[XIII] The Declaration stated that 'a federal settlement in Cyprus *emanates equally from Greek Cypriots and Turkish Cypriots*' (Art. 3), and that a 'federal constitution shall prescribe that the united Cyprus federation shall be composed of "*two constituent states of equal status"*, and then referred to the "*residual powers exercised by the constituent states*"' (Art. 3).

This rough description encapsulates the following fundamental state-building principles: i) two politically equal (ethnic) communities desire to form an independent federal state without reference to two pre-existing founding-states, ii) the federation shall be composed by two self-governing ethno-territorial constituent states that will also share power at the centre, iii) part of their sovereignty, mainly external, will be transferred by the ethnic communities to the central government while part of it (*residue*) shall remain at the constituent state level, iv) the federal government shall represent the single legal international personality of the state for international membership and representation, v) and finally, union in whole or in part with any other country or any form of partition or secession or any other unilateral change to the state of affairs will be prohibited.

At first glance, the Declaration recognizes that two constituent states represent the two politically equal communities agreeing to a federation. Yet the Declaration refers to the

existence of 'two equal communities' with no explicit mention whether these communities make one, two or separate people, and without specifying a distinct right to ethnic self-determination-cum-sovereignty (internal) outside the proposed federal framework. Moreover, it does not explain whether these distinct communities form a common national constituency with an indivisible self-determination or if they will concurrently exercise their separate rights to self-determination only as a prerequisite to forming a federation.[XIV] However, it appears that the ethno-federal units shall contain guaranteed majorities of the two distinct and politically equally communities comprising two distinct constituencies on the constituent state level and one perceivably common constituency on the federal. Naturally, one may suggest that prohibitions on partition or union with other states limit self-determination within the federal framework. Hence, we may suppose that the right to exercise concurrent self-determinations is meant only as part of a federal solution and it is strictly framed, delimitated and predefined to associate only and exclusively with the creation of a federal state. Yet according to the Turkish Cypriot side, the Declaration points towards the existence of two separate rights of self-determination, which according to the international law is granted to the 'communities' as a legitimate political body.

Furthermore, the term 'residual powers' could either imply bottom-up federalization, signifying a primary and self-accrued sovereign authority to the constituent units or top-down federalization, as the residue of powers granted to constituent states by the federal centre. At the same time, the Declaration restates the single international legal personality and the single sovereignty of the state 'defined as the sovereignty which is enjoyed by all member States of the United Nations under the UN Charter and which *emanates equally from Greek Cypriots and Turkish Cypriots*'. Since sovereignty emanates equally from the two communities - represented by their territorial entities - with a capacity to concede and retain authorities, then, this perceivably functions to the benefit of the Turkish Cypriots in a way that appeases fears of subordination and minoritization. Finally, according to the Declaration there will be a 'single united Cyprus citizenship', regulated by federal law. However, all citizens of the united Cyprus shall also be citizens of either the Greek-Cypriot constituent state or the Turkish-Cypriot constituent state. The Declaration clarifies that this status shall be internal and shall complement, and not substitute in any way, the united Cyprus citizenship (Art. 3).

On the surface, the spirit of the Joint Declaration coincides with Monroe Leigh's opinion that sovereignty would *devolve* fully and legitimately to any new federal Cypriot government as a product of a *concurrent exercise of self-determination by the two communities*' (Leigh 1990). However, Leigh argued that powers would be devolved to the new Cypriot government (from the federated states) as a means of accomplishing a concurrent (i.e. an agreed and simultaneous) exercise of sovereignty (ibid). Yet Leigh presumed the pre-existence of two self-acting states and not just their peoples exercising a concurrent right of self-determination, something that is not contained in the Declaration. The Declaration recognizes the existence of two politically equal communities that shall be contained in two constituent states of equal status following an agreement but does not refer to the pre-existence of separate states coming together to form a federation. Therefore, the Declaration is consistent with Security Council Resolution 541 (1983) because it signifies unwillingness to recognize the exercise of a distinct right to self-determination outside the constitutionally agreed federal framework and eliminates the possibility of equalizing the two territorial entities on the island outside an agreed framework.[XV]

Serving as a rough guide to a future constitution, the Declaration designated the horizontal separation of powers, and highlighted the exclusiveness between federal and constituent state competencies. Both sides recognize that the 'single international identity', 'single sovereignty', and 'single citizenship' principles are *sine qua non* principles for a federation. Tufan Erhürman pinpoints that 'it is a well-known fact that in a federation, a constituent state does not have a different international identity from that of the federation in terms of international law' (Erhürman 2010: 36-37).

Nonetheless, Greek Cypriots would prefer the federal government to hold most utmost powers (*strong federation*) in order to cement the singleness of the federal state's sovereignty and deter Turkish Cypriot withdrawal. Turkish Cypriots would like to develop a model in which the constituent states have increased sovereign powers to prevent federal control and supremacy (Ibid: 38). Neither of the two sides trusts the motivation of preferring the one to the other. Greek Cypriots fear an intended Turkish Cypriot withdrawal and the development of a secessionist movement, whereas Turkish Cypriots fear an intended Greek Cypriot manipulation and domination through the federal structures (ibid: 36-37).

In sum, the Joint Declaration equips constituent states with constitutionally protected internal (and probably limited external) sovereign powers, which if rightly understood, emanate from the two communities and are neither devolved from nor retrievable by a federal centre. Internal sovereignty, alongside with an explicit recognition of two communities (as separate and single constituencies) recognizes a distinct and joint right to self-determination but it does not provide ethnic communities with the legal means to controvert or replace the overall political sovereignty and territorial integrity of the single federal state. Therefore, constituent state competencies may legally function as part of an overall consociational agreement and constituent polities may therefore act as partial legal subjects in international law as they will be allowed to exercise their designated powers only within the federal framework.

Given the lack of trust and expected commitment, the discussed ethno-federal framework presupposes the making of a difficult trade-off. The security of the Turkish Cypriots depends upon the type and degree of sovereign powers endowed to them by an agreement conditional to the acceptance of an indivisible sovereign state. Similarly, the security of the Greek Cypriots relates to the indivisible sovereignty of the federal state, which is conditional to acceping sovereign powers transferred to the constituent units. As regards to the Turkish Cypriots, the transfer of substantial competencies to the federal units is crucial for enhancing their own sense of security, while for the Greek Cypriots, a more explicit reference to the indivisibility of the federal state's single legal sovereignty and overarching territorial integrity may be useful for unblocking their hesitations. Although parties have seemingly agreed on the future constitutional shape of the federal state, they remain hesitant in accepting institutional provisions that would help settle the question of distributing sovereign powers. Compromise is difficult because the two parties define the centre of constitutional gravity differently (centripetal vs centrifugal). As a result, they opt for institutional provisions in line with their clashing understandings of security.

6. Conclusion

Defining and agreeing on the constitutional nature of sovereignty, as reflected upon the right to self-determination and territorial self-governance points to a major security concern because it may determine the position of the two communities and their respective territorial entities in the international system in case a federal arrangement breaks down. Motivated by fear and mistrust, and contemplating the political and security ramifications of state building processes and the possibility of federal collapse, Greek and Turkish Cypriots have been arguing about what would become the 'founding narrative' of a conceivable ethno-federal state in Cyprus. Naturally, the derivation and nature of an ethnic federation is hard to evade the question of sovereignty (Rusinow 1981). Turkish Cypriots have argued for the existence of two separate and equal communities currently residing in two territorial entities that will come together without sacrificing their distinct self-determination and territoriality while retaining much of their political sovereignty at the constituent state-level. Greek Cypriots argue that the de jure state of Cyprus (RoC) will be structurally devolved into a bizonal and bicomunal federation by granting constitutionally protected rights (internal sovereignty) to the two separate and equal communities by exercising their concurrent self-determinations within an agreed framework and with the emanating source of sovereignty retained at the federal centre. In fact, the new federal state will be neither a mere continuation of the Republic of Cyprus nor the creation of a new state by two pre-existing states. It is better conceivable that the federal structure will accommodate *ex-nihilo* the two ethnic communities in a new but indivisible sovereign state. The 2014 Joint Declaration provides a framework addressing some concerns, without fully or explicitly satisfying or annulling the positions held by the two communities.

In a perceivably competitive security context, however, the relative degrees of sovereignty and legitimacy will depend on whether trust and commitment will make it feasible for a trade-off to happen, setting thus the constitutional standards and security prospects for the two communities. The deliberate misinterpretation of state-building provisions and the deep-seated fear and mistrust reduce willingness to compromise when risks and corresponding costs of muddling on with a dubious solution are deemed higher than those of maintaining the status quo. How sovereignty is shared and practiced is much of a concern in Cyprus where parties seem to fear that a federal solution could simply keep

the competing views and inbuilt suspicion of one another under wraps, forcing an instinctive preference for the evil one knows against the uncertainty inherent in the kind of compromise that could be presently achieved.

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I A sovereign state is, in international law, a nonphysical juridical entity that is represented by one centralized government that has sovereignty over a geographic area.

II *UN General Assembly declaration on the Rights of Persons Belonging to National, or ethnic, religious and Linguistic Minorities* (art. 1, 2 and 8) states "that States shall adopt appropriate legislative and other measures…to protect the existence and the national, ethnic, cultural, religious and linguistic identity of minorities within their respective territories, but (continues in art. 8) nothing may be construed as permitting any activity contrary to the purposes and principles of the UN, including sovereignty, equality, territorial integrity and political independence of states". See: Thomas D. Musgrave (2000). *Self-Determination and National Minorities*. Oxford University Press. p. 239.

III Notably, although in international law there is no rule that prohibits the declaration of independence, or secession integral parts of sovereign states, under international law, do not have a right to unilateral secession while the principle of protection of territorial integrity is a cornerstone of international legal order.

IV With the exception of Kosovo and Vojvodina which existed under an Autonomy Status within the Yugoslav Federal Republic of Serbia

V Counter-arguments suggest that Yugoslavia, to which UNSC 1244 referred to, had already been dissolved and succeeded by Serbia & Montenegro.

VI Ministry of Foreign Affairs of the Republic of Turkey, "Where do the Parties Stand in Terms of a Negotiated Settlement?" Available at: http://www.mfa.gov.tr/where-do-the-parties-stand-in-terms-of-a-negotiated-settlement_.en.mfa.

VII Referring to the 2004 referendum for the reunification of Cyprus, Özdil Nami added that "the Turkish Cypriot people have clearly done their part and utilized their right to self-determination toward the establishment of a new partnership in the island https://www.washingtontimes.com/news/2014/sep/30/turkish-republic-northern-cyprus-ministry-foreign-/.

VIII Ministry of Foreign Affairs of the Republic of Cyprus, Address by the Minister of Foreign Affairs Markos Kyprianou at the dinner organized by the Cypriot Brotherhood, at the House of Commons in 2008. Available at:http://www.mfa.gov.cy/mfa/mfa2016.nsf/8effcb841e067c1cc2257f950023ec01/af1f23d1e4607c9dc2257fa0004581b8?OpenDocument.

IX In any case, a new federal structure, according to Greek Cypriots, will necessarily accommodate the transferring of authority to the existing Turkish Cypriot administrative apparatus and retain some of its 'accrued' obligations and liabilities under the federal (central) government.

X For more see: Vienna Convention on Succession of States in respect of Treaties (1978)

XI Eroglu stated in December 2012 that "a possible settlement of the Cyprus issue could be viable only if it is based on the existing realities on the island," which acknowledges that "there were two different people having two separate languages, religions, nationality and origin and two different states." Turkish Cypriot leader M. A. Talat stated before the parliamentary assembly of the Council of Europe on 1 October 2008 that he wants to establish a new partnership state in Cyprus, which will be composed of two constituent states of equal status.
Avaliable at:
http://www.mfa.gov.cy/mfa/mfa2016.nsf/8effcb841e067c1cc2257f950023ec01/af1f23d1e4607c9dc2257fa0004581b8?OpenDocument.

XII *Turkish Cypriot and Turkish Media Review*.5 February 2016. "Presidential spokesman of TRNC government Baris Burcu denied the claim that Akinci supports a solution which will be achieved through the evolution of the Cyprus Republic ".
Avaliable at:
http://www.moi.gov.cy/moi/pio/pio.nsf/All/FF5FF9BDCECC26DEC2257F500049D6F6?OpenDocument&highlight=burcu%20baris.

XIII Joint Declaration Statement by President Nicos Anastasiades and Turkish Cypriot leader Dervis Eroglu, 11 February 2014. For more see: UN Cyprus Talks. Available at: http://www.uncyprustalks.org/11-february-

2014-joint-declaration-on-cyprus/.

[XIV] The type of electoral system set in place for electing federal government can be indicative of whether the two ethnic groups are treated as a single (unified) or conjoined (fragmented) national body.

[XV] SCR/541/1983 condemned the unilateral declaratory exercise of the self-determination right by the Turkish Cypriot community and the establishment of a politically sovereign Turkish Republic of Northern Cyprus in Northern Cyprus because of force outside an agreed framework.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Article 7 TEU: From a Dormant Provision to an Active Enforcement Tool?

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

For a long time considered, improperly, a sort of 'nuclear' option, Article 7 TEU is the key EU Treaty provision in the field of values enforcement. In the context of the Union's current rule of law crisis, such a provision deserves the greatest attention, especially after the European Commission's proposal in December 2017 to trigger the procedure against Poland, under Article 7(1) TEU. This article contributes to understandings of the provision by reviewing its main features and contextualising its deployment in the general Polish rule of law crisis, with the aim of evaluating whether it can now be considered as an operational instrument for values enforcement. Although the Commission's (late) decision to activate the Article 7(1) TEU procedure should be welcomed as a major effort in restoring the rule of law within the European Union, the (perceived and real) limits of Article 7 TEU and the inertia of the EU institutions cast a shadow over the procedure's effective implementation.

Key-words

Article 7 TEU, European Union, rule of law, Poland, enforcement of values

1. Introduction

The European Commission's 20 December 2017 proposal to trigger the procedure envisaged by Article 7(1) TEU against Poland may have come as a surprise for those who were not following the case closely. Nevertheless, such an event was the culmination of two years of dialogue between the Commission and Poland, through which the EU tried to act in response to the recent and rapid ongoing erosion of the rule of law in that country. The degradation of Poland's liberal structure is one of the greatest signs of the Union's rule of law crisis, that is, an ongoing process in some Member States of widespread and increasing denial of the founding values of the European Union, amongst which is the rule of law.

The rule of law is a concept at the very heart of the European legal order, enshrined in Article 2 TEU, the 'homogeneity clause', which encapsulates the axiological foundation of the European Union, enlisting those values that are 'common to the Member States' and on which the EU is founded. Despite its ambiguity, the core of this principle encompasses six key elements reiterated by the Venice Commission, namely: *legality*, *legal certainty*, *prohibition of arbitrariness*, *access to justice*, *respect for human rights*; *non-discrimination* and *equality before the law*.[I] This work is therefore based on the idea that the rule of law can be viewed as a constitutional principle of the EU and a cornerstone among the other EU founding values. Accordingly, a substantive notion of the rule of law will be embraced throughout this work, denoting a system where not only laws are applied and enforced thoroughly, but also democracy and the enjoyment of fundamental rights are guaranteed.

As the outcomes of talks with the Polish government were disappointing, to say the least, the Commission then decided to initiate, for the very first time, the preventive mechanism foreseen by Article 7 TEU. Such a provision is specifically envisaged by the Treaties to prevent or sanction the most serious breaches of the EU founding values, now solemnly entrenched in Article 2 TEU. The Commission's action is a unique case in the Union's history, as Article 7 TEU has been widely acknowledged, by both politicians and scholars, as a sort of nuclear and practically unfeasible option; a definition which relates

mostly, albeit not exclusively, to its political nature and the expected consequences of its use.

Against this background, this work will assess whether the 'nuclear bias' against Article 7 TEU has finally been removed, making it an operational instrument for values enforcement. In doing so, this article firstly revisits the most important features of the mechanisms envisaged by Article 7 TEU (1), with the aim of explaining why for a long time it has been (improperly) considered a sort of 'nuclear' provision (2). Then, the focus will shift towards the Commission's proposal to initiate the procedure envisaged by Article 7(1) TEU. The issue will be firstly contextualised by briefly recalling the most recent (worrisome) developments in Poland as well as the measures taken by the European Commission to address these (3). Finally, the Commission's decision to trigger the Article 7(1) procedure will be analysed, in order to evaluate the suitability of the measure and whether this development may be considered as a major change in the attitude towards the procedures under Article 7 TUE (4). In conclusion, some considerations on the recent Commission's initiative will be made. The point this work would like to make is that unfortunately, due to the (perceived and real) limits of Article 7 TEU and the inertia of the EU institutions, the rule of law is still hardly enforceable in the European Union.[II]

2. What is Article 7 TEU about? Origin and content of the provision

Although it is a broad and ambiguous legal concept, the rule of law has been widely acknowledged as one of the major principles on which European constitutional systems should be founded.[III] It is not only one of the backbones of the European Union but also of all the constitutional systems of the Member States, now fully part of the European values entrenched in Article 2 TEU:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Although the respect for EU founding values in general, and the rule of law in particular, is vital for the survival of the European supranational legal order, at the time the European Economic Community (EEC) was founded no mechanisms to address and sanction violations of EU values were included in the Rome Treaty. On the one hand, in light of the fact that the Community's primary role was related with market integration, issues such as the respect for democracy, human rights and rule of law were not considered of paramount relevance. On the other hand, the role of the European Court of Human Rights as regards monitoring compliance with such values led to a sort of implicit division of roles with the European Union (De Búrca 2004: 684).

The situation only evolved with the Amsterdam Treaty of 1997, where a first mechanism to sanction breaches of EU values was included. The main driver for the establishment of this sanctioning system was the perspective of the big Eastern enlargement, as existing Member States were concerned about the incapacity of new candidate countries to reach their thresholds as regards legal approaches, human rights and the rule of law (Sadurski 2010: 6). Indeed, the first of the 'Copenhagen criteria' which, developed in 1993, laid down the essential conditions to be fulfilled to become a member state of the EU, refers to 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities':[IV] an expression very much in line with what is now stated in Article 2 TEU.[V]

The precursor to the sanctioning procedure under Article 7 foresaw a mechanism to determine 'the existence of a serious and persistent breach by a Member State' of the European founding values, as well as to apply sanctions.[VI] Indeed, after such a determination, made through a unanimity vote of the European Council, the Council could decide by qualified majority to suspend certain rights of the Member State concerned.

As regards the preventive mechanism of Article 7, it was added only some years later, with the amendments introduced by the Treaty of Nice in 2001. The catalyst for such a development was the *Haider affair* in Austria which followed the great electoral support received in the 1999 Parliament election by the far-right populist Freedom Party (FPÖ) led by the governor of the federal Land of Carinthia Jörg Haider. After months of negotiations, the FPÖ took part in the coalition government led by Wolfgang Schüssel, the leader of the centre-right People's Party (ÖVP). Although Haider himself decided not to

participate, the event was the source of much concern across Europe, as Haider and other FPÖ members were well-known for their xenophobic and racist positions.

In the following months, the other Member States tried to organise a concerted response, supported by the Portuguese Council presidency (Black and Connolly 2000). On 31 January 2000, the Governments of 14 Member States issued a statement in which they declared that they were not willing to accept 'any bilateral official at political level with an Austrian Government integrating the FPÖ'.[VII] Moreover, they denied support to any Austrian candidates seeking positions in international organisations and they also decided that 'Austrian Ambassadors in EU capitals will only be received at a technical level'.

While the EU Treaties offered a specific sanctioning provision for addressing the issue, Article 7, Member States decided not to use such a mechanism, the employment of which was urged only by the European Parliament (hereafter EP).[VIII] As such, they decided to rely on diplomatic and bilateral sanctions, which, although concerted and agreed among all Member States, quickly showed their limitations. Indeed, contacts between the Austrian government and other Member States were maintained in the context of European institutions (Sadurski 2010: 14).[IX] Moreover, after the report on the commitment of the Austrian government to respect the common European values commissioned from a group of experts, the 'wise men',[X] the French Presidency decided to lift the sanctions, which had also the unexpected and negative consequence of fuelling Eurosceptic and populist movements in Austria.

Even though Article 7 was not used in order to deal with the Haider Affair, this event represented a strong impetus for expanding the possibility of a Union's action in the field of values' safeguarding. In the report's conclusions, the authors recommended the introduction of a preventing and monitoring mechanism in Article 7, specifically aimed at dealing such situations within the EU framework, right from their outset (Ahtisaari, Frowein and Oreja 2001: par. 117-118). This recommendation was then followed during the drafting of the Nice Treaty and paved the way for the introduction of a preventing mechanism in Article 7, that is, the possibility of reacting to *the clear risk* of a serious violation of EU values.[XI] Following the proposal by one-third of the Member States, the EP or the Commission, the TEU now foresees a specific warning procedure to be activated by the Council, acting by a majority of fourth-fifth of its Members, after having

obtained the consent of the European Parliament and having heard the Member State concerned.

As a result, Article 7 TEU now consists of a double procedure: a preventive mechanism, described at paragraph 1, and a sanctioning one at paragraphs 2 and 3. Although these may seem to be two steps of a single instrument, these two procedures should instead be understood as two different and autonomous mechanisms. Notably, they are different, because while the former requires the determination that there is a *clear risk* of a serious breach, the latter applies only in cases where a serious and persistent breach of the values is already in place. They are also autonomous, as the use of the preventive mechanism does not imply that the sanction mechanism should also be activated. At the same time, the sanction mechanism does not require the prior activation of the preventive mechanism. As Besselink pointed out, 'barking', the warning procedure, and 'biting', the sanctioning one, are 'two different ways to respond to a rule of law crisis' (Besselink 2017: 133).

With the entry into force of the Lisbon Treaty Article 7 underwent only minor changes. As regards the warning mechanism, with respect to the previous version, the Lisbon Treaty slightly changed the provision, entrusting broader monitoring powers to the Council, together with the possibility of issuing recommendations before the determination of the existence of a clear risk of serious breach of values is made (Besselink 2017: 133-134).

If changes in the situation occur, it is for the Council to determine the modification or the lifting of sanctions, acting by a qualified majority (paragraph 4).

Voting arrangements are laid down in Article 354 TFEU: these provide that, in the European Council and in the Council, representatives of the Member State concerned can neither take part in the vote, nor be counted in the calculation of the majorities. As regards to the voting requirements for the European Parliament, Article 354 requires 'the two-thirds majority of the votes cast, representing the majority of its component Members'.

A key feature of Article 7 TEU is its scope of application, which is broader than the one of infringement procedures. Indeed, such a provision is considered horizontal and general in scope; the actions of the European Union in values enforcement, rather than being limited to areas covered by EU law, also apply to areas where the Member States act autonomously. The rationale of this feature is linked to the safeguard of the trust between

the Member States: as clarified by the Commission, 'here would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction'.[XII]

On the other hand, Article 7 not only has a broad scope of application but also is *lex specialis* since it does not exclude the application of Articles 258, 259 and 260 TFEU as mechanisms for values protection when the breach of the latter falls within the scope of EU law.

3. A long story of non-application of Article 7 TEU

As a matter of fact, the introduction of the Article 7 TEU procedures did not lead to reducing risks of values infringements within the European Union. Despite the magnitude and seriousness of earlier values infringements within the European Union,[XIII] before the recent Polish case the mechanisms under Article 7 TEU had never been activated, either in sanctioning or in the preventing forms. Since its inclusion in EU Treaties, Article 7 TEU has been extensively seen as a sort of 'nuclear option', as the former Commission's President Barroso called it in 2012,[XIV] and its deployment was largely considered as a last-resort and practically unfeasible. The reasons behind this idea have been mostly related to four main drawbacks.

3.1. A provision of political nature

The element which has been considered as the main limitation of Article 7 TEU relates to the high thresholds required for its activation and the political discretion involved in its triggering. Reinforced qualified majority and unanimity are indeed the main voting requirements for the determination of the clear risk and the existence of values breaches, while the decisive role lies in the hands of the Council; in contrast, the role of the Commission is almost exclusively limited to a right to initiative.[XV]

Thresholds are particularly high for the procedures set out in paragraphs 2 and 3, since the former requires unanimity in the European Council, while the latter needs a reinforced qualified majority and also a successful use of the procedure under Article 7(2). As far as Article 7(3) is specifically concerned, another limitation is that this provision is unclear in respect to what kind of sanctions can actually be imposed.[XVI] This vagueness gives wide

discretion to the Council, thus increasing the risk that political rather than legal considerations will drive the decision as regards the substance of sanctions. The situation is slightly different for the preventing mechanism, where the majority required is lower, namely the fourth-fifths of the Council's members, the Member State concerned does not vote and there is no express reference to sanctions.

Furthermore, according to Article 269 TFEU, the jurisdiction of the Court of Justice of the EU (CJEU) is limited to an oversight of the legality of an act adopted by the Council or by the European Council under Article 7 TEU 'solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article'. Such a limitation of jurisdiction is an exception to the Court's general competence stated in Article 19 TEU. This fact clearly highlights the political nature of the Article 7 procedures, as well as the reluctance of the Member States to create an effective and supranational judicial control.

As a conclusion, it has been suggested that the nature of the Article 7 procedures involves such high 'considerations of political opportunity' that hardly any Member States would be willing to deploy this mechanism, preferring instead to be guided by 'a habit of mutual indulgence' (von Bogdandy et al 2012). For a long time, this view has contributed to the depiction of Article 7 as a politically unfeasible provision.

3.2. Article 7 TEU v. the respect for national identity

One of the most frequent justifications for the prevention of the use of Article 7 TEU is the claim for the non-interference of the EU institutions in area not covered by Union law, pursuant to the idea that such a provision is not a viable option whenever its use might imperil the 'national identity' of the Member State concerned. Such a statement is usually supported with a reference to Article 4(2) TEU, the 'national identity' clause.[XVII] This provision codifies the 'defensive concerns' championed by some national Constitutional Courts, supporting the idea of a *relative nature* of the primacy of EU law, rather than the absolute concept embraced by the CJEU (Guastaferro 2012: 4). Indeed, as the Court of Justice has affirmed many times, EU law is characterised by some very peculiar features such as autonomy, primacy and direct effect.[XVIII] These essential characteristics shape a 'structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States'.[XIX] Such a legal structure is itself based on compliance, both

by the Member States and EU Institutions, with the founding values enshrined in Article 2 TEU because the latter is essential for the uniform application of EU law.[xx]

Since Article 4(2) TEU does not specify who is in charge of the definition, or determination, of the idea of national identity, such a determination may have some disruptive implications as regards the uniform application of Union law, which would be severely undermined if Member States were free to use national rules to justify derogation from EU law. The risk is therefore that any Member State may declare that it can freely decide what national identity means in its case and, according to this definition, set limits to the Union's action. It was not by chance that, right from the very beginning, the leader of the Hungarian Government Viktor Orbán has justified the country's deviation from EU values by referring to the safeguard of the Hungarian constitutional identity, as guaranteed in Article 4(2) TEU. The judgment of the Hungarian Constitutional Court of 5 December 2016 (*Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law*) is illustrative in this respect as the Court, loyal to the Fidesz government, developed an *ultra vires* review according to which recognising the primacy of EU law could not encroach on the sovereignty of Hungary and its constitutional identity (Halmai 2017: 152).

In a nutshell, can this respect for national identities prevent the EU institution from launching the Article 7 procedure or, even worse, might this clause legitimate derogation from the values entrenched in Article 2 TEU?

While this seems convincing, such an opinion is difficult to argue if we go through a careful interpretation of Article 4(2) TEU. Although this provision did not define the meaning of 'national identity', the core of the concept refers exclusively to those elements which are so enshrined in national constitutions to be considered 'inherent in their fundamental structures, political and constitutional' to the Member State. By contrast, values established in Article 2 TEU, are not only the very basis of the Union's identity but are also 'common to the Member States', affecting their identity, too (Pinelli 2012: 8). Threatening these values at the national level entails the risk of jeopardising the Union's architecture.

Article 4(2) TEU does not protect 'an entirely pre-political or pre-constitutional understanding of national identity' (von Bogdandy and Schill 2011: 1430). Demanding respect for national identity under Article 4(2) TEU cannot be conceived of as a derogation

from compliance with the Union's fundamental values established in Article 2 TEU and, consequently, cannot be used by a Member State as a pretext to breach those values or to oppose sanctions adopted through Article 7 TEU.

3.3. The risk of a popular backlash

A perceived threat associated with the use of the procedures envisaged by Article 7 TEU relates to the side effects of a centralised enforcement of values. Indeed, one of the ideas behind opposition to the use of Article 7 was the fear of worsening national resistance to the Union (*The Rule of Law in the Union*, 2016: 602). On the one hand, a punitive approach may nurture bad feelings towards the EU among civil society, fuelling the campaigns of populist parties as well as criticisms of the rule of law and human rights (*Enforcing the rule of law in the EU*, 2016: 772). Since sanctions are never popular among those who are subject to them, the Union's actions may easily appear too intrusive into citizens' lives, especially in case of a country where popular dissatisfaction and frustration has allowed far-right or populist parties to win elections.[XXI] In the worst case, sanctions may seriously compromise the democracy-building process, or provoke 'illiberal' Member States to challenge the EU's legitimacy, notably in cases where the values' crisis concerns fields falling within the Member States' own competence. Objections and popular resistance to EU sanctions, perceived as illegitimate and inequitable, may easily raise questions about the respect of the Union's competences and limits, challenging the legitimacy of the EU. The worst result of this trend may be that of undermining the authority of EU law and the EU construction and project. On the other hand, the use of sanctions runs the risk of damaging trust between the EU and its Member States, which is essential for cooperative relations between them and, in the end, also for the survival of the whole integration project (Bieber and Maiani 2014: 1091-1092).

The above reasoning is clearly rational; external interventions should thus be excluded whenever the national situation will realistically be 'self-correcting' (Müller 2011). Yet, this is not the case in serious rule of law violations such as those happening in Poland and Hungary, where the current governments have shown themselves to be fully aware and willing to pursue their constitutional and 'illiberal' revolutions. (Bugaric 2016: 97-98). Moreover, since, as often suggested by the European Commission and also affirmed throughout this work, the rule of law can be read in a substantive way as the cornerstone of

EU values, the intervention of the EU should be welcomed in order to stop the deterioration of the rule of law and uphold European values.

This is not to say that Article 7 TEU should be triggered irresponsibly. Indeed, the provision itself acknowledges, as an explicit limiting factor to sanctions, that the Council shall 'take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons' (Article 7(3)). Hence, the consequences of sanctions on populations should be carefully considered and evaluated, encouraging their wise, selective and reasonable use.

3.4. How to define a 'serious and persistent breach'?

The last sensitive issue associated with Article 7 TEU relates to the criteria for its activation. It is well-known that implementation of Article 7 can only respond to very serious violations of EU values, but what are the actual thresholds for triggering this procedure? How can we establish whether these thresholds are met?

Unfortunately, defining the notion of 'serious and persistent breach' of the values referred to in Article 2 TEU is not an easy task. The European Commission and the European Parliament have tried to identify some indicators and possible criteria to set these thresholds,[XXII] which have been followed by other possible definitions from the academic side. As one might well imagine, individual, sporadic breaches of values are not enough to activate the Article 7 TEU procedures as, though deplorable, small and periodic rule of law infringements are difficulties faced by all democratic societies. Mechanisms which are highly political and of a high impact such as the ones foreseen by Article 7 are not meant to tackle these kinds of violations. Healthy democracies should have the legal mechanisms to address these issues through domestic procedures, and they may also resort to the ones foreseen at the European and international levels.

Since thresholds for activating Article 7 should be much higher than individual breaches of values, it has been widely acknowledged that what is needed to satisfy the seriousness criteria is the *systemic* nature of the violations (von Bogdandy and Ioannidis 2014: 74). This threshold can be met either if domestic institutions are not able to cope with the values, or in the case of a deliberate choice of violating them, as is the case of the reforms in Hungary and Poland. Yet, stressing the *systemic* feature of breaches further helps

to explain why the procedures under Article 7 have largely been acknowledged as an unfeasible, last-resort and nuclear options.

Despite efforts made to clarify the topic, it is still difficult to clearly state which concrete violations correspond to the seriousness criteria of values' breaches. The models presented so far are too general and vague to be recognised as a real threshold, and unable to clearly identify a breach of EU values, or a clear risk of it. Without doubt, the activation of Article 7 procedures requires the existence of a threat of particular seriousness and duration. However, the actual notion of the seriousness criteria is still far from clear.

An approach that gives substance to the thresholds for activating Article 7 procedures is therefore probably needed in order to assess their actual operational potential.

3.5. Article 7 TEU beyond the 'nuclear myth'

As the analysis above has shown, the procedures envisaged by Article 7 TEU suffer from being of an extremely political and discretional nature. This circumstance is intensified by the lack of clear benchmarks aimed at giving substance to the criteria for the activation of the two mechanisms as well as the possible side-effects of the measure in terms of popular support.

For a long time these shortcomings made Article 7 a dormant, and nuclear, provision; however, notwithstanding these limitations the Article should instead be considered as what it actually is: an important legal instrument at the Union's disposal (von Bogdandy 2016). The characterisation of Article 7 as a 'nuclear option' has been definitely overstated. A system that claims to be a 'Community of law', based on the rule of law, should have the foresight to include mechanisms to prevent and sanction non-compliance with its founding values. In this respect, Article 7 has the merit to 'enhance supranationalism' within the EU (Sadurski 2010: 33-34) notably by overcoming the issue of competence by addressing violations committed by any Member State regardless of whether or not they were carried out implementing Union law. It represents a key feature of the values-protection system within the EU, giving it (at least formal) credentials to define itself as 'a Community based on the rule of law',[XXIII] and to stress that violations of the founding values by any Member State concern not only that country but the European Union as a whole.

In this respect, the recent decision of the European Commission to (finally) trigger the procedure in the Polish case should be definitely welcomed.

4. Poland and abuses of the rule of law: an overview

In May 2015 the Law and Justice Party (*Prawo i Sprawiedliwość*, hereafter PiS), led by Jarosław Kaczyński, won the presidency of Poland with the election of President Andrzej Duda. A few months later, in October, PiS also won the Polish parliamentary elections. The path the country started to follow from that moment was anything but promising in terms of rule of law and respect for European values. In particular, the most worrisome measures concerned the reform of the judiciary; these risked undermining judicial independence as well as democratic checks and balances.

Since an overarching analysis of the overall context is beyond the ambition of this work, here it is enough to recall some of the key events that raised concerns over the rule of law situation in Poland and paved the way for the Commission's actions.

In order to respond to the worsening situation of the rule of law in Poland, on 1 June 2016 the European Commission decided to launch for the very first time the new mechanism foreseen by the *EU Framework to strengthen the Rule of Law* (hereafter New Framework) by issuing a rule of law opinion against the country (Pech 2016). Such a soft law instrument, set out by the Commission in 2014 to tackle rule of law backslidings, is conceived of as an additional mechanism and an upstream process to the launch of the procedure under Article 7(1) TEU: a sort of structural dialogue engaged between the Commission and the 'rogue' Member State, in order to prevent the emergence of systemic threat to the rule of law.[XXIV] Indeed, the mechanism envisages a three-stage procedure at the end of which, in a case of an unsatisfactory outcome, the Commission *may* decide to evaluate the launch of the Article 7 TEU mechanisms. Before taking such as step, the Commission performs an *assessment* of the rule of law situation in the country concerned and, if it is of the opinion that a systemic rule of law threat is emerging, it will substantiate its concerns in a 'rule of law opinion' to be sent the Member State in order to start a dialogue. If no such cooperation follows, the Commission will then issue a 'rule of law recommendation' where it will set a deadline for compliance and recommend that the Member State find a solution to the problems identified, while also suggesting some specific instructions and indications.

Since the overall context of the rule of law deterioration in Poland is important in order to understand whether the actions of the Commission were justified and appropriate, the main contested measures took by the Polish government as well as the main critiques and concerns expressed by the Commission should now be retraced.

The Commission started paying attention to the situation of the Judiciary in Poland with regard to the dispute over the appointment of the members of the Constitutional Tribunal (hereafter Tribunal). In November 2015 the *Sejm* (*Sejm Rzeczypospolitej Polskiej*: the lower house of the Polish Parliament) amended the 'Law on the Constitutional Tribunal' in order to make the annulment of previous judicial appointments possible. Consequently, the Parliament dismissed five judges appointed by the previous legislature and nominated five new members. On 9 December the Tribunal issued a judgment in which it invalidated the appointment of three of the judges elected by the new Sejm since it was not entitled to elect them.[XXV]

On 22 December, the Sejm amended the Law on the Constitutional Tribunal and disposed that the adjudication on the general composition of the Tribunal, the full bench, should have required the attendance of at least 13 out of 15 of the Tribunal's judges. Moreover, it introduced new voting requirements for passing a decision in the full bench, a two-thirds majority, while the dates of its hearings had to be established as regards the chronological order of the cases. According to the Commission, the combined effect of these new measures 'undermined the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution',[XXVI] while for the Venice Commission it 'would seriously hamper the effectiveness of the Constitutional Tribunal'.[XXVII]

In some respects, the 'Law on the Constitutional Tribunal' of 22 July 2016 slightly improved the situation. The attendance quorum was lowered to 11 judges, while a simple majority of votes replaced the two-thirds stipulation. The chronological order rule of case hearings (sequence rule) was tempered by allowing the President of the Tribunal to disregard it in some very specific cases and 'if this is justified by the necessity to safeguard the rights or freedoms of citizens, national security or the constitutional order'.[XXVIII] Yet, other measures introduced by the Law raised further concerns as they risked preventing the effective work of the Tribunal. As noticed by the Venice Commission, the amendments to the sequence rule still did not guarantee sufficient flexibility in the work of the Tribunal, as

they granted the power to apply the limited exception to the President.[XXIX] Moreover, the powers of the Prosecutor General, who from March 2016 also became the Minister of Justice, were dramatically increased. Since his presence is always required in cases before the full bench, including complex ones, his absence is now sufficient to prevent hearings to take place.[XXX] Taking into account the joint effect of these reforms, it was not hard to imagine a risk of politicisation of the Tribunal. Such a concern was also reinforced by the fact that the request of three judges was sufficient to refer a case to the full bench (Article 26(1)(1)(g)).

The Tribunal itself struck down the law-package twice. Firstly, in March 2016 it declared unconstitutional many of the provisions of the law of November 2015 and stated that three out of the fifteen judges composing the full bench were not constitutionally appointed.[XXXI] Then, in August the Tribunal rejected the newly problematic measures introduced by the Law of July 2016 and mentioned above, while restating the unresolved issues of its previous judgment (Koncewicz 2016a). Yet, none of these rulings was made public.

All these concerns were addressed in the Commission's action towards Poland, firstly in its rule of law opinion under the New Framework and then, after a failed period of dialogue, in the first rule of law recommendation. The Commission highlighted that recent Polish laws raised concerns over the effectiveness of judicial review. Indeed, it stressed 'the fact that the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review adversely affects its integrity, stability and proper functioning, which is one of the essential safeguards of the rule of law in Poland' and acknowledged that the reforms adopted by Poland constituted a 'systemic threat to the rule of law'.[XXXII] It then invited the Polish authorities to take measures to urgently address this threat.

The deadline set by the recommendation expired on 27 October 2016. On that day, in its reply, the Polish government opposed all the issues raised by the Commission and no initiative was announced to accommodate its concerns (Kroet 2016). In the meantime, new measures taken by Warsaw raised further concerns in Brussel and drew the attention of other European Institutions.[XXXIII]

These developments were taken into account in the subsequent rule of law recommendation, issued by the Commission on 21 December 2016, where it recalled that

the situation in Poland continued to pose a systemic threat to the rule of law and invited Warsaw to address the issues already raised in the previous recommendation and take action within two months.[XXXIV] Moreover, a new source of concern was the 'Law on the status of judges' which allowed only those judges who took the oath before the President of the Republic to receive cases by the President of the Tribunal. This seemed a precise attempt to target the three judges unlawfully nominated in December 2015, who had already been sworn in by the President of the Republic (Koncewicz 2016b). In addition, the Commission expressed its concerns with respect to the procedure to appoint a new President of the Tribunal, whose term of office ended on 19 December 2016. The two major measures on the basis of which a new President of the Tribunal was elected were the 'Law on organisation and the procedure before the Constitutional Tribunal' and the 'Law on introducing the Law on the status of the judges and on the organisation and procedure before the Tribunal' ('Implementing Law'). The combination of these acts resulted in the General Assembly of the Tribunal being composed by those judges who took the oath before the President of the Republic. It is worth remembering that according to the Polish constitution the candidates to these offices are appointed on the basis of a list proposed by the General Assembly. Therefore, the judges unlawfully elected in December 2015 could participate in the election process, while those elected by the previous Parliament in October 2015 could not.[XXXV] On 21 December Julia Przyłębska was appointed as new President of the Tribunal by the President of the Republic. Since the notice for the convocation of the General Assembly was very short and the possibility to postpone it was denied, only six judges took part in the election. According to the Commission, the procedure that led to her election was 'fundamentally flawed as regards the rule of law'.[XXXVI] Thus, it invited Poland to guarantee a constitutional review of the Tribunal as regards the three new and contested laws.[XXXVII]

Once again, the outcome of the dispute was not successful and the pattern repeated itself: Poland continued to disregard both European values and the Commission's recommended actions, while the latter could do no better than issuing recommendations and engaging in an ineffective dialogical approach (Pech and Scheppele 2017b).[XXXVIII]

It is also worth mentioning that in the meantime the PiS government has also taken other serious and unprecedented measures: limitations to the independence of the media; contentious electoral reform (Sadurski 2018), substantial and sustained opposition to the

EU migrant relocation scheme; a controversial 'memory law' (Gliszczyńska-Grabias and Kozłowski 2018); and the unlawful logging of the Białowieża forest, a UNESCO World Heritage site.[XXXIX]

In July 2017 the Commission issued the third rule of law recommendation where it disapproved of the fact that none of the actions suggested in its previous recommendations had been carried out. Furthermore, it expressed further concerns as regards four new draft laws which 'contain a number of other sensitive provisions from the point of view of the rule of law and the separation of powers':[XL] the Law on the National School of Judiciary; the Law on the Ordinary Courts Organisation; the Law on the National Council for the Judiciary and the Law on the Supreme Court.

The Law on the Ordinary Courts, particularly, drew attention as in the Commission's view it breaches EU law. Therefore, the Commission decided to launch an infringement procedure for dealing with the some of the most problematic issues of this law, namely the different retirement ages of judges on the basis of gender and the discretionary power given to the Minister of Justice as regards the dismissal of judges and the extension of their mandate.[XLI]

The Law on the National Council for the Judiciary and the Law on the Supreme Court were vetoed by Polish President Duda in July 2017. Unfortunately, two months later Duda presented his own draft versions of the two laws, both very disappointing. Among the principal changes they introduced, the first bill envisaged the interruption of the constitutional term of office of all the current members of the National Council for the Judiciary, an institution specifically envisaged for guaranteeing judicial independence, and the election of their substitutes. The mechanism for judicial members' appointment was not much different from the one proposed in the previous bill since the Polish parliament (*Sejm*) was entrusted with such a task, although a three-fifths majority was introduced (Matczak 2017).

With respect to the draft law on the Supreme Court, it envisaged the retirement of high court judges at the age of 65 (the former limit was 70). Since this provision also applied to current sitting judges, it would force the retirement of nearly 40 percent of the court's judges in a short period of time: such a measure not only would undermine the current judges' 'security of tenure' but also endanger 'the independence of the Supreme Court in general'.[XLII]

The reply of the Polish Government of the Commission's recommendation was sent in August 2017. It came as no surprise that Warsaw disagreed with all the concerns expressed in the recommendation[XLIII] and made no mention of any measures to address them.[XLIV] And besides, on 8 December 2017, the Sejm adopted the two problematic laws, which were then approved by the Senate one week later.

5. The triggering of Article 7 TEU against Poland: a (late) step in the right direction?

In light of the difficulties encountered in engaging Poland in a constructive dialogue, on 20 December 2017 the European Commission (finally) decided to submit a reasoned proposal to the Council for a decision on the determination of 'a clear risk of a serious breach by the Republic of Poland of the rule of law referred to in Article 2 TEU'.[XLV] The Commission found that in two years Poland had adopted 13 laws which heavily altered the structure of the judicial system, allowing political power 'to interfere significantly with the composition, the powers, the administration and the functioning' of judicial authorities and bodies.[XLVI] According to the draft Decision, the Council should assess the clear risk of a serious breach by Poland of the rule of law and also recommend that the independence of the Tribunal be restored, its judgments fully implemented and its members lawfully appointed; whilst the four laws challenged in Recommendation 2017/1520 should be 'amended in order to ensure their compliance with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty'.[XLVII]

Additionally, the Commission referred in the infringement proceeding against Poland to the breaching of the principle of equal treatment of men and women before the Court of Justice.[XLVIII] At the same time, it also decided to issue a fourth rule of law recommendation where the key sources of concerns were the two recently approved acts, the Law on the Supreme Court and the Law on the National Council for the Judiciary, which, in the words of the Commission, 'significantly increase the systemic threat to the rule of law as identified in the previous Recommendations'.[XLIX] The Commission, therefore, suggested specific amendments and actions as regards the two most recent and contested laws, as well as reiterating the proposals recommended in its previous

recommendations which so far have not be addressed by Warsaw.[L] A three-month deadline to comply with the recommendation was set.[LI]

The Polish Government actually responded to the Commission's concerns expressed in the fourth rule of law recommendation by the established deadline of the 20 March 2018. It seemed that Warsaw accepted making some minimal changes, but not in the most critical measures targeted by the Commission (Wróbel 2018).[LII] Once again, the Polish government demonstrated to have failed to grasp the essence of the Commission's concerns. Rather than pave the way for a real dialogue between the two parts, the Polish answers risked further delaying the procedure under Article 7(1).

In the light of the inadequate replies of the Polish government, the procedure under Article 7(1) is still ongoing, although it is making very slow progress. On 26 June 2018, the Council (General Affairs configuration) held a first hearing under Article 7(1) and the Member States' Ministers had an exchange with Poland on the major problems identified. At the end of the meeting, the first Commission Vice-President Frans Timmermans restated that 'the systemic threat for the rule of law persisted' and therefore the dialogue shall continue (De La Baume and Herszenhorn 2018b). The next General Affairs Council will assess the Polish responses and also decide on the follow-up steps under the Article 7 procedure.

Considering the severe deterioration of the rule of law situation in Poland over the last two years, one might reasonably wonder what the Commission has waited for before triggering the Article 7(1) procedure. Although the Commission's *Rule of Law Framework* did not oblige it to trigger Article 7 at the end of the third step, Poland's clear rejections of the Commission's demands made the non-activation of such a provision quite difficult to justify.

So why did the Commission wait so long before taking such a decision? Probably, one of the reasons relates to the well-known reluctance of both the Council and the European Council to deal with the issue, as shown by the fact that neither of them actively supported the launch of the New Framework against Poland. Another reason may relate to the fact that both Hungary and Poland (the latter learning the lesson of the former) have been deploying a very clever and disingenuous strategy: on the one hand, they have made violations which, in themselves, may not constitute a sufficiently serious basis to speak of

systematic breach of the rule of law. On the other hand, they have acted through 'tactical retreats' and adopted 'the most minimalistic formal remedies when found in breach of EU law, leaving values-violating practices in place' (Pech and Scheppele 2017a).[LIII]

However, while the situation in Poland has already reached an indefensible level, the failure of the main instruments at the Union's disposal has also created the need for a stronger response.

Indeed, the Commission's decision to trigger Article 7(1) represents the last resort solution in the never-ending dispute against Poland. Such a development had become inevitable in order to both send a clear signal that the rule of law 'is a must' in the EU and restore the credibility of European Institutions.

It is worth reiterating that Article 7(1) should not be understood as a mere determination but as 'a sanction by itself' (von Bogdandy 2016). If the Council ultimately makes the determination of 'a clear risk of serious breach' of the rule of law, the Polish government will see its reputation seriously damaged, while it will be hugely difficult for it to ignore such a formal outcome. Moreover, it has been suggested that the initiation of Article 7(1) may act as a catalyst for other developments, such as a more serious evaluation by the Commission of the opportunity of suspending EU funds against Poland or a strong standpoint of the Court of Justice (Kochenov, Pech and Scheppele 2017). Such an interpretation, coupled with the extremely high political thresholds required by the procedure under Article 7(2), as we have discussed, may partially explain why the Commission has decided to trigger the Article 7(1) procedure rather than the one envisaged by the following paragraph; in a situation such as the Polish one the disregard of the rule of law can no longer be regarded as a mere 'threat'.

While it remains extremely difficult to say how the political scenario will evolve, the Commission's decision to (finally) propose the triggering of Article 7(1) TEU is an important step, being the very first time in the history of the EU. Employing Article 7(1) TEU would be beneficial, firstly, as it would emphasise the role of the rule of law within the Union, reinforcing and reiterating its structure as 'a Community based on the rule of law'. Secondly, it would contribute to the re-establishment of EU credibility when it comes to its founding values, a remarkable step in a period when the Union's authority is regularly challenged, both internally and externally.

Nevertheless, by the time the Commission took the initiative, the response had become not only unavoidable but also quite inadequate. Indeed, it should have acted much earlier, as the deterioration of the principle of judicial independence in Poland was foreseeable at least from autumn 2016. It should have done so to prevent both the backsliding of the rule of law in Poland and to show its teeth after the failed outcomes of its first recommendations adopted under the New Framework. Despite some vagueness of the criteria for triggering Article 7 TEU, there is little doubt that the liberticidal process ongoing in Poland since late 2015 amounts to a serious violation of the rule of law as set out in Article 2 TEU. The reluctance of both the EU institutions and the Member States to activate the preventive mechanism in due time can hardly be justified on legal grounds and has a very strong political component.

Furthermore, the Commission still has made little effort to address the situation in Hungary,[LIV] a country which started to undertake illiberal measures long before Poland and which nowadays may be described as a 'mafia state' (Magyar 2017). Yet, there is also something paradoxical in not having previously challenged the Hungarian authoritarian measures adopted from 2010. By losing the battle against Hungary, the EU also lost much of its credibility, as well as the first and crucial fight against authoritarian backslidings.

In this respect, the European Parliament seems much more willing to take a stronger stance against rule of law violations. Indeed, the EP not only supported the Commission's Article 7(1) proposal against Poland at the earliest stage,[LV] but is also considering the possibility of triggering the same procedure against Hungary. At present, the *Committee on Civil Liberties, Justice and Home Affairs* (LIBE) has approved a draft proposal asking the Council to trigger the Article 7(1) procedure against Hungary.[LVI] Yet, the EP's limited powers as far as Article 7 TEU is concerned very much restrict its scope for action.

Besides the EP, another major EU institution has started to take a strong stand on the matter: the Court of Justice. The renewed judicial activism of the Court in the *Białowieża Forest* case,[LVII] in the *Associação Sindical dos Juízes Portugueses* judgment,[LVIII] and, more recently, in the *LM* judgment,[LIX] is illustrative in this respect.[LX] For what concerns the enforcement of the rule of law in the EU, the CJEU is increasingly demonstrating its willingness to play a role in the picture, despite the limits that Article 7 TEU poses to its competence.

Given that the Member States seem reluctant to show their teeth against rule of law violations, the procedure under Article 7(1) TEU risks being slowed down further; perhaps

further analysis should explore the role of these two institutions in the enforcement of European values.

6. Conclusions

In light of the analysis and the considerations made above, it is now possible to draw some conclusions as regards the EU's approach towards Poland's rule of law problems and whether the latter case contributed to the transformation of Article 7 TEU in becoming an active instrument for values enforcement.

Although the Commission's New Framework was conceived in complementarity with both the Article 7 TEU procedures and the traditional infringement proceedings, this new mechanism contributed to the further characterisation of Article 7 as a last-resort, nuclear, option. As already recalled, such a connotation does not reflect the nature and the spirit of the procedures envisaged by the provision. There is nothing nuclear in using a mechanism foreseen by the EU Treaties for tackling a specific worrisome situation of value-violation, or the risk thereof. Procedures provided by EU law are indeed there to be applied. It should also be noted that while the voting requirements of Article 7 are particularly high, at least as regards the sanctioning mechanism the thresholds can be reached in an easier way. If deployed at the right time and wisely, the Article 7(1) procedure can help to signal the risk of a serious breach of EU values before it materialises. Rather than being nuclear, it has instead a preventive function (Bonelli 2017).

Alas, the EU institutions have failed to take advantage of this instrument. By delaying the application of Article 7(1) TEU for an unreasonable period of time (in order either to give preference to more dialogical instruments or to address minor issues through infringement procedures), EU institutions have simply postponed the moment when that provision will possibly be invoked (Kochenov and Pech 2015: 529). Indeed, as the Polish case is sadly showing, once authoritarian power has been consolidated, the use of the 'barking procedure' becomes much less reasonable and feasible.

This is not to say that Article 7 should be used in a careless and uncritical way. As already acknowledged, the use of this instrument, and especially of the sanctioning mechanism, runs the risk of increasing popular resistance and democratic backlashes against the EU. However, rather than acting as a deterrent from its use, such

considerations should instead promote a wise and proper application of Article 7 in cases when it is needed to address or prevent a critical situation of value-violation.

In the Work Programme 2018, the Commission proposed a new 'initiative to strengthen the enforcement of the rule of law in the European Union' to be launched before the end of 2018.[LXI] There is little clue as regards the form that such an initiative might take.[LXII] Yet, we can at least say what it should not be: another device to seek avoidance of EU Treaties or a mechanism to further duplicate or, worse, delay current instruments and procedures. The Union may well lose the battle against authoritarian illiberal forces, but at least it has to fight for its values.

Unfortunately, in practice, things seem to be moving in the opposite direction. While in the literature the 'nuclear weapon' myth about Article 7 has largely been dismantled (Kochenov 2017: 8;12), in the realm of politics the Article cannot be considered a suitable instrument. Indeed, both the EU institutions and several Member States still do not appear inclined to use it. The events of the Polish rule of law crisis, and the attempts of the Commission to tackle this, sadly demonstrated it. Therefore, if referring to Article 7 TEU as a 'nuclear option' is undoubtedly a misnomer, its highly political nature and the vague criteria for its activation cast a shadow over its effective implementation.

The Commission's decision to (finally) propose the triggering of Article 7(1) TEU is an important step, being the very first time in the history of the EU and a restatement of its structure as *a Community based on the rule of law*. Nevertheless, such a step should not be underestimated. In all likelihood, the Member States will do their best to avoid a direct vote against Poland (Bodalska 2018). A decision to simultaneously trigger the Article 7(1) procedure against both Poland and Hungary could represent a possible way out from a legal point of view, at least as it could preclude each country from vetoing sanctions against the other in the event of a procedure under Article 7(2).[LXIII] Yet, politically speaking, the Commission has so far shown little intention to go in this direction and it seems that there is also internal disagreement as regards the feasibility of going ahead with the Article 7(1) procedure against Poland (De La Baume and Herszenhorn 2018a).

What clearly emerges from the overall analysis is the Union's difficulties in dealing with the 'Copenhagen dilemma',[LXIV] that is, the gap between the commitment of candidate

countries to respect the rule of law at the time of accession to the EU and the Union's actual capacity to enforce these criteria. The EU has to act in this respect. If it fails to do so and to address the current rule of law crisis in an appropriate way, there will be serious consequences for the Union as a whole. Indeed, the rule of law crisis is not just one among the many crises the Union is facing, as the rule of law is a key prerequisite for both the application of EU law throughout the Union and the maintenance of mutual trust among Member States and European citizens (Closa 2016: 15-16). Moreover, the credibility of the Union also depends on its capacity to uphold its shared values and, in particular, the rule of law. In a nutshell, if its founding values are no longer respected and upheld, the very existence of the EU integration project in its entirety risks being severely jeopardised.

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I Venice Commission, *Report on the rule of law*, 25-26 March 2011, p.10. Such a definition has also been embraced by the European Commission on a number of occasions. See for instance: European Commission, *Annexes to the Communication to the European Parliament and the Council, A new EU framework to strengthen the rule of law*, Strasbourg, 11 March 2014.

II As the issue of the enforcement of EU values in general, and the rule of law in particular, is constantly evolving, in preparing this paper the effort was made to closely monitor – and give account of – the most recent events and developments ongoing in Poland and at the EU level, as well as the comments and the suggestion advanced by the scholars. In this respect, this work discusses the latest developments unfolded until the end of August 2018.

III *Supra*, note 1.

IV See: EUR-Lex, *Glossary of Summary*, under the term 'Accession criteria (Copenhagen criteria)', https://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhague.html, last access 30 June 2018.

V Nowadays it can be said that the rule of law has not only an internal dimension in the EU legal order: respect for the rule of law shall be promoted outside the European borders by the Union and the Member States (Articles 3(5) and 21 TEU) and –importantly – its respect and commitment to its promotion is a formal accession requirement for candidate countries (Article 49 TEU). For a critical analysis of the external dimension of the EU rule of law see Pech, 2015.

VI Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Com
munities and certain related acts, 97/c 340/01, Article F.1.

VII *Statement by the Portuguese Presidency of the EU on behalf of XIV Member States,* 31 January 2000, https://www.cvce.eu/obj/statement_by_the_portuguese_presidency_of_the_eu_on_behalf_of_14_member_states_31_january_2000-en-8a5857af-cf29-4f2d-93c9-8bfdd90e40c1.html.

VIII *European Parliament resolution on the result of the legislative elections in Austria and the proposal to form a coalition government between the ÖVP (Austrian People's Party) and the FPÖ (Austrian Freedom Party)*, Brussels, 3 February 2000, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2000-0045+0+DOC+XML+V0//EN.

IX On this issue see also: Lachmayer (2017).

X The group, formed by the former Finnish president Martti Ahtisaari, the former Spanish foreign minister Marcelino Oreja and the German international lawyer, Jochen Frowein, issued the report on 8 September 2000. The document stated that the Austrian Government was committed to European values and, although the FPÖ program and many statements of its members were not in line with EU values and standards, FPÖ ministers had worked according to the Government's commitment (Ahtisaari, Frowein and Oreja 2001, par. 108-113).

[xi] Treaty of Nice Amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2001/c 80/01), Article 1(1).
[xii] *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based*, COM/2003/0606 final, Brussels, 15 October 2003, p. 5.
[xiii] In recent years, several cases were debated as the possible violation of EU values. The most visible case of rule of law backsliding is Hungary, where since 2010 the Viktor Orbán's government has adopted a significant number of illiberal measures and actions predicated on a very particular idea of preserving the country's sovereignty and constitutional identity. For further analysis on the Hungarian case: Magyar 2016.
[xiv] 'We need a better developed set of instruments– not just the alternative between the "soft power" of political persuasion and the "nuclear option" of article 7 of the Treaty' (Barroso 2012).
[xv] It has been argued in the literature that Article 7 TEU also entrusts the Commission with the monitoring competence to determine the existence of a serious breach by a Member State of the Article 2 TEU values, as well as the risk thereof (Mori 2016: 6).
[xvi] What it is known for sure is that EU membership cannot be suspended, since only Article 50 TEU paves the way for leaving the Union on the basis of a voluntary withdrawal of the concerned Member State (Besselink 2017: 131).
[xvii] 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.
[xviii] CJEU, Case 26-62, *van Gend & Loos*, [1963], ECLI:EU:C:1963:1; CJEU, Case 6-64, *Flaminio Costa v E.N.E.L,* [1964], ECLI:EU:C:1964:66.
[xix] CJEU, Opinion 2/13, [2014], ECLI:EU:C:2014:2454, par.167.
[xx] 'This legal structure is based on the fundamental premise that each Member State shares with all the other Member States and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected'. Ibid, par. 168.
[xxi] It is worth mentioning that, according to the 'wise men' report (*supra,* note 10), the rise of nationalist feelings in Austria was a side effect of the measures taken by fourteen Member States against the Haider government, since they were sometimes 'wrongly understood as sanctions directed against Austrian citizens' (Ahtisaari, Frowein, Oreja, 2001: par. 116)
[xxii] See *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, cit.* and *European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)),* Brussels, 20 April 2004.
[xxiii] As defined by the CJEU in Case 294/83, *Partie Ecologiste "Les Verts" v. Parliament*, [1986] EU:C:1986:166, par. 23.
[xxiv] *Communication from the Commission to the European Parliament and the Council - A new EU Framework to strengthen the Rule of Law* COM/2014/0158 final Brussels, 19 March 2014.
[xxv] *Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland*, par. 6-10.
[xxvi] Ibid par. 28.
[xxvii] Venice Commission, *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, No 833/2015, 11 March 2016, par. 88.
[xxviii] Article 38(4)(5), *The Constitutional Tribunal act of 22 July 2016*. Published by The Venice Commission, Opinion No. 860/2016, Strasbourg, 7 September 2016.
[xxix] Venice Commission, *Opinion on the Act on the Constitutional Tribunal of Poland,* No 860/2016, 14 October 2016, par. 43-48.
[xxx] Ibid par. 37-39.
[xxxi] See for a comment: Starski 2016.
[xxxii] Recommendation 2016/1374, par.72.
[xxxiii] See the *European Parliament resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (2016/2774(RSP))*,

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0344+0+DOC+XML+V0//EN.

[XXXIV] *Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374*, par. 68.

[XXXV] *Recommendation 2017/146*, par. 43-46.

[XXXVI] Ibid par. 58-59.

[XXXVII] Ibid par. 66.

[XXXVIII] For what concerns the political belief behind the Polish reforms, the rhetoric applied by the ruling party has been almost the same: a continuous discredit of the polish post-1989 institutions and laws, perceived as an attempt to restore the communist past. Indeed, according to the discourse of Mr. J. Kaczyński, the PiS leader, the previous communist elite still enjoys great power in the country after having colluded with the liberal politicians (Foy, 2016).

[XXXIX] In November 2017 the Court of Justice issued a remarkable decision where it ordered to Poland to cease all logging operations in the Białowieża forest, except when such activity was essential to ensure the public safety of persons. Surprisingly, it also affirmed its jurisdiction to impose penalty payments in the context of an interim relief ruling under Article 279 TFEU (€100000 per day of non-compliance, starting from the date on notification of the order), an absolute novelty for the Court's jurisprudence. Such an outstanding decision clearly stressed the serious threshold that the Polish rule of law crisis has reached, while restating the fundamental role that EU values play in the European legal order. CJEU, Order in Case C-441/17 R, *European Commission, v. Republic of Poland*, [2017].

[XL] *Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146*, par. 44.

[XLI] According to the Commission, Polish law is contrary to Article 157 TFEU and also breaches the Directive on gender equality in employment (Directive 2006/54). As regards the extension of the powers of the Minister of justice, the Commission stated that such a reform would undermine the independence of the courts, breaching Article 19(1) TFEU read in connection with Article 47 of the EU CFR.
In replying to the letter of formal notice, the Polish authorities denied the existence of any breach of EU law. At present, the Commission has referred the Polish Government to the European Court of Justice as regards the retirement regime introduced by the Law on the Ordinary Courts. European Commission, *Press release: Rule of Law: European Commission acts to defend judicial independence in Poland*, Brussels, 20 December 2017.

[XLII] Venice Commission, *Opinion on the draft act amending the act on the National Council of the Judiciary, on the draft act amending the act on the Supreme Court, proposed by the President of Poland, and on the act on the organisation of Ordinary Courts*, No. 904/2017, 11 December 2017, par. 44-48 http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e.

[XLIII] *Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520*, Brussels, 20 December 2017, par. (13).

[XLIV] In a speech on the rule of law in Poland at the EP's LIBE Committee the Vice-President Timmermans stressed that Polish authorities did not announce any concrete measures to address the issues raised in the third rule of law Recommendation, while none of the four letters sent by the Commission to the Polish government inviting them to meet was accepted (Timmermans 2017).

[XLV] European Commission, *Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, *Explanatory Memorandum*, COM(2017) 835 final, 20 December 2017, par. 172.

[XLVI] Ibid, par. 173.

[XLVII] Ibid, Article 2.

[XLVIII] *Supra,* note 41.

[XLIX] *Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520*, Brussels, 20 December 2017, par. 38.

[L] Ibid par. 45-49.

[LI] Ibid par. 50.

[LII] As a consequence, in July 2018, the Commission launched a new infringement procedure against Poland regarding the Law on the Supreme Court for failure to fulfil the obligations under Article 19(1) TEU and Article 47 of the EU CFR. European Commission - Press release, *Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court*, Brussels, 2 July 2018.

[LIII] This was the case of the outcome of the infringement procedure against Hungary for having fired its data protection commissioner. In response to the recommendations of the Court of Justice (CJEU, Case C-288/12, *European Commission v Hungary*, ECLI:EU:C:2014:237), Hungary limited itself to paying compensation to the fired commissioner since it could not reiterate its mistake by firing the new 'independent' one. See also for a comment: Scheppele 2014.

[LIV] The Commission launched a couple of infringement procedures concerning violations of the rule of law against Hungary; the latest one being the one challenging the Hungarian Higher Education Law, the 'lex CEU' (on 7 December 2017 the case was referred to the Court of Justice). However, so far all have fallen short of addressing the general rule of law problems and had only a limited focus on few technical problems. Beside the already mentioned case regarding the substitution of the Hungarian Parliamentary Commissioner for Data Protection (*supra, note* 53), the case concerning the 2011 reform that lowered the retirement age of judges from 70 to 62, leading to the abrupt retirement of more than 200 judges, is illustrative in this respect. The Commission claimed the violation of the principle of non-discrimination on grounds of age, relying on Directive 2000/78/EC on the equal treatment in employment and the Court of Justice found the breach of that principle as stated in Articles 2 and 6(1) of Directive 2000/78 (Case C-286/12). Yet, the thin legal grounds of the Commission's decision are quite disappointing, since it could have relied on much more problematic provisions contained in the law in question, such as the broader issue of the independence of the judiciary.

[LV] European Parliament, *Resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland*, Doc. 2018/2541(RSP).

[LVI] The proposal will be put to a vote by the EP plenary in mid-September 2018. European Parliament, Press Release, *Rule of law in Hungary: Parliament should ask Council to act, say committee MEPs,* 25 June 2018, http://www.europarl.europa.eu/news/en/press-room/20180625IPR06503/rule-of-law-in-hungary-parliament-should-ask-council-to-act-say-committee-meps.

[LVII] *Supra*, note 39.

[LVIII] CJEU, C-64/16, *Associação Sindical dos Juízes Portugueses*, [2018], EU:C:2018:117.

[LIX] In the LM case the Court of Justice affirmed that the judicial authority executing a European Arrest Warrant (EAW) could refuse to do so by way of exception when it has proof that the person in respect of whom the EAW was issued will, 'if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial a right guaranteed by the second paragraph of Article 47 of the Charter' (par. 59). In order to make such an assessment, the executing judicial authority has to collect material 'that is objective, reliable, specific and properly updated' and it also must 'assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk' (par. 61 and 68). Quite importantly, the CJEU specified, as regards the first step of the assessment, that 'information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment' (par. 61). Yet, at the same time the Court stated that the executing judicial authority could automatically refuse to execute an EAW 'without having to carry out any specific assessment' only if the European Council had adopted on the basis of Article 7(2) TEU, stating the existence of a serious and persistent breach of the values at Article 2 TE in the issuing Member State (par. 72). CJEU, C-216/18 PPU, *Minister for Justice and Equality v LM*, [2018], ECLI:EU:C:2018:586.

[LX] See for further analysis: Lazzerini, 2018: paragraphs 4, 5 and 6.

[LXI] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Commission Work Programme 2018 An agenda for a more united, stronger and more democratic Europe*, COM/2017/0650 final, 24 October 2017, pp. 12-13.

[LXII] In May 2018 the Commission issued a proposal for a Regulation for suspending EU funds in countries where there are generalised breaches of EU values. European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States*, Brussels, 2.5.2018 COM(2018) 324 final.

[LXIII] This position was largely sustained by Professor K.L. Scheppele (Scheppele 2016).

[LXIV] 'Today everybody mentions the situation in Hungary and Romania. Are we sure that we will not see such a situation again in a couple of weeks in another EU country? Now let us be honest – and some of the parliamentarians have said it very clearly – we face a Copenhagen dilemma. We are very strict on the Copenhagen criteria, notably on the rule of law in the accession process of a new Member State but, once this

Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect'. European Parliament, Plenary debate on the political situation in Romania, statement by V. Reding, former European Commissioner for Justice, Fundamental Rights and Citizenship, 12 September 2012.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Environmental subsidiarity in the EU: or halfway to green federalism?

by

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Perspectives on Federalism, Vol. 10, issue 3, 2018

Abstract

Environmental protection and sustainable development are competences that the EU is entitled to integrate into the definition and implementation of its policies. However, shared competences in these areas are still a reality, as a margin of discretion persists for Member States, aimed at maintaining a high level of decentralisation, particularly where issues related to national policies and more (nation) specific sectoral legislation are concerned. This paper intends to analyse the application of the principle of subsidiarity to environmental issues within the EU, to examine the characteristics of a possible path to the future of green federalism in Europe.

Key-words

subsidiarity principle, green federalism, decentralisation, environmental law, EU law

1. Introduction

The realities of environmental protection and sustainable development are not new topics of concern at the European level. Nevertheless, in recent years these themes have taken on a new importance, with the urgent need to find local and global solutions to climate change, the erosion of biodiversity, depletion of natural resources and, more generally, to 'global environmental damage' (Sadeleer 2012: 74).

As a matter of fact, the European Union (EU) governance and law-making institutions have had considerable influence on environmental regulation and policy in the territories of Member States, especially since the last decades of the 20th century, when European integration started to be a more consistent reality. Therefore, according to the principles and norms of the Treaties and also the Charter of Fundamental Rights of the European Union, environmental protection and sustainable development are issues which the Union is entitled to integrate into the definition and implementation of its policies and activities.

However, shared competences in the areas of environment are still a reality, as a large margin of discretion should persist for the powers of Member States, aimed at maintaining a high level of decentralisation within the Union regarding these matters, particularly where issues related to national policies and more sectoral legislation are concerned (van Zeben 2014: 419).

Examples of shared competences utilised by the European institutions include: directives on environmental impact assessment of projects and programmes; industrial emissions; the EU emissions trading system (EU ETS); regulations concerning the registration, evaluation, authorisation and restriction of chemicals (REACH); and the protection of species of wild fauna and flora though the regulation of their trade. Moreover, Member States are obliged to implement those directives through national statutory laws, and comply with these regulations (or more infrequently, decisions), which have particular effects depending on the form of the legal instrument (Martella and Francke 2012: 8-13).

This path of building an integrated European *acquis* and harmonisation of national laws of Member States, specifically in environmental areas, has played an important role in enhancing the awareness of the whole Union (including national governments and their

citizens) in regard of the principles and main priorities that are intrinsic to the European project.

Nevertheless, principles of subsidiarity and proportionality are understood as establishing that decisions should be made at the most local level possible (*i.e.* nationally or regionally) and that EU action should be limited to the minimum necessary to achieve the intended objectives. In reality, legal and political problems arise in cases in which the implementation of directives leads to uneven application by national institutions. As a consequence, some directives are revised and reintroduced as regulations, or Member States are subject to the 'EU-Pilot' schemes to resolve compliance problems which, if not resolved, usually result in infringement proceedings (Martella and Francke 2012: 8-13).

However, the truth is that, in some situations, this uneven application may be caused by a simple interpretation of those 'centralised' committees, agencies and organs of the European institutions; in these cases subsidiarity and proportionality play a fundamental role in the relation between the European institutions (and their agencies' unchecked rulemaking powers), national governments and parliaments, which are entitled to approve the legal instruments, and the principles of democracy and participation in Member States.

This paper intends to analyse the different shades of grey that, therefore, may exist between the principle of subsidiarity as foreseen in the Treaties and conceivable characteristics of an environmental variant of federalism within the EU.

2. Subsidiarity and the environment

Where the topic of subsidiarity is concerned, it should be emphasised, right from the outset, that this principle was primarily and expressly introduced in the European Treaties through the Single European Act (1986), which added a Title VII to Part Three of the European Economic Community (EEC) Treaty and introduced Article 130r(4).[I] At that time, curiously, it was only applicable to environmental issues, but the Treaty of Maastricht (1992) resulted in its extension, to become a more general and overarching principle of both the European Community (EC) Treaty, inserting it in Article 3b,[II] and the Treaty on the European Union, through the last paragraph of Article B.[III]

Following that, in a 1993 report regarding the subsidiarity principle, the European Commission stated that

> (…) the risk of encountering resistance from national administrations which, because of a mutual lack of confidence, are anxious to obtain the most detailed regulations possible.[IV]

In the same document, the Commission defended that subsidiarity

> is first and foremost a political principle, a sort of rule of reason. Its function is not to distribute powers. That is a matter for (...) the authors of the Treaty. The aim of the subsidiarity principle is, rather, to regulate the exercise of powers and to justify their use in a particular case.

Then, with the Treaty of Amsterdam (1997), a Protocol (No 30) on the Application of the Principles of Subsidiarity and Proportionality was adopted, in order to clarify when and in which measure subsidiarity could and should be applied.[V]

In 2007, the Treaty of Lisbon moved the principle of subsidiarity to Article 5(3) TEU[VI] with a new Protocol (No 2) appended, on the Application of the Principles of Subsidiarity and Proportionality,[VII] explicitly referring for the first time to regional and local levels in the provision concerning the subsidiarity principle and rendering a new approach of subsidiarity, more inclusive than that of the former treaties (Arribas and Bourdin 2012: 13-17).

However, the idea that government should be no more centralised than strictly necessary, for it to achieve the objectives assigned to its powers, had been a reality since the earliest stages of European integration. Indeed, even the original version of the Treaty of Rome, in 1957, assumed this principle (albeit roughly) when shaping the legislative, executive, and judicial powers of and within the Community. Therefore, the TEU demonstrated, from its very beginning (Article 1, second paragraph)[VIII] the option of marking 'a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen'.

As a matter of fact, this legal option also reflects aspirations of balancing the path of integration, through the extension of the powers conferred to the Union, and the maintenance of confidence in the Member States and their subnational authorities and citizens, guaranteeing the proximity of government and assuring that integration must not be synonymous with centralisation (Lenaerts 1993: 846-895).

According to the provisions of Article 5(3) TEU, two conditions must be met for the EU to be able to take measures in which it has non-exclusive competence: (i) if the objectives of the proposed action cannot be sufficiently achieved by the Member States; and (ii) if those objectives can, because of their scale and effects, be better achieved at a higher level by the EU. In addition, following the procedure of the protocol, the Commission 'shall consult widely' and must explain in its proposal why it is necessary that the EU take action in each specific situation.[IX] It should also be emphasised that 'the reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators'.[X]

Nevertheless, assessments on whether certain objectives can (or not) be better achieved at the EU level are not absolutely clear and commonly accepted by all EU institutions and Member States. For example, northern European Member States usually have more ambitious environmental agendas and, therefore, would probably enact certain green policies or measures without the spur of the EU. On the other hand, other Member States would probably not take such environmental measures if the EU did not enact commensurate decisions or legislation and, in some cases, acting at EU level can be the only way to ensure that effective environmental policy is enacted throughout the whole territory of the EU (Krämer 2012: 18).

In this sense, environmental legal acts typically fulfil the requirements of the subsidiarity principle (Jans and Vedder 2012: 14), since most environmental problems are by their very nature transboundary, coordinated or harmonising policies and measures are considered to be the most effective option to tackle problems such as pollution or the existence of hazardous substances. Additionally, some environmental protection measures enacted by Member States individually may generate negative effects or externalities on the internal market and competition within the EU.[XI] This means that action by the EU represents a way to avoid such possible distortions since all EU actors would be subject to the same requirements, or at least common minimum rules, depending on the form of the legal act (from decisions to regulations and directives). And that is why Sadeleer states that:

> The principle of subsidiarity is inherent in the European institutional architecture. In any case, the environmental domain does not escape. It could even be argued that this principle could serve as a test-bed for the exercise of a shared competence, whereas the principle of proportionality had the effect of

> regulating the exercise of those powers in the sense of a very harmonised approach which leaves a considerable margin of appreciation to the State entities. (Sadeleer 2012: 89)

Protocol (No 2) on the Application of Subsidiarity and Proportionality Principles consequently gave the opportunity[XII] for national parliaments to review a legislative proposal that may be not in accordance with the subsidiarity principle (Barnard and Peers 2014: 112-113). This mechanism in the protocol is predicated on the idea that the application of the subsidiarity principle, on whether the EU can legally adopt a legal act, is more appropriate for *ex ante* political control rather than for *ex post* judicial control (Langlet and Mahmoudi 2016: 46-48).

It should also be mentioned that, as the protocol clearly demonstrates, subsidiarity is strictly connected to the principle of proportionality, which is set in Article 5(4) TEU.[XIII] According to this principle, there is a myriad of environmental legal acts that only assume the character of framework directives, leaving a relatively wide scope for Member States to adopt concrete and more adaptable measures and policies in order to achieve the objectives of the EU law,[XIV] hence balancing the European integration process between a path of both subsidiarity and proportionality.

On this topic it would be noteworthy to emphasise that, from Sadeleer's perspective

> …the principle of subsidiarity can be examined from two different angles. The first is part of the division of powers between the Union and the Member States, while the second concerns new modes of regulation, namely co-regulation and self-regulation (Sadeleer 2012: 89).

And, while assessing if the protection of the environment is better ensured by the increased role played by subsidiarity, the author considers that the majority of experts highlight that subsidiarity had contributed to exacerbating a phenomenon of decentralisation and deregulation to the detriment of a centralised and coherent right.

In effect, on this issue, Sadeleer continues his reasoning stating that

> This combined phenomenon of decentralization and deregulation seems to contribute more to aggravating ecological crises than to curbing them. After four decades of environmental policy, the record has indeed nothing positive. … environmental threats will only be eliminated through coherent policies requiring joint efforts to achieve a high level of protection.

As a matter of fact, federal systems assume as their fundamental concern the need to balancing the regulatory power of the central and local levels. And subsidiarity is one of the most relevant and accurate legal tools for maintaining that balance (van Zeben 2014: 416), especially in what is often called the 'sui generis system of governance' that characterises the EU (Kohler-Koch and Eising 1999).

3. Green federalism?

In effect, the path to a federalisation (or at least a para-federalisation) of European environmental law and policy has followed a gradual development throughout the six decades of the integration process. In fact, in the beginning the Treaty of Rome contained no provision providing for environmental regulation; nonetheless, more than 70 environmental directives were adopted between 1973 and 1983 (Vogel et al. 2010: 2).

Following the enactment of the Single European Act in 1987, which, as already explained above, provided a clear legal basis for EC environmental policy and eased the procedures for the approval of environmental directives, EC environmental policy-making tended to accelerate. Originally primarily motivated by the need to prevent divergent national standards from undermining the single market, environmental law and policy became an increasingly important focus for the EC and then the EU. Each successive treaty has strengthened the European commitment to a responsibility for improving environmental quality and promoting sustainable development throughout Europe.

From van Zeben's perspective, the reality of the EU 'falls short of a federal system but achieves a level of integration that goes beyond that of an international organization' and, as a result, it is constructed out of a unique combination of institutional features that are typically only found in international organisations *or* nation states, but not in one single system (van Zeben 2014: 421).

van Zeben stressed the fact that, at times, the application of principles that developed within a domestic federal setting tend to prove problematic, as their meaning changes together with their institutional setting. The subsidiarity principle appears to be a prime example of such a phenomenon. The virtues ascribed to subsidiarity in the European context are very similar to those ascribed to, for instance, American federalism. From self-

determination and accountability, to political liberty, or flexibility, preservation of identities, diversity and respect for internal division of component states. These elements are also part of European integration.

Logically, the objectives of diversity and the preservation of identities carry different weight and meaning in a union of sovereign nations when compared to a federal nation state such as the United States (US). At the same time, the relationship between individual citizens and the EU institutions – the role of individuals within the democratic process of the EU, as well as its way of governing – is distinct from that of national citizen and a federal government, as properly considered in the US.

It is, as a matter of fact, relevant to mention that there are substantive differences between the European and American systems; even in the language it is possible to notice the risks of comparison. As an example, when American scholars refer to 'national standards', they mean federal standards as opposed to local or state standards, while at the same time, for European scholars, 'national standards' necessarily refer to standards approved and set by the national Member States, as opposed to either local or European standards (Faure and Johnston 2009: 271).[XV]

In fact, in the US, the path to a greater centralisation of environmental law and policy-making occurred relatively rapidly compared to the EU. In the mid-1970s (the so-called 'environmental decade'), federal standards were established for virtually all forms of air and water pollution.[XVI] Effectively, by the end of the decade, federal regulations already governed the protection of endangered species, drinking water quality, pesticide approval, the disposal of hazardous wastes, surface mining, and forest management, among other policy areas, through the implementation of a new and massive federal pollution control regulatory structure (Gottlieb 1993: 148-157). This process was, in point of fact, strongly supported by pressure from environmental activists, who believed that federal regulation was more likely to be effective than regulation at the state level (Vogel et al. 2010: 1-41).

However, the US system of federal environmental regulation does not completely displace state regulation. Regulators at the federal Environmental Protection Agency (EPA) set minimum, technology-based emission standards; state regulators then generally assume the authority to implement general standards by writing plant-specific permits, and to monitor and enforce compliance with permit terms. Although there are exceptions, for the most part states are free to set state emission standards that are even tougher than federal

standards. Moreover, in translating national standards into site-specific permits, states are often legally permitted to give more weight to the cost of compliance than are federal regulators. This could be considered as a system of cooperative environmental federalism (Faure and Johnston 2009: 214-217).

On the other hand, in the EU, Member States are sovereign nations, and currently there is still substantial environmental regulatory authority remaining with the Member States. In effect, under the principle of conferral (or attribution), foreseen in Article 5(1)[XVII] and (2)[XVIII] TEU, EU powers extend only as far as expressly confirmed by the treaty. Despite this principle, the power of the 'European bureaucracy' has increased, and led to a shift of environmental regulatory competences to the European institutions. This means that a large amount of environmental legislation in the territories of Member States is European law or influenced by European law, consisting of directives which must be transposed into national law – or even regulations directly applied in the territories of Member States.

Therefore, as European environmental law directives are only indirectly effective, through Member State environmental laws which must be enacted or revised to comply with European standards, some authors would contend that the actual strength of European environmental law depends upon the enforcement of European environmental law by Member States (Krämer 2002: 178-182). Nevertheless, with the landmark *Francovich* case of November 19 1991, [XIX] the European Court of Justice (ECJ) demonstrated that, under certain circumstances, citizens who have suffered damage as a result of a lack of implementation by a Member State can be entitled to compensation for this damage by the uncompliant Member State. This decision indubitably created a form of potential liability for those Member States that do not implement EU law, which goes far beyond the constitutionally permissible liability of American states in US.[XX]

And in cases of non-compliance, the Commission can make use of the 'EU-Pilot' scheme, which was designed to resolve compliance problems, through direct contact with Member States, without having to resort to infringement proceedings.[XXI]

Closely related to this issue is another highly relevant principle: the direct effect. The principle emerged from a decision of the ECJ,[XXII] and allows any citizen to invoke European law on his behalf, even if he is challenging the policies of his own Member State.

While comparing different federal (or para-federal) systems, it is essential to highlight that the US constitutional system, being more than two centuries old, has more historically established procedures of articulation between the states and the centralised reality. On the other hand, it was only during the mid-1980s that the EU changed its procedures in order to facilitate the adoption of environmental directives and began substantial efforts to limit non-tariff barriers in the creation of a single market. Then, in the 1990s, an increased political influence of pro-environmental forces (mainly at the political level) emerged within the EU, with a number of green parties forming part of governments of western European nations and, at the same time, there was a decline in the influence of green pressure groups on American federal governments. During that period, a number of European environmental policies became more centralised – and more stringent – compared to the reality of the US.

And, as a matter of fact, nowadays statistics have shown that more than 80 percent of environmental protection laws in force in EU Member States are now derived from decisions made in Brussels, home to the EU law-making bodies collectively referred to as the EU institutions (Martella and Francke 2012: 8). Consequently, it can be argued that having a classic constitutional federalism, such as in the US, does not mean that environmental law and policy is more harmonised in that federal state. And, at the same time, the political and 'constitutional' reality of the EU, often described as *sui generis,* has been changing into a more and more centralised reality in areas of environmental law and policy. Maybe this follows of the logic of Sadeleer (discussed above), who considers that the only way of eliminating environmental threats can be through coherent policies 'requiring joint efforts to achieve a high level of protection.'

However, according to Vogel, it is also true that

> On one hand, the continued efforts of states in the US and member states of the EU to strengthen a broad range of environmental regulations suggest that fears of a regulatory race to the bottom may be misplaced. Clearly, concerns that strong regulations will make domestic producers vulnerable to competition from producers in political jurisdictions with less stringent standards have not prevented many states on both sides of the Atlantic from enacting many relatively stringent and ambitious environmental standards. On the other hand, the impact of such state policies remains limited, in part because not all states choose to adopt or vigorously enforce relatively stringent standards. Thus, in the

> long run, there is no substitute for centralised standards; they represent the most important mechanism of policy diffusion. (Vogel et al. 2010: 37-38)

And, in both the US and the EU, there are strong reasons to follow Arnold and Gunderson's perspective: that legal institutions need to help build adaptive capacity, not only among local or state (or even Member State in EU) communities and authorities, but also among federal environmental regulatory agencies and federal natural-resources management agencies (Arnold and Gunderson 2014: 324). This adaptive capacity means strong participatory and deliberative governance, adapting to extreme weather events, rising coastlines, or other environmental transformations, while also maintaining basic human freedom, dignity and rights. Only through this way is possible to guarantee a better and continuous articulation between Environmental law within the whole EU and also between its different Member States.

Other interesting examples of subsidiarity principle within a federal state could be presented with reference to the realities of Canada or Germany. In Canada, famous for having a large number of principles and norms not found in its formal constitutional structure (the 'unwritten constitution'), the principle 'aims to preserve local variation and diversity within a federation' (Kong 2015: 45). In Germany the Basic Law expressly provides in its article 72(2) – specifically dedicated to 'concurrent legislative powers' – that the Federation has the right to legislate on environmental matters, but only 'if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.' Moreover, article 72(3) provides that, on matters of protection of nature and landscape management, 'if the Federation has made use of its power to legislate, the *Länder* may enact laws at variance with this legislation', which gives them a large margin to legislate, ensuring local variation and diversity as mentioned above, leaving more space for political than for legal or judicial discussion (Taylor 2006: 115-130).

However, in respect of the EU, it is true that, for a long time, the Union has been moving away from a model of regulation based on adopting legislation laying down binding legal obligations which intend to harmonise laws across all the territories of the Union. This political option has been an almost general trend, but it is particularly applicable for environmental protection law. Partly, this has been because of perceived inadequacies in

old-style, 'command-and-control legislation' as it is, allegedly, neither flexible enough, nor responsive enough to the complex demands of environmental regulation (and which are to become ever more complicated and intricate as the EU is expanding – even more so with the particular episode of 'Brexit').

Nevertheless, the subsidiarity principle has also been presented as an answer to some of the problems that the EU has faced over its political and legal legitimacy. The reality is that there is still a perception that EU rulemaking is too remote from those it affects – its subjects – and does not sufficiently engage with the main stakeholders in different sectors and the wider public. And in a particular area such as environmental law, in which a wide array of private and public interests persists in the debate, that is a real problem. These were some of the arguments that ultimately dictated an important shift of focus towards what is nowadays known as EU environmental *governance*.

In fact, as Bell, McGillivray and Pedersen correctly state, there are three related features to this more recent development – which, it must be stressed, is already more and more concretely taking shape in the EU (Bell, McGillivray and Pedersen 2013: 206).

The first feature that should be mentioned is the move away from an exclusively 'top-down' approach to environmental law-making – from EU institutions to Member States – to encompass decision-making processes that are more likely to involve both state and non-state actors. In the environmental field, an existing example could be highlighted and that is the 'Auto-Oil' initiative, which brought together different actors, such as the Commission, vehicle manufacturers and the oil industry in trying to tackle the environmental problem of air pollution, that could not be addressed coherently without, in effect, the problem being 'shared' by the two .[XXIII]

A second feature that could be mentioned is the consequence of taking the option of moving away from a focus on harmonisation – particularly concerning substantive harmonisation. This could be seen in the approach of the Court of Justice in the *Standley* case, in which the Member States were given an extensive degree of discretion in the issue of how to implement a Directive when it came to designating areas for protection.[XXIV]

The third and final feature is that there is in practice an emphasis on using different regulatory techniques that seem to result in a better fit with this approach. Therefore, in place of binding standards set at an EU level, there is much greater emphasis on trying to stimulate improved environmental performance within the Member States and their

stakeholders. This is through such strategies as learning and monitoring the market reality, as benchmarking and sharing best practice, but there is likely to be some legal force behind this approach. One example is the fact that legislation sets out, procedurally, the terms by which different information is generated, and requires that reports are published and reviewed by the Commission. The Directive 2009/28/EC, on the promotion of the use of energy from renewable sources, illustrates how this approach has already been taken.

In short, as a consequence there are multiple pressures to move away from the trend of legislative harmonisation (and even, as in the case of the environment, away from minimum harmonisation). The particular case of the 'Cardiff process', at the level of policy, could be seen as a far-reaching example of the approach we have discussed.[XXV] In time, it is possible that this new approach will also be extensively adopted instead of a reliance on traditional legal approaches such as the use of standard-setting Directives; these have always tended to predominate in environmental law, especially in those areas in which topics about subsidiarity are more strongly analysed and researched. But the evidence so far is that the option for 'new governance' approaches is used much less frequently than the usual rhetoric about them would suggest or even require (Holzinger, Knill and Schäfer 2006: 403).

There are evidently contrasting views on what is going on with European law in the environmental field. Some perspectives accept these developments as generally positive solutions, emphasising the need to grant Member States – and main actors – greater freedom to pursue environmental protection in ways that they consider to be the most appropriate, though against a backdrop of transparency, and structured evaluation and coordination. From another point of view, however, these developments can be seen in a more negative perspective, as substantive legal standards can, at least in principle, be enforced either through traditional legal means or, indirectly, by pressure groups raising awareness of non-compliance. Seen in this light, headlines reporting that Member States have breached EU law by failing to submit necessary evaluative reports on how they are combating pollution simply carry less force than similar publicity that Member States practising polluting behaviour (Bell, McGillivray and Pedersen 2013: 207).

These are only some examples of how EU environmental law has had a somewhat undecided status, hovering between centralisation and decentralisation, though tending most of the time towards a centralised approach. As already demonstrated, this option does

not seem to be the optimum solution in the integration process. However, both Member States and the EU institutions have started to realise (even if slowly, in a limited way) that a more balanced approach – maybe through taking some characteristics of the US system as an example in environmental law – would potentially be a more reasonable pathway towards a green federalism for the EU.

At this point, it is also relevant to emphasise that the integration (or federalisation) of the EU is an ongoing process in which there is still a lot to adjust and evolve. In effect, one of the curious facts is that, while legislating in a myriad of environmental matters – in some cases with too much detail – EU environmental powers have been very shy in tackling economic and fiscal issues for the protection of environment and climate change adaptation, such as the case of carbon taxes, under the limits of the subsidiarity principle. And the truth is that current forecasts for EU institutional reforms and new developments on environmental policy are far of demonstrating this trend. Which means that the EU still needs to take bolder steps in these areas. However, environmental protection is, like the EU as a whole, also a process of adjustment and adaptation, especially in these times of climate uncertainty.

4. Conclusions: the way ahead

One of the most frequently offered criticisms of environmental decentralisation is, as previously demonstrated, the 'race to the bottom' thesis (Adelman 2014: 1-91), though the truth is that there is little empirical evidence to prove the theory with the application of the principle of subsidiarity. Differences in state policies may not necessarily lead to 'races to the bottom' or exacerbate rivalry, but rather result in positive spillover effects, such as drawing lessons from each other.

Decentralisation in environmental law and policy offers the possibility to create greater proximity to local concerns, improve representation, legitimacy, and efficiency. Nevertheless, as previously stated, some Member States which have more ambitious environmental agendas may enact certain green policies or measures without the spur of the EU, while at the same time other Member States would not do the equivalent and, at the end, the principles and the norms of the treaties would not be complied with by all Member States in the same way.

In reality, nowadays there is a myriad of environmental issues that cannot remain local: regional and global problems and the effects of environmental mismanagement cross state and national borders, notably where the impacts of climate change are concerned, in a world that each day evolves more and more rapidly. From problems such as transboundary pollution or conservation of endangered species to the extremely challenging needs of more effective solutions such as knowledge and research on environmental management, most of the time it is necessary to expand approaches to gain the economies of scale to solve larger environmental problems (Chakrabarti and Srivastava 2015: 2-3). And that is the primary argument for an expanded approach of solving environmental problems in the territory of the EU, but also in the rest of the world.

Environmental federalism requires comprehensive research on the appropriate jurisdictions for the management and provision of environmental goods and services, depending on territorial, historical and cultural realities. For example, it makes sense that from the US's perspective, harmonisation is not so necessary than in the case of EU, where after only 60 years of integration it is obvious that historically different national and traditional characteristics still exist and will continue to persist in the future, even with a strong will for integration. In this case, and in order to meet similar developmental indicators, harmonisation is absolutely necessary, both from the legal and policy perspectives.

Following the analysis from Martella and Francke:

> The extent to which federalism will extend to implementation and enforcement of EU environmental protection laws remains to be seen. Companies that operate across the EU might like to see more harmonized implementation and enforcement of EU environmental protection laws. Yet there remains a need for meaningful changes to the administrative rulemaking process, starting ideally with publically transparent and legally binding administrative standards, both procedural (e.g., in terms of standing) and substantive (e.g., in terms of cross-boundary uniformity). Until this happens, private companies doing business in the EU will continue to look to individual Member States' implementation and enforcement of EU environmental protection laws to offset the Commission's largely unchecked rulemaking powers (Martella and Francke 2012: 6).

Consequently, when taking action under the principle of subsidiarity, the EU is obliged to state reasons pursuant to the TEU and Protocol No 2, including those which reveal that

the political institutions consider that the action is consistent with the principles of subsidiarity and proportionality. Therefore, to maintain a balance between better management of local realities and, at the same time, a global control of compliance to the principles of the treaties, it is essential for all EU institutions (including the necessary interpretations from the ECJ) and Member States, to follow a process of integration that must be aware of this need of articulation between all those principles and, at the same time, the specificities of different territories and communities.

Following van Zeben (2014), it is noteworthy to emphasise that non-transparent and non-judiciable European decision-making processes, on the allocation of power between the EU institutions and the Member States, may possibly lead to an undermining of the legitimacy of both the EU's and Member States' regulatory power and action. And this way might create a reduced feeling of confidence among the different actors and stakeholders (institutions, multinational companies, pressure groups, associations and, especially, citizens). For that reason, van Zeben proposes the option of substantiating the principle of subsidiarity in meaningful ways, for instance through a competence allocation approach, as a way to start to strengthen the principle in a more practical and positive way (van Zeben 2014: 464).

Clearly, the critical view of subsidiarity within the EU should not be mistaken for a more general preference for decentralisation within the territory of the Member States. There are many governance and policy areas that have benefitted from the option of centralisation, particularly in environmental fields, or that would not have existed without coordination by EU institutions and their specialised agencies. Nevertheless, it would be extremely naive to believe that political options for centralisation should continue to exist in the EU without a strong and extensive legal basis, as well as with more room for judicial review.

Over the last decades, EU leaders and legislators have been working in, and researching into, a unique and *sui generis* species of a federal system, while striving to face and overcome economic and political crises. And during these difficult periods, the temptation to adopt an *ad hoc* approach to power sharing between the EU institutions and the Member States has gained strength, and has often seemed to favour more and more centralisation, notwithstanding Member States' strong protests.

As a matter of fact, the recent case of 'Brexit' is an example of how the political perspectives and even protests of Member States – and especially of their citizens – are often disregarded by EU institutions and their leaders. This is one of the reasons why the process of building a federal EU must take into account the citizens that support the Union and who, ultimately, vote and elect those who are to act as public officials, responsible for the future political and legal choices, both of the EU and the Member States. Here, the mechanisms of public participation and other new adaptive (or even 'smarter') instruments for law- and decision-making – such as decentralised and iterative processes discussed above – assume an extremely relevant role (Cosens et al. 2017: 30). This is particularly relevant in environmental issues, always which concern concrete, but changeable and evolving realities that are intrinsically connected to the idiosyncrasies and specific characteristics of each territory and each community living there. As a consequence, it is reasonable to conclude that a future EU green federalism has to be based on both centralised and decentralised elements and processes.

The perspective presented in this article means that it is only through the above-mentioned balancing process that it might be possible for all actors (from public to private sectors, different Member States, multinational companies, pressure groups and citizens) to work together to ensure a distributed governance of the environment across the existent multiple levels of jurisdiction, for regulation, implementation, and monitoring by reference to their respective capabilities (Lenaerts 1993: 893-895).

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[I] Article 130r(4) EEC: 'The Community shall take action relating to the Environment to the extent to which the objectives referred to in paragraph 1 [to preserve, protect and improve the quality of the environment; to contribute towards protecting human health; and to ensure prudent and rational utilization of natural resources] can be attained better at Community level than at the level of the individual Member States. Without prejudice to certain measures of Community nature the Member States shall finance and implement the other measures.'

[II] Article 3b EC: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be

sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'
[III] Article B, last paragraph, TEU (1992): 'The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 3b of the Treaty establishing the European Community.'
[IV] Commission Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle, COM (93) 545 (November 1993).
[V] The protocol, which was also adopted in 1997, established the conditions for the application of the principles of subsidiarity and proportionality enshrined in Article 3b of the EC Treaty 'with a view to defining more precisely the criteria for applying them and to ensure their strict observance and consistent implementation by all institutions.'
[VI] Article 5(3) TEU: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.'
[VII] The protocol referred to establishes the conditions for the application of the principles of subsidiarity and proportionality and a system for monitoring the application of those principles, as well as sets that the protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.
[VIII] Previous article A, second paragraph.
[IX] Article 2, Protocol No 2.
[X] Article 5, Protocol No 2.
[XI] Some authors consider that far too much authority has been allocated to the European level and, in some cases, more than would be necessary to avoid transboundary externalities. In this sense, see Van den Bergh, Faure and Lefevere (1996).
[XII] Article 6, Protocol No 2.
[XIII] Article 5(4) TEU: '[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'
[XIV] As examples of these kind of more open legal solutions are Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000, establishing a framework for Community action in the field of water policy, or Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy.
[XV] In the words of Krämer, 'The European Union (EU) does not enjoy the prerogatives of a state; it may act only where it has been expressly so authorised by the Treaty. Any comparison with domestic environmental law in the Member States, or with that of the USA is therefore necessarily misleading' (Krämer 2004: 155).
[XVI] As an example of that time, President Richard Nixon asked Congress, in 1970, to pass more stringent standards based on the lowest pollution levels attainable using developing technology. Congress responded by enacting the technology-forcing Clean Air Act Amendments of 1970, which required automakers to reduce their emissions of carbon monoxide and hydrocarbons by 90 per cent within five years and their emissions of nitrogen oxides by 90 per cent within six years. These drastic reductions were intended to close the large gap between ambient urban air pollution concentrations and the federal health-based Nationally Uniform Ambient Air Quality Standards established pursuant to the US Clean Air Act. Curiously, California was permitted to retain and/or enact more stringent standards, though these were specified in federal law (Vogel et al. 2010: 7).
[XVII] Article 5(1) TEU: 'The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.'
[XVIII] Article 5(2) TEU: 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'
[XIX] See Judgment of the Court of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (joined cases C-6/90 and C-9/90).

[xx] On this issue, see the example of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), in which the U.S. Supreme Court held that Congress cannot alter the states' immunity from suit by private citizens that is granted by the Eleventh Amendment of the U.S. Constitution, unless it makes its intention to do so 'unmistakeably clear' in the language of the statute.

[xxi] The 'EU-pilot' scheme was launched by the Commission in April 2008 to test a new problem-solving mechanism involving 15 Member States: Austria, the Czech Republic, Denmark, Germany, Finland, Hungary, Ireland, Italy, Lithuania, the Netherlands, Portugal, Slovenia, Sweden, Spain and the United Kingdom. This allows the Commission to refer correspondence and complaints directly to the Member State for comment and resolution. The Commission is kept informed and has the option of taking further action, also through the launching of infringement procedures, where necessary.

[xxii] See Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (Case 26-62). According to the ECJ, the question whether individual rights could be found directly in Community law was dependent solely upon the contents and wording of the European legislation concerned, with national legislation playing no role in this issue.

[xxiii] It is notable that this initiative resulted in traditional regulatory standards being adopted and that it has, in fact, been criticised by some authors, mainly because: i) it took some four years to negotiate an agreement that would bite some ten years after it was concluded. The new solution was hardly a swift alternative to the legislative process that would be expected to finalise a Directive, which could be transposed and implemented easily within that timetable; ii) there was little wider public participation in the negotiation of the agreement, which was largely conducted between the Commission and the associations involved. In addition to these arguments, compliance data would only be made public on a collective basis across the whole sector, meaning that individual manufacturer's performance would not be evaluated; *iii)* there were no enforcement mechanisms for non-compliance cases; *iv)* the defined targets had become outdated by the foreseeable introduction of existing technologies. As a matter of fact, the targets represented a 'business as usual' model that would not necessarily stabilise CO_2 emissions discharged from passenger cars at 1999 levels by 2010; and *v)* the targets did not act as sufficient incentives in order to develop alternative technologies to the already existing ones (Volpi and Singer 2000; Bell, McGillivray and Pedersen 2013: 575).

[xxiv] The mentioned Case C-293/97 – *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others* involved a challenge that the Government of the United Kingdom, when drawing up its initial list of nitrate vulnerable zones (NVZs) under the Agricultural Nitrates Directive (91/676/EEC), had failed to consider whether the excessive nitrate levels were caused by non-agricultural sources. The farmers argued that the mentioned failure discriminated against agricultural users in the NVZ, because the cost of reducing the nitrate concentrations to an acceptable level was to be borne wholly by the farmers when there were other users that may have been responsible for the nitrate pollution. The case was referred to the Court of Justice and the Court upheld the approach of the Government in identifying waters in which agricultural sources made a 'sufficient contribution' to excessive nitrate levels, in line with a purposive interpretation of the respective Directive. Indeed, the Court hinted that something rather less than a significant contribution might have been enough, showing the amount of freedom that Member States are to enjoy. The referred flexibility is also demonstrated in the Court's rejection of an argument that the UK violated the Polluter Pays Principle (now foreseen in Article 192(2) TFEU), because the Directive had a sufficient margin to ensure that action programmes targeted the contribution of farmers proportionate to those of other polluter stakeholders.

[xxv] The 'Cardiff Process' is the name given to the process launched by European heads of state and government (The European Council) at their meeting in Cardiff, in June 1998, requiring different Council formations to integrate environmental considerations into their respective activities, putting article 6 of the EC Treaty into practice. The Cardiff process has contributed to raising the political profile of integration, the latter now being regularly discussed at the highest political level. The Cardiff process has also generated a sense of ownership of environmental integration in some Council formations with positive knock-on effects on actions in other EU institutions and Member States.

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