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President Jean-Claude Juncker
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3 December 2014

Dear President Juncker

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
(Procedure file 2013/0091(COD))

The House of Lords EU Home Affairs, Health and Education Sub-Committee has been conducting scrutiny on this proposal since it was first issued last year. We have had detailed correspondence with the UK Government about the substance of the proposal, but as part of the political dialogue, we wish to draw your attention in particular to the provisions relating to parliamentary scrutiny of Europol as we have grave concerns about the possible outcome of the trilogue negotiations.

We welcomed the initial text of Article 53 in the Commission's draft Regulation, which offered a flexible approach to implementing Article 88 TFEU, leaving the details of parliamentary scrutiny to informal agreement between the European Parliament and national parliaments.

Parliamentary scrutiny of European agencies such as Europol must be organised flexibly in order to allow for different scrutiny arrangements in different situations. Furthermore, we recall the EU Speakers Conference in Belgium in 2011, which concluded, *inter alia*, that "scrutiny [of Europol] should be organised within existing interparliamentary structures", including joint meetings organised by the European Parliament's LIBE Committee and meetings organised by the Chairpersons of Home Affairs Committees.[1]

We have grave concerns that the amendments proposed by the European Parliament, which would create a Joint Parliamentary Scrutiny Group, offer too formalised and prescriptive a solution to the problem of ensuring parliamentary scrutiny of Europol. As currently conceived, this Joint Parliamentary Scrutiny Group would fail to offer sufficient flexibility – for example, for a meeting to be convened in the Presidency country in conjunction with a

[1] Para. 12

meeting of the Chairpersons of Home Affairs Committees – and would grant control over the parliamentary scrutiny process to the LIBE Committee and its Chair without taking account of the important role of national parliaments in this sphere. Such a Group would risk taking scrutiny of Europol further away from citizens, rather than closer to them, as the Treaty intended.

There are also vital constitutional issues at stake regarding this proposal. Under the UK's constitution, the Westminster Parliament is sovereign: its proceedings are neither regulated by legislation nor subject to the review of courts. This is a fundamental principle of the UK's constitutional settlement. The Westminster Parliament cannot therefore be the subject of directly effective EU legislation that regulates its participation in a Joint Parliamentary Scrutiny Group. The initial text of Article 53, drafted by the Commission, respects the distinction between national constitutions and EU law, and is in accordance with Article 4(2) TEU which safeguards the constitutions of the Member States.

The initial text of Article 53 is also in accordance with the final sub-paragraph of Article 88(2) TFEU. The Treaty of Lisbon was drafted in French, and it is the French language version which most clearly shows that national parliaments were not intended to be the object of this sub-paragraph, unlike the European Parliament, but to be associated with it: *Ces règlements fixent également les modalités de contrôle des activités d'Europol par le Parlement européen, contrôle auquel sont associés les parlements nationaux.*

In addition, we draw attention to the fact that references to national parliaments in the EU Treaties are descriptive rather than prescriptive. The word "shall" was deliberately removed from the English language versions of Articles 5 and 12 TEU, and Article 69 TFEU, in the negotiation of the Lisbon Treaty to clarify that they did not place obligations on national parliaments. This was a particular concern of the House of Lords. Attached to this letter are two extracts from the relevant reports it published at the time, confirming the removal of "shall" and the reasons why.

It would therefore be inappropriate for a Regulation negotiated by the co-legislators to seek to prescribe the actions of national parliaments or impose obligations upon them. Furthermore, for the co-legislators to do so would be a violation of procedural fairness, given that national parliaments are excluded from the negotiation process under the ordinary legislative procedure.

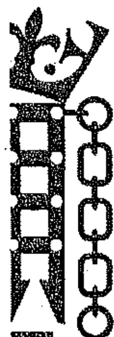
The better course would be to agree the involvement of national parliaments in the oversight of Europol informally, outside the framework of EU law.

We would be grateful if you could share this letter with First Vice-President Timmermans, given his responsibility for relations with national parliaments, Commissioner Avramopoulos, and Commissioner Jourová, in the light of the open dossier on the reform of Eurojust. I am writing also to the Chair of LIBE, the relevant rapporteur and shadow rapporteurs, and to the Italian and Latvian Presidencies, in order to make our views known to all those involved in the ordinary legislative procedure. We do not require a response to this letter.

Yours sincerely

Tim Boswell

The Lord Boswell of Aynho
Chairman of the European Union Committee



HOUSE OF LORDS

European Union Committee

35th Report of Session 2006–07

The EU Reform Treaty: work in progress

Report with Evidence

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HL Paper 180

CHAPTER 2: NATIONAL PARLIAMENTS

The general role envisaged for national parliaments

24. The Reform Treaty proposes a new Article 8c as part of a new Article 8 of the Treaty of European Union (TEU). For the first time the role of national parliaments is recognised in an article of a Treaty. Previous reference was only in protocols, in particular the Protocol on the Role of National Parliaments in the European Union inserted into the TEU by the Amsterdam Treaty—"the Amsterdam Protocol".

25. A detailed Protocol (No. 1) on the Role of National Parliaments complements the new Article 8c.

26. The early version of the text of Article 8c begins:

    "National parliaments shall contribute actively to the good functioning of the Union".

27. This wording is different from that in the Amsterdam Protocol which merely states a desire to encourage greater involvement by national parliaments in the activities of the Union.

28. The current definitive French text of the Reform Treaty reads as follows:

    "Les parlements nationaux contribuent activement au bon fonctionnement de l'Union."

29. If that language were purely descriptive that would be wholly appropriate. The Committee noted however a problem with the original English wording. It might imply that the EU could impose obligations on national parliaments. The Committee drew this matter to the attention of the Minister who replied:

    "the wording of the new Article on the role of national parliaments is inappropriate. This will be raised during the IGC and we will press for more appropriate language."[7]

30. Kim Darroch confirmed in evidence (Q 2) that "there is no mandatory sense in the French... so 'shall', we think, is not the right English translation". No compulsion on national parliaments was intended (Q 3). Mr Leffler for the Commission commented that no one involved in the drafting of the mandate "even in their wildest fantasies thought that somehow the Union Treaty could or should instruct national parliaments to contribute". At the most the phrase was intended to express national parliaments' willingness to contribute (Q 41).

31. **While we accepted these reassurances, we considered it necessary to ensure that the phraseology was correct while the interests of national parliaments were appropriately presented in the text. If the language were not changed the criticism could be made that the Reform Treaty inappropriately sought to prescribe functions for sovereign national parliaments. We were accordingly pleased to have heard that the word "shall" has been eliminated from the English text.**

[7] Ref to Minister in previous Report.

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION

WEDNESDAY 19 SEPTEMBER 2007

Present	Bowness, L	Roper, L
	Cohen of Pimlico, B	Thomas of Walliswood, B
	Grenfell, L (Chairman)	Wright of Richmond, L

Examination of Witnesses

Mr Kim Darroch, Ambassador and United Kingdom Permanent Representative, Ms Alison Blackburne, Political Counsellor, Mrs Sally Langrish, Legal Counsellor, Mr Vijay Rangarajan, Counsellor (Justice and Home Affairs), Mr Edward Smith, Press Spokesman, and Ms Ann Swampillai, First Secretary (Future of Europe), United Kingdom Permanent Representation to the European Union, examined.

Q1 *Chairman:* We are on the record; it is as if it were a public meeting. I want to begin by thanking you very much indeed, Ambassador, and your colleagues, for agreeing to meet with us so that we can discuss some of the issues relating to the Reform Treaty that are of particular interest to our Committee. As you know, we have done an analysis of the Treaty as we had it in the English version. Now I am very happy that you have been able to provide us with the French version and we would be particularly interested to see what they say about whether or not the national parliaments *contribuent* is going to be formulated in some other very elegant Gallic manner. We do thank you very much indeed for being with us. We will, of course, send you the transcript of this so that you can check and see that your remarks, and those of your colleagues, have been properly recorded. You are an old hand at appearing before this Committee anyway, but please feel free to call upon any of your colleagues at any point where you wish to do so. I think I will start by asking you whether you would like to make a brief opening statement on the issue or go straight into questions, it is entirely your choice.

Mr Darroch: My Lord, only a very brief one. Thank you for your presence here; it is an honour for us to have you here. Just to say of my team, we have Vijay Rangarajan at the end, who you met over lunch, who is our JHA Counsellor; Sally Langrish is our Legal Counsellor; Alison Blackburne is our Political Counsellor; Ann Swampillai, First Secretary Institutions, and you will see from this huge pile of files here that she is our all-round guru and expert on the Treaty. In the background, Ed Smith is the Press Spokesman in UKREP. We are at your service. Let us go straight to questions.

Q2 *Chairman:* Good. Thank you very much indeed. I think we will start with a rather general question and we can get into some of the more detailed issues as we go along. Maybe you could just update us on one thing which I need to know, which is whether you have spotted any real changes in the French text from the English. We all know that any change to the IGC Mandate would be viewed with great alarm by the Lisbon Presidency, and no doubt many other people. I am not assuming that there would be any changes in the French text other than maybe some tidying up of language. Before we go any further, so that we know what basis we are talking on, has anything been spotted in there that suggests there have been any changes?

Mr Darroch: I do not think so. Just on where the process is: the Mandate came out of the June Council and over the summer the Council Legal Service turned that into a draft Treaty text. There was a first reading of that text the week before last amongst 27 legal experts from around the EU. We are now in the course of the second reading. These are not, as it were, negotiations of substance, the negotiations were settled at the June European Council, this is a process of going through the text to check if they are technically correct. A number of technical issues have emerged and translation issues and so on. That is no surprise because the Council Legal Service had to work extremely quickly through the summer to turn this text into a draft Treaty. Emerging from the first reading there were some 50 technical points left outstanding for second reading and those are being worked through now. I could, if you like, give you some examples of them. One of the things we have secured, for example, is to pin down the language about lack of European Court of Justice involvement in Common Foreign and Security Policy where it affects it in two very small areas: it patrols, if you like, the frontier between the first and second pillar, and there is an issue about sanctions against national or legal persons. It is pinned down in the text now and otherwise CFSP is outside the jurisdiction of the ECJ. There are some other technical mistakes that we have spotted. We have pinned down that there is both a yellow card and an orange card procedure for national parliaments. Those are the sorts of things

that are in there. Since you mentioned translation problems, you may come on to this issue about whether national parliaments "shall" contribute or not, but let me just say that in the French text there is no mandatory sense in the French, so "shall", we think, is not the right English translation but I do not think we have yet discovered what the right one is.

Q3 *Chairman:* So it is purely declaratory.
Mr Darroch: The intention of this was never that it should be some sort of compulsion on national parliaments to contribute. That is one of those translation points that is being worked through. I will just turn and see if there are any other points I should mention in this context or whether it is purely translation issues.
Ms Swampillai: No, I do not think so. It is basically as the Ambassador said, that there are a number of technical points, a number of translation issues, and there are some technical points that both we and other Member States raised. Those were resolved to a certain extent during first reading and now we are going back over the points which remain open. We saw the CFSP point as something that we were very keen to pin down, and we have.

Q4 *Chairman:* So the legal experts did, in fact, meet their deadline of 13 September? They are not going back to this, are they, they have done their job?
Mr Darroch: They have not finished yet. The second reading is still proceeding. I am not sure whether they are meeting this afternoon or not. The second reading had set a deadline of 13 September and it has overrun that. It does not mean that it is coming apart but it has not proceeded to quite the timetable that they had hoped. I think they still intend to finish this week.

Q5 *Chairman:* Because presumably the next deadline is 15-16 October General Affairs Council?
Mr Darroch: My Lord, that is right. The intention is that the legal experts should finish their work and that should be it. The text is then produced in as many language versions as they can manage before the European Council in October and that European Council should reach political agreement on it. Thereafter, it goes back to Jurists Linguists to check that all the different translations are correct and to have another look just to see that all the language is precisely right, and then it gets signed at the December European Council. There is, of course, a potential if there are outstanding issues of policy still, or problems after the lawyers have finished their work, for either a focal points meeting, which was the senior officials group that met before the June Council, on which I represented us until June and on which Jon Cunliffe, my successor in Number 10, will represent us now, or, of course, there is always the option of meetings at ministerial level if that should be needed, but we hope none of that will be necessary.

Q6 *Chairman:* Before handing over to my colleagues and coming on to some of the Government red lines, maybe you could say a few words, if you would, Ambassador, about the Viana do Castelo meeting that was held on 6-7 September, because one understands that this is where the Polish Foreign Minister was raising in particular the issues of the Charter, the idea that they might be associated with the Protocol that we have asked for, and also the inclusion of the Ioannina principle. Could you tell us how that meeting went?
Mr Darroch: It was not an extensive discussion. It certainly did not get into the detail of Treaty language or any of the work that the lawyers are doing. The point that emerged from it, that the Presidency made in its report afterwards, was that they believed that they were still on course to agree a text for the Reform Treaty for the European Council in October. You are right that the Poles have floated two possibilities, both there and in other contexts. They mentioned it, for example, here in Brussels, although the group is not about that. I do not want to go too far in interpreting what the Poles have asked for but, as I understand it, they have raised the possibility, which was in the Mandate, that they would join the Charter Protocol, although they do say that it would not be exactly the Charter Protocol that we have, that they would want some changes to the language. This raises the question, of course, of whether they are actually joining our Protocol or having a new Protocol which is their own, which you could argue would be outside the Mandate. So that is the issue there. It is also the case, I think, that as of now, although we will see if this is a formal position when it comes to the European Council, there is a question in their minds over whether what is in the draft Treaty about how this Ioannina-style mechanism operates is what they understood was agreed at the June European Council. Whether, in the event, they raise that at the European Council, and quite where they finish on the Charter Protocol, it is impossible for me to say; to be honest, I do not know.

Q7 *Chairman:* But is the impression amongst you and colleagues from the other Member States that the IGC Mandate is, so to speak, inviolate, that the Presidency is not going to accept changes? For example, if Poland wanted an entirely different Protocol, this being outside the Mandate, they are firm in their own minds, and others support them, that it is just not on the cards?

HOUSE OF LORDS

European Union Committee

10th Report of Session 2007–08

The Treaty of Lisbon: an impact assessment

Volume I: Report

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HL Paper 62-I

11.23. This Committee has reported several times on the yellow card procedure at various stages of its evolution. Our most recent report was based on the now defunct Constitutional Treaty, and was published in April 2005; but most of what it said still stands. The main points are summarised in Box 4.

BOX 4

Our report on the yellow card of 2005—main points

The report went into detail on the meaning and history of the subsidiarity principle, and the emergence of the proposal for the yellow card. It recorded different views as to the effectiveness of the subsidiarity principle to date.

We considered in detail how the procedure should operate in this House. We recommended that the vote should be cast by the House, on the basis of a report from ourselves. We recommended that exceptionally, if the deadline for decision fell in recess, the House could delegate the decision to this Committee. We recommended that, if either House voted for a yellow card, the Government should not support the proposal in question in the Council without first giving reasons to Parliament; the Government agreed "in principle". While we envisaged close communication with the Commons, we reckoned that in the end the two Houses were entitled to take different views.

The Government submits an Explanatory Memorandum (EM) on every EU document deposited for scrutiny in Parliament, including a view on subsidiarity. It is meant to do so within two weeks of deposit. Given the short time allowed for the yellow card procedure, we recommended that, if the EM were delayed, the subsidiarity analysis should be presented separately. The Government undertook to present it "as early as possible".

The report considered how devolved assemblies could play a role in the new procedure. It also considered the provision allowing national parliaments to invoke the ECJ.

We also considered how the procedure would play out beyond Westminster. We examined the readiness of each chamber around the Union to operate the new procedure, and we strongly advocated cooperation between national parliaments in doing so. But we came out against tactical voting; national parliaments should vote on the merits of each case, not on the basis of the prospect of reaching the threshold for a yellow card. We noted that adverse votes would exert political pressure, even if the threshold were not reached.

Strengthening national parliamentary scrutiny of the EU—the Constitution's subsidiarity early warning mechanism, 14th Report 2004–05, HL 101

Government response published in *Scrutiny of Subsidiarity: Follow up Report*, 15th Report 2005–06, HL 66

Evidence

Obligations on national parliaments

11.24. The original draft of the Lisbon Treaty stipulated in what is now Article 12 TEU that "national parliaments shall contribute ..." This was translated in French, which has no direct equivalent of the English mandatory "shall", as "*Les parlements nationaux contribuent* ..." This can be translated literally, "national parliaments contribute". However this does not mean that the French version is necessarily devoid of mandatory connotation.

11.25. Following representations by the EU scrutiny committees of both Houses[261], the English version of Article 12 TEU has been amended to delete "shall"; but in other languages the drafting has not changed. The Government insist that there are no obligations (e.g. Explanatory Memorandum on the Treaty of Lisbon para 15), and in September 2007 both Kim Darroch, UK Permanent Representative to the EU, and Christian Leffler of the Commission, told us that no obligation was envisaged when the Treaty was drafted (*Work in Progress*[262] para 30). Mr Darroch said, "There is no mandatory sense in the French". Responding to *Work in Progress*, the Government said, "That position has been acknowledged by all Member States and by the Presidency; Portuguese Foreign Minister Amado wrote to the Foreign Secretary to confirm that: 'this article imposes no obligation on national Parliaments and is purely declaratory in nature'".[263] The point is however arguable: see Appendix 4.[264]

11.26. "Shall" was also removed from Article 5 TEU and Article 69 TFEU, both of which deal with national parliaments ensuring compliance with subsidiarity. It survives in the Protocol on the role of national parliaments, in Article 9 on interparliamentary cooperation (see above). The Government explained that this "refers to the need for the European Parliament to cooperate with national Parliaments".

11.27. Andrew Duff MEP, a supporter of the Treaty, saw Article 12 TEU as merely a useful description (p S138). The European Parliamentary Labour Party welcomed it, on the basis that it "formalises" the right of national parliaments to be involved in EU law-making (p S140). On the other hand, the Campaign against Euro-federalism, quoting it in its original form, considered that it "underlines the subordinate role of national parliaments" (p S125). The Democratic Party[265] felt the same, and were not comforted by the deletion of "shall" (p S157).

11.28. The correspondence about the Treaty which we received from the general public sometimes complained that national parliaments were marginalised by the EU (i.e. "Erosion of national competence under so many areas will make Westminster redundant"—e-mail from Nick Atkinson p S120). But we received no such correspondence complaining about the imposition of obligations.

Receipt of documents

11.29. The provisions for national parliaments to receive additional documents direct are not a subject of widespread comment, perhaps because the Commission are already sending legislative proposals direct as part of the Barroso initiative. The European Parliamentary Labour Party saw this as a "key innovation" (p S139); Professor Peers regretted that it did not go further (p S155).

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261 See House of Commons European Scrutiny Committee 35th Report (2006–07): *European Union Intergovernmental Conference* (HC 1014).

262 35th Report (2006–07): *The EU Reform Treaty: work in progress* (HL Paper 180).

263 Letter from Jim Murphy MP to Lord Grenfell, 14 January 2008.

264 See also House of Commons European Scrutiny Committee, 3rd Report (2007–08): *European Union Intergovernmental Conference: follow-up report* (HC 16–iii).

265 A political party registered in Great Britain.

Yellow and orange cards

11.30. Mr Nymand Christensen of the Commission considered the Treaty provisions on national parliaments in general, and the yellow and orange card procedures in particular, to be a significant step forward, which "advances the democratic quality of the EU". Subsidiarity "is an important principle for the Union and should be brought to the fore". He hoped that national parliaments would "wake up" to their new role (Q S322).

11.31. John Palmer agreed that the yellow and orange card provisions were important (p S15). In his view their impact would depend on the capacity of national parliaments to exploit them, and to co-operate with one another (Q S34). He advocated involving MEPs in the process of national parliamentary scrutiny. Likewise Professor Wallace saw them as a "window of opportunity being opened", which this House was well placed to exploit (Q S189). Sir Stephen Wall supported the changes; he advised Parliament to organise itself to move fast, particularly over recesses, and to improve coordination with other parliaments (Q S228). The National Farmers' Union welcomed these provisions; they would ensure that the EU "only acts in areas where it adds value" (p D15). They were likewise welcomed by the Coalition for the Reform Treaty (p S130).

11.32. The Law Society of Scotland and Sir David Edward drew attention to the special challenge of operating the yellow card procedure in the particular context of criminal justice. In the UK this is a devolved matter, where Scotland has its own law and institutions. This is discussed in more detail in Chapter 6.

11.33. Lord Leach of Fairford, speaking as Chairman of Open Europe, called the cards "tokenist" (Q S47). Neil O'Brien and David Heathcoat-Amory MP explained the reasoning behind this position (QQ S98–102). The yellow card could only make the Commission think again, which national parliaments can do already. For the orange card, the bar was set so high that, if it were reached, the proposal would in any case be blocked in the European Parliament or the Council. Even the orange card only required the Commission to explain itself better. What was missing was a red card, allowing national parliaments to block a proposal altogether (see also Peers, p S155).

11.34. As evidence that the cards would be ineffective, Mr O'Brien referred to the first COSAC pilot, on the 3rd railway package in 2005. 14 chambers raised subsidiarity issues, but the package was passed regardless in 2007 (Q S100).

11.35. Brendan Donnelly agreed that the yellow card only formalised political reality (p S134). The Commission was not likely to promote a proposal which numerous national parliaments would find offensive to subsidiarity; and if they did, and those parliaments protested, the Commission would think again. A red card would have been impractical, and would also have offended the theory that the main role of national parliaments was to control national governments, leaving democratic control of the Commission to the European Parliament.

11.36. The Centre for European Policy Studies, Egmont and the European Policy Centre (in "the Joint Study")[266] agreed that the cards would not have a big

266 *The Treaty of Lisbon: Implementing the Institutional Innovations*, joint study by the Centre for European Policy Studies, Egmont and the European Policy Centre, November 2007.

APPENDIX 4: "SHALL": THE DRAFTING OF ARTICLE 12 TEU

In the case of all versions of the Lisbon Treaty the original is in practice drafted in French, from which all other texts are translated. The Lisbon Treaty inserts in the Treaty on European Union a new Article 12. In the English text considered by the Committee in its report *The EU Reform Treaty: work in progress* this read: "National Parliaments shall contribute actively to the good functioning of the Union ..." The original French text read: "*Les parlements nationaux contribuent activement au bon fonctionnement de l'Union ...*"

These remained the English and French texts in version CIG 1/1/07 REV 1 of 5 October 2007. In that version the German, Italian and Spanish texts read:

> "*Die nationalen Parlamente tragen aktiv zur reibungslosen Funktionsweise der Union bei, indem sie ...*"
>
> "*I parlamenti nazionali contribuiscono attivamente al buon funzionamento dell'Unione: ...*"
>
> "*Los Parlamentos nacionales contribuirán activamente al buen funcionamiento de la Unión, para lo cual: ...*"

In the texts of 3 December 2007, CIG 14/07, which in all five languages were (in the case of this provision) unchanged before signature, the English text had been amended to read: "National Parliaments contribute actively to the good functioning of the Union ..." i.e. "shall" had been omitted.

The French, Italian and Spanish were unchanged. The German had been amended to read: "*Die nationalen Parlamente tragen aktiv zur guten Arbeitsweise der Union bei, indem sie ...*" The change from "*reibungslosen Funktionsweise*" to "*guten Arbeitsweise*" is irrelevant for present purposes.

There is no equivalent in French to the English mandatory "shall". In legal texts the present tense is used in French to convey that meaning. The same is true of the German and Italian, which are in the present tense. The Spanish is in the mandatory future.

There are of course cases where the present tense is used in the original French in a descriptive sense, and the English is also in the present, e.g. Article 2 TEU: "The Union is founded on the values of ..."

However, whenever the French present is used in a mandatory sense, the word "shall" is used in English, e.g. "*L'article premier est modifié comme suit*" is translated as "Article 1 shall be amended as follows", even though in this particular case the present would suffice in English, and would be used in English domestic legislation.

Articles 14–19 TEU impose duties on the institutions of the Union. Each begins in French with the mandatory present which is translated into English using "shall", e.g. Article 16, where the original French reads: "*Le Conseil exerce, conjointement avec le Parlement européen, les fonctions législative et budgétaire. Il exerce des fonctions de définition des politiques et de coordination conformément aux conditions prévues par les traités*", which is translated as: "The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties."

It is very unlikely that the Court of Justice would ever have to interpret Article 12 of the amended TEU. If it did, while an argument could be made that Article 12 imposes duties on national Parliaments, it is highly unlikely that such an argument would succeed, having regard to the context and the understanding of the Member States as to its interpretation (mentioned in Chapter 11 of this report).