

THE NETHERLANDS

THE ROLE OF THE STATES GENERAL WITHIN THE EUROPEAN UNION¹

Ever since the adoption of the EEC Treaty in 1957, democracy - and more particularly parliamentary representation of citizens - has been a matter of great concern within the Netherlands parliament, the States General (*Staten-Generaal*). What was later referred to as the 'democratic deficit' was identified in the parliamentary debates already at the time the EEC Treaty was approved in 1957; the limitation of democratic representation at national level was not accompanied by parliamentary representation at the European level.² It is still a key concern in parliamentary debates at every amendment of the founding treaties today. This implies that, right from the beginning, the role of the national parliament has been viewed as part of an overall European political system.

As we shall see, one of the particularities of the debate in the Netherlands is the importance attributed to the European Parliament: its *lack* of formal powers of co-decision has been a major justification for a role of the national parliament; its *possession* of co-decisive powers as a justification to tone down that role. Nevertheless, parliament has always been active in scrutinizing European affairs, at least in certain policy sectors. In the Act on Approval of the EEC and Euratom Treaties of 1957, it was stipulated that the government was to send the parliament an annual overview of the development of European integration. This is the legal basis for an annual debate on European integration, since 1999 called 'the State of the Union debate' in which Dutch MEPs participate.³ Possibly the very first national parliamentary Resolution on

¹ This report was prepared in the context of a working party of the Netherlands Association for European Law. Texts and comments were submitted by Brecht van Mourik, Ton van den Brink and Davor Jančić (University of Utrecht), Auke Baas (EP), Thomas van Damme and Ronald van Ooik (University of Amsterdam), Florus Wijsenbeek (formerly EP), and Aniel Pahladsingh (Raad van State). Final drafting and editing was the responsibility of Leonard Besselink, University of Utrecht. Language revision has kindly been done by Alison McDonnell.

² At the time, this may have been inspired by similar concerns expressed in the *Bundestag*. The proposals for a resolution of the *Bundestag* were included in the parliamentary documents of the States General, see *Bijlagen Handelingen TK* [Parliamentary Documents Lower House] 1956-1957, 4725, No 14: 'Der Bundestag wolle beschliessen dass... 8. die Stellung der europäischen Versammlung stetig gestärkt und vor allem so entwickelt wird, das alle parlamentarischen Rechte, auf welche die nationalen Parlamente der Mitgliedstaaten durch die Ratifikation der Verträge verzichten, auf das europäische Parlament übergehen, und die Stärkung der Kontrollbefugnisse der Versammlung verbunden wird mit einer Weiterentwicklung der Kompetenzen der Kommissionen' (proposal CDU/CSU of 4 July 1957; a quite similarly worded proposal of the same date was made by the SPD).

³ In Articles 4 and 5 of the *Wetten* [Acts of Parliament] of 5 December 1957, *Staatsblad* [Official Journal] 493 and 494, the government is asked 'to report on the effects and application of the [Treaties] from which report it should appear to what extent *the institutions of the Community and the Member States, as well as our Ministers*, do justice to the necessity of a progressive expansion of employment opportunities in the Netherlands, having in view the population density and growth' (italics added). Until 1999 these annual reports were discussed in a committee meeting. The reporting duty was a compromise in order to withdraw an amendment which would have forced the government to make a declaration at ratification to the effect that the Communities and their institutions would apply the Treaties in such a manner as to take into account the demographic situation of the Netherlands as most densely populated Member State. The idea of an annual report may have been inspired by a similar undated resolution of the French *Assemblée*, reproduced in the Lower House parliamentary documents: 'a. Le Gouvernement devra présenter annuellement au Parlement, en vue de son approbation, un compte rendu de l'application du Traité de Communauté Economique Européenne et des mesures économiques fiscales et sociales intervenues dans la Communauté, en

guaranteeing the role of a national parliament was adopted by the Netherlands Lower House [*Tweede Kamer*] on 11 January 1967:

‘The House, [...] judges that the Netherlands Government shall not agree to definitive decisions in the Council on Community measures concerning the size and distribution of the tax burden unless it has previously consulted the Netherlands Parliament.’⁴

In this report, we first describe the role of the States General with regard to EU affairs in terms of the situation as it is at present, *before* the entry into force of the Lisbon Treaty. We discuss some relevant constitutional features, the parliamentary practice and how they affect the relations between government and parliament as well as the legitimacy of the EU. Finally, we discuss issues which arise under the Lisbon Treaty and how the new Treaty will affect the normative framework and practice of the States General. We shall see that in practice the States General are anticipating the situation that will arise under that Treaty.

I CONSTITUTIONAL FRAMEWORK

The manner in which the States General are involved in European decision-making is at least in part an expression of some general constitutional characteristics of the Netherlands system of government. In this section we describe the constitutional features of the parliamentary system in the Netherlands and the committee system in parliament. Next we discuss the committees which are more particularly in charge of EU affairs, and the constitutional provisions on the role of parliament which are relevant to parliamentary oversight of EU decision-making.

We first make a preliminary observation of a comparative nature. This concerns the ideological basis of the institution of parliament, or rather, the absence of an ideological basis. The Netherlands Constitution, the *Grondwet*, does not contain a clause on ‘sovereignty of the people’, nor any provision which identifies democracy with parliamentary institutions. Such clauses were indeed included in a series of - mostly ineffective - constitutions inspired by the French model (and sometimes dictated by the French ambassador or other representatives); but these were abolished with relief in 1814/1815.⁵ Traditionally, democracy has also always been practised through institutions of what is nowadays referred to as ‘civil society’, although the 1980s saw the abolition of the accompanying system of wide consultation of civil society through advisory bodies. The broader notion of democracy has, however, remained very much part of the broad consensus-seeking civil culture in the Netherlands.

exposant les mesures qu’il a prises ou qu’il entend prendre pour faciliter l’adaptation des activités nationales aux nouvelles conditions du Marché.’

⁴ *Motie* [Resolution] introduced by MPs *Berg c.s.* 11 January 1967. Bijlage Handelingen Tweede Kamer [Appendix to the Minutes of the Lower House], 1966-1967, 8556, nr. 8. Translation by the rapporteur.

⁵ On the historical explanation for the absence of a strong constitutional doctrine of sovereignty, see the Netherlands report, *An Open Constitution and European Integration: The Kingdom of the Netherlands*. In: FIDE, XVII. Kongreß I. *Nationales Verfassungsrecht mit Blick auf die europäische Integration*. Fédération Internationale pour le Droit Européen. (Deutsche Wissenschaftliche Gesellschaft für Europarecht und Nomos Verlagsgesellschaft, Baden-Baden. Berlin 9.-12 Oktober 1996, [volume I], 361-394; SEW Tijdschrift voor Europees en economisch recht, 6(44), June 1996, 192-206.

The absence of a strong constitutional notion of sovereignty of the people confirms that, at least in this respect, the Netherlands constitution is of the British type and not of the continental European type. This, combined with a much broader democracy principle than one identifying it with parliamentary institutions, means that an approach like in the German *Lissabon Urteil* would be hard to conceive in the Netherlands (had it had a competent court to adjudicate an infringement of the ‘democracy principle’ in the first place).

1. Constitutional features of the parliamentary system

The Netherlands parliamentary system contains only a ‘negative’ rule of confidence: a government does not need the positive expression of the confidence of parliament, but shall resign upon the adoption of a motion of censure. Due to the system of proportional representation in a multiparty political culture, parliament is only made up of minority parties. Hence, there is always the need to form coalitions in order to have cabinets enjoying the support of a majority in parliament. Since the Second World War, there have practically always been cabinets enjoying positive support from a majority in the Lower House.

The States General are a bicameral parliament. The Houses are called *Tweede Kamer* (literally, ‘second chamber’) and *Eerste Kamer* (literally, ‘first chamber’). Confusingly, at least for the foreign scholars engaged in comparative parliamentary studies, the *Tweede Kamer*, ‘second chamber’ comes first in terms of powers and political prominence, and the *Eerste Kamer*, ‘first chamber’, comes second. When we refer in this report to the Lower House, we mean the *Tweede Kamer*, while we use Upper House to refer to the *Eerste Kamer*.

A general feature of bicameralism in the Netherlands is that, unlike most other bicameral systems it is consecutive (or diachronic): the *Tweede Kamer* is *always* first to deal with legislation, and only after a bill has been adopted by it, it is sent for deliberation and a vote to the *Eerste Kamer*.

The powers of the *Tweede Kamer* with regard to legislation are broader than those of the *Eerste Kamer*. The Upper House does not have the right to initiate bills, nor does it have the right of amendment. That the Upper House has the last word - "the final say" - on a bill is one of those interesting inconsistencies which are the charm of so many constitutional systems.

There is some disagreement between constitutional lawyers as to the question whether the *Eerste Kamer* can force a cabinet to resign through a motion of censure. This is because only the *Tweede Kamer* is involved in forming a cabinet after general elections (or after a cabinet has resigned without general elections being held). This leads some people to argue that, if it is not in its power ‘to make’ a cabinet, the *Eerste Kamer* can not be in the position ‘to break’ a cabinet. This view is not generally shared.⁶ There is general consensus, however, that causing a cabinet to fall, unless in exceptional situations, would not befit its proper role for the Upper House to be in the floodlights of day-to-day politics. With few exceptions, members of the *Eerste Kamer* are, unlike members of the *Tweede Kamer*, part time politicians.

⁶ In 1999, the rejection (by a majority of one vote) of a government bill introducing a corrective referendum in the Constitution was reason for the cabinet to tender its resignation. As the government can take the rejection of a government bill as a vote of no-confidence, the *Eerste Kamer* can effectively cause the fall of a cabinet. More commonly, individual ministers and state secretaries have resigned as a consequence of criticisms and rejection of proposals in the *Eerste Kamer*; most recently, in 2003 (Minister of the Interior).

There is no mechanism for reaching consensus between the Houses, which guard their independence towards each other. This results mainly from their respective roles in the legislative process: they decide consecutively, and independently of each other - the Upper House always after the Lower House has adopted a bill, with no possibility of referring the bill back from the Upper House to the Lower House.

There are two provisos to this mutual independence with regard to non-legislative matters discussed in both Houses. The first is that sometimes the Houses cooperate in a joint committee, particularly with regard to delegations to (inter)parliamentary assemblies, and also on two occasions with regard to EU affairs. This was the case at the time of the second EU Convention, which drew up the abortive EU Constitution. As we shall see, this was also temporarily the case with regard to the subsidiarity review of draft EU legislative measures.⁷ A second proviso is that, on the whole, the *Eerste Kamer* adheres rigorously to a less prominent political role than that of the *Tweede Kamer*. Politically, the *Tweede Kamer* is stronger than the *Eerste Kamer*: the Upper House is meant to be (and is) a *chambre de réflexion*. With regard to EU affairs, this has most recently led to the articulation by the *Eerste Kamer* of a doctrine of 'complementariness' with regard to its role in non-legislative procedures: the *Eerste Kamer* is complementary to the *Tweede Kamer* and should not deal with matters which are already dealt with by the *Tweede Kamer* if this would result in overlap.⁸

2. The parliamentary committee system in the Netherlands

In order to understand parliamentary practice regarding EU decision-making, it is crucial to know how the committee system functions. Parliamentary committees play an important role in the general work of both the *Tweede Kamer* and the *Eerste Kamer*.

The existence of parliamentary committees is assumed in Article 71 of the *Grondwet*, which mentions these committees with respect to parliamentary immunity. There are no further constitutional provisions on parliamentary committees. The tasks and powers of the various committees vary. Most of the committees are involved in the legislative process and political oversight of government with a view to holding it to account.⁹ As regards bills, committees as a rule only draft members' written questions to the government concerning the bill; the government answers these in writing. A committee can also hold a committee meeting together with the responsible member of government on a bill. A fairly distinctive feature is that traditionally there were no *rapporteurs* in a committee. What is more, the committee as such never takes a stand on a bill; it limits itself to deciding that the bill has been prepared sufficiently for a plenary meeting on it to be held. MPs can already propose amendments at committee stage, but this is not a decision of the committee, but something to be decided on by the plenary.

⁷ The States General also meet in 'Joint Session'. The *Grondwet* limits the decisions to be taken in joint session to a specified number of situations in which separate and contrary decisions of the Houses are considered undesirable (e.g. certain bills concerning the King and the Royal Family, declaring the country in a state of war). The Houses can also meet in Joint Session for purposes other than decision-making, e.g. the annual speech from the throne, and sometimes when receiving a foreign head of state or government to address the States General.

⁸ Letter of the Speaker of the *Eerste Kamer* to the Speaker of the *Tweede Kamer*, EK 2008-2009, 30953, G; and her speech of 8 September 2009 <www.europapoort.nl>.

⁹ See P.P.T. Bovend'Eert, H.R.B.M. Kummeling, *Het Nederlandse parlement*, Kluwer, Deventer 2004, p. 150.

The political scrutiny of government action by committees usually takes the form of written questions or meetings with a member of government. Such meetings – like all committee meetings – are public unless decided otherwise. Also here, there are rarely *rapporteurs* appointed, and traditionally the committee as such does not take a stand, nor does it report as a committee to the plenary assembly, but will refer a matter to the plenary if the debate with the government in a committee gives rise to further debate in the plenary.

We shall see below that the scrutiny of EU documents has necessitated a change in the tradition of not formulating a point of view of the committee: in this context, it is often the very purpose of the committee to propose a particular point of view to the plenary. In addition, the EU Affairs committee refers matters to Standing Committees. Initially, this was regarded with suspicion as it suggested that the EU affairs committee could interfere with the autonomy of the other committees. This has been overcome, also by a practice of having a meeting of two (or more) committees together.

Adopting a position by a committee has been the most radical change to parliamentary practice wrought by the necessities of scrutinizing EU decision-making.

Furthermore, the *Tweede Kamer* has introduced the possibility of having a *rapporteur* for the committee, basically to prepare the committee's work. In practice, this has been used only very rarely. Recently, however, two *rapporteurs* were appointed by the EU Affairs Committee, who prepared a proposal for a procedure to be followed after the introduction of parliamentary scrutiny procedure as required by the Act of Approval of the Lisbon Treaty.¹⁰

2. a. *Tweede Kamer*

Unless the *Tweede Kamer* decides otherwise, the Speaker of the *Tweede Kamer* decides on the composition of the committees on the basis of approximately proportional representation of the parliamentary groups. Most committees have around twenty-five members. The Rules of Procedure of the *Tweede Kamer* distinguish between different kinds of committees. The most important ones for the purpose of this report are the standing committees and the general committees.

According to Article 16 of the Rules of Procedure of the *Tweede Kamer* (*Reglement van Orde van de Tweede Kamer*), there is a 'standing committee' for each ministry. There are also standing committees for European Affairs and for Netherlands-Antillean and Aruban Affairs. The standing committees are involved in the law-making process and scrutinize the government. They carry out the preparatory examination of bills and hold regular consultations with the minister or state secretary concerned.¹¹

Secondly, the *Tweede Kamer* has committees for the duration of a parliamentary session – which in the Netherlands is the duration of the House from the one election to the next. This is the case with 'general committees'. A 'temporary committee' may last for a shorter period.

'General committees' are established to deal with matters that are of special importance for the performance of the duties of the House or matters that concern all ministries. General committees have a coordinating role. Their main task is to inform, support and advise the other parliamentary committees. In order to carry out their coordinating task, general committees have the same powers as standing committees.

¹⁰ The *Eerste Kamer* does not allow the appointment of *rapporteurs*, but allows the forming of sub-committees composed of at least three members.

¹¹ Karel Kraan, *The Kingdom of the Netherlands*, in: Lucas Prakke, Constantijn Kortmann (Eds), *Constitutional Law of 15 EU Member States*, Kluwer, Deventer 2004, p. 617.

'Temporary committees' are set up for specific matters and do not have the power to carry out the preparatory examination of bills.¹² The difference between a temporary committee and the general committee lies in the different purpose for which they are established. The temporary committee is established to accomplish a specific task only, while the general committee is to promote a broader general interest.¹³

2.b. *Eerste Kamer*

Parliamentary committees also play an important role in the *Eerste Kamer*. As in the case of the *Tweede Kamer*, the Speaker of the *Eerste Kamer* decides on the composition of the committees and here, too, the aim is to achieve proportional representation of the parliamentary groups.¹⁴

The Rules of Procedure of the *Eerste Kamer* (*Reglement van Orde van de Eerste Kamer*) mention two committees explicitly, which are the Household Committee and the Petition Committee.

Furthermore, the Rules of Procedure prescribe that the *Eerste Kamer* has to establish at least one standing committee for every ministry. For some ministries the *Eerste Kamer* has established more than one standing committee.¹⁵

The *Eerste Kamer* can also establish special committees to prepare proposals of an extraordinary character. The powers of the parliamentary committees of the *Eerste Kamer* are comparable to those of the parliamentary committees in the *Tweede Kamer*.

According to Article 32 of the Rules of Procedure, the standing committees and the special committees prepare the plenary meeting on bills orally and in writing. Furthermore, the committees enter into debate with the government. Like the *Tweede Kamer*, the *Eerste Kamer* also has the right to set up a Committees of Inquiry.¹⁶

3. Constitutional provisions on the role of parliament regarding the EU

Although a series of proposals for constitutional amendment, in order to include references to the European Union, have been advanced in a study commissioned by the Netherlands government,¹⁷ there are at present no such explicit references in the *Grondwet*. Nor is there any case law in the

¹² See Article 90 of the Rules of Procedure of the *Tweede Kamer*; an English version is no longer available via the website of the House since it was 'modernized' a few years ago.

¹³ J.A. van Schagen, *De Tweede Kamer der Staten-Generaal, Een staatsrechtelijke studie over haar organisatie en werkwijze*, W.E.J. Tjeenk Willink, Zwolle 1994, p. 83.

¹⁴ See Bovend'Eert and Kummeling, [see footnote 9 above], p. 158.

¹⁵ E.g. in the field of Foreign Affairs the *Eerste Kamer* has established three standing committees: the Committee on Foreign Affairs, the Committee on European Cooperation Organizations and the Committee on Development Cooperation.

¹⁶ Contrary to the *Tweede Kamer*, it has never used that right. See Bovend'Eert and [footnote 9 above], p. 158-159.

¹⁷ L.F.M. Besselink et al, *De Nederlandse Grondwet en de Europese Unie*, Europa Law Publishing, Groningen 2002. These range from amending the present provision which entrusts the government with the task of promoting the development of the international legal order (the present Article 90 *Grondwet*) to include also promoting the development of the European legal order, to the introduction of a provision either to prohibit or to facilitate 'accelerated implementation' by reducing the role of parliament in the adoption of EU implementing legislation which leaves little discretion to the legislature. None of these have been taken up so far. A bill to amend the *Grondwet* to require a two thirds majority for all amendments to the EU founding treaties is pending in the Lower House. During a first plenary deliberation it transpired that there is no majority for this proposal. Recently, a committee of experts has been commissioned to investigate whether the inclusion of a constitutional provision on the European Union is desirable (*Staatscommissie Grondwet*); the committee is to report by the summer of 2010.

Netherlands on the role of the national parliament or the European parliament (there is no specialized constitutional court in the Netherlands, competent to provide judicial guarantees of the role of parliament). It is up to parliament itself to guard against infringements of its constitutional and political position. All this is not to say that there are no significant constitutional provisions which apply to European Union affairs in the Netherlands. In the following, we discuss the most important ones, which concern the attribution of public authority to international organizations, the approval of primary EC and EU law, and the legislative role in implementing (secondary) EC and EU law.

3.a. Attribution of public authority to international organizations

Article 92 of the *Grondwet* authorizes transfers of sovereignty to the European Union, although the provision neither refers to the concept of sovereignty, nor to the European Union:

Legislative, executive and judicial powers may be conferred on international organizations under public international law, by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3.

Article 91 paragraph 3 requires two thirds of the votes in each of the Houses of Parliament if the treaty provisions diverge from the Constitution. This provision has so far not been used with regard to the European founding treaties or their amending treaties.

3.b. Parliament and Treaty Approval

Treaty ratification is subject to Article 91 of the *Grondwet*, as well as to the Act on the Approval and Publication of Treaties.¹⁸ Treaties require the approval of both Houses of Parliament. Approval may be given either tacitly or expressly by act of parliament.¹⁹ The EU and European Communities treaties have always been submitted for approval by act of parliament.

One of the themes in the consecutive debates on the approval of the founding treaties and their amendments has been concern for the democratic legitimacy of the European integration process. These debates have centred on strengthening the European Parliament rather than the national counterpart.²⁰ The introduction of the co-decision procedure was generally perceived as an important step forward, but some MPs pointed out what they perceived as shortcomings in the functioning of the European Parliament as a fully-fledged parliament. Democratic concerns focused particularly on the newly introduced provisions on Justice and Home Affairs: the lack of parliamentary oversight with regard to these issues led the Netherlands parliament to introduce a requirement of parliamentary consent with regard to binding decisions in this area (see below section II subsection 2c). This right was to a great extent abolished during the recent parliamentary approval of the Treaty of Lisbon. As the Treaty of Lisbon introduces the co-

¹⁸ The most important provisions of this Act of Parliament in English can be found in L.F.M.Besselink, *Constitutional Law of the Netherlands. An Introduction with Texts, Cases and Materials*, Ars Aequi Libri, Nijmegen 2004.

¹⁹ The Act on the Approval of Treaties establishes that express approval is by act of parliament, while tacit approval takes place if no House, or one fifth of its members, request express approval within a period of thirty days of the treaty being laid before parliament.

²⁰ *Handelingen TK* [Verbatim Records of Lower House] 1992-1993, 3 November 1992. When approving the EEC Treaty in 1956-1957, the first committee report immediately regretted that the Treaty was not discussed in the consultative assembly of the ECSC between the six governments and the parliamentary representatives of the six parliaments, and considered how this affected the position of the national parliament vis-à-vis the government, *Kamerstukken TK* [Parliamentary Documents *Tweede Kamer*] 1956-1957, 4725, nr 9, p. 2.

decision procedure for most subjects in the field of Justice and Home Affairs, it was felt that the right of national parliamentary consent had become redundant.

An important event in the recent history of parliamentary approval of the EU treaties in the Netherlands was the negative outcome of the consultative referendum on the European Constitution in 2005, held at the initiative of the national parliament.²¹ The outcome of the referendum was a disappointment to many politicians, as the vast majority in Parliament had actually been in favour of the European Constitution. The approval of the Treaty of Lisbon triggered the referendum discussion once more. The *Raad van State* [Council of State] found that the Lisbon Treaty lacked some of the important constitutional features of the Constitutional Treaty. The Council of State formulated a set of criteria – without answering the question whether these were fulfilled or not – for holding a referendum. All this was eagerly understood by both government and a parliamentary majority to imply a negative opinion as to the need to hold a referendum on this occasion. This was an important factor in parliament's decision to refrain from organizing a referendum.²²

A final note on the parliamentary approval of European treaties relates to timing. The approval of treaties is, by its very nature, the final stage in the decision-making process preceding entry into force. This leaves national parliaments with very few possibilities to influence the substance of the texts, as re-negotiation has become increasingly difficult by that stage. The general trend according to which national parliaments are involved at earlier stages in the decision-making process, does also emerge in the field of treaty negotiations, however. The government's position in the negotiations on the Treaty of Lisbon was extensively debated in parliament beforehand.²³

3.c. *Implementation of EU law*

A further form of involvement of the States General in EU affairs is its legislative role in implementing EU law. Directives and framework decisions, but also other EU legal instruments need implementation at the national level. This often results in the adoption of acts of parliament. On such occasions, the national parliament does not only act as a legislature in which the national citizens are represented, but also as an institution of a Member State entrusted with the execution of EU law. The position of national parliaments in the context of the implementation of EU law may, therefore, be qualified as somewhat ambiguous. Yet, the States General have taken on their new role rather inconspicuously, without consciously identifying their position. As a result, no fundamental arrangements have been made with regard to the implementation of EU law. The *Grondwet* contains no provisions specific to EC and EU implementation, nor is a general delegation provision comparable to that in the British European Communities Act in force. In terms of formal arrangements, the adoption of EU implementing legislation is therefore subject to the same procedures and rules as the adoption of autonomous national legislation as provided for in Articles 81 and following of the *Grondwet*.

²¹ On the political background see L.F.M. Besselink, Double Dutch: the Referendum on the European Constitution. In: *European Public Law*, volume 12, issue 3, 2006, p. 345-352. For an analysis of the constitutional background see L.F.M. Besselink, The Dutch Constitution, the European Constitution and the Referendum in the Netherlands. In: Anneli Albi, Jacques Ziller (eds.), *The European Constitution and the National Constitutions: the Ratification and Beyond*, Kluwer Law International, Dordrecht, 2006, p. 113-123.

²² Further details are in B. van Mourik and L.F.M. Besselink, The role of the National Parliament and the European Parliament in EU decision-making: The approval of the Lisbon Treaty in the Netherlands. In: *European Public Law*, volume 15, issue 3, 2009, p. 307-318.

²³ *Kamerstukken TK*, 2006-2007, 21 501.

Nevertheless, the specific nature of EU implementation is reflected in the need to implement EU law in a timely fashion. In the past, different proposals have been made to speed up the EU implementation process. Most notably, the introduction of ‘Henry VIII-clauses’ into relevant acts of parliament, on the basis of which acts of parliament can be set aside and replaced by government decrees, were proposed by the Netherlands government in 1999.²⁴ After much academic and political debate, however, the present government has rejected such proposals – one argument in the academic debate was that such clauses infringe Article 81 of the Constitution which specifies that the legislative power rests with the States General and government acting jointly.²⁵ Specific delegation provisions in acts of parliament remain, therefore, the most important instrument for speeding up EU implementation and are widely used in practice.²⁶

Article 339 of the *Guidelines for the drafting of legislation*²⁷ provides that in case of EU implementation, delegation of regulatory power is more acceptable, as:

- the EU instrument to be implemented leaves the national legislature fewer possibilities to make its own policy choices;
- the instrument to be implemented is more detailed;
- time constraints for the implementation are the more pressing;
- the chances are high that the EU instrument will be changed more often in the future;
- delegated legislation is used more frequently in the sector.

Obviously delegation is more appropriate in areas such as environmental protection and agriculture than in the field of cooperation on criminal matters. In the latter case, the legality principle as it is understood in the continental legal orders, is an obstacle to the delegation of regulatory power and guarantees the input by the national parliament.

Although EU implementation heavily constrains the national legislature, both in substantive and in procedural terms, implementation often involves more than simply ‘cut-and-paste’. Adding extra legislative clauses not required by EU law (so-called ‘gold plating’) is often seen as increasing the regulatory burden for national businesses, thereby harming national competitiveness. Yet, EU legislation often explicitly allows for national legislatures to take additional, more stringent measures (minimum harmonization). In case of vague and unclear provisions in EU legislation, the principle of legal certainty even requires the adoption of additional national provision. This in turn has its own drawbacks, as the existence of national discretion in EU legislation has been identified as one of the main reasons in the Netherlands for late implementation.²⁸

²⁴ A. van den Brink, Implementing EU law in the Netherlands: the current System, its Limitations and Possible Alternatives, *European Public law*, volume 12, issue 1, March 2006, p. 110-125.

²⁵ See the manual for legislative draftsmen: *Handleiding Wetgeving en Europa*, Den Haag 2008, p. 114; Art. 81 Netherlands Constitution: ‘Acts of Parliament [Dutch: *wetten*] shall be enacted jointly by the government and the States General.’

²⁶ For an overview of different types of delegation provisions in Netherlands legislation: Besselink and others, 2002 [see footnote 18 above], Annex 3.

²⁷ *Aanwijzingen voor de regelgeving*; this is a set of instructions addressed to all departmental civil servants issued by circular letter by the Prime Minister on 18 November 1992, and regularly revised thereafter.

²⁸ *Handleiding Wetgeving en Europa*, Den Haag 2008, p. 116.

All in all, EU membership has substantially changed the legislative function of the Netherlands parliament and provided new challenges. Although no constitutional changes have been made to the structure and the organization of the national legislative power, the national parliament has taken on a double role. As the Netherlands legislature representing the Netherlands people, it reflects the idea of government by the people, for the people. In implementing EU law it has taken on a European responsibility and could be said thus also to have become a 'European' parliament, albeit sometimes in order to adapt European legislation to 'local' circumstances in accordance with locally preferred standards.

II THE PRACTICE OF PARLIAMENTARY INVOLVEMENT

1. The committee procedures in European Affairs

1.a. The Tweede Kamer European Affairs Committee

As we mentioned, the *Tweede Kamer* has a Standing Committee for European Affairs (*Commissie EU-zaken*), which we shall refer to as the European Affairs Committee. From 9 October 1986 onwards,²⁹ European affairs were dealt with by a General Committee on European Affairs, but in 2002 the *Tweede Kamer* decided to give this general committee a permanent status by changing its Rules of Procedure. The decision to transform the General Committee on European Affairs into a Standing Committee was based on an evaluation of the work of the Committee in the years 1994-1998.³⁰ The European Affairs Committee of the Lower House mainly plays a coordinating role. The Committee coordinates the parliamentary oversight of government action during the negotiations at the European level. It also alerts and advises the other relevant standing committees about specific European developments in their policy areas, and refers matters on to them in its 'gatekeeper' function, as further elucidated below.

Ultimately, responsibility for parliamentary oversight over government action with respect to the European decision-making process lies predominantly with each of the relevant standing committees. General government policy regarding broader developments in the EU, however, is scrutinized by the European Affairs Committee.

Every year the European Affairs Committee organizes the parliamentary debate on 'The State of the Union', which was mentioned above.

The committee also organizes an annual consultation on the European Commission's legislative and work programme. At the request of the European Affairs Committee, the other standing committees give their views on the programme as input for the discussion.³¹

1.b. The Eerste Kamer Committee on European Cooperation Organizations

According to Article 32, paragraph 2 of the Rules of Procedure, the standing committees and the special committees not only prepare the debates on bills, but also stimulate discussion with the government, also about other issues as far as matters within their remit are concerned. On this basis, the committees of the *Eerste Kamer* are involved in scrutinizing European legislative

²⁹ *Handelingen TK 1986-1987*, p. 335.

³⁰ *Kamerstukken TK 1997-1998*, 26 054, No. 1, p. 14 and TK 2001-2002, 28 452.

³¹ See www.tweedekamer.nl.

proposals. The Committee on European Cooperation Organizations (*Commissie ESO*), was established on 23 June 1970, long before the *Tweede Kamer* set up a European affairs committee. It used to have a 'gatekeeper' function, like that of the Committee of European Affairs in the *Tweede Kamer*. This has changed recently.

In September 2009, the *Eerste Kamer* adopted a new working method with respect to the deliberation of European proposals coming directly from Brussels. The Upper House no longer waits for the information sent from the government (in the form of so-called *fiches*, or notices), but acts independently on the basis of documents sent directly from Brussels. The essence of this new working method is that the standing committees themselves are generally responsible for following European initiatives within their own remit, without any intervention from the Committee on European Cooperation Organizations.³² The standing committees will take the EU Commission's legislative and work programme as the basis for selecting documents for their deliberations. The Committee on European Cooperation Organizations plays a coordinating role in this process in that it monitors and evaluates the work of the various standing committees.

The Committee on European Cooperation Organizations will retain an important role in the general promotion of the involvement of the *Eerste Kamer* in European Affairs.

1.c. The Eerste Kamer Committee for the Justice and Home Affairs Council

Another highly important Committee involved in European Affairs in the *Eerste Kamer* is the Standing Committee for the Justice and Home Affairs Council. This committee was established to give effect to the parliamentary consent procedure that was introduced in the Act of Approval of the Maastricht Treaty.

Under the consent procedure, the government was quite dependent on getting a 'green light' from this Committee, so it provided it with a great deal of information, including confidential information, at a very early stage of decision-making. This Standing committee therefore acquired a stronger position in EU affairs than any other committee. When the Treaty of Lisbon enters into force, the Committee will continue its work regarding those very few matters for which the parliamentary consent procedure still exists within the Area of Freedom, Security, and Justice (Title V of the consolidated version of the Treaty on the Functioning of the EU), in which the EP has no co-legislative powers. Although the Committee will remain involved in this policy area, it can be expected gradually to fade into the background with the eclipse of the consent requirement as a consequence of the introduction of co-decision for the European Parliament.

The Committee on European Cooperation Organizations and the Committee for the Justice and Home Affairs Council have together played an important role in promoting general parliamentary involvement with respect to EU affairs.

1.d. The Temporary Joint Committee for Subsidiarity Review

Until September 2009, there was a Temporary Joint Committee for Subsidiarity Review, first established in 2006, which examined whether European legislative proposals comply with the legal basis requirement and the principles of subsidiarity and proportionality.

The States General had taken the lead in a structured subsidiarity assessment. Parliamentary reports in 2003 ("*Op tijd is te laat*" [In time is too late]) and 2006 ("*Parlement aan zet*" [Parliament's turn to make a move]) expressed the view that the States General should reinforce its position in relation to the scrutiny of draft proposals for European legislation. One of the results was the setting up of a mixed committee (of the two Houses) on subsidiarity in 2005, in

³² See the speech of the Speaker of the *Eerste Kamer* of 8 September 2009 <www.europapoort.nl>.

2006 converted in the Temporary Joint Committee for Subsidiarity Review (*Tijdelijke Gemengde Commissie Subsidiariteitstoets* or *TGCS*).

The decision to establish a joint committee was not undisputed. Questions were raised about the composition of the committee, as it was equally composed of members of the two Houses. Some MP's argued that a joint committee would - whatever its composition - conflict with the principle of primacy of the *Tweede Kamer*.³³ In the end a compromise was struck by giving the joint committee a temporary status.

Recently, the *Eerste Kamer* evaluated the work of the Temporary Joint Committee for Subsidiarity Review. The conclusion of this evaluation was that the work of the Committee should not be continued.³⁴ The *Eerste Kamer* did not see added value in continuing the committee, and found that the Committee leads to an unnecessary delay of at least a week. The *Eerste Kamer* reconsidered its role in the European decision-making process, especially in relation to the *Tweede Kamer*. The main conclusion of this exercise was that the work of the *Eerste Kamer* should not overlap, but should complement the work of the *Tweede Kamer*. According to the *Eerste Kamer*, this means that the two chambers should conduct their own separate subsidiarity checks, while preventing overlap through mutual exchange of information, and striving for 'like-mindedness' in the assessment. Upon reading the suggestions for reform, one cannot help getting the impression of two '*séparés inséparables*'.

The argument of the 'complementarity' of the *Eerste Kamer* vis-à-vis the *Tweede Kamer* is not altogether convincing from a constitutional point of view. As a matter of fact, just as was the case under the consent procedure, most of the work was done by the *Eerste Kamer*, and comparatively little by the *Tweede Kamer*.

The *Tweede Kamer* has not excluded the creation of a separate Subsidiarity Committee, although for the time being the matter is left to the regular standing committees, which will also have a role in the 'scrutiny reserve' procedure which will soon be put in place (see below section III *in fine*, and IV, 1). The *Eerste Kamer* decided to entrust the task of subsidiarity review to the respective standing committees for each ministry.³⁵

2. The existent instruments of the Netherlands parliament with regard to EU decision-making³⁶

The system of scrutiny by the States General is a mixture of a 'document-based' and a 'procedure-based' model. The procedures, as described below, can basically be divided into three types. The subsidiarity and *fiches* (written notices) procedures are document based, the 'agenda

³³ *Handelingen TK 2005-2006*, 35. See J.J. van Dijk, *Hoe verging het de Tijdelijke Commissie Subsidiariteitstoets (TCS)?*, [How did the Temporary Committee on Subsidiarity do?] in: *Regelmaat*, 2007, afl. 4, p. 141-142. The author is a senator who argues that there were no constitutional objections, since the opinions of the joint committee would be put to the plenary of the Houses, each of them remaining fully free to take their own view on the matter.

³⁴ *Kamerstukken EK 2008-2009*, 30953, F and G (15 June 2009).

³⁵ *Kamerstukken EK 2008-2009*, 30953, G (15 June 2009). Report of a meeting of the Committee for European Affairs of 2 September 2009; *Besluitenlijst van de procedurevergadering van woensdag 2 september 2009*, p. 3-4, under point 12 <www.tweedekamer.nl>, which suggests that a Temporary Committee of the House on Subsidiarity Review shall be established consisting of the *Tweede Kamer* members of the previous Joint Committee.

³⁶ The description of the existing Dutch instruments is largely based on Van Mourik and Besselink, *The Roles of the National Parliament and the European Parliament in EU Decision-making: The Approval of the Lisbon Treaty in the Netherlands*, *European Public Law* 15, no. 3 (2009): p. 307-318.

procedure' is procedure based. The consent requirement in the Area of Freedom, Security and Justice is based on assessment of documents, but in practice has strong features of the procedure based model, since the consent in relation to a document frequently depends on how and when it is dealt with in the decision-making procedure in the EU Council.

There is considerable confusion over terminology. This has arisen in particular concerning the consent requirement. The parliamentary consent procedure in the Netherlands should not be considered a 'mandating procedure' strictly speaking. The parliamentary consent procedure gives the power to parliament to say no to a specific European legislative proposal, but the procedure does not formally empower parliament to give instructions or mandates with respect to the negotiation position of the government. The parliamentary consent procedure therefore differs from, for instance, the Danish system, where ministers negotiate on the basis of a specific mandate, which is submitted to parliament (in fact: a parliamentary committee mandated to act for the *Folketing*) in advance, for the purpose of seeking the parliamentary committee's agreement to the terms of the mandate.

All the procedures described below operate with Article 68 of the *Grondwet* as a backdrop; this reads:

'Ministers and Secretaries of State shall provide, orally or in writing, each of the Houses separately or in joint session, with any information requested by one or more members, provided that the provision of such information does not conflict with the interests of the State.'

This provision also applies to the information which is requested with regard to EU decision-making. On the basis of this constitutional obligation, some specific instruments have been developed in parliamentary practice in order to scrutinize EU decision-making, mainly on the basis of a set of requests for continuous information from the government.

2.a. Government 'Fiches'

First, there is what is known as the '*fiches* procedure'.³⁷ Through this procedure both Houses of parliament are informed on a monthly basis about new European Commission proposals which, in the opinion of the relevant minister(s), have 'substantial consequences for the national legal order'.³⁸ The European Commission proposals are summarized for the government by ministries at the request of a committee of civil servants from various ministries, on special forms, called '*fiches*'. The *fiche* contains a brief summary and an assessment of the subsidiarity and proportionality of the proposal. It also contains an indication of a negotiating position on the basis of the effects of the proposal for the Netherlands legal order, and it should contain information on financial consequences of the EC proposal. These *fiches* are sent to both Houses

³⁷ See for an extensive description of the *fiches* procedure N.Y. Del Grosso, *Parlement en Europese Integratie*, Kluwer, Deventer 2000, p. 173-177.

³⁸ Aanwijzing 332 of the 'Aanwijzingen voor de regelgeving' (*Guideline on legislation by the Prime Minister nr. 332*). The origin of the *fiches* procedure goes back to a parliamentary debate in 1990, in which the Minister of Finance was requested to give Parliament information on EC legislation concerning insurances more frequently (*Handelingen TK* 14 February 1990, 40-2323). Subsequently the government was requested to extend this procedure to all policy areas (*Kamerstukken TK* 1989-1990, 21 109, No. 17). The government was willing to do that, and promised to present a list of Commission proposals on a monthly basis (*Kamerstukken TK* 1989-1990, 21 109, No. 36).

of Parliament. In the period 2001 to May 2004, 523 fiches were sent;³⁹ in the period January 2005 to December 2008, 768 fiches were sent.

When the *fiches* arrive in the *Tweede Kamer*, the Standing Committee on European Affairs selects those which are of specific interest and forwards them to the relevant Standing Committees. Despite the fact that the *fiches*-procedure enables the Lower House to influence the government with respect to European decision-making at an early stage, most *fiches* are not discussed on a regular basis.⁴⁰

The *Eerste Kamer*, quite contrary to the *Tweede Kamer*, used to make a more intensive use of the *fiches*. On the basis of the *fiches*, officials of the European Bureau of the *Eerste Kamer*, which support members of the Upper House in European affairs, made an e-file and put this online.⁴¹ The e-file also contained other information from these officials for the Committee on European Cooperation Organizations and for further consideration in the other Standing Committees of the *Eerste Kamer*. If the Committee on European Cooperation Organizations decided to forward a proposal to a Standing Committee, the proposal was assigned a number of stars (ranging from one to three), indicating an assessment of their importance.⁴² The Standing Committees discussed these proposals on a regular basis and, if they wanted more information, consulted the government.⁴³

Since 1 September 2009, the Upper House has changed its practical procedures, as we mentioned above. In the new working method, the e-files are no longer based on the government *fiches*, but on the decision of a standing committee that a European legislative proposal is of special importance.

2.b. Agenda Procedure

Another instrument of the Netherlands parliament for supervising the government with regard to European decision-making is the so-called 'agenda procedure' in the *Tweede Kamer* – the procedure is not used in the *Eerste Kamer*.⁴⁴ Under this procedure, at least one week prior to a Council or a European Council meeting, an annotated agenda for that specific meeting is sent to parliament. Although the agendas are sent to both Houses, it is the *Tweede Kamer* in particular which discusses them, usually during the weekly 'Europe deliberation'. Participants in these meetings are members of the European Affairs Committee, members of the relevant standing committees and the ministers who will take part in the relevant Council meeting. After the

³⁹ See *Algemene Rekenkamer, Aandacht voor financiële gevolgen Europees beleid* [Attention paid to the financial consequences of European policies], Report of the General Chamber of Audit of September 2004, *Kamerstukken TK 29751*, No. 2.

⁴⁰ This confirms an earlier evaluation of the General Committee for European Affairs. See TK 1997-1998, 26054, No. 1. See also Olaf Tans, "The Dutch Parliament and the EU; A Constitutional Analysis" in: Olaf Tans, Carla Zoethout, Jit Peters, *National Parliaments and European Democracy, A Bottom-up Approach to European Constitutionalism*, European Law Publishing, Groningen 2007, p. 172. See also below, section III, 3 b and d.

⁴¹ See <www.europapoort.nl>.

⁴² The maximum of three stars was, for example, assigned to a proposal concerning the European Union Agency for Fundamental Rights (COM (2005) 280).

⁴³ Further information about the *fiches* procedure in the *Eerste Kamer* can be found in *De Eerste Kamer en Europa*, http://www.eerstekamer.nl/id/vhyxhwkzewyv/document_extern/ekeneuropa/f=/ekeneuropa.pdf, p.10-15, last consulted 5 March 2009, and *Nuttige wenken voor Leden van de Eerste Kamer der Staten-Generaal* [Useful suggestions for Members of the Eerste Kamer], Den Haag, June 2007, p. 5.

⁴⁴ See Bovend'Eert and Kummeling, 2004, [footnote 9 above], p. 300 and Del Grosso, 2000 [footnote 37 above], p. 177-189.

Council meeting, ministers give an account of what happened in ‘Brussels’ to the same members of parliament who were involved in discussing the agenda.⁴⁵

The annotated agenda of European Council meetings are always first discussed in a committee, with the possibility to introduce resolutions in the plenary, where these are debated in a brief ‘two minute’ debate. Until Spring 2003, the results of each European Council were debated in the plenary, but this is no longer the case.

For the purpose of the agenda procedure, use can be made of the relevant *fiches* for proposals on the agenda, but frequently the annotated agenda includes issues for which no *fiche* is available. This is particularly true for the European Council agendas.

2.c. *Consent requirement*

In the Netherlands, parliamentary consent is required for binding decisions in the ‘third pillar’ (Title VI of the EU Treaty which contains provisions on police and judicial cooperation in criminal matters) and decisions based on Title IV of the EC Treaty which are not (yet) taken under the co-decision procedure. A similar requirement of parliamentary consent was first introduced at the approval of the Schengen Agreement.⁴⁶ The Approval Acts of the Maastricht Treaty, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Prüm contain a similar provision.⁴⁷ The main reason for introducing the requirement of parliamentary consent was to compensate for the existence of a democratic deficit with respect to these decisions, as the European Parliament had no co-legislative role.

In practice, the major effect of the consent requirement has been that the government has informed parliament considerably more intensively about the state of negotiations, positions of the government and other member states, and parliament has in several instances influenced positions taken by the government in the Council. An actual veto has never been cast. When the Treaty of Lisbon enters into force the most important change concerns the consent requirement. Parliament agreed with the government, after a long debate on the Approval Act of the Lisbon Treaty, that the requirement of parliamentary consent should be abolished in all cases in which the EP has powers of co-decision; it is maintained only for decisions in the Area of Freedom, Security and Justice (Title V of the consolidated version of the Treaty on the functioning of the European Union) where the European Parliament has no co-legislative powers.⁴⁸

2.d. *Subsidiarity Review*

Finally, there is the subsidiarity review; until recently, a central role was played by the Temporary Joint Committee for Subsidiarity Review, but, as we mentioned above, that body is defunct since 1 September 2009. Since a *fiche* is only produced when an official Commission (or sometimes Member State) proposal has been published, while subsidiarity review (in its broad sense, and including a review of proportionality and legal basis) occurs in an earlier phase, there

⁴⁵ Olaf Tans, *The Dutch Parliament and the EU; A Constitutional Analysis*, in: Tans, Zoethout and Peters 2007 [footnote 40 above], p. 173.

⁴⁶ Amendment Van Traa-de Hoop Scheffer, *Kamerstukken TK* 1991-1992, 22140, No. 20.

⁴⁷ Lastly Article 3 and 4 of the *Rijkswet houdende goedkeuring van het Verdrag van Nice* [Act for the Realm concerning approval of the Treaty of Nice, *Staatsblad* [Official Journal] 2001, 677]. The requirement of consent was introduced in the approval act of the Treaty of Maastricht by an amendment of a member of parliament (Amendment Van der Linden c.s., *Kamerstukken TK* 1992-1993, 22647 (R1437), No. 20); the consent clauses in the acts approving the treaties of Amsterdam and Nice were included in the bill by the government.

⁴⁸ *Kamerstukken TK* 2007-2008, 31384 (R 1850), No. 11; the consent requirement is Article 3 in the Act of Approval.

are no *fiches* available to take as a starting point; if a *fiche* is produced on a dossier for which a subsidiarity review has taken place, this is included in the *fiche*. The selection of pre-proposals to be reviewed for their compatibility is, thus, not based on a *fiche*. In practice, the Joint Committee selects a number of draft proposals on the basis of the EU Commission's legislative and work programme. This concerned 11 proposals in 2008 and 16 in 2009.

2.e. Sanctions

As to the enforcement of the government duty to provide information to the Houses of Parliament and its members under Article 68 of the *Grondwet*, it is up to the individual MPs and to the relevant House respectively, to assess whether the government has fulfilled its constitutional duty to parliament in answering questions – a majority of the House is required in order to sanction any perceived infringement of this duty. Only the consent procedure provides parliament with an efficient and effective instrument in order to make the government more forthcoming in providing information than where the consent requirement does not apply.

III RELATIONS BETWEEN GOVERNMENT AND PARLIAMENT

European integration has no doubt reinforced the position of the executive at the expense of the position of parliament. As a general phenomenon, this is no different from other countries, but we here seek to give an explanation for the particular causes of this for the States General. We point to three possible explanations within the Netherlands constitutional order: these are sought in the constitutional system governing relations between government and parliament, the structure and organization of the executive in European affairs, and the position of parliament with regard to parliamentary scrutiny of European affairs.

1. Constitutional parameters of the relations between Government and Parliament

The constitutional parameters regarding the respective positions of executive and parliament in EU affairs explain executive dominance on three points: the role of parliament and executive in the conclusion and revision of the founding Treaties, the position of parliament in implementing secondary EC/EU legislation, the constitutional position of EU and EC law under Netherlands constitutional law.

1.a. Approval of (amendment of) the Founding Treaties

When entering or amending the European project, parliament can ultimately only say yes or no to whatever the outcome is of the negotiations leading to the founding treaties, the amendment treaties and the accession treaties. Of course, in the process leading to the negotiated result, the government does not act in total isolation from parliamentary involvement. But this involvement is merely deliberative, and parliament cannot force the government to adopt a particular position. Nor does the government always seek guidance from parliament; on the contrary, it involves parliament to muster support for its position, so as to make the results acceptable as far in advance as possible.

The 'convention method' does not fundamentally change the legitimacy of the result in terms of parliamentary involvement. The nomination of parliament's representatives was such that in a

broad and nuanced political party landscape of minority parties, it could exclude certain voices.⁴⁹ And although parliament met in a committee of both Houses – in itself, a pretty unique circumstance – to discuss the state of affairs in the convention a number of times, this was similarly deliberative and not in terms of seeking to steer the position to be taken by the representatives.

1.b. Implementing legislation

Obviously, the position of the legislature in implementing EC and EU directives and framework agreements is of necessity weaker than when the legislature acts autonomously. For all intents and purposes, the right to amend bills is diminished to what is allowed by the EC and EU measures. Very often, legislative implementation is through executive orders on the basis of a delegation clause in legislation. The more open the delegation clause, the broader the discretion for the executive to set the norms which they themselves execute. This reinforces executive dominance.

Unlike the UK, where there is no constitutional principle which prescribes that government action requires a basis in an act of parliament, this can be somewhat more problematic in a continental European country like the Netherlands, where the principle of legality exists, in the sense of the necessity for public authority to find a basis in an act of parliament. This principle, as well as the principle of the separation of legislative and executive powers, render ‘Henry VIII-clauses’ – which are also controversial in the UK, though that country does not have a ‘legality principle’ in the sense indicated - highly problematic from the constitutional point of view.

1.c. The status of EC law in the Netherlands legal order

Executive dominance is reinforced by the constitutional position of European secondary legislation in the Netherlands legal order under the present Constitution. The *Grondwet* is fairly unique in providing that if their provisions are directly effective, decisions of international organizations overrule conflicting national law, including provisions of the *Grondwet* itself.⁵⁰ Unlike treaties, there is no general requirement of parliamentary approval for decisions of international organizations.

Moreover, there is a uniquely Dutch point of view in the doctrine that the autonomy of EC law also means that its legal effect in the Netherlands legal order is not governed by national constitutional law. Although this conflicts with the very purpose for which the constitutional provisions on the effect of decisions of international organizations were introduced in the 1950s, even the penal chamber of the *Hoge Raad* has endorsed this view in an *obiter dictum*, in a

⁴⁹ The *Tweede Kamer* had agreed unofficially that it would appoint a member of the Labour Party (PvdA), Timmermans, while the *Eerste Kamer* would appoint a member of the Christian Democrats (CDA), thus leaving the second largest party VVD only the alternates. The VVD found this interfered with the principle of proportional representation traditionally adhered to. See *Handelingen Eerste Kamer*, 5 February 2002, EK [vol.]18- [p.]890.

⁵⁰ Article 93 *Grondwet*: ‘Provisions of treaties and of decisions by international organizations under public international law, which can bind everyone by virtue of their contents shall become binding after they have been published.’ Article 94 *Grondwet*: ‘Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law, which can bind everyone.’ The interpretation that directly effective provisions of decisions of international organizations also override the provisions of the *Grondwet* is dominant in the doctrine. There is a minority view that this overriding effect is restricted only to provisions of treaties which have been adopted with a two thirds majority under Article 91(3) *Grondwet*, i.e. treaties which parliament has declared to conflict with the *Grondwet*. This is relevant to EC and EU law as the founding and amending treaties have never been approved under this provision.

judgment four days after the conclusion of the Treaty on a Constitution for Europe.⁵¹ This view, if it were taken to its logical conclusion, would place EC law outside the purview of parliament and the other constitutional organs unless EC law itself attributes powers to them. This would emasculate the powers of parliament whenever the executive acts in the framework of the EC or EU. Luckily, this position has not been taken up explicitly, although the present government has taken the (untenable) view that under the Lisbon Treaty parliament can only take positions binding the government when the Treaty explicitly attributes a role to national parliaments under their constitution or otherwise.⁵² This comes very close to, if it is not identical with, saying that the EU treaties determine the cases in which national parliament can make use of its constitutional powers.

2. Structure and organization of executive in European affairs

Executive dominance in EU affairs is in line with the traditional situation for foreign affairs. Though the executive in European affairs has traditionally been dominated by the ministry of foreign affairs, this is less and less the case. Instead of reducing executive dominance, the normal non-foreign-affairs part of the executive has acquired a dominance *vis-à-vis* parliament in European affairs which it previously did not have in autonomous national affairs. European affairs have become broadly speaking internal affairs; in internal affairs with a European aspect to them, the executive has been able to assert a dominant position over parliament which it did not previously possess.

The increased ‘spread’ of European affairs over different ministerial departments has increased the difficulty of coordinated executive action. An investigation by the *Algemene Rekenkamer* [General Chamber of Audit] of 2004 indicated that, in the various ministries, there was usually no complete and uniform file available for the 60 dossiers it analysed with a view to government informing parliament on these files, but such a file needed to be ‘composed’ for the occasion, while in many cases information was incomplete or missing.⁵³ Usually, the substantive knowledge was in the policy directorates, while the knowledge of the negotiation process and communication with parliament resided in the EU or international directorates.

Evidently, the incoherence of information within the executive increases the difficulty of a parliamentary grip over executive action in European affairs. Many reports have appeared on the improvement of executive coordination of European affairs in the past few years. They acknowledge that lack of such coordination makes it more complicated for the executive to provide information to parliament.⁵⁴

⁵¹ Hoge Raad 2 November 2004, www.rechtspraak.nl, LRN: AR1797. The timing can hardly be coincidence, in particular since the statement about European law’s effect *praeter constitutionem* was entirely immaterial to the dictum. It remains a matter of speculation what exactly was the intention of this *obiter dictum*.

⁵² *Handelingen TK*, 17 June 2009, 96-7571: the Minister of the Interior states that because the Lisbon Treaty does not provide for national parliamentary consent or involvement in decision-making to make use of the *passerelles*, the Treaty prohibits even a *constitutional* provision requiring parliamentary consent before the Netherlands government representative in the Council could agree to such a Council decision. By implication, the *Lissabon Urteil* which actually forced the German legislature to require parliamentary consent and even approval by act of parliament, is in the eyes of this minister in conflict with the Lisbon Treaty.

⁵³ See Report of 2004 [see footnote 39 above], pp. 32-33.

⁵⁴ Raad van State, *Jaarverslag* [Annual Report] 2004; Raad van State, *Advies nr. W04.05.0338/I over de gevolgen van de Europese arrangementen voor de positie en het functioneren van de nationale staatsinstellingen en hun onderlinge verhouding* [Advisory opinion on the consequences of the European institutional framework for the

3. Dependence on the executive in parliamentary scrutiny

The tendencies towards executive dominance over parliament are, of course, counteracted by the attempts of parliament at involvement whenever EC and EU decision-making is involved. For this, the information position of parliament is crucial.

3.a. *The success of the consent requirement and its abolition at the government's initiative*

The most successful story in this respect was no doubt the introduction of the consent requirement with regard to binding decisions in the area of Justice and Home Affairs and of the Area of Freedom, Security and Justice whenever there was no co-decision involving the European Parliament. This gave parliament an instrument to force government to give full information at all stages of the decision-making process as long as the Houses had not given their consent. Whenever the government was reticent in providing information, when it gave incomplete information or was slow in providing information, the Houses (in practice nearly always acting at the proposal of the *Eerste Kamer* Committee for the Justice and Home Affairs Council) could and would refuse consent until the matter was cleared. This was the main use made of the consent requirement; consent has never been ultimately withheld, nor is it to be expected that the procedure would ever be used in that manner, since there will usually be a coalition majority supporting government, should it ever come to a head-on collision. The consent requirement was in practice not a veto power that would ever be exercised, except in very unusual circumstances.

A brief investigation of the practice before and after the abolition of the consent requirement with regard to the Area of Freedom, Security and Justice after the introduction of co-decision is telling. As a consequence of the move to co-decision,⁵⁵ the consent requirement was abolished, as stipulated under the Act of Approval of the Treaty of Amsterdam. Whereas before co-decision was introduced, the *Eerste Kamer* in particular showed a relatively intense interest in decision-making, the *Eerste Kamer* no longer took any significant initiative afterwards, not even with regard to such highly sensitive issues as the Schengen Border Code,⁵⁶ the establishment of SIS II,⁵⁷ or the powers of the Frontex Rapid Border Intervention Teams.⁵⁸ The main explanation is that it received significantly less information from government, or rather, as a consequence of abolishing the consent requirement, it no longer had an instrument to force the government to keep it informed of the state of play in negotiations and the position which the government took on draft legislation.⁵⁹

position and functioning of the national constitutional institutions and their mutual relationships.] *Kamerstukken TK* 2005–2006, 29993, No. 22; Raad voor het Openbaar Bestuur [Council for Public Administration]. *Nationale coördinatie van het EU-beleid: een politiek en proactief proces*. [Report on national coordination of EU policy: a political and pro-active process] 2004.

⁵⁵ Council Decision of 22 Dec. 2004, (2004/927/EC), OJ L 396,45), providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty; for the *passerelle*, see Article 67, paragraph 2, second indent EC Treaty.

⁵⁶ Regulation (EC) No 562/2006 of the European Parliament and of the Council. 15 March 2006.

⁵⁷ Regulation (EC) No 1987/2006 of the European Parliament and of the Council, 20 December 2006.

⁵⁸ Regulation (EC) No 863/2007 of the European Parliament and of the Council, 11 July 2007.

⁵⁹ See Van Mourik and Besselink, footnote 36 above.

Apart from the fact that the consent requirement is to be abolished with the entry into force of the Lisbon Treaty, except for a very small number of issues, most EC and EU measures have always been outside the scope of the consent requirement. Here, the information position of parliament is – at least in practice – comparatively weak. Complaints of informational asymmetry abound. This asymmetry is one of the root causes of the diagnosis that what parliament does is "too little too late", in the Netherlands as in many Member States.

3.b. *The fiches in practice*

Initially, parliament had made itself practically entirely dependent on the information from the government on EC and EU matters, thus reaffirming executive dominance.⁶⁰ Only in recent years has parliament become aware of the limitations this poses. As to the present practice with the *fiches*, it is a well-known fact, also admitted by the government, that they are usually too late. They very often appear after negotiations have begun, which greatly diminishes parliamentary influence.

Since 2003, the intention is to send a *fiche* to Parliament within 6 weeks of publication of the Commission proposal. Since 2005, there is a shorter *fiche* on important or large proposals which should reach parliament within 3 weeks.

In reality, in 2005 no more than 8 % of the *fiches* were sent in time; this improved to nearly 35 % in 2008, which still means that about two thirds of the *fiches* are too late. If one looks at the average number of days it takes, the figures are even more disastrous. Instead of being within the maximum term of 42 days, the average in the period 2005-2008 was 78 days (over the period 2001-2004 it was 83 days).⁶¹ According to the *Algemene Rekenkamer* this does not necessarily mean that the matter has already been dealt with in the EU Council: if we allow for a period of 2 to 4 weeks before a matter is actually on the Council agenda, then around one third of the *fiches* reaches parliament too late. In its research, the *Algemene Rekenkamer* does not appear to have taken into account the various manners in which a proposal can be put on the Council agenda, or the various kinds of status such proposals may have, which may distort this last figure.

The introduction of shorter, abbreviated *fiches* has not really remedied the situation. By its nature a briefer version of the already brief *fiches* can only mean less information, but what is more decisive is the fact that they are hardly used in practice.

The State Secretary for European Affairs, who held his own evaluation shortly before the *Algemene Rekenkamer* published its results, was above all happy with the improvement since 2005 (the reduction to on average 35 days delay!); he has promised once again to improve his ways.⁶²

3.c. *The agenda procedure*

It should be stressed that the *fiche* is often not the only information sent to parliament by the government.⁶³ In approximately two thirds of the cases, extra documents are sent, of which the

⁶⁰ Besselink, Parlement en Europese besluitvorming [Parliament and European Decision-Making], In: *Parlement en buitenlandse beleid* [Parliament and Foreign Affairs] W.E.J. Tjeenk Willink, Zwolle 1993, 47-83.

⁶¹ The figures are derived from *Algemene Rekenkamer* [General Chamber of Audit] report, *Aandacht voor financiële gevolgen van Europees beleid; Terugblik 2009* [Attention paid to the financial consequences of European policies: retrospective study 2009], 29 September 2009, TK 29751, No. 4, pp. 13-16.

⁶² See the letter of State Secretary for European Affairs Timmermans of 29 June 2009 containing an evaluation of the *fiches* procedure, *Kamerstukken TK 2008–2009*, 22 112, No. 884.

⁶³ Report *Algemene Rekenkamer* 2004 [see footnote 39 above], pp. 39-40.

annotated agendas form an important part. Occasionally, the government provides information, mostly in the annotated Council agendas, before a *fiche* has been prepared.⁶⁴

In the agenda procedure, the annotated agenda of an EU Council (or European Council) meeting is discussed briefly before the relevant meeting takes place. In a number of cases the agenda item will have an accompanying *fiche*, but often the annotation is the only information on the basis of which parliament will discuss the matter.

This annotation is often significant in that the negotiating position is made clear. This clearly has the potential to trigger political interest. There is no certainty that in cases in which a *fiche* is available, the *Tweede Kamer* makes full use of that information, but in the absence of a *fiche*, it may be more difficult for the *Tweede Kamer* to assess the importance of a certain agenda item. The *Algemene Rekenkamer* has established that with regard to the ‘second pillar’, the discussion is never on the basis of a *fiche* as none are made.⁶⁵ The only information parliament has to go by is the annotation by the government to the relevant agenda items.

3.d. *Does it make a difference and does it matter?*

Two more issues are whether *parliament* in practice proves really to care about the information provided on EU affairs, and whether the *government* really cares what parliament's views are. On both scores the evidence is not reassuring.

In 2004, the *Algemene Rekenkamer* [General Chamber of Audit] undertook an in-depth analysis of the files and *fiches* on the basis of a stratified random sample of 60 files and how they were treated in the *Tweede Kamer*. (This analysis has already been referred to above.) Of these 60 issues, 23 were put on the agenda for debate at least once in one of the standing committees of the *Tweede Kamer*; fourteen times a question was put in a committee meeting; written questions were posed on 4 issues, and twice a resolution was proposed. In four cases, the *Tweede Kamer* requested and obtained further information. Out of the sixty subject files, five *fiches* were used and discussed intensively by the *Tweede Kamer*.⁶⁶

It was also found that where matters were put on a committee agenda, in the majority of cases the matter was not discussed due to an overload of agenda items.⁶⁷

In the same report the Chamber of Audit found that there was a ‘great discrepancy’ between what was contained in the files at ministerial departments concerning information to and from the *Tweede Kamer*, and what could actually be traced in the official Parliamentary Documents. From interviews at the ministerial departments, it turned out that often the officials dealing with the substance of a file did not know that the Lower House had been informed, nor did they know anything about what the *result* of Lower House action was with regard to the relevant file.⁶⁸ This gives food for thought, and implies that not only is there executive dominance over parliament in EU affairs, but more disconcertingly, the executive is not interested in what parliament’s actions and views are with regard to EU affairs.

⁶⁴ Report *Algemene Rekenkamer* 2004 [see footnote 39 above], p. 41; this occurred in 23 out of 220 letters sent by ministers to the Lower House which were analysed.

⁶⁵ Report *Algemene Rekenkamer* 2004 [see footnote 39 above], p. 23.

⁶⁶ *Ibidem*.

⁶⁷ *Ibidem*, p. 43.

⁶⁸ *Ibidem*, pp. 40-41.

3.e. *Alternative sources of information*

One cause of information asymmetry is that many MPs are often not highly informed or very knowledgeable about EU affairs in general; this is also the case for MPs elected on the anti-European ticket of the populist parties of left and right. This means that unless clerical support is rallied, and civil society (NGOs and the like) brings issues to the attention of parliament, these will not easily be picked up independently by MPs or their parliamentary groups.

There are no formal rules for the participation of non-governmental actors and organizations in parliament's work in European affairs.⁶⁹ Some non-governmental actors and organizations provide parliament with information on their own initiative. Thus, for instance, the independent Standing Committee of Experts on International Immigration, Refugee and Criminal law (mostly composed of lawyers who are expert in the field), which is frequently also heard as witness by the UK House of Lords, also addresses the States General, its committees and its members regularly on issues within the remit of this NGO.

Parliament can have access independently to external sources, it can hold hearings and call for witnesses, but unlike its British counterparts, this is in practice not done very frequently in European affairs.⁷⁰

Clerical support is at the moment such that the EU Affairs Committee of the Lower House has 8 fte substantive expert support, one clerk and a secretarial staff of one (previously less; in 1993 it was still 0.5 clerk, 0.25 staff and a 0.25 secretarial support). The *Eerste Kamer* committee has one expert and one further staff support; its Europa Bureau has 4 staff members and 2 deputy clerks, as well as two information specialists. The *Tweede Kamer* committee has a separate travel budget, which is significantly higher than for other permanent committees, but lower than for the Foreign Affairs Committee; the *Eerste Kamer* committee does not have a separate budget for travel for the committee. Since 2004, the States General have a permanent representative of the *Eerste* and *Tweede Kamer* in Brussels, Mr Overbeeke, who liaises between the institutions and the States General, and can bring proposals to the attention of the Houses at a very early stage.

The *Eerste Kamer* has an open website, 'Europa portaal', which is in principle a practical means, whereby information and documentation per file is collected and made available.⁷¹

3.f. *Independent information gathering and 'politicization'*

It is true that the States General has for a long time been receiving all Commission documents directly from Brussels, but it has taken a long time to set up a procedural mechanism to deal with these independently. This really only started to take shape with the introduction of the subsidiarity review.

For politicians, it is the response from the government which at present is the major cue for members of parliament to take a stance on issues. In EU affairs, this response tends not to be a highly politicized view, either because the substance of the issue is highly technocratic, or to

⁶⁹ For a suggestion as to more structural participation of civil society in parliament, see Besselink 1993 [see footnote 61], p. 81-83.

⁷⁰ A recent example is the hearing of stakeholders by the Joint Committee on Subsidiarity Review concerning the EU Commission draft proposal for a Directive on quality and safety standards for human organs intended for transplantation (COM 2008 (818)), which was eventually judged negatively from the point of view of subsidiarity; see *Kamerstukken TK* 31805, nr 9.

⁷¹ For external users, the website is not very transparent or 'user friendly', which is true of many similar documentary websites of national parliaments on EU affairs.

avoid parliamentary controversy which governments are rarely likely to elicit, so parliamentary activity is not easily triggered spontaneously.

In this light it remains to be seen in practice how the new approach introduced as of September 2009 in the *Eerste Kamer*, indicated above, will work out. The abolition of the coordinating and stimulating role which the Committee on European Cooperation Organizations played (its 'gatekeeper' function) is supposed spontaneously to be taken over by the regular Standing Committees. This may only work in practice if the subsidiarity scrutiny is taken as a cue in order to create a political approach to the EU files.

The abolition of the Joint Committee on Subsidiarity, due to a perceived lack of added value by the Upper House, may emphasize the question whether separate scrutiny is in fact more efficient, although it is claimed to save time. The intention is to have mutual exchange of information by the committees of each house as to which decisions are under scrutiny, but this will first have to prove itself in practice. The simultaneous undertaking of the *Eerste Kamer* not to engage in scrutiny of proposals which are under scrutiny at the Lower House may prove counterproductive, in as much as the quality of the scrutiny by the Lower House has on the whole been inferior to that of the Upper House.

Again, one should not expect too many wonders from the subsidiarity review. Experience has confirmed that national positions which governments take on the matter, tend to be reproduced at the level of the national parliaments. This is small wonder, as governments tend to be supported by a parliamentary majority. Moreover, national positions in EU affairs tend not to be overly divisive along the political lines of government/opposition cleavages.

The major advantage of subsidiarity scrutiny may be that parliament is involved and has informed itself about some European dossiers from a very early stage - but some dossiers only, as the subsidiarity test is limited to *legislative* proposals, and 'legislative' issues do not take the highest place in the priority ranking of the more political branch of parliaments either in the Netherlands or in other parliamentary systems.

IV THE RELATION TO THE EU: PARLIAMENTARY PRACTICE AND LEGITIMACY OF THE EU

In the academic literature, the view has been put forward that the role of national parliaments within the encompassing constitutional order of Europe depends on whether one views them as exclusively bound to their national constitutional context, or views them within the larger complex of interacting public institutions, empowering and regulating the exercise of public authority in Europe. In the latter view national parliaments may gradually become actors within the EU system as such.⁷² This would mean that a national parliament - representing EU citizens - would directly communicate with the European institutions, and the European institutions with the national parliaments, as well as parliaments with each other.

We briefly discuss the extent to which this has taken shape for the States General, and the various forms it takes.

⁷² See Besselink 2006, National Parliaments in the EU's Composite Constitution: a Plea for a Shift in Paradigm. In: Ph. Kiiver (ed.), *National and Regional Parliaments in the European Constitutional Order*, Groningen: Europa Law Publishing, 2006. pp. 117-131; also Besselink 2007, *A Composite European Constitution*, Groningen, Europa Law Publishing, 2007.

1. Parliamentary participation and cooperation beyond the national constitutional order

Neither of the Houses consider their position in a dogmatic way as exclusively linked to and merely functioning within the national constitutional setting. Within this dynamic beyond the national constitutional setting, we distinguish between what comes from Europe directly to the national parliament and what goes from the national parliament to Europe.

1.a. From Europe to the national parliament

One form of parliamentary involvement beyond the national constitutional institutions, is the round of visits which the Commission President has made to national parliaments of all the member states, and during which he has debated directly in parliament during a session to defend the Commission programme. The speech and debate of Barroso in the Assemblée Nationale in 2006 was exemplary.⁷³ In the Netherlands, however, the Commission President did not have that kind of public reception. Unlike heads of state and government, he has never been received in order to speak to the States General in Joint Session, nor in any of the Houses. The Speech to a group of members of the States General has remained off the parliamentary records, and the questions posed on that occasion to Barroso as well as his answers have remained confidential. The opportunity to hold an EU institution to account in parliament was not seized.

Another aspect is that members of the European Parliament who have been elected in the Netherlands, have the right to be speak and participate in the deliberations of the *Tweede Kamer*.⁷⁴ For a number of years they have been invited to parliament at the yearly debate in autumn on the State of the European Union, and they also intervene. In addition, MEPs are welcome to the EU committee meetings (though there is no information on whether they attend). A similar possibility is not provided for in the Rules of Procedure of the *Eerste Kamer*.⁷⁵ Initially, the *Tweede Kamer* showed extreme caution in letting MEPs speak in the plenary. The anecdote is recounted that the first time MEPs showed up to take their seats in the front row in the Lower House, some members of the *Tweede Kamer* quickly occupied the seats intended for the MEPs to prevent them from taking such prominent places. Also, a discussion took place on whether, as a matter of principle, they were allowed to pose questions to the government and whether the government should be allowed to answer them, as Article 68 *Grondwet* seemed to suggest to some that there is an exclusive communicative relation between the members of the States General and the government. These matters now seem to belong to the past.

1.b. From the national parliament to Europe

Another, and perhaps more significant, form of parliamentary activity beyond national constitutional boundaries, is the '*Barroso initiative*' undertaken by the Commission since 2006, in order to consult the national parliaments before a definitive Commission proposal has been formulated. This is viewed by the responsible commissioner Wallström and by Barroso as a 'political dialogue' with 'unprecedented' possibilities for national parliaments 'to give comments,

⁷³ For the full debate, see < www.assemblee-nationale.fr/international/barroso.asp >.

⁷⁴ Article 55a, Rules of Procedure TK.

⁷⁵ This does not mean their participation is impossible, but requires ad hoc decisions to that effect. To our knowledge members of the EP who were not simultaneously members of the *Eerste Kamer* have never participated in the deliberations of the House. Some MEPs have, however, participated in deliberations about EU affairs at the level of political groups in the Upper House.

criticism and positive feedback on Commission proposals, and the Commission the opportunity to both listen and to explain better'.⁷⁶

From the annual reports which the Commission has published on the response from national parliaments to pre-legislative draft proposals, it appears that the Netherlands parliament has not fully seized its opportunity to give its input and full assessment of the Commission proposals. The States General have increased their response over the years, from 2 in 2006 and 1 in 2007 to 8 opinions in 2008.⁷⁷ Moreover, the reports show that the number of other contacts between the Commission and the States General have increased rapidly.

Unlike some other parliaments, the States General, however, also in the context of the Barroso initiative, take a quite limited approach to the 'political dialogue' by restricting themselves to their particular form of 'subsidiarity review' (which includes an assessment of the legal basis ex Art. 5 EC and proportionality) instead of giving a full political assessment of the draft proposals. If the States General have concluded that there is no 'subsidiarity' problem, they do not state why, nor do they communicate any further political assessment, so no response from the Commission can be expected. The full merits of the draft proposal have so far not been made the object of communications with the Commission, although the Commission has explicitly solicited such an assessment on the merits.

2. Relations with other national parliaments

The position of the Netherlands parliament towards the COSAC is currently somewhat ambiguous. This can in part be explained by the preoccupation of the *Eerste Kamer* with disbanding the Joint Committee on Subsidiarity, and creating a procedure which should do more justice to its 'complementary' nature in relation to the *Tweede Kamer's* more prominent political role. Initially, the *Tweede Kamer*, or some of its key members in this respect, had high hopes of the potential role of COSAC in formally coordinating the subsidiarity mechanism after the entry into force of the Lisbon Treaty. To that effect, a proposal was made to COSAC at the Bled-Brdo meeting (May 2008), which was finally rejected at the Paris meeting in November 2008. Instead it is now left to parliaments themselves to exchange relevant information in the course of the subsidiarity procedure under Lisbon, via the IPEX website. This seems to have disillusioned some Dutch MPs.

In view of the frequency of COSAC's meetings and the limited number of concrete policy files treated (only 2 per year), COSAC, which has always had a very limited institutional role to play in effective interparliamentary political exchange, is not considered an appropriate body in that respect. COSAC is a useful instrument, but its usefulness is restricted, is the prevalent view. Also, the fact that COSAC is a forum for European affairs committees, not of sectoral and subsidiarity committees, imposes restrictions. The permanent representatives of the national parliaments in Brussels are, however, considered to be of great importance for interparliamentary contacts of MPs.⁷⁸

⁷⁶ See most recently Press release by the Commission (Barroso/Wallström), 28 September, 2009, IP/09/1368.

⁷⁷ The most recent Commission Report on Relations with National Parliaments, is Annual Report 2008 On Relations Between The European Commission And National Parliaments, Brussels, 7.7.2009 COM(2009) 343 final, Annexes.

⁷⁸ Interview of Auke Baas with officials of the *Tweede Kamer* and a parliamentarian (*Tweede Kamer*) Ten Broeke.

3. The relations with the European Parliament

At the practical level, the relations with the European Parliament are quite limited, and no new initiatives have been developed, notwithstanding the Brok resolution on the relation with national parliaments adopted by the European Parliament on 6 May 2009.

At the staff level, contrary to the well-established relationship with the Commission, contacts with EP officials are *ad hoc*. At the political level, ways are sought to bring MPs and MEPs together, but of existing possibilities, the speaking time for MEPs at the annual State of the Union debates, mentioned above, is the most concrete example. At party level, there are periodic meetings between the members of the political groups represented in the States General and the MEPs of the same party, but these do not appear to be the powerhouses of exchange of political information on concrete dossiers of common political concern.

At the ideological level there is a major obstacle to close cooperation, which is deeply enshrined in the debate on the constitutional relations between the States General and the European Parliament. This is the doctrine of their mutual exclusiveness. From the beginning onwards, the role of national parliaments has been understood to be mainly a compensation for the lack of democratic parliamentary legitimacy at the European level. This lack of democratic legitimacy has come to be viewed not in factual political terms, but in terms of formal competence: the lack of formal co-decisive power of the European Parliament is considered the main justification for the Netherlands parliament involvement in European affairs.

This was the formal justification for introducing the consent requirement in the context of the Schengen Implementing Convention and the Third Pillar of the Maastricht Treaty, that of the introduction of the Euro. The formality of this reasoning went so far as to stipulate in the Act on Approval of the Amsterdam and Nice Treaties that the consent requirement was automatically rescinded as of the moment that for issues within Title IV of the EC Treaty (Area of Freedom, Security and Justice) the unanimity procedure was exchanged for the regular co-decision procedure. The lack of a formal role for the EP was not only the reason for *giving* a strong role to the national parliament, the existence of formal co-decisive powers was also a reason *to take away* that role from the national parliament.

The constitutional logic of this reasoning may be highly disputable,⁷⁹ but the present government was happy to use it to take the initiative in abolishing the whole of the consent requirement in the Bill for the Approval of the Lisbon Treaty. It was even a reason for the government not only strongly to resist an amendment to retain the consent requirement, but also the introduction in that Bill of a formal scrutiny reserve. On the latter point, the government maintained that in practice this would have the same effect as a consent requirement, because it would enable parliament to retain a reserve until the government yielded to parliament's wishes. On the first point, the consent requirement, the government largely got its way through the use of pressure on coalition parties in the *Tweede Kamer* - 'marching orders' as a prominent Labour MP called them off the record. On the second, it only mellowed when an amendment on a 'scrutiny reserve' in a weakened form was proposed, which was supported by a majority of the House: a 'scrutiny' reserve can be imposed by either of the Houses on issues of particular political importance for the duration of a maximum of two months (see further on the scrutiny reserve in the next section).

⁷⁹ See Van Mourik and Besselink, above footnote 36.

The most important institutional consequences for parliaments which the Lisbon Treaty triggered are the subsidiarity procedure and its sequel, bringing a case to the ECJ for infringement of the subsidiarity requirement. In the Netherlands, the broad introduction of co-decision has paradoxically led to the curtailing of the powers of parliament through abolition of the consent requirement in the Area of Freedom, Security and Justice. This may partly be compensated by the introduction of a ‘scrutiny reserve’.

1. Scrutiny reserve

The Act of Approval of the Lisbon Treaty provides for a duty of the government to inform the parliament with respect to EU legislative proposals which one of the Houses finds of such particular political interest that it wishes the government to inform it more specifically about that proposal.⁸⁰ Upon notification, the government shall forthwith make a parliamentary reservation in Brussels. Within four weeks after the scrutiny reserve has been made, parliament will consult with the government as to the ‘particular political significance’ of the EU proposal, the manner of providing parliament with information as regards the state of the negotiations, the legislative procedure and possible further consultations with the government. The scope of this parliamentary procedure is limited to ‘legislative acts in the sense of Article 2 of the Protocol concerning the Role of National Parliaments in the EU’.⁸¹

Recently, the *Tweede Kamer* has agreed on the procedural principles to be followed in practice as regards this scrutiny reserve. It intends to introduce the new scrutiny procedure before and independently of the entry into force of the Lisbon Treaty – which is striking as it suggests it could have been introduced without a legislative basis (presumably under Article 68 of the *Grondwet*). The *Tweede Kamer* seeks government commitments to the effect that, with regard to proposals under the scrutiny reserve, government must send a *fiche* within three weeks after the publication of the proposal. It will be up to the standing committees to deal with the substance of scrutinizing the proposal, the European Affairs committee is only to have an organizational role ‘directing’ proposals to the standing committees, unless a proposal covers the field of several standing committees. The intention is in principle to have an integral assessment of both the subsidiarity and other political aspects, although the subsidiarity judgement can be made separately from the overall political assessment.⁸² Technically, there are indeed reasons to organize the Netherlands scrutiny reserve and the subsidiarity instrument under Lisbon differently. For one thing, there is the different time frame - the scrutiny reserve can be put on a proposal within two months after receiving the proposal, for the duration of 4 weeks, yet on subsidiarity, Protocol Nr. 2 requires parliaments to act within 8 weeks after the Commission⁸³ has sent them its proposal.⁸⁴

⁸⁰ Article 4 (1) of the Act of Approval of the Lisbon Treaty.

⁸¹ *Kamerstukken TK* 2007-2008, 31384 (R1850), No. 23; this amendment became Article 4 of the Act of Approval of the Lisbon Treaty].

⁸² *Kamerstukken TK* 2009-2010, 31 384 (R1850), No. 27, 17 September 2009.

⁸³ Or one of the other possible initiators mentioned in Article 7 (1) Protocol No. 2.

⁸⁴ See Art. 6 of Protocol No. 2.

2. Subsidiarity

The Lisbon Protocol on Subsidiarity and Proportionality (despite its name) only seems to grant national parliaments a right to issue a reasoned opinion to the Commission based on subsidiarity, according to the EC's own fairly technical definition.⁸⁵ As we have mentioned above, however, the States General have not restricted their judgement to a narrowly defined subsidiarity test; moreover, they have extended their judgement to cover issues of proportionality as well as an assessment of the legal basis for the legislative proposal. This is quite understandable, as subsidiarity, even in a strict definition, involves a broader political assessment. The Netherlands Government had stated at the adoption of the Act of Approval of the Lisbon Treaty that it supports the continuation of the practice to take a broader approach so as to include a review of proportionality and legal basis.⁸⁶ Moreover, the broader approach is by no means a uniquely Dutch phenomenon, as proven by the COSAC pilot projects on subsidiarity.⁸⁷

Three questions on future consequences of this practice remain, however. The first is whether the Commission will attach any consequence to an objection on the proportionality or the legal basis of the proposed legislative measure.

A second point concerns the relation between the political dialogue of the 'Barroso initiative' and the subsidiarity procedures. It is unclear to what extent the political dialogue will recede into the background under pressure of the 'yellow' and 'orange card' procedures. Should this happen, this would diminish the (potential) role of national parliaments within the EU.

Thirdly, the effects of the strict subsidiarity review under the Protocol's procedures might lead a national parliament such as the States General to take a narrow view of its role within the larger EU framework.

3. Judicial protection of national parliaments at the ECJ

The pre-Lisbon Protocol on the Role of National Parliaments may already mean that if the time limits stipulated therein within which national parliaments must be informed of legislative proposals have not been respected, this legally vitiates the validity of an EC measure taken. No case, however, has been brought to the ECJ arguing that invalidity. It would have needed an initiative from a parliament affected by that procedural shortcoming to have its government bring an appeal for annulment. In German law, the federal government has been under the obligation to bring such a case to the ECJ since the entry into force of the Maastricht Treaty.⁸⁸ Similar legislation does not exist in the Netherlands.

A new element in Protocol No. 2 is that Article 8 provides for actions for annulment of an EU act being brought to the ECJ not only by Member States (read: governments), but also by

⁸⁵ See Art. 7 (2) and (3) of Protocol No. 2.

⁸⁶ See *Kamerstukken TK*, 2007-2008, No. 31 384, on p. 88.

⁸⁷ See COSAC 'Tenth Biannual Report: Developments in the European Union, Procedures and practices relevant to parliamentary scrutiny', Paris, November 2008, p. 19.

⁸⁸ This is a constitutional obligation as to subsidiarity complaints with the entry into force of the Lisbon Treaty, see German constitutional amendment of 8 October 2008, which inserted an Article 23 (1a) into the *Grundgesetz*: 'Der Bundestag und der Bundesrat haben das Recht, wegen Verstoßes eines Gesetzgebungsaktes der Europäischen Union gegen das Subsidiaritätsprinzips vor dem Gerichtshof der Europäischen Union Klage zu erheben. Der Bundestag ist hierzu auf Antrag eines Viertels seiner Mitglieder verpflichtet.'

parliaments for an infringement of the subsidiarity principle. It provides that the ECJ shall have jurisdiction in cases 'notified by [the member states] in accordance with their legal order on behalf of their national Parliament or a chamber thereof'. The language reveals that it is not the government or Member State which is actually bringing the action, but the parliament or a chamber of it: the government merely 'notifies' it. Parliaments are thus recognized as true actors in their own right within the EU constitutional order, prised away from the grip of their governments in the particular context of European Union decision-making, also *vis-à-vis* the European Court of Justice.

In the Netherlands, there has been no initiative to create a legislative right for parliament and a concomitant duty for the government to bring a case to the ECJ at the request of parliament. It is practice that this kind of implementing legislation is passed together with the Act of Approval of a treaty necessitating implementation. From the absence of a provision to that effect in that Act, it follows that the government does not intend to create a binding obligation on its part. Nor has parliament taken any steps in that direction. This means that it is unclear whether under Netherlands law the government is at all under the obligation to notify an action for annulment on grounds of subsidiarity to the ECJ. It is unclear under what circumstances it might nevertheless do so: is it at the request of both or each of the Houses, or perhaps at the request of one fifth of members of a House (the usual relevant minority in Netherlands constitutional law)?

In the absence of legislation on this point, a minority of for instance one fifth of the members of a House of the State General cannot create such an obligation for the government. Probably there is no legal obligation at all for the government to comply with a request of either one or both Houses,⁸⁹ since the 'legal order' of the Netherlands is not explicit about the matter. This is not to say that the government may not comply with such a legally non-binding request at its own volition. The ECJ case *Netherlands v. Parliament and Council (C-377/98)* was brought after parliamentary debates over the validity of biotechnology directive.⁹⁰ The question is, of course, what would happen if the government opposed the views of parliament, either a House or a significant minority of it, both as to the merits of the claim, the subsidiarity compliance or the question whether to bring a case to the ECJ. The point is moot at present and may remain so.

VI CONCLUSIONS

We sum up some distinctive elements of the role of parliament in EU affairs in the Netherlands, and briefly evaluate its performance.

The parliamentary procedures are of old a combination of document-based and procedurally-based procedures. They may influence the negotiating position the government takes in the Council, but legally speaking that is not the specific purpose of these procedures.

⁸⁹ An action notified on behalf of a *minority* of a parliament or of a chamber thereof, might seem outside the scope of the words 'on behalf of their national Parliament or a chamber thereof' of Article 8 of Protocol No. 2, though it does seem to be covered under the words 'in accordance with their [i.e. a Member State's] legal order'. The latter will probably be decisive.

⁹⁰ ECJ, 9 October 2001, Case C-377/98, paragraph 4: 'The applicant states, as a preliminary point, that it is acting at the express request of the States General, in the light of the opposition expressed there to genetic manipulation involving animals and plants and to the issuing of patents for the products of biotechnological procedures liable to promote such manipulation.' See *Kamerstukken TK 26568*; Directive 98/44/EC Legal protection of biotechnological inventions.

There has been a very strong dependence on government information, but since the subsidiarity, proportionality and legal basis review was introduced in 2006, parliament needs to make a more independent assessment of EU proposals, at least as regards legislative proposals.

The States General have been the only national parliament which formally had a legal veto power, to wit a ‘consent requirement’ with regard to binding Third Pillar decisions and intergovernmental decisions under Title IV of the EC Treaty. This consent requirement has never been used to veto a proposal, but merely to force government to keep parliament informed on decision-making in Brussels; only in relatively few cases was it used to convince government of the political position of parliament on the substance of that decision-making.

The consent requirement is largely abolished with the extension of co-decision after the Lisbon Treaty enters into force. This means effectively that parliament’s role and position in the area of freedom, security and justice will be significantly reduced.

This is a consequence of the highly doubtful assumption that national parliament only has a role to play with regard to EU decision-making if the European Parliament formally does not have a role. The untenability of this assumption is also proved by the fact that there are no constitutional obstacles for the States General to act outside the strictly national constitutional context – and in fact it has been open to direct communication with the EU in the framework of the ‘Barroso initiative’, although with some initial reticence and a quite slow start.

Bicameralism in the Netherlands plays out differently compared with bicameral parliaments in other Member States. Although there have been experiments to work with bicameral committees, these have each time been discontinued, due to the different political profile of the two Houses in the national political context. This does not detract from the fact that on the whole the less political Upper House, *Eerste Kamer*, has proved to be better informed and more active than the politically more prominent *Tweede Kamer*.

A number of sometimes serious shortcomings notwithstanding, the assessment would be that the States General as a so-called ‘working parliament’ has dealt with EU decision-making fairly actively, albeit to a different extent between the two Houses of Parliament, and with different degrees of intensity and continuity for different parliamentary committees. This compares favourably with some other parliaments in the Member States, although there can be no doubt that certain other parliaments do better - at least on a number of points. All in all, the role of the States General in the European Union is modest.
