

National Parliaments' Involvement in European Law Making - Prevention of European Law Breaking?

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1. slide - title

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I. Intro

- Ladies and gentlemen, you've heard from experts, fine experts, of the Czech legislature, judiciary and executive...some very insightful views, if I may say so. For those of you that are wondering why the seminar doesn't end here, I should explain why now me. As I understand you are officials of all the institutions, though mostly Commission's, involved in law-making. And that is why we thought, and the organizers understandingly agreed, that this would be an appropriate forum to give some brief intro or even spark a debate on a relatively fresh or if not "fresh" then "refreshed" or "on the rise" aspect of the business of making European secondary laws – the role of national parliaments.
- You have just heard views of experts on problems related to the quality of the legislative process in the Czech Republic with emphasis on the "EU connection"...I will, if you allow me, probably talk less law and more policy. Or better using the categorization of my kind colleague Jan Kysela: the material aspect of quality of lawmaking. I will talk about the impact of policy - or the substance - of EU legislation and the way it is generated, not only on quality of law as such but also on the way it is accepted in the Member States and transposed by national parliamentarians into national law. Because I believe, and I seem not to be alone, the process very much determines the outcome.

II. Ex-ante scrutiny by national parliaments via national government

2. slide – map

(the most primitive map of the EU legislative process)

Process

- As you know, national parliaments in just about every Member State play some role in controlling the government when it negotiates on EU rules.
- The reason for it is simple – the governments act here as a *de facto* legislators (the Council of the EU is often dubbed the second – delegated – chamber of EU's legislature) and the fact that it acts in this capacity naturally – and to a significant extent – limits the national legislatures when they fulfil the international obligation of transposing the results of the negotiations, now already in the form of directives (to simplify things), into the domestic legal orders.

Why are they doing it - Legitimacy

- Very briefly – problem of European constitutive people - *demos*.
- People arguably rather relate to their domestic political representations than the European one...see e.g. the decline in participation in EP elections - “democratic deficit.”
- For some, including the framers of first the Constitutional and later the Lisbon Treaties, one of the remedies – or even *white knights riding to the rescue* – should be the national parliaments:
 - by bringing in their increased load of legitimacy
 - by their closer relation to the citizen
 - by their passion for the integration project (well, most of them at least)

Legal frame

Domestic constitutions:

- There are as many systems of parliamentary ex-ante scrutiny of EU legislative process as there are Member States.
- The systems are most often classified by **muscle** – that is the extent to which the government is bound by the mandate that the parliament gives it for negotiating on a given EU proposal.
- But a much more appropriate criterion is the **authority** or respect to the opinion of the Parliament which does not necessarily include legal enforceability.

EU primary law

- Up until the second half of the nineties (Amsterdam) all these processes were taking place in the Member States without EU primary law taking account of them.

3. slide – Protocol

- The manner and extent of national parliaments' involvement - or its absence - were left totally on domestic MS rules. But with the Amsterdam revision of the founding Treaties a **protocol on the Role of National Parliaments in the EU** saw light, by which – very rudimentarily – the participation of EU national parliaments on European law making was recognized.

- The essence of the Protocol is a six week period that needs to elapse between making a proposal for EU legislation available to all national parliaments in all official languages and a vote in the Council.
- **I will not talk about the Lisbon Treaty** which will change things now for lack of time.

III. Direct communication with the European Commission

(Now I am getting to the most interesting part, hopefully, to this forum.)

4. slide – Sept. 2006 Arrival of the “Barroso Initiative”

Set-up:

- From September 2006 the national parliaments are provided with an opportunity to communicate directly with the initiator of most legislation – the Commission.
- This direct communication launched by President Barroso (sometimes therefore called “The Barroso Initiative”) was to be one of the tools for the ultimate goal of “bringing Europe closer to its citizens” and helping do away with the democratic deficit.
- The Commission started sending all its legislative proposals and communication documents directly to all national parliaments (which previously had to rely for their provision on their governments) and it has asked for feedback or more exactly “**reactions**”.

5. slide – Statistics: Senate & Commission

Statistics:

- The Czech Senate - to this date - has communicated its feedback on the Commission’s proposals over 30 times.
- The first communications took place soon after the September 2006 launch of the Barroso initiative.
- The first two documents were:
 - The Czech Senate’s reaction to the *Annual Report 2005 on relations between the European Commission and national parliaments* (17 October 2006)
 - The Czech Senate’s reaction to the *Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters* (17 October 2006)
- The most recent Senate reaction sent was
 - *Proposal for a Directive of the European Parliament and of the Council on standards of quality and safety of human organs intended for transplantation* (8 January 2009)
- To put these numbers into perspective, here is a statistic on the Senate’s exchanges with the government on EU dossiers:

6. slide – Statistics: Senate & Government

7. slide - Annual Report 2007 on relations I.

Annual Report 2007 on relations between the European Commission and national parliaments:

- As of 31 December 2007, the Commission had received **168** opinions regarding **82** Commission texts from **27** national Parliaments in **19** Member States.
- **Thirty-five** opinions were issued as part of two coordinated subsidiarity exercises conducted by the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC).
- The **133** remaining opinions concerned various Commission documents. Several proposals elicited at least three opinions: the proposals on the European Technology Institute, the common organisation of the wine market, soil protection, sanctions against employers of illegally staying third-country nationals; the Green Papers on tobacco, modernising labour law, diplomatic and consular protection, public access to documents held by the institutions of the European Community, research policy and the future common European Asylum System; the Communication on a European vision for the oceans and seas and the Annual Policy Strategy for 2008.

8. slide - Annual Report 2007 on relations II.

- **Very active Parliaments**
“Some lower (sic!) chambers were very active: the French Senate, the German Bundesrat, the House of Lords and the Czech Senate alone submitted **92** opinions. Sweden's Riksdag and Denmark's Folketing also took positions on several consultation documents, while the Parliament of the Portuguese Republic issued a series of favourable opinions on subsidiarity. These seven chambers issued 138 opinions.”
- **Commission replies**
“The Commission replied to **109** of these opinions. **41** of the opinions from the national Parliaments were favourable and did not require any answer other than an acknowledgement of receipt. The Commission replies in the language of the chamber concerned, and its reply is sent for information to the European Parliament and the Council.”

9. slide – Annual Report - Table

10. slide – Case Study: Reform of the wine sector

Case study: Reform of the wine sector

11. slide – Case Study: Reform of the wine sector I.: Resolution of the Senate

- The Senate has communicated its position outlined in Resolution no. 223 of 31 October 2007 regarding the **Proposal for a Council Regulation on the common organisation of the market in wine and amending certain regulations** (Senate doc. no. N 042/06).
- After welcoming the positive aspects of the reform that the Senate considered necessary just as much as the Commission, it stated its discontent with some of its aspects:

12. slide – Case Study: Reform of the wine sector I.: Resolution of the Senate

- i. with the proposed ban on adding beet sugar during the production process since this procedure forms part of traditional wine production techniques in many wine regions situated in the north, and notes that the ban on acidification used on the contrary in the south regions has not been proposed;
- ii. with the historical share of the wine budget as one of the criteria proposed as a basis for the allocation financial resources into national financial frameworks because such regard to previous payments would discriminate against wine-growers from the new Member States and regions situated in the north, and on the contrary supports the criterion of wine planted area

These comments were on substance, but the Senate also pronounced on the procedure the Commission followed during the drafting phase of the proposal:

13. slide – Case Study: Reform of the wine sector II.

- iii. (The Senate) Expressed concern over the current development of debates on the reform as it considers that the European Commission has not adequately reflected neither the observations of the Czech Republic and remaining Member States nor the positions of specialized organisations and the European Parliament;
- iv. (The Senate) Considered it appropriate that the Czech Republic be on further instances included during the preparatory stage among countries to which the European Commission presents the Common Agricultural Policy reform proposals impacting sectors where the Czech Republic is a significant producer.

14. and 15. slide – Case Study: Reform of the wine sector II: Reply of the Commission

- The Commission in its reply first welcomed the Senate's support for several aspects of the proposed reform (considerable part of the reply).
- Then it went on to inform the Senate that „in the course of negotiations towards an agreement in the Council the input from the Czech Republic was taken into consideration – including that coming from the Senate Resolution”.
- And that this concerned above all the question of adding sugar and the possibility to use sugar beet for it.

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- So does this ring a bell with some of you? I would be very interested to hear whether your services have been asked to elaborate a response to a national parliament's comments on a proposal and how they have been dealt with...
 - And I would be even more interested to hear what impact they had on further fate of the proposal.
 - My thoughts on the impact issue? Is there any impact? This is hard to say. The COM replies differ greatly – they are conceived by different DGs. In general the Commission tends to emphasise the aspects of the proposal that found support in the Senate. Then it usually proceeds to make the case for the aspects that were criticized by the Senate or it tries to reassure it that implications of the proposal will not result in what the Senate feared it might.

- In several of the reactions, the Commission informed the Senate that parts of the proposal that it did not agree with were omitted or significantly amended in the negotiation process, taking into account the Senate's reservations communicated to the Commission.

Situation:

- So the parliaments were asked in 2006 to give the Commission their reactions on the proposals submitted...but they were not told how their feedback will be dealt with.
- While the parliaments usually have well running systems of dialog with their governments, what should be the result of their communication endeavours with the Commission is unclear. Even after practical running of the communication has hinted on this question.
- In practice, a national parliament that submits its comments on a proposal or communication to the Commission, receives a reply letter if the Commission considers that the reaction merits one.
- While the process of mandating and holding the government to account as it negotiates in the Council is a fully fledged component of the law-making process on its domestic part, the direct communication with the Commission is to be necessarily regarded as a political initiative that has (as yet?) no fundament in primary law.
- Its current main aim has to be – if conditions are fulfilled – the hope that with greater involvement of Member States national parliaments in the European law making process will bring about increased feeling of **ownership** and with it its greater and smoother **acceptance** – though we are today still at a phase where it is more **symbolic** than anything else.

Future development:

- The parliaments, who overwhelmingly welcomed the initiative and participate in it, have made suggestions on how to improve the mechanism – some of them have been already implemented by the Commission.
- The COSAC (Conference of EU committees of national parliaments) has called for the Commission to make its replies to parliaments' comments public and upload it on the interparliamentary database IPEX – this is now being done.
- The COSAC has also asked the Commission to inform the parliaments what has been the impact of direct communication regarding a certain proposal on its further development and how the reactions have influenced the Commission in further formulation of policy in a given field (COSAC Contribution of Estoril and Brdo) – this is yet to happen

16. slide - Effects on policy formulation

Effects on policy formulation (Chapter 2.3. of the Annual Report 2007 on relations between the European Commission and national parliaments):

“The most immediate effect of the national Parliament opinions is to **elicit a reply and explanation** from the Commission. This is a new form of transparency that the Commission would like to promote in order to **enrich its policy formulation and development process**. In accordance with the Treaty and their constitutional rules and practice, the national

parliaments **do not take part in decision-making at European level**. As part of the political dialogue launched by the Commission in September 2006, their contribution can, however, help **improve European policy formulation**.

The national Parliaments have replied on numerous occasions to consultation documents from the Commission. For its part, the Commission will take these replies into account when drafting its proposals.

It is worth noting that, while examining legislative proposals from the Commission, on several occasions the European institutions echoed concerns expressed by the national Parliaments. This was the case with such matters as the completion of the internal market for postal services, the proposals on soil protection, motorway infrastructure safety and the European Technology Institute.”

17. slide – primitive map again

The Lisbon Treaty

- very little mention
- It has to be mentioned here as the direct communication with the Commission is in fact an example of cherry-picking from the departed Treaty establishing a Constitution for Europe.
- Communication between NPs and COM will grow more important under new provisions of the Lisbon Treaty – **notorious yellow and orange card mechanisms** – together with the possibility for the national parliament to go to the Court if it feels an EU legislative act contravenes the subsidiarity principle.
- The National Parliaments are preparing for the new role through means of setting up mechanisms for cooperation in the frame of COSAC – coordinated subsidiarity checks and technical support – Interparliamentary database IPEX (where just recently the Commission started uploading its replies to national parliaments’ responses).

18. slide – Conclusion

IV. Conclusion

- I am from a...lets say...cautious chamber when it comes to EU issues. But I have not seen it miss any opportunity for legislative dialogue – with the government – and especially the one it is engaging in so ferociously – **with the Commission**. The Commission has taken in my view a very good step forward in courting the national parliaments. They have many stakes in the process and most of them have things to say – and some do it very elaborately (look at the UK Lords, to mention just one chamber).
- Why do I perceive national parliaments’ involvement – in all its different forms – so important? Well because it can help to legitimize the whole necessarily and by nature bureaucratic machine of European lawmaking while contributing, with a little luck (especially of people going to the ballot-box in the Member States), to higher quality of legislation in general.
- But the Commission needs to take the initiative further and demonstrate the impact national parliaments’ feedback has on its policy-making.

- The role of NPs in assuring adherence to the subsidiarity principle is as well significant – the mere existence of the system as proposed will lead to more caution on the side of the proposing institutions.
- But the card mechanisms will therefore seldom be invoked.
- With a national parliament’s petition to the ECJ will be a very rare “nuclear” option.
- NPs will still stick primarily to checking their governments but many have taken the Barroso initiative on board (I cam from one) and see it as something with further potential (see COSAC debates and demands – impact on policy formulation...)

Sum-up:

Involvement of NPs in EU legislative process in my bias opinion leads to:

- Greater acceptance of regulation coming from Brussels (x rubberstamping) – avoiding situations – to a certain extent - like the one we are now having with the antidiscrimination directive
- Gives feedback to the initiator of EU legislation (accommodation of national views and avoidance of future friction all already in preparation of a proposal)
- Results in better law? Maybe.
- More accepted and more easily implemented law? Definitely.

19. slide