THE OIREACHTAS AND THE EUROPEAN UNION:

the Evolving Role of a National Parliament in European Affairs

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What follows, although reasonably extensive, should nonetheless be regarded as a work in progress, rather like the subject it addresses - the evolving role of the Oireachtas in European affairs.

TABLE OF CONTENTS

CHAPTER 1

Getting to Grips with Europe: A History of Oireachtas Involvement in European Union Affairs in Context[1]

1. *Introduction – Adjusting to Europe*

> *"It might well be that for all the supra-national and non-parliamentary bodies that influence governance, the biggest democratic deficit may be sitting at our own doorstep."* [2]

At least one positive outcome of the recent economic misfortunes of this country has been that, for students of the Irish political system, the dangers of being distracted by the 'gravity of past success' [3] have declined. Ireland, to borrow the words of two academic commentators, has now seen "the economy weather four dreadful economic crises in less than a century",[4] and the dictum that those who cannot remember the past are condemned to repeat it[5] now serves as a grim warning for this country insofar as the management of its own affairs is concerned. The moment thus seems opportune for critical appraisal of Ireland's method of conducting its affairs in a whole range of areas. The operation of the Oireachtas is one such field[6] and, more specifically, the role of the Oireachtas in European Union affairs, which is the topic of this chapter.

It is widely recognised that Ireland's entry into the then European Communities in 1973 constituted the laying of a key foundation stone for later economic success, most prominently during the so-called Celtic Tiger era, which was to span the final years of the twentieth century and most of the first decade of the twenty-first. The magnitude of what had been achieved in 1973 by gaining accession to the predecessor organisations of today's European Union may not have been obvious in the years that immediately followed this step: before the fruits of membership could be harvested, the crippling effects of oil crises, followed by inflation, economic recession, large-scale unemployment and, last but

1. What follows builds on earlier material written by the author in *Oireachtas Control Over Government Activity at European Union Level: Reflections on the Historical Context and the Legal Framework* in G. Barrett (ed.) *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press, Dublin, 2008).
2. B. Andrews, "*Who Runs This Country? Certainly Not Dáil Éireann*" Irish Times, 19 July 2003. Andrews was a Teachta Dála from 2002 to 2011 and later Minister of State for Children from 2008 to 2011.
3. A phrase used in G. Kasparov, *How Life Imitates Chess* (Bloomsbury, New York, 2007)
4. D. Vines and M. Watson, *"Ireland's Unexpected Economic Comeback"*, Financial Times, 16 August, 2011.
5. G. Santayana, *The Life of Reason* Vol. I, *Reason in Common Sense* (Dover, New York, 1905)
6. See generally now M. MacCarthaigh and M. Manning, *The Houses of the Oireachtas: Parliament in Ireland* (2010, Institute of Public Administration, Dublin)

far from least, self-inflicted economic mismanagement, had first to be worked through by Ireland. This was above and beyond any of the normal economic adjustments and institutional reforms which might have been expected to be required by, and to accompany, membership. Economic success did, in the closing years of the twentieth century, follow the early years of economic hardship – only to be followed, however, by the current ongoing period of economic difficulty, which began in 2008.[7]

Within a number of years of Ireland's joining the European Economic Community, the realisation became ever clearer that, at European level, a succession of adjustments to the institutional machinery of the EEC would be needed if the Community itself were ever to fulfil its potential. In the first place, institutional reforms were required: most importantly, the gradual dismantling of the understanding that decision-making could be carried out in the Community only when unanimous agreement existed (a decision forced on its unwilling fellow member states by de Gaulle's France through the Luxembourg Accord of 1966). The initial step towards more widespread majority voting, brought into effect by the Single European Act in 1987, succeeded in facilitating the establishment on a much firmer basis of the Common Market (rechristened the Single European Market at this time). A succession of further institutional reforms brought about by the Treaties of Maastricht (1992), Amsterdam (1997), Nice (2001) and Lisbon (2007) have facilitated both successive enlargements and the gradual evolution of an economically-focused European Economic Community of only six members to the present European Union of twenty-seven member states, with much broader political aims and objectives.[8] The process of change at European level has rarely been an easy one, as the political convulsions over the (ultimately successful) effort to ratify the Treaty of Lisbon have most recently demonstrated.

At national level too, economic, political, institutional and social adjustments were always going to be required by membership of the European Union. Nor would it be accurate to regard such adjustments and adaptations as have been required of Ireland by virtue of the process of integration as now complete. The need for adjustment has, in several respects, been an ongoing one. This is not merely because the constantly changing and evolving nature of integration requires a correspondingly evolving response – although this is certainly true. It is also because some of the original challenges stemming from Ireland's adherence to the European Union were never adequately met. This, as will be seen in this chapter and the next, has arguably been the case concerning Oireachtas involvement in European Union matters.

The role of the Oireachtas in European affairs is multifaceted. It includes carrying out the function of an intermediary – transmitting, on the one hand, the views of the electorate to the institutions of executive governance and, on the other, informing the electorate of what legislative, and other, business is being conducted at European Union level. Overlapping with this is the task of imposing some form of democratic control on the executive concerning its activities at European level.

7. Ireland has thus now had three periods of contrasting economic fortunes in the short history of its European Union membership from which lessons may be drawn.
8. This is not to forget the still-extant European Atomic Energy Community and the now-expired European Coal and Steel Community Treaty. However, from an early point the key community was the European Economic Community (known from 1993 as the European Community). With the coming into force of the Treaty of Lisbon in December 2009, this Community effectively merged with the European Union to form a new European Union.

In this regard it will be recalled that the activities of the Irish executive at European Union level are exercised via the participation of government ministers in the Council of Ministers. Of the four political institutions at European Union level[9] – the European Council,[10] the Council of the European Union, the European Commission, and the European Parliament – it is clearly the Council of Ministers and the European Council which are at present most in need of control by national parliaments. The European Parliament, after all, is subject to the discipline of being answerable to voters in direct elections. As for the Commission, its institutional role requires a measure of political independence.[11] It is, in any case, controlled both by its need for member state cooperation in order to achieve its objectives and, to an increasing and arguably not always wholly desirable extent,[12] by the European Parliament. (One example of such control in action was seen in the forced collective resignation in 1999 of the Santer Commission). The European Council and the Council of Ministers, in contrast, are subject to no comparable collective control as institutions. Their individual members are subject only to whatever control is imposed on them by their national political structures.

2. *The Oireachtas and the Executive: A Context of Dominance*

How well has the Oireachtas exercised influence over the Irish Government in European matters over the years and, more particularly, regarding ministers in Council and, more recently, Taoisigh in the European Council? This is one topic with which this chapter and the succeeding one concern themselves. In discussing the relationship between the legislature and the executive in Ireland in relation to European affairs, however, it is appropriate to frame this relationship in the broader context of the traditional relationship between these two branches of Irish government. In brief: although, as we shall see, the position in relation to European affairs has shown some improvement, much remains to be done – unless the view is taken that a situation of almost complete executive dominance is appropriate. In European affairs as in other policy areas, to paraphrase Tonra, "the Oireachtas has not had a strong record… Despite formal constitutional provisions which indicate otherwise, the political reality is that the Oireachtas is effectively the servant of the executive rather than its master."[13]

It is important, however, to be realistic in our expectations in this context: one must bear in mind that the setting of the legislature's agenda by the executive is the norm in modern parliamentary democracies. Indeed, Gallagher has pointed out that, set against classical liberal theory, "practice right across Europe

9. This is not counting, for present purposes, the European Central Bank as a political institution. The ECB, like the European Council, became an institution for the first time with the coming into force of the Lisbon Treaty. (See Article 13 of the Treaty on European Union.)
10. According to Article 15(2) of the Treaty on European Union, "the European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work."
11. See more generally, E. Gallagher and J. Temple Lang, "*What Sort of European Commission Does the EU Need?*" Challenge Europe, Issue 7, 14 February 2002, available at http://www.epc.eu/en/ce.asp?TYP=CE&LV=177&see=y&t=42&PG=CE/EN/detail&l=3&AI=166.
12. See in this regard, *J.-P. Jacqué,* "*The Principle Of Institutional Balance*" (2004) 41 Common Market Law Review 383, and see in particular Article 17(7) of the Treaty on European Union regarding the appointment procedure for the Commission.
13. B. Tonra, "*Democratic Oversight over the Irish Government in the Field of the Common Foreign and Security Policy*" in G. Barrett (ed.), *op. cit.,* n. 1 above, p. 243 at p. 244.

can seem rather disappointing, because it appears that once a government gets into office it can go its own way largely unchecked by parliament".[14] There are, nonetheless, degrees of dominance, and the relationship between parliament and executive in Ireland has long had the reputation of being particularly weighted in favour of the executive.[15] Ireland's rapid slide into economic crisis from 2008 onwards was the apparent result of policy choices which had been unchecked to any significant degree by Oireachtas control.

There appear to be many reasons for the degree of executive control over parliament in Ireland. Tonra has argued that

> "the combination of powerful party whips, a tradition of comparatively strong majority-holding governments (single and multi-party), an electoral system which is seen to reward assiduous constituency work over legislative activity and, overall, a comparatively weak committee structure, has traditionally undermined the Oireachtas' capacity to hold the executive to account." [16]

On somewhat similar lines, O'Halpin has asserted that "party discipline, the pressures of constituency business, and its own conventions, timetable and procedures combine to make the Oireachtas appear a rather lackadaisical institution." [17]

The various reasons offered for the dominance of the executive are worth reflecting upon briefly.[18] Not all of these reasons are peculiar to Ireland.

i. The Requirement of Full-Time, Professional and Focused Government

One of the main reasons which has been put forward for why executives right across the world have come to occupy a dominant position vis-à-vis parliaments is simply that the ever-increasing complexity of modern life requires a standard of full-time, professional and focused government that only an entity which functions along the lines of national executives is capable of meeting. As Gallagher puts it

> "Government business has become much more complex, and it is more difficult for all but those directly and continuously involved to monitor its work. The level of specialisation and expertise required is such that everyone else, including the backbench member of parliament, is effectively an amateur in the policy-making process."[19]

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14. M. Gallagher, "*The Oireachtas*" in J. Coakley and M. Gallagher (eds.) *Politics in the Republic of Ireland* (fifth edition, Routledge/PSAI, London, 2010), p. 198 at p. 201. Emphasis added.
15. See further A. Ward, "*Parliamentary Procedures and the Machinery of Government in Ireland*" (1974) 4 Irish University Review 222 at p. 241; D. Dinan, "*Constitution and Parliament*" in B. Girvin and R. Sturm (eds.) *Politics and Society in Contemporary Ireland* (Gower, Aldershot 1986), p. 71 at p. 71 and B. Chubb, *The Government and Politics of Ireland* (third edition, Longman, Harlow, 1992) at p. 189, all cited in Gallagher, *loc. cit.,* n. 14 above at *loc. cit.*.
16. B. Tonra, *loc. cit.,* n. 13 above. It is only fair to note that Tonra was speaking in the context of foreign policy, where challenges are particularly pronounced. His observations also apply with considerable force outside that particular context, however.
17. E. O' Halpin, "*Irish Parliamentary Culture and the European Union: Formalities to be Observed*" in P. Norton (ed.) *National Parliaments and the European Union* (Frank Cass, London, 1996) p. 124 at p. 125
18. See more generally, Gallagher, *loc. cit.,* n. 14 above, at p. 223 *et seq.*
19. Gallagher, *loc. cit.,* n. 14 above, at pp. 223-4.

Viewed like this, executive dominance is only to be expected for only in this way is modern government capable of functioning in a manner which is adequately effective to meet the needs of society.

This need for an adequately professional, expert and full-time approach may be part of the reason why the Department of Foreign Affairs has reputedly vehemently opposed the idea of the introduction of a mandate system for the Oireachtas in relation to European affairs [20] – an idea which would result in vastly increased answerability to the Oireachtas on the part of the executive.

ii. The Divided Attention of Parliamentarians

Dominance of the Oireachtas by the executive is enhanced by the reality that the attention of parliamentarians is constantly divided.[21] TDs carry out their legislative functions effectively on a part-time basis, balancing legislative and policy-based work with an engagement in constituency work at a highly intensive level that is necessary if they wish to retain their seats. This division of parliamentary work is reflected in the fact that, over the entirety of 2010, the Seanad sat for only 97 days, and the Dáil for only 100.[22] As elections draw near, in the second half of a parliamentary term, the focus of TDs on policy and legislative work becomes still harder to retain,[23] with the need to engage in electoral campaigning perhaps not unnaturally prevailing over all other concerns and resulting, for example, in a decline in attendance at committee meetings.

Even within the realm of policy work, the attention of parliamentarians can be divided. An Oireachtas member will frequently be a member of more than one committee with the result that insufficient time is available to him or her to build up an expertise in one policy area, or to attend committee meetings in their entirety – even given the willingness to do so. For this reason, in early 2011, the Secretariat of the Management Advisory Committee of the Houses proposed a policy of 'one member, one Committee' should operate in order "to increase the capacity of individual members to contribute more fully to Committee business and to focus their attention on areas of specialist expertise."[24]

The efficacy of individual parliamentarians is also lessened by the fact that committee meetings are scheduled at the same time at which plenary debates are being conducted in the House, perhaps by virtue of sittings being concentrated in the three middle days of the week. In practice, Oireachtas committee members frequently leave a committee room in which a debate is being conducted only to appear moments later on the monitors in the committee rooms, speaking in one or other House. Furthermore, it is clear from the contributions to committee meetings that many parliamentarians attend such meetings with little or no preparation or thought having been given by them to the topic under discussion.

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20. Interviews carried out by the author. See also in this regard the views expressed by the then Minister for Foreign Affairs, Micheál Martin TD, to the Meeting of the Oireachtas Sub-Committee (of the Joint Committees on European Affairs and European Scrutiny) on the Review of the Role of the Oireachtas in European Affairs on 19 May 2010, available at the time of writing at http://debates.oireachtas.ie/EUR/2010/05/19/ in which he expressed opposition to the idea of the introduction of a scrutiny reserve system, much less a mandate system.
21. See also Gallagher, *loc. cit.*, n. 14 above, pp. 224-5.
22. Houses of the Oireachtas Commission Annual Report 2010, pp. 22 and 26.
23. Interview with member of European Affairs Committee, 5 May 2010.
24. Houses of the Oireachtas Commission Annual Report 2010

iii. The Particularly Powerful Nature of the Irish Executive

Irish parliamentarians attempting to render the executive accountable face a particularly challenging scenario. As Laffan has pointed out, "executive power – the power of government – is strong in the Irish system of public policy-making. Put simply, there is a marked concentration of executive power in the Irish system given the unitary nature of the state."[25] Part of this concentration of power derives, for example, from the non-federal nature of the Irish state. Part of it derives from the fact that Ireland is also a state in which strong institutions of local government have failed to develop. The overall effect is that the Oireachtas, in its dealings with the executive, is already working with a branch of government with more power concentrated in its hands and in its own national polity than is held by its counterparts in other states.

iv. Party Politics

A third reason for executive dominance in the Oireachtas is the operation of the Irish party political system. Like their counterparts in other member states of the European Union, TDs are required to follow a party line which, while it may well be necessary in order to render stable government possible, effectively prevents government-party TDs from attacking the substance of actions taken by party colleagues who are members of the Government. Any such system has obvious implications for the capacity of parliament to render the executive accountable. No matter what powers are given to national parliaments, no system of challenging Government ministers will function properly in the absence of a will on the part of TDs to apply it. Yet the party political system deprives Government TDs of much incentive to challenge the executive, with backbench Government members of parliament identifying more closely with their colleagues in the executive than with the institution of which they are members, or with their fellow parliamentarians from Opposition parties.[26] To quote Gallagher again:

> "When political life is dominated by political parties, as is the case throughout Europe, deputies' orientation to party is stronger than their orientation to an abstract notion of 'parliament'. This is not necessarily a bad thing – to govern effectively, governments need to be able to rely on their own backbenchers to support them through thick and thin. In Ireland, government backbenchers have proved very reliable indeed." [27]

This does not mean that ensuring parliamentary accountability is an impossible task. But it does moderate our expectations of what accountability should involve. In the field of European affairs, in particular, Auel has suggested drawing a distinction between 'monitoring scrutiny' of governmental

25. B. Laffan, "*The Parliament of Ireland: A Passive Adapter Coming in from the Cold*" in A. Maurer and W. Wessels (eds.) *National Parliaments on their Ways to Europe: Losers or Latecomers* (Nomos, Baden-Baden, 2001) p. 251 at p. 252
26. See also Gallagher, *loc. cit.,* n. 14 above, at p. 225.
27. *Ibid.* Elsewhere the same writer observes that "Parliament would become more powerful if TDs of the government parties ceased to see their main role as supporting the government and became, instead, quasi-neutral observers of the political process, ready to back or oppose the government depending on their view of the issue at hand. Such a development, which is improbable in the extreme, would undoubtedly transform the role not only of parliament but of the entire process of government- and not necessarily for the better." (*Loc. cit.,* n. 14, p. 226).

action on the one hand, and 'political scrutiny' on the other. She defines 'monitoring scrutiny' as demanding information on actions which have been carried out by government, and on the context of these actions.

The aim of this form of scrutiny is to reduce information asymmetries.[28] 'Monitoring scrutiny' is capable of being carried out on a regular basis, even by government party parliamentarians. 'Political scrutiny', on the other hand, involves the "assessment of, and political judgement on, the appropriateness of the government's decision and the respective outcome of European negotiations and, thus, 'whether they exercised [their] powers in ways that the political bodies to whom they are accountable – such as parliament or the electorate – can endorse.'" Establishing this kind of accountability is a task which should normally belong to opposition parties.[29]

v. Ireland's Westminster-style Parliamentary System

Such party politics operate as part and parcel of a Westminster model of parliament. The so-called 'efficient secret' of the Westminster model – in effect the lack of a separation between executive and legislature[30] – operates to some extent to lighten parliamentary control over the executive. Gallagher has argued that the 'fusion' of government and parliament which result from such a system, "with virtually all ministers simultaneously being TDs, greatly affects the way in which TDs, especially government backbenchers, see their role."[31] He goes on further to say that:

> "the Dáil does not challenge the government, not because it does not meet for a sufficient number of days or because its procedures are inadequate, but because backbench government TDs want to back the government – indeed ultimately to become members of it – and not to harass it. Giving government TDs more teeth will not alter the role of the Dáil if these TDs do not wish to bite the government."[32]

The Westminster model and its impact in Ireland are further examined in the text below.

vi. The Bypassing of the Oireachtas

A further reason for the relative weakness of the legislature, and one which is linked to the first reason above, is that the national decision-making process has, in certain respects, effectively bypassed the Oireachtas. European affairs is a field in which the executive has long exercised a dominant role and

28. Auel describes this as being "of particular importance in European policy making, as national parliaments, or, more specifically, the majority parties, are not directly involved in decision making at the European level."
29. See generally, K. Auel, *Democratic Accountability and National Parliaments – Re-Defining the Impact of Parliamentary Scrutiny in EU Affairs*, (2007) 13 European Law Journal 487 at 500.
30. Hence the remark by Martin that "as in many other legislatures *operating without separation of powers* (and particularly those that follow the Westminster model of parliamentary democracy such as Canada, Australia and the UK itself), it is the government rather than the parliament that effectively shapes legislation". (See S. Martin , "*The Committee System*" in MacCarthaigh and Manning (eds.), *op. cit.,* n. 6, p. 285 at p. 294.)
31. *Loc. cit.,* n. 14, p. 225.
32. *Ibid.*

in which the Oireachtas has found itself, to some extent, 'outside the loop' in decision-making terms.[33] Many important legislative and policy decisions are now taken at European Union level - where Government ministers are involved only to the extent that they are members of the relevant formation of the Council of the European Union, and where the Oireachtas has at most an indirect input (and this of only very recent origin). If the EU is to function properly, then national executives will require a certain degree of flexibility in order to carry out their tasks. But the question can still be posed (and is posed in this and the succeeding chapter) as to whether the Oireachtas has taken advantage of those opportunities for involvement in European Union decision-making that have presented themselves to date.

vii. The Conservative Nature of Parliaments

A further reason for the relative weakness of parliaments across the world has been their tendency to be conservative in the organisation of their affairs. In this, they may be aided by the unwillingness of their executive – supported in this unwillingness by a majority in parliament – to see much-needed reforms effected. Thus, for example, it has been clear that Seanad reform has been badly needed for many years, yet it has never been carried out. Similarly, little was done about a manifestly inadequate committee structure for decades. It took until 1993, a full seventy years after independence, before any serious effort was made to create a comprehensive system. Moreover, little has been done to date to ensure that parliamentary questions (another method by which accountability is ensured in relation to European affairs) are an effective tool for eliciting information on policy matters: no mechanism is yet in place to prevent ministers from giving replies which are manifestly inadequate to questions posed by Dáil deputies.

In the specific field of European Union affairs, the Oireachtas, unlike many other parliaments in the European Union, has failed to obtain as a means of fulfilling the objective of establishing ministerial accountability either the power of a scrutiny reserve on European proposals or a Danish-style mandate. Further, in seeking powers to render ministerial accountability, there seems to have been a notable reluctance to consider seriously looking beyond the British-style solution of a scrutiny reserve.[34]

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33. This has also been the case in relation to the outcome of social partnership process, which led to agreements setting out an extensive and detailed policy agenda, with the Oireachtas having little option other than to rubber-stamp a deal already agreed upon. See most recently in this respect, the social partnership agreement entitled *Towards 2016:Review and Transitional Agreement 2008-2009* (available online at the time of writing at http://www.taoiseach.ie/attached_files/Pdf%20files/Taoiseach%20Report_web.pdf) which was a full 49 pages long and set out a very detailed list of commitments. See also Gallagher, *loc. cit.,* n. 14 above, p. 224.

34. See Report of the Sub-Committee on Ireland's Future in the European Union *Ireland's Future in the European Union: Challenges, Issues and Options,* 27 November 2008 (available at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/committees30thdail/j-europeanaffairs/Sub_Cttee_EU__20081127.doc) and the Report of the Sub-Committee on Review of the Role of the Oireachtas in European Affairs, 7 July 2010 (available at http://www.oireachtas.ie/documents/committees30thdail/j-europeanaffairs/subctteeroleofoireachtas/Publications/Report_of_the_Sub-Committee_on_Review_of_the_Role_of_the_Oireachtas_in_European_Affairs.pdf). At European level, the Oireachtas has never tended to be in the vanguard of those calling for increased powers within the European Union structure for national parliaments. For example, it was noticeably not among those calling at the time of the negotiation of the Treaty of Amsterdam for the increased powers that were ultimately accorded to national parliaments by the Protocol on National Parliaments agreed at the time of that Treaty. See in this regard the First Report of the Joint Committee on European Affairs, *The Role of the Oireachtas in the European Union post 1996 Intergovernmental Conference* (June 1996), which was an extraordinarily timorous and conservative document, including as regards the position of the Oireachtas *vis-à-vis* the executive. (See in particular pp. 44-45 thereof.)

viii. Resources

The imbalance in resources of every description – but most prominently financial,, administrative, staffing, information and research resources – further ensures that the relationship between the two branches of government is a far from equal one. A recent international benchmarking report compiled by the Houses of the Oireachtas Commission revealed that, of fifteen surveyed parliaments, the Oireachtas was spending less per member of parliament than all but one of them.[35] A more limited comparison of six parliaments put the Oireachtas last in the ratio of staff to members of parliament.[36] Moreover, the effect of the economic crisis, and consequent budgetary cuts here, have been considerable. Between 2009 and 2011, Oireachtas staff numbers fell by close to 9 per cent and staff costs by over €2.2 million. A moratorium on recruitment was expected to see the fall in numbers of staff to exceed 10 per cent by the end of 2012.[37]

For all of this, the resources made available to the Oireachtas – including financing of the Committee system – have improved since the time of the setting up of the Houses of the Oireachtas Commission in 2003. However, "it remains the case that the Oireachtas is at the mercy of the Minister for Finance and resources can be as easily withdrawn as they are given" – something which was made clear with the onset of the economic crisis.[38]

Even such resources as have already been provided to parliamentarians have not always been used to enhance the legislative and policy functions of the Oireachtas. Martin has pointed out that

> "in recent years the secretarial support available to each TD has been supplemented by a parliamentary assistant for each deputy... In theory, this should greatly enhance the ability of TDs to prepare for committee work; however it is up to each deputy to decide who to appoint and the type of work the assistant undertakes. Some deputies have hired graduates to assist with research and policy development, while others have located the parliamentary assistant in their constituency office to assist with constituency matters."[39]

3. *The Historical Context: The Relationship Between the Legislature and the Executive in Ireland Since Independence*

The traditional relationship between the executive and the legislature in Ireland has frequently been misunderstood. Part of the reason for this lies in the wording of the Irish Constitution. Article 28 of

35. The conclusions of the *Report on Comparative Benchmarking of Parliaments* are reported in the *Houses of the Oireachtas Commission Annual Report 2010* at p.19 thereof. The comparator parliaments were those of Australia, Austria, Belgium, Canada, Denmark, Finland, India, the Netherlands, New Zealand, Northern Ireland, Scotland, South Africa, Sweden, Wales and the United Kingdom.
36. The comparator parliaments were those of the Netherlands, New Zealand, Scotland, Finland, Ireland and the United Kingdom. See *Houses of the Oireachtas Commission Annual Report 2010* at p. 57.
37. *Ibid.*, p. 68.
38. Martin, *loc. cit.*, n. 30, p. 298.
39. *Ibid.*

the 1937 Constitution, after establishing that the executive power of the State shall (subject to the provisions of the Constitution) be exercised by or on the authority of the Government,[40] purportedly establishes the ground rules of the relationship between the political branches by providing that "the Government shall be responsible to Dáil Éireann".[41]

Yet everyday reality is very different to the impression created by these words which, even at the time they were written, were misleading, and constituted little more than a genuflection which it was felt obligatory to make in the direction of a constitutional theory already well out of date in 1937. Chubb has observed, regarding the gap here between words and fact, that

> "the explanation for this apparent, albeit mild, political schizophrenia is not difficult to discern. A constitution is a legal document expressing mainly legal relationships. It is usually written in conventional, even traditional, language, embodying the concepts of accepted political and constitutional theory, in this case of nineteenth-century British liberalism. The politicians subscribed to these ideas in much the same way as many people subscribe to their religion, their behaviour from Monday to Saturday often reflecting a bending to the pressures and exigencies of everyday life."[42]

Nineteenth-Century Liberalism and the Twentieth-Century Westminster Model

> "*The past is a foreign country: they do things differently there.*" [43]

Part and parcel of the nineteenth-century liberal concept of government to which implicit reference was (and continues to be) made in the 1937 Irish constitution is the principle of the supremacy of parliament – the idea that parliament holds the ultimate power to make laws and control the action of government and the administration.[44] A later refinement was that the people hold ultimate power but, nonetheless, this power, between elections, is delegated to parliament.[45] The essential idea here is an attractive one, that of a chain of command reaching downwards from the people to the parliament onwards to the government and the administration. Such ideas have exercised a powerful hold on the imagination right up to the present time and are reflected to some degree in the manner in which both the 1922 and 1937 Constitutions were worded. By the beginning of the twentieth century, however, it was clear that this was no longer an accurate description of the Westminster model of government. Hence Gallagher's observation that

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40. Article 28.2 of the Constitution.
41. Article 28. 4.1°.
42. B. Chubb, *Cabinet Government in Ireland* (Institute of Public Administration, Dublin, 1974), 8.
43. L. P. Hartley, *The Go-Between* (Hamish Hamilton, London, 1953) at p. 1.
44. Other – sometimes contradictory ideas – which found currency in nineteenth century British political theory and which are also reflected in the Irish constitution are the separation of powers (seen *e.g.,* in the classification by Article 6 of the Constitution of the powers of government as legislative, executive and judicial) and the principle of the sovereignty of the people (seen *e.g.,* in the Preamble of the 1937 *Bunreacht* with its reference to "We, the people of Éire", as well as *e.g.,* in Article 6.1 of the *Bunreacht*, with its assertion that "all powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.").
45. See Chubb, *loc. cit.,* n. 42 above, pp. 9-12. See more generally A. Birch, *The British System of Government* (tenth edition, Routledge, London, 1998).

> "the Constitution, by assigning law-making powers exclusively to the Oireachtas... reflects one of the central tenets of classical liberal democratic theory: the legislature (parliament) makes laws and the executive (government) carries them out. In this vision, the government is merely the striking arm of parliament, carrying out parliament's will whether it likes it or not. This is obviously not the case, and it is more common to find the view expressed that parliament, in Ireland even more than in many other countries, has come to be a mere 'glorified rubber stamp'...for whatever proposals government puts before it. It is a slight, but only a very slight exaggeration to say that all legislation passed by the Dáil emanates from the government, and that all legislation proposed by the government is passed by the Dáil." [46]

By 1922, matters had long moved away from the liberal ideal towards an approach that is still in use today in both Britain and Ireland: governments being produced as the direct consequence of general elections (the results of which are registered by the composition of parliament) and subsequently ruling the country with the assistance of a professional civil service; such governments being led by a prime minister (or Taoiseach, in Ireland) who is the leader of the party (or coalition of parties) that has won the general election; maintenance of such governments in power in both houses by parliamentarians who are party loyalists; some degree of collective and individual answerability of ministers to (and hence influence by) parliament but, in practice – because of party loyalty and discipline, as well as the notion of collective cabinet responsibility – little likelihood of dismissal of the government by parliament in the normal run of events[47]; government proposals publicly discussed in parliament, but almost invariably passed with concessions made only in relation to details; and political parties outside parliament helping to mobilise the electorate at election time and forming the forum in which political leadership could be attained.[48]

In contrast to the nineteenth-century liberal understanding, with its idea of parliaments controlling governments, the early twentieth-century Westminster approach involved a far lesser role for parliament. Indeed that 'efficient secret' of the Westminster system has been the effective fusion of the executive and the legislature under the control of the former. Insofar as the respective legislative roles of the two branches are concerned,

> "the *government* operates at the critical stage in the public decision-making process, namely the point at which the needs, desires, ideas and demands of the community, and their reactions to suggestions from politicians, are precisely formulated into proposals for legislation and

46. Gallagher, *loc. cit.,* n. 14 above, at p. 208.The opening clause is a reference to Article 15.2.1 of the Irish Constitution, which provides, in another clause reflecting classical liberal theory that "the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

47. The Dáil has dismissed two governments in its history – in 1982, the coalition led by Garret FitzGerald, and in 1992, the coalition led by Albert Reynolds. It is also true however that nine governments have resigned rather than face the likelihood of defeat in the Dáil. Hence Gallagher's comment that "one reason why governments have so rarely been dismissed by the Dáil is that when they have seen defeat staring them in the face, they have usually jumped off the cliff rather than waiting to be pushed." (*Loc. cit.,* n. 14, at p. 207) Overall, the same writer has well summarised matters with the observation that "the Westminster model then, does not adequately capture the reality of the Dáil's true role in appointing and dismissing governments. However, it remains true that Irish governments do not routinely fear dismissal by the Dáil." (*Ibid.*)

48. See more generally, Chubb, *loc. cit.*, n. 42 above, at pp. 12 to 16.

> governmental action. Once formulated, these proposals are very likely to go through. At the next succeeding stage, [*parliament*] will give them the status of law and thus formally legitimise them, but it will probably not make a positive contribution of major importance to their content. Thus it has been rightly said that parliaments in systems such as this are not so much law-making as law-declaring bodies."[49]

Further increasing the centrality of the executive's role in any political system, using the early twentieth-century Westminster approach, is that the government sits at the confluence of streams of advice and opinion not only from parliament (which in this regard is only one voice in many), but also from interest groups, political parties and, crucially, highly expert civil servants. And, of course, the head of government will also be a party leader and leader of the majority in parliament as well. Such, then, were the features of the parliament-executive relationship inherited by the new Irish State in 1922.

The Impact of the 1922 Constitution

The drafters of the Irish Free State Constitution of 1922, the first constitution of the new, internationally recognised state which emerged after the war of independence, began their task by replicating the structures of early twentieth-century British government, even while they used the language of nineteeth-century liberalism. If this had been all they had done, this might have been a straightforward recipe for continued executive dominance. But the drafters of the 1922 document harboured genuine intentions to rein in the executive. Thus, they grafted onto the British-style structures a number of institutions which deviated from the original model and were serious attempts, if not to substitute, then at least to moderate the power of the new state's executive. Thus, for example, provision was made for referendums to be held on the written demand of two-fifths of the members of Dáil Eireann or of a majority of the members of Seanad Eireann, which would effectively out-vote the government.[50] So too was provision for the initiation, by a minimum number of voters, of proposals for laws or constitutional amendments.[51] The governing 'Executive Council' – stipulated, like its modern counterpart, to be responsible to Dáil Eireann – was constitutionally limited to the small number of between five and seven ministers appointed on the nomination of its President (the equivalent of the present-day Taoiseach).[52] Here again the legislature could flex its muscles, in that the Constitution provided that the number of ministers could be raised to twelve by the addition of so-called extern ministers "nominated by Dáil Eireann on the recommendation of a Committee of Dáil Eireann chosen by a method to be determined by Dáil Eireann, so as to be impartially representative of Dáil Eireann."[53] Each such minister was individually "responsible to Dáil Eireann alone for the administration of the Department or Departments of which he is the head" and no such minister could be removed from office during his term other than by the Dáil itself, in strictly regulated circumstances designed to avoid executive dominance.[54] This was not all.

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49. Chubb, *loc. cit.*, n. 42 above, at 16. Emphasis added.
50. Article 47 of the 1922 Constitution.
51. Article 48 of the 1922 Constitution.
52. Article 51 of the 1922 Constitution.
53. Article 55 of the 1922 Constitution. The term 'extern minister' was not found in the text of the Constitution but came into later popular usage. See Chubb, *loc. cit.*, n. 42 above, p. 16.
54. *Viz.* "for stated reasons, and after the proposal to remove him has been submitted to a Committee, chosen by a method to be determined by Dáil Eireann, so as to be impartially representative of Dáil Eireann, and the Committee has reported thereon." (See generally Article 56 of the 1922 Constitution).

The President was to be appointed on the nomination of the Dáil, and all other ministers appointed with its assent, with the retirement from office of all required if the President ceased to retain the support of a majority in the Dáil. Nor could the Oireachtas be dissolved on the advice of an Executive Council which had ceased to retain the support of a majority in Dáil Eireann.[55] Above and beyond all these constitutional provisions, it is interesting to note the expressed intentions of some of the founders of this state that Westminster-style party discipline ought not to prevail but, instead, that the Oireachtas be a "deliberative assembly in the fullest sense of the word" in which each legislative proposal would be "analysed only on its merits" and there would be "the maximum of individual liberty for the deputies in the Dáil".[56] Even the choice of electoral system (proportional representation with a single transferable vote and multi-seat constituencies) "appeared a recipe for a complex multi-party system in which the parliament would be untameable and strong and the executive consequently rather weak, dependent for further survival on constant appeasement of various parliamentary groupings."[57]

These careful plans notwithstanding, political power was not successfully redistributed between the two branches of government. The political conditions needed in order to enable the constitutionally-intended rebalancing of power between executive and legislature simply never appeared. Even from the beginning, the degree of political support for them never seemed entirely assured – it is noteworthy that even the above-described system of rebalancing had involved a considerable climb-down on the original, more radical, proposals of the 1922 Constitution's drafters (who had, for example, envisaged an Executive Council limited to only four members).[58] In any case, whatever hopes of success such plans to rein in the executive might otherwise have had, the death knell for the idea of a powerful legislature in the Irish State certainly rang with the emergence of two major post-Civil War political party blocs vying fiercely with each other for national political control. This kind of intense party loyalty facilitated executive control. Rigid adherence to party lines meant that discretions constitutionally conferred on the Oireachtas could in effect be exercised by the government (whose members, after all, controlled the dominant political party). In political reality, a particularly strong variety of executive hegemony over the legislative branch was therefore established, a situation that has persisted in Ireland right up to the present day. As might have been expected, decision-making continued to occur at the executive level and in private, but subject to controls far weaker than those that the founders of the State had originally hoped might be capable of being imposed by their planned deliberative assembly.

In sum, contrary to the original intentions of the drafters of the 1922 Constitution, a more or less textbook Westminster-style approach to government prevailed.[59] Institutional rules were quickly amended so as to more accurately reflect this political reality. Thus, for example, extern ministers were effectively done away with by a combination of constitutional amendments and political practice in 1927. As Chubb

55. Article 53 of the 1922 Constitution.
56. Kevin O' Higgins, Minister for Home Affairs, speaking in the Dáil on 12 October, 1922. (Dáil Debates cc. 1558-60). Quoted in Chubb, *loc. cit.*, n. 42 above, at p. 23.
57. O' Halpin, *loc. cit.,* n. 17, at p. 125.
58. Chubb, *loc. cit.*, n. 42 above, pp. 22 to 24.
59. *Cf.* Gallagher, *loc. cit.,* n. 14 above, pp. 201 to 202 and pp. 207, although see the views expressed by the same writer at pp. 206-7 thereof.

pointed out, "the 'un-British' institutions were shed within five years, and cabinet government in the British style was firmly established."[60]

These qualities that typify the Westminster model have been exhibited in a number of ways ,[61] for example: in Government's ability to rely on the regular support of parliament;[62] in government seeing its plans approved by parliament without the agreement of the Opposition and without even taking its views into account (beyond having to give them a hearing);[63] and in the lack of significance traditionally accorded to committees (which, in practice, can be a significant conduit for providing parliamentarians a meaningful role in policy formation).[64]

Under such a system, the Oireachtas is not bereft of *any* powers vis-à-vis the executive. Indeed, as regards the formation and dismissal of governments, Gallagher has counted six occasions in the history of the Irish State on which the Dáil itself has chosen the government by electing a minority Government (rather than, as is usually the case, being confined to the Westminster-type role of functioning as a register for votes cast in an election, or of ratifying a deal already put together by Coalition parties with sufficient votes to form a majority government). The Dáil has also dismissed two governments, with a further nine having resigned rather than face defeat in a vote. But these are exceptional events and indeed, insofar as dismissal of the government is concerned, arguably ought to be.[65] Overall, under the Westminster model, parliament acts as a law-legitimator rather than a law-maker,[66] a body which can aspire only to render the government accountable, rather than to be a policy-maker itself.[67]

The failure of initial attempts to ensure that dominance of parliament would not be as absolute in the new state as it had been at Westminster should not be seen as the consequence of party loyalties being taken advantage of by a cynical executive. A great deal of scepticism had always existed regarding the workability of plans to share power between the legislature and the executive. Indeed, this scepticism was so prevalent that it led to such plans being considerably diluted by the time the 1922 Constitution was adopted. And it is noteworthy too that, post-1922, the majority of parliamentarians dutifully toed the party line in taking the constitutional, legislative and political steps needed to consolidate executive powers – motivated at each such step, one assumes, not only by party discipline, but also by awareness of the unpalatable reality that empowerment of the Oireachtas could mean empowerment

60. Chubb, *loc. cit.*, n. 42 above, p. 21. One could quibble with the time-scale. The possibility of voter-initiated constitutional amendments was removed in 1928, when the government saw that it might be used to achieve a result it did not approve of.
61. Gallagher, *loc. cit.,* n. 14 above, at p. 219.
62. Ibid, pp. 206-7.
63. Ibid, p. 209
64. See Gallagher, *loc. cit.,* n. 14 above, p. 218, where he notes that committees tend to be more powerful in countries with parliamentary systems closer to the consensus model than where the Westminster model applies, and at p. 213 where he notes the tendency in Westminster model countries for the committee stage consideration of draft legislation to be timed to occur after the plenary discussion - with the result that any changes effected as a result of the committee's deliberations will be minor.
65. See Gallagher, *loc. cit.,* n. 14 above, p. 207 who observes with some force that the idea of parliaments acting like that of the Fourth Republic in France (which had its its governments replaced by parliament on average over twice a year) is neither realistic or attractive.
66. A largely symbolic role which is not, however, to be disparaged for that. See Gallagher, *loc. cit.,* n. 14 above, p. 213, citing P. Norton, *"Conclusion: Legislatures in Perspective"* in P. Norton (ed.), *Parliaments in Western Europe,* (Frank Cass, London, 1990) p. 143 at p. 147
67. Gallagher, *loc. cit.,* n. 14 above, p. 15.

of the Opposition. The parliamentary majority apparently preferring the emasculation of parliament to handing some of the levers of political control to their Civil War opponents, led by Eamon de Valera.

Executive-Legislature Relations and the 1937 Constitution

Although in terms of its constitutional significance, the coming into force of the 1937 *Bunreacht* under de Valera's Fianna Fáil was obviously an event of seminal importance, it essentially involved more of the same from the point of view of executive-legislature relations: the same twentieth-century Westminster model of government remained in place, with a patina of wording included here and there in the Constitution capable of misleading the careless or unwary into thinking that classical liberal theory – with its attendant notion of parliament as the dominant branch of government – prevailed.

Ironically, the 1937 Constitution, if anything, entrenched the Westminster model of executive-legislature relations even more firmly than had previously been the case. Symptomatic of this was that, unlike in 1922, no provision was made in the new Constitution for the creation of posts for 'extern ministers'. Further, the role accorded to the new office of Taoiseach was, as Chubb put it, "to elevate the Taoiseach formally and in practice to the position of a strong British prime minister".[68] One example of the enhanced prime-ministerial role was that the Taoiseach was given the power to terminate the appointment of any member of the Government.[69] Another was that the Taoiseach, rather than the cabinet as a whole, was given the power to bring about the dissolution of the Dáil.[70]

Executive-Legislature Relations in the Post-1937 Era [71]

It is a testament to the enduring nature of the early-twentieth century Westminster model on the Irish political scene that, seventy years after the adoption of the present Constitution, and notwithstanding many reforms, a fundamental rebalancing of the powers of executive and legislature has nonetheless never occurred. Up until recent years, even basic improvements in the workings of parliament tended to take place painfully slowly. Writing as late as 1995, O'Halpin could observe that

> "the Oireachtas's weakness as a parliament has been reflected in the antiquated and cumbersome way in which it has customarily discharged its business. Deputies and senators receive only meagre office accommodation and secretarial support, there are no parliamentary research facilities other than a notoriously underdeveloped library, and there is no money to pay for research assistance. Until the 1980s, when the FitzGerald coalition embarked on a somewhat haphazard experiment in procedural reform, the Oireachtas had nothing akin to a substantial committee system either to deal with draft legislation or to scrutinise Government policy and actions." [72]

68. Chubb, *loc. cit.*, n. 42 above, at pp. 16 and 33.
69. Article 13.3 of the 1937 *Bunreacht*.
70. Article 13.2 of the 1937 *Bunreacht*. Contrast Article 53 of the 1922 Constitution. In neither the 1922 nor the 1937 Constitution was such power uncircumscribed, depending as it did on retention of the support of a Dáil majority.
71. See generally here, M. MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Institute of Public Administration, Dublin, 2005) at 70-93.
72. *Loc. cit.,* n. 17, at p. 126.

For most of the history of this state, parliamentary reforms in Ireland tended for the most part to come about years, or even decades, after they were first proposed.[73] Fianna Fáil governments, which held power for an uninterrupted period of sixteen years from 1932 to 1948, tended – like their first predecessor governments – to have little interest in sharing power with the Opposition, and the party system hardened decisively into a 'Fianna Fáil against the rest' mould which was to endure for over fifty years. As MacCarthaigh observed:

> "notwithstanding two three-year periods in government between 1948 and 1957, the main opposition parties failed to give Dáil Éireann the means to hold future governments…successfully to account. Indeed, it appears that the inter-party coalitions were so eager to keep Fianna Fáil out of government that they engaged in the very thing they criticised it for – closed and unaccountable government." [74]

It might have been thought that the second sixteen-year period of uninterrupted Fianna Fáil governments might have given the Opposition adequate time to reflect upon the fact that the long-term disadvantages of a wholly adversarial political system might outweigh its short-term gains. Indeed, when the long period of rule by Fianna Fáil came to an end under the 1973 Fine Gael-Labour Coalition led by Liam Cosgrave, five *ad hoc* Dáil committees were established to consider important legislation. However, this proved to be something of a false dawn. These committees failed to present any real challenge to the government, in part because of their weak powers and temporary nature. (The same government made a further contribution to Oireachtas reform by implementing the vast bulk of the reforms which had already been recommended by the Fianna Fáil-appointed 1971/2 Sub-Committee on Reform of Dáil Procedure. Ironically, however, many of these reforms had nothing to do with – and indeed some militated against – a reduction in the adversarial nature of the political system.) Overall, as Gallagher has observed, "the pre-1980s committee system was generally acknowledged to be ineffective, with the possible exception of the Public Accounts Committee." [75]

By the early 1980s, however, change was finally in the offing. The return to power of Fianna Fáil in 1977, with a massive majority, finally saw Fine Gael move to align its position with the more long-standing calls of the much smaller (and therefore even more parliamentarily disadvantaged) Labour Party for reform. In 1983, under the second Fine Gael-Labour Coalition of Garret FitzGerald, a broad select committee system was introduced facilitating non-adversarial discussion of various cross-departmental issues. A total of seventeen select committees were created, and funding increased.[76] This sudden explosion in the number of committees soon turned out to have been "too much, too quickly,"[77] however, with the new committees being "immediately undermined by their superabundance".[78] Moreover, the remit of certain committees was too vaguely defined and the correspondence with government activity too

73. As will be deduced from the text below, however, recent years, have seen both an alteration of the rate of change and substantial improvements in several respects (*e.g.,* research facilities) (as to which see generally M. Dennison, "*Supporting Parliament: Oireachtas Library and Research Services*" in MacCarthaigh and Manning (eds.), *op. cit.,* n. 6, p. 234). The illustrations of his point offered by O'Halpin in the text above would certainly not be valid today.
74. MacCarthaigh, *loc. cit.,* at n. 71 above, p. 71.
75. *Loc. cit.,* n. 14 above, p. 219.
76. A. Arkins, "*The Committees of the 24th Oireachtas*" (1988) 3 Irish Political Studies 94.
77. *Ibid.*, p. 97.
78. *Ibid.,* p. 94.

inexact, giving rise to "an uncoordinated mish-mash of committees"[79] which failed to scrutinise certain executive activities at all.[80] O'Halpin characterised the process as "a somewhat haphazard experiment".[81] It was also an experience which was destined to be short-lived. A Fianna Fáil government led by Charles Haughey came to power in 1987 and, with its leader's advocacy of the merits of single-party government, the select committees of the twenty-fourth Dáil were not re-established.

Oireachtas committees last only as long as the life of the Oireachtas itself and lapse when an election is called. Right up to the beginning of the 1990s, however – in other words, for the first seventy years of the existence of the state – there was no broad tradition of automatic re-establishment of committees (apart from what one might call housekeeping and procedural committees such as the Dáil Standing Committee on Procedure and Privileges). Laffan has observed that "until the reforms of the 1990s, the procedures and practices of the Dáil were more akin to those obtaining in the British Parliament at the foundation of the state."[82] Significant change began to occur from the early 1990s, however. MacCarthaigh has suggested that the failure of Fianna Fáil to secure an overall majority in the snap election subsequently called by Charles Haughey in 1989 should be seen as a 'critical juncture' in the development of parliamentary accountability in Ireland, on a par in this regard with the adoption of the 1922 and 1937 Constitutions. This is because it marked the point of origin of what was likely to be a permanent shift to Coalition governments in this country – a change which, he argued, would inevitably move Ireland closer to consensual government by introducing other 'veto players' (in the shape of coalition partners) in the process.[83]

If Ireland has indeed been moving in the direction of more consensual government over the last two decades or so, progress along the route has been slow. Nonetheless, it is undeniable that there has been gradual evolution in the Oireachtas committee system.[84] It is also accurate to trace the origins of this evolution to the beginning of the 1990s. After the 1992 election, and as the result of negotiations leading to Labour formatting a coalition government with Fianna Fáil, "the committee system leapt into life again"[85] with the introduction of a new system of joint committees. Some of these committees (such as the Joint Committee on Foreign Affairs) were departmentally aligned. Some of them (like that on women's rights) were not. As with the 1983-1987 experiment – from which it seems insufficient lessons had been learned – there were arguably too many committees. However, the system was more logically structured than had been its predecessor in the twenty-fourth Dáil. Significant new powers were also given to these committees by entrusting the previously, and rather misleadingly, named 'committee stage' of legislation to them instead of to both Houses.[86] This new committee system was maintained and kept in place by the Rainbow Coalition of 1994-1997 and then, subsequently, by the four administrations which have ruled the country since that administration. Some reorganisation has taken place. In particular (a) in 1997, when the incoming Fianna Fáil-Progressive Democrat Coalition reduced the excessive number and

79. *Ibid.*
80. Gallagher, *loc. cit.,* n. 14 above, p. 219.
81. *Loc. cit.,* n. 17 above at p. 126.
82. Laffan, *loc. cit.,* n. 25 above, p. 253.
83. MacCarthaigh, *loc. cit.,* n. 71 above, pp. 84-87.
84. See the useful table provided in this regard by Martin, *loc. cit.,* n. 30 above, at pp. 296-7.
85. Gallagher, *loc. cit.,* n. 14 above, p. 219.
86. *Ibid.*

size of the committees, and (b) in 2011, after the February 2011 election, when the number of committees (which had been raised again for reasons of political expediency by the previous regime in 2007) was once again reduced by the new Fine Gael-Labour Government. At the time of writing (September, 2011) eleven joint committees had been set up in the period since the election of the 31st Dáil.[87]

The committee system introduced in 1992 thus continues to exist (and indeed to evolve). This is not to say, however, that it has proven to be particularly effective. Much useful work has certainly been done by some committees but, for various reasons which will be returned to presently, the Oireachtas committee system has not yet developed to the point it has in other European democracies, particularly in consensus-model democracies. Yet it has improved over time (a good example of this being in terms of its research capacities[88]).

It is noteworthy that it has been perceived to be necessary for the programmes of recent coalition governments to stress the idea of further strengthening committees. Hence, for example, the 2007 *Agreed Programme for Government* of the incoming Green Party-Fianna Fáil coalition government promised that it would "pursue the issue of reform of Oireachtas sitting times, Oireachtas procedures *and strengthening the role of Committees*".[89] The programme of the 2011 Fine Gael-Labour coalition went further, promising to "reduce the number of committees, and give key committees constitutional standing" and stating that "the Dáil needs fewer but stronger committees, resourced properly."[90]

There are, however, limits to what should be expected of such reforms to the committee system.[91] Government backbenchers who aspire to promotion to ministerial office are unlikely ever to use committee powers of interrogation too rigorously against colleagues in ministerial office. A political system in which re-election is so dependent on constituency work is unlikely ever to produce committees with more than a small number of members who have a strong interest in committee legislative or policy work, especially when the media profile of such work is generally negligible. Governments generally have little incentive to strengthen a system which will increase the scrutiny to which their work is subjected and, perhaps unsurprisingly, the experience of past governments has been that fine words about strengthening committees have not always been matched by actions. A further limitation is that although the resourcing of committees has improved, it is still inadequate, and matters in this

87. *Viz.* the Joint Committee on Health and Children, the Joint Committee on Justice, Defence and Equality, the Joint Committee on Communications, the Natural Resources and Agriculture, the Joint Committee on the Environment, Transport, Culture and the Gaeltacht, the Joint Committee on Jobs, Social Protection and Education, the Joint Committee on Finance, Public Expenditure and Reform, the Joint Committee on Foreign Affairs and Trade, the Joint Administration Committee, the Joint Committee on Investigations, Oversight and Petitions, the Joint Committee on the Implementation of the Good Friday Agreement and the Joint Committee on European Union Affairs. (See generally http://www.oireachtas.ie/ViewDoc.asp?fn=/documents/committees31stdail/Committees2011.htm&m=k)

88. See generally Dennison, *loc. cit.* at n. 73 above, at p. 74.

89. See p. 85 thereof. (Emphasis added.) (Available online at the time of writing at http://www.dfa.ie/uploads/documents/EU%20Division/newprogrammeforgovermentjune2007.pdf)

90. See *Government for National Recovery 2011-2016* (available online at the time of writing at http://www.socialjustice.ie/sites/default/files/file/Government%20Docs%20etc/2011-03-06%20-%20Programme%20for%20Government%202011-2016.pdf) at p. 19 thereof.

91. See also in this regard Gallagher, *loc. cit.,* n. 14 above, at pp. 220-221.

regard are likely to get worse rather than improve given current financial difficulties and the public sector recruitment embargo.[92]

Overall, Martin has well summarised the position regarding Oireachtas committees to date in the following terms:

> "albeit from the weakest of starting points, Oireachtas committees have evolved significantly since the 1980s. While the trajectory has not always been in the direction of a stronger committee system, the overall trend has clearly been towards establishing a more significant set of parliamentary committees. Nevertheless, it would be misleading to characterise Oireachtas committees as being particularly powerful relative to committee systems in other legislatures. In comparative rankings of the strength of committee systems of national parliaments in thirty-nine advanced industrial democracies, Ireland comes in mid-table. While its ranking over time has improved significantly, Irish committees still lag well behind that of many national parliaments in Europe, most especially the committee systems of Scandinavian legislatures." [93]

O'Halpin has correctly noted that "there is little doubt that committee work has finally won recognition as a central feature of Oireachtas work".[94] It is nevertheless also true that the effect of the relative weakness of the same committee system,[95] combined with the powerlessness of the Seanad, has meant that a fundamental recalibration of the relative powers of executive and legislature has not yet occurred in Ireland. In sum, this country still operates a version of the early twentieth-century Westminster model, as yet relatively lightly modified by recent reforms. Such is the context in which Oireachtas intervention in European affairs operates. It is a political system in which, as Chubb once put it, the Oireachtas has only a comparatively modest role as a policy-maker, and one which historically, it has not performed very well.[96]

4. *Ireland's Accession to the European Communities: The Early Role of the Oireachtas*

Introduction: A Failure to Prepare?

In the light of the foregoing discussion, it can scarcely come as a surprise to learn that the Oireachtas had no serious role in controlling or monitoring the actions of the Government in European matters prior to the entry of Ireland into the then European Communities. Nor did the view appear to be broadly shared at the time that matters should be otherwise: Laffan has noted that, in two government papers which were laid before the Houses of the Oireachtas in April, 1970, and January, 1972, it was not

92. See in this regard, *Houses of the Oireachtas Commission Annual Report 2010* at p. 68 thereof.
93. Martin, *loc. cit.,* n. 30, at p. 301.
94. O' Halpin, *loc. cit.,* n. 17 above, p. 127.
95. Note that the investigative capacities of committees were dealt a considerable blow in the Supreme Court decision in *Maguire v. Ardagh* [2002] 1 IR 385 ("the *Abbeylara* case" considered in J. O' Dowd, "*Knowing How Way Leads on to Way: Some Reflections on the Abbeylara Decision*" [2003] Irish Jurist 162)
96. Chubb, above, n. 42, at 65.

thought necessary to make any reference to the potential impact of membership of the Communities on the Oireachtas (although, in contrast, the potential impact on the Constitution was considered sufficiently politically sensitive to merit some discussion).[97]

The phenomenon of the widespread lack of attention paid to the implications for the Irish parliament of impending membership of the Communities was a situation which stood in marked contrast with the pre-entry situation in many other European countries, such as Denmark (which joined at the same time as Ireland and whose legislature had been involving itself in European matters since as far back as 1961), Finland, Sweden and Slovenia (all of which were later entrants).[98] In the United Kingdom, an independent Study of Parliament Group brought out a report in July, 1972 on the implications for the Westminster parliament of forthcoming membership,[99] but even this very limited reaction had no counterpart in the Irish jurisdiction.

The fact of the Oireachtas being accustomed to its historically subservient role may well have been a significant factor here. Not having an agenda-setting role in relation to any other issue, members of the Oireachtas probably did not expect to obtain one in European matters which, moreover, involved highly technical legal and economic issues more familiar to members of the government (involved, as they were in meetings of the Council of Ministers) and to departmental civil servants than to TDs. The task of setting the national agenda on accession-related issues was therefore unquestioningly left to the executive.[100]

The relatively uncontroversial nature of the objective of Irish membership in the Community – reflected in the massive 83 per cent vote in favour of entry in the 1972 referendum – has been argued to have been a further possible contributory factor for such torpor, by ensuring that there would be no pressure on the government to set up any such parliamentary body, since it seemed likely to win a referendum on accession even without doing so.[101]

The Biannual Report System

On Irish entry to the Community, and with the adoption of the legislation facilitating this, a consciousness that the Oireachtas would no longer be the sole legislative body finally seemed to grow among Senators and TDs, resulting in demand for some local parliamentary control.[102] A very limited role was created

97. Laffan, *loc. cit.,* n. 25 above, p. 252. The lack of such interest in Ireland was noted at the time of entry and criticised by the then Senator Mary Robinson. (See M. Robinson, *"Challenge for Oireachtas",* Irish Times, 23 January, 1973).

98. Contrast the positions in *e.g.,* Slovenia and Denmark, Finland and Sweden, detailed in, respectively D. Fink-Hafner, *"Ensuring Democratic Control over National Government in European Affairs – the Slovenian Experience"* and T. Raunio and M. Wiberg, *"Too Little, Too Late? Comparing the Engagement of Nordic Parliaments in European Union Matters",* in Barrett (ed.), *op. cit.,* n. 1 above, at p. 393 and 379 respectively.

99. D. Coombes, M. Beloff and N. Johnson, *Westminster to Brussels: the Significance for Parliament of Accession to the European Community* (PEP Broadsheet 540, 1973).

100. See also in this regard, Laffan, *loc. cit.,* n. 25 above; and O' Halpin, *loc. cit.,* n. 17 above.

101. B. Laffan, *"National Parliaments and Domestic Core Executives"*, paper delivered at *Ireland, Europe and the Challenge of Democracy – Ensuring Democratic Control over Government in European Union Affairs,* conference held at Europe House, Dublin, Friday, 20 May 2005. For an interesting study of referendums generally in the Irish political system see R. Sinnott, *"Cleavages, Parties and Referendums: Relationships Between Representative and Direct Democracy in the Republic of Ireland"* (2002) 41 *European Journal of Political Research* 811.

102. Robinson, *loc. cit.,* n. 97 above.

for parliament by the European Communities Act 1972.[103] There are three aspects to this Oireachtas role which merit mention.

In the first place, and thanks to an amendment inserted in the Seanad debates on the European Communities Act 1972,[104] the Government was required under s. 5 of this Act to make a report twice yearly to each House of the Oireachtas on developments in the European Communities. Hopes expressed that "this report should not be confined to noting what has been decided, but should be broad enough to encompass the proposals for further development and the Government attitude to these proposals" notwithstanding,[105] the s. 5 obligation turned out in practice to be of little value in empowering the Oireachtas. The reports normally arrived late. Almost two decades after this obligation was introduced, a 1991 Oireachtas Joint Committee report was still complaining of a "serious delay" in the presentation of the reports.[106] The impression that time would be made to debate the reports also turned out to be a chimera. As early as March, 1977, a Joint Oireachtas Committee report complained that the latest Dáil debate on a report pertaining to Community developments had taken place in July, 1975, close to two years earlier, and the latest Seanad debate in March, 1976, a full year earlier.[107] This situation did not improve over time. The 1991 report observed that

> "debates in the Houses on these reports have been infrequent, tardy and unsatisfactory because pressure of other business has forced debates to be fragmentary. When debates do take place they are diffuse and cursory because of the very comprehensive and broad subject matter of the report." [108]

Democratic Control of the Use of Ministerial Regulations

The second provision made by the Act involving increased powers for the Oireachtas was the provision in s. 4(1) for the possibility of ministerial regulations, which were to have 'statutory effect', being adopted in order to give effect to obligations under the Treaties. The Oireachtas role here was to be that unless a regulation was confirmed by Act of the Oireachtas – and an Act passed within six months of the regulation being made, at that – it would cease to have statutory effect after the expiration of six months.[109] The operation of this provision turned into something of a fiasco, however. Only one confirming statute – the European Communities (Confirmation of Regulations) Act 1973 – was ever adopted. This Act provided that twenty-two ministerial regulations listed in the Schedule to that Act were thereby confirmed. However, the regulations were simply laid in the Oireachtas library, rather than being sent to individual TDs and senators. The explanatory memorandum to the proposed legislation neither set out the contents of the regulations nor explained their impact on the law. "The debates in both Houses revealed that very few deputies or senators had bothered to look at the complete text of these regulations, and were in fact blindly confirming regulations which had been part of Irish law for the

103. See also O' Halpin, *loc. cit.,* n. 17 above, pp. 127-131; and Laffan, *loc. cit.,* n. 101 above.
104. See generally on the 1972 Act the note by M. Robinson at (1973) 10 CML Rev 352.
105. Robinson, *loc. cit.,* n. 97 above.
106. See Joint Committee on the Secondary Legislation of the European Communities *Report No. 07 - Review of the Functions of the Joint Committee on the Secondary Legislation of the European Communities* (Stationery Office, Dublin, 1991) at para. 10.
107. See Joint Committee on the Secondary Legislation of the European Communities Report No. 55 - Joint Committee on Secondary Legislation of the European Communities, Functions and Work (23 March 1977) at p. 6.
108. *Loc. cit.,* n. 106 above.
109. S. 4(1) of the 1972 Act.

previous six months – for the purpose of continuing them in force..."[110] Unsurprisingly, severe criticism resulted and the Government promised legislation giving the Oireachtas a more positive role.[111]

The result was the adoption, over the course of a nine day period in July, 1973, of the European Communities (Amendment) Act 1973, which amended the 1972 Act so as to eliminate the above-described procedure,[112] and replace it with a new one. This was a significant step. It marked, unbeknownst to its proponents, the end of any serious prospect of regular plenary Oireachtas debates on European issues. As has already been seen, the biannual reports provided for in the 1972 Act were to fail to give rise to regular debates [113] and, as will be seen in the text below, Oireachtas Committee reports on European matters were destined to suffer in large measure the same fate. The 1973 Act was also to be a significant step in a positive way, however. Crucially, in creating this new procedure, express provision was made for a Joint Committee on the Secondary Legislation of the European Communities, the germ of the current system of Oireachtas control over the executive in European matters.

In the place of the old provision requiring positive confirmation of regulations, the new provision now introduced a negative check enabling regulations to continue to have statutory force for an unlimited period of time *unless* annulled by the Oireachtas. The relevant provision now became the following:

> "if the Joint Committee on the Secondary Legislation of the European Communities recommends to the Houses of the Oireachtas that any regulations under this Act be annulled and a resolution annulling the regulations is passed by both such Houses within one year after the regulations are made, the regulations shall be annulled accordingly and shall cease to have statutory effect…" [114]

The new procedure at least avoided the problems experienced in the operation of the original provision. However, in effect, its creation involved the replacement of one regular opportunity to discuss European matters from the floor of the Houses with a Committee-based procedure. Ironically, the new system was an even greater failure in ensuring proper democratic surveillance of the implementation of European-level obligations by means of ministerial regulations than its preceeding mechanism had been, becoming, in effect, a virtual legislative dead letter. Apparently, only on one single occasion (if even that) did a Joint Committee on the Secondary Legislation of the European Communities recommend the annulment of any regulation under this provision.[115] Neither did subsequent Oireachtas Committees

110. M. Robinson, "*The Role of the Irish Parliament*" (1974) 22 Administration 1 at p. 15. See also by the same writer, "*Irish Parliamentary Scrutiny of EC Legislation*" (1979) 16 Common Market Law Review 9.
111. *Ibid.*
112. *Viz.* by substituting a new s. 4 into the 1972 Act. (See s. 1(1) of the 1973 Act.)
113. And as will be seen in the text below, Oireachtas Committee reports on European matters were destined to suffer the same fate.
114. S. 4(1)(b) of the 1972 Act as substituted by s. 1(1) of the 1973 Act. Continuing the approach of the 1972 Act, the annulment was to be without prejudice to the validity of anything previously done under the regulation in question.
115. See the Committee report cited at n. 106 above at para. 38. The occasion on which the power was (allegedly) used was, however, not identified in the report. Nor is there any evidence that a statutory instrument was actually annulled by the Houses. Writing in 2004, Tomkin asserted categorically that no statutory instrument made under the 1972 Act had ever been annulled by the Houses of the Oireachtas – a point he notes was confirmed to him by the Library of the Houses of the Oireachtas. (See J. Tomkin, "*Implementing Community Legislation into National Law: The Demands of a New Legal Order*" (2004) 2 Judicial Studies Institute Journal 130 at p. 138).

which inherited this power make any use of it.[116] In other words, in practice, the 1973 amending legislation effectively gave the executive what amounted to a complete *carte blanche* in the use it made of regulations to implement European law, untroubled by any real fear of intervention by the Oireachtas. The exercise of adequate democratic control by the Oireachtas over the use of ministerial regulations to implement European Union law remains conspicuous by its absence right up to the present day.[117] Indeed, in practice, the Courts – even though they themselves have arguably been excessively liberal in their interpretation of the extent to which reliance can be placed on ministerial regulations in implementing European law – have imposed greater restraints on their use in this context than has the legislature.[118]

The Joint Committee on the Secondary Legislation of the European Communities

Of more significance than either the biannual reports or the annulment procedure was the third aspect of the 1973 reforms relating to the Oireachtas - the establishment of the Joint Committee on the Secondary Legislation of the European Communities which, according to the 1973 Act, would operate the annulment procedure.

As its name would suggest, the Joint Committee, which came into being in July, 1973, under the newly-elected Fine Gael-Labour coalition, drew its membership of 25 from both the Dáil (which provided eighteen members) and the Seanad (which provided seven). Political parties were represented in proportion to the number of their representatives in each House. MEPs were also entitled to attend the first Committee as *ex officio* members. Yet in a foretaste of the experience of other European-related Oireachtas committees and joint committees, in practice MEPs rarely attended, handicapped as they were by difficulties of distance and timing.[119] They were excluded from membership of subsequent Joint Committees, seemingly on constitutional grounds.[120] However, MEPs with dual mandates, i.e. MEPs who were also members of either House of the Oireachtas, continued to be notified of meetings and could attend and participate without the right to vote. The consequence of the ending of *universal ex officio* membership of *all* Irish MEPs was, effectively, the gradual severence of a link with Europe. On the other hand, it is true that which was already participating in the activities of the Committee only to a very limited extent.[121]

116. This includes the Joint Committee on European Affairs, which inherited this power in 1995 (by virtue of the amendment of s. 4 of the 1972 Act (as previously amended) by s. 1 of the European Communities (Amendment) Act 1995) and retained it until 2011, when it ceased to exist. So utterly unused was the annulment power that in this writer's experience, there were members of the European Affairs Committee who were not even aware of its existence.

117. Indeed the position worsened considerably with the demise of the Joint Committee on the Secondary Legislation of the European Communities in 1992, since this Committee did produce reports on batches of statutory instruments at irregular intervals. One (random) example of this is the fourth Joint Committee's Report *78 Statutory Instruments* (9 May 1985).

118. See *e.g.,* the rulings in *Meagher v. Minister for Agriculture and Food* [1994] 1 IR 329, *Maher v. Minister for Agriculture and Food* [2001] 2 IR 139, and *Browne v. Attorney General* [2003] 3 I.R. 205 and *Kennedy v. Attorney General* [2005] 2 I.L.R.M. 401.The latter two cases led to the enactment of the European Communities Act 2007 which expanded the use of statutory instruments by ministers to give effect to European Community law.

119. See Joint Committee on the Secondary Legislation of the European Communities *Report: Functions and Work of Joint Committee* (23 March 1977) at pp. 7-8.

120. See the Committee report cited at n. 106 above at para. 34. It should be borne in mind that from June 1979, MEPs were directly elected to the European Parliament, rather than having been selected from among the membership of the Houses of the Oireachtas, as had previously been the case.

121. By 1991, only two of Ireland's then 15 MEPs were dual mandate holders. See generally in relation to the foregoing, the Committee report cited at n. 106 above at para. 50 thereof. See also in relation to MEPs, O' Halpin, *loc. cit.,* n. 17 above, pp. 127-8.

It has already been noted in the text above that Oireachtas committees last only as long as the life of the parliament and lapse when an election is called, with no guarantee of continuity in their membership even if re-established in the subsequent legislative period. This constant lapsing was to be termed "a major weakness in the Committee system" by the Joint Committee on the Secondary Legislation of the European Communities Committee itself, which criticised the delays which had occurred in effecting its reappointment following general elections.[122] On the other hand, the Joint Committee at least enjoyed an unusual stability apart from this, being re-established after every election on five further occasions, and having a twenty-year life span until its replacement by the Committee for Foreign Affairs in 1993.

As the table below indicates, the Joint Committee produced reports in relatively large numbers over the years. The quality of these reports could be decidedly mixed, however, and the level of output was erratic. Moreover, even the distant approach of elections radically reduced their number[123] – a point most graphically illustrated by the third Joint Committee which failed to produce a single report in the five months of its existence, which were the months leading up to the February 1992 general election.

Table 1: Production of Reports by Joint Oireachtas Committee on the Secondary Legislation of the European Communities

Committee	***Years of Existence***	***Number of Reports Produced***
First Joint Committee	1973-1977	59
Second Joint Committee	1977-1981	94
Third Joint Committee	1981-1982 (five months)	0
Fourth Joint Committee	1983-1987	36
Fifth Joint Committee	1987-1989	14
Sixth Joint Committee	1990-1992	14

The existence of the Joint Committee permitted the development of some expertise in European matters among that small body of parliamentarians who made up its members. The Joint Committee has additionally been credited with blazing a trail insofar as the use of Oireachtas committees was concerned, setting the stage for the introduction of a committee system in the 1980s, and its later, rationalised, reintroduction in the 1990s. It is partly for this reason that Laffan has observed that "just as the EU has been part of the modernisation of the Irish economy and society, it has been an element in the reform and modernisation of the Irish parliament".[124]

122. See the Committee report cited at n. 106 above at para. 39.
123. Figures compiled from Committee report cited at n. 106 above, para. 16 and from the Oireachtas Committee website at http://193.178.2.84/test/R/index.html. Note also report cited at n. 106 above at para. 16.
124. Laffan, *loc. cit.*, n. 25 above, p. 268.

The existence of the Committee also represented some (very slight) progress in adjusting the almost total imbalance which existed between executive and the legislature, although only in the context of membership of the Community – membership which could be expected, given its institutional make-up, to reinforce the prerogatives of the executive. The Committee was to see its terms of reference gradually adjusted and expanded over time.[125] But it suffered from a number of major faults.

In the first place, the broad ambit of the policy areas it was expected to scrutinize and the calibre of its chairpersons (who included the very experienced former foreign minister Peter Barry and future Taoiseach Charles Haughey) notwithstanding, the fact is that the Committee's work "remained essentially technical and obscure, the object of little comment or controversy".[126] The first Committee implicitly admitted as much by wishing that its successor "be more concerned than it has been with policy questions and less with technicalities."[127] It blamed its own narrow terms of reference for this problem.[128] In consequence, the second and subsequent Joint Committees were given a somewhat broader remit - being empowered to consider "such programmes and guidelines prepared by the Commission of the European Communities as a basis for possible legislative action".[129] This facilitated the production of numerous reports on various topics. To take the example of the Fifth Committee, this Committee produced reports on topics as diverse as: the implementation of the Directive on Product Liability; the Council Directive relating to credit, suretyship and legal expenses insurance; the Community trade mark;, mortgage credit; and public works and public supply contracts. Worthy although such topics were, there was a clear sense, during the entire period of existence of successive committees (and not merely the first) of missing the broader picture, and a sense that this failure was at least in some measure attributable to the continued narrowness of the Committee's remit. In a 1991 report, the Joint Committee referred to difficulties it had faced "when, because of its restrictive Terms of Reference, it was excluded from considering such major issues as GATT and the effects of German unification". It also complained of the somewhat astonishing situation that its terms of reference might not even allow it to consider the outcome of the then ongoing Maastricht intergovernmental conference.[130] Small wonder then that the Committee's output of reports was described by one commentator as no more than 'superficially impressive.'[131]

As if this was not enough, the Committee faced other difficulties. A further problem – that the Committee was constantly behind on its work – meant that much of its work was retrospective by the time it was published,

125. See also generally M. Robinson, *"Irish Parliamentary Scrutiny of EC Legislation"* (1979) 16 CMLRev 9. See also D. Walsh, *"Irish Parliamentary Scrutiny of EU Measures on the Free Movement of Persons: Going Through the Motions?"* (2005) 40 Irish Jurist 261 at 263.
126. *Ibid.,* p. 129.
127. See Committee Report cited at n. 119 above, p. 9.
128. *Viz.* for having confined it to examining formal proposals by the Commission for secondary legislation to be adopted by the Council, rather than enabling the Committee to look at the programmes and policy documents produced by the Commission which dealt with matters at a broader level and were more suitable for discussions of principle. (*Ibid.,* pp. 4-5.)
129. Following the recommendation of the first Committee in the Committee Report, *loc. cit.,* n. 119 above, p. 5. See further report of the Committee *loc. cit.,* n. 106 above, p. 5.
130. See Committee report cited at n. 106 above, para. 31. The seriousness which the Committee viewed this problem as having was sufficient for it to recommend a move to a new Committee. Hence at para. 29, the Committee noted that "the restrictive Terms of Reference of the Joint Committee confine its deliberations to EC secondary legislation and this effectively excludes consideration of the macro issues referred to above... Broadening the Terms of Reference of the Joint Committee is clearly indicated to face this challenge. The Joint Committee needs to be relaunched." (*Ibid.,* para. 29.)
131. O' Halpin, *loc. cit.,* n. 17 above, p. 129.

and thus failed to contribute to the debates preceding proposals becoming law at European level.[132]

Yet another challenge, although one linked to the last-mentioned difficulty, was that from the very outset of its work, the Committee was handicapped by a mismatch between the resources available to it and the scale of the task it was expected to undertake. Indeed, a dispute over such questions as staffing, back-up facilities and assistance available to it meant that it was well into 1975 before the first Committee was engaged in anything like a satisfactory work routine.[133] Even once it was, its financial resources and those of its successors remained extremely limited.

Further, securing the attendance even of its own members was problematic. In order to get its work done, the Committee had to meet relatively frequently, making correspondingly large demands on members' time.[134] It soon encountered difficulties in securing an adequate attendance at its meetings,[135] unsurprising given the poor electoral reward to be expected for this work and the competing demands of constituency work. Exacerbating these problems, financial resources and the attendance of Oireachtas members became the subject of competition when a host of other committees [136] were set up in the 24th Dáil in 1983.

Research capacity was also lacking. Neither members of the Committee nor administrative staff had sufficient expertise to deal with the many technical and complex issues EU law and policy were capable of raising.[137] Revealingly, the 1991 report produced towards the end of the last Committee's existence called attention to the need for a revamped committee to be given access to legal advice and greater use of consultancy services in order to enable it to produce in-depth reports on major issues – such as the Common Agricultural Policy and economic and monetary union – and an adequate financial allocation to allow it keep in contact with the Community institutions and the European affairs committees of other member states' parliaments.[138]

Last, but not least, there was also a clear disconnect between the work of the Committee and the rest of the Oireachtas, probably not helped by its procedural approach of operating through sub-committees which met and deliberated in private.[139] As O'Halpin has put it

> "it was dogged by the esoteric and technical nature of its deliberations, far removed from the

132. See also Laffan, *loc. cit.,* n. 25 above, p. 259.
133. See Committee Report cited at n. 119 above, p. 1. See also in this regard the revealing report to be found in the Irish Independent of 19 July 1974.
134. Thus for example, between April 1975 and March 1977 there were 64 meetings of the Committee or its sub-committees – an average of 32 a year. (See Committee Report cited at n. 119 above, p. 2.)
135. See Committee Report cited at n. 119 above, p. 7.)
136. With "rather more scope both for travel and moralising", as O'Halpin has put it. (See O' Halpin, *loc. cit.,* n. 17 above, p. 129.)
137. Laffan, *loc. cit.,* n. 25 above, p. 259. Nor should it be forgotten that what advantage it had in terms of its intellectual resources and institutional memory was affected by the fact its membership endured only as long as the relevant parliamentary term.
138. See Committee report cited at n. 106 above, para. 31(b) and (d).
139. See Committee Report cited at n. 119 above, pp. 1-2. The four sub-committees dealt with (a)economic, commercial and financial affairs, (b) social, environmental and miscellaneours mattes, (c) agriculture and fishery matters, and (d) statutory instruments and legal affairs. (See Joint Committee on the Secondary Legislation of the European Communities, *Report No. 07 - Review of the Functions of the Joint Committee on the Secondary Legislation of the European Communities* (Stationery Office, Dublin, 1991) at para. 13 thereof.)

> normal fare of Irish parliamentarians, for most of whom it was a complete backwater: it is no coincidence that the one member consistently singled out for praise by officials, academics and other observers was a strictly part-time politician who was a leading expert on European law, the then Senator and [later] President Mary Robinson."[140]

This disconnect between the work of the Committee and the Oireachtas as a whole manifested itself in the Committee's failure to have its reports debated in the House. The 55th report of the first Joint Committee – published in March, 1977 – revealed that not a single one of that Committee's previously published reports had been debated by the Oireachtas.[141] In 1978, in an apparent response to a plea by the first Committee for a definite arrangement for debates on the Committee's reports in each House at regular intervals,[142] a facility was introduced enabling the second and subsequent Joint Committees to arrange for their reports to be debated in either or both Houses if it so requested.[143] This arrangement was an almost complete failure in the Dáil, however. By 1991, a derisory three Joint Committee reports had been debated in all of the then eighteen years of the Committee's existence.[144] More debates took place in the Seanad although, even here, the number tended not to be that large, and debates could not be described as having taken place on anything approaching a 'regular' basis, except perhaps in the lifetime of the fourth Joint Committee, during the second Fine Gael-Labour Coalition led by Garret FitzGerald, when 25 of 36 reports (i.e. 69 per cent of the total) produced by the Joint Committee were debated in the Seanad (although only one was debated in the Dáil).

Table 2: Debates in the Houses of the Oireachtas on Reports of Joint Committees on the Secondary Legislation of the European Communities from 1973 to 1989 [145]

Joint Committee	*Years of Existence*	*No. of Reports Produced*	*No. of Reports Debated in Dáil*	*No. of Reports Debated in Seanad*	*No. of Reports Debated in Total*
First Joint Committee	1973-1977	59	0	0	0
Second Joint Committee	1977-1981	94	2	9	11
Third Joint Committee	1981-1982 (five months)	0	0	0	0
Fourth Joint Committee	1983-1987	36	1	25	26
Fifth Joint Committee	1987-1989	14	0	7	7

140. O' Halpin, *loc. cit.,* n. 17 above, pp. 128-129.
141. See Committee Report cited at n. 119 above, p. 6.
142. *Ibid.,* p. 6
143. See Committee Report cited at n. 106 above, at para. 15 thereof.
144. *Ibid*.
145. *Ibid.,* Annex 1. Note that no figures have been made available in respect of the sixth Committee which existed from 1990 to 1992 although certainly by February 1991 (over fourteen months after the establishment of this Committee no report by it (it ultimately produced fourteen of these) had been debated in either House or was on the order paper for debate in the Dáil, and only one paper was at that time on the order paper for debate in the Seanad. (*Ibid.*)

This failure on the part of the Oireachtas as a whole to engage with the Committee on European matters in any meaningful sense may to some extent have been the result of the narrow remit of the Committee, which, as we have seen, excluded consideration in its reports of many broad and politically interesting European issues.[146] There was, however enough discussion of important issues in the Committee's reports to merit far more discussion in the Dáil than actually occurred. To take one somewhat remarkable example, even the fourth Committee's report on the Single European Act failed to be debated in the Dáil.

The lack of debating time allowed for committee reports may, at times, have stemmed from a rejection by the Government of the idea of governing by consensus, with the consequent empowerment of committees which that would have entailed. The existence of such attitudes is undeniable. It has already been noted in the text above that such a mindset led to the failure to re-establish the committee structure of the twenty-fourth Dáil when Charles Haughey came to power in 1987. However, the failure to engage with European matters in any meaningful sense on the part of the Oireachtas as a whole was of such lengthy duration that it seems likely that other reasons were in play.

This lack of engagement may have been partly linked to the culture of the Oireachtas. Across Europe, when it comes to European affairs, *"the nature of the relationship between the legislature and the executive depends...on established routines and traditional practices".*[147] The habits of a half-century die hard, and as O'Halpin points out, "the Oireachtas...was permeated with a culture which took the absolute dominance of the executive for granted and which discouraged backbench activism, the pursuit of cross-party consensus on any issue, and the rigorous investigation of the activities of Government." [148]

International studies have also indicated that there is, in any case, a relationship between the general effectiveness of national parliaments and their effectiveness in the field of scrutiny of European matters. Raunio notes that

> "the literature on explaining cross-national variation in the level of scrutiny of EU matters suggests that the variation is primarily explained by two factors: the role of the parliament in the domestic political system, and public and party opinion on European integration. If the parliament is strong independent of integration, and if the parties and/or the public are divided or sceptical of Europe, then the government is subjected to tighter scrutiny – and vice versa." [149]

It is relevant in this respect that the general position of the Oireachtas vis-à-vis the executive has never been strong and, at this time (as has already been seen in the text above), the parliament was performing far worse than it is now. Performing weakly in its other accountability functions, it would perhaps have been more surprising – and would certainly have been an exception to the general experience concerning parliaments – if Oireachtas efforts to establish accountability in the field of European affairs had been crowned with more success.

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146. *Ibid*., para. 29.
147. T. Raunio, "*Holding Governments Accountable in European Affairs: Explaining Cross-National Variation*" (2005) 11 Journal of Legislative Studies 319 at 338.
148. O' Halpin, *loc. cit.,* n. 147 above, p. 134.
149. T. Raunio, "*National Parliaments and European Integration:What We Know and What we Should Know*" (Arena Working Paper No. 2, Centre for European Studies, University of Oslo, January 2009) at p. 6.

Finally, an additional reason for the continued lack of general Oireachtas engagement in European affairs was probably the lack of any negative reaction to such non-involvement from the electorate. Raunio – as may be noted in the text quoted above – has observed that in states where public opinion is Eurosceptical, the probability of the government being subjected to tighter scrutiny in EU affairs by the legislature increases.[150] Ironically, the generally positive attitude of the Irish public to European integration meant that there was little electoral incentive for the government to increase parliamentary involvement in European matters. Overall, as Laffan put it in 2001,

> "the generally high levels of support for Ireland's membership of the EU mean that governments have not had to fight that hard for their EU policies. They can usually rely on an acquiescent parliament and an acquiescent public. The parliament does not see itself as leading the national agenda on EU issues – that is the business of the executive." [151]

O'Halpin has accurately characterised the initial twenty years of membership – more than half of the period, to date, of Ireland's participation in what is now the European Union – as "two decades of endemic neglect of European Community affairs by the national parliament" and described the response of the Oireachtas to Irish membership as "half-hearted and inadequate," noting that "the work of the [Joint Committee on the Secondary Legislation of the European Communities], and the requirement that the government report twice yearly to the Oireachtas, were for long treated simply as formalities to be observed."[152] European affairs were largely left to the Joint Committee by the membership of the Oireachtas. There was, however, never any prospect of a Committee run in the manner of, and subject to the constraints of, the Joint Committee on the Secondary Legislation of the European Communities exercising any serious influence over the government.

5. *A Temporary Interlude: The Foreign Affairs Committee 1993-1995*

By 1991, conscious of its own limitations, the Joint Committee on the Secondary Legislation of the European Communities called for its own replacement by a Joint Committee on European Affairs with, *inter alia,* broader terms of reference enabling it to examine "macro" issues of European integration.[153] A lengthy and at times controversial period of deepening of European integration and extensive Treaty revisions gathered pace in earnest around this time – when, it will be recalled, the Maastricht Treaty was being negotiated – and has continued ever since. This provided some external pressure for reform of the approach taken by the Oireachtas up until that time. The Institute of European Affairs, a think tank which has strived to engage politicians, officials and academics alike in the issues raised by European integration, was also founded in 1991.[154]

150. *Ibid.*, but see also Raunio, *loc. cit.,* n. 147 at 336.
151. Laffan, *loc. cit.,* n. 25 above, p. 255
152. *Loc. cit.,* n. 17, pp. 127 and 133-4.
153. Committee Report cited at n. 106 above, para. 29. The report itself referred to this as a revamping or relaunch of the Committee.
154. It was subsequently renamed the Institute of International and European Affairs.

Change came initially in 1993, but not in the form in which it had been sought by the Joint Committee, and not in response (at least directly) to international developments. Instead, the negotiations which led to the formation of a Coalition between the Labour Party and the Albert Reynolds-led Fianna Fáil in this year proved to be the vital catalyst. As part of the price for its involvement in Government, Labour demanded and obtained major reforms to the Committee system.[155] As a direct consequence of this, instead of – as had been the norm for two decades – the Joint Oireachtas Committee on Secondary Legislation being re-established once again, a new committee was set up in May, 1993: the Joint Committee on Foreign Affairs. This absorbed the work of the earlier Committee. The new Committee was the largest one in the Oireachtas. Initially, it had 30 members, 25 of whom were TDs and five of whom were Senators.[156] A number of experienced and capable politicians had a role in this Committee, including former foreign minister Brian Lenihan (who chaired it briefly, before passing on this role to the equally experienced Alan Dukes), Nora Owen and Prionsias de Rossa.[157] A series of innovations came into operation with this new Committee. MEPs, including those elected in Northern Ireland, were allowed to attend its proceedings, although not vote (an opportunity not availed of by Unionist MEPs for obvious political reasons and only rarely taken up by any MEPS at all, this poor take-up rate apparently being for logistical reasons).[158] Vitally, in the present context, the Committee had the power to appoint sub-committees. This power was used to establish a Sub-Committee on European Legislation, chaired by former foreign minister Gerry Collins, which was, effectively, a form of re-establishment of the old Joint Oireachtas Committee on Secondary Legislation. The Committee and its sub-committees operated more in public than the old Joint Oireachtas Committee on Secondary Legislation, the sub-committees of which, as we have seen, deliberated in private. Wisely, the Sub-Committee began by declining to work its way chronologically through the huge number of instruments left unexamined by the time of its first meeting, choosing instead to concentrate its energies on where it could be useful.[159]

The Committee had a broader remit in the field of European affairs than its predecessor and, hence, had more liberty to choose what areas of European policy-making it would engage in. Its Orders of Reference provided that it should consider "such matters arising from Ireland's membership of the European Communities and its adherence to the Treaty on European Union as the Joint Committee

155. Note the account of these negotiations provided by a participant in them in F. Finlay, *Snakes and Ladders* (New Island, 1998) chapter 10 esp. p. 153. See also O' Halpin, *loc. cit.,* n. 17 above, at p. 130.

156. A list of Committee members is to be found at the start of each of its reports which are at the time of writing available online at http://193.178.2.84/test/R/index.html The 1993 orders of reference which referred to 25 TDs and five senators gave way to revised orders of reference in 1995 which stipulated 21 TDs and ten senators. (See respectively http://193.178.2.84/test/R/1994/en.toc.com.ORDERS_19940928_1_en.html and http://193.178.2.84/test/R/1995/en.toc.com.ORDERS_19950523_1_en.html)

157. The Committee's chairperson was paid a considerable allowance in apparent recognition of the high expectations put on the office. (O' Halpin, *loc. cit.,* n. 17 above, p. 131)

158. *Ibid.*, p. 132. Note that Gerry Collins, the chair of the Committee's Sub-Committee on European Legislation (regarding which, see text below) was himself, a dual mandate-holder, even at that time, however, a category of parliamentarian becoming ever-rarer.

159. See Joint Committee on Foreign Affairs 14, July 1993 cols. 151-64, cited by O' Halpin, *loc. cit.,* n. 17 above, p. 132.

[might] select".[160] According to Laffan, the Joint Committee produced seven reports between December, 1993, and October, 1995.[161] European matters certainly featured prominently, with the Committee finding time to issue one report on the then forthcoming 'EFTA' enlargement of the European Union and another on European Union security and defence.[162] The former report succeeded in forming the basis of a Dáil debate on the topic.

Some successes notwithstanding, the Foreign Affairs Committee also suffered from some weaknesses insofar its role in the field of European affairs was concerned. While its creation represented some change, it was clearly not of a nature radical enough to involve any major increase in the level of accountability of the executive in European affairs, or indeed in the policy-influencing role of the Oireachtas. The Government remained almost as free as it had ever been of the obligations of demonstrating any real accountability to the Oireachtas in relation to the conduct of affairs at European level.

Furthermore, there were clear organisational problems with the Foreign Affairs Committee. First, the idea of dealing with the sheer mass of European legislation and policy-making as a sub-category of foreign affairs asked too much of the Committee. There was always going to be enough work under *either* the foreign affairs *or* the European Union rubric to fill the agenda of any Oireachtas Committee. The work of the Foreign Affairs Committee simply did not leave it with sufficient time to follow European law and developments generally.[163] Secondly, the structure of the Committee – combining a sub-committee dealing with European Union legislation and a general committee which itself was expected to pronounce on European developments – created a constant risk of overlap of functions.[164]

6. *The Establishment of a Joint Committee on European Affairs*

The Programme for Government of the 'Rainbow Coalition', which was led by John Bruton and came to power at the end of 1994, featured proposals designed to deal with these disadvantages. Pursuant to

160. More specifically, its Orders of Reference (available online at the time of writing at http://193.178.2.84/test/R/1994/en.toc.com.ORDERS_19940928_1_en.html) provided "…that the Joint Committee shall consider such aspects of Ireland's international relations, including its cooperation with developing countries, and such matters arising from Ireland's membership of the European Communities and its adherence to the Treaty on European Union as the Joint Committee may select and report thereon to both Houses of the Oireachtas"; and further "…that the Joint Committee shall, in particular, consider: (i) such programmes and guidelines prepared by the Commission of the European Communities as a basis for possible legislative action and such drafts of regulations, directives, decisions, recommendations and opinions of the Council of Ministers proposed by the Commission, (ii) such acts of the institutions of those Communities, (iii) such regulations under the European Communities Acts, 1972 to 1993, and (iv) such other instruments made under statute and necessitated by the obligations of membership of those Communities as the Committee may select and shall report thereon to both Houses of the Oireachtas.

161. Laffan, *loc. cit.,* n. 25 above, at p. 260. If this is so, the Oireachtas website is incomplete, since it contains records only of five reports, however.

162. See Joint Committee on Foreign Affairs, *Report – The Enlargement of the European Union* (28 September, 1994)(available at the time of writing at http://193.178.2.84/test/R/1994/en.toc.com.ORDERS_19940928_1_en.html); and Joint Committee on Foreign Affairs, *Report on European Union Security and Defence* (23 May, 1995)(available at the time of writing at http://193.178.2.84/test/R/1995/en.toc.com.ORDERS_19950523_1_en.html)

163. See also Laffan, *loc. cit.,* n. 25 above, p. 260.

164. See also O' Halpin, *loc. cit.,* n. 17 above, p.133.

this Programme, the broad field of European matters was removed from the responsibility of the Joint Committee on Foreign Affairs and, in March, 1995, a new Oireachtas Joint Committee on European Affairs was established. This new Committee was to have a fifteen-year existence, being re-established under all of the Fianna Fáil-led governments that governed Ireland from 1997 on, until its eventual replacement in 2011 by a somewhat modified group in the form of the Joint Committee on European Union Affairs.[165]

The Joint Committee was smaller and at first was regarded as less prestigious than the Foreign Affairs Committee.[166] It had only seventeen members, at least initially,[167] of whom eleven were TDs and six were senators. It was required that it be chaired by the Chair of the Dáil Select Committee on European Affairs.[168] Additionally, (i) members of the European Parliament elected from constituencies in Ireland, including Northern Ireland, (ii) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and (iii) other Members of the European Parliament (in this case, at the invitation of the Joint Committee or of a sub-Committee) were entitled to attend meetings of the Joint Committee and of its sub-Committees, and could take part in proceedings without having a right to vote.[169] The Committee's meetings took place at least once a fortnight [170] and were held in public unless the Committee itself ordered otherwise.[171]

According to its terms of reference, the Joint Committee was to

> "(i) consider such matters arising from Ireland's membership of the European Communities and its adherence to the Treaty on European Union, as it may select,
>
> (ii) consider such –
>
> (II) programmes and guidelines prepared by the Commission of the European Communities as a basis for possible legislative action and such drafts of regulations, directives, decisions, recommendations and opinions of the Council of Ministers proposed by the Commission,
> (II) acts of the institutions of those Communities,
> (III) regulations under the European Communities Acts…

165. The most recent Joint Oireachtas Committee on European Affairs at the time of writing was established in the wake of the February 2011 general election, following Orders of Dáil Éireann on 8 June 2011 (see http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees31stDail/EuropeanUnionAffairs/OrdersofReference/document1.htm) and of Seanad Éireann.
166. Laffan, *loc. cit.*, n. 25 above, at p. 260.
167. See the Terms of Reference of the Committee (reproduced in Joint Committee on European Affairs, *Annual Report of the Joint Committee on European Affairs, 1995 - Second Report* (1 July, 1996). By 2001, however it had nineteen members (fourteen TDs and five Senators).(See *Annual Report - Joint Committee on European Affairs 1997-1998* (2001) available online at http://193.178.2.84/test/R/2001/REPORT_01122001_1.html).)
168. Para. 3 of its Orders of Reference.
169. Para. 2(d) of the Joint Committee's Orders of Reference.
170. In the year 2000, for example, it had 31 meetings. In the year 2001, it had 39 meetings. (Source: Annual Reports of the Committee).
171. *Ibid.* at para. 3. Indeed its proceedings were televised within the Leinster House complex and made available for television broadcast afterwards.

(IV) other instruments made under statute and necessitated by the obligations of membership of those Communities,

as it may select,

(iii) consider such other matters as may be jointly referred to it from time to time by both Houses of the Oireachtas, and

(iv) represent the Houses of the Oireachtas at the Conference of European Affairs Committees (COSAC)". [172]

The Committee was also required to report thereon to both Houses of the Oireachtas.[173]

The Committee had power to set up sub-committees. This power was used by it to set up a Sub-Committee on European Scrutiny to deal with European Community secondary legislation.[174]
The Joint Oireachtas Committee on European Affairs had several achievements to its credit. Through its many public meetings and reports, it contributed to a culture of greater openness in European policy matters. Indeed, as the internet age progressed, this openness increased with considerable efforts being put into rendering documents, debates, and even videos of its proceedings, up on the internet.[175]

The Committee also used innovative work methods – it commissioned, for example, a high profile advisory group to examine the role of the European Union (EU) in its relations with developing countries.[176] Another innovation would later be seen in its 2006 efforts to contribute directly to a significant debate at European level through its *Contribution to the European Commission Green Paper on a Future Maritime Policy for the European Union* and its *Contribution to the European Commission White Paper on a European Communication Policy.*[177]

The Committee was also able to focus on issues of importance to Ireland, instead of being forced by unsuitable terms of reference – as had been its predecessor, the Joint Committee on the Secondary Legislation of the Communities – to concentrate most of its energies in the dry exercise of working through myriad European legislative proposals (a task it happily now left to its Scrutiny Sub-Committee). In 2001, to give a randomly-chosen example, the Committee held meetings dealing with such subjects as the Treaty of Nice, the introduction of the euro, the European Arrest Warrant, Turkish entry to the European Union, asylum, and illegal immigration.[178]

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172. Para 2(a) of the Joint Committee's Orders of Reference.
173. *Ibid.*
174. This sub-committee was ultimately replaced by a full Joint Committee on European Scrutiny in the Thirtieth Dáil in 2007, which however was not reconstituted in the Thirty-First Dáil in 2011.
175. See now http://www.oireachtas.ie/parliament/about/europeanunion/
176. See *Report of the Advisory Group to the Joint Committee on European Affairs Examining the Role of the European Union (EU) in its Relations with Developing Countries* (4 February 2003) available at http://www.oireachtas.ie/documents/committees29thdail/jea/Report_AdvisoryGroupJCEA.pdf
177. See Joint Committee on European Affairs, Annual Report 2006 (January 2007).
178. See Joint Committee on European Affairs, *Annual Report - Joint Committee on European Affairs 1997-1998* (2001) Appendix 3. See also the analysis by Laffan to similar effect of the Comittee's meetings in 1997-1999 in Laffan, *loc. cit.*, n. 25 above, p. 263.

These positive achievements notwithstanding, the Committee's record was far from an unqualified success. It clearly experienced major difficulties. For example, for much of its existence it had inadequate administrative and research back-up to develop independent thinking on European issues.[179] A January 2002 report by former Taoiseach, John Bruton, TD, observed of the legislative scrutiny process that

> "there is much room to improve on the existing process. Apart from procedural change, the European Affairs Committee needs substantially improved in-house resources if it is to do its job properly. The Committee currently has the assistance of only two and a half people at Executive level. This should be increased to 10 executive level people."[180]

In carrying out its legislative scrutiny work, and in order to compensate for the lack of adequate in-house expertise, the Committee had had recourse to consultants for a number of years in the time leading up to the 2002 report. This does not seem to have been an unqualified success however, at least partly because of the manner of use made of the output of these consultants by the Committee. According to the 2002 report,

> "… the Joint Committee on European Affairs, which meets every week, receives reports from a firm of private consultants on draft directives and regulations proposed by the Commission to the Council. The consultants summarise the content and attempt to indicate the ones that have a locally important political content that would merit the attention of the Committee. These reports have been considered by the Committee over the past four years. The Committee has decided to go further. It tabled the reports by the consultants before the Dáil in 1999 and 2000, but did not single out any particular proposals as being of special concern, and did not make any particular recommendations. None of these reports have been debated by the Dáil. There is no formalized reporting-back arrangement by Government to the Committee, so it is impossible to say what influence, if any, the Committee's reports have had on subsequent Government action at the Council of Ministers. Subsequently, the Committee asked Ministers to supply them with a comprehensive tabulation of proposals currently before the Council of Ministers. While a great deal of information was supplied, this was not differentiated on grounds of political sensitivity and did not provide the Committee with the focused and prioritised information it needs to conduct enquiries that would have real relevance and effect. It is understood that the government is considering proposing improvements to this process, but these have not yet been made public."[181]

In terms of the level of engagement of government ministers, a perusal of the annual reports of the European Affairs Committee is of interest in that it reveals that, in just over a decade of the Committee's existence, the number of ministerial appearances before the Committee was never either (a) sufficiently systematic or (b) at a level sufficient for real accountability to be imposed on the executive in relation to its conduct of European affairs. What is also of interest, however, is that from 2002 onwards a sustained rise in the number of ministerial a ppearances before the Committee occurred – a development which,

179. Laffan, *loc. cit.*, n. 25 above, p. 262.
180. Joint Committee on European Affairs, *Annual Report of the Joint Committee on European Affairs, 2000* (2002) at para 4.73 (available at http://193.178.2.84/test/R/2002/REPORT_31012002_1.html)
181. *Ibid.*, para. 4.72.

like many other changes in how the Oireachtas dealt with European affairs, was probably not unrelated to the defeat of the referendum on the Treaty of Nice in June, 2001.

Table 3: Visits by Ministers and Ministers of State to the Joint Oireachtas Committee on European Affairs [182]

Year	*Number of ministerial appearances*
1995	8
2000	5
2001	3
2002	12
2004	13
2005	12
2006	9

7. The June 2001 Defeat of the Nice Treaty Referendum: the Impact on the Role of the Oireachtas in European Affairs

The shock defeat of the government side in the first Nice Treaty referendum campaign in June, 2001, was to result in significant changes to the way in which the Oireachtas exercised its European vocation. The consequences of these events have been as good an illustration as any of the enduring truth of Monnet's dictum that "people only accept change when they are faced with necessity, and only recognise necessity when a crisis is upon them."[183] In this case, the necessity which made itself evident was that of the political necessity to redress, at least to some degree, the almost complete imbalance of power in Ireland between legislature and executive in European matters before another constitutional referendum necessary to permit ratification of the Nice Treaty could be held. In one way, it was ironic that the ratification of the Treaty of Nice provided the flashpoint for the emergence of this issue, since the actual content of the Treaty of Nice had little if anything to do with it. Nonetheless, the ratification process of the Nice Treaty provided an opportunity for the issue to be raised, which it was – most prominently in a May 2001 article in the *Irish Times* by a former Attorney General, John Rogers, in which he announced his personal preparedness to vote against enabling ratification of the Treaty of Nice in the then forthcoming referendum.[184] Those of Rogers' arguments which were based on the substantive

182. The information in this table was obtained from the annual reports of the Joint Committee on European Affairs. For present purposes, a visit, as occasionally occurred by a minister of state and a minister to the same session is counted as two visits. A visit by the Taoiseach to the Committee is also deemed a ministerial visit for present purposes. No information is available in these reports on the years not included in this table.

183. J. Monnet, *Memoirs* (Collins, London, 1978).

184. J. Rogers, *"Voters Should not be Blackmailed into Voting Yes to Avoid Giving Offence"*, Irish Times, 19 May 2001.

text of the Nice Treaty produced no substantive reaction. The Treaty would later be ratified with the relevant provisions still in place.[185] But Rogers' objections to the fact that the State had not "sought to adjust its domestic institutions and constitutional arrangements" and that "the Oireachtas has been entirely sidelined in the context of legislation emerging from the institutions of the Community" were a different matter. These words struck an undeniable chord. Yet, puzzlingly, the fact that the Oireachtas had also been sidelined from all but an extremely subordinate role in the context of *domestic* legislation for the previous six decades, certainly when compared with consensus-model democracies, seemed to escape the attention of almost all contributors to this debate. At any rate, after the defeat of the initial Nice referendum in June, 2001, the Government felt compelled to defuse the issue of the limited role of the Oireachtas in European affairs before putting a constitutional referendum before the electorate again in October, 2002.

A revised system of scrutiny and oversight was thus introduced by the Fianna Fáil-Progressive Democrat Government in the Summer of 2002. This was done, at first, informally and then given a legislative basis with the enactment of the European Union (Scrutiny) Act 2002. Due to the fact that, at the time of the enactment of the 2002 Act, the Government was faced with the prospect of a further referendum on the Treaty of Nice, it strove for a large measure of consensus in relation to this measure. The basic structure of the compromise forged as a result has endured to the present. The reformed system of Oireachtas scrutiny in European affairs introduced at this time has two aspects to it.[186]

In the first place, a more systematic process of review of European Union-level legislative proposals was introduced. The means of achieving this was provided by s. 2(1) of the 2002 Act, which provided that

> "as soon as practicable after a proposed measure is presented by the Commission of the European Communities or initiated by a Member State, as the case may be, the Minister shall cause a copy of the text concerned to be laid before each House of the Oireachtas together with a statement of the Minister outlining the content, purpose and likely implications for Ireland of the proposed measure and including such other information as he or she considers appropriate."

In practice, as summarised by O'Hegarty, this translated into the introduction of the following regime:

> "the Government forwards to the European Affairs Committee all legislative proposals (across all three pillars of the Union), together with information notes outlining the purpose, significance and implications of the texts presented. The Sub-Committee[187] then conducts a preliminary survey of the various proposals, with a view to prioritising them. Prioritisation means making a 'judgment-call' about which proposals are most significant in terms of policy, in order to ensure that adequate time

185. This was perhaps appropriate - they arguably took insufficient account both of political realities and of the institutional needs of enlargement.

186. See generally in relation to these, K. Meenan "*What is the Role of a Committee on European Affairs?*" and L. O'Hegarty, "*Parliamentary Scrutiny of European Affairs in Ireland — The European Affairs Committee, the Scrutiny Committee, and the European Union (Scrutiny) Act 2002*", both in Barrett (ed.), *op. cit.*, n. 1 above, at pp. 309 and 273, respectively.

187. This refers to the Sub-Committee on European Scrutiny appointed by the Oireachtas Joint Committee on European Affairs. It should be noted that this sub-committee was replaced by the Joint Committee on European Scrutiny in the Thirtieth Dáil (2007-2011).

> and attention can be devoted to these. Proposals which have been identified for further scrutiny are then referred to the relevant sectoral committees to be considered in greater detail." [188]

This obviously represented a significant change in practice. The new system was also, however, a carefully restricted one. The effect of a recommendation made either by the European Affairs Committee or by any other Committee under the 2002 Act was limited indeed. Thus, the relevant Government minister was obliged merely to "have regard to any recommendations made to him or her from time to time… in relation to a proposed measure".[189] He or she was thus not subjected to any mandate along Danish or Austrian lines, or even by a United Kingdom-style scrutiny reserve. Furthermore, even this limited obligation placed on Government ministers was subject to exceptions. It did not apply "where there [was] insufficient time for the carrying out of the procedures aforesaid and the performance of the functions of the Houses of the Oireachtas"[190] or "to a proposed measure which, in the opinion of the Minister, [was] confidential".[191]

The second aspect of Oireachtas oversight of the executive since 2002 is one that derives from practice rather than law, and to this day remains unsupported by legislative provision, the Government having declined to make provision in this regard in the 2002 Act. It consists of the supposed arrangement that Government ministers, or ministers of state, make themselves available (in particular before meetings of the Council of Ministers and the European Council), for discussions with the European Union Committee or the relevant sectoral committee, as appropriate. At the time of the adoption of the 2002 Act, the Government of the day is understood to have suggested that the norm should be for a minister to be requested to appear before the relevant sectoral committee in the week before the relevant meeting of the Council of Ministers.[192] If such a suggestion was made, however, there is no evidence that it was acted upon by any but a tiny minority of Government ministers.[193]

One aspect of this latter practice is that, prior to meetings of the Council of Ministers when it meets as the General Affairs Council,[194] the Joint Oireachtas Committee on European Affairs is given an opportunity to meet either with the Minister for Foreign Affairs or the Minister of State for European Affairs to discuss the Council's agenda. The question of how well this system functions is looked at in the next chapter.

A final element of the post-2002 scrutiny or overview process which merits mention is the fact that s. 2(5) of the European Union (Scrutiny) Act 2002, requires that every Government minister make a report to each House of the Oireachtas not less than twice yearly in relation to measures, proposed

188. O'Hegarty, *loc. cit.,* n. 187, pp. 281-282.
189. S. 2(2) of the 2002 Act, which refers to recommendations "by either or both Houses of the Oireachtas or by a committee of either or both such Houses". The reference to recommendations by either or both Houses of the Oireachtas has in practice been largely superfluous to date since reference onwards by a Committee of issues referred to them for full Oireachtas debates, although a theoretical possibility, do not normally occur. (See O'Hegarty, above, n. 43.) Note also the possibility of ministers or officials being invited to appear before a committee. (*Ibid.*)
190. S. 2(3) of the 2002 Act.
191. S. 3(1) of the 2002 Act.
192. O'Hegarty, above, n. 43, at p. 17.
193. By 2010, the Department of Foreign Affairs was the only Government Department purporting to provide pre-Council briefings. See European Movement Ireland, *Accountability Report 2010* (Dublin, 2011) at p. 47 and see further the discussion of this issue in the next chapter.
194. Prior to the coming into force of the Lisbon Treaty in December, 2009, this was known as the External Relations Council.

measures and other developments concerning the European Communities and the European Union in relation to which he or she performs functions. Again, the question of how well this process has operated in the 30th Dáil is examined in the next chapter.

8. Conclusion

The involvement of the Oireachtas in European affairs has clearly evolved considerably from the time of Ireland's entry into the European Communities in 1973. Developments have come about slowly and unevenly, however. The referendum process in Ireland has clearly driven some reforms with, for example, the fear of losing the second Nice referendum in 2002 playing a major role in the taking of some of the most significant steps to date, and the loss of the Lisbon referendum in 2008 also leading to considerable reflection on the future direction of the interaction on the part of the Oireachtas with European Union affairs. Another feature of the almost four decades of Irish membership of what is now the European Union has been the ongoing, and painfully slow, process of trial-and-error which has led to gradual improvements in the contribution of Oireachtas committees in relation to European affairs. These improvements have taken place, however, in the context of (a) broader continuing problems such as the failure to adequately link interest on the part of the Oireachtas as a whole with the work of Oireachtas Committees dealing with European matters and, more broadly still, with (b) an imbalance between the powers of executive and legislature, which has seen very little real adjustment over the years. The conduct of Ireland's relations with the European Union was that they remained executive-dominated to a remarkable degree.

It is proposed in the next chapter to turn to a more detailed examination of the workings of the post-2002 relationship of the Oireachtas in relation to European affairs.

CHAPTER 2

Where We Are Now: The Post-2002 Relationship of the Oireachtas and the Executive in the Field of European Affairs

1. *Introduction*

This chapter is intended to provide a summary of the relationship between the Oireachtas and the executive in the field of European affairs as it stood at the end of the 30th Dáil (2007-2001).[1] As will be seen, much of the Oireachtas system for dealing with European policy issues has remained the same since 2002, although the impact – both direct and indirect – of the coming into force of the Lisbon Treaty on 1 December, 2009, has been sufficient to merit discussion in a separate chapter of this study (Chapter 4).

There are three main aspects to the relationship which exists between parliament and government in Ireland. First, parliament has a role in forming and dismissing governments. Secondly, parliament has a role in policy-making and law-making. Thirdly, parliament has a role in rendering the Government accountable in respect of its acts in the European policy field.[2] Insofar as European affairs are concerned, it is generally the second and third roles which are of interest. It is proposed to examine each of these briefly in turn.

2. *The Parliamentary Role in Policy-making and Law-making*

The functions of parliament in policy-making and law-making in Ireland can be divided its role insofar as this relates to decision-making at European level and its role insofar as it relates to decision-making at an Irish level. This distinction, while useful for explanatory purposes, is somewhat rough-and-ready, as there is some overlap between the two roles. Evidence for such an overlap is visible if one considers the exercise by the Oireachtas of its functions in securing ministerial accountability, as well as in the exercise of its task of approving treaties providing for changes to the European Union's constitutive treaties. Each of these functions obviously has implications both at national and at European level. Nevertheless, those

1. It has additionally been possible to include limited reference to some subsequently-occurring developments.
2. See generally, M. Gallagher, "*The Oireachtas*", chapter 7 of J. Coakley and M. Gallagher, *Politics in the Republic of Ireland* (fifth edition, Routledge, Abingdon, 2010).

who fail to generalise miss important truths, and drawing such a distinction does help us to gain a clearer idea of what activities the Oireachtas engages in as regards European policy matters.

i. The Role of the Oireachtas at National Level in Relation to Policy-Making and Law-Making in the Field of European Affairs

Introduction

It seems permissible to begin a discussion of the parliamentary role in relation to policy-making and law-making at a national level in the field of European affairs with some broad observations. The first is that the role for parliament in policy-making at national level, and not just as regards policy *vis-à-vis* the European Union, is clearly a limited one. In practice, the Oireachtas functions as a policy legitimator rather than as a policy maker. The policy-making function resides, in reality, with the Government. Secondly and similarly, as regards its law-making function, the Government initiates almost all legislation, and everything it initiates is, in turn, enacted by the Oireachtas. There is no chance of any legislation introduced by a Government which commands a majority being defeated in a second-stage debate, and only minor changes are likely at Committee stage. Thirdly, since no effort is made to create consensus – Irish Governments can, and regularly do, use their parliamentary majorities to have legislation adopted regardless of the will of the Opposition – there is little incentive for the Opposition to be constructive. Opposition speeches opposing whatever the Government proposes are the norm, even if what is opposed would also be what the Opposition would do, were it itself in Government.[3]

There are, nonetheless, certain limits to the accuracy of what may appear a rather bleak general picture from a democratic standpoint. In the first place, since approval of legislation by the legislature is a legal requirement for its valid adoption, the Government does have to bear in mind, when drafting legislation, the need to carry with it a majority of the membership of each House – a factor which must impose a moderating influence. Further, the Government is constrained by the need to retain the support of the political parties whose members give it its majority support in the legislature.[4]

All the foregoing applies just as much in relation to Ireland's membership of the European Union as it does to any other kind of legislation. Leaving aside the work carried out by Oireachtas committees in European affairs (which is examined elsewhere in this chapter), there are five main methods by which the Oireachtas exercises its role in relation to policy-making and law-making at national level regarding European affairs – the first three of which involve the adoption of primary legislation. These five methods are: (1) through the adoption of legislation amending the Constitution in order to facilitate treaty ratifications; (2) through the adoption of legislation incorporating European Union treaties into national law; (3) through the adoption of legislation implementing directives or facilitating the incorporation into Irish law of other measures consequent on Irish membership of the European Union; (4) through actual ratification by the Dáil of European Union-related treaties; and (5) through

3. It may be noted that Ireland is not the only country where this is the practice. See P.-H. Spaak, *The Continuing Battle: Memoirs of a European* (Little, Brown & Co., Boston, 1971) at p. 491.
4. Gallagher, *loc. cit.*, at n. 2 above.

annulment of regulations adopted under the European Communities Act 2007 for the purposes of implementing European norms.

Primary Legislation in Ireland and the '80 per cent Myth'

The exact degree of influence of European Union law on primary legislation in the member states of the Union has been a topic of debate and, indeed, even myth in several member states for many years. Töller has traced the course of this debate well, and discusses it in the following terms:

> "in 1988, shortly after the Single European Act became effective, Jacques Delors, the former President of the European Commission, speaking before the European Parliament, made a prophecy: 'In ten years 80 per cent of the legislation related to economics, maybe also to taxes and social affairs, will be of Community origin'.[5] Over the almost 20 years that followed, this prophecy, meaning a non-scholarly forecasting of a future development, has developed considerable momentum. Already in the early 1990s when the Maastricht Treaty was challenged in Germany before the German Constitutional Court, the claimant referred to Delors' prophecy, turning it into a diagnosis, the description of a present situation. As we can read in the decision by the German Constitutional Court: 'The claimant, referring to an assessment made by the President of the European Commission, Delors […], brings forward that already now almost 80 per cent of all legislation in the field of economic law […] is determined by Community law'.[6] At the same time in France, the Conseil d'État reacted to Delors' prophecy when considering the question how far French law was already penetrated by European law.[7]

In Autumn 2004, the Netherlands experienced a heated public debate after the Secretary of the State for European Affairs, Atzo Nicolai, stated that 60 per cent of all laws and regulations that are in effect in the Netherlands have their origin in Brussels.[8] Later on commentators suggested that the share of Europeanised Dutch legislation was between 70 and 80 per cent.[9] Similar figures were discussed for Austria.[10] In early 2007, former German President Roman Herzog asserted in a newspaper article dealing with the Constitutional Treaty in particular and the state of Europe in general that 84 per cent of all laws and regulations that apply in Germany come from Brussels, whereas only 16 per cent originate from Berlin.[11]"[12]

5. Bulletin No- 2-367/157, July 6, 1988.
6. BVErfGE 89, 155, translation from German by the author.
7. Conseil d'État, 1993: 42-48.
8. *e.g.,* NRC Handelsblad October 1-6, 2004.
9. M. Bovens and K. Yesilkagit, K., "*The Impact of European Legislation on National Legislation in the Netherlands*", Paper prepared for the 2004 NIGH Conference, Session "Governance in the European Union"; Erasmus University Rotterdam, October 29, 2004, available online at: https://ep.eur.nl/handle/1765/1763?mode=full at p. 7.
10. W. Müller and M. Jenny "*From the Europeanization of Law-Making to the Europeanization of National Legal Orders: The Case of Austria*", in: Public Administration, Special Issue, forthcoming, p. 2.
11. Herzog, R., and Gerken, L. "*Die Europäische Union gefährdet die parlamentarische Demokratie*", Gastkommentar in die Welt, January 13, 2007, available online at: http://debatte.welt.de/kontroverse/292/hat+die+eu+zuviel+macht/pro
12. A. Töller, "*Measuring and Comparing the Europeanization of National Legislation: A Research Note*" (2010) 48 JCMS 417. Note that for the purposes of clarity the notes included in the text by this author have been converted into footnotes above and aligned in style to the footnotes in this study, but not otherwise altered.

As Töller notes, what some have called the '80 per cent myth' has even been taken up in some academic textbooks.[13] In reality, the true extent of the 'Europeanisation' of national legislation in any given European country is very difficult to measure. Counting the number of statutes which are influenced by European Union policy does not give the whole picture in this regard for a number of reasons. In the first place, the impact of laws is qualitative and not merely quantitatitive. The original Constitution of the United States was a mere seven articles and one preamble long, yet few could doubt its significance. Analogously, it seems unrealistic to expect the impact of European law to be accurately measured by counting the number of national statutes it affects. Secondly, the degree to which national legislation is Europeanised does not measure the full impact of European Union law, since not all European norms automatically require national implementation. European Union regulations (adopted under Article 288 of the Treaty on the Functioning of the European Union) are a case in point here. Thirdly, the impact of European influence on a statute is not always clearly visible. It may not be acknowledged in the legislation itself. Or the legislation may amend measures themselves derived from European norms, without its European connection being obvious to a non-expert eye. Fourthly, not all legislation is adopted by the legislature. Secondary legislation in the form of statutory instruments must also be taken into account although, complicating matters yet further, this often deals with matters of a more technical and less significant nature than those provided for in statutes. Fifthly, there are problems when it comes to measuring the impact of European law on individual statutes. For example, if one section of a national statute which has hundreds of sections refers to European law, is this to be regarded as a 'Europeanised' measure? Furthermore, there is some room for discretion in assessing whether the impact of European law on a statute is to be deemed significant or not.

Notwithstanding all of the above reservations, it must be acknowledged that counting the number of statutes and/or statutory instruments which have a significant connection with European Union law is, nevertheless, one *indicium* of the impact of European Union law. In Ireland's case, European Union law influences large numbers of statutes adopted by the Oireachtas (even if the impact in this corner of Irish law comes nowhere near the levels prophesied by Jacques Delors in 1988 for the impact of European law as a whole on the legal system of member states as a whole). In 2010, for example, the Oireachtas adopted forty public statutes. Of these, no less than seventeen (42.5 per cent) were significantly connected in some manner with Ireland's membership of the European Union, i.e. linked to European Union membership in a way which went beyond the merely peripheral.[14] A number of ways in which legislation could be linked to European Union membership were evident, including the fact that the legislation was adopted in order to give effect to European Union directives, and that it

13. *Ibid.*, pp. 419-420.

14. A further six statutes contained references which may be categorised as peripheral. (1) The broad scheme dealt with by the Competition (Amendment) Act 2010 (Public Act No. 12/2010) is inspired by the model of European Union competition law. (2) The Health (Miscellaneous Provisions) Act 2010 (Public Act No. 18/2010) refers to employment rights which derive from European Union law. (3) The Adoption Act 2010 (Public Act No. 21/2010) expressly excludes members of the European Parliament from an authority referred to in that Act. (4) The Social Welfare (Miscellaneous Provisions) Act 2010 (Public Act No. 28/2010) makes reference to a National Employment Action Plan inspired by European Union and to Terms of Employment (Information) Acts 1994 and 2001 which implement a European directive. (5) The Prevention of Corruption (Amendment) Act 2010 (Public Act No. 33/2010) makes some peripheral reference to the Protection of Employees (Fixed-Term Work) Act 2003 which implements a European Union directive. Finally, (6) the Social Welfare and Pensions Act 2010 (Public Act No. 37/2010) makes peripheral reference to the European Parliament membership and the European Parliament (Irish Constituency Members) Act 2009, and to a series of European Union-mandated employment rights.

regulated powers which were created in the first place in order to give effect to European norms. (See Table 1 below.[15])

Table 1: Statutes Adopted by the Oireachtas in 2010 That Have a Significant Connection with Ireland's Membership of the European Union

Name of Statute	***Reasons Why This Statute Is Linked to European Union Membership***
1. Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (Public Act No. 2/2010)	Contains provisions specifically applying a European Union directive; contains provisions regarding application of Irish regulations implementing European Union norms.
2. Finance Act 2010 (Public Act No. 5/2010)	Makes changes to the law specifically related to Irish membership of European Economic Area
3. Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (Public Act No. 6/2010)	Gives effect to a European Union directive
4. Euro Area Loan Facility Act 2010 (Public Act No. 7/2010)	Adopted to safeguard financial stability of euro area: enables payments to be made to enable effect to be given in the state to agreement made by and between certain member states of the European Union
5. Inland Fisheries Act 2010 (Public Act No. 10/2010)	Amends several earlier regulations adopted specifically in order to give effect to requirements of European Union law.
6. Energy (Biofuel Obligation and Miscellaneous Provisions) Act 2010 (Public Act No. 11/2010)	Expressly gives effect to provisions of a European Union directive.
7. Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010 (Public Act No. 13/2010)	Makes provision regarding Single Electricity Market and also European Union greenhouse gas emissions trading system
8. Merchant Shipping Act 2010 (Public Act No. 14/2010)	Expressly refers to and relies upon both European Union norms and Irish measures adopted to give effect to European Union norms.
9. European Financial Stability Facility Act 2010 (Public Act No. 16/2010)	Provides for matters relating to participation by Irish state in the European Financial Stability Facility
10. Central Bank Reform Act 2010 (Public Act No. 23/2010)	Effects numerous amendments to Irish regulations designed to give effect to European Union norms
11. Road Traffic Act 2010(Public Act No. 25/2010)	Makes provisions expressly related to disqualification under European Convention on Driving Disqualifications.
12. Planning and Development (Amendment) Act 2010 (Public Act No. 30/2010)	Expressly gives effect to several European Union directives in the environmental policy field.
13. Value-Added Tax Consolidation Act 2010 (Public Act No. 31/2010)	Applies provisions of a 2006 VAT Directive and makes specific provisions regarding intra-European Union acquisitions

15. Note that most of these Acts, however, also contained provisions which had little or nothing to do with European Union law.

14. Chemicals (Amendment) Act 2010 (Public Act No. 32/2010)	Specifically applies European Union directives and regulations regarding chemicals
15. Credit Institutions (Stabilisation) Act 2010 (Public Act No. 36/2010)	Makes provision for preserving/restoring the financial position of credit institutions in context of, inter alia, the European Union/International Monetary Fund programme of financial support for Ireland; amends regulations implementing a European Directive; and specifically aims at compliance with European Union state aids rules
16. Financial Emergency Measures in the Public Interest Act 2010 (Public Act No. 38/2010)	Specifically includes provisions as measures provided for in the European Financial Stabilisation Mechanism and the European Financial Stability Facility and the International Monetary Fund programmes for Ireland.
17. Public Health (Tobacco) (Amendment) Act 2010 (Public Act No. 39/2010)	Transfers to the Health Services Executive powers conferred by Irish regulations which specifically implement European Union norms.

European Union law also had a significant impact on secondary legislation adopted in Ireland, i.e. laws adopted in the form of statutory instruments. Using, once again, the year 2010 as a sample year, we see that a total of 689 statutory instruments were adopted. Of these, a full 208 (or 30 per cent of the total) were adopted under s. 3(1) of the European Communities Act 1972. This is a provision which, as shall be seen in the text below, empowers ministers of state to make regulations in order to give full effect to European Union law. However, a further 108 statutory instruments not adopted under s. 3(1) of the 1972 Act – or 16 per cent of the total number of 689 statutory instruments adopted – also had a significant connection with Ireland's European Union membership.[16]

All told, then, 216 statutory instruments – or 46 per cent of all statutory instruments adopted in Ireland in 2010 – either implemented European Union law or had some other significant connection with Ireland's membership of the European Union. The proportion of items of secondary legislation (i.e. statutory instruments) which related in a significant way to European Union law was thus considerably higher than the number of items of primary legislation (i.e. statutes). Qualitatively, the impact seemed to be greater, too, in that large numbers of such statutory instruments had as their dominant objective the implementation of European Union law, whereas primary legislation frequently had other aims. (See generally Table 2 below.)

16. Author's own assessment, based on a reading of all of these statutory instruments.

Table 2: Proportion of the 689 Statutory Instruments Adopted in 2010 That Had a Significant Connection with Ireland's Membership of the European Union

Type of Statutory Instrument	*Number*	*Percentage This Represented of 2010 Total of 689 Statutory Instruments*
Statutory instruments adopted in 2010 under s. 3(1) of the European Communities Act 1972	208	30%
Statutory instruments adopted in 2010 under other legislation but which had a significant connection with Ireland's European Union membership	108	16%
Total number of statutory instruments adopted in 2010 which had a significant connection with Ireland's European Union membership	216	46%

Reviewing the Five Main Ways in Which the Oireachtas Exercises its Role in Relation to Policy-Making and Law-Making at National Level Regarding European Affairs

It is proposed to review briefly the five main ways in which the Oireachtas exercises its role in relation to policy-making and law-making on a national level in the field of European affairs. The first three of these methods, as has already been noted above, involve the adoption of various forms of primary legislation. The fifth relates to the creation of statutory instruments in order to implement obligations under European Union law.

1. Legislation Amending the Constitution to Facilitate Treaty Ratifications

Article 46 of the Irish Constitution provides for amendments to the text of the Constitution. Amendment proposals are required to be initiated in Dáil Éireann as a Bill and, having been passed or deemed to have been passed by both Houses of the Oireachtas, are required to be submitted by referendum to the decision of the people[17] after which they are required to be signed by the President.[18] The Irish Constitution has been amended on six separate occasions to facilitate Irish accession to the original three Community Treaties and to later treaties which amended or added to them. Both Houses of the Oireachtas have had a significant part to play (under Article 46 of the Constitution) in the process of amendment of the Constitution to facilitate ratification of all of these Treaties. The most recent example of this has been the Twenty-Eighth Amendment Of The Constitution (Treaty Of Lisbon) Act 2009 which, subsequent to its being passed by both Houses of the Oireachtas, was approved – in a referendum held on 2 October, 2009 – by 1,214,268 votes (67 per cent) to 594,606 (33 per cent), in a total poll of 1,816,098 (59 per cent). It was signed into law by President McAleese on 15 October, 2009.

17. This is required to be in accordance with the law for the time being in force relating to the referendum. See generally Article 46(2) of the Constitution.
18. Article 46(5) of the Constitution.

The process of amendment of the Constitution in order to facilitate the ratification of a European treaty is not necessarily confined to treaties amending to or adding to (or replacing[19]) constitutive treaties. The Eleventh Amendment of the Constitution Act 1992, apart from amending the Constitution to facilitate the Treaty of Maastricht, also inserted a new Article 29.4.6° in the Constitution, which provided that "the State may ratify the Agreement relating to Community Patents drawn up between the Member States of the Communities and done at Luxembourg on the 15th day of December, 1989."[20] The Treaty establishing the European Stability Mechanism (ESM) signed by the finance ministers of the seventeeen euro-area countries on 11 July, 2011, in contrast, was deemed by the Government not to raise constitutional difficulties sufficient to require the adoption of a Constitutional amendment analogous to that effected in 1992 to facilitate the Community Patent Convention.[21]

2. *Legislation Incorporating European Union Treaties into National Law*

Under Article 29.6 of the Irish Constitution, "no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." At the time of Ireland's entry into the European Communities in 1972, legislation was adopted in order to comply with the requirements of Article 29.6 in relation to the various elements of the *acquis communautaire* – the accumulated body of European law – as well as future acts of institutions and bodies of the Communities (now the European Union).[22]

This Act was the European Communities Act 1972. S. 2(1) of the 1972 Act[23] provides that the treaties governing the European Union, acts adopted by the institutions of the European Union,[24] acts adopted by the institutions of the European Communities in force immediately before the entry into force of the Lisbon Treaty and acts adopted by bodies competent under those treaties shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in the treaties governing the European Union.[25]

The original Treaties have of course been added to and amended by a long line of other treaties. The list of treaties in the 1972 Act has been correspondingly amended by a long list of subsequent enactments, the latest of which is the European Union Act 2009. The long title of this latter statute describes it as

19. The Treaty Establishing a Constitution for Europe would have replaced the existing constitutive treaties but never got to the point of a referendum in Ireland as it was rejected in referendums in France and Holland in May and June, 2005, respectively.
20. Subsequently renumbered by the Eighteenth Amendment of the Constitution Act 1998 (which facilitated the ratification of the Treaty of Amsterdam) and then, again, by the Twenty-sixth Amendment of the Constitution Act 2002 (which facilitated the ratification of the Treaty of Nice), this provision was ultimately deleted by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009 which itself facilitated the ratification of the Treaty of Lisbon.
21. See regarding this Treaty, G. Barrett, "*The Treaty Amendment on the European Stability Mechanism: Does It Require a Referendum in Ireland?*" (2011) 29 Irish Law Times 152. See also by the same author "*A Referendum for the ESM? – The Implications of Treaty Change to Accommodate the New European Stability Mechanism*", lecture delivered at invitation of the Bar Council of Ireland and the Institute of International and European Affairs and, and responded to by former Attorney General, Paul Gallagher SC, held at Arbitration Centre, Distillery Building, Dublin, 29 June 2011 and viewable online at http://www.youtube.com/watch?v=7U1PQMHm_QY
22. See in this regard, B. McMahon and F. Murphy, *European Community Law in Ireland* (Butterworth, Dublin, 1989), pp. 271-272.
23. As substituted by s. 3 of the European Union Act 2009.
24. Other than acts adopted on the basis of the Treaty provisions relating to the common foreign and security policy. (See s. 2(1)(b) of the 1972 Act (as substituted by s. 3 of the European Union Act 2009) and Article 275 TFEU.)
25. Other than acts adopted on the basis of the Treaty provisions relating to the common foreign and security policy. See s. 2(1)(d) of the 1972 Act (as substituted by s. 3 of the European Union Act 2009) and Article 275 TFEU.

an Act, that aims, *inter alia*, to 'make provision with respect to the State's membership of the European Union; to provide for the application under the law of the State of the Treaty of Lisbon...; [and] for those purposes to amend the European Communities Act 1972'.

The 1972 Act has been amended on each occasion a major Treaty – such as the Single European Act or each of the Treaties of Maastricht, Amsterdam, Nice and Lisbon – has been ratified. However, various other Treaties (or aspects thereof) have also been incorporated into national law by the expedient of amending the provisions of the European Communities Act 1972, including, for example, budgetary treaties and accession treaties for new member states. As regards accession treaties, most recently, the European Communities (Amendment) Act 2006 amended the European Communities Act 1972 so as to provide that certain provisions of the Treaty concerning the Accession of the Republic of Bulgaria and Romania to the European Union should be part of the domestic law of the state. On each of these occasions, therefore, the legislative role of the Oireachtas was called into play.

3. *Legislation Implementing Directives or Facilitating the Incorporation into Irish Law of Other Measures Consequent on Irish Membership of the European Union*

A directive is a form of European Union law which, by its very nature, envisages an incorporation process into domestic Irish law.[26] Although the majority of directives are implemented into Irish law *via* statutory instruments, from time to time primary legislation is enacted by the Oireachtas in order to transpose a directive.

Legislation is occasionally enacted solely to implement the provisions of directives. One relatively recent example of such legislation is the Employees (Provision of Information and Consultation) Act 2006, which was passed mainly in order to implement the 2002 Information and Consultation Directive[27] (and partly to implement one single provision of the Transfer of Undertakings Directive[28]). Legislation can, however, also be adopted partly in order to implement a directive and partly in order to achieve other goals. This was the case with the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, which was adopted partly to implement the Third Money Laundering Directive and partly to achieve other aims, such as the repeal and consolidation of existing money laundering legislation.[29]

Legislation can also be enacted in relation to measures other than directives, which are nevertheless consequent on Irish membership of the European Union. Such legislation can vary considerably in the form it takes and in the reasons giving rise to it.

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26. See Article 288 TFEU, which provides that "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."
27. Directive 2002/14/EC of the European Parliament and of the Council Providing for the Establishment of Arrangements for Informing and Consulting Employees in Undertakings
28. Article 3(2) Of Council Directive No. 2001/23/EC of 12 March, 2001, on the Approximation of the Laws of the Member States Relating to the Safeguarding Of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses and to Provide for Related Matters.
29. See further speech delivered to the Seanad by the then Minister for Justice, Mr. Dermot Ahern, TD, in opening the debate in the Second Stage reading of the Bill. [See Vol. 201 *Seanad Debates* (2 March, 2010).] See more generally, M. Barrett, *Money Laundering and Terrorist Financing Act 2010: Annotated* (Clarus Press, Dublin, 2011).

Thus, for example, the Euro Area Loan Facility Act 2010 was passed in order to enable effect to be given in the State to an international treaty agreed between eurozone states providing for pooled bilateral loans to help Greece avoid potential insolvency.[30]
A very different statute falling into this category was the European Parliament (Irish Constituency Members) Act 2009 which implemented in Irish law arrangements for payment of MEPs in the manner set out in a European Parliament Decision.[31]

4. Approval by the Dáil of European Union-Related Treaties

Under Article 29.5.1° of the Constitution every international agreement to which the State becomes a party shall be laid before Dáil Éireann. Under Article 29.5.2°, the State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann. The provisions of Art. 29.5.1° and Art. 29.5.2° apply in a European Union context just as they apply in any other. Hence, when the founding Treaties of the Union have been amended, a corresponding motion has had to be approved by the Dáil. An example of this was seen on 8 October, 2009 – i.e. subsequent to the second (this time successful) referendum on legislation facilitating the Treaty of Lisbon[32] – when a motion was agreed to by the Dáil to the effect that

> "Dáil Éireann approves the terms of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, copies of which were laid before Dáil Éireann on Tuesday, 6 October 2009."[33]

Such motions will be necessary even when the agreement in question does not amend the constitutive Treaties. A more recent example of a motion being brought in compliance with 29.5.2° in relation to an EU-related Treaty occurred on 15 December, 2010, when a motion to approve the agreements providing for the EU-IMF Programme of Financial Support for Ireland was successfully moved by the then Minister for Finance, the late Brian Lenihan, TD.[34]

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30. *Viz.* the Intercreditor Agreement Regarding the Pooled Bilateral Loans for the Benefit of the Hellenic Republic Made by and Between Certain Member States of the European Union. The text of the agreement is to be found in Schedule 1 to the Act. An analogous statute to the Euro Area Loan Facility Act 2010 is the European Financial Stability Facility And Euro Area Loan Facility (Amendment) Act 2011.
31. Decision 2005/684/EC, Euratom of the European Parliament of 28 September, 2005, adopting the Statute for Members of the European Parliament (OJ L 262, 7.10.2005, p. 1).
32. *Viz.* the Twenty-Eighth Amendment Of The Constitution (Treaty Of Lisbon) Act 2009
33. The sole recorded contribution to the debate was made by Deputy Dick Roche, Minister of State at the Department of Foreign Affairs, who observed "I move this with some considerable relief." [See Vol. 691 *Dáil Eireann* Debates (8 October, 2009).]
34. Vol. 725 *Dáil Debates* (15 December, 2010). The agreements in question were (i) the letter of intent signed by the Minister for Finance and the Governor of the Central Bank and addressed to the President of the Eurogroup, the European Union Presidency, the European Commission and the President of the European Central Bank dated 3 December, 2010; (ii) the letter of intent signed by the Minister for Finance and the Governor of the Central Bank and addressed to the International Monetary Fund dated 3 December, 2010; and (iii) the memorandum of understanding between the European Commission and Ireland.

5. *Annulment of Regulations Which Are Adopted under the European Communities Act 1972 for the Purposes of Implementing European Norms*

Although it is possible for European Union directives to be implemented by legislation enacted by the Oireachtas, it is in fact far more normal for them to be implemented via ministerial regulation. As has been alluded to in the text above, one of the main vehicles for this has been s. 3 of the European Communities Act, 1972 (as amended).

This merits explanation. S. 2(1) of the 1972 Act[35] provides that, *inter alia,* the treaties governing the European Union, acts adopted by the institutions of the European Union,[36] and acts adopted by bodies competent under those treaties[37] are to be binding on the State and to be part of its domestic law.[38]

S. 3(1) of the 1972 Act then goes on to provide that a Minister of State may make regulations for enabling this provision to have full effect. Under s. 3(2) of the 1972 Act, the legal impact of such regulations may be considerable, since they "may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act)."

Indeed, since 2007, it has moreover been possible for such regulations to create indictable offences.[39]

In practice, very large numbers of statutory instruments are adopted under s. 3(1) of the 1972 Act. Thus, for example – and as has already been noted in the text above – in 2010 alone, 208 statutory instruments (or 30 per cent of the total of 689 statutory instruments adopted in that year) were adopted under s. 3(1).

S. 3A of the 1972 Act[40] seeks to ensure democratic control over ministerial implementation of European Union law via such statutory instruments. Under s. 3A,

> "every [implementing regulation] shall be laid before each House of the Oireachtas as soon as may be *after it is made* and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House sits after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder."[41]

35. As substituted by s. 3 of the European Union Act 2009.
36. Other than acts adopted on the basis of the Treaty provisions relating to the common foreign and security policy. (See s. 2(1)(b) of the 1972 Act (as substituted by s. 3 of the European Union Act 2009) and Article 275 TFEU.) As has been seen in the text above, acts adopted by the institutions of the European Communities in force immediately before the entry into force of the Lisbon Treaty are also included here, but this is of little relevance for present purposes.
37. Other than acts adopted on the basis of the Treaty provisions relating to the common foreign and security policy. [See s. 2(1)(d) of the 1972 Act (as substituted by s. 3 of the European Union Act 2009) and Article 275 TFEU.]
38. *Viz.* under the conditions laid down in the Treaties.
39. See s. 3(3) as substituted by s. 2 of the European Communities Act 2007
40. As inserted by s. 3 of the European Communities Act 2007
41. Emphasis added.

The theory espoused by s. 3A of the 1972 Act is not matched by the reality, however. In practice, the Oireachtas exercises no real oversight over the use of secondary legislation in the implementation of European Union law. Oireachtas members will not normally even know of the existence of statutory instruments implementing European obligations until *after* they have been created by the relevant Minister. Even then, there is little likelihood that members (other than regular readers of the *Iris Oifigiúil*) will actually find out about any given instrument's existence within the 21 days after its being 'laid before the House',[42] which actually means no more than an instrument being delivered to the clerk of the House. Over the last four decades, s. 3A and its predecessor provisions have effectively been a dead letter. Moreover, many statutory instruments with a significant connection to Ireland's European Union membership are adopted each year under statutes other than the 1972 Act. For example – as has been seen in the text above – in 2010 alone, 108 such statutory instruments were adopted. This was a full 16 per cent of the total of 689 statutory instruments made by Ministers in that year. However, the system of control over the use of statutory instruments embodied in s. 3A has no application to these measures.

Given the undeniable convenience of the method which the executive has given itself for implementing European norms, and the equally undeniable lack in practice of any systematic democratic control worthy of the name over the system,[43] it is perhaps little surprise to find that Irish ministers have been using statutory instruments for decades in order to give effect to all kinds of rules – even when at times, these rules ought arguably to have been implemented by an Act of the

Oireachtas. Unsurprisingly, the drafting quality of regulations adopted, unchecked as they are by any parliamentary control, has occasionally been uneven.[44]

It is possible that the 31st Dáil will see some change in this regard. The 2011 programme for Government, *Government for National Recovery 2011 - 2016*, proposed that:

> "regulatory impact assessments prepared for Ministers on all EU directives and significant regulations will be forwarded automatically to the relevant sectoral Oireachtas committees. These committees should advise the Minister and the Joint Committee on European Affairs as to whether the transposition should take place by statutory instrument or by primary legislation. Where primary legislation is recommended the full Oireachtas plenary process should be followed."[45]

42. Details of this procedure are provided in Appendix V of the Cabinet Handbook, as well as in the Standing Orders of Dáil Éireann and Seanad Éireann. See also, for some details, the Oireachtas website at http://www.oireachtas.ie/ViewDoc.asp?fn=%2Fdocuments%2Flibrary%2FDocuments_Laid%2Fdocument1.htm#Question 2
43. Although note the text below concerning parliamentary questions, particularly questions for written answer.
44. One particularly egregious example of this phenomenon was the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations, 1980 (Statutory Instrument 306 of 1980) which enacted employment law norms into the Irish legal system with hardly any adjustment to take account of the particular features of the Irish legal system and subsequently had to be amended in order to avoid a threatened Commission prosecution of Ireland under what is now Article 258 of the Treaty on the Functioning of the European Union.
45. See *Government for National Recovery 2011-2016* (available online at http://www.socialjustice.ie/sites/default/files/file/Government%20Docs%20etc/2011-03-06%20-%20Programme%20for%20Government%202011-2016.pdf) at p. 25.

Obviously, such a change, if implemented, would offer the prospect of some improvement from the present situation, which facilitates avoidance of the role of the Oireachtas and is utterly unsatisfactory from a democratic point of view.

ii. The Role of the Oireachtas at European Union Level in Relation to Policy-Making and Law-Making in the Field of European Affairs

The role for parliament at European Union level in relation to legislating and policy-making is somewhat different to that played by it at national level. At national level, parliament's interlocutor will normally be the Government, which will be vested with full policy-determining power. At European Union level, the national parliament's interlocutor is not the same or, where it is, it does not have the same function. The Irish Government is of course involved in policy-making in the European Union. Yet, unlike at national level, it is not the main determiner of policy. Instead, each Irish Government minister has only one voice of 27 in the Council of the European Union (and far from the loudest, at that, given the normally weighted voting arrangements). In other words, it has a reduced share of an increased decision-making competence. Indeed, in decisions which are taken by qualified majority vote, it is possible (although rare, given the culture of consensus that predominates in the Council[46]) for the Government itself to be outvoted at Council level. Thus the national parliament seeks either to exert influence on an executive which plays a role radically different to the position enjoyed by it at national level or, alternatively, to exert influence over the European Union legislature or one of its component institutions in the form of the Council of Ministers, the European Commission or the European Parliament.

A series of roles are envisaged for national parliaments in relation to European-level decision-making:

1. Rendering Ministers Accountable

The first and most significant European-level role undertaken by national parliaments, and one that might also fairly be described as a national-level role, is that of making ministers accountable for law-making activity at the level of the Council of the European Union. This, however, has been a task rather poorly carried out by the Oireachtas to date. The only Ministers habitually appearing in front of an Oireachtas Committee during the lifetime of the 30th Dáil – either before or after meetings of the Council of Ministers – were the Minister for Foreign Affairs or the Minister of State for European Affairs (who appeared on a relatively frequent basis before the Joint Oireachtas Committee on European Affairs). This was in spite of the supposed arrangement put in place in the wake of the defeat of the first referendum on the Treaty of Nice that Government ministers, or ministers of state, make themselves available for discussions with Oireachtas Committees, in particular before meetings of the Council of Ministers. As was noted in an earlier part of this study, at the time of the adoption of the 2002 Act, the Government of the day is understood to have suggested that the norm should be for a Minister to be requested to appear before the relevant sectoral committee in the week before the relevant meeting of

46. As to which, see chapters 2 and 10 of F. Hayes-Renshaw and H. Wallace, *The Council of Ministers*, (Macmillan, Houndmills, 1997); and R. Dehousse and F. Deloche-Gaudez, "*Voting in the Council of Ministers : The Impact of Enlargement*" in A. Ott and E. Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives* (TMC Asser Press, The Hague, 2009), p. 21.

the Council of Ministers.[47] To date, this suggestion has never been acted upon by any but a tiny minority of Ministers or Oireachtas Committees. The programme for government adopted at the beginning of the 31st Dáil in 2011 does promise change in this regard, however, undertaking that "all Ministers will be obliged to appear before their respective Committees or before the Committee on European Affairs prior to travelling to Brussels for meetings of the Council where decisions are made."[48]

2. Scrutiny of Draft European Legislation

Secondly, the national parliament has the role of scrutinising draft European laws, a task undertaken in the 30th Dáil to the point of near-exclusivity by the Joint Oireachtas Committee on European Scrutiny. Again, this is a function which could be described as a national-level one in many ways, particularly since little if any effort seems to be made at present to call scrutiny reports to the attention of decision-makers at European level – although this need not necessarily be the case. As shall be seen in the text below, a mechanism now exists for consideration at European Union level of the reflections of national parliaments in relation to European Union proposals. The role of the Joint Oireachtas Committee on European Scrutiny is returned to at a later point in this chapter.

3. Consideration of Major European Union Policy Issues

A third European-level role enjoyed by the national parliament is that of considering major European Union policy initiatives from the national perspective – for instance, the consideration of European Commission Green and White Papers. This function was largely carried out by the Joint Oireachtas Committee on European Union Affairs in the lifetime of the 30th Dáil. Like the second parliamentary role outlined above, this role is capable of feeding into the fourth parliamentary role.

4. Contributing to the 'Political Dialogue' at European Union Level

A fourth European-level role for national parliaments – one which comes into play at an early stage in the European policy-making process – is that of contributing directly to the policy-making dialogue at European level. This role (which is returned to in the text below in the discussion of the role of the Joint Oireachtas Committee on European Affairs) has been facilitated since the introduction of a system of 'political dialogue' between the European Commission and national parliaments in 2006 in the form of the so-called Barroso initiative.[49] This system is now underpinned by the strong information rights enjoyed by national parliaments under Protocol (No 1) on the Role of National Parliaments in the European Union[50] and Protocol (No 2) on

47. L. O'Hegarty, "*Parliamentary Scrutiny of European Affairs in Ireland – The European Affairs Committee, the Scrutiny Committee, and the European Union (Scrutiny) Act 2002*" in G. Barrett (ed.) *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press, Dublin, 2008) p. 273 at p. 287.
48. See *Government for National Recovery 2011-2016, op. cit.*, n. 45 at p. 25.
49. See Communication from the Commission to the European Council *A Citizens' Agenda - Delivering Results for Europe* (COM/2006/0211 final)(available online at the time of writing at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0211:EN:NOT) and see now the dedicated website created by the Commission concerning the political dialogue at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm
50. See Title I thereof.

the Application of the Principles of Subsidiarity and Proportionality.[51] The role of national parliaments at European Union level is not one of a policy-making actor, but it does have the assurance that its views will be heard by the Commission and replied to.

5. Operating the Subsidiarity Review Mechanism

Fifthly, the national parliament has the functions assigned to it by European law under the subsidiarity review mechanism.[52] This mechanism involves either House of the Oireachtas sending to the Presidents of the European Parliament, the Council and the European Commission a reasoned opinion stating why it does not consider that a draft law complies with the principle of subsidiarity. A resolution of the House in question is required for these purposes.[53] This mechanism and the specific mode of its implementation in the Irish legal system are examined in detail in Chapters 3 and 4 of this study.

6. Requesting Proceedings to be Brought in Respect of Subsidiarity Violations

Sixthly, either House of the Oireachtas may notify the Minister for Foreign Affairs in writing[54] where it is of the opinion that an act of a European Union institution infringes the principle of subsidiarity and wishes that proceedings seeking a review of that act be brought in the Court of Justice. The Minister is then required, as soon as may be after being so notified, to arrange for such proceedings to be brought.[55] Again, this mechanism and the specific mode of its implementation in the Irish legal system are examined in detail in Chapters 3 and 4 of this study.

7. Receiving, Processing and Considering Documentation

A seventh European-level role carried out by the Houses of the Oireachtas is that of receiving, processing and giving due consideration to the wave of documents pouring into the Oireachtas under Protocol (No 1) on the Role of National Parliaments in the European Union[56] and Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.[57] This particular role is obviously intimately linked to other roles enjoyed by the Oireachtas, such as scrutinising draft European legislation, considering major European Union-level policy initiatives, contributing to the political dialogue at European level, and operating the subsidiarity review mechanism. It is far from clear that any adequate strategy or system for adequately dealing with the vast amounts of material involved has yet been formulated.

8. Contributing to Amendment Process of Constitutive Treaties

Eighthly, Article 48 of the Treaty on European Union now envisages a far greater role for national

51. See Article 4 thereof.
52. Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality which was annexed at Lisbon to the Treaty on European Union and to the Treaty on the Functioning of the European Union. See also Article 5(3) TEU.
53. See Article 6 of Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality and s. 7(3) of the European Union Act 2009.
54. *Viz.* for the purposes of Article 8 of Protocol No. 2 on the Application of the Principles of Subsidiarity and Propotionality.
55. Article 8 of Protocol No. 2 and s. 7(3) of the European Union Act 2009.
56. See Title I thereof.
57. See Article 4 thereof.

parliaments in the process of amending the founding Treaties of the European Union than was the case prior to the entry into force of the Treaty of Lisbon at the end of 2009. Until then, the Oireachtas had little role beyond facilitating the ratification of the already-agreed amendments. This role now includes: (a) being notified of proposed amendments;[58] (b) providing representatives to take part in conventions to consider proposed amendments and make recommendations in relation to them;[59] (c) ratifying proposed amendments or approving them in accordance with national constitutional requirements, depending on the Treaty amendment procedure used;[60] and (d) in effect, each House of the Oireachtas exercising a veto over the deployment of *passerelles*, which involve switches to qualified majority voting and to the 'ordinary legislative procedure' (which carries with it co-decision rights for the European Parliament at European Union level).[61] As regards the last of these, the procedure is that either House may, not later than 6 months after receiving an Article 48(7) TEU notification, pass a resolution opposing the adoption of the decision to which the notification relates.[62] The effect of its making known its opposition is that the decision is not to be adopted.[63] This topic is returned to in Chapters 3 and 4 of this study.

9. *Contributing to Process of Accession of New Member States*

A ninth aspect of parliament's role as it relates to policy-making and law-making at European level is in regard to the accession of new states to the European Union. Since the coming into force of the Treaty of Lisbon at the end of 2009, this role now comes at the beginning and at the end of the admission process.

Under Article 49 TEU, any European state which respects the values on which the Union is founded,[64] and is committed to promoting them, may apply to become a member of the Union. It is required that the European Parliament and national parliaments be notified of this application,[65] thus facilitating discussion of the question of admission in national parliaments at an early stage.

The applicant State is required to address its application to the Council, which, in turn, is required to act unanimously after consulting the Commission and after receiving the consent of the European Parliament (which is to act by a majority of its component members). The conditions of eligibility agreed upon by the European Council are taken into account.

The eventual conditions of admission – and the adjustments to the founding Treaties which the accession of a new member state entails – are required to be the subject of an agreement between the existing member states and the applicant state. This agreement is then required to be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements. In Ireland, as has been seen in the text above, the accession of new member states has always also been

58. See Article 48(2) TEU.
59. See Article 48(3) TEU.
60. See Article 48(4) TEU and Article 48(6) TEU.
61. i.e. the ordinary legislative procedure. See generally Art 48(7) TEU, Article 29.4.8 of the Constitution and Section 7(1) of the European Union Act 2009.
62. Section 7(1) of the European Union Act 2009
63. See Article 48(7) TEU.
64. See Article 2 TEU.
65. As is the European Parliament.

accompanied by legislation to amend the European Communities Act 1972. The latest example of this is the European Communities (Amendment) Act 2006, the long title of which is 'An Act to amend the European Communities Act 1972, so as to provide that certain provisions of the Treaty concerning the Accession of the Republic of Bulgaria and Romania to the European Union shall be part of the domestic law of the state.'

3. *The Parliamentary Role in Establishing Accountability on the Part of Government in Relation to European Policy Matters: Special Constitutional, Statutory and Political Rules*

Parliament also has a role in establishing accountability on the part of the Government. There is obviously some degree of overlap here with the legislative role of parliament (which has been looked at in the text above), since that too works to provide a check on the executive. Special rules exist for the purposes of establishing accountability in relation to various European policy questions. These rules are found variously in the Constitution, in statute and by virtue of political arrangements.

i. Constitutional Provisions Imposing Accountability on the Government in Relation to European Policy-Related Decisions

For certain European policy-related decisions, approval from the Houses of the Oireachtas is required by the Constitution. The amendments made to the Constitution in order to facilitate ratification of the Lisbon Treaty have made a significant difference in this regard. They are examined in greater detail in Chapter 4 of this study and are therefore only briefly rehearsed again here, for the sake of comprehensiveness.

1. Approval of Any Opting into Enhanced Co-operation

By virtue of Article 29.4.7° of the Constitution,[66] any exercise by the State of options or discretions under Article 20 TEU is made subject to the prior approval of both Houses of the Oireachtas. This Treaty article provides for member states engaging in 'enhanced cooperation' with one another – in other words, closer integration.

2. Approval of Any Use of a 'Passerelle'

As has already been seen in the text above, under Article 29.4.8° of the Constitution the agreement by the Irish State to any decision[67] (a) authorising the Council of the European Union to act other than by unanimity,[68] or (b) authorising the adoption of the ordinary legislative procedure (involving co-

66. See para. (i) thereof.
67. Taken either under the Treaty on European Union or the Treaty on the Functioning of the European Union.
68. See Article 29.4.8° (i).

decision on legislation by the Council and the European Parliament)[69] – in other words, the deployment of a *passerelle* – is made subject to the prior approval of both Houses of the Oireachtas.

3. Approval of Opting into Schengen Protocol Provisions or Proposals

Also under Article 29.4.7° of the Constitution,[70] any exercise by the State of options or discretions under Protocol (No 19) on the Schengen Acquis Integrated into the Framework of the European Union is made subject to the prior approval of both Houses of the Oireachtas.

It should be explained that under the Schengen Protocol, Ireland may at any time request to take part in some or all of the provisions of the Schengen *acquis*, a request which the Council of Ministers is required to decide on by unanimity.[71] Proposals to *build* upon the Schengen *acquis* are subject to a more liberal regime, involving a *prima facie* right to accede.[72]

4. Approval of Any Exercise of Options under Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice

Article 29.4.7° of the Constitution[73] also provides that any exercise by the State of options ordiscretions under Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice is made subject to the prior approval of both Houses of the Oireachtas – to include the option that that Protocol shall, in whole or in part, cease to apply to the State.

This requires some further explanation. Protocol (No. 21) – originally designed to protect Ireland's common transport area with the United Kingdom, but now (since the coming into force of the Lisbon Treaty) serving a seemingly broader agenda – provides for the *prima facie* exclusion of Ireland from provisions of the area of freedom, security and justice. It provides, *inter alia,* that

> "none of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union [*viz.* the Treaty Title concerning the area of freedom, security and justice], no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland" [74]

Provision is made in the Protocol (a) that Ireland may notify,[75] within three months of a proposal or initiative being presented to the Council pursuant to Title V, that it wishes to take part in the adoption and application of the proposed measure, whereupon it shall be entitled to do so; (b) that Ireland may

69. See Article 29.4.8° (ii).
70. See para. (ii) thereof.
71. Article 4 of the Protocol.
72. Article 5 of the Protocol. *Cf.* however Case C-137/05 *United Kingdom v. Council of the European Union* [2007] ECR I-11593.
73. See para. (iii) thereof.
74. Article 2 of the Protocol.
75. *Viz.* to the President of the Council in writing.

notify[76] at any time after the adoption of a measure under Title V, its intention that it wishes to accept that measure (although its ability to do so is conditional on the unanimous agreement of the member states who have accepted);[77] and (c) that Ireland may notify the Council in writing that it no longer wishes to be covered by the terms of this Protocol, in which case the provisions of Title V will then apply to Ireland.[78]

The Supreme Court judgment in *Iqbal v. Minister for Justice*[79] demonstrates that considerable judicial deference will be shown to the will of the Houses of the Oireachtas in opting in to the adoption of a proposed measure. *Iqbal* indicates that the Courts would only invalidate an opt-in if there had been "such significant departure from the approved text as to warrant the conclusion that the constitutionally necessary prior approval had not been given."[80]

In the 30th Dáil, the Article 29.4.7°(iii) procedure was triggered whenever the Department of Justice, following consultations with the Office of the Attorney General, indicated that an opt-in motion under Title V should be considered by the Joint Committee on Justice, Defence and Women's Rights.[81] Motions were then – nominally – considered by the full Houses. In reality, it was far from unusual for them to be simply adopted without any debate at all taking place beyond that which had already occurred in the Joint Committee.[82]

The extent to which, as a result of the various requirements of Oireachtas approval discussed in this section, European-level justice and home affairs cooperation dominated the agenda of the Joint Oireachtas Committee on Justice, Defence and Women's Rights can be seen by looking at the *2009 Annual Report and Work Programme 2010* of the Joint Committee on Justice, Equality, Defence and Women's Rights.[83] This reveals that of the nineteen topics considered at the ten meetings held by that Committee in 2009, 14 of them (i.e. 74 per cent) involved the consideration of some matter related to European Union justice and home affairs cooperation. Of these 14 topics, in turn, 11 involved opt-in resolutions of the kind which have been under discussion here (with the remaining three of the 14 involving more general issues of justice and home affairs cooperation). (See further Table 3 below.) This made the Joint Committee on Justice, Equality, Defence and Women's Rights the Oireachtas Committee – other than the Joint Oireachtas Committee on European Affairs and the Joint Oireachtas Committee on European Scrutiny, which are examined below – whose agenda was most dominated by European Union-related issues.[84]

76. *Viz.* to the Council and to the Commission
77. See Article 4 thereof.
78. See Article 8 of the Protocol.
79. [2008] 4 IR 362.
80. [2008] 4 IR 362 at p. 377. Clear disregard by the Oireachtas of its constitutional duties would be needed in order to see its opt-in invalidated by the Courts. (*Ibid.*) In *Iqbal*, differences between the Framework Decision on the European Arrest Warrant and the draft proposal the Houses had approved did not invalidate that approval, which was held to include any reasonable and usual drafting changes.
81. On these occasions, briefings were prepared for the Joint Committee by the Library and Research Services Committee team. (See *Annual Report 2010,* p. 37, available online at the time of writing at http://www.oireachtas.ie/documents/publications/Annual_Report_2010_revised.pdf)
82. See, *e.g.,* motion regarding Directive of the European Parliament and of the Council on attacks against information systems and repealing Council Framework Decision of 14 December, 2010, adopted in the Seanad without debate. See also the example in the text below at n. 133.
83. Located at http://www.oireachtas.ie/documents/committees30thdail/j-justiceedwr/reports_2008/AnnualRpt20100311doc
84. See further the discussion of the role of Oireachtas committees in relation to European affairs below.

Table 3: Topics Considered at the Ten Meetings Held by the Joint Committee on Justice, Equality, Defence and Women's Rights in 2009 [85]

Category of Topic	*Number of Times This Category of Topic Considered*
Motions on Opting in to Some Facet of European Union Justice and Home Affairs Cooperation [86]	11
Other European Union-Related Topics [87]	3
Non-European Union-Related Topics [88]	5
TOTAL	19

The benefits for Ireland of having such an 'opt-out with an opt-in' arrangement at European Union level as regards the justice and home affairs provisions of the Treaty (apart from improving the chances of success of the referendums concerning the ratification of the Lisbon Treaty) are not clear. The 2011 programme for government contains a commitment to "enhance the Irish role in EU judicial and home affairs cooperation."[89] But it is unclear whether that means that Ireland will serve notice that it no longer wishes to be covered by the terms of this Protocol. Should the Government wish to take this step, Article 29.4.7° of the Constitution will require the prior approval of both Houses of the Oireachtas.

85. Source: information provided in paragraph 7(1) of the 2009 *Annual Report and Work Programme 2010* of the Joint Committee on Justice, Equality, Defence and Women's Rights.

86. These were, respectively (1) a motion on the adoption and application of the proposal from the European Commission for the recasting of the Eurodac Regulation; (2) a motion on the adoption and application of the proposal from the European Commission for the recasting of the Dublin Regulation; (3) a motion on the adoption by Ireland of an EU Council Decision on the establishment of the European Criminal Records Information System (ECRIS); (4) a motion on proposals from the European Commission for Regulations establishing procedures for the negotiation and conclusion, between member states and third countries, of bilateral agreements within the civil justice area; (5) a motion on Adoption of an EU Council Decision on the Agreement between the European Union and Iceland and Norway on the stepping up of cross border co-operation, particularly in the areas of combating terrorism and cross border crime; (6) a motion regarding a proposed Council framework decision on the application, between EU Member States, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention; (7) a motion on a proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office; (8) a motion on an agreement between the EU and the USA on the processing and transfer of Financial Messaging Data from the EU to the USA for the purposes of the Terrorist Finance Tracking Programme (the 'SWIFT' Agreement); (9) a motion on a Council framework decision concerning accreditation of forensic service Providers carrying out laboratory activities; (10) a motion on a Council Decision on the signing, on behalf of the European Union, of an agreement between the European Union and Japan on mutual legal assistance in criminal matters; and (11) a motion on a proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA. See generally para. 7(1) of the Joint Committee's work.

87. These were, respectively (1) briefings on Justice and Home Affairs matters (twice); (2) discussion with Centre for Irish & European Security on a then forthcoming report by European Security Policy & Innovation Forum.

88. These were, respectively (1) a discussion of a report of the Garda Síochána Inspectorate; (2) a discussion with the Garda Commissioner; (3) a discussion on the Department of Defence and Defence Forces Strategy Statement 2008-2010 with the Minister for Defence; (4) a discussion of the Committee Work Programme; and (5) a consideration of a sub-committee report on women's participation in politics.

89. *Op. cit.,* n. 45, p. 58.

5. Approval of Participation by the Irish State in Specified Forms of Co-operation in the Justice and Home Affairs Field

Under Article 29.4.8° of the Constitution,[90] the prior approval of both Houses of the Oireachtas is required for the Irish state's agreement to certain specified forms of cooperation in the justice and home affairs field, namely:

(a) the establishment by directive of minimum rules on specific aspects of criminal procedure (under Art. 82(2)TFEU);[91]
(b) the establishment by directive of minimum rules concerning the definition of criminal offences (under Art. 83(1) TFEU);[92]
(c) the establishment by regulation of a European Public Prosecutor's Office (under Article 86(1) TFEU);[93] and
(d) the extension of the powers of the Office of the European Public Prosecutor to include certain serious crimes (under Article 86(4) TFEU).[94]

The existence of these requirements reflects the particularly conservative approach which is being taken in Ireland in relation to justice and home affairs cooperation – an approach which seems to be driven by the frequent need to subject major amending treaties to a referendum process in Ireland.

ii. Statutory Provisions Imposing Accountability on the Government in Relation to European Policy-Related Decisions

Beyond the various Constitutional rules outlined above requiring the approval of both Houses of the Oireachtas to the taking of various steps by the Irish Government at European Union level, accountability is also imposed on the Government under certain statutory provisions.

1. Entitlement to Twice-Yearly Report from Each Government Minister

S. 2(5) of the European Union (Scrutiny) Act 2002 requires that every Government Minister make a report to each House of the Oireachtas not less than twice yearly in relation to measures, proposed measures and other developments concerning the European Communities and the European Union in relation to which he or she performs functions.

The Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs has observed that "the six-monthly reports prepared by Departments for the Oireachtas in accordance with the 2002 Act, which now include a forward looking element, are a useful planning tool and help to guide the

90. See para. (iii) thereof.
91. Such directives must be agreed by unanimity by the Council under Article 82(2)(d) TFEU.
92. Note that the ordinary legislative procedure (co-decision) applies in adopting such directives.
93. Such regulations must be agreed by unanimity by the Council under Article 86(1) TFEU.
94. Any such extending decision must be agreed by unanimity by the European Council under Article 86(4) TFEU.

Committees on what should be prioritised in the coming six months."[95] Nevertheless, in practice, the value of these reports is more limited than this might indicate. In the first place, when discussed at all in Oireachtas committee meetings during the lifetime of the 30th Dáil, they were usually delivered by officials rather than by the Minister him- or herself, lessening or even eliminating the ability of Oireachtas members to impose any real political accountability. Secondly, during the lifetime of the 30th Dáil, the reports were generally received by the Joint Oireachtas Committee on European Scrutiny rather than by the House in plenary session, facilitating discussion but simultaneously limiting awareness of the report to a relatively small sub-category of Oireachtas members. Thirdly, in practice, much of what was found in the reports was retrospective, providing little political meat for discussion by Oireachtas members. Finally, the reports frequently arrived several months late, reducing their value as anything more than a historical record of whatever measures have been undertaken in the European policy field.

Echoes of these difficulties could be seen in the recommendation of the Joint Sub-Committee that

> "a greater emphasis should be placed on the six-monthly reports and their timely submission, and in particular the reports' overview of progress made in legislative proposals considered by the Oireachtas and their look ahead to the priorities of the coming six months. Therefore, the reporting requirements under the 2002 Act should be streamlined in order to meet the needs of the Oireachtas. Such a change would also lighten the administrative burden." [96]

The topic of these reports is returned to in the examination of the Joint Oireachtas Committee on European Scrutiny in the text below.

2. *Annual Government Report on Developments in the European Union*

Under s. 5 of the European Communities Act 1972 (as substituted by s. 4 of the 2002 Act), the Government has been obliged to make a report to each House of the Oireachtas on developments in the European Union each year since 2003.[97] The usefulness of this step has been questioned. For example, the *Report of the Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs* of 7 July, 2010, expressed the Joint Sub-Committee's belief that "the annual report is historical and therefore its purpose is limited."[98] The Sub-Committee went on to recommend that there should no longer be a requirement to prepare an annual report.[99]

95. Para. 21 of the *Report of the Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs* (7 July, 2010) (Available online at the time of writing at http://euaffairs.ie/publications/Sub-Committee-Report-Review-of-Role-of-Oireachtas-in-European-Affairs.pdf).
96. *Ibid.* Note that the observation concerning the lightening of the administrative burden seems to relate to the Sub-Committee's views (expressed in the same paragraph) on the limited usefulness of annual Government reports on developments in the European Union, which the Sub-Committee felt should be abolished.
97. S. 5 itself refers to the Communities, but this is clearly now obsolete.
98. *Ibid.*, at para. 21 of the Report's conclusions.
99. Recommendation 5 of the Sub-Committee.

iii. A Political Arrangement Imposing Accountability on the Government in Relation to a European Policy-Related Decision: the Seville Declaration

Accountability is also imposed on the Government in relation to European policy by a political arrangement – part of the response of the Irish Government to the initial 'No' vote in the June 2001 referendum on a constitutional amendment permitting ratification of the Treaty of Nice came in the shape of a 'National Declaration by Ireland' which was made by the Irish Government at the Seville European Council on 21 June, 2002. Paragraph 6 of this Seville Declaration states that

> "Ireland reiterates that the participation of contingents of the Irish Defence Forces in overseas operations, including those carried out under the European security and defence policy, requires (a) the authorisation of the operation by the Security Council or the General Assembly of the United Nations, (b) the agreement of the Irish Government and (c) the approval of Dáil Éireann, in accordance with Irish law."[100]

Although the terms of the Seville Declaration are of no legally binding force, it is nonetheless regarded as politically binding and, in practice, any deployment of Irish troops abroad is now made subject to a vote of approval in Dáil Éireann.

4. Establishing Accountability on the Part of Government in European Matters: The Role of Committees in the 30th Dáil

i. Committees: Some General Observations

Committees have been described as "the key mechanism by which a legislature develops the ability to counter-balance the many advantages of the executive in terms of policy."[101] It has been argued that "if parliament is to have any chance at influencing the Government's legislative process and holding both ministers and their agent accountable, a well resourced committee system is a minimum, if not sufficient, requirement."[102]

A significant role in the task of establishing accountability on the part of the Government in European matters, and in seeking to influence European policy in other ways, was allocated to Oireachtas committees both in the 30th Dáil and in preceding Dála. The principal committees in this regard were (a) the Joint Oireachtas Committee on European Affairs and (b) the Joint Oireachtas Committee on

100. See Council of the European Union, *Presidency Conclusions of the Seville European Council (21 and 22 June 2002)*, Brussels, 24 October, 2002, (13463/02 POLGEN 52), Annex III (available online at the time of writing at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/72638.pdf). Note also the declaration by the European Council itself in Annex IV.

101. See S. Martin, "*The Committee System*", in M. MacCarthaigh and M. Manning, *The Houses of the Oireachtas* (Institute of Public Administration, 2010), p. 285 at p. 285.

102. *Ibid.*, p. 302.

European Scrutiny. However, (c) sectoral Oireachtas committees also had a role to play. It is proposed to examine briefly the role of each of these in turn.

First, however, some general observations concerning Oireachtas committees are appropriate. The first is that Oireachtas committees come in two varieties: (i) select committees, which are committees of one or either House, and (ii) joint committees which are formed of members of select committees from both Houses. Thus, for example, some five months after the election of the 30th Dáil,[103] the Dáil itself ordered on 23 October, 2007, that a select committee (to be called the Select Committee on European Affairs) be appointed, consisting of eleven members of the Dáil,[104] and that it be joined with a select committee to be appointed by Seanad Éireann to form a Joint Committee on European Affairs. One day later, on 24 October 2007, Seanad Éireann duly ordered a select committee, consisting of six of its members, be appointed to be joined with the Dáil Select Committee to form this Joint Committee on European Affairs.

Select committees have a role of their own, distinct from their role in providing the membership of joint Oireachtas committees. Thus, for example, when a Bill is going through committee stage in the Dáil and not being considered by a committee of the full House, it will be considered by a Dáil select committee (i.e. rather than a joint Oireachtas committee, on which there are senators). Similarly, where the Dáil has powers above and beyond those of the Seanad, (e.g. in finance and international agreements[105]) the exercise of these may well, in some way, involve a select committee of the Dáil, but will not involve a joint Oireachtas committee.

Apart from the distinction between select committees and joint committees, a second useful distinction to bear in mind when discussing Oireachtas committees is that between the discretionary and non-discretionary work which such committees carry out. Committees agree their own work programme. For many committees (including, during the lifetime of the 30th Dáil, the Joint Committee on European Affairs and the Joint Committee on European Scrutiny), the work programme is prepared at the start of each year, detailing the activities to be undertaken during the year ahead. Some of this programme is discretionary and some is not. Certain committees have a greater capacity for discretionary work programmes than others. A committee with a heavy legislative workload will have a correspondingly reduced capacity for discretionary work. The discretionary element (and therefore the work programme as a whole) is very frequently departed from in the course of the year because some major political issue or other has arisen.

As regards the two Oireachtas committees concerned with European affairs during the period of the 30th Dáil, one Oireachtas staff interviewee observed to the writer:

> "The agenda of the Joint Oireachtas Committee on European Affairs is very largely discretionary. The Dáil does not ask them to deal with much legislation because there is very little European-related legislation. The Foreign Affairs Committee deals with the estimate for foreign affairs. So

103. The election of the membership of the *30th Dáil* took place on 24 May, 2007, and it first met on 14 June.
104. Paragraph 1(a) of the Order. This was later amended to thirteen members. (See Order of Dáil Éireann of 2 October, 2008, amending paragraph (1)(a) of the Order of Dáil Éireann of 23 October, 2007.)
105. See in this regard Articles 21 and 29.6 of the Constitution.

> the Dáil asks the Joint Committee on European Affairs to do very little work, other than things like examine what Ireland's future in Europe is going to look like – in relation to which they set up a sub-committee to look at the issue and report back to them. The Joint Oireachtas Committee on European Scrutiny is completely different. They have very little discretionary time. Their workload is dictated by the number of proposals coming from Europe. So the Joint Committee on European Affairs has a lot of discretionary time, the Joint Committee on European Scrutiny very little." [106]

It has been seen in the previous chapter that the Oireachtas committee system is, for the most part, of relatively recent vintage – for example, the Joint Oireachtas Committee on European Affairs was created for the first time in 1995. It has developed rapidly in that time, but is, nevertheless, a system which is not as embedded as similar committee systems in other parliaments. Unsurprisingly, given the lack of electoral reward for committee work and the localised nature of the factors which *do* tend to be electorally rewarded, full-hearted commitment of all Irish parliamentarians to such work is far from the norm. Martin has opined that

> "apart from legal and financial barriers to the further evolution of committees within the Oireachtas, perhaps the greatest barrier to an enhanced committee system is the inability of TDs to dedicate appropriate time and resources to committee work at the expense of electorally necessary constituency work. The lack of outputs by some committees, varied levels of attendance by parliamentarians, and instances of disengagement with people appearing before the committee will be difficult to overcome while TDs are focused on constituency at the expense of a national political role."[107]

Linked to the foregoing is the question of the relative prestige of the European committees of the 30th Dáil. Oireachtas committees vary in terms of how attractive membership of them – and subsequently, participation in them – is for TDs and senators. According to the source interviewed above:

> "In terms of their prestige as committees, if you used a football league-table analogy, the two European affairs committees would be high mid-table, but they would certainly not be Champions' League teams. The most high-prestige committee is the Public Accounts Committee. The members like it – not necessarily because the work it does is more important than that done by other committees, but because it gives one access to the areas the media are interested in."[108]

The general lack of engagement of many parliamentarians in committee work has made arguments in relation to empowerment of Oireachtas committees more difficult to make than would otherwise be the case. These arguments are returned to in the text concerning the Joint Oireachtas Committee on European Affairs below. It may be noted here, however, that there is obviously some danger of a chicken-and-egg situation arising if empowerment of parliamentary committees is made dependent on evidence of commitment of parliamentarians to the committee process, when the commitment of parliamentarians is scarcely likely to develop in favour of committees which have very few real powers.

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106. Source: interview conducted by the author with a member of the Oireachtas staff on 28 September, 2010.
107. *Loc. cit.*, at n. 84 above, p. 302
108. *Ibid.*

The radical step of empowering (via the amendment of Article 15.10 of the Constitution) each House of the Oireachtas to conduct inquiries into any matter – over the course of which the conduct of any person could be investigated and findings made in respect of such conduct – was to be decisively rejected in a referendum held on 27 October, 2011, but this had relatively little relevance in the field of European affairs in any case.[109] Of more interest in terms of empowerment in this context is the question of the ability of Oireachtas committees to secure real accountability on the part of the executive in relation to European policy by, for example, securing ministerial appearances before the committees to inform them of government policy prior to or after meetings of the Council of the European Union. This topic is looked at in the text below.

There has been a gradual increase in the empowerment of Oireachtas committees over time. However, limits still exist as to how far this can go, even aside from (a) the problem of securing adequate commitment from parliamentarians in relation to committee work. Such limits include (b) the limited size of the Oireachtas, and thus the talent pool available from which to draw committee members;[110] (c) the lack of incentive for Government supporters in the Oireachtas to engage in anything more than monitoring scrutiny (which involves demanding information on an executive's actions) as opposed to political scrutiny (which involves assessment of how appropriate the Government's approach actually is);[111] (d) the small number of days on which the Oireachtas as a whole meets, which (as shall be seen below) is normally when the Joint Committee on European Affairs meets; (e) the lack of a selfish incentive for the Government – or, for that matter, for an Opposition with realistic chances of being elected to Government – to permit the increase of Oireachtas committees' powers to secure ministerial accountability; and (f) the financial (and hence staffing and organisational) constraints that operate on committees, particularly in the current straitened financial circumstances.

That said, there have been external forces exerting pressure in favour of the further empowerment of committees. These include: (a) the perceived need to respond generally to electoral concerns about the performance of parliament as a body capable of securing accountability; (b) peer pressure, in terms of the visibly better performance of national parliaments in other European Union member states; and, of course, (c) legal changes – brought about by, for example, the coming into force of the Treaty of Lisbon – which are examined in more detail in Chapters 3 and 4 of this study.

ii. The Joint Oireachtas Committee on European Affairs

Introduction – An Historical Note

The Joint Oireachtas Committee on European Affairs, as seen in Chapter 1, was first set up in March, 1995. Membership of the Joint Committee, at least initially, was regarded as less prestigious than

109. The Thirtieth Amendment of the Constitution (Houses of the Oireachtas Inquiries) Bill 2011 was rejected in referendum by 928,175 votes (53 per cent) to 812,008 votes (47 per cent) on a voter turnout of 56 per cent.
110. It should be recalled that this is further depleted by the absence of Government ministers and Opposition spokespersons.
111. This topic is returned to in Chapter 5 of the present study. See more generally, K. Auel, "*Democratic Accountability and National Parliaments*" (2007) 13 European Law Journal 487 at pp. 500-501.

membership of the Foreign Affairs Committee.[112] However, the European Affairs Joint Committee was to see itself moved to a more prominent position as a result of the successive initial referendum defeats of the Nice Treaty (in 2001) and the Lisbon Treaty (in 2008).

The two referendum defeats were to have major implications for the Committee. It was seen in Chapter 1 that the initial referendum defeat of the Nice Treaty led to, *inter alia,* (a) a legislative response in the shape of the adoption of the European Union (Scrutiny) Act 2002 and (b) a governmental response in the form of indicated changes to ministerial behaviour prior to meetings of the Council of the European Union (even though it turned out that, in practice, these changes were to prove far less transformative than had originally been indicated). Both of these reforms resulted, ultimately, in increased powers being conferred on the Joint Oireachtas Committee on European Affairs. The new powers conferred by the 2002 Act were devolved to its Sub-Committee on European Scrutiny. In the 30th Dáil, elected in May, 2007, these powers were transferred to a new Committee – the Joint Committee on European Scrutiny. The role this latter committee played in the 30th Dáil will be examined presently.

Another referendum defeat – that of the Lisbon Treaty in June, 2008 – led the Joint Committee establishing the *Sub-Committee on Ireland's Future in the European Union*, chaired by Fine Gael Senator Paschal Donohoe.[113] After extensive hearings, this sub-committee produced an extensive and well-received report in November of that year which included consideration of the role of the Oireachtas itself in European matters.[114] The eventual coming into force of the Treaty of Lisbon in December, 2009, (with its new powers for national parliaments)[115] was to see more powers conferred on the Committee, as well as to help stimulate the production of a further sub-committee report. This report specifically reviewed the role of the Oireachtas in European affairs in detail,[116] and both it, and the general impact of the Lisbon Treaty in Ireland, are considered in Chapter 4 of this study. Such was the extent of the impulse for reform engendered by the initial Lisbon Treaty referendum defeat, however, that the Joint Committee on European Affairs was itself replaced by another Committee in the 31st Dáil in the wake of the Fine Gael-Labour coalition taking power following the February 2011 election:[117] the Joint Committee on European Union Affairs.

The Joint Committee on European Affairs – Some Preliminary Reflections

It is proposed to examine in the text below what became the two most important functions of the Joint Committee on European Affairs: (a) the holding of ministers to account in respect of their

112. B. Laffan, "*The Parliament of Ireland: A Passive Adapter Coming in from the Cold*" in A. Maurer and W. Wessels (eds.) *National Parliaments on their Ways to Europe: Losers or Latecomers* (Nomos, Baden-Baden, 2001) p. 251 at p. 260.
113. This was also a sub-committee of the Joint Oireachtas Committee on European Scrutiny.
114. Sub-Committee on Ireland's Future in the European Union, *Ireland's Future in the European Union: Challenges, Issues and Options* (27 November, 2008). This report is considered *in extensu* elsewhere in this work and available online at http://www.euaffairs.ie/sub-committee/Sub-CommitteeReport.pdf
115. See the chapter of this work concerning the evolving role of parliaments in the European Union legal order.
116. This was the Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, chaired by Fine Gael TD Lucinda Creighton, whose report (*op. cit.,* n. 95 above) is examined elsewhere in this work. See, for a more detailed examination of the reports of the two sub-committees, the chapter of this work dealing with the Irish response to the Lisbon Treaty.
117. The setting up of the Joint Committee on European Affairs came too late for it to form the subject of this study, beyond merely noting the fact of its creation here.

activities in the Council of the European Union and (b) the Committee's delivery of Reports. Some preliminary observations may be added at this point, however.

The first concerns the agenda of the Joint Committee on European Affairs. One of the most significant advantages of this Joint Committee was that – unlike its predecessor committee, the Joint Oireachtas Committee on the Secondary Legislation of the European Communities – the Joint Committee on European Affairs was not rigidly tied to the legislative agenda of the European Union. This was hugely important in that, as was seen in the previous chapter, the restriction on the Joint Committee on the Secondary Legislation of the European Communities effectively relegated that Committee permanently to the realms of political irrelevance. However, the new freedom given to the Joint Committee on European Affairs to determine its own agenda also created the risk that over time a disconnect would arise between the deliberations of the Committee and the political agenda at European level. A certain degree of eclecticism in issues which the Joint Committee addressed did indeed become, and remained, a feature of its engagement with European affairs.[118] A study conducted in 2010 was critical of the Joint Committee on this point, observing that:

> "given the centrality of economic issues in Ireland and across the EU throughout 2010, it would be reasonable to conclude that this matter would have been of significant concern to the European Affairs Committee. However, the European Affairs Oireachtas Committee discussed issues related to Irish and European finances and the IMF on only five occasions in 2010... Separately, foreign affairs related issues were discussed a total of nine times. However, within these nine foreign affairs discussions, the Middle East and Israel were the focus of attention on a total of six occasions. This means that 67% of the discussion on foreign affairs within the European Affairs Committee in 2010 focused on concerns about the Middle East."[119]

This is a serious criticism, all the more so in a small country with only limited resources in terms of time and personnel available. There is an opportunity cost accompanying any failure to focus on those European policy issues which are of the most importance to the country. That said, it is also true that the Joint Committee had a difficult balance to achieve, seeking to be relevant to the national political agenda and, at the same time, seeking to link into the policy-making agenda at European Union level.

A second point of interest comes in the form of issues relating to the number of meetings held and to attendance at those meetings. In the sample year of 2010, the Joint Committee on European Affairs had 36 public meetings. This was in addition to six meetings of the Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, as well as a number of private meetings of the Joint Committee itself.[120] This is indicative of a considerable degree of commitment by the members of the Committee, particularly given that it had considerable discretion in relation to its agenda and the

118. *Ibid.* See also G. Barrett, "*Oireachtas Control over Government Activity at European Union Level: Reflections on the Historical Context and the Legal Framework*", chapter 6 in Barrett (ed.), *op. cit.*, at n. 47, pp. 169 to 171.

119. European Movement Ireland, *Accountability Report 2010* (Dublin, July 2011) at p. 44. Available online at the time of writing at http://www.europeanmovement.ie/fileadmin/files_emireland/downloads/Uploads_2011/ACCOUNTABILITY REPORT_2010.pdf

120. Source: author's calculations based on online record of Joint Committee on European Affairs debates found at http://debates.oireachtas.ie/committees/2010/EU.asp

number of times it met. It was also consistent with a long-term trend in this regard: an earlier study noted that in the five years of the 29th Dáil (2002-2007), the Joint Committee had met on 142 occasions. This was the largest number of meetings for any comparable committee,[121] translating to an average of just over 28 meetings per year. Over this period, the Joint Committee generally met once a week on days when the Dáil and Seanad were sitting (*viz.* Tuesdays, Wednesdays or Thursdays). On 26 occasions in the whole five year term – an average of just five times a year, or less than 20 per cent of its average yearly total of meetings – it met either on days when the Houses were not in session, or on a Monday or Friday, when the Houses are in session, but not sitting. The Joint Committee sitting outside Dáil and Seanad sitting days was therefore the exception rather than the rule. Although sitting on the same day as the Dáil or Seanad probably had the advantage of ensuring a higher attendance than would otherwise have been the case, it also has the disadvantage of importing a certain degree of disruption into Committee meetings due to the fact that members of the Committee frequently left Committee meetings to fulfil speaking commitments in one or other House.[122]

In the 30th Dáil, the Joint Committee on European Affairs had 22 members. As was the case with all Oireachtas committees, however, attendance at European Affairs Committee meetings was always far lower than the actual membership of the Committee. The Committee had a quorum of only five, with at least one member having to come from either House[123] and, in practice, relied on a highly dedicated cross-party minority of its membership in order to get its work done. A study of attendance at Committee meetings by parliamentarians in 2010 indicated that the Committee had an average attendance rate of 58 per cent – i.e. an average of just under 13 of its 22 members attending each meeting. This placed it in a lowly 17th position out of 21 Committees surveyed.[124] Carroll's study of the Joint Committee on European Affairs in the 29th Dáil indicated a slightly better average attendance of 62 per cent, with substitutes attending on a further 2 per cent of occasions, making a 36 per cent average absence rate. This meant that an average of 11.2 of the then 17 Committee members attended meetings.[125]

Attendance records can be misleading, however, since (a) they do not measure the level of engagement of individual members. Some idea of this can be gained from the number of members who choose to speak at a Committee meeting. In terms of speaking contributions, two random examples may be taken. First, the Joint Committee meeting of 14 December, 2010, which concerned two issues: the proposed Single Market Act, and a motion on the European Financial Stability Facility and the European Financial Stability Mechanism. The recorded attendance at this meeting was thirteen, eight of whom made a verbal contribution over the period of the one-and-a-half hours for which it lasted. Secondly, the Joint Committee meeting of 20 July, 2010, which discussed the issue of the Working Time Directive. The recorded attendance at this meeting was eleven, five of whom contributed to the discussion.

121. J. Carroll, *"Assessing the Role(s) of the Irish Parliamentarian in European Affairs in Ireland"*, paper presented at the Political Studies Association of Ireland Conference 2010, Dublin Institute of Technology, 9 October, 2010, at p. 12.
122. It is far from unknown for members of Oireachtas committees to pose questions of individuals appearing before the Committee and no longer to be present in the committee room when the question is answered.
123. See para. 2(b) of its Orders of Reference.
124. See European Movement Ireland, *op. cit.,* at n. 119, p. 23. The Committee on Agriculture, Fisheries and Food had the highest average attendance at 76 per cent and the Committee on Justice, Defence and Women's Rights had the lowest at 42%.
125. *Loc cit.,* n. 121, at p. 13.

Even using the number of speakers as a guide to engagement can mislead, however, since contributions can be well or poorly prepared. Some Committee members clearly did prepare for meetings but, despite the availability of improved research support from the Oireachtas Library and Research Service, it is clear that many members did not.

Attendance records can also exaggerate the level of commitment in that (b) they do not record when a member has entered and left the room. An attendance of merely a few minutes could suffice in order to ensure the attendance of members of the Committee was recorded – and, in this writer's experience of observing the Committee on European Affairs in operation, frequently had to – although it should be stressed that this was not the case with the core minority of active members on which the Committee depended for much of its useful activity.

Securing Ministerial Accountability in the Council of the European Union: Ministerial Briefings

One aspect of Oireachtas oversight of the executive, purportedly introduced in 2002, consisted of the supposed arrangement that Government ministers or ministers of state would make themselves available (in particular before meetings of the Council of Ministers and the European Council) for discussions with the European Union Committee or the relevant sectoral committee, as appropriate. Any such commitment derived and derives from practice rather than law. To this day, it remains unsupported by legislative provision, the Government having declined to make provision in this regard in the 2002 Act. At the time of the adoption of the 2002 Act, the Government is understood to have suggested that the norm should be for a Minister to be requested to appear before the relevant sectoral committee in the week before the relevant meeting of the Council of Ministers.[126]

If such a suggestion was made, however, it was most certainly never acted upon by any but a tiny minority of Government ministers. One aspect of this promise was fulfilled, however, and continued to be so right up to the end of the 30th Dáil. Prior to meetings of the Council of the European Union when it meets as the General Affairs and Foreign Affairs Councils,[127] the Joint Oireachtas Committee on European Affairs was given an opportunity to meet either with the Minister for Foreign Affairs or the Minister of State for European Affairs to discuss the Council's agenda.

Table 4 indicates the frequency of these briefings in the years 2006 to 2010 as well as the frequency of the relevant Council meetings during this time.

126. O'Hegarty, above, n. 47 at p. 17.
127. Prior to the coming into force of the Lisbon Treaty in December, 2009, this was known as the External Relations Council.

Table 4: Briefings in Advance of General Affairs Council meetings 2006-2010 [128]

Year	*2006*	*2007*	*2008*	*2009*	*2010*
Number of General Affairs Council meetings	13	10	14	11	10 [129]
Number of ministerial briefings	6	2	10	11	8

A number of observations can be made about these briefings. The first is that there has always been an element of 'doubling up' on the part of ministers in terms of presenting and delivering these briefings as one briefing, consolidating the General Affairs and Foreign Affairs Councils. This is becoming less feasible now, as the profile and involvement of the European Union in the field of foreign affairs increases. Foreign Affairs Council meetings are being held more frequently on days other than those consecutive to a General Affairs Council meeting. For example, five Foreign Affairs Council and General Affairs Council meetings were held in 2010 on non-consecutive days. Rather than having two separate briefings on these occasions, *no* ministerial briefing was provided to the Joint Committee on European Affairs in respect of these Foreign Affairs Councils. Nor was any provided to the Joint Oireachtas Committee on Foreign Affairs.[130]

The second observation is that the level of briefings provided in 2006 and 2007 was so low that the Oireachtas cannot be said to have been kept informed in advance of General Affairs Council meetings in these two years. As can be seen from the table above, the Joint Committee on European Affairs held six meetings in advance of General Affairs Council meetings in 2006, a number so low that it meant that the Committee was briefed in advance of less than half such Council meetings at European level[131] In 2007 – an election year – no parliamentary control at all was exercised in relation to ministerial activity in General Council meetings for most of the year. The only two ministerial briefings provided in the entire year came in mid-November and early December. This raises serious questions as to the interest and ability of the Oireachtas to ensure accountability on the part of the Government in an election year, and the willingness of the executive to facilitate such accountability: important business at European Union level does not cease to be conducted merely because an election happens to be occurring in Ireland. Only in 2009 was a ministerial briefing provided before all General Affairs meetings. In all other years of the five surveyed. at least a fifth of the General Affairs meetings took place with no briefing having been provided to the Committee. In the worst of these years, 2007, four-fifths of such Council meetings took place with no briefing whatsoever.

128. See generally for a schedule of General Affairs Council meetings http://www.consilium.europa.eu/press/council-meetings.aspx?lang=en&pagenum=1 For information on Joint Oireachtas Committee on European Affairs meetings, see http://debates.oireachtas.ie/committees/

129. Five Foreign Affairs Councils not included here were held in 2010 on days which were not consecutive to the day on which General Affairs Council meetings were held.

130. Note also that more General Affairs Council meetings are now being held without a Foreign Affairs Council meeting the next day. Two of the General Affairs Council meetings in 2010 (which are included in the above table) fit this description.

131. See Paragraph 4.1, Sub-Committee on European Scrutiny of the Joint Oireachtas Committee on European Affairs, *Fourth Annual Report on the Operation of the European Union (Scrutiny) Act 2002:1 January 2006 to 31 December 2006* (March 2007). See further http://debates.oireachtas.ie/committees/2006/EU.asp Regarding the frequency of the Council meetings in 2006, see the Council's own website at http://www.consilium.europa.eu/press/press-releases/general-affairs.aspx?target=2006&infotarget=&max=0&bid=72&lang=en&id=

The degree to which the duty to brief the Committee is adhered to appears to depend on the attitude of the Minister. The statistics from 2009 and 2010 appear to reflect the particularly diligent attitude adopted towards briefing the Oireachtas by the then Minister for Foreign Affairs, Micháel Martin, and the Minister of State for European Affairs, Dick Roche.[132] But there is no guarantee that every Minister for Foreign or European Affairs can be relied upon to adopt a similar approach.

It should be borne in mind that the General Affairs Council is only one of ten formations in which the Council sits. Between 2006 and 2010, the Council as an institution met in its various formations a total of 287 times.[133] Thirty-seven ministerial briefings were given to the Joint Committee on European Affairs over that time period. Even assuming each of these briefings to have covered *both* a General Affairs and a Foreign Affairs Council, this amounts to the Oireachtas having been briefed by the relevant minister on 74 occasions only – i.e. in relation to a mere 26 per cent of the Council meetings. Although, very occasionally, other ministers have given briefings to other Committees,[134] this has been very much the exception rather than the rule. A survey (by the writer) of the meetings of every other Dáil, Seanad or Oireachtas committee which sat in the sample year of 2010 – when 73 Council meetings were held[135] – could find no evidence from any other committee of a ministerial briefing having been given in respect of any other Council meeting, other than the eight mentioned in the table above. Once again, counting each of these 2010 briefings to have covered both a General Affairs and a Foreign Affairs Council, and so the overall number of briefings to have covered sixteen Council meetings, this amounts to ministerial briefings having been given in respect of a mere 22 per cent of Council meetings. Although European issues were clearly discussed from time to time in several of the other Committees, we may fairly conclude, nonetheless, that in relation to three quarters of the meetings of the Council, no systematic accountability either *ex post facto* or *ex ante* was exercised.

Even in relation to Council meetings for which a ministerial briefing is provided, the effectiveness of this method of securing executive accountability remains open to doubt. The relevant Irish Minister

132. Respectively, Mr. Micheál Martin, TD and Mr. Dick Roche TD.

133. Author's own calculation. The final meeting in 2010 was the 3061st (Environment) Council. The final meeting in 2005 was the 2774th (Agriculture) Council. Extraordinary Council meetings have been excluded from this figure. Were they included, this would of course worsen the briefing percentages noted in the text above following this footnote.

134. The then Minister for Justice, Equality and Law Reform, Dermot Ahern TD, briefed the Committee on a forthcoming Council meeting on 24 February, 2009, as did the Minister of State at the Department of Justice, Equality and Law Reform, Conor Lenihan TD, on 1 April, 2009. There do not appear to have been other ministerial briefings during the 30th Dáil - although briefings on opt-in motions under Article 29.4.7° of the Constitution (discussed in the text above at n. 53 *et seq.)* sometimes served a similar function. Minister Ahern on the occasion of a briefing of this latter kind on 25 November, 2009, observed that "this is no different from any other proposal that comes to this committee under a motion that is required under Article 29 of our Constitution, that is, to opt in or opt out. That is the case and has been the case for many years – as long as I have been coming to this committee – in that the prior approval of the Oireachtas has to be obtained before Ireland can give its assent at a European Council meeting…" Former Minister for Justice, Equality and Law Reform Michael McDowell gave a few pre-Council briefings in the lifetime of the 29th Dáil. On 19 May, 2004, he gave what constituted both an *ex post facto* briefing on the previous three Justice and Home Affairs Council meetings and an ex ante briefing on the next such meeting to the Joint Committee on Justice, Equality, Defence and Women's Rights Debate. The last previous occasion on which he had done this had been on 26 November, 2003, when he had given an *ex ante* briefing on the next Justice and Home Affairs meeting. These demonstrations of ministerial willingness to engage with the Committee compared favourably with that in other Departments – and yet were clearly nowhere near enough to ensure ongoing accountability in respect of decisions being taken in the Justice and Home Affairs Council.

135. This figure does not include the extraordinary Council meetings held on 18 January, 30 April, 10 September and 10 November or attach significance to the fact that the 3044th meeting of the Council took place on two separate dates (11 and 15 November). (See further Council's own site at http://www.consilium.europa.eu/press/council-meetings.aspx?lang=en&pagenum=9)

is not bound in any way by the position taken by the Oireachtas, and the benefit of these processes in terms of providing the minister with anything by way of additional information has been questioned. One Minister in the Fianna Fáil-Progressive Democrat coalition which left office in mid-2007 was prepared to assert to this writer that he had never heard a useful contribution made at any such Committee meeting. Meenan, on the other hand, was able to cite a small number of examples of where opinions expressed at the Joint Oireachtas Committee on European Affairs clearly did have an impact on Government policy (and, indeed, European Union policy when Ireland has happened to have held the Presidency of the Council of Ministers at the relevant time).[136] In addition, it does seem likely that, as the same writer has observed, "specific, well-informed views, expressed in a consensual, cross-party setting" will tend to have an impact on ministerial positions.[137] On the other hand, given what this writer observed on several occasions to be the lack of preparation which many (although, in fairness, not all) committee members seem to put into preparing for such briefings, it is not clear that well-informed views are actually made available to ministers in such meetings as often as one might wish them to be. Carroll has accurately described the questioning of ministers at such meetings as "largely for the purpose of information gathering rather than seeking to influence policy."[138]

Reports

Much of the Committee's use of time has seemed to involve the holding of meetings, the invitation of speakers to appear before it, and occasional study visits. From the beginning, the Committee's output in terms of reports was usually relatively small. However, by 2000, it had had five of its reports debated in one or the other House, which does seem to imply some positive reflection on the importance of the topics which were dealt with in the reports.[139]

It is difficult to piece together an accurate idea of how many reports (in the ordinary sense of the word 'report') were produced over the years, as the Committee's own annual reports – the last of which was published in 2007 – which sought to record this information were themselves sporadic,[140] sometimes years late,[141] and included under the rubric 'report' documents which were not reports in the true sense.[142] Moreover, the picture in the Committee's annual reports was confused by exaggeration in the form of the conflation of statements and 'meeting reports' with reports, properly so called, on substantive European policy issues.

Table 5 below indicates the number of reports produced that were based, in part, on figures provided by the Joint Committee itself and otherwise compiled independently by the writer. The term 'report' has

136. See K. Meenan, "*What is the Role of a Committee on European Affairs?*" , Chapter 11 in Barrett, *op. cit.,* n. 47 at pp. 317 *et seq.*.
137. *Ibid.* at p. 318
138. Carroll, *loc. cit.,* at n. 121 above, at p. 19.
139. See Laffan, *loc. cit.,* n. 112, p. 264.
140. Reports appear to be available only in relation to 1995, 1997-1998 (one report only), 1999, 2000 (although this is not an annual report in the real sense of the term), 2001, 2002/3 (one report only), 2004, 2005, 2006, and a report for three months of 2007.
141. Many of these reports referred to in the foregoing footnote do not in fact relate to activities which happened in the year in question. The 1997-1998 report, for instance, contains information relating to activities that took place in 2001. Many of the reports were published years after the year referred to in their title.
142. The list of 'reports' in the Joint Committee's 2005 annual report included its 2005 work programme.

been given the Committee's own historically rather generous definition, and reports of sub-committees have been included as the output of the Committee itself.[143]

Table 5: Reports Produced by the Joint Oireachtas Committee on European Affairs Each Year

Year [144]	***Substantive Reports Produced by the Joint Oireachtas Committee on European Affairs***
1995	4
2000	5
2001	5
2002 [145]	1
2003	4
2004	5
2005	7 [146]
2006	6
2007	3
2008	5
2009	13
2010	6

During the lifetime of the 29th Dáil (which lasted from May, 2002, to April, 2007), the Joint Committee on European Affairs produced a total of 22 reports in five years, which comes to an average of just under four a year.[147] During the term of the 30th Dáil (which had a shorter lifetime, lasting only from May, 2007, to January, 2011), 23 reports were produced in just under four years, coming to an average of just under six reports a year. As can be seen in Tables 6 and 7 below, the production of reports was not evenly spread across the lifetime of either Dáil, however. Thus neither Dáil saw any reports produced by the Committee on European Affairs in the first calendar year of its existence – reflecting the slowness

143. However, the figures below exclude so-called 'meeting reports' of the Scrutiny Sub-Committee (which lasted until 2007) These were less reports of the kind being discussed here than a record of documents which were considered at Sub-Committee meetings. Their inclusion would otherwise distort the picture.
144. Statistics were unavailable to the writer in respect of years other than those listed below.
145. Note that the Committee's own annual reports in respect of this period assert that from November, 2002, to 2003, four reports were produced.
146. This includes four EU Scrutiny Sub-Committee reports produced in this year and also includes a statement on human rights in Zimbabwe, all of which were included in the Committee's own figures on the number of reports it had produced.
147. Author's own figures compiled by counting all known reports.

with which Joint Oireachtas Committees are constituted after an election.[148] Both Dála saw a major reduction in the productivity of the Joint Oireachtas Committees on European Affairs after their third year of existence, probably demonstrating an altered set of priorities of parliamentarians as elections drew near. Although the average number of reports produced annually showed an increase between the time of the 29th and 30th Dála, this seems to be accounted for by the reduction in output in the last year of the 29th Dáil. The actual number of reports produced in the four years of the 30th Dáil mirrors relatively closely the number of reports produced in the first four years of the 29th Dáil.

Table 6: Number of Reports Produced Each Year by the Joint Oireachtas Committee on European Affairs During the 29th Dáil

Year	2002	2003	2004	2005	2006	2007
Number of reports produced by the Joint Committee	0	5	12	6	6	3

Table 7: Number of Reports Produced Each Year by the Joint Oireachtas Committee on European Affairs During the 30th Dáil

Year	2007	2008	2009	2010
Number of reports produced by the Joint Committee	0	5	13	6

It would be unrealistic to expect the quantity of the reports produced by the Joint Committee on European Affairs to be on a level with that produced by, for example, the House of Lords European Union Select Committee[149] in that the latter Committee is incomparably better resourced in terms of its finances, research support and the number of personnel at its disposal (at both administrative and membership level). Given its more limited resources, the Joint Committee on European Affairs has arguably always been destined to be more selective, out of necessity. Nonetheless, the output in terms of reports from both the 29th and 30th Dála does seem lower than would be expected, even when taking this into account.

In considering output, however, quality (as well as quantity) is relevant. In the 30th Dáil, the Joint Committee on European Affairs and its Sub-Committees produced some reports which have been significant contributions to the debate on European issues. Examples include the Report of the Sub-Committee on Ireland's Future in the European Union – *Ireland's Future in the European Union: Challenges, Issues and Options* – of 27 November, 2008, and the subsequent *Report of the Sub-Committee on the Review*

148. The Orders of Reference setting up the Joint Committee during the 29th Dáil had to await 7 October, 2002, (Seanad) and 16 October, 2002, (Dáil) – some five months after the General Election. The Orders of Reference setting up the Joint Committee during the 30th Dáil had to await 24 October, 2007, (Seanad) and 27 October, 2002, (Dáil) - some five months after the General Election in each case. Part of the cause of this delay is that the setting up of Joint Oireachtas Committees has to await the outcome of the (later) Seanad elections.

149. See http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/publications/

of the Role of the Oireachtas in European Affairs of July, 2010.[150] Useful work was also produced by the Joint Committee in the 29th Dáil. The Joint Committee's March 2007 *Report on Migration and Integration Policy in Ireland*, for example, was a useful contribution to the debate on the issues it addressed.

In particular, the introduction of a *rapporteur* system, for at least some reports of the Joint Committee on European Affairs in the 30th Dáil, seems to have had positive effects in terms of the quality of its reports. A *rapporteur* system effectively invites one individual to take ownership of the report in question and, moreover, creates an incentive to do the work involved properly by permanently linking that individual's name to the report: when an individual reputation is at stake, a Joint Committee report seem more likely to be done to an adequate standard. Recent *rapporteur*-driven reports by the Joint Committee on European Affairs in the 30th Dáil have included its Fourteenth Report, *European Monetary Union: Challenges and Options*[151] (the *rapporteur* for which was Fine Gael's Senator Paschal Donohoe[152]); its Thirteenth Report, *The Need for Strong EU Financial Regulation*[153] (the rapporteur for which was Fianna Fáil's Senator John Hanafin); and its Eleventh Report, *The Position of Minority Groups in Europe – an Examination of Roma Policies in the European Union*[154] (with Fianna Fáil's Senator Terry Leyden taking on the mantle of *rapporteur*).

A significant (and relatively new) kind of report[155] by the Oireachtas Committee has been its so-called EU Scrutiny Reports which are, in effect, reports on contributions made by the Committee under the process of political dialogue instituted by the Commission in 2006, as well as on feedback received from the Commission.[156] The topic of this dialogue is returned to in the text below.

Another feature of the Committee's operations that has led to useful studies being produced has been the Committee's occasional request for, and publication of, reports which are written by external persons or groupings. Two such reports were the well-considered October 2003 *Report to the Oireachtas Joint Committee on European Affairs from the Advisory Group on the Role of the European Court of Auditors*[157] and the February 2003 *Report of the Advisory Group to the Joint Committee on European Affairs*, the

150. These Sub-Committees were also sub-committees of the Joint Oireachtas Committee on European Scrutiny.
151. Published in July, 2010.
152. Senator Donohue was also the *rapporteur* for the Joint Committee's report, *Sovereign Wealth Funds – European Union Policy, Implications and Recommendations for Ireland* (16 July 2009).
153. Published in June, 2010.
154. Published in December, 2009.
155. The first appears to date from 2007. An Opinion was sent to the Commission by the Oireachtas Joint Committee on European Affairs on Action programme for Reducing Administrative Burdens in the European Union (COM(2007)23) and replied to in July, 2007, but the first dated so-called report on the compilation of such an opinion in the online archives as the July 2008 *Third Report: Report on the Joint Committee's Contribution to the European Commission on its Annual Policy Strategy 2009.* A possibly earlier, but undated submission by the Oireachtas Joint Committee on European Affairs on the June 2006 European Commission Green Paper on a Future Maritime Policy for the European Union is also to be found archived online. (See http://euaffairs.ie/coop/archive.asp). This probably dates from 2007 as the Commission has no record of the receipt of any opinions by the Joint Committee under the political dialogue from 2006.
156. See, e.g., the Joint Oireachtas Committee's May 2009 *EU Scrutiny Report No. 4: Report on the Joint Committee's Contribution to the European Commission on its Green Paper on agricultural product quality: product standards, farming requirements and quality schemes, COM (2008) 641; its April 2009 EU Scrutiny Report No. 5: Report on the Joint Committee's Contribution to the European Commission on its Green Paper 'Towards a secure, sustainable and competitive European Energy Market' COM (2008) 782;* and its September 2008 *EU Scrutiny Report No. 3 Report on the Joint Committee's Contribution to the European Commission on its White Paper on the Integration of EU Mortgage Credit Markets, COM(2007)807.*
157. Somewhat remarkably, without providing any financial or personnel support of any kind.

product of a group of eminent persons[158] that advised on the role of the EU in its relations with developing countries. This latter report was produced with a view to making proposals which could be included in the programme of the 2004 Irish Presidency of the Council and European Council. Another example of an externally-produced report was the November 2002 *Report by John Bruton T.D., Member On The Convention On The Future Of Europe To The Joint Committee On European Affairs*. Yet another was the November 2008 report *Ireland's Future in Europe: Scenarios and Implications*,[159] which was commissioned by the Oireachtas Sub-Committee on Ireland's Future in the European Union and which was later cited in the Sub-Committee's own report as having made an invaluable contribution to its work.[160] Such reports, like reports carried out by rapporteurs, have tended to be of comparatively high quality.

Other reports produced by the Joint Committee have been less impressive, however. Occasionally, some 'reports' produced by the Joint Committee have been so brief that they would be more accurately characterised as resolutions than report.[161] Moreover, the substantive topics dealt with by Committee reports could be rather eclectic. A lack of an overall system could also be criticised. There were times when the Committee appeared to be excessively distracted by the political issues of the day rather than systematically focusing on major issues of European integration.[162] At times, the topics chosen for reports – whatever the political importance of these subjects – had a connection with European Union affairs which seemed tenuous.[163] Occasionally, and notwithstanding the importance of many of the political matters which are constantly dealt with at European level, the significance of the subject matter of Committee reports could appear questionable.[164] Finally, as has already been noted in the text above, in the days when the Committee produced annual reports (a practice which was abandoned after 2007), there could be quite extraordinary delays in their production.[165]

158. Including former Taoiseach Garret FitzGerald.
159. Authored by five academics from the UCD Dublin European Institute.
160. This report was published on the Sub-Committee's website with its own report. See http://www.oireachtas.ie/viewdoc.asp?DocID=10119
161. So-called reports on motions are a particularly strong example of this. See, *e.g.,* Joint Committee on European Affairs, *Report on a Motion regarding the Loans to Ireland from the European Financial Stability Facility and the European Financial Stability Mechanism* (December 2010). Extraordinary brevity could be seen in a number of reports produced before the time of the 30th Dáil *e.g., Report (No. 9) on the Lisbon Strategy (Part 2): Strengthening the social dimension March 2005* which was all of one page long and *Report (No. 10) Statement: Human Rights in Zimbabwe March 2005* which consisted of a one page statement – on a subject which might arguably have fallen more comfortably within the remit of the Joint Oireachtas Committee on Foreign Affairs than that of the Joint Oireachtas Committee on European Affairs. The July 2003 *Report on the proposal to display the European Flag for the duration of Ireland's Presidency of the European Union* is another example of an extremely brief report, more accurately described as a resolution.
162. A lack of system could also be seen at times in the sometimes puzzling numbering of Committee reports. On some occasions reports were numbered, in other cases not. On other occasions, reports were incorrectly numbered: thus, for example, in 2009 there were two 'seventh reports': *Seventh Report: The Lisbon Treaty & Workers' Rights of September 2009 and Seventh Report: Report on the Joint Committee's Contribution to the European Commission on its Annual Policy Strategy 2010 of July, 2009*.
163. See *e.g.,* the *Report on a Motion regarding the Situation in Gaza*, January 2009; *Report (No. 6) on Motion re. Middle East Peace Process* November 2004
164. The July 2003 *Report on the Proposal to Display the European Flag for the Duration of Ireland's Presidency of the European Union* is probably the best example of this.
165. The *Annual Report 2005* was published only in April, 2006, the *Annual Report 2004* was published in May, 2006, and the *Annual Report 2002/2003* was published in July, 2006. The *Annual Report 2006* was published promptly on January, 2007, at which time the practice of publishing such reports was discontinued.

Sending Opinions to the European Commission: Oireachtas Participation in the Process of Political Dialogue via the Joint Oireachtas Committee on European Affairs

The production of reports by the Joint Oireachtas Committee on European Affairs overlaps with another important activity for the Joint Committee – the sending of opinions to the European Commission in the context of a political dialogue with that institution. In 2006, a process of informal political dialogue between national parliaments and the Commission known as the Barroso initiative commenced,[166] a process which has been ongoing ever since.[167] It is a process which has opened up the possibility of national parliaments exercising influence at an early stage in the formulation of policy at European level. To some extent, it involves national parliaments playing an unaccustomed new role of advocates or lobbyists at European level. The Oireachtas (or more precisely, the Joint Oireachtas Committee on European Affairs) has participated in the political dialogue process on several occasions, albeit on a fairly limited basis. The European Commission has published information in this regard, the conclusions of which are set out in Tables 8 and 9 below.

Table 8: Commission Information on Oireachtas Participation in the Process of Political Dialogue in 2010 [168]

Year	*Total number of opinions received by Commission (under political dialogue) from Oireachtas*	*Reasoned opinions on subsidiarity received by Commission from Oireachtas*
2010	3	0

Table 9: Commission Information on Oireachtas Participation in the Process of Political Dialogue in 2006-2009 and Overall

Year	*Total number of opinions acknowledged by the European Commission to have been received by the Commission from the Oireachtas* [169]
2009	6
2008	7
2007	1
2006	0
2006-2010 inclusive	17

166. See Communication from the Commission to the European Council, *A Citizens' Agenda Delivering Results For Europe* (Brussels, 10.5.2006 COM(2006) 211 final).
167. See generally the Commission website on this dialogue at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm
168. Source: European Commission, *Annual Report 2010 on Relations Between the European Commission and National Parliaments* (Brussels, 10.6.2011 COM(2011) 345 final), European Commission, *Annual Report 2009 on Relations Between the European Commission and National Parliaments* (Brussels, 2.6.2010 COM(2010) 291 final), European Commission, *Annual Report 2008 on Relations Between the European Commission and National Parliaments* (Brussels, 7.7.2009 COM(2009) 343 final), European Commission, *Annual Report 2007 on Relations Between the European Commission and National Parliaments* (Brussels, 6.5.2008 COM(2008) 237 final)
169. No distinction was drawn in statistics for 2006 to 2009 as to whether these were opinions on subsidiarity or not.

According to these published figures, overall, between the Barroso Initiative being set in motion in 2006 [170] – a step which began a process of informal political dialogue between national parliaments and the Commission – and 2010, the Oireachtas sent a total of seventeen opinions to the European Commission. This translates to an average of just over five opinions a year, although, as can be seen from Table 9, there have been peaks and troughs in the number of opinions sent. For example, 2008 saw a record seven contributions made, whereas 2006 saw none at all. It is also clear that, notwithstanding the impression given by Commission statistics, several of the seventeen opinions sent to the Commission from 2006 to 2010 were not true contributions to the political dialogue. Some were merely opinions on whether the principle of subsidiarity had been breached at EU level by particular draft pieces of legislation selected in a series of exercises organised by COSAC.[171]

Overall, compared with many other European Union member states, this seems a relatively low degree of engagement in the process of political dialogue. In 2010, the last year for which records are available,[172] three contributions were recorded, all of them contributions to the political dialogue rather than reviews for breaches of the subsidiarity principle. Fourteen of the 27 other member states did better than this, with several of these being states of comparable size to Ireland or smaller, including Denmark, Lithuania and Luxembourg.[173] And yet participation in the process of political dialogue provides the Oireachtas with a listening ear for its views, guaranteeing that these views will not simply be ignored. It also offers the Joint Oireachtas Committee the possibility of acting as a conduit through which the views of stakeholders within Ireland can pass to the European legislator and, additionally, through which the views of the latter can be communicated to the former.

170. See Communication from the Commission to the European Council, *A Citizens' Agenda Delivering Results For Europe* (Brussels, 10.5.2006 COM(2006) 211 final).

171. The Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union. In the years 2006 to 2009, COSAC conducted seven subsidiarity checks in which national parliaments offered opinions on whether particular measures complied with subsidiarity. (In fact, COSAC conducted eight in total between 2005 and 2009, but the earliest occurred in 2005 - i.e.. before the Barroso initiative was put in place and has therefore been disregarded for the purposes of the point being made here. (Source: L. Raulinaityté, "*Control of Subsidiarity by National Parliaments Coordinated at the EU Level*", paper delivered at *Subsidiarity Check - Practical Application of the Subsidiarity Principle,* a conference organised by the Academy of European Law Trier, 9-10 June, 2011.) This means that up to seven of the seventeen opinions offered to the Commission by the Oireachtas between 2006 and 2010 may have simply been opinions on subsidiarity-compliance rather than contributions to the process of political dialogue. The 'National Parliament Opinions and Commission Replies' website of the Commission (see http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm) contains some guidance in this regard, although apparently the information contains is incomplete since it acknowledges only three Oireachtas opinions having been sent to it in 2008 (all sent by the Joint Committee on European Affairs except one which was a reasoned opinion on subsidiarity sent by the Joint Committee on European Scrutiny), five Oireachtas opinions having been sent to it in 2009 (all sent by the Joint Committee on European Affairs except one which was a reasoned opinion on subsidiarity sent by the Joint Committee on European Scrutiny), and one Oireachtas opinion in 2010 (sent by the Joint Committee on Agriculture, Fisheries and Food). The Commission's own reply to at least one other opinion sent in 2008 by the Joint Oireachtas Committee on European Affairs was made available on the latter's website at http://euaffairs.ie/publications/

172. And the only year in which a distinction has been drawn by the Commission between subsidiarity reviews and opinions sent for the purposes of the political dialogue process.

173. *Viz.* Portugal (106 opinions), Italy (96 opinions), Czech Republic (32 opinions), Germany (29 opinions), Sweden (20 opinions), Austria (25 opinions), United Kingdom (15 opinions), Denmark (11 opinions), Romania (9 opinions), Luxembourg (7 opinions), Poland (7 opinions), Greece (4 opinions), Lithuania (4 opinions) and Spain (4 opinions).

An Example of Involvement in the Political Dialogue Process on the Part of the Joint Committee on European Affairs

The history of the Joint Committee's opinion on the European Commission's Green Paper, *Towards a secure, sustainable and competitive European Energy Market*, is worth examining as a typical example of the operation of the political dialogue process.[174]

At its meeting on 19 March, 2009, the Joint Committee on European Affairs considered this European Commission Green Paper for the first time. Following this meeting, the Joint Committee agreed to consider a contribution to the European Commission regarding the Green Paper. The intention was to emphasise the issues raised by members of the Joint Committee during its own consideration of the Paper and to take into account the views of those witnesses invited to attend and make submissions at the Committee meeting. The Joint Committee subsequently met with representatives of key stakeholders - Eirgrid (Ireland's independent transmission system operator and operator of the wholesale market), Bord Gáis Éireann, Gaslink (the independent system operator for the gas market), and the Department of Communications, Energy and Natural Resources. The Joint Committee also invited observations from the Joint Committee on Communications, Energy and Natural Resources as well as the Joint Committee on Climate Change and Energy Security, receiving from the latter, at least, what it termed a useful contribution to its own consideration of the Green Paper.[175] A contribution for submission to the European Commission was then agreed by the Joint Committee at its meeting of 16 April, 2009. It was also agreed that this report of the Joint Committee's consideration be laid before both Houses of the Oireachtas and forwarded to the Department of Communications, Energy and Natural Resources.

In the contribution sent by the Joint Committee to the Commission, which was over nine pages long, the Joint Committee set out (a) the views of Eirgrid, Bord Gáis Éireann and Gaslink, (b) the views of the Department of Communications, Energy and Natural Resources, (c) a summary of the comments it had received from the Joint Committee on Climate Change and Energy Security[176] and then, finally, (d) the views of the Joint Committee on European Affairs itself. In other words, the opportunity was used by the Joint Committee to communicate to the Commission the views of Irish stakeholders, the view of the Irish executive (although the Commission would already have access to this via the Council), the views of the Joint Committee itself and the views of the relevant sectoral committee.

On 3 July, a two-page letter signed personally by the then Vice-President of the European Commission for Institutional Relations and Communications Strategy, Margot Wallström, was sent to the Chairperson of the Joint Oireachtas Committee on European Affairs, acknowledging the Joint Committee's contribution as an "extremely valuable document" for the Commission's work, expressing appreciation of the consultations organised by the Joint Committee (which had given a good overview of

174. See generally the Joint Oireachtas Committee's April 2009 *EU Scrutiny Report No. 5: Report on the Joint Committee's Contribution to the European Commission on its Green Paper 'Towards a secure, sustainable and competitive European Energy Market' COM (2008) 782*.

175. Remarkably, given the importance of the Green Paper, no contribution, or at least no useful contribution, appears to have been received from the Joint Committee on Communications, Energy and Natural Resources

176. They are stated to have been included in full in an Annex, although the Annex does not appear in the contribution published on the Commission website.

the reactions of Irish stakeholders), addressing several of the points raised in the report, and expressing particular interest in one of the suggestions contained in the contribution – *viz.* the strengthening of the TransEuropean networks for energy and the evolution of such networks into an energy security and solidarity instrument.[177] In other similar cases of engagement in the process of political dialogue, the text of such European Commission replies was normally subsequently posted on the web page of the Joint Committee on European Affairs.[178] This does not appear to have happened with this particular reply – a lapse which made the Joint Committee's work less valuable in transmitting European Union-level views to national level than in transmitting national views in the opposite direction.

Apart from the unfortunate lapse involved in failing to publicise the European Commission's reply, this process appears to have involved work by the Joint Committee on European Affairs of a kind which is particularly useful. It demonstrated the Joint Committee's successful operation as a conduit to the European legislature for its own views, those of stakeholders and concerned authorities, and those of Oireachtas sectoral committees, all at a moment in time when it was actually possible for the future shape of legislative action to be influenced by input from a national level.

Conclusion on the Political Dialogue

Overall, the Joint Committee has been engaged for some time now in significant level of political dialogue with the European Commission in a manner which increases the level of Irish input at a delicate stage of policy formation. Greater commitment to this process in the future is to be hoped for by the Oireachtas. Valuable improvements could include sending a greater number of communications to the Commission, adopting a more systematic approach to selecting the topics on which opinions are offered and, perhaps, taking a more systematic approach too to the onward communication to the public via the Committee website of Commission replies to the Committee. Such a multi-faceted approach would likely yield dividends in terms of the focus of Committee work at national level and in terms of the quality of that work. It seems likely that the impact at European level of Joint Committee opinions will be maximised by the inclusion of opinions from national level which (a) communicate the views of interested stakeholders in Ireland, and (b) contain well-informed views on the part of national parliamentarians. In other words, the impact of opinions will be maximised if they contain material of significant added value. It might also be suggested that more commitment ought, perhaps, to be shown by the European Commission in the form of a more comprehensive account on the Commission's own webpage of its dialogue with the Oireachtas. This is obviously important for the purposes of keeping non-participants in the dialogue (including the general public) aware of what is happening. A

177. Other Commission replies have involved a short letter accompanied by a more detailed separate response. See, *e.g.,* the Commission response to the opinion of the Joint Committee on European Affairs on the Commission White Paper on a strategy for Europe on nutrition, overweight and obesity related health issues dated 21 February, 2008, both of which have been made available on the website of the Joint Oireachtas Committee on European Affairs at http://euaffairs.ie/publications/

178. See mainly http://euaffairs.ie/publications/

commitment on the part of the Commission to reducing delays in replying to opinions sent by national parliaments would also be welcome.[179]

iii. The Joint Oireachtas Committee on European Scrutiny

The Joint Oireachtas Committee on European Scrutiny was set up in October, 2007, taking over – for reasons that appear to have been both organisational and political[180] – tasks that had, in the 29th Dáil, been carried out by a sub-committee of the Joint Oireachtas Committee on European Affairs, the Sub-Committee on European Scrutiny.

The tasks of the Joint Oireachtas Committee on European Scrutiny, like those of its predecessor Sub-Committee, were based on the provisions of the European Union (Scrutiny) Act 2002.

Scrutinising Proposed Legislation

Under s. 2(1) of the European Union (Scrutiny) Act 2002,

> "as soon as practicable after a proposed measure is presented by the Commission of the European Communities or initiated by a Member State, as the case may be, the Minister[181] shall cause a copy of the text concerned to be laid before each House of the Oireachtas together with a statement of the Minister outlining the content, purpose and likely implications for Ireland of the proposed measure and including such other information as he or she considers appropriate."

The 2002 Act provides for exemptions from these obligations in the event of there being insufficient time.[182]

The Scrutiny Committee's own account of how the process of scrutiny of proposed European measures worked in practice over the lifetime of the 30th Dáil was that

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179. The Commission's website account of its dealings with the Oireachtas is incomplete and unsatisfactory - as can be seen by comparing the enumeration of Commission replies found on its own website at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm with the more extensive set of copies of Commission replies found on the website of the Joint Committee on European Affairs at http://euaffairs.ie/publications/ and http://euaffairs.ie/coop/archive.asp Moreover, there have been complaints about delays in Commission replies to opinions from national parliaments, although it is unclear whether these relate only to its replies regarding reasoned opinions under the subsidiarity review procedure, or apply more widely to opinions generally put forward in context of the political dialogue with national parliaments. (See Joint Oireachtas Committee on European Union Affairs "*Committee on European Union Affairs Chairman urges EU Commission to respond more speedily to opinions from national parliaments*", press release of 4 October, 2011.)

180. According to the Joint Committee itself, it was set up "in recognition of the the growing importance of EU legislation". (See, *e.g.,* the "*Notes for Information*" contained in Joint Committee on European Scrutiny, *Report on Documents considered at 73rd Meeting on 2 Decembe,r 2010.*) Interviews conducted by this writer indicated that the need to have sufficient chairmanships of committees to allocate at the outset of the 30th Dáil may also have played a role however.

181. Note that under s. 1(1) of the 2002 Act, "'Minister', in relation to a measure, means the Minister of the Government performing functions in relation to the measure or, if there is more than one such Minister of the Government, such one of them as may be agreed upon by them."

182. S. 2(3) of the Act. However, under s. 2(4) of the 2002 Act, where, pursuant to s. 2(3), a text of a proposed measure has not been laid before each House of the Oireachtas and the measure concerned is adopted by an institution of the European Communities, the Minister is required to cause a copy of the text of the measure to be laid before both Houses of the Oireachtas together with a statement outlining the implications for Ireland of the measure and the circumstances of its adoption and including such other information as he or she considers appropriate.

"each Department, on publication of a measure by the European Commission, prepares an information note and submits this along with the draft EU legislative measure to the Joint Committee on European Scrutiny. Under agreed guidelines, a Department submits a measure to the Joint Committee on European Scrutiny within four weeks of publication by the European Commission. The information note includes a summary and aim of the measure, its legal basis in the EU Treaties, the anticipated negotiation period, the expected implementation date and the implications for Ireland.

At its meetings, the Joint Committee on European Scrutiny conducts an examination of these measures in public session and determines which of those presented require further scrutiny. If the Joint Committee on European Scrutiny decides that a measure warrants further scrutiny it has a number of options open to it to carry out this scrutiny:

- it can undertake this detailed examination itself and prepare a scrutiny report;
- it can refer the measure to the relevant sectoral committee requesting observations on the basis of which the Joint Committee on European Scrutiny will prepare a scrutiny report; or
- it can refer the measure to the relevant sectoral committee for it to undertake detailed scrutiny and the sectoral committee will prepare its own scrutiny report.

If the Joint Committee on European Scrutiny decides to further scrutinise a measure itself, it can do this either by a paper based exercise but more often than not it will decide to hold public hearings with the Government and the relevant stakeholders. Following the hearing, a scrutiny report is agreed by the Joint Committee on European Scrutiny. The report will usually contain recommendations to the relevant Minister as regards the position Ireland should take in negotiations at European Council. In accordance with the Act, the Minister is obliged to have regard to these recommendations. The report can also be referred to the plenary for a debate on the matter."[183]

This is a somewhat idealised account. For example, in practice, the system of referring measures to sectoral committees – which in practice is often merely for 'information' rather than for observations, much less for detailed scrutiny – stimulated very little work from those committees, as will be seen in the section of this study which immediately follows.

In total, 441 documents were considered by the Joint Scrutiny Committee in 2010. This corresponds exactly to the number of documents and legislative proposals in respect of which information notes were received from Government departments. By far the largest number of information notes was provided by the Department of Enterprise, Trade and Innovation (with 122 notes), followed by the Department of Finance, the Department of Foreign Affairs and the Department of Agriculture, Fisheries and Food (each of which provided about half of that number[184]) and the Department of Justice and Law Reform

183. See the Joint Committee website at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EUScrutiny/Process_EUScrutiny.htm

184. Respectively 69, 67 and 63 information notes.

(which provided somewhat over a third).[185] How efficient individual Government departments were in complying with their duty under s. 2(1) of the 2002 Act is unclear, however. There does not appear to have been any mechanism within the Committee or the Oireachtas as a whole for checking whether each Government department was providing information notes on all European Union legislative proposals within their remit. Somewhat remarkably, three departments – namely, the Department of Defence, the Department of Social Protection and the Department of Community, Equality and Gaeltacht Affairs - appear to have provided no information notes at all in 2010.

An example of an information note in relation to a proposed European measure of the kind envisaged in s. 2(1) is the following:

Com (2010) 607 Final

Information Note

1. Proposal
To introduce flexibilities for tractor manufacturers regarding emission targets

2. Title
Proposal for a Directive of the European Parliament and of the Council amending Directive 2000/25/EC as regards the provisions for tractors placed on the market under the flexibility scheme

3. Date of Council document
8 November 2010

4. Number of Council document
15935/10

5. Number of Commission document
COM (2010) 607 final

6. Dealt with in Brussels by
Coreper
Council (Competitiveness)

7. Department with primary responsibility
Department of Agriculture, Fisheries and Food

8. Other Departments involved
N/A

9. Short summary and aim of the proposal
The proposal is mainly technical in nature.

Efforts at European level to reduce the level of emissions from engines in agricultural and forestry tractors have been ongoing for some time. As the levels set down are being reduced engine manufacturers require lead in time and information on these levels to facilitate the necessary research and development and manufacturing processes to be put in place.

185. More precisely, 47 information notes. The Departments of Education and Skills (22), Transport (18), Environment, Heritage and Local Government (11), Health and Children (9), the Taoiseach (6), Communications, Energy and Natural Resources (4) and the Revenue Commissioners (2 – *semble* these should more properly have been attributed to the Department of Finance) came next, followed by the Department of Tourism, Culture and Sport (1 – attributed in the Joint Committee's statistics to 'Art', which fell within the remit of this Department).

The current stage of emission limits applicable for type approval of the majority of compression ignition engines is referred to as Stage III A. The Directive currently provides that those limits will be replaced by the more stringent Stage III B limits, entering into force progressively as of 1st January 2011 with regard to the placing on the market and from 1st January 2010 as regards the type approval for those engines.

Stage IV provides for limit values more stringent than Stage III B, and are scheduled to enter into force progressively as of 1st January 2013 as regards the type approval for those engines and as of 1st January 2014 with regard to the placing on the market.

Recognising the global financial and economic crisis and its resultant impact on manufacturers of engines, the proposed Directive utilises provisions in Directive 2000/25/EC providing for a flexibility scheme to allow tractor manufacturers to purchase, in the period between the two emission stages mentioned, a limited quantity of engines that do not comply with the current limit values, but are approved to the nearest previous stage of emission limits.

The specific limits of this flexibility scheme are set down in Annex 1 of the proposed Directive and are based on the number and size of engines. These measures reflect a temporary difficulty faced by the industry and will expire on 31st December 2013.

10. Legal basis of the proposal
Article 114 of the Treaty on the Functioning of the European Union

11. Voting method
QMV

12. Role of EP
Ordinary Legislative Procedure (Co-decision)

13. Category of Proposal
Technical

14. Implications for Ireland
Limited – applicable to the manufacturers of tractor engines

15. Anticipated negotiating period
6 months

16. Proposed implementation date
The new Directive will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

17. Consequences for national legislation
A Statutory Instrument will be required to give effect to the Council Directive

18. Method of Transposition into Irish Law
Statutory Instrument

19. Anticipated Transposition date
Within the limits set down

20. Consequences for the EU budget in euros annually
None

21. Contact name, telephone number and e-mail address of official in Department with primary responsibility

[Given]

Date: 1 December 2010

It will have been noted that the account by the Scrutiny Committee which is quoted in the text above of how the process of scrutiny of proposed European measures worked in practice in the 30th Dáil, referred to the obligation for a minister to have regard to the Committee's recommendations. This obligation followed from s. 2(2) of the Act, which provides that

> "the Minister shall have regard to any recommendations made to him or her from time to time by either or both Houses of the Oireachtas or by a committee of either or both such Houses in relation to a proposed measure."

This obligation stops well short of both (a) a duty to comply with a scrutiny reserve – which is imposed on a minister in equivalent circumstances in other European Union member states, most prominently the United Kingdom – or (b) a duty to comply with a parliamentary mandate – an obligation imposed in states such as Denmark, Finland and Austria. This is a theme returned to in Chapters 5 and 6 of this study.

In 2010, the Joint Committee considered a total of 382 legislative proposals and 59 other documents, making a cumulative total of 441 documents.[186] Since the Committee met on 22 occasions, this means that an average of 20 documents were processed in each meeting in 2010. In 2009, the Joint Committee considered a total of 391 legislative proposals and 49 other documents, making a cumulative total of 440 documents. Given that the Joint Committee held 24 meetings in 2009, this meant an average of 18 documents were considered in each meeting that year. In reality, since not all meetings of the Scrutiny Committee are dedicated to documentary scrutiny, the number of documents considered in those Committee meetings in both years which *were* actually dedicated to such consideration was much higher than this. This means that many legislative proposals (which, in fairness, are very often dry, technical documents) received very little by way of detailed scrutiny.

Of the 382 legislative proposals considered in 2010, the Joint Committee took the view that a mere 21 – approximately 5.5 per cent of the total – might be of significant importance to Ireland and thus required further scrutiny. Eleven of the proposals were considered by the Joint Committee itself,[187] although the Joint Committee went on to produce individual reports in relation to only four of these.[188] Ten proposals were sent to sectoral committees, and what became of these is examined in the next section. Some idea of the difficulties associated with farming these reports out to sectoral committees can be obtained from the observation of the 2010 chairperson of the Scrutiny Committee, that

> "… if we send a report from the Joint Committee on European Scrutiny to sectoral committee for a report back, one invariably finds it is rubberstamped… I give the example of a report by the Joint Committee on European Scrutiny about a directive on fisheries. This will be sent to the committee with responsibility for fisheries but will be sent back without any major due diligence on the document. That is the current difficulty."[189]

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186. See Joint Committee on European Scrutiny, *Eighth Annual Report on the Operation of the European Union (Scrutiny) Act 2002* (Dublin, January 2011) at para. 7 thereof.
187. *Ibid.*, para. 14.
188. *Ibid.* See Appendix 4 thereof.
189. John Perry TD speaking in the Joint Oireachtas Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, 5 May, 2010 (available online at the time of writing at http://debates.oireachtas.ie/EUR/2010/05/05/printall.asp)

In 2009, of the 391 legislative proposals considered, the Joint Committee decided that 24 – approximately 6 per cent of the total – might be significant for Ireland and required further scrutiny. Fourteen of the proposals were then reported to have been examined in detail by the Joint Committee itself,[190] although the Joint Committee went on to produce scrutiny reports on only seven individual proposals.[191] Ten proposals in total were sent to the relevant sectoral committees, half of these for detailed scrutiny, half for the purpose of obtaining observations to assist the Scrutiny Committee in considering the implications of the proposal. (See generally Table 10 below.)

Table 10: Joint Oireachtas Committee on European Scrutiny: Number of Documents and Legislative Proposals Considered, Referred, Examined and Reported On

Year	***2010***	***2009***
Documents considered	441	440
Legislative proposals considered	382	391
Proposals considered to require further scrutiny	21	24
Proposals sent to a sectoral committee[192]	10	10
Proposals examined by the Joint Committee itself	11	14
Number of scrutiny reports on individual proposals by the Scrutiny Committee	4	7

Six-Monthly Reports

A further obligation which was of relevance to the Scrutiny Committee – and one which has already been looked at briefly in the text above [193] – is set out by s. 2(5) of the 2002 Act, which provides that:

> "every Minister of the Government shall make a report to each House of the Oireachtas not less than twice yearly in relation to measures, proposed measures and other developments in relation to the European Communities and the European Union in relation to which he or she performs functions."

Reports were expected to be divided into two parts – the first part giving an overview of the significant developments at EU level in a particular Department's policy area during the relevant half of the year, and the second part giving an update on the current status of all European Union legislative measures being negotiated within the remit of the Department. Once the reports of all fifteen Departments had been considered, the Joint Committee then published its own composite report, (with all fifteen

190. Joint Committee on European Scrutiny, *Seventh Annual Report on the Operation of the European Union (Scrutiny) Act 2002* (Dublin, 13 May, 2010) at para. 10 thereof.
191. *Ibid,* para. 11.
192. See further the text in the section below.
193. See text above at n. 95

Departmental reports contained in a lengthy appendix).[194] The system of six-monthly reports, while probably useful in ensuring some level of information, was a largely retrospective exercise, even if some attempt has been made in recent times to include a forward-looking element.[195] To take a random ((but typical)) example of this, the discussion of the Report of the Department of Justice, Equality and Law Reform, which took place in the Joint Committee meeting held on 20 April, 2010, related to the period from July to December, 2009. What, in political terms, is a very considerable length of time had passed by the time of that Joint Committee meeting, during which time the events reported on would have been well and truly superseded by other issues.

Reports More Generally

The Joint Committee published several reports each year. In 2009 and 2010, initiatives involving both the Scrutiny Committee and the Joint Committee on European Affairs resulted in particularly valuable work – in 2009, via a joint report with the Committee on European Affairs,[196] and, in 2010, via a joint sub-committee of both Oireachtas Committees.[197] Nevertheless, it has to be said that, given the very large output of European Union proposals, the volume of reports produced by the Scrutiny Committee was relatively low, even when compared with the low number of proposals deemed to be of significant importance to Ireland and thus to warrant further scrutiny. The overall number of reports produced was boosted very considerably by the inclusion of so-called 'meeting reports' in the total. However, although a useful historical record, these contain little added value by way of analysis but, rather, merely listed documents considered by the Scrutiny Committee and noted the decision taken in relation to the documents in question. (See Table 11.)

194. See *e.g.,* Joint Committee on European Scrutiny, *Fourth Report: Special Report on New EU Legislation 1 Jan to 30 June 2009* (October 2009) available online at the time of writing at http://www.oireachtas.ie/viewdoc.asp?DocID=14713&CatID=78&StartDate=01%20January%202010&OrderAscending=0

195. *Loc. cit.,* at n. 95 above.

196. Joint Committee on European Affairs and Joint Committee on European Scrutiny, *Joint Report on Implementation of the Lisbon Treaty: Interim arrangements on the enhanced role of the Houses of the Oireachtas* (8 December 2009).

197. Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, *Review of the Role of the Oireachtas in European Affairs* (7 July 2010).

Table 11: Reports of All Kinds Produced by the Scrutiny Committee in 2009-2010 [198]

Year	*2010*	*2009*	*Total for Period Under Consideration*
Number of scrutiny reports on individual proposals by the Scrutiny Committee	4	7	11
Number of 'special reports' by the Scrutiny Commitee (i.e. composite reports of Departmental reports, providing summary of most important developments.)	2	2	4
Other reports	1[199]	3[200]	4
Sub-Committee reports	1	1	1
Number of 'meeting reports' (enumerating documents considered at meetings of Scrutiny Committee)	20	13[201]	33

Witnesses played some role, albeit a limited one, in the Joint Scrutiny Committee's activities – a phenomenon which may have been related to the relatively small number of reports which was produced by the Committee. Under its orders of reference, the Scrutiny Committee had the power to request the attendance of the Secretary General of a Government Department (or a nominated representative) in order to discuss the Department's most recent six-monthly report.[202] Yet there was only one appearance by a Secretary General in 2011,[203] one in 2010 [204] (in which year there was only one other meeting with officials of a lower rank), and two in 2009[205] (in which year there were only two other meetings with officials of a lower rank). Considering the fact that there are 15 Government Departments, it is clear that this a very little used power overall.

The Scrutiny Committee also had the power to request the appearance of a member of the Government

198. No records appear to exist of any reports of any kind in January, 2011, which was the last month of the Joint Committee's existence in the 30th Dáil.
199. This was the Seventh Annual Report on the Operation of the European Union (Scrutiny) Act 2002 of 13 May, 2010.
200. This figure refers to the Annual Report 2007-8 (which was published on 6 August 2009), the Sixth Annual Report on the Operation of the European Union (Scrutiny) Act 2002 of 2 October 2009 and the Joint Committee on European Affairs and Joint Committee on European Scrutiny's Joint Report on Implementation of the Lisbon Treaty: Interim arrangements on the enhanced role of the Houses of the Oireachtas (8 December 2009). It excludes three 'reports' included in the Committee's Seventh Annual Report on the Operation of the European Scrutiny Act 2002 *viz.* the Work Programme 2009, the November 2009 Report of the Delegation of the Joint Committee on European Scrutiny to COSAC XLII and an unidentified document of March 2009 simply referred to as 'Meeting with Northern Ireland Assembly – Committee for the Office of the First Minister and Deputy First Minister' on the grounds that none of these documents appear to be Scrutiny Committee reports properly so called, and were certainly not counted as such in 2010.
201. Note that the Scrutiny Committee only began publishing a separate report for each meeting in June 2009.
202. See Order 1(b)(iv) of its Orders of Reference (*viz.* the Order of Dáil Éireann of 23 October 2007, the Order of Seanad Éireann of 24 October 2007).
203. On 13 January 2011, when the Secretary General of the Department of Agriculture, Fisheries and Food appeared before the Committee just before the dissolution of the Dáil on 2 February, 2011.
204. On 20 April, 2010, when the Secretary General of the Department of Justice, Equality and Law Reform appeared before the Committee.
205. On 26 May, 2009, when the Secretary General of the Department of the Environment, Heritage and Local Government appeared before the Committee, and on 1 December, 2009, when the Secretary General of the Department of Foreign Affairs came before the Committee.

or a Minister of State,[206] but the appearance of a minister before the Scrutiny Committee was an even greater rarity. The last ministerial appearance – involving a minister of state – before the Committee took place as long ago as 3 February, 2009.[207]

On eight occasions in 2009, and eight times again in 2010, the Committee heard from representatives of organisations, groups and individuals. Again, however, this was not an over-frequent occurrence. Of those groups and individuals who did feature, industry or sectoral groups were the most heavily represented over the two years, making eight appearances.[208] Regulatory authorities of some nature were next in line with five appearances,[209] and bodies linked in some manner to European activities made three appearances during the period.[210] (See generally Table 12 below.)

Table 12: Appearances of (a) Ministers, (b) Secretaries General, (c) Other Officials and (d) Other Groups and Individuals before the Joint Committee on European Scrutiny 2009-2011

Year	***2011 (January only)*** [211]	***2010***	***2009***	***Total in Period Under Consideration***
Number of Appearances by Ministers	0	0	0	0
Number of Appearances by Ministers of State	0	0	1	1
Number of Appearances by Departmental Secretaries General	1	1	2	4
Number of Appearances by Other Officials	0	1	2	3
Number of Appearances by Other Officials	0	8	8	16

The Joint Oireachtas Committee on European Scrutiny and COSAC

The Joint Oireachtas Committee on European Scrutiny also jointly represented the Oireachtas at meetings of COSAC [212] – the Conference of European Affairs Committees of National Parliaments of

206. See Order 1(b)(iii) of its Orders of Reference (*viz.* the Order of Dáil Éireann of 23 October 2007, the Order of Seanad Éireann of 24 October 2007).
207. On which occasion the then Minister of State at the Department of Agriculture, Food and Fisheries, Deputy Tony Killeen, appeared before the Committee.
208. In 2009, these were by (i) the Federation of Irish Fishermen; (ii) Financial Services Ireland; (iii) the Irish Banking Federation; (iv) the Irish Funds Industry Association; and (v) the Irish Stock Exchange. In 2010, (vi) the Consumers' Association of Ireland; (vii) the Irish Banking Federation; and (viii) Bio Tech appeared before the Scrutiny Committee.
209. In 2009, these were by (i) the Central Bank and Financial Services Authority of Ireland; and (ii) the Financial Regulator. In 2010, (iii) the Central Bank; (iv) the Environmental Protection Agency and (v) Leitrim County Council appeared before the Scrutiny Committee.
210. In 2009, what was referred to as (i) the Irish delegation to the Committee of the Regions appeared before the Committee, followed in 2010 by (ii) the European Commission Representation in Ireland; and (iii) the Permanent Representative of the Oireachtas to the European Union (Mr. John Hamilton).
211. Two months only: the Dáil was dissolved on 2 February, 2011.
212. See Order 1(a)(iii) of its Orders of Reference (*viz.* the Order of Dáil Éireann of 23 October 2007, the Order of Seanad Éireann of 24 October 2007).

EU Member States – together with the Joint Committee on European Affairs. This involved attendance at COSAC chairpersons' meetings twice a year by the chairperson of the Joint Oireachtas Scrutiny Committee in addition to the attendance of a three person delegation from the Committee, including the chairperson at COSAC plenary sessions twice a year.[213] Prior to the entry into force of the Lisbon Treaty in December 2009, the Joint Committee participated in pilot projects operated by COSAC, which involved the monitoring of compliance with the subsidiarity principle on the part of European Union legislative initiatives.[214]

Final General Observations on the Joint Oireachtas Committee on European Scrutiny

Overall, the Committee met on 22 occasions in 2010 and on 24 occasions in 2009.215 Its work, however worthy, was indisputably frequently dull and perceived as being completely lacking in any political reward for participating parliamentarians. As a result, attendance at meetings was relatively low. In 2010, there was an average attendance rate of 55 per cent, leaving the Joint Scrutiny Committee in nineteenth place out of 21 committees, with only the Oireachtas Committee on Climate Change and Energy Security and the Committee on Justice, Defence and Women's Rights having worse records.[216] The meetings themselves tended to be brief and the debates which took place in the Committee frequently perfunctory. The last point is illustrated by this not untypical excerpt from the meeting of the Scrutiny Sub-Committee held at 11am on 28 January, 2010:[217]

> Chairman: We will begin with adopted measures. It is proposed that the adopted proposal COM (2009) 539 does not warrant further scrutiny. Is that agreed? Agreed
>
> … Based on the information available, it is proposed that the proposal COM (2009) 670 does not warrant further scrutiny. Is that agreed? Agreed.
>
> Based on the information available, it is proposed that the finalised measure COM (2009) 677 does not warrant further scrutiny. Is that agreed? Agreed.
>
> Based on the information available and the fact that agreement is being sought at Council level by the end of this month, it is proposed that COM (2009) 697 does not warrant further scrutiny. Is that agreed? Agreed...[218]
>
> We now move to items which require no further scrutiny and which will be sent to the relevant sectoral committee for its information. Based on the information available from the Department, it is proposed that COM (2008) 50, on which the Council decision has been adopted, be noted and sent to the Joint Committee on Foreign Affairs for
>
> its information in advance of a motion coming before Dáil Éireann with regard to ratification of the agreement. Is that agreed? Agreed.

213. See generally *op. cit.,* n. 186
214. See generally in relation to the Joint Committee's relationship with COSAC its *Seventh Annual Report on the Operation of the European Scrutiny Act 2002* (13 May, 2010), paras. 15 to 17.
215. Only two annual reports are available in respect of particular calendar years in the lifetime of the 30th Dáil - the annual reports in respect of 2009 and 2010. Earlier reports are in respect of lengthier periods and, therefore, the statistics quoted therein are less useful for comparative purposes.
216. Source: See European Movement Ireland, *op. cit.,* at n. 119, p. 43.
217. See for the full debate: http://debates.oireachtas.ie/SRJ/2010/01/28/00002.asp Eight parliamentarians attended the debate, of whom none spoke, other than those quoted in the text below.
218. Sixteen proposals were treated in precisely similar fashion at this meeting. For the purposes of brevity, only four examples have been included above.

Given that the Council decision on concluding the UN Convention on the Rights of Persons with Disabilities has been adopted by the Council, it is proposed that this part of COM (2008) 530 does not warrant further scrutiny. However, the Council has not yet adopted the draft Council decision on the conclusion of the additional protocol to the convention, despite the fact it has been approved by the European Parliament. It is proposed, therefore, to write to the Department of Justice, Equality and Law Reform to seek clarification as to why the Council has decided not to adopt this part of the proposal at this stage. It is also proposed to forward the proposal to the Joint Committee on Justice, Equality, Defence and Women's Rights for its information. Is that agreed? Agreed.

Deputy Joe Costello: Is there any proposal which it would be worth our while following up and tracing to see where it goes? It comes back to us from the Department in any case. Are there any proposals that seem to have substance in the sense that we might need to follow up on them to find out what happens to them?

Chairman: We can ask that we be kept updated in that regard.

Based on the information provided by the Department, it is proposed that COM(2009)491 does not warrant further scrutiny and that it be sent to the Joint Committee on Finance and the Public Service for its information. Is that agreed? Agreed.

Based on the information provided by the Department, it is proposed that the adopted proposal COM (2009) 636 be noted. It is further proposed that it be sent to the Joint Committee on Agriculture, Fisheries and Food for its information. Is that agreed? Agreed.

We now move to early warning notes. Based on the information available, it is proposed that EWN L153/06 does not warrant further scrutiny at this stage. Is that agreed? Agreed.

We now move to justice and home affairs measures. Based on the information available, it is proposed that COM (2009) 704 does not warrant further scrutiny by this committee. However, given that the proposal requires Oireachtas approval under Article 29.4.7° of the Constitution, it is also proposed to forward it to the Joint

Committee on Justice, Equality, Defence and Women's Rights for its information. Is that agreed? Agreed…[219]
That concludes the discussion of the measures. The Dáil is to debate the committee's 29th scrutiny report on the draft legislative package for reforming the EU financial supervisory regulatory framework at 2 p.m. today. The time available, 90 minutes, is limited but I would be glad if as many Members as possible participated in the debate.

The joint committee adjourned at 11.55 a.m. until 11 a.m. on Tuesday, 9 February 2010.

For all that, however, it should be acknowledged and emphasised that the Joint Oireachtas Committee on European Scrutiny provided a centralised mechanism during the lifetime of the 30th Dáil whereby European Union proposals were systematically checked for relevance to this country. It was also a Committee in which a core group of dedicated parliamentarians met regularly to carry out a task for which they would receive little if any reward in political terms.

iv. The Involvement of Sectoral Oireachtas Committees in Dealing with European Union Affairs

The Joint Oireachtas Committee on European Affairs and the Joint Oireachtas Committee on European Scrutiny were not the only Oireachtas Committees in the 30th Dáil to deal with European policy and legislative matters. Such questions could, and did, arise before sectoral Oireachtas committees. This happened both (a) through draft European Union legislation being referred to sectoral committees by the Joint Oireachtas Committee on European Scrutiny and (b) in other ways.

219. Precisely the same approach was adopted in relation to three proposals. For the purposes of brevity, only one example has been included above.

The Involvement of Sectoral Committees via the Process of Scrutiny of Draft Legislation

Measures could be referred to sectoral committees by the Joint Committee on European Scrutiny either individually or collectively. In considering the measures in question, the sectoral joint committee could hear from – or exchange views with – bodies, organisations and individuals. An example of both of these points can be seen in the May 2008 referral of three proposals (relating to the implementation of the EU Climate-Energy legislative package) to the Joint Committee on Climate Change and Energy Security for detailed scrutiny. In considering these proposals, the Joint Committee heard submissions from, and exchanged views with the Department of the Environment, Heritage and Local Government (which is the 'lead Department' in policy matters concerning climate change); the Department of Communications, Energy and Natural Resources, (which is the lead Department in energy policy questions); IBEC; the Commission for Energy Regulation; Eirgrid; the ESB; environmental non-governmental organisations (namely, GRIAN, an Taisce, Birdwatch Ireland and Friends of the Earth); and the Irish Wind Energy Association. The Joint Committee then prepared its report on the basis of these discussions and consultations.[220]

Some sectoral committees were more likely than others to see questions of serious concern referred to them by the Scrutiny Committee. (Thus, for example, given the remit of the Joint Committee on Communications, Marine and Natural Resources, it always seemed a likely candidate to be asked to provide further scrutiny in relation to European Union proposals.[221]) However, European–related matters could be referred for further scrutiny by the Scrutiny Committee to Oireachtas Committees whose main specialism had little to do with the central core of European Union activities. The field of education provides one example of this. Under Article 6 TFEU, the field of education and vocational training is primarily one for the member states, and the European Union has competence merely to support, coordinate or supplement the actions of the member states. However, such EU competence does lead to the adoption of legislation. This is reflected, for example, by the existence of European Union legislation in the field of mutual recognition and transferability of qualifications.[222] In the 29th Dáil, one example of a proposed measure in the education field being referred for consideration to the Joint Oireachtas Committee on Education and Science by the then Sub-Committee on European Scrutiny was the Commission proposal for a decision of the European Parliament on a single framework for the transparency of qualifications and competences. The ensuing April 2004 report of the Joint Committee[223] was a brief affair – barely over three pages long – but did make some recommendations of interest concerning the proposed measure.

220. Joint Committee on Climate Change and Energy Security, *Report No. 1 COM (2008) 16, COM (2008) 17, COM (2008): Scrutiny Report on three proposals relating to the implementation of the EU Climate-Energy legislative package* (October, 2008)

221. See *e.g.,* the June 2006 *Joint Committee on Communications, Marine and Natural Resources Report: EU Scrutiny of COM (2005) 646 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.*

222. Such legislation can also be justified under the Treaty provisions providing for free movement of workers and of services and freedom of establishment.

223. *EU Scrutiny Report No. 2: COM (2003)796. Proposal for a decision of the European Parliament on a Single Framework for the Transparency of Qualifications and Competences (EUROPASS)*, available online at the time of writing at http://www.oireachtas.ie/viewdoc.asp?DocID=2556&CatID=78&StartDate=01%20January%202004&OrderAscending=0

An idea of the overall importance and effectiveness of sectoral committees in the process of scrutiny may be gained by using 2010 as a sample year. In that year, the Joint Committee on European Scrutiny forwarded a total of 77 legislative proposals to sectoral committees, (with some of them being sent to more than one committee). This constituted approximately one-fifth of the 382 legislative proposals considered by the Scrutiny Committee.[224] However, the vast bulk of the proposals sent on to the sectoral committees by the Scrutiny Committee were simply sent for information purposes. The total number of proposals sent to sectoral committees for further *scrutiny* was a mere ten - i.e. less than 3 per cent of the total number of proposals considered by the Scrutiny Committee.[225]

These ten proposals were distributed among only four (out of a total of 18 [226]) sectoral Oireachtas committees. These were (i) the Joint Committee on Justice, Defence and Women's Rights (which received six proposals); (ii) the Joint Committee on Agriculture, Fisheries and Food (which received two proposals); (iii) the Joint Committee on Communications, Energy and Natural Resources (which received one proposal); and (iv) the Joint Committee on Finance and the Public Service (which also received one proposal). (See Table 13 below.)

Table 13: Number of EU Legislative Proposals Referred to Sectoral Oireachtas Joint Committees for Detailed Scrutiny by Joint Oireachtas Committee on European Scrutiny [227]

Sectoral Oireachtas Joint Committee	***Number of EU legislative proposals referred to sectoral Oireachtas joint committee by Joint Scrutiny Committee for detailed scrutiny***
Joint Committee on Justice, Defence and Women's Rights	6
Joint Committee on Agriculture, Fisheries and Food	2
Joint Committee on Communications, Energy and Natural Resources	1
Joint Committee on Finance and the Public Service	1
Joint Committee on Climate Change and Energy Security	0
Joint Committee on the Constitution	0
Joint Committee on the Constitutional Amendment on Children	0
Joint Committee on Economic Regulatory Affairs	0
Joint Committee on Education and Skills	0

224. Joint Committee on European Scrutiny, *op. cit.,* n. 186, para. 7. In total the Scrutiny Committee considered 441 documents in this time.(*Ibid.*)
225. Perhaps considerably less, since an (unspecified) number of proposals were sent on to more than one sectoral committee, and thus this figure of ten proposals involves the double counting (at least) of any proposal sent to more than one committee by the Scrutiny Committee.
226. This obviously excludes the Joint Oireachtas Committee on European Scrutiny itself.
227. Table based on tabulated information contained in Joint Committee on European Scrutiny, *op. cit.,* n. 186, at p. 14 and see list of Joint Oireachtas Committees at http://www.oireachtas.ie/parliament/oireachtasbusiness/committees/jointcommittees/

Joint Committee on Enterprise, Trade and Innovation	0
Joint Committee on the Environment, Heritage and Local Government	0
Joint Committee on European Affairs	0
Joint Committee on Foreign Affairs	0
Joint Committee on Health and Children	0
Joint Committee on the Implementation of the Good Friday Agreement	0
Joint Committee on Social Protection	0
Joint Committee on Tourism, Culture, Sport, Community, Equality and Gaeltacht Affairs	0
Joint Committee on Transport	0
Total	10

Of these committees, (i) the Joint Committee on Justice, Defence and Women's Rights produced no report at all on European issues in 2010 and, in particular, nothing on the six proposals referred to it for scrutiny;[228] (ii) the Joint Committee on Agriculture, Fisheries and Food produced one valuable report on a European issue and co-produced another, but produced nothing on either of the two legislative proposals referred to it by the Joint Scrutiny Committee;[229] (iii) the Joint Committee on Communications, Energy and Natural Resources duly produced a report on the one legislative proposal referred to it[230] and (iv) the Joint Committee on Finance and the Public Service produced no report on any European issue at all in 2010.[231] (See Table 14 below.)

228. See Joint Committee on Justice, Defence and Women's Rights, *Annual Report 2010* at p. 10.
229. See generally http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-AgricultureFisheriesFood/Reports_2009/document1.htm The two reports were the November 2010 *Fourth Report: Report on Reform of the Common Agricultural Policy Post-2013* and the July 2010 *Report by two Oireachtas Committees on the European Commission's Green Paper on Protecting Europe's Forests against Climate Change*
230. Joint Committee on Communications, Energy and Natural Resources, *EU Scrutiny Report No. 1: COM(2009)363 – Scrutiny Report on proposal relating to the security of gas supply* (May, 2010)
231. See http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-FinancePublicService/Reports document1.htm

Table 14: Responses by Oireachtas Joint Sectoral Committees to References of EU Legislative Proposals for Detailed Scrutiny by the Joint Oireachtas Committee on European Scrutiny [232]

Sectoral Oireachtas Joint Committee	***Number of EU legislative proposals referred to sectoral Oireachtas joint committee by Joint Scrutiny Committee for detailed scrutiny***	***Number of reports published by sectoral Oireachtas joint committee in response***
Joint Committee on Justice, Defence and Women's Rights	6	0
Joint Committee on Agriculture, Fisheries and Food	2	0
Joint Committee on Communications, Energy and Natural Resources	1	1
Joint Committee on Finance and the Public Service	1	0
Total	10	1

As has already been seen, according to the Annual Report of the Joint Oireachtas Committee on European Scrutiny, of 382 legislative proposals considered by the Scrutiny Committee in 2010, only 21 were felt by that Committee to be of significant importance to Ireland to require further scrutiny of any kind. This is already a relatively low proportion – only 5.5 per cent of the proposals considered by the Scrutiny Committee. Of these 21 proposals, just over half (11) were then purportedly examined in detail by the Scrutiny Committee itself.[233] Of the remaining ten proposals sent to the relevant sectoral committees for detailed scrutiny, we have just seen that only one ever gave rise to a report of any kind. In these circumstances, it is difficult to describe the involvement of sectoral committees in the process of scrutiny of EU law measures as having been anything other than dysfunctional. In the case of nine out of ten measures pre-selected by the Joint Scrutiny Committee for their significance to this country, with ten such measures already a surprisingly low number, there is no evidence that they were actively scrutinised by the relevant sectoral committee at all. This contributed significantly to a situation in which a miniscule 1.3 per cent of the proposals for EU legislation received by the Oireachtas in 2010 were made the subject of a dedicated report by any joint Oireachtas committee.[234]

It should be added that EU legislative proposals were referred in larger numbers by the Joint Scrutiny Committee to joint sectoral committees purely for the purposes of information than for the purposes of more detailed scrutiny. The leading four sectoral committees in receipt of such references for information were the Joint Committee on Finance and the Public Service (which received seventeen such proposals), the Joint Committee on Justice, Defence and Women's Rights (which also received seventeen), the Joint Committee on Enterprise, Trade and Innovation (which received eleven) and the Joint Committee on Agriculture, Fisheries and Food (which received ten proposals). However, such

232. Source: Author's own calculations based on information contained in Joint Committee on European Scrutiny, *op. cit.*, n. 186, para. 32 and in annual reports and websites of various Oireachtas Joint Committees in the 30th Dáil.
233 Although, as has been seen in the text above, reports were produced only in relation to four of these.
234. *Viz.* the four reports produced by the Joint Oireachtas Committee on European Scrutiny itself and the single report produced by the Joint Committee on Communications, Energy and Natural Resources.

references appear to have involved no active response by the relevant sectoral committees and it is difficult to see what, if anything, such references for information added to the process of accountability beyond simply broadening the awareness among Oireachtas members of the existence of the proposals in question. (See Table 15 below.)

Table 15: Number of EU Legislative Proposals Referred to Oireachtas Joint Sectoral Committees for Information by Joint Oireachtas Committee on European Scrutiny [235]

Sectoral Oireachtas Joint Committee	***Number of EU legislative proposals sent to sectoral Oireachtas joint committee for information by Joint Scrutiny Committee***
Joint Committee on Finance and the Public Service	17
Joint Committee on Justice, Defence and Women's Rights	17
Joint Committee on Enterprise, Trade and Innovation	11
Joint Committee on Agriculture, Fisheries and Food	10
Joint Committee on Health and Children	8
Joint Committee on Transport	6
Joint Committee on European Affairs	4
Joint Committee on Foreign Affairs	3
Joint Committee on Communications, Energy and Natural Resources	2
Joint Committee on the Environment, Heritage and Local Government	2
Joint Committee on Climate Change and Energy Security	1
Joint Committee on Social Protection	1
Joint Committee on Tourism, Culture, Sport, Community, Equality and Gaeltacht Affairs	1
Joint Committee on the Constitution	0
Joint Committee on the Constitutional Amendment on Children	0
Joint Committee on Economic Regulatory Affairs	0
Joint Committee on Education and Skills	0
Total	83

235. Joint Committee on European Scrutiny, *op. cit.*, n. 186, at Appendix 10 thereto.

The Involvement of Sectoral Committees Other Than via the Process of Scrutiny of Draft Legislation

European policy matters could be brought before sectoral committees in ways other than by virtue of references from the Scrutiny Committee, however, in the lifetime of the 30th Dáil. Thus the Joint Committee on European Affairs *also* occasionally referred certain documents - albeit non-legislative ones. In July 2010, for example, the Joint Committee on Climate Change and Energy Security and the Joint Committee on Agriculture, Fisheries and Food produced a joint report on a Commission Green Paper (the *Green Paper on Protecting Europe's Forests against Climate Change*) which had been referred to it for scrutiny by the Joint Oireachtas Committee on European Affairs.[236] This joint report was duly published, laid before both Houses of the Oireachtas, and forwarded to relevant stakeholders.[237] The report – which involved both a Committee member acting as *rapporteur* (Fine Gael TD Andrew Doyle) and the work of a professional consultancy firm[238] – is an outstanding example of the benefits of using a sectoral approach in examining European policy questions. However, it might have been worthwhile feeding its conclusions into the process of political dialogue between the Commission and national parliaments, which had begun with the so-called Barroso initiative in 2006. The likelihood of this happening might, in turn, have been improved by the relevant European affairs committee lending some expertise to sectoral committees in terms of advice on the appropriate process to use when dealing with European Union-level initiatives.

An earlier report by the Joint Committee on Agriculture, Fisheries and Food was fed into the political dialogue process as an 'own initiative' report. This was the November 2010 *Fourth Report: Report On Reform Of The Common Agricultural Policy Post-2013*, which was duly replied to by the Commission

(although only after a very considerable delay of approximately six months).[239] Again, this Joint Committee report is an outstanding piece of work and, again, involved the use of external expert consultancy help.[240]

The foregoing reports are not the only examples of work done on European policy matters by sectoral committees. The *Annual Report 2009* of the Joint Committee on Agriculture, Fisheries and Food included mention of the fact that, among the matters considered by it had been a review of the Common Fisheries Policy and the European Commission's Green Paper on the Reform of the Common Fisheries Policy.[241]

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236. *Report by two Oireachtas Committees on the European Commission's Green Paper on Protecting Europe's Forests against Climate Change,* available online at the time of writing at http://www.oireachtas.ie/documents/committees30thdail/j-climate_change/reports_2008/20100721.pdf
237. See the chairpersons' foreword to the report. Surprisingly, there is no explicit evidence of the Report having been forwarded to the very institution that should have been the first to receive it if the objective had been to maximise its influence – the European Commission itself. The report itself does not indicate it was forwarded to the Commission and the relevant Commission website makes no mention of the Commission having received it, although it is true that the Commission website is very incomplete in this regard. (See http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm)
238. EPS Consulting, whose contribution is expressly acknowledged in the report.
239. Both the report itself, and the Commission's reply to it (dated 12 May, 2011), are to be found at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/ireland/unsolicited_en.htm
240. This time that of a Mr. Bart Brady, whose contribution is expressly acknowledged in the report.
241. COM (2009) 163 final.

It has already been noted in the text above that the *2009 Annual Report and Work Programme 2010* of the Joint Committee on Justice, Equality, Defence and Women's Rights[242] revealed that of the 19 topics considered at the ten meetings which that Joint Committee held in that year, 14 involved the consideration of some matter related to justice and home affairs cooperation at European Union level (11 involving opting-in resolutions required under what is now Article 29.4.7° of the Constitution) - making the Joint Committee on Justice, Equality, Defence and Women's Rights the sectoral Oireachtas committee[243] which was most dominated by European Union-related issues. (In contrast, European issues featured a surprisingly lowly twice among the thirty issues considered by the Joint Committee on Enterprise, Trade and Innovation in 2010.[244])

A final observation which may be made in relation to sectoral committees is that, because the line between foreign affairs issues and European affairs issues can be a narrow one, sometimes the Joint Oireachtas Committee on Foreign Affairs could produce work which had a European Union aspect to it. Past examples of this (both from the lifetime of the 29th Dáil) have included the January 2005 Joint Committee on Foreign Affairs document *Honouring Our Commitments To The Developing World: Report of the Conference of Chairpersons of Development Co-operation Committees Of EU Parliaments and of The Candidate States 23-25 May, 2004* and the November 2004 Joint Committee on Foreign Affairs document, *Report of the Conference of Chairpersons of Foreign Affairs Committees of EU Parliaments, of the Parliaments of the Acceding States and of the Candidate States Dublin Castle, Ireland, 28-30 March 2004*. Both of these reports involved cooperation on the part of parliamentary committees located in and around the European Union (more specifically in member countries, acceding states and candidate states) and were aimed at maximising the collective voice of national parliaments in the Europe Union in the respective fields of development policy and foreign policy. The European Union provided the framework for the cooperation if not the substance of its subject matter. Such cross-European cooperation, of course, is one manner in which an added European dimension can be provided to Oireachtas work by sectoral parliamentary committees.

5. *Establishing Accountability on the Part of Government in European Matters: The Role of the Plenary Sessions of the Dáil*

Apart from the efforts made by Oireachtas committees to secure accountability on the part of the Government, such accountability is also secured by the actions of both Houses sitting in plenary session. The Dáil (which sits only on Tuesdays, Wednesdays and Thursdays) sat on 100 days during 2010, with a total of 843 sitting hours. In the same year, the Seanad sat on 97 days, corresponding to 613 sitting

242. Located at http://www.oireachtas.ie/documents/committees30thdail/j-justiceedwr/reports_2008/AnnualRpt20100311.doc
243. Excluding in this regard, the Joint Oireachtas Committee on European Affairs and the Joint Oireachtas Committee on European Scrutiny.
244. Joint Committee on Enterprise, Trade and Innovation, *Annual Report 2010-2011 and Work Programme 2011* (February 2011), p.10. Indeed, it could be argued that the presence of European issues was even less than indicated in the text above, since it was the same issue which featured twice in the Joint Committee debates – *viz.* the European Globalisation Fund, and its funding and functioning.

hours. In the Dáil,[245] accountability is sought to be imposed *via* (i) parliamentary questions; and (ii) debates.A few observations must be made about how the Dáil works in plenary session before dealing with these mechanisms.

The first point is that the procedure governing such mechanisms[246] is provided for by Standing Orders, which have been aptly described as the procedural rulebook members are required to follow.[247] Put in place in the 1920s, Standing Orders have been subject to considerable modifications, but have not yet been given the comprehensive review they arguably need (and consequently have been the source of some considerable dissatisfaction to TDs).[248]

The second point to be made is that the amount of time dedicated to each of these accountability mechanisms is not constant from one day to another. The Dáil timetable varies considerably from day to day. Although some events (private members' business and matters on the adjournment, for example) are held at the same time each day, others (such as parliamentary questions to the Taoiseach) are not.[249]

Thirdly, the Government of the day is very much in control of the agenda. The Government chief whip is responsible for scheduling business – even if the Opposition whips meet with their Government counterpart on a weekly basis to discuss the agenda.[250] However, as Caffrey has pointed out,

> "the Opposition has a range of formal opportunities to scrutinise government activity, including questions to ministers, debates on legislation, and debates on topical issues, both local and national. It also uses Dáil procedures to its own advantage, creating novel ways to hold the government accountable, such as raising questions on the 'order of business'…"[251]

i. Parliamentary Questions

The use of parliamentary questions has been described as "in theory one of the few worthwhile instruments with which any TD can trouble the Government".[252] Parliamentary questions are clearly a much-used mechanism in Irish political life. One recent study has indicated that, in 2010, the Dáil had the second highest number of parliamentary questions tabled in that year (44,943 questions)[253] and the highest

245. The main focus of the present discussion. The Seanad is dealt with elsewhere in this chapter.
246. Like that governing Oireachtas committees.
247. This is supplemented by the *Salient Rulings of the Chair,* which provides a set of precedents for the Ceann Comhairle in the Dáil and the Cathaoirleach in the Seanad to follow. (See generally R. Caffrey, *"Procedure in the Dáil",* Chapter 13 of M. McCarthaigh and M. Manning, *The Houses of the Oireachtas* at p. 257.)
248. *Ibid.,* p. 282-283. They were revised in 2010, together with Committee Orders of Reference, and the revisions made approved by both Houses.
249. See Caffrey, *loc. cit.* at n. 247, pp. 258-259.
250. *Ibid.,* p. 260.
251. *Ibid.*
252. E. O'Halpin, *"Irish Parliamentary Culture and the European Union: Formalities to be Observed"* in P. Norton, *National Parliaments and the European Union* (Frank Cass, London, 1996) , p. 124 at p. 125.
253. The parliaments surveyed were those of New Zealand, Ireland, Scotland, Finland, the Netherlands, the House of Commons (United Kingdom), the House of Lords (United Kingdom), Denmark, the lower House of the Canadian parliament, Australia, Austria and India. See Report on Comparative Benchmarking of Parliaments, the conclusions of which are set out in the Houses of the Oireachtas Commission, *op. cit.,* at n. 81, pp. 45-46. Note that this was 4 per cent less (or 1,807 fewer questions asked) than in 2009. (*Ibid.,* p. 23).

number of parliamentary questions per member (at 271 per TD)[254] across twelve parliaments reviewed.

Such figures are somewhat misleading, however, since between a third and a quarter of questions put are never answered. In 2010, a hefty 26 per cent of questions, or 11,782 questions in total, were simply withdrawn and a further 2.8 per cent – i.e. 1,255 questions – were disallowed.[255] Moreover, it is worth bearing in mind that parties deliberately put down large numbers of similar questions to increase the likelihood of questions for oral answer (which appear on the order paper in a sequence decided by lottery) succeeding in arriving at a place on the order paper which will see them answered.[256] For all that, it is clear that questions *are* used extensively by TDs (a practice which, incidentally, is also widespread among Irish MEPs in the European Parliament. Eleven of the twelve MEPs from Ireland rank in the top 100 MEPs out of a 736-strong membership in terms of the number of parliamentary questions they ask [257]).

The asking of questions can be an information-seeking exercise. But it can also form part of a quite different process. Gallagher has observed of the Dáil that

> "question time is highly politicised. Opposition TDs put down questions for oral answer not in an ingenuous search for information but, in most cases, as part of the ongoing war of attrition against the government, which they hope to be able to embarrass... Ministers treat question time in the same spirit, aiming to give away as little as possible. The culture is one of concealment, not of openness. The etiquette of parliamentary questions...requires not that answers be helpful or informative but only that they not be untruthful."[258]

Parliamentary questions come in six different varieties in relation to which varying rules apply.[259] These are:

(i) Questions to the Taoiseach (which are generally put by the leaders of Opposition parties[260])

Questions to the Taoiseach can be a useful way for Opposition leaders to find out information about developments at European Union level. The following exchange, which took place in November, 2010, has been reproduced at length as it shows the potential usefulness of such questions in finding out a broad range of European-related issues. It also shows that questions to the Taoiseach can be used as a means of obtaining extra information about the results of European Council meetings beyond that provided in statements. (The topic of statements is returned to in the text below.) Further interesting features of the exchange reproduced below include the fact that it shed light on informal meetings between heads of government at the margins of the European Council – a topic which might not normally be expected to feature in statements by the Taoiseach on European Council outcomes. The exchange also shows questions to be capable of, at least occasionally, eliciting a very detailed level of

254. *Ibid.,* p. 47.
255. *Ibid.,* p. 23.
256. Caffrey, *loc. cit.,* at n. 247, p. 263.
257. See European Movement Ireland, *op. cit.,* at n. 119, p. 23.
258. Gallagher, *loc. cit.,* n. 2 at p. 217.
259. See generally, Caffrey, *loc. cit.,* at n. 247, at pp. 262 to 264.
260. Governed by Standing Order 36. In the 30th Dáil, questions to the Taoiseach were put on Tuesdays and Wednesdays and lasted for 45 minutes.

information about matters of fundamental constitutional and economic importance.[261] Finally, the opportunity given to the Opposition politician, in this case, to obtain extra information by putting forward further questions in the course of the debate is also of interest.

1. Deputy Eamon Gilmore asked the **Taoiseach** if he will make a statement on his participation in the EU Summit in Brussels on 28 and 29 October 2010

2. Deputy Eamon Gilmore asked the **Taoiseach** if he will make a statement on any discussions he had with other EU leaders on the margins of the EU Summit in Brussels on 28 and 29 October 2010

3. Deputy Enda Kenny asked the **Taoiseach** if he will report on his attendance at the October meeting of the European Council in Brussels; and if he will make a statement on the matter.

4. Deputy Enda Kenny asked the **Taoiseach** about the bilateral meetings he held on the margins of the October European Council meetings; and if he will make a statement on the matter.

5. Deputy Enda Kenny asked the **Taoiseach** if he will report on his recent contacts with the President of the European Commission; and if he will make a statement on the matter.

6. Deputy Caoimhghín Ó Caoláin asked the **Taoiseach** if he will report on his participation in the European Council meeting on 28 October

The Taoiseach: I propose to take Questions Nos. 1 to 6, inclusive, together.

I attended the October meeting of the European Council in Brussels on 28 and 29 October. As I will be making a statement to the House later today, I will confine myself to giving a summary account of the proceedings now.

The Council endorsed the outcome of the task force on economic governance, chaired by President Van Rompuy, and agreed that the legislative measures needed to implement its recommendations be fast-tracked, so that agreement is reached between the Council and European Parliament by summer 2011.

The Council also discussed the question of a permanent crisis mechanism. There was agreement that this was needed to safeguard the financial stability of the euro, and that we need to get the work under way so that the mechanism can be in place by mid-2013, when the current arrangement expires.

The Council asked President Van Rompuy to undertake consultations with member states on limited treaty change to this effect. The Council will return to the matter at its next meeting in December, when it will agree on an outline for the mechanism, and on any necessary limited amendment to the treaty.

While it was not on our agenda, a number of member states indicated a wish to discuss the Union's budget following a presentation by the President of the European Parliament, Jerzy Buzek. We agreed to return to the

matter at our next meeting in December.

In addition, the Council discussed a number of other issues including preparations for the forthcoming G20

Summit in Seoul; for the Cancún conference on climate change; and for summits with third countries, including the United States, Russia, Ukraine, India and Africa.

Prior to the European Council meeting, I attended a meeting of the European Liberal Democrat Party, the ELDR, at which I met a number of my European Council colleagues, including the new Prime Minister of the Netherlands, Mark Rutte. While I had no formal meeting with the President of the European Commission, I did of course see President Barroso at the European Council meeting.

Deputy Eamon Gilmore: I wish to ask the Taoiseach about the proposal to make a treaty change to accommodate

261. See Vol. 720 *Dáil Debates* c. 844 *et seq.* (3 November 2010).

the establishment of a permanent mechanism for financial stability and the stabilisation fund. I understand it is the intention that the President of the Council will report back to the December summit. Does the Taoiseach expect that the President of the Council, Mr. Van Rompuy, will make a proposal to the December summit with regard to a proposed treaty change?

Is it considered that such a treaty change would require a referendum in this State? The Taoiseach will recall that at the time the Lisbon treaty was passed it was understood by all parties in the House and by the public that it was unlikely that there would be further treaty-amending referenda for some time, that institutional issues had been resolved as far as the European Union was concerned for the foreseeable future. Does he anticipate that the proposed change will give rise to a referendum?

Has any consideration been given to the implications of Article 48 of the Lisbon treaty which speaks in fairly explicit terms about the necessity for a convention if treaty changes are being considered? Is it intended that a convention would be convened arising from any proposal that the President of the Council would make?

The Taoiseach: We agree with the need for proposals on a proposed permanent crisis mechanism. As Deputy Gilmore is aware, arrangements for a facility are currently in place that end in mid-2013. It was felt that it would be generally reassuring to markets and to meet the requirements of the situation that a permanent crisis mechanism would be put on a firm legal footing.

President Van Rompuy is to undertake consultations with member states on the limited treaty change required to that effect. The European Council will come back to the matter in December with a view to taking a final decision. There is a simplified amendment procedure in the treaty. It is not the case that an Intergovernmental Conference must be held in all situations. One must await the details of the proposals but it is envisaged that this is a matter that would be decided upon in December. It is an urgent matter given the nature of the financial crisis worldwide and the need to deal with it. The Council has decided that the President of the Council will undertake consultations with member states on limited treaty change required to that effect.

On whether a referendum is required, we must examine whatever emerges from the process very carefully. It is clear that the European Council is seeking limited change. When we have a proposal we must assess carefully what steps are necessary to enable this country to ratify any change.

Until there is a specific proposal, it is not very rewarding to speculate further. Every country has to ratify according to its own constitutional arrangements. There are legal thresholds that would indicate whether referenda are required and we have to await the details of the proposal.

Deputy Eamon Gilmore: Does the Taoiseach believe that the issue of treaty change which is now being considered by the President of the Council is contributing in any way to the uncertainty in the markets? A possible treaty change in respect of crisis mechanisms is being considered by the European Council while the Heads of some member states are speculating and making suggestions on how those mechanisms might work in practice. This has consequences for the markets.

Other matters have been under consideration by the Council for some time. For example, the regulation of international rating agencies was considered by the Council as far back as June 2008 when the EU was planning to regulate them. As a country, we have been on the receiving end of the opinions expressed by these agencies. Has any progress been made in terms of their regulation or regarding the idea of the establishment by the EU of a European rating agency?

In December, there was a commitment to establish a fundamentally new structure for financial supervision in Europe. Was this matter discussed at the Council meeting and what progress has been made?

The Taoiseach: In adopting the Van Rompuy report, the Council is involved in preparing six legislative proposals by early summer of next year, four of which will involve, as I understand it, the involvement of the European Parliament. The proposals are designed to strength the Stability and Growth Pact and the EU regulatory framework for members states' public finances and to broaden the scope of economic surveillance beyond the budgetary position. The proposals aim to achieve these by enhancing the importance of the debt criteria, introducing sanctions, including financial sanctions, for euro area member states in the case of persistent non-compliance with the Stability and Growth Pact and a tiered range of procedures and sanctions designed to prevent the emergence of macroeconomic imbalances in a member state that, if left uncorrected, could ultimately jeopardise the functioning of the euro and the euro area.

The Commission's legislative proposals will be subject to the normal procedure of consultation and discussion with member states. We will engage positively in that process, taking account of our own circumstances and needs. The Council has set the summer of 2011 as a target for agreement with the European Parliament in the Commission's legislative proposals.

There are six Commission legislative proposals – a directive on requirements for budgetary frameworks, two regulations amending existing regulations on the Stability and Growth Pact, two regulations relating to the introduction of new arrangements for the surveillance of macroeconomic imbalances and a regulation on proposed financial sanctions in the event of persistent non-compliance with budgetary obligations on the part of euro area member states.

Specifically regarding the question of regulation of credit agencies and where that is at the moment, perhaps the Minister for Finance should be asked where that is with the euro area ECOFIN group. I do not have that information before me, but I know that it is a matter that is under discussion and work is ongoing in respect of it.

The earlier matter referred to by the Deputy related to the questions of markets and the discussion. I share a concern about the need for avoiding read-across by markets...

(ii) ***Questions to ministers*** (which are answered by ministers according to a rota, with limits applying to the numbers of questions and the time spent answering and asking supplementary questions, and which also require four days' notice).

The following example of a question to a minister, which was put in February, 2010, is interesting in that it shows that such questions can be used to obtain answers about the activities of a European institution – even where the activities of that institution are not under the control of the Minister's Department – provided that information surrounding the activities in question is either made available or produced by a body under the purview of the Minister's department.[262]

Deputy Olwyn Enright asked the **Minister for Finance** the extent to which banks are currently depending on European Central Bank liquidity support; his views on whether the terms in which its support is available will be tightened; and the implications of such changes for Ireland.

Deputy Brian Lenihan: The latest Central Bank statistics, released on 1 February, show that Eurosystem borrowing by credit institutions resident in Ireland has fallen significantly from its highs of last summer. Borrowings at end December 2009 stand at €91.9 billion, down from the high of €130 billion in June 2009. These numbers reflect not just Irish headquartered banking groups but include subsidiary operations of international groups operating

in Ireland. While the Central Bank publishes figures which cover all credit institutions operating in Ireland, including

the IFSC credit institutions, it does not publish figures for individual institutions as these are highly market sensitive. The total aggregate balance sheet of all institutions is €1,306.9 billion, of which €91.9 billion represents ECB lending at end 2009, that is, 7% of aggregate assets.

Funding from the ECB is an important part of funding not just for covered institutions but for all credit institutions and was a common feature even before the recent turmoil in the markets. For example, in December 2006, €27 billion of the aggregate balance sheets of all credit institutions operating in Ireland represented ECB lending. It would be inappropriate for me to speculate upon or pre-empt the decisions of the ECB governing council concerning future

262. See Vol. 701 *Dáil Debates* c. 64 *et seq.* (3 February, 2010). Analogously, in a question for written answer dealt with in January, 2010, Deputy Ciarán Lynch sought and obtained from the Minister for the Environment, Heritage and Local Government, detailed information on the cases then being taken by the European Commission against Ireland in relation to the State's failure to transpose or implement European Union directives in environmental law. See Vol. 699 *Dáil Debates* c. 64 *et seq.* (21 January, 2010), available online at http://debates.oireachtas.ie/dail/2010/01/21/00038.asp

funding decisions, but should it bring forward changes to funding policy this might be a good indication that wholesale funding markets are improving and returning to proper functioning.

The ECB has indicated publicly that it is engaging in the progressive, timely and gradual phasing out of the non-conventional measures which had been introduced in response to the financial crisis but that liquidity will remain abundant for months to come. As such, there are no negative implications in the medium term from the announced "phasing out" measures.

(iii) Leaders' questions[263] (which, in order to enable topical issues to be aired, allow leaders of Opposition parties to pose questions to the Taoiseach without prior notice).

The following exchange involves a leader's question concerning an important issue of European Union policy. Of particular interest is the mutually critical tone both of the question and of the response, a useful reminder of the political role which questions (and, at times, answers) have to play, and a reminder of their use as a device not only to elucidate information but to secure a political advantage by embarrassing one's political opponents. Also of interest is that the mechanism of leaders' questions was used here to secure *ex post facto* accountability[264] in relation to a meeting of the ECOFIN Council involving a very large financial commitment on the part of the Irish state.[265]

Deputy Enda Kenny: Last weekend, the EU Finance Ministers put together a package of €750 billion for the relief of distressed eurozone economies. I am disappointed that the Dáil did not have an opportunity to discuss the matter, as allowed under the Lisbon treaty, in advance of its being considered by the EU ministers. While the new mechanism is necessary, it is insufficient in so far as it will not deal with the structural deficiencies in the economies of vulnerable eurozone countries, including Ireland. Although it will deal with debt liquidity for a period of time, it will not deal with the financing pressures that will arise in the future in the absence of a serious and determined programme of competitiveness, growth and investment. Ireland is no different – we cannot plan for a jobless recovery…

The Taoiseach: The decisions taken by the European Council and ECOFIN over the weekend were taken as a rapid response to what the European Central Bank regarded as the prospect of a systemic risk to the euro currency, beyond the Greek situation alone. The original purpose of last Friday's meeting was to finalise the arrangements relating to Greece. It was not a question of not giving prior notice of issues that were coming up. This issue had to be dealt with as a matter of urgency. It was dealt with quite well by the European Council and ECOFIN over the weekend. Rather than running down the prospects of the euro and the country, it is far better to acknowledge that the market has reacted positively.

The statement also referred to the structural issues that have to be dealt with, in terms of deficit reduction, by all countries with such issues. There has been an acknowledgment that the Irish Government and the Irish economy started that structural adjustment in 2009. There was an adjustment of 5% in 2009 and an adjustment of 2.5% in 2010. While we have to remain vigilant, further adjustments which will lead to a reduction in the deficit have to be made. The international markets have shown an acknowledgement and an acceptance of the credibility of the Irish position.

The European Commission, the European Council and ECOFIN are clearly emphasising the need to have a more effective surveillance and monitoring mechanism, in respect of the stability of the euro, in the future. The task force that is working under the Presidency of Herman Van Rompuy will have to accelerate its work. The proposals to be made by the Commission this week will make an input into that. When people are commenting on these matters, I ask them to acknowledge the commendations that have been given to the Irish so far. While we should not be self-congratulatory in any way, that which is acknowledged externally might be acknowledged at home as well…

263. See Standing Order 27
264. In this case, the only kind of accountability to the Oireachtas made possible by the Irish political system.
265. See Vol. 708 *Dáil Debates* c. 465 *et seq.* (11 May, 2010), available online at the time of writing at http://debates.oireachtas.ie/dail/2010/05/11/00012.asp

(iv) ***Private notice questions*** (which are rarely[266] allowed by the Ceann Comhairle to be put without prior notice so as to allow matters of urgent public importance to be raised).

Permission to ask such questions is not often granted. It is possible, although rare, for a private notice question to raise European issues.[267]

(v) ***Priority questions*** (which effectively allow parties which are sufficiently large to form groups to 'jump the queue' – and to ask questions on specific issues at the start of ministerial question time).

The following example of the use of priority questions in the field of European policy occurred in December, 2010, when this mechanism was used to raise questions about the Common Agricultural Policy.[268] It will also be noticed that the question succeeded in eliciting some information about a Council meeting which had recently been attended by the relevant Minister.

10. Deputy Seán Sherlock asked the **Minister for Agriculture, Fisheries and Food** his views on the three options outlined in the Common Agricultural Policy reform proposals communication recently published; and if he will make a statement on the matter.

11. Deputy Noel J. Coonan asked the **Minister for Agriculture, Fisheries and Food** the response and submissions he will make to the European Commission following the recently published discussion document on Common Agricultural Policy reform from the Commission entitled *The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future*; his response to the report and when he expects to communicate his proposals to the EU Commission; and if he will make a statement on the matter.

Deputy Brendan Smith: I propose to take Question Nos. 10 and 11 together.

I must first underline some fundamental points that we should bear in mind in this CAP reform. Now, more than ever, we need to focus on ensuring security of supply of safe, high quality and sustainably produced food – at reasonable prices for our consumers, and with reasonable returns to our farmers and processors. In order to achieve this we will require a strong and adequately resourced CAP. I agree with the communication that "the CAP should remain a strong common policy, structured around its two pillars". However, I would caution that, to be meaningful, this will require appropriate resources and this must be reflected in the new financial framework.

Although three options for CAP reform are outlined in the recent Commission communication, it is clear that the main option under consideration is the second option for a better targeted and effective policy. I had the opportunity to give my first reaction to the communication at last Monday's meeting of the EU Council of Agriculture Ministers. This was the first step in what will be a lengthy process of negotiations. Over the coming months, we will discuss the communication in greater detail with a view to agreeing conclusions on the general orientation of policy for the CAP after 2013, before the legislative proposals, due next July, are framed. I will be participating actively in that process and I will continue to build up alliances among my colleagues in other member states to secure support for my position.

The communication is short on detail so I would reserve our position on many of the substantive issues until such time as detailed proposals are presented. Having said that, I welcome the commitment of the Commission to a strong CAP in the future and I subscribe to the three strategic aims that have been identified of ensuring security of food supply, sustainable management of natural resources and maintenance of viable rural areas. I also welcome the commitment to the continuation of decoupled direct payments, the maintenance of the current rural development themes and the retention and enhancement of market management measures, although I would have preferred to see more specific proposals to address the increase in market volatility…

266. Of the 44,494 questions processed in 2009, only 95 of them were private notice questions. (See Caffrey, *loc. cit.*, at n. 247)
267. See, for example, Vol. 403 *Dáil Debates* c. 1201 (5 December, 1990) (as to which see http://debates.oireachtas.ie/dail/1990/12/05/00021.asp) where Mr. Bernard Allen TD raised concerns over the conduct of the then ongoing GATT negotiations by the European Commission as a private notice question.
268. See Vol. 723 *Dáil Debates* c. 670 *et seq.* (1 December, 2010)

(vi) ***Questions for written answer***, (an unlimited number of which can be asked as long as three days' notice is given) and which are used for administrative and constituency issues as well as policy issues.

Questions for written answer frequently involve European Union issues. An interesting example of a question for written answer being used to exact executive accountability in relation to the manner of implementation of a Directive by ministerial regulation is seen in the following exchange drawn from the Dáil debates in June 2010.[269]

Deputy Michael Fitzpatrick asked the **Minister for Enterprise, Trade and Innovation** the reason his Department deleted paragraphs 3, 4 and 5 of Schedule 2 of Statutory Instrument No. 220 of 2010, the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010, that were contained in earlier drafts; if his attention has been drawn to the fact that one of the recognised accountancy bodies has made representations on this matter seeking discussions on the decision to delete these paragraphs to which they did not receive any reply from his Department in advance of the signing of the regulation; and if he will make a statement on the matter.

Minister for Enterprise, Trade and Innovation (Deputy Batt O'Keeffe): Directive 2006/43/EC was transposed by means of S.I. No. 220 of 2010 on 20th May, 2010. No amendments have been made to the Regulations since and no paragraphs have been deleted from Schedule 2 of S.I. No. 220 of 2010.

In June 2007, the Department established a group consisting of the six Recognised Accountancy Bodies (RABs) and the Irish Auditing and Accounting Supervisory Authority (IAASA) to assist with the transposition of the Directive. The group met at regular intervals and considered each of the Articles of the Directive in detail. The Department undertook a formal written consultation in July 2008 in relation to Articles 9, 11 and 12 concerning optional derogations from standards of knowledge, education, competence and training for auditors.

The majority of the recognised accountancy bodies were strongly of the view that to avail of the derogations provided in these Articles could seriously diminish the quality and status of the professional qualification. In addition, the Irish Auditing and Accounting Supervisory Authority (IAASA), which has responsibility for promoting adherence to high professional standards in the auditing and accountancy profession, were concerned about any dilution in educational standards relating to qualification. In its view this could seriously compromise the integrity of the system of auditor qualification in Ireland. In the light of these views, it was decided not to avail of these derogations and this was communicated to the group in advance of making the Regulations.

I am aware that representations have been made by one of the recognised accountancy bodies and a reply will issue to this body on the issues raised as soon as possible.

Another example of a question for written answer seeking information about the implementation of a directive – this time more basic information – occurred in December, 2010. At one level, this example shows that parliamentary questions can be used to obtain such information. At another, given the rather fundamental nature of the information sought, the fact that a question had to be asked in order to elucidate that information may be regarded as indicating that the implementation of directives is not otherwise being systematically controlled by the Oireachtas.[270]

Deputy Kathleen Lynch asked the **Minister for Enterprise, Trade and Innovation** the current position and timeframe for the transposition of the Services Directive; and if he will make a statement on the matter.

Minister for Enterprise, Trade and Innovation (Deputy Batt O'Keeffe): The European Union (Provision of Services) Regulations 2010 (S.I. No. 533 of 2010) were signed into law by me on 10th November 2010. The Regulations give effect in Ireland to the Services Directive with the exception of the European Communities (Court Orders for the Protection of Consumer Interests) Regulations 2010 (S.I. No. 555 of 2010), which, *inter alia*, transpose Article 42 of the Directive.

269. See Vol. 711 *Dáil Debates* c. 830 *et seq.* (9 June, 2010), available online at the time of writing at http://debates.oireachtas.ie/dail/2010/06/09/00012.asp

270. See Vol. 723 *Dáil Debates* (2 December 2010), available online at the time of writing at http://debates.oireachtas.ie/dail/2010/12/02/00050.asp

The second set of Regulations also transpose Directive 2009/22/EC on injunctions for the protections of consumers' interests (codified version) and revoke the European Communities (Protection of Consumers Collective Interests) Regulations (S.I. No. 449 of 2001), which transposed the original Injunctions Directive. The Injunction Directive ensures that consumers' rights, as set out in a number of other Directives, can be protected by providing a means by which Member States can bring an action to stop any breaches of consumer rights under the Directives in question. The decision to transpose Article 42 of the Services Directive in the European Communities (Court Orders for the Protection of Consumer Interests) Regulations 2010 (S.I. No. 555 of 2010) was taken for reasons of transparency. Article 42 adds the Services Directive to the list of Directives that are covered by the Injunctions Directive.

Finally, the following is an example of a question for written answer which is of interest in that, rather than concerning the implementation of a measure already adopted at European level, it instead elicited information about the progress of negotiations in relation to a European Union directive then still only in *draft* form, and about the Irish Government's position in negotiations concerning the proposed measure.[271]

Deputy Lucinda Creighton asked the **Minister for Finance** if he will report on the progress of the Alternative Investment Fund Managers Directive; and if he will make a statement on the matter.

Minister for Finance (Deputy Brian Lenihan): The Alternative Investment Fund Managers (AIFM) Directive proposal remains the subject of intense negotiation between the European Council, the European Parliament and the European Commission. Presently, it is envisaged that the European Parliament will vote on a compromise proposal on 18 October at its plenary meeting. Ireland is working constructively in this negotiation process.

By way of background, the proposed Directive has two main aims to establish a secure and harmonised EU framework for monitoring and supervising the risks that AIFMs pose to their investors, counterparties, other financial market participants and to financial stability; and to permit, subject to compliance to strict requirements, AIFMs to provide services and market their funds across the EU's internal market (the so-called "passport").

AIFMs manage hedge funds and private equity funds as well as commodity funds, real estate funds and infrastructure funds. The proposal is essentially aimed at the managers of any investment fund not covered of the Undertakings for Collective Investments in Transferable Securities or UCITS Directive. Sovereign wealth funds are not included within the scope of the proposal.

The proposal is part of the EU's efforts to reform the financial regulation environment in Europe aimed at ensuring that the recent economic and financial turmoil is not repeated.

As has been seen, any of the above six forms of parliamentary questions is capable of being used in order to enable European policy-related issues to be aired, and to find out useful information either about the Government's conduct of European Union affairs or information to which the Government has access.

ii. Debates

European issues are also aired to a considerable extent via debates in the Oireachtas.[272] Although precise estimates of the extent to which European matters feature in Oireachtas debates are difficult to make,[273] one recent study calculated that by 14 December, 2010, approximately 213 Dáil debates in that calendar

271. See Vol. 717 *Dáil Debates* (30 September 2010), available online at the time of writing at http://debates.oireachtas.ie/dail/2010/09/30/00054.asp

272. See generally on the topic of debates, Caffrey, *loc. cit.*, n. 247, p. 268 *et seq.*

273. To take one example, an amendment proposed regarding a proposed motion on the Seanad order paper on 15 December, 2010 sought to commend the Government "for its management of the economy which means that Ireland has emerged from recession with the strongest GDP growth rate of the euro area in the first quarter of this year". Opinions might legitimately differ on whether a comparative reference to a sub-group of EU members involves European Union matters featuring in Oireachtas debates.

year had involved discussion of specific EU issues.[274] Furthermore, the same study indicated that, in 2010, only 12 of the 100 sitting-days of the Dáil were days on which no EU issues were raised.[275] European issues were, it is reported, raised most often in debates on the order of business (64 times), followed by debates on legislative Bills (49 times), debates on motions (which are a mechanism used for debating matters for decision by the House) [276] (33 times), adjournment debates (which take place at the end of business each day [277]) (31 times) and statements (which are a mechanism used for dealing with matters which do not require a decision by the House (16 times).[278]This kind of analysis is purely quantitative, not qualitative, however, and it should be borne in mind that more useful and thorough debate may be conducted on a motion or statement rather than on the order of business, even if European issues surface more often in the latter kind of debate.

A flavour of the manner in which European matters can surface in a debate on the order of business is given in the following exchange, which took place in January, 2010.[279]

Minister for Finance (Deputy Brian Lenihan): It is proposed to take No. *a*13, motion re membership of committees; No. *b*13, motion re referral of papers to the Joint Committee on Health and Children; No. 24, statements on the mid-west task force; No. 13, motion re proposal that Dáil Éireann notes the report of the Joint Committee on European Scrutiny, EU Scrutiny Report No. 29: COM (2009) 499, 500, 501, 502 & 503 – Draft legislative package on reforming the EU's financial supervisory and regulatory framework; and No. 23, Planning and Development (Amendment) Bill 2009 [*Seanad*] – Second Stage (resumed)…

…**An Ceann Comhairle:** Is the proposal for dealing with No. 24 agreed to? Agreed. Is the proposal for dealing with No. 13 agreed to?

Deputy Enda Kenny: I agree with it. I will not have an opportunity to speak on this debate but I call on the Minister for Finance to note that I have raised the matter of European scrutiny with the Taoiseach and Tánaiste on a number of occasions. Under existing facilities and prior to the Lisbon treaty we did not have the capacity to examine the way particular directives were transposed into Irish law, as against being transposed into law in other countries. This has a particular impact in a number of areas. In the context of this report, which is important, and now that the Lisbon treaty has been passed, I call for the Joint Committee on European Scrutiny to have the opportunity to take a small number of directives and examine the way they have been transposed into law here, because there are implications for the smooth running of business and for the operation of a number of sectors in Ireland. This should be feasible now that the Lisbon treaty has been passed. I recommend this proposal strongly as I will not have an opportunity to contribute to the debate.

274. Unpublished research conducted by European Movement Ireland for the purposes of its *Accountability Report 2010.* I am grateful to Andrea Pappin and Noelle O'Connell for having brought this to my attention.
275. *Ibid.*
276. Presumably meaning motions not fitting into the other categories listed in the text above. These could include *e.g., ad hoc* motions on current political issues or even motions of no confidence in the Government. (See more generally on motions, Gallagher, *loc. cit.*, at n. 2 above, pp. 215-216. A motion might also be moved to note a European-related Committee report. Such motions make take some time to come before one of the Houses. The Seanad order paper for 15 December, 2010 referred to a motion to note the Report of the Joint Oireachtas Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, copies of which had been laid before the Seanad five months earlier.
277. See more generally Caffrey, *loc. cit.*, at n. 247, p. 269.
278. *Ibid.* Debates on requests to move adjournments (six occasions), on private members' business (three occasions), on referrals to Joint Committees (two occasions) and on adjournment matters (once) reportedly provided the remaining occasions on which European issues were debated by the Dáil in 2010. An example of private members's time being used for a European-related purpose was the motion listed in the Seanad Order of Business on 15 December, 2011 moved by all Fianna Fáil Senators that "Seanad Éireann supports the Government in their endeavours to improve fish quotas for Irish fishermen in the light of the annual reviews due this week.; and supports the minister and government in their negotiations in the review of the Common Fisheries Policy.
279. Vol. 700 *Dáil Debates* c. 581 *et seq.* (28 January 2010) (available online at the time of writing at http://debates.oireachtas.ie/dail/2010/01/28/00004.asp)

Deputy Brian Lenihan: Deputy Kenny makes a fair point. I take it he is referring to the issue of whether it is implemented by statute or regulation and it is important that there should be parliamentary involvement in that. I will draw it to the attention of the Taoiseach.

Deputy Joe Costello: On the same issue, it is very welcome that we hold a debate on an item coming through from the Joint Committee on European Scrutiny. I welcome the measure and I wish to see it extended, as we all do, with the enhanced role promised under the Lisbon treaty. Will the Minister for Finance –

An Ceann Comhairle: These points have been heard. The Deputy will have an opportunity to make them during the debate.

Deputy Joe Costello: There are two directives being signed at present, the services directive, which is very controversial, and the flooding directive. They are being passed into Irish law by statutory instrument without the slightest involvement of the House.

An Ceann Comhairle: The Deputy will have the opportunity to make those points during the debate.

Deputy Joe Costello: We are beginning the process of the enhanced role of the national Parliament through the Lisbon treaty and at this point the Government is doing the exact opposite.

An Ceann Comhairle: Is the proposal for dealing with No. 13 agreed to? Agreed.

As regards adjournment debates, these usually take place at the end of each day's business. Four matters – which are submitted in advance by members – are selected for debate. Each member gets five minutes to make his contribution and the Minister has the same amount of time to reply.[280] As the following sample extract from a March 2010 debate shows,[281] issues of European policy are sometimes raised in such debates:

Deputy Andrew Doyle: The background to this matter is a question I raised in regard to the €7 million competitiveness measures in respect of the food development initiative introduced recently by Government, the objective of which is to improve food sector competitiveness in exports markets. The reality is that unless something is done to address the serious devaluation of sterling, this will count for nothing and will be money down the drain... This goes beyond food and food exports ... We cannot devalue or deal with this because we are part of the euro and the restrictions on us in this regard.

I wish to make two suggestions. Will the Minister of State present a case to the EU for assistance on the grounds that our food sector is at a major competitive disadvantage owing to the devaluation of sterling by our neighbour, the UK? This creates serious trade distortions in respect of cross-Border trade and for our exports. It is a competition issue which should be addressed by the Irish Government and the EU before the food production sector is irreparably damaged and jobs in the sector are lost forever. The second line of support is the availability of a State-backed credit insurance scheme which would assist exporting companies in dealing with increased costs. A similar scheme is already in place in Hungary, France, Belgium, Sweden, Holland, Austria, Germany and Luxembourg. In recognition of the difficulty of exports across the EU, the European Commission has, in response to a parliamentary question by Mairead McGuinness, MEP, simplified the rules and application procedure for countries seeking sanction to put in place a credit insurance scheme.

The €7 million competitiveness measures are supposed to protect jobs and viable companies and businesses across the food exporting sector. Unless we put in place a credit insurance scheme, this will count for nothing. Has the Minister of State any intention of supporting the food and drinks industry group, IBEC, which has made a strong case for the introduction by Government of a viable export credit insurance scheme? While the Government has introduced all sorts of initiatives, including innovation funds and policies, not one job has been saved or created as

280. See generally Caffrey, *loc. cit.,* at n. 247, p. 269.
281. Vol. 704 *Dáil Debates* c. 936 *et seq.* (11 March, 2010), available online at the time of writing at http://debates.oireachtas.ie/dail/2010/03/11/00021.asp

a result. This is an indigenous sector. Surely, we can introduce measures already streamlined and approved by the EU to protect an industry worth protecting and which can sustain and create more jobs. I look forward to hearing the Minister of State's response.

Deputy Tony Killeen: I thank Deputy Doyle for raising this matter. Underlying this matter on the Adjournment is of course the effect of currency volatility, in particular in respect of sterling and Irish food exports. As the Deputy will be aware, national currency adjustments are not possible for Ireland or other members of the euro group. While Ireland successfully pressed for targeted EU market management measures in the milk sector in 2009, EU funding is not available to aid the food sector in a single member state. EU state aid rules preclude export subsidies and currency assistance within the Single Market. This has a greater impact on Ireland than on other euro member states as 44% of Irish exports go to the UK, our nearest market and one with similar consumer and retail demands. In the face of this challenge, the industry has shown great resilience. In volume terms exports in 2009 were at 97% of 2008 levels despite a 13% fall in value.…

Requests for an adjournment debate to discuss urgent matters of national importance that have arisen suddenly are regularly made by TDs under Standing Order 32. This is in spite of the fact that such requests are almost never granted.[282] Given the remoteness of the possibility that such requests will be acceded to, it seems that the requests themselves are, for the most part, simply being used by TDs as a convenient method of drawing attention to issues of concern. That European themes can feature among such issues is shown by the following example, which dates from November, 2010.[283]

An Ceann Comhairle: Before coming to the Order of Business I propose to deal with a number of notices under Standing Order 32 and I will call on Deputies in the order in which they submitted their notices to my office.

Deputy Olivia Mitchell: I seek the adjournment of the Dáil under Standing Order 32 to debate the following urgent matter: the need for a debate on the current bailout crisis; the need for solidarity in the face of external attack; the need to debate all our other options no matter how appalling they may be; the possible potential of an immediate all-party budget to defuse the current crisis; the absolute imperative of resisting external pressure to seek a bailout which would lock us indefinitely into penal bond rates; the need to remind other countries, particularly Germany, that it was low interest rates, especially in the 1990s, dictated by Germany and designed to support its sluggish economy even while it was inappropriate to ours that at least in part caused our property bubble and the requirement for it to reciprocate that support and to respect our national determination to retain our sovereignty.

Deputy Aengus Ó Snodaigh: Ba mhaith liom an Dáil a chur ar athló chun déileáil leis an rún seo atá gá plé leis go práinneach: ...to welcome the recent Irish efforts at European level to prevent Israeli access to the personal data of Irish citizens; to note that such concrete efforts by Ireland to stand up to Israel are long overdue; to express deep disappointment and anger that those efforts were unsuccessful and to call on the Government to take a further stand and demand the European Commission give due regard to the democratically expressed wishes of the Irish people and halt the planned agreement.

Deputy Seán Power: I seek the adjournment of the Dáil under Standing Order 32 to debate the following urgent matter: the recent speculation that Ireland will be forced to accept assistance from the stability fund and the International Monetary Fund, IMF.

An Ceann Comhairle: Having given the matters full consideration, I do not consider them to be in order under Standing Order 32.

282. According to Caffrey's calculation, permission for such a debate has been granted nineteen times since the foundation of the State. (See generally Caffrey, *loc. cit.,* at n. 247, p. 268.)

283. Vol. 722 *Dáil Debates* (16 November, 2010), available online at the time of writing at http://debates.oireachtas.ie/dail/2010/11/16/00014.asp

As regards motions, the level of debate on these can vary considerably. It may be surprising to learn that motions on approval of the exercise of options under Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice in compliance with Article 29.4.7° of the Constitution[284] are frequently adopted without any debate at all, as the following example from June, 2010, demonstrates. It was followed by a motion – also adopted without debate – approving the terms of the Council of Europe Convention on Action against Trafficking in Human Beings in accordance with Article 29.5.2° of the Irish Constitution.[285]

Minister of State at the Department of the Taoiseach (Deputy John Curran): I move:

That Dáil Éireann approves the exercise by the State of the option or discretion under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, to take part in the adoption and application of the following proposed measure: a proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA,

a copy of which was laid before Dáil Éireann on 28 April 2010.

Question put and agreed to.

Minister of State at the Department of the Taoiseach (Deputy John Curran): I move:

That Dáil Éireann approves in accordance with Article 29.5.2 of Bunreacht na hÉireann, the terms of the Council of Europe Convention on Action against Trafficking in Human Beings, a copy of which was laid before Dáil Éireann on 13 May 2010.

Question put and agreed to.

In relation to debates on statements, Caffrey has observed that "matters that do not require a decision by the House are often dealt with by means of statements. Under [Standing Order] 43, a member of the Government who has given prior notice to the Ceann Comha irle can make a statement to the House on any matter."[286] One particularly important form of such statement in the field of European affairs has been the formal statement which the Taoiseach makes to the Dáil after European Council meetings explaining – from an Irish national perspective – what has taken place. The tradition of such statements dates from the origins of the European Council in the mid-1970s, and the statements, which are responded to by the leaders of the principal Opposition parties, have been described as "a useful device to ensure that deputies are aware of the major issues as they evolve on the EU agenda and on the outcome of EU deliberations at the highest level."[287] In 2010, the European Council met five times, (with a further informal meeting of Heads of State or Government taking place in Brussels on 11 February,

284. See para. (iii) thereof.
285. Vol. 712 *Dáil Debates* c. 636 *et seq.* (17 June 2010) available online at the time of writing at http://debates.oireachtas.ie/dail/2010/06/17/00005.asp
286. Caffrey, *loc. cit.*, at n. 247, p. 271.
287. See Laffan, *loc. cit.*, at n. 112, p. 256.

2010).[288] The then Taoiseach, Brian Cowen, briefed the Dáil on four occasions, each of them after the European Council in question.[289]

A recent debate – one which took place on 13 April, 2011 – serves as a typical example of a debate following a European Council meeting. On this occasion, an 85-minute debate was agreed to by the House, consisting of ten minutes' worth of statements by the party leaders. The debate began with the Taoiseach reading a prepared statement and ended, after statements by other party leaders, with some twenty minutes of questions. The European Council to which this debate related had actually taken place on the 24th and 25th March, a fact which meant the Council conclusions at issue were far from fresh by the time the debate was held.

The programme for government for the 31st Dáil – *Government for National Recovery 2011-2016* – outlined a departure from established practice in that the Taoiseach would be obliged, henceforth, to brief the Oireachtas prior to attending European Council meetings.[290] This new approach was deployed in relation to the European Council meeting of 24th and 25th March, 2011.[291]

6. Other Miscellaneous Aspects of the Oireachtas' Role in Relation to European Affairs

i. The Role of the Seanad

The Seanad, as the upper House of the Oireachtas, has 60 members, 43 of whom are elected by five quasi-vocational panels[292] (comprising only 1,092 individuals for the 2011 elections[293]), three of whom are elected by graduates of the National University of Ireland and a further three by graduates of Trinity College Dublin, and eleven of whom are appointed by the Taoiseach. As the vocational panels are politicised, and the Taoiseach's appointees are also chosen with an eye to the party political situation, the Seanad itself is, like the Dáil, dominated by party politics rather than being the largely vocationally representative institution it was originally intended to be.[294] Legally the weaker of the two Houses, it meets slightly less often than the Dáil (97 days as opposed to 100 in 2010), for shorter hours (613 hours as opposed to 843 in 2010),[295] and its members are less well paid.

Most of what has been said of procedural arrangements in relation to the Dáil also applies in relation to the Seanad. Some further observations may be added here, however. The first is that, historically,

288. See the European Council's own website on this at http://www.european-council.europa.eu/council-meetings/conclusions.aspx?lang=en
289. European Movement Ireland , *op. cit.,* n. 119 at p. 47.
290. *Loc. cit.,* n. 45 at p. 26 thereof.
291. See generally Vol. 730 Dáil Debates 30 (13 April 2011) at p. 30 *et seq.*
292. The five panels are the Agriculture, Culture and Education, Industry and Commerce, Labour and Public Administration panels.
293. These, under the Seanad Electoral (Panel Members) Acts 1947 and 1954, were members of Dáil Éireann, the outgoing Seanad Éireann and county, urban and city councillors from around the country. The complete electoral roll is to be found online at http://www.oireachtas.ie/documents/publications/2011Electoralroll.pdf
294. M. Manning, "*The Senate*" in MacCarthaigh and Manning, *op. cit.,* at n. 101 above at p. 153 *et seq.*
295. See Houses of the Oireachtas Commission, *op. cit.,* at n. 81, p. 16.

the Seanad has occasionally shown itself open to playing a role in European affairs going beyond that of the Dáil. In the previous chapter, it was noted that, in 1978, a facility was introduced enabling the second and subsequent Joint Committees on the Secondary Legislation of the European Communities to arrange for their reports to be debated in either House, or both Houses, if it so requested. Far more debates took place in the Seanad than the Dáil as a consequence. Thus, for example, during the second (1982-1987) Fine Gael-Labour Coalition led by Garret FitzGerald, 25 of 36 reports (i.e. 69 per cent of the total) produced by the Joint Committee were debated in the Seanad, whereas only one was debated in the Dáil.

Secondly, many proposals have been made down through the years for the Seanad to be given a greater role in relation to European affairs. Manning has observed that throughout its history "and with varying intensity the role and existence of the Seanad has been questioned", making it "the only major Irish constitutional institution whose very existence has been called into question on several occasions".[296] It is the fusion of (a) this need to find a *raison d'être* and a role for the Seanad with (b) the need to improve the performance of the Oireachtas by securing accountability in relation to European policy that has fuelled calls for increases in the Seanad's role in the European Union policy field.

Examples of such calls include that found in the lengthy and impressive 2004 *Report on Seanad Reform*, which was produced by the Sub-Committee on Seanad Reform of the Seanad Éireann Committee on Procedures and Privileges.[297] This recommended that the Seanad should be responsible for four specific functions in relation to European Union affairs:

> "1. assessing legislative and other proposals going before EU Councils;
> 2. reviewing draft EU legislation of major national policy importance;
> 3. providing Irish MEPs with a domestic forum to discuss EU issues and account for their work; and
> 4. developing a medium-term policy framework to address the challenges and opportunities facing Ireland in Europe over the next ten years." [298]

The November 2008 report of the Sub-Committee on Ireland's Future in the European Union – Ireland's Future in the European Union: Challenges, Issues and Option – which was issued in response to the initial 'No' vote in the June 2008 referendum concerning the Lisbon Treaty,[299] also made - rather different - recommendations concerning the Seanad, advocating "that a new panel be constituted in the Seanad for a minimum of 5 Senators to be nominated on the basis of experience in EU affairs. Senators elected from this panel would participate in the Oireachtas European Committees. They should also build relations with the Irish MEPs as well as directly with the EU institutions."[300]

296. *Loc. cit.,* n. 294, p. 153.
297. Available online at http://www.oireachtas.ie/documents/committees29thdail/subcomonseanadreform/Report_on_Reform_of_the_Seanad.pdf
298. *Ibid.,* pp. 56 *et seq.*
299. Available online at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/committees30thdail/j-europeanaffairs/Sub_Cttee_EU__20081127.doc
300. See para. 41 of the Sub-Committee's recommendations.

The July 2010 Report of the Sub-Committee on Review of the Role of the Oireachtas in European Affairs[301] made a more extensive series of recommendations regarding the Seanad. Some of what the Sub-Committee called for concerned both Houses. Examples of this include its call for regular debates in both the Seanad and the Dáil on important European Union-related issues,[302] and its recommendation that the Standing Orders of both Houses be amended so that reports of the Joint Committee on European Affairs and the Joint Committee on European Scrutiny – which had been specifically recommended for debate in the Houses – be taken for debate within a certain period of time.[303]

However, some of the recommendations of the Sub-Committee were also Seanad-specific. Hence the Sub-Committee also recommended that selected sectoral committees be obliged to report to the Seanad periodically in respect of their European Union-related work. The idea was that the chairperson of the sectoral committee would be expected to present the committee's work to the Seanad and to hold a discussion with the Seanad. The motivation for this, in addition to facilitating debate on European Union issues within the Seanad, was to help ensure that sectoral committees actually carried out European Union-related work which was referred to them304 – something which, as has already been seen in the text above, certainly gave rise to difficulties in the 30th Dáil.

Another more novel recommendation by the Sub-Committee was that the Seanad play an important role in the area of monitoring the transposition of European Union directives. To facilitate such a role, the Sub-Committee proposed that the earlier recommendation of the Sub-Committee on Ireland's Future in the European Union that a new five-member Seanad vocational panel be established "should be actively considered. Alternatively, the Taoiseach's nominees for the Seanad should be influenced by a desire to appoint individuals with a background in EU affairs."[305]

None of these recommendations - many of which have a great deal to recommend them - has been implemented. In the meantime, debate has shifted from the idea of reform of the Seanad to the idea of its total abolition. Hence the programme for government agreed in 2011 – *Government for National Recovery 2011-2016* – commits the Government to prioritise putting to referendum a number of urgent parliamentary reform issues, including abolition of the Seanad. Should the Seanad be abolished as an institution, this would obviously have serious ramifications in the field of European policy. For example, whether (and how) the Dáil alone would be capable of providing sufficient members to enable Oireachtas committees to carry out the kind of work done by them in the field of European affairs, much less improve upon it, would remain to be seen. The platform for reform in the field of European policy which the Seanad might otherwise provide, and which was envisaged in the above-mentioned reports, would also disappear.

301. Available at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EuropeanAffairs/SubCtteeRoleofOireachtas/Publications/Report_of_the_Sub-Committee_on_Review_of_the_Role_of_the_Oireachtas_in_European_Affairs.pdf
302. Para. 41 of the Sub-Committee's report.
303. Recommendation 19 of the Sub-Committee.
304. See generally Recommendation 20 of the Sub-Committee and the associated text.
305. Recommendation 24 of the *Report of the Sub-Committee on Review of the Role of the Oireachtas in European Affairs* (*Op.cit.,* n. 95).

ii. The Oireachtas National Parliament Office in Brussels [306]

Since 2004, the Houses of the Oireachtas have been represented in Brussels by the Oireachtas National Parliament Office, which operates independently of the Permanent Representation to the European Union. The purpose of the office is to support the Oireachtas in its European Union-related functions. It provides information on what is happening in Brussels. In theory, it should also provide information about the views of the Oireachtas and its Committees to Brussels but, in reality, the traffic is largely in one direction. The Office is a one-man affair, consisting of an Oireachtas representative who is drawn from the staff of the Houses of the Oireachtas Service.[307] Like other national parliamentary representations, the Office is provided with accommodation in the European Parliament's building (although it is independent of that institution).

The Oireachtas representative is one of a total of 26 national parliamentary representatives.[308] The representatives hold meetings every Monday morning – a practice which facilitates the informal exchange of information. Access to such information is crucial to the effective functioning of the subsidiarity mechanism which, it will be recalled, works on a collective basis.

Among the other significant activities of the Office are: the provision of a bulletin every two or three weeks called *Latest Developments in the European Parliament and the EU*, [309] which summarises information on European legislation and other matters of relevance to Ireland; providing feedback on issues at the Monday morning meetings of national parliament representatives; and providing reports for Oireachtas Committees on the European Commission's Annual Policy Strategy and Annual Legislative Work Programme.

iii. Europe Day

Europe Day 2006 [310]

The original commemoration of Europe Day by the Oireachtas took place in 2006 when both Houses met in joint session one day after the 56th anniversary of the Schuman Declaration of 9 May, 1950 – the Declaration that led to the establishment of the European Coal and Steel Community in 1952 and ultimately today's European Union.

The idea of marking Europe Day had emerged two years earlier in COSAC, when European affairs committees in EU member state parliaments had each agreed to do this in their own fashion. The direct

306. See generally http://www.oireachtas.ie/viewdoc.asp?fn=/documents/committees30thdail/j-EuropeanAffairs/OirParlOffice document1.htm
307. And who returns there when finished his period in Brussels.
308. At the time of writing, the one remaining European Union member state without a representative (Malta) is about to send one as well.
309. This is circulated to members of the European affairs committees, committee clerks, and the chairs of both Houses.
310. See generally, Joint Oireachtas Committee on European Affairs, *Report on Europe Day in Dáil Éireann*, (10 May 2006) (Twelfth Report). See also Joint Committee on European Affairs, *Bringing The European Union and the Citizen Closer Together – Reflections on Europe Day in Dáil Éireann* (10 May 2006) available online at http://www.oireachtas.ie/documents/committees29thdail/europeanaffairsreports/Reflections_Europe_Day.pdf

idea of arranging a joint session seems to have come from the Joint Oireachtas Committee on European Affairs and was taken up by the then Ceann Comhairle.[311]

The Oireachtas Joint Committee for European Affairs set up a dedicated website which invited members of the public to submit comments and questions on EU issues for discussion during the special session.[312]

On the day in question, an opening address was given by the Ceann Comhairle, following which the European Commissioner for Agriculture and Rural Development, Mariann Fischer Boel, addressed members of both Houses, including the Taoiseach, and took questions from the floor of the Dáil Chamber. Questions from the floor to the Commissioner covered a wide gamut of issues including those of security, the difficulties which would arise when the current CAP arrangements ended, the drop in the numbers of those engaged in agriculture, and the need to simplify procedures and regulations affecting farmers.[313] The Houses were also addressed by the Chairman of the Joint Committee on European Affairs[314] and by the Minister for Agriculture and Food.[315]

According to the Committee's own report,

> "the joint session, which lasted for eight hours, also had discussions on: development issues following an opening statement by Minister Conor Lenihan TD; on migration (introduced by the Vice-Chairman of the Joint Committee on European Affairs, Deputy Barry Andrews); as well as the operation of the European Union (Scrutiny) Act 2002, under which the Joint Committee for European Affairs examines EU legislative proposals (introduced by Deputy Bernard Allen, Chairman of the Committee's sub-committee on European Scrutiny). During the session European Affairs Minister Noel Treacy TD introduced the Second Stage of the European Communities (Amendment) Bill 2006 to provide for the accession of Bulgaria and Romania to the EU. This was passed by both Houses subsequently."[316]

Europe Day 2011

The idea of involving the Oireachtas in marking Europe Day was revived on 9 May, 2011. The day included a one-hour special Dáil sitting addressed first by the Taoiseach, then by the European Commissioner for Research Innovation and Science, Ms. Máire Geoghegan-Quinn, followed by statements by party leaders

311. Dr. Rory O'Hanlon TD.
312. More than sixty questions or comments were received and many of these were raised in the course of the day-long debate. The Joint Committee arranged for written replies to each question to be prepared by relevant Government Departments and sent to the individuals who submitted them. (See generally, Joint Oireachtas Committee on European Affairs, *Report on Europe Day in Dáil Éireann*, (10 May 2006) (Twelfth Report), p. 1) A list of the questions and of the replies sent to them was available online at the time of writing at http://www.oireachtas.ie/viewdoc.asp?DocID=6075&CatID=121 See generally concerning Europe Day 2006, http://www.oireachtas.ie/ViewDoc.asp?DocId=-1&CatID=121&m=e
313. *Ibid.*, pp. 1-2.
314. Mr. John Deasy TD.
315. Ms. Mary Coughlan TD.
316. Joint Oireachtas Committee on European Affairs, *op. cit.* n. 312, p. 3.

(some of the leaders of smaller groups being strongly hostile to the European Union [317]). Unlike in the 2006 event, no questions were taken by the Commissioner. The Dáil then adjourned for the day, and a meeting of the specially-set Select Committee on Europe Day, which was held in the Dáil Chamber. This comprised of opening remarks by the Chairman of the Select Committee,[318] then contributions by Irish MEPs followed by questioning of MEPs and a statement by the Minister of State for European Affairs.[319]

The event – which had to be arranged at very short notice[320] – may be judged to have been successful to the extent that the attention of legislators was focused, at least briefly, on broad issues regarding Irish membership of the European Union, and a genuine exchange of views on the European Union was generated by the holding of the event. There was a good attendance in the public gallery, including several members of the diplomatic corps. However, the entire process was extremely brief, with the plenary session and the Committee meeting lasting, together, only three hours. Given the ferocity of some of the verbal attacks against the European Union made in some of the statements, the second Oireachtas contribution to Europe Day can not be described as having been entirely celebratory in nature. Neither however, unlike its 2006 predecessor, was it intended to be practical in the sense of generating any decision or measure constituting an input into policy-making process at either Irish or European level. Indeed, the leader of the Opposition criticised it on precisely this ground observing that

> "the Programme for Government's proposal was for a week long debate to be held in the week in which Europe Day falls. This was to be structured as a formal review of the Commission's Annual Work Programme and/or priorities for the future... it is a pity the Government has not tabled any substantive item for the committee to discuss. As a result, today will be another in an increasingly long line of sessions given over to statements."[321]

The success of other aspects – the format of the question and answer session involving MEPs[322] and the fact that the Commissioner did not remain to answer questions by Committee members,[323] for example – was also questioned by some of the participants.

Such criticisms notwithstanding, a renewed start has clearly been made. Given Government commitments and that more time will be available to prepare the event in future, it seems likely that, in the lifetime of the 31st Dáil, the programme of European-related Oireachtas activities surrounding Europe Day may be expanded in future years. According to the present programme for government – *Government for National Recovery 2011-2016*

> "the EU Commission produces its Draft Annual Work Programme in October/November for the following year. We propose that the week in which the 9th May, "Europe Day," falls will be the occasion

317. The text of the debate is reproduced at http://debates.oireachtas.ie/EPS/2011/05/09/00003.asp
See comment in G. Barrett, "*We Can't Turn Our Back on EU*" Sunday Business Post, 22 May 2011.
318. Mr Joe Costello TD. The fact that Seanad elections had taken place only some days earlier precluded the possibility of an Oireachtas Committee being set up.
319. Ms. Lucinda Creighton TD.
320. See the remarks of the chairman of the Select Committee at the outset of the Committee debates (reproduced at http:/debates.oireachtas.ie/EPS/2011/05/09/00003.asp) as well as the remarks of the Minister of State for European Affairs.
321. Mr. Micheál Martin TD.
322. See the observations in this regard of Mr. Proinsias de Rossa, MEP.
323. See the observations in this regard by Deputy Seán Ó Fearghaíl.

for a week-long parliamentary debate on Ireland's priorities within the EU. The debate will review the national progress in implementing the current year's work programme and focus on identifying the major issues of concern to Ireland for inclusion on the following year's EU Draft work Programme."[324]

ANNEX TO CHAPTER 2:

REPORTS OF THE JOINT COMMITTEE ON EUROPEAN AFFAIRS IN THE 30TH AND 29TH DÁLA IN REVERSE CHRONOLOGICAL ORDER

30TH DÁIL

Report	*Date of Report*
Report on a Motion regarding the Loans to Ireland from the European Financial Stability Facility and the European Financial Stability Mechanism	December 2010
Report of the Study Visit to the EU Institutions Brussels 27-28 September 2010	December 2010
Fourteenth Report: European Monetary Union: Challenges and Options	July 2010
Joint Sub-Committee[325] on the Review of the Role of the Oireachtas in European Affairs: Review of the Role of the Oireachtas in European Affairs	7 July 2010
Thirteenth Report: The Need for Strong EU Financial Regulation	June 2010
Twelfth Report: Report on the Joint Committee's Contribution to the European Commission on the future "EU2020" Strategy	February 2010
Joint Report[326] on Implementation of the Lisbon Treaty: Interim arrangements on the enhanced role of the Houses of the Oireachtas	8 December 2009
Eleventh Report: The position of Minority Groups in Europe – an examination of Roma policies in the European Union	December 2009

324. *Op. cit.,* n. 45, p. 26.
325. Of the Joint Committee on European Affairs and the Joint Committee on European Scrutiny
326. Of the Joint Committee on European Affairs and the Joint Committee on European Scrutiny

Report	*Date of Report*
Tenth Report: Joint visit to Gaza, Israel and the Palestinian Territories 20-24 July 2009	October 2009
Seventh Report: The Lisbon Treaty & Workers' Rights	September 2009
Sovereign Wealth Funds – European Union Policy, Implications and Recommendations for Ireland	16 July 2009
Seventh Report: Report on the Joint Committee's Contribution to the European Commission on its Annual Policy Strategy 2010	July 2009
EU Scrutiny Report No. 4: Report on the Joint Committee's Contribution to the European Commission on its Green Paper on agricultural product quality: product standards, farming requirements and quality schemes, COM (2008) 641	May 2009
Sixth Report: Report of the Joint Committee's comments on the recommendations of the High Level Group on Financial Supervision in the EU	April 2009
EU Scrutiny Report No. 5: Report on the Joint Committee's Contribution to the European Commission on its Green Paper 'Towards a secure, sustainable and competitive European Energy Market' COM (2008) 782	April 2009
Report on Study Visit to the Western Balkans: Croatia & Bosnia-Herzegovina – EU Accession and a European Perspective	March 2009
Fourth Report: Report on Sources of EU Funding	March 2009
Report on a Motion regarding the Situation in Gaza	January 2009
Report on a Motion regarding the EU / Israel Association Agreement	January 2009
Report of the Sub-Committee on Ireland's Future in the European Union: Ireland's Future in the European Union: Challenges, Issues and Options	27 November 2008
EU Scrutiny Report No. 3 Report on the Joint Committee's Contribution to the European Commission on its White Paper on the Integration of EU Mortgage Credit Markets, COM(2007)807	September 2008

Report	*Date of Report*
Third Report: Report on the Joint Committee's Contribution to the European Commission on its Annual Policy Strategy 2009	July 2008
Report On The Lisbon Reform Treaty	29 May 2008
First Report: Interim Report on the Lisbon Reform Treaty	February 2008

29TH DÁIL

Report	*Date of Report*
Thirteenth Report: Report on Migration and Integration Policy in Ireland	March 2007
Sub-Committee[327] on European Scrutiny: Fourth Annual Report on the Operation of the European Union (Scrutiny) Act 2002: 1 January 2006 to 31 December 2006	March 2007
Annual Report 2006	January 2007
Annual Report 2002/2003	July 2006
Annual Report 2004	May 2006
Sub-Committee[328] on European Scrutiny: Third Annual Report on the Operation of the European Union (Scrutiny) Act 2002: 1 January 2005 to 31 December 2005 to 31 December 2005	May 2006
Twelfth Report on Europe Day in Dáil Éireann	10 May 2006
Annual Report 2005	April 2006
Eleventh Report on Migration: An Initial Assessment of the Position of European Union Migrant Workers in Ireland post 2004.	April 2006

327. Of the Joint Committee on European Affairs and the Joint Committee on European Scrutiny.
328. Of the Joint Committee on European Affairs and the Joint Committee on European Scrutiny

Report	*Date of Report*
Sub-Committee[329] on European Scrutiny: First Annual Report on the Operation of the European Union (Scrutiny) Act 2002: 10 October 2002 to 31 December 2004	October 2005
Tenth Report: Statement on Human Rights in Zimbabwe	March 2005
Ninth Report on the Lisbon Strategy (Part 2): Strengthening the social dimension	4 March 2005
Eighth Report on Turkey and Accession to the European Union	December 2004
Report on Motion re Turkish Membership of the European Union	November 2004
Sixth Report on Motion re. Middle East Peace Process	November 2004
Sub-Committee[330] on European Scrutiny: First Annual Report on the Operation of the European Union Scrutiny Act 2002 10 October 2002 to 31 December 2003	October 2004
Report on the Lisbon Agenda	April 2004
Final Report: Advisory Group on role of the European Court of Auditors	October 2003
Report on the proposal to display the European Flag for the duration of Ireland's Presidency of the European Union	16 July 2003
Institutions of the European Union – Suggestions for Change by the EU Convention on the Future of Europe: Chairman's Overview following Discussions by the Joint Committee with the Irish Convention Delegates in relation to the drafting of the proposed Convention Constitutional Treaty	9 April 2003
Report of the Advisory Group to the Joint Committee on European Affairs	4 February 2003
Report by John Bruton T.D., Member On The Convention On The Future Of Europe To The Joint Committee On European Affairs	29 November 2002

329. Of the Joint Committee on European Affairs and the Joint Committee on European Scrutiny
330. Of the Joint Committee on European Affairs and the Joint Committee on European Scrutiny

CHAPTER 3

Europe Expects: The Evolving Precepts of the European Union Regarding the Role of National Parliaments

1. *Introduction*

i. National Parliaments – a Role in the Shadow of the Treaties

It is difficult to understand the response of the Oireachtas to the demands made of it by the process of European integration without first analysing what European Union law and the European Union as a whole expect or demand of national parliaments. The purpose of this chapter, therefore, is to examine the norms which the European Union has established regarding the role of national parliaments, and how these norms have evolved over time.

National parliaments can be said to have been present at the birth of what is now the European Union. Each of the three original constitutive Treaties required ratification by the national parliaments of all six founding member states. Another Treaty – the 1952 European Defence Community Treaty – foundered for the want of such ratification, failing to secure passage through the French *Assemblée Nationale.* The founding Treaties of the three original Communities, however, had very little to say about national parliaments. Although, as shall be seen in the text below, some role was envisaged for them, overall, national parliaments have been well described as having remained largely in the shadow of the Treaties.[1]

Several possible reasons can be identified for this early neglect of national parliaments in the Treaty provisions, which were to remain unamended for over four decades.

A first reason was that, even if it is true that the ultimate aims of the European integration process clearly always went far beyond the merely economic,[2] the early central focus of the European integration process was, nonetheless, on solving a particular set of market and industrial problems – developing a

1. To borrow the phrase of Pennera (See C. Pennera, "*Les parlements nationaux dans le système de l'union européenne*" in G. Carlos Rodriguez Iglesias and L. Ortiz Blanco (eds.) *The Role of National Parliaments in the European Union* 79 at p. 122 (referring to their status right up to the time of the coming into force of the Lisbon Treaty in December, 2009).
2. See in this regard the text of the Schuman Declaration, available online at the time of writing at http://europa.eu/abc/symbols/9-may/decl_en.htm

common market in coal and steel and, later, the creation of a more general common market allied to the development of the nuclear industry. The institutional challenges presented to existing national structures by this European-level process of market creation were not the immediate main focus.

Secondly, the nature of the potential challenge posed to national parliaments by European integration was initially less than it later became. What has become the European Union was a sectoral organisation to begin with, in its scope if not in its ultimate aims.

Thirdly, as Kiiver has pointed out, there existed an ideological reason for the early failure to address the role of national parliaments with much energy. This was that, according to the classical federalist logic of European integration, efforts for developing European parliamentarianism were felt to be more appropriately concentrated on the European Parliament, rather than on national parliaments.[3] Insofar as the European integration process gave rise to concerns relating to democracy, it was therefore felt that the solution to these issues lay in compensating at European level for consequent disempowerments of national parliaments and not in finding ways to re-empower national parliaments.

Certainly, during the first few decades of the European integration process, the democratising impulse seemed to have been taken up with the gradual empowerment of the 'Common Assembly'. The idea of the Assembly itself, had emerged as something of an afterthought in the negotiations on the 1951 European Coal and Steel Treaty, having featured nowhere in the Schuman Declaration of the previous year.[4] What was initially dubbed the 'Common Assembly' chose to rename itself the 'European Parliamentary Assembly' on its first sitting in 1958,[5] and then adopted the name 'European Parliament' in 1962 – a choice of name officially ratified only with the coming into force of the Single European Act in 1987.[6] Direct elections followed in 1979, and the introduction of the 'co-operation' legislative procedure by the Single European Act in 1987 began the movement toward a greater Parliamentary role in the legislative process. The 'co-decision' legislative procedure, introduced by the Maastricht Treaty in 1993, gave the European Parliament legislative powers largely equivalent to those of a national parliament where the procedure applied. All subsequent Treaties, including the Lisbon Treaty, have increased the scope of the application of co-decision and added to the powers of the European Parliament.

The European Parliament's own view of the European-level vocation of national parliaments still tends to emphasise the role of the latter institutions in filling in gaps where the European Parliament has little or no say, such as the common foreign and security policy and the European security and defence policy.[7] However, as will be seen in the text below, from about the beginning of the 1990s, a shift in

3. P. Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building* (Kluwer, The Hague, 2006) at p. 77.
4. See Article 7 of the now-expired European Coal and Steel Community Treaty of 1951.
5. The Treaty establishing the European Economic Community referred to it only as the 'Assembly'. It renamed itself the 'European Parliamentary Assembly' by resolution adopted on 20 March, 1958. See *Résolution de l'Assemblée parlementaire européenne relative à la dénomination de l'Assemblée* of that date (Official Journal 24 April, 1958, p. 6.)
6. See *Résolution de l'Assemblée parlementaire européenne, du 30 mars 1962, relative à la dénomination de l'Assemblée* (Official Journal 26 April, 1962, p. 1045).
7. See *e.g.*, paras. 17 to 19 of *European Parliament resolution of 7 May 2009 on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon* (2008/2120(INI)) available online at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0388&language=EN and see more generally Kiiver, *op. cit.* at n. 3, at pp. 80 to 90.

the overall democratisation debate took place, with a role alongside an increased role for the European Parliament now being widely envisaged for national parliaments.

A fourth reason for the continued neglect of national parliaments in the early years of the European Union was that, though it was appreciated that there was a need to remedy any erosion in national-level democratic controls, political incentives to do much about the issue were lacking – national executives, not legislatures, were in the driving seat when it came to negotiating treaties and, thus, had little immediate reason to query changes which provided them with more power.

Fifthly, the reality could not be escaped that conceiving and then securing agreement on the appropriate level of involvement on the part of national parliaments in a multi-level organisation such as the European Union has presented, and continues to present, formidable challenges of both an intellectual and a political nature. It has taken a long time to even identify these challenges and much more for any broad agreement to be reached on proposed solutions. The *sui generis* nature of the European Union has arguably required a *sui generis* approach in relation to any involvement of national parliaments. The gradual identification of the role of national parliaments in the overall structure can be seen as involving an evolutionary process of trial-and-error and, like all such processes, has needed time in order to achieve a degree of finality (and, arguably, requires still more time).

Sixthly, and finally, the empowerment of national parliaments by European law is an issue which even now tends to be bedevilled by sensitivities regarding national sovereignty.[8] Resistance from within member states – including from within certain national parliaments themselves – to intervention by European laws with internal constitutional arrangements concerning national parliaments has also contributed to the highly cautious approach taken to the involvement of European Union law in this area. Evidence of the attitude of member states is to be seen in the Preambles to the respective Treaty Protocols on the role of national parliaments agreed upon by the member states at Amsterdam in 1997 and Lisbon in 2007, both of which began by carefully recalling that either the fact [9] or manner [10] of scrutiny was "a matter for the particular constitutional organisation and practice of each Member State". Further, the wording of Article 12 of the Treaty on the Functioning of the European Union (agreed upon at Lisbon) had to be toned down. In the face of opposition from, among others, the House of Commons European Scrutiny Committee, it was necessary to soften the language of the Article from its originally-proposed prescriptive wording to the effect that "national parliaments *shall* contribute actively to the good functioning of the Union" [11] to its present, merely descriptive, wording to the effect that "national parliaments contribute actively to the good functioning of the Union". In other words, national parliamentary resistance to reforms proposed at the 2007 Lisbon intergovernmental conference was seen even though the interference in question actually involved empowering national parliaments in relation to national executives.[12]

8. See text below at n. 117.
9. In the case of the Amsterdam Protocol on the Role of National Parliaments in the European Union.
10. In the case of the Lisbon Protocol on the Role of National Parliaments in the European Union.
11. See Annex I ("Draft IGC Mandate") to the Presidency Conclusions of the Brussels European Council, 21-22 June, 2007, at p. 26 thereof. (Emphasis added.)
12. See the example cited in n. 117 below.

ii. The Genesis of Change

Notwithstanding the lack of prominence given to national parliaments in the founding Treaties of what is now the European Union, a case could always be made for according them a greater role in European matters, not only at national level, but also at European level.[13] In some respects, this case has strengthened over time. Of course, advancing the process of democratisation has also been sought *via* the ongoing process of empowerment of the European Parliament. Yet, as time has gone on, this approach has not seemed to suffice for various reasons, including the lack of identification between national electorates and the European Parliament, and low participation rates in European Parliament elections.

Among the many arguments which could be raised [14] in favour of increasing the role of national parliaments is that doing so would serve the purposes of defusing arguments of a democratic deficit at European Union level, bridging the gap between the European Union and its citizens, and assisting in increasing European Union transparency.

Further empowerment of national parliaments could also be argued to be necessary as a means of avoiding the escape of national executives from democratic control due to the transfer of decision-making power to European level – an argument which gained in force with the gradual increases over time in the competences of what is now the European Union.

The growth, over time, in the use of qualified majority voting arguably added to the case for a role for national parliaments. The idea here was that a European-level role for national parliaments might compensate for a loss of democratic control at national level in outvoted states.

Another argument for the empowerment of national parliaments relating to the evolution of the European Union was that, from the time of the 1979 advent of direct European Parliament elections, it became necessary to compensate for the rupturing of links with national parliaments – links which had existed when the membership of the Parliament was made up of delegates from national parliaments as opposed to directly elected representatives.

Whether for the above reasons or not, an unmistakeable trend towards the gradual development and consolidation of the legal provisions concerning national parliaments has been witnessed over time. What is now the European Union has moved from (a) a situation (which existed under the original Treaties) characterised by a near-complete absence of provisions which specifically addressed national parliaments to (b) the adoption of a non-legally binding Declaration concerning them at Maastricht to (c) the adoption of a Protocol relating to them – equal in legal value to Treaty text – at Amsterdam to (d) extensive and specific (if overlapping) provisions in two Protocols annexed to the doomed Constitutional Treaty, as well as scattered provisions in the Constitutional Treaty itself to (e)

13. See generally A. Maurer, "*National Parliaments in the European Architecture: From Latecomers' Adaptation towards Permanent Institutional Change?*" in A. Maurer and W. Wessels (eds.), *National Parliaments on their Ways to Europe: Losers or Latecomers?* (Nomos Gesellschaft, Baden-Baden, 2001) 27 at pp. 65 *et seq.*

14. Kiiver has usefully divided the arguments which can be made for increasing the role of national parliaments between those which can be raised from a national constitutional perspective and those which can be raised from a European perspective (See in relation to this distinction, Kiiver, *op. cit.* at n. 3 above, Chapter 3.)

the retention of these measures under the Treaty of Lisbon, and the addition to them of a general article on national parliaments in the text of the Treaty itself. The rate of reform has not, however, been uniform. It took four decades for the underlying seismic shifts in opinions pertaining to the appropriate role of national parliaments in the European Union to make themselves visible in the conclusions of intergovernmental conferences. The temporal peaks (or perhaps plateaus) in the debate since then have been the negotiation and ratification of the Treaty of Maastricht from 1990 to late 1993, the negotiation and ratification of the Treaty of Amsterdam from 1995 to 1999, and the lengthy process of Treaty reform that began with the Convention on the Future of Europe in 2001 and finally played itself out with the coming into force of the Lisbon Treaty at the end of 2009.

In this chapter it is proposed to examine in more detail this evolution of the legal rules at European Union level which relate to national parliaments.

2. *In The Beginning: Examining the Original Legal Position of National Parliaments in Detail*

The position envisaged for national parliaments in the process of European integration – under the Treaties as originally drafted – was a strictly limited one. National parliaments were not initially afforded a key role in the day-to-day life of the Community. A role was foreseen for national parliaments, but in only one respect was this role expressly set out in the Treaties. Article 138(1) of the 1957 Treaty establishing the European Economic Community stipulated that the common Assembly of the (then) three Communities,[15] which was later to be referred to as the European Parliament, "shall be composed of delegates whom the Parliaments shall be called upon to appoint from among their members in accordance with the procedure laid down by each Member State." National parliaments were thus expected to supply the membership of the Assembly and, in this way, an institutional link was established between them and the institutions of the Community.

(Interestingly, Article 138(1) of the EEC Treaty differed in this from Article 21 of the earlier European Coal and Steel Community Treaty of 1951 which had envisaged the breaking of this umbilical cord to national parliaments, providing that

> "the Assembly shall be composed of delegates whom the parliaments of each of the member States shall be called upon to designate once a year from among their own membership, *or who shall be*

15. The European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community.

elected by direct universal suffrage, according to the procedure determined by each respective High Contracting Party."[16])

This connection to national parliaments proved an enduring one and was only broken two decades later, in 1979, with the advent of direct elections to the European Parliament – an event which provided an additional incentive to find an alternative role for national parliaments in European governance.

Four other provisions seemed to envisage a role for national parliaments, but in none of these cases was this role referred to in so many words. First among these was Article 236 of the EEC Treaty, which envisaged that future amendments to the Treaty should enter into force only "after being ratified by all Member States in accordance with their respective constitutional rules". Such rules would, of course, normally involve national parliamentary intervention.

Analogously, Article 237 provided that agreements between the existing member states and applicant states, governing conditions of admission of the latter to the Community,[17] had to "be submitted to all the contracting States for ratification in accordance with their respective constitutional rules". This, too, would normally involve a national parliamentary role under the various national legal regimes.

A third provision, Article 201, provided for the Council laying down so-called 'own resources' provisions for the Community "whose adoption it shall recommend to the Member States in accordance with their respective constitutional rules". Again, this would normally be expected to involve a role for national parliaments.

Finally, the provision of Article 146 that the Council should be "composed of representatives of the Member States" and that "each Government shall delegate to it one of its members" seemed to anticipate some role for national parliaments, given that the normal relationship between Governments and parliaments is that the former are accountable to the latter.

In sum: of the five cases cited above, only in one was the role of national parliamentarians made explicit – the composition of the Assembly stipulated by Article 138(1) – and this, in itself, was a role subsequently to be lost following the onset of direct elections in 1979. Of the other - implicit - roles,[18] three (namely, the ratification of Treaty amendments, of accessions of new member states, and of 'own resources' decisions), although obviously important, did not impinge in any way on the daily activities of what is now the Union.19 The remaining role of holding national ministers accountable was at the discretion of the member states and, in most member states, its exercise remained for many years in the realms of legal fiction. Maurer and Wessels have correctly described the situation which existed at the outset

16. The composition of the Assembly was not the only way in which a relatively radical approach was taken at an early point with this institution. Subsequent to the 1952 signing of the European Defence Community Treaty (fated, however, never to achieve ratification), the foreign ministers of the then six member states turned to the Assembly to request the drawing up of a draft Treaty establishing a European Political Community, a task which it duly carried out. In doing this work the Assembly was referred to as the *Ad Hoc* Assembly. Later developments in the democratisation of the European Union – such as direct elections to the European Parliament and giving it some role in the process of Treaty drafting - were thus prefigured in the 1950s.
17. And providing for necessary Treaty amendments.
18. Those stipulated under Articles 201, 236 and 237.
19. See Pennera, *loc. cit.*, at n.1 above at p. 122.

of the European construction as one in which national parliamentarians were offered "opportunity structures" to obtain access to institutions such as the European Parliament and the Council.[20] This did not mean that the opportunities presented were exploited with any great effectiveness, however.

3. *From Maastricht to Nice: The Evolution of the Legal Position of National Parliaments*

Treaty changes were slow to arrive in the wake of the coming into force of the original constitutive Treaties. Time, nevertheless, did not stand still. A generalised desire to involve national parliaments more actively in European affairs seemed to take hold towards the end of the 1980s. Concerns were beginning to be expressed at this time about the existence of a possible democratic deficit, and the involvement of national executives at EU level was obviously reducing the scope of national parliamentary power.[21] Certain extra-Treaty developments provided evidence of a desire to bring national parliaments into the equation. Hence, some studies, reports and proposals emerged from the European Parliament at around this time.[22] The most prominent manifestation of extra-Treaty interparliamentary cooperation, however, was the setting up in 1989 of an interparliamentary conference made up of parliamentarians specialising in European matters. This conference later came to be known as COSAC (which now stands for the Conference of Community and European Affairs Committees of Parliaments of the European Union). COSAC originally had no existence outside of its biannual meetings which would take place in whichever country currently held the Council Presidency and at which six members would represent each parliament (including the European Parliament). Since 2003, however, COSAC has had a small secretariat. It continues to operate to this day as a forum for the exchange of information and best practice rather than as a player in the policy-making process at European level.

Another extra-Treaty development from this time – albeit a less enduring one – consisted of the so-called Assizes of Rome, held over four days in November, 1990, in the Italian Chamber of Deputies. The Assizes drew together 173 parliamentarians from the member states, as well as 85 MEPs.

Such developments were highly significant. As we shall see, at least part of the evolution of the position of national parliaments in the legal order of the European Union has involved extra-Treaty developments, which have then sometimes come to be formally recognised or built upon in subsequent Declarations, Protocols and even Treaty provisions.

20. A. Maurer and W. Wessels, "*National Parliaments after Amsterdam: From Slow Adapters to National Players?*" in Maurer and W. Wessels, (eds.), *op.cit.* at n. 13 above, 425 at p. 453.
21. *Ibid.*, at p. 434
22. *E.g.,* the *Resolution on relations between the national parliaments and the European Parliament, 16 February, 1989* (OJ C 69 (20 March, 1989) 149 and the so-called Carvinho report of 24 September, 1991.

i. Declaring the Way Ahead: the Treaty of Maastricht

The first recognition by an intergovernmental conference of the need for an increased role for national parliaments finally occurred with the agreement on the Treaty of Maastricht in 1993.[23]

No binding legal rule – much less any norm of Treaty status – was agreed at Maastricht. However, the intergovernmental conference which adopted this Treaty also adopted two legally non-binding Declarations: Declaration (No. 13) on the Role of National Parliaments in the European Union and Declaration (No. 14) on the Conference of the Parliaments. The adoption of these Declarations was a move proposed by the United Kingdom and France.[24]

In Declaration No. 13, it was asserted that

> "the Conference considers that it is important to encourage greater involvement of national Parliaments in the activities of the European Union.
>
> To this end, the exchange of information between national Parliaments and the European Parliament should be stepped up. In this context, the governments of the Member States will ensure, *inter alia*, that national Parliaments receive Commission proposals for legislation in good time for information or possible examination.
>
> Similarly, the Conference considers that it is important for contacts between the national Parliaments and the European Parliament to be stepped up, in particular through the granting of appropriate reciprocal facilities and regular meetings between members of Parliament interested in the same issues."

If the member states really wanted national Parliaments to receive Commission proposals for legislation "in good time for information or possible examination", however, Declaration No. 13 seemed very far from the ideal way to ensure this. Apart from its lack of legally-binding force, the Declaration also promoted the idea of *governments* ensuring that national parliaments received legislative proposals in good time – without, however, suggesting either that there should be any sanctions for failure to do so or that any deadline apply. The effect of of this approach would be that governments could decide if and when to inform national parliaments of proposals.

The statement in the Declaration that the Conference considered it important for contacts between national Parliaments and the European Parliament to be "stepped up" referred to the fact that such contacts had already been taking place in the framework of COSAC since 1989.

23. The Treaty of Maastricht (also known as the Treaty on European Union) was signed on 7 February, 1992, and entered into force on 1 November, 1993.
24. See R. Corbett, *The Treaty of Maastricht: From Conception to Ratification* (Cartermill International, London, 1993), 61-62; and A. Krekelberg, "*The Reticent Acknowledgment of National Parliaments in the European Treaties: A Documentation*" in Maurer and Wessels (eds.), *op.cit.* at n. 13 above, 477 at p. 477.

Weakly worded and lacking any legally-binding force although it was, it has, nonetheless, been claimed that Declaration No. 13 did have some political effects. In reality, proof of causation is hard to establish but, at European level, an intensification of the debate on parliamentary involvement in European affairs did take place between national parliaments and the European Parliament in the wake of the adoption of the Declaration.[25] Moreover, at domestic level, Maurer and Wessels have chronicled the fact that, subsequent to Maastricht, improvements were effected in the information rights of the vast bulk of the member states' national parliaments.[26] Yet it must be said that, for some time afterwards, such rights were generally restricted to the obtaining of *ex post facto* information, rather than the right to participate in important policy decisions. A very considerable increase in interparliamentary co-operation – demonstrated by an increase in meetings of various kinds – also came about in the mid-1990s.[27]

The other relevant Declaration adopted at Maastricht was Declaration (No. 14) on the Conference of the Parliaments which provided as follows:

> "The Conference invites the European Parliament and the national Parliaments to meet as necessary as a Conference of the Parliaments (or 'Assises').
>
> The Conference of the Parliaments will be consulted on the main features of the European Union, without prejudice to the powers of the European Parliament and the rights of the national Parliaments. The President of the European Council and the President of the Commission will report to each session of the Conference of the Parliaments on the state of the Union."

This particular "attempt to strengthen the collective role of the national parliaments on the European level"[28] proved unsuccessful. Although the November 1990 Assizes of Rome which had inspired this Declaration had succeeded in agreeing a declaration in which several proposals for Treaty reform were called for, a feeling that the European Parliament had taken over the event had led to several parliaments declining to repeat the experiment. Declaration No. 14 did nothing to change this, and the invitation set out in it notwithstanding, no such Conference was ever held.[29]

Jumping ahead briefly, we may note that the aversion to a collective role of this nature for national parliaments was to prove enduring. A decade later, in the 2001-2003 Convention on the Future of Europe – which produced the draft Constitutional Treaty – the support of Convention Chairman Valery Giscard d'Estaing for the revived Assizes with the modified name of a 'Congress of the Peoples of Europe' proved insufficient to persuade the Convention to support the idea.

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25. See Krekelberg, *loc. cit.* at n. 24 above, at p. 477.
26. See Maurer and Wessels, *loc. cit.* at n. 20 above, p. 440.
27. Maurer, *loc. cit.* at n. 13 above at pp. 27 and 52.
28. Krekelberg, *loc. cit.* at n. 24 above, p. 477.
29. See M. Knudsen and Y. Carl, "*COSAC - its Role to Date and its Potential in the Future*" in G. Barrett (ed.), *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and other Member State Legislatures* (Clarus Press, Dublin, 2008) 455 at p. 463.

The process of ratification of the Maastricht Treaty also had positive effects for some national parliaments. It was used to confer extra rights on them, in some cases via national constitutions.[30] The more critical attitude of the public to European integration, which revealed itself dramatically for the first time in the process of ratification of the Maastricht Treaty, was probably also conducive, in the long term, to the acceleration of the process of parliamentary empowerment.[31]

Matters should not be exaggerated. As has already been noted, many national parliaments' rights, post-Maastricht, continued to be confined, for the most part, to the *ex post facto* acquisition of information without any acquisition of influence over the management of European policy by national executives. Something of an awakening seems to have occurred on the part of many national parliaments, however, as to the need to convince their governments to improve matters in this regard. And there was change: at about this time the provision of supplementary information by governments (in the form of short commentary sheets, for example) now became the norm in several member states.[32]

ii. Protocols and Parliaments: the Treaty of Amsterdam

From the mid-1980s, change to the constitutive Treaties of what is now the European Union was to become a relatively frequent occurrence. Less than three years after the entry into force of the Treaty of Maastricht, the member states signed the next major amending Treaty – the Treaty of Amsterdam.[33] The Treaty negotiations leading to the Amsterdam accord once again addressed the topic of national parliaments, focusing on the issues of (a) the creation of some form of European platform for the scrutiny role of national parliaments and (b) the question of interparliamentary cooperation.[34]

It was noticeable that the negotiations on the Amsterdam Treaty attracted more interest and higher expectations on the part of member state parliaments than those which had led to earlier Treaties[35] and, this time, the member states ultimately proved amenable to agreement on an instrument which had binding legal force, unlike the mere Declaration which had emerged at Maastricht. The Final Act of the intergovernmental conference at which the Treaty of Amsterdam was adopted thus also adopted a Protocol – Protocol (No. 13) on the Role of National Parliaments in the European Union. Protocols, it should be noted, are deemed to form an integral part of the Treaty to which they are annexed. In other words, they have exactly the same legal force as Treaty provisions.[36]

The Protocol [37] has been well described by Ferrer as having "[contained], on the one hand, rules

30. See Maurer, *loc. cit.* at n. 13 above, p. 51.
31. See for examination of the relevance to strong parliamentary scrutiny of a critical public attitude to European integration, T. Raunio, "*Holding Governments Accountable in European Affairs: Explaining Cross-National Variation*" (2005) 11 Journal of Legislative Studies 319.
32. See Maurer and Wessels, *loc. cit.* at n. 20 above, at p. 441.
33. The Treaty of Amsterdam was signed on 2 October, 1997, and came into force after ratification by all of the member states on 1 May, 1999.
34. Krekelberg, *loc. cit.* at n. 24 above, p. 478.
35. Maurer, *loc. cit.* at n. 13 above at p. 53.
36. See in relation to the Amsterdam Protocol, the then Article 311 of the EC Treaty (which was Article 239 prior to its renumbering at Amsterdam).
37. Which was annexed to the Treaty on the European Union and the Treaties establishing the European Communities (as they then were). See Preamble to Protocol.

to facilitate the indirect participation of national parliaments in Community affairs, articulating mechanisms of information for them. On the other hand, it [confirmed] COSAC as a mechanism for their direct or collective participation."[38] The Protocol was correspondingly divided into two Titles, one relating to information which national parliaments were to be provided with, the other pertaining to COSAC.[39]

Title I of the Protocol (styled 'Information for National Parliaments of Member States') provided that

> "1. All Commission consultation documents (green and white papers and communications) shall be promptly forwarded to national parliaments of the Member States.
>
> 2. Commission proposals for legislation as defined by the Council in accordance with Article 151(3) of the Treaty establishing the European Community, shall be made available in good time so that the government of each Member State may ensure that its own national parliament receives them as appropriate.
>
> 3. A six-week period shall elapse between a legislative proposal or a proposal for a measure to be adopted under Title VI of the Treaty on European Union being made available in all languages to the European Parliament and the Council by the Commission and the date when it is placed on a Council agenda for decision either for the adoption of an act or for adoption of a common position pursuant to Article 189b or 189c of the Treaty establishing the European Community, subject to exceptions on grounds of urgency, the reasons for which shall be stated in the act or common position."

These provisions contained several inherent limits. In the first place, they did not go very far. Their focus on indirect participation by national parliaments at European level involved an implicit acceptance that there should be no *direct* role for national parliaments there. Secondly, even as regards the idea of an indirect role for national parliaments, Title I did no more than facilitate such a role via the transmission of information and the introduction of delays before legislative proposals could be placed on the Council agenda. However, governments were in no way to take up the implicit invitation to inform or engage in meaningful discussions with their parliaments. Thirdly, and linked to the previous observation, the wording of the Protocol[40] carefully avoided imposing an obligation on member state governments (or anyone else, for that matter) even to carry out the most basic informative task of transmitting legislative proposals to national parliaments. Fourthly, the Protocol's definition of the legislative proposals which were to be made available in good time so as to facilitate their transmission

38. C. Ferrer, "*The Role of National Parliaments in the EU after the Lisbon Treaty*" in J. Roy and R. Domínguez (eds.) *Lisbon Fado: The European Union under Reform* (Miami-Florida European Union Center of Excellence and the Jean Monnet Chair of the University of Miami)145 at p. 149.

39. It also had a Preamble which displayed a certain ambivalence about European-level empowerment of national parliaments, with member states recalling that "scrutiny by individual national parliaments of their own government in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State" (see Paragraph 1 of the Preamble) but also expressing a desire "to encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on matters which may be of particular interest to them." (See Paragraph 2 of the Preamble.)

40. With the use of wording like "as appropriate" in Article 2.

was narrow – thus, implicitly excluding a wide variety of measures such as those falling under the remit of the Union's Common Foreign and Security policy, documents relating to enhanced cooperation, documents prepared for the Council by member states, and Schengen-related material.[41]

As regards Title II of Protocol No. 13 – styled "The Conference of European Affairs Committees" – it gave COSAC Treaty-level recognition for the first time,[42] formalising and making official its role. According to the provisions of Title II,

> "4. The Conference of European Affairs Committees, hereinafter referred to as COSAC, established in Paris on 16-17 November 1989, may make any contribution it deems appropriate for the attention of the institutions of the European Union, in particular on the basis of draft legal texts which representatives of governments of the Member States may decide by common accord to forward to it, in view of the nature of their subject matter.
>
> 5. COSAC may examine any legislative proposal or initiative in relation to the establishment of an area of freedom, security and justice which might have a direct bearing on the rights and freedoms of individuals. The European Parliament, the Council and the Commission shall be informed of any contribution made by COSAC under this point.
>
> 6. COSAC may address to the European Parliament, the Council and the Commission any contribution which it deems appropriate on the legislative activities of the Union, notably in relation to the application of the principle of subsidiarity, the area of freedom, security and justice as well as questions regarding fundamental rights.
>
> 7. Contributions made by COSAC shall in no way bind national parliaments or prejudge their position."

These provisions of Title II were the ultimate successors of earlier proposals made by France, the United Kingdom and Denmark, and the conclusions of the October 1996 Dublin COSAC.[43] They also marked the culmination of a long-standing earlier debate, led by France and other intergovernmentally-minded states, concerning the possible institutionalisation at European level of a second chamber composed of national parliamentarians or, at the very least, the institutionalisation of COSAC.[44] The fear among other member states that such proposals would undermine the European Parliament, threaten the institutional balance of the Union and distort its democratic foundations, however, led to the failure of these ambitions for a second chamber or for a radically strengthened COSAC. The highly circumscribed provisions of Title II proved to be as far as the member states were prepared to go. Their limitations

41. Maurer, *loc. cit.* at n. 13 above at p. 62.
42. See text immediately below concerning Article 311 of the EC Treaty.
43. See the Conclusions of the XV COSAC held in Dublin, 15-16 October, 1996 (and available online at the time of writing at http://www.cosac.eu/en/meetings/15/doc/), paragraph 3 of which stated COSAC's belief that "Declaration 13 should be reinforced by the Inter-Governmental Conference, by including it in the Treaty, to ensure that Governments follow through on their commitments under the Declaration and that the National Parliaments have a period of at least four weeks for examining all proposals of relevance to the legislative process." See more generally, Maurer, *loc. cit.* at n. 13 above at p. 58.
44. A good summary of some of the main elements in this debate is to be found in Maurer, *loc. cit.* at n. 13 above, pp. 58-62.

were to be seen in the provision for member states forwarding draft legal texts to COSAC only "by common accord", in restricting COSAC's right to examine justice and home affairs initiatives solely to proposals "which might have a direct bearing on the rights and freedoms of individuals", and in the express stipulation that COSAC contributions were in no way to bind national parliaments.

The weak nature of the provisions concerning COSAC should have come as no surprise. Nor should the fact that, ultimately, the impulse seen in Amsterdam for European-level democratisation of the European Union was to find a more effective outlet via the extension of the co-decision procedure. In practical terms, empowering COSAC would always have been deeply problematic. For one thing, the power of national delegations to represent the views of their respective parliaments varied considerably. For another, a body such as COSAC, made up of MPs from national parliamentary committees responsible for handling EU affairs, was hardly likely to have the expertise to deal with more sectoral issues such as justice and home affairs.[45]

Subsequent to Amsterdam, COSAC proved unable to take much advantage of the provisions of the Protocol (which turned out to be the high water mark in Treaty provisions concerning this body). Rather than becoming a locus for activities of the kind envisaged in Title II of the Protocol, COSAC instead remained largely a forum for the exchange of information and best practice.[46]

The Amsterdam intergovernmental conference fell far short of meeting the high expectations of the foremost advocates of an increased role for national parliaments. Nonetheless, it was significant as a point in time at which it came to be seen clearly that enhancing the powers of the European Parliament would no longer suffice as the near-exclusive focus of the process of ridding the European Union of any democratic deficit.

iii. The Prospect of Change: the Treaty of Nice

Debate on the appropriate level of national parliamentary participation in the affairs of the European Union did not, of course, end at Amsterdam. Agreement on the Amsterdam Treaty was followed, within a few short years, by that on the Treaty of Nice, which itself entered into force in 2003 and which was the last constitutive treaty to come into force before the Treaty of Lisbon in 2009.[47] The Nice Treaty focused intensely on institutional reform prior to the forthcoming enlargement of the European Union to incorporate the Central and Eastern European states, Cyprus and Malta. However, it made no provisions at all in relation to national parliaments. Notwithstanding this, the Nice intergovernmental conference is of significance for present purposes, as the Final Act of the conference involved, *inter alia,* the adoption of Declaration (No. 23) on the Future of the Union – a document which marked the starting point of a process of change in the way the European Union dealt with national parliaments.

The Declaration on the Future of the Union called for a deeper and wider debate about the future of the European Union. It expressly anticipated a process of wide-ranging discussions with, *inter alia*,

45. *Ibid.* at p. 64.
46. See more generally, Knudsen and Carl, *loc. cit.* at n. 29 above.
47. *The Treaty of Nice* was signed on 26 February, 2001, and entered into force on 1 February, 2003.

representatives of national parliaments.[48] It also expressly anticipated that the European Council, at its meeting in Laeken in December, 2001, would agree on a declaration containing appropriate initiatives for the continuation of this process.[49] Paragaph 5 of Declaration No. 23 stated that

> "5. The process should address, inter alia, the following questions: how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity; the role of national parliaments in the European architecture."

According to the Declaration, a new Conference of the Representatives of the Governments of the Member States was to be convened in 2004 to address these issues, among others, with a view to making corresponding changes to the Treaties.[50]

Although admittedly followed by another paragraph which concerned issues of democracy in a more general way,[51] Paragraph 5 involved a narrowing of a debate which might otherwise have been usefully extended to cover the nature of parliamentary democracy in the European Union. The reason for the focusing-in on national parliaments in particular seems to have been the concentration – by German Foreign Minister Joschka Fischer, French President Jacques Chirac and British Premier Tony Blair in their *printemps constitutionnel* speeches – on finding a role for national parliaments in the European order. These speeches may have had little effect on the substance of the Nice Treaty itself, but they formed a definite backdrop when it came to considering the post-Nice agenda.[52]

It is worth recording that an attempt had been made at Nice to amend the Amsterdam Protocol on National Parliaments so as to remedy some of its deficiencies. The COSAC meeting held in 2000, during the French Presidency, had already put forward clear proposals on how exactly this could be done,[53]

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48. See paragraph 3 thereof.
49. Paragraph 4 of the Declaration.
50. Para. 7 of the Declaration.
51. Paragraph 6 of the Declaration also concerned issues of democracy, but in a more general way, stating that "Addressing the abovementioned issues, the Conference recognises the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States."
52. For the three speeches in question, see J. Fischer, *From Confederacy to Federation:Thoughts on the Finality of European Integration,* speech delivered at Humboldt University, Berlin, 12 May, 2000 (available online at the time of writing at http://centers.law.nyu.edu/jeanmonnet/papers/00/joschka_fischer_en.rtf); J. Chirac, *Notre Europe,* speech delivered before the German Bundestag, Berlin, 27 June, 2000 (available online at the time of writing at http://www.bundestag.de/kulturundgeschichte/geschichte/gastredner/chirac/chirac2.html); and the untitled address given by Tony Blair to the Polish Stock Exchange, Warsaw, 6 October, 2000 (available online at the time of writing at: http://www.ena.lu/address given_tony_blair_polish_stock_exchange_warsaw_october_2000-2-18822.pdf). See further A. Maurer and W. Wessels, "*Major Findings*" in Maurer and Wessels, *op. cit.,* at n. 13 above, 17 at p. 32.
53. See Contribution adopted by the XXIII COSAC, Versailles, 16-17 October, 2000 (available online at the time of writing at http://www.cosac.eu/en/meetings/23/doc2/doc1/), paragraph 5 of which stated: "5. Considering that national Parliaments, together with the European Parliament, are a constituent element of the democratic legitimacy of the European institutions, COSAC urges the Inter-governmental Conference to modify part I of the Protocol on the role of national Parliaments as follows: - All consultation documents and proposals for legislation from the European Commission, as well as proposals for measures under titles V and VI, should be transmitted by electronic means to each national Parliament as soon as they are adopted by the college of Commissioners; The six-week time period provided by para. 3 should also apply, except in urgent cases, to proposals for measures to be adopted under titles V of the Treaty on European Union as well as to proposals regarding interinstitutionnal agreements to which the Council is a party ; A minimum 15-day time period, or one week in urgent cases, should be observed between the final reading of a text by COREPER and the Council decision.COSAC recalls that no provision of this protocol can jeopardise the competences and prerogatives of each national Parliament as provided by its national constitutional arrangements."

but the idea of amending the Amsterdam Protocol fell victim to the unwillingness of member states to raise yet another institutional issue at the final, and already fractious, December 2000 meeting of the Nice intergovernmental conference. As a result, France and Belgium – the prime advocates at Nice of amending the Amsterdam Protocol – compromised, settling for the legislative equivalent of a post-dated cheque in the form of the Paragraph 5 declaration instead.[54]

Insofar as national parliaments were concerned, the end result of all of this was twofold. In the first place, two topics which concerned national parliaments had now been placed at the centre of a vast debate about to take place in relation to the future of the European Union and in relation to which an intergovernmental conference was to take place in 2004.[55] Secondly, it had been made clear that national parliaments themselves were now to have a role in that same debate. As will be seen below, the December 2001 Laeken Declaration was to confirm the status of national parliaments in this regard.

4. *A Decisive Moment – The Drafting by the Convention on the Future of Europe of the Treaty Establishing a Constitution for Europe*

i. The Results of the Convention: an Enduring Settlement

In the story of the position of national parliaments in the European legal order to date, the deliberations of the Convention on the Future of Europe constituted what Passos has accurately termed "the decisive moment… i.e. the time when a deep and serious discussion about the role of national parliaments in the Union took place".[56] The result of this Convention – which was established in December, 2001, and met from February, 2002, until July, 2003 – was a draft Treaty Establishing a Constitution for Europe (often referred to by the abbreviated title 'Constitutional Treaty'). This contained a considerable number of provisions enhancing the role of national parliaments. The draft provided the framework for the final version of this document – agreed upon in the subsequent 2003/2004 intergovernmental conference[57] – which maintained the substance of the Convention's proposals concerning national parliaments.

The final version of the Constitutional Treaty was signed at Rome in 2004. However, as is well known, it was fated never to enter into force, its ratification grinding to a halt after successive referendum defeats in France and the Netherlands in May and June, 2005. After a period of reflection, the member states declared themselves in the legally non-binding Berlin declaration of March, 2007,[58] to be "united in [their] aim of placing the European Union on a renewed common basis" within a short period of time. A short intergovernmental conference began in July, 2007, with a detailed agreed mandate,[59] and the

54. See Krekelberg, *loc. cit.* at n. 24 above, p. 478; and Knudsen and Carl, *loc. cit.* at n. 29 above, pp. 469-470.
55. See Maurer and Wessels, *loc. cit.* at n. 20 above, at p. 465.
56. R. Passos, "*Recent Developments Concerning the Role of National Parliaments in the European Union*" (2008) 9 ERA Forum 25 at p. 27.
57. The conference was brought to a successful conclusion in June, 2004, under the then Irish Presidency.
58. Available online at the time of writing at http://europa.eu/50/docs/berlin_declaration_en.pdf
59. General Secretariat of the Council, IGC 2007 Mandate (11218/07 Council of the European Union, Brussels, 26 June, 2007) available online at the time of writing at http://register.consilium.europa.eu/pdf/en/07/st11/ st11218.en07.pdf

signing of the Lisbon Treaty by the member states followed on 13 December, 2007. On one hand, this was a document shorn of the constitutional trappings of the Constitutional Treaty, and one which took the alternative route of amending rather than replacing the existing Treaties. On the other, in substance, it maintained the vast bulk of the proposals of the Constitutional Treaty, including all of those relating to national parliaments, In fact, it actually enhanced these proposals to some degree in the light of the painful evidence of voter alienation which had been provided by the French and Dutch referendums. The Lisbon Treaty entered into force on 1 December, 2009, after a difficult ratification process, which involved the necessity for two referendums in Ireland. Its impact is examined in some detail below, but it suffices to note for present purposes that *all* of what was agreed in the Convention on the Future of Europe ultimately made it safely into the Treaty of Lisbon. It is, therefore, a worthwhile exercise to retrace the steps that ultimately led to the establishment of the current European norms in this area.

ii. The Constitutional Convention

a) From Nice to Laeken to the Constitutional Convention

It had long been clear that, in any future negotiation of constitutional arrangements in the European Union, the role of national parliaments would form a significant topic of discussion. Hence, as we have seen, Declaration No. 23 on the Future of the Union – annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Nice in 2001 – had already referred to the need to address "the role of national parliaments in the European architecture"[60] and, indeed, had also promised the encouragement of "wide-ranging discussions" with "representatives of national parliaments" in the process.[61]

The December 2001 Laeken Declaration on the Future of the European Union,[62] which announced the initiation of the process which led to the unsuccessful Constitutional Treaty (and, indirectly, the successful Treaty of Lisbon), went into much more detail than this. Under the heading "More democracy, transparency and efficiency in the European Union", it noted, *inter alia,* that "the national parliaments… contribute towards the legitimacy of the European project". It recalled that the Nice Declaration had "stressed the need to examine their role in European integration." The Laeken Declaration then posed a series of questions concerning the democratic legitimacy of the Union. Insofar as the role of national parliaments was concerned, it asked

> "should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European Parliament has no competence? Should they focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?"

60. A copy of this Declaration is to be found at the time of writing at http://eur-lex.europa.eu/en/treaties/dat/12001C pdf/12001C_EN.pdf at p. 85. See in particular para. 5 thereof.
61. Para. 3 of the Declaration
62. Available online at the time of writing at http://european-convention.eu.int/pdf/lknen.pdf

The Laeken Declaration also announced the decision of the European Council to convene a Convention on the future of the Union, with former French President Valery Giscard d'Estaing acting as Chairman of the Convention. It proclaimed that, apart from Giscard d'Estaing and two Vice-Chairmen,[63] the Convention would be composed of "15 representatives of the Heads of State or Government of the Member States (one from each Member State), 30 members of national parliaments (two from each Member State), 16 members of the European Parliament and two Commission representatives." Representatives of national parliaments thus constituted by far the biggest bloc in the Convention, and contributed close to half its membership (30 members out of 66). Indeed, the influence of national parliaments went further than this, as they contributed two out of 12 members of its steering body, the Praesidium. (One of these two was former Irish Taoiseach, John Bruton).[64] The Convention, the Chairman of which frequently referred to its task as being analogous to that of the 1787 Philadelphia Convention which drafted the American Constitution,[65] was thus established in December, 2001, met for the first time in February, 2002, and concluded its work in July, 2003, with the production of a Draft Treaty establishing a Constitution for Europe.

Although a significant and, it would now seem, enduring contribution to the involvement of national parliaments at European level, the modern form of the Convention was not the first opportunity national parliamentarians had been given to involve themselves in European-level Treaty drafting. After the 1952 signing of the Treaty establishing the European Defence Community, the foreign ministers of the six member states of the European Coal and Steel Community had requested that the Common Assembly draw up a draft Treaty establishing a European Political Community. It duly did this, although – as was noted at the outset of this chapter – the debacle of the European Defence Community Treaty's non-ratification by the French *Assemblée Nationale* meant that this even more ambitious document was fated never to be signed, much less ratified.[66]

The 2001-2003 Convention on the Future of Europe was not even the first use of a Convention in a European Union context. This honour belonged to the 1999-2000 Convention, which drafted the Charter of Fundamental Rights on the European Union. In June, 1999, responding to the perceived need to make the overriding importance and relevance of fundamental rights more visible to the Union's citizens,[67] the Cologne European Council had conferred on a specially-convened Convention the task of drafting a Charter of Fundamental Rights of the European Union. The Convention, chaired by former German President Roman Herzog, had held its first meeting in December, 1999, and adopted the draft Charter in October, 2000.[68] The fate of the Charter was, as is well known, ultimately to be determined by Article 6(1) of the Treaty on European Union (as amended at Lisbon), which now provides that the European Union recognises the rights, freedoms and principles set out in the Charter[69] "*which shall have the same*

63. Former Italian premier Giuliano Amato and former Belgian Prime Minister Jean-Luc Dehaene.
64. The other was British Labour Party politician Gisela Stuart, a former junior health minister.
65. See P. Norman, *The Accidental Constitution: the Making of Europe's Constitutional Treaty* (second edition, EuroComment, Brussels, 2005) at p. 24.
66. In doing this work, the Common Assembly was referred to as the 'Ad Hoc Assembly'.
67. See Annex IV of the Conclusions of the Presidency, Cologne European Council, 3 - 4 June, 1999, available online at the time of writing at http://www.europarl.europa.eu/summits/kol2_en.htm#an4
68. The Charter was subsequently signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission – albeit as a merely political document - at the European Council meeting in Nice on 7 December, 2000.
69. As (slightly) adapted at Strasbourg, on 12 December, 2007

legal value as the Treaties". For present purposes, however, the important point to note is that 30 of the 71 members of the Convention that drafted this hugely significant document were representatives of national parliaments. As was the case in the later Convention on the Future of Europe, the group of national parliamentarians was, by far, the largest bloc in that particular Convention.[70]

The Convention on the Future of Europe, which was established in December, 2001, and which provided the initial draft of the Treaty Establishing a Constitution for Europe, was thus only the second modern use of the Convention process.

Conventions involving participation by national parliamentarians are set to become a permanent feature in the existence of the European Union. As will be seen in the text below, Article 48(3) of the Treaty on European Union (as amended at Lisbon) now makes express provision for the normal involvement of a Convention in the process of Treaty amendment. Moreover, it is stipulated that it is to be composed, *inter alia*, of representatives of the national Parliaments

b) The Convention on the Future of Europe: Two Working Groups Dealing With National Parliaments

Of six Working Groups set up during the Convention on the Future of Europe to focus on particular issues in more detail, one – Group IV – dealt specifically with the role of national parliaments.

However, most of the report of another Working Group *also* concerned national parliaments. This was Working Group I, chaired by Spanish MEP Íñigo Méndez de Vigo, which dealt with subsidiarity[71] and – in a conclusion with which Group IV agreed – saw a key role for national parliaments in enforcing this principle.[72] The proposals Group I made in its final report may be judged to have been highly successful in that they bear a very strong resemblance to the provisions of Lisbon Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, which have subsequently entered into force.

The report of Working Group IV, which was chaired by British MP Gisela Stuart was, as might to some extent have been expected, a more general one, although it probably did not maximise its impact, as it focused (in its own words) on the three topics of "the role of national parliaments in scrutinising governments (national scrutiny systems)", "the role of national parliaments in monitoring the application of the principle of subsidiarity" and "the role and function of multilateral networks or mechanisms involving national parliaments at the European level."[73] The first topic, however interesting, was always likely to, and ultimately did, remain largely a question under national control – as did a large part of the third topic – and the second was dealt with comprehensively by Working Group I.

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70. There were also 15 representatives of the Heads of State and Government, 16 representatives of the European Parliament and one representative of the Commission.
71. See generally European Convention, *Conclusions of Working Group I on the Principle of Subsidiarity,* CONV 286/02, Brussels, 23 September, 2002, available at the time of writing at: http://register.consilium.europa.eu/pdf/en/02/cv00/cv00286.en02.pdf
72. See *Conclusions of Working Group I on the Principle of Subsidiarity*, *loc. cit.,* para. 6, p.3. The two Working Groups held a joint meeting on the issue of subsidiarity.
73. See *Conclusions of Working Group IV on the Role of National Parliaments, loc. cit.,* para 3 of the Report.

The Working Group IV report – apart from its introductory section – had sections on 'general observations and recommendations on the role of national parliaments in the EU',[74] 'national scrutiny systems',[75] 'subsidiarity'[76] and, finally, 'multilateral networks or mechanisms involving national parliaments at the European level'.[77]

As regards its 'general observations and recommendations on the role of national parliaments in the EU', the Working Group made three recommendations. First, that

> "the future Constitutional Treaty should contain specific wording that acknowledges the importance of the active involvement of national parliaments in the activities of the European Union, in particular by ensuring the scrutiny of governments' action in the Council, including the monitoring of the respect of the principles of subsidiarity and proportionality."

Secondly, the Working Group recommended that "the Council should act in public in all cases where it exercises its legislative functions. Policy coordination as well as other activities should also be carried out with open doors as much as possible. Clear reasons should be given when closed sessions were deemed necessary."

Finally, the Working Group also recommended that "records of [Council] proceedings should be sent within 10 days to the European Parliament and the national parliaments, parallel to the transmission to governments."

The first recommendation was largely of symbolic importance, while the second represented the codification of a change that had already taken place in practice. Both would survive into the Lisbon Treaty.[78] The third, while welcome, survived only in watered-down form – in the provision of a proposed Protocol to the Convention's own draft Treaty that the *minutes* of meetings where the Council is deliberating on draft legislative acts be forwarded directly to national Parliaments at the same time as to member state governments.[79] This proposal was adopted in an effectively identical form at Lisbon.[80]

Working Group IV's recommendations on 'national scrutiny systems' were quite conservative – perhaps not surprising, given the sensitivities felt in some member states regarding the perceived imposition of European Union requirements on national legislatures. The core recommendation here involved the evolution of the Amsterdam Protocol on the Role of National Parliaments in the European Union rather than calling for a radical departure from it. Working Group IV advocated that:

74. *Ibid.*, Section II.
75. *Ibid.*, Section III.
76. *Ibid.*, Section IV.
77. *Ibid.*, Section V.
78. As regards the first recommendation, see now Articles 5(3) TEU and 10(2) TEU. These provisions were supplemented at Lisbon by the addition of Article 12 TEU, discussed in the text below. As regards the second recommendation, see now Article 16(8) TEU.
79. See Article 5 of the then-proposed Protocol on the Role of National Parliaments in the European Union.
80. See now Article 5 of Protocol (No. 1) on the Role of National Parliaments in the European Union, discussed in the text below.

"an amended version of the Amsterdam Treaty Protocol on the role of national parliaments in the European Union should include provisions stating that:

- The Amsterdam Treaty Protocol on the role of national parliaments should be strictly observed, including the six-week period, with exceptions on the grounds of urgency as set out in the Protocol.

- Council Working Groups and Coreper should not acknowledge preliminary agreements on proposals covered by the six-week period of the Amsterdam Treaty Protocol on national parliaments until the end of that period, with exceptions on the grounds of urgency as set out in the Protocol.

- Parliamentary scrutiny reserves should be given a clearer status within the Council's rules of procedure. Such reserves should furthermore have a specified time limit, so as not to unnecessarily block the decision procedure.

- The Council's rules of procedure provide for a clear week to elapse between a legislative item being considered at Coreper and the Council. The Council Secretariat should henceforth keep and publish a record of the observance of the rule.

- The Commission should transmit all legislative proposals and consultative documents simultaneously to national parliaments, the European Parliament and the Council.

- The Commission should transmit the Annual Policy Strategy and annual legislative and work programme simultaneously to national parliaments, the European Parliament and, the Council.

- The Court of Auditors should transmit its annual report simultaneously to national parliaments, the European Parliament and the Council."

The first recommendation was duly implemented, albeit with the six-week period being extended at Lisbon to a more generous eight weeks.[81] Only a watered-down version of the second recommendation was ultimately adopted. It focused on temporarily blocking the placing of a draft measure (with a view to its adoption) on a provisional agenda for the Council rather than the much stricter standard suggested by the Working Group (which would have entailed the temporary blocking of Council Working Groups and Coreper from acknowledging preliminary agreements). No Treaty or Protocol change resulted from the third and fourth recommendations, either – even in the Convention's own draft Treaty – although the fifth, sixth and seventh recommendations were implemented.[82]

As regards 'subsidiarity', Working Group IV effectively deferred to Working Group I, recommending (in contrast to the latter Group's far more explicit recommendations) merely that

81. See now Article 4 of Protocol (No 1) on the Role of National Parliaments in the European Union.
82. For the fifth see now Articles 2 and 1 of Protocol (No 1) on the Role of National Parliaments in the European Union, examined in the text below. For the sixth, see now Article 1 of the same Protocol. For the seventh, see now Article 7 of the same Protocol.

> "a mechanism should be set up to allow national parliaments to convey early on in the legislative process their views on the compliance of a legislative proposal with the principle of subsidiarity. Such a mechanism should be process-based and it should not hinder or delay the legislative process."

Finally, as regards 'multilateral networks or mechanisms involving national parliaments at the European level', Working Group IV made a number of recommendations:

- "The method of a Convention should be formalised in a future Constitutional Treaty, as a preparatory mechanism for future Treaty changes.

- The mandate of COSAC should be clarified to strengthen its role as an interparliamentary mechanism. It could usefully act as a platform for a regular exchange of information and best practices, not only between European Affairs Committees, but also between sectoral standing committees. It should become a stronger network for exchange between parliaments.

- The Convention should explore further whether there is scope for creating a forum for a debate on the larger political orientations and strategy of the Union, involving both national parliaments and the European Parliament. In this context the Group took note of the idea of a Congress and considered that this should be the subject of further examination in the Convention.

- Interparliamentary conferences on specific issues could be convened as the need arises.

- A European week should be organised each year to create a common window for EU-wide debates on European issues in every Member State."

This was a relatively weak set of recommendations. Indeed, the third recommendation was no more than a *renvoi* back to the Convention and, of the five recommendations, only the first expressly anticipated Treaty change (a change subsequently accepted by the Convention and ultimately given effect by the Lisbon Treaty[83]). Admittedly, the second and fourth recommendations would also yield fruit in the form of primary law. Interparliamentary co-operation was to be made the subject of a specific Protocol Title,[84] with a specific Article of the relevant Protocol meeting the second Working Group IV recommendation by clearly setting out a role for a conference matching COSAC's description. This Article included the idea that COSAC should "promote the exchange of information and best practice between national Parliaments and the European Parliament, *including their special committees*".[85] Further, corresponding to the Working Group's fourth recommendation, it was stipulated that this conference might also "organise interparliamentary conferences on specific topics".[86]

83. See Article 48(3) TEU.
84. See now Title II of (Lisbon) Protocol (No 1) on the Role of National Parliaments in the European Union, examined in the text below.
85. See now Article 10 of Protocol No. 1. Emphasis added.
86. *Ibid.*

Overall, however, even if many of Working Group IV's recommendations were ultimately implemented, what seems most striking about the Group's report is its surprising lack of ambition for national parliaments. Part of the problem may have been that the Working Group chose to focus much of its discussion on areas which it was clear that the Constitutional Treaty would either not deal with or, where it did, would defer to national laws and practices (in the areas of national scrutiny systems and multilateral networks, for example).

c) Beyond the Working Groups: The Broader Convention

The broader Convention itself ultimately proposed reforms going beyond Working Group IV's recommendations. The Convention proposals envisaged a role for national parliaments in relation to justice and home affairs,[87] and for a role for national parliaments in accelerated Treaty amendment procedures[88] and in procedures for accession of new states to the Union.[89] Even in matters basically covered by Working Group IV's proposals, the Convention chose, in certain respects, to go further than Working Group IV. Hence, the final Convention proposals in the draft Constitutional Treaty included the stipulation that a ten-day period elapse between the placing of a draft legislative act on the provisional agenda for the Council and the adoption of a position.[90] This idea is nowhere to be found in the Working Group recommendations. The Convention's draft Constitutional Treaty also included a greater role for national parliaments in the Treaty revision process than had been anticipated by Working Group IV.[91] Further, it adopted the parliamentary subsidiarity review mechanism which had been proposed by Working Group I.[92]

The Convention therefore proved somewhat more ambitious than Working Group IV. At the same time, however, it did not depart too radically from its proposals. Notwithstanding the focus which had been on the role of national parliaments prior to the Convention, the considerable efforts which were put into providing national parliaments with an opportunity to express their views in the Convention itself, and the facilitation of the discussion of the national parliamentary role, the Convention itself was ultimately quite conservative in terms of what it was prepared to propose regarding national parliaments.

Members of the Convention generally demonstrated little interest in major parliamentary deficits concerning the common foreign and security policy, the European security and defence policy, enhanced co-operation, and the open method of co-ordination.[93] Furthermore, little ultimately came in the Convention of a range of proposals which would have involved national parliaments

87. See Articles I-41(2), III-160, III-161, III-162, III-174(2) and III-177(2) of the draft Constitutional Treaty produced by the Convention.
88. Articles I-24(4), of the draft Constitutional Treaty produced by the Convention.
89. Article I-57(2) of the draft Constitutional Treaty produced by the Convention.
90. See Article 4 of the Protocol on the Role of National Parliaments in the European Union which was annexed to the draft Constitutional Treaty
91. See Article IV-7(1) of the draft Constitutional Treaty produced by the Convention.
92. Article III-160 of the draft Constitutional Treaty produced by the Convention and the Protocol on the Application of the Principles of Subsidiarity and Proportionality which was annexed to the Draft Constitutional Treaty.
93. A. Maurer, "*National Parliaments in the Architecture of Europe after the Constitutional Treaty*" in Barrett, *op.cit.* at n. 29 above, 47 at p. 78.

in the appointment process of persons in European Union leadership positions, such as that of President of the Commission.[94] Finally, the Convention was surprisingly restrained in terms of the extent to which it was prepared to require the involvement of national parliaments in forming the policy agenda prior to the proposal of any actual individual item of legislation.[95]

The conservative nature of the Convention's ultimate proposals stands in very marked contrast to some of the ideas which have been considered for national parliaments in the years since the coming into force of the Amsterdam Protocol. It is worth reminding ourselves that the Convention did not propose the creation of any new bodies (even if it did propose the formalisation of the Convention method). It did not propose the further institutionalisation of COSAC.[96] Nor did it accept the proposed resurrection of the Assizes in the form of a 'Congress of the Peoples of Europe' which would draw its membership from national parliaments and the European Parliament, have consultative powers, and meet to discuss important issues. Convention Chairman Valery Giscard d'Estaing's support for this proposal undoubtedly contributed to its re-emergence in the Convention's 'preliminary draft constitutional treaty' of 28 October, 2002,[97] but the matter went no further.

The idea of adding an extra Chamber to the European Parliament in which national parliaments would be represented[98] also went nowhere in the Convention. The idea, which had been suggested by then German Foreign Minister Joschka Fischer in an influential speech in Berlin's Humboldt University in May, 2000,[99] as well as by Tony Blair in a speech to the Polish Stock Exchange in November of the same year,[100] echoed earlier suggestions that had failed to win acceptance at the 1996-1997 intergovernmental conference in Amsterdam.[101] The idea had attracted criticism from Maurer and Wessels for foreseeably adding to the complexity of the European Union's institutional architecture by requiring the creation of a body whose legitimacy would be deliberately rooted in a nationally-oriented selection procedure, unlike the directly-elected European Parliament.[102] Even the idea of conferring only a limited role on the second chamber – such as confining its remit to

94. *Ibid.,* at pp. 82-83.
95. *Ibid.,* at pp. 79-81
96. An idea put forward by the French parliament in 1995. See Maurer, *loc. cit.* at n. 93 above at pp. 59-60.
97. CONV 369/02 (Brussels, 28 October, 2002). (available online at the time of writing at http://register.consilium.europa.eu/pdf/en/02/cv00/cv00369.en02.pdf) See Article 19 thereof. The idea met with a frosty reception from the European Parliament, whose Committee on Constitutional Affairs had already argued that it ignored "the current and potential role of an already existing institution such as COSAC". [See European Parliament, Committee on Constitutional Affairs (Rapporteur: G Napolitano), *Report on relations between the European Parliament and the national parliaments in European integration* (2001/2023(INI) A5-0023/2002, Brussels, 23 January, 2002) at para. 27 thereof and see generally, Passos, *loc. cit.* at n. 56 above, p. 28.]
98. This could have been either according to the United States Senate model of direct elections in the member states or according to the Bundesrat model of the nomination of a number of members from each member state (weighted according to population and other factors). (See Maurer and Wessels, *loc. cit.* at n. 20 above, p. 466.) The same authors have, elsewhere, described this idea as one of the two main options considered in the post-Nice reflections, with the other being the organisation of interparliamentary exchanges on a larger scale. (See Maurer and Wessels, *loc. cit.* at n. 52 above, p.23.) The Convention, as has been seen, favoured neither of these options.
99. *Loc. cit.* at n. 36 above at p. 7 thereof.
100. *Loc. cit.* at n. 36 above at pp. 9-10 thereof.
101. Suggested both by Philippe Séguin, the then President of the French Assemblée nationale (see report in Le Figaro of 7 December, 1994) and by then Commissioner Leon Brittan [see L. Brittan, *Europe: The Europe We Need* (Hamish Hamilton, London, 1994) at p. 227]. See generally Maurer, *loc. cit.* at n. 13 above, pp. 58-59.
102. See Maurer and Wessels, *loc. cit.* at n. 52 above, pp. 23-24, and see the same writers, *loc. cit.* at n. 20 above, at pp. 466-468.

policing subsidiarity,[103] or to controlling the Union's common foreign and security policy or its security and defence policy – failed to gain acceptance in the Convention. So, too, did the idea of having national parliamentarians represent member states in Council meetings.[104]

d) After the Convention: from the 2003-2004 Intergovernmental Conference to the Constitutional Treaty

All of the reforms concerning national parliaments which were proposed by the Convention in the July 2003 draft Constitutional Treaty were to survive that document's transformation into its final form in the 2003-2004 intergovernmental conference. A significant new provision also made its appearance at this point. It should be explained that an extensive, accelerated procedure for amending the Treaty's provisions on the internal policies and action of the European Union via European Council decision was introduced by the intergovernmental conference. The member states, however, carefully provided that any such amending decision would not enter into force until "approved by the Member States in accordance with their respective constitutional requirements". In substance, this retained the traditional role of national parliaments in Treaty amendments even while moving the process of amendment itself to European level and placing it in the hands of the European institutions.

As is well known, although signed at Rome by the member states in October, 2004, the Constitutional Treaty failed to achieve ratification, stymied by May and June 2005 referendum rejections in France and the Netherlands respectively. This did not, however, put an end to the proposals found in the Constitutional Treaty concerning national parliaments. Effectively identical proposals were subsequently put into the Lisbon Treaty, and signed into law in December, 2007. Indeed, the Constitutional Treaty reforms concerning national parliaments – probably the least controversial aspects of that document – were actually *expanded* upon at Lisbon. And, notwithstanding the considerable difficulties encountered, this time there would be no failure to ratify.

5. Where We Are Now – The Lisbon Treaty

On March 25, 2007, the member states signed the Berlin Declaration, marking the 50th anniversary of the Treaty of Rome and proclaiming that the member states were united in their "aim of placing the European Union on a renewed common basis" by mid-2009.[105] These were no idle words. On foot of consultations which had been held with member states in the first part of 2007, a mandate was drawn up in June of that year for an intergovernmental conference which ended up drafting the Lisbon

103. An idea which also predated the Amsterdam negotiations. See the report by French senator Michel Pionatowski, *Rapport d'information no. 45 du 12 novembre 1992 sur le principe de la subsidiarité* cited by Maurer and Wessels, *loc. cit.* at n. 20 above, at p. 470.
104. Passos, *loc. cit.* at n. 56 above, p. 28.
105. The text of the Declaration is available online at the time of writing at http://europa.eu/50/docs/berlin_declaration en.pdf

Treaty.[106] The mandate specifically anticipated modifications to the Constitutional Treaty's innovations so as to provide for an enhanced role for national parliaments.[107] More time to reflect on European legislation, a reinforced control mechanism for national parliaments (to enable them to better police observance of subsidiarity by the European legislature), and a new general Article reflecting the role of national parliaments were all specifically required of the new Treaty by the mandate.[108]

The Treaty of Lisbon was quickly negotiated, signed at Lisbon on 13 December, 2007, and – after a turbulent ratification process – finally entered into force somewhat later than originally anticipated, on 1 December, 2009. The result of its seasoning of the already agreed-upon Constitutional Treaty reforms with additional new changes was that the coming into force of the Lisbon Treaty saw the emergence of a more multi-dimensional role for national parliaments than had ever heretofore existed. It is proposed to spend some time analysing the various aspects of this new role.

i. The New General Article

A general provision on representative democracy had *already* been included in the Constitutional Treaty.[109] This provision – which was in part a response to the recommendation of Working Group IV in the Convention on the Future of Europe for clear recognition of the role of national parliaments[110] – survived the coming into force of the Treaty of Lisbon and now takes the form of Article 10 TEU, which points out *en passant* what has always been, and will continue to be, the primary role of national parliaments in the European Union's legislative process: namely, the holding of national Government ministers to account for their decisions in Council. Article 10 TEU provides that

> "1. *The functioning of the Union shall be founded on representative democracy.*
>
> 2. Citizens are directly represented at Union level in the European Parliament.
>
> *Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable* either *to their national Parliaments*, or to their citizens…"[111]

This constituted explicit recognition (for the first time in European law) of a role for national parliaments which, whatever its importance, had previously always been assumed rather than acknowledged at Treaty level.[112] However, in the wake of the 2005 referendum rejections of the Constitutional Treaty in

106. See Annex I ("Draft IGC Mandate") to the Presidency Conclusions of the Brussels European Council, 21-22 June, 2007 (available online at the time of writing at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/94932 pdf).
107. *Ibid.*, paras. 4 and 11.
108. Para. 11 of the mandate, *loc. cit.*, n. 106.
109. Article I-46 of the Constitutional Treaty, entitled 'the principle of representative democracy' and ensconced in a Title VI of Part I of that Treaty, entitled 'The democratic life of the Union'.
110. See *Final report of Working Group IV on the role of national parliaments*, para. 5, available at the time of writing at http:/ register.consilium.europa.eu/pdf/en/02/cv00/cv00353.en02.pdf
111. Emphasis added.
112. The significance of this step is emphasised by Pennera, *loc. cit.* at n. 1 above, pp. 87-88.

France and the Netherlands, this acknowledgment – at that time found in the doomed Constitutional Treaty – came to be regarded as an insufficient reminder of the democratic legitimacy of the Union. Hence, among the changes envisaged by the June 2007 Brussels European Council when it contemplated the effective resurrection of much of the Constitutional Treaty in the form of the Lisbon Treaty was a *further* new general Article reflecting the role of the national parliaments.[113] This became what is now Article 12 TEU. It provides that

> "national Parliaments contribute actively to the good functioning of the Union:
>
> (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
>
> (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;
>
> (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;
>
> (d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;
>
> (e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;
>
> (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union."

A number of observations can be made about this new Article.

In the first place, taken together with Article 10, Article 12 constitutes the first explicit *general* recognition of the role of national parliaments in European law.

Secondly, Article 12 is the first recognition *in the body of a Treaty* of the multi-faceted role of national parliaments in the European Union's legal system. This marks a significant change in the approach of European law regarding national parliaments. As one commentator has put it, by placing such an

113. See para. 11 of Annex I ("Draft IGC Mandate") to the Presidency Conclusions of the Brussels European Council, 21-22 June, 2007 at p. 17 thereof.

article in the Treaty on European Union itself, the member states "clearly expressed their political will to enhance the position of national parliaments in the European Union".[114]

Thirdly, and less sanguinely, Article 12 in and of itself appears to be of declaratory value only, and adds nothing, in express terms, to the rights of national parliaments provided for elsewhere in the Protocols annexed to the Treaties and, indeed, adds nothing to the rights which were already provided for national parliaments under the Constitutional Treaty – although perhaps the caveat should be added to the foregoing that it might be unwise to rule out the eventual possible intervention of the European Court of Justice in this regard.[115] The wording of Article 12 marks something of a climb-down. The original announced intention had been to have an article providing that "national parliaments *shall* contribute actively to the good functioning of the Union".[116] The imposition of such a duty under European law collided with the sensibilities of British MPs, however, with the Scrutiny Committee of the House of Commons expressing its strongly-held view that actively contributing to the good functioning of the Union should be a matter of discretion rather than a legal obligation (for which one can probably read *European* legal obligation).[117] The wording of what is now Article 12 was duly altered and other Treaty provisions concerning national parliaments now use similarly muted descriptive terminology.[118]

ii. The Lisbon Protocols

Pennera has accurately described the role of national parliaments as being "the object of a series of provisions characterised neither by their clarity nor the elegance of their presentation".[119] The principle justification for this unflattering description lies in the admittedly rather peculiar situation whereby the role of national parliaments is now the subject of two separate but overlapping protocols, both of which were adopted at the time of the Lisbon Treaty. This situation is the result of precedent rather than logic. Quite simply, two protocols dealing with a somewhat similar subject matter had earlier been adopted

114. Passos, *loc. cit.* at n. 56 above, p. 32.
115. The Court has a record of interpreting generously the implied rights of the European Parliament in the legislative process See, for example, Case 138/79 *Roquette Frères v. Council* [1980] ECR 3333 and Case 139/79 *Maizena v. Council* [1980] ECR 3393. In para. 33 of its ruling in the former case, in which it annulled a measure on the grounds of the failure to consult the European Parliament, without there being any express provision for this in the Treaties, the Court held "the consultation provided for in the [relevant provision of the Treaty] is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void."
116. See Annex I ("Draft IGC Mandate") to the Presidency Conclusions of the Brussels European Council, 21-22 June, 2007, at p. 26 thereof. (Emphasis added.)
117. See House of Commons European Scrutiny Committee, *European Union Intergovernmental Conference: Thirty-fifth Report of Session 2006-07 - Report, Together with Formal Minutes and Written Evidence* (HC 1014, 9 October, 2007) at p. 23 in which the Committee pointed out that it regarded as a particularly serious matter "the drafting of a new provision which appeared to place a legal obligation directly on national parliaments…In our view, these are matters of entitlement, not obligation and it is wholly a matter for Parliament to decide whether it wishes to use these opportunities: there should be no question of being under any legal obligation to do so."
118. See, for example, Article 10 TEU (repeating, however, the wording of Article I-46 of the Constitutional Treaty) and Article 5 TEU (diverging from the wording of its predecessor article Article I-11), which now provides, *inter alia,* that "the institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol."
119. *Loc. cit.* at n. 1, p. 98. (Translation by the present writer).

at the time of the October 1997 agreement on the Amsterdam Treaty,[120] and it was decided during the debates of the Convention on the Future of Europe – which had separate working groups on the role of national parliaments and subdsidiarity, respectively[121] – to stay with this arrangement. The idea of inserting a major role for national parliaments in the subsidiarity protocol *also* stemmed from the Convention, but the sensible idea of putting all of these national parliament provisions in one single, coherent protocol unfortunately prevailed neither at the Convention nor subsequent to it.[122]

iii. The Role of National Parliaments under Protocol No. 1 on the Role of National Parliaments in the European Union

a) Introduction

The first of the two Lisbon Protocols which concern national parliaments is Protocol No. 1 on the Role of National Parliaments in the European Union. This was annexed at Lisbon to the Treaty on European Union, to the Treaty on the Functioning of the European Union, and to the Treaty establishing the European Atomic Energy Community. Apart from the extension by two weeks of the period allowed to national parliaments for consideration of draft legislative acts, the Protocol reproduces, effectively verbatim, the provisions of the similarly-titled Protocol annexed to the Constitutional Treaty, which never entered into force. Similar to the approach used in the previous 1999 (Amsterdam) Protocol on the Role of National Parliaments in the European Union, Protocol No. 1 is divided into two Titles. Title I is entitled 'information for national parliaments', although it is important to note that where – as is the case in Ireland – the national parliamentary system is not unicameral, all of Title I's provisions apply to the *component chambers* of the parliament rather than to the parliament as a whole.[123] Title II is styled 'interparliamentary co-operation'.

b) The Information to be Supplied to National Parliaments

Information is the oxygen that sustains life in any process of national parliamentary accountability or scrutiny, and the aim of the relevant Treaty and Protocol provisions is that national parliaments be supplied with it directly, thereby lessening their dependence on the whim of national executives. It has already been noted that Article 12 of the Treaty on European Union provides that national parliaments contribute actively to the good functioning of the Union, *inter alia,* "through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union".[124] The relevant provisions of Protocol No. 1 in this regard are all found in Title I thereof, and the documents that Title I requires

120. *Viz.* the 'Protocol on the role of national parliaments in the European Union' which provided both for information for national parliaments of member states and for the role of COSAC (the conference of European affairs committees), and the Protocol on the application of the principles of subsidiarity and proportionality. The latter Amsterdam Protocol involved no role for national parliaments, however.
121. *Viz.* Working Groups IV and I, respectively.
122. Pennera, *loc. cit.* at n. 1, p. 98.
123. Article 8 of Protocol No. 1.
124. See para. (a) of Article 12.

national parliaments to be provided with can be divided into three broad categories: draft legislative acts, documents which are in some way related to draft legislative acts, and other documents.

A) Draft Legislative Acts

Draft legislative acts sent to the European Parliament and to the Council are to be forwarded to national Parliaments.[125] The notion of 'draft legislative acts' is a new one.[126] It is given an extensive meaning under Article 2 of the Protocol, comprising proposals from the Commission for the adoption of a legislative act, or initiativesfrom a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank, and requests from the European Investment Bank to the same end.[127]

This marks a considerable expansion on the approach adopted in the 1999 Amsterdam Protocol which, insofar as draft laws were concerned, merely referred to *Commission* proposals for legislation.[128] An enormous number of initiatives and proposals are covered by the requirements of the newer Protocol. However, it does still leave certain gaps in national parliamentary supervision of the acts of European institutions. The European Council – notwithstanding the major increase of its powers and influence following the coming into force of the Treaty of Lisbon – is not obliged to send any of its many proposals or initiatives to national parliaments since, according to Article 15(1) of the Treaty on European Union, the European Council is not deemed to exercise legislative functions. Indeed, mention of the very name of this most influential of institutions is conspicuous only by its absence from the Protocol.

Procedure: Direct Provision to National Parliaments

Apart from the expansion in the kinds of draft laws which have to be forwarded to national parliaments, another major difference with the new Protocol is that it envisages a direct relationship between the European institutions and the national parliaments.

The Amsterdam Protocol merely provided for Commission legislative proposals to be "made available in good time so that the government of each Member State may ensure that its own national parliament receives them as appropriate."[129] This left the ultimate obligation for ensuring transmission on the relevant national government. Any lack of diligence on the part of national governments, however, was capable of introducing a delay which might, in itself, be enough to prevent national parliaments from intervening effectively regarding any given legislative measure. The Lisbon Protocol bypasses this potentially disruptive intervention of national executives by stipulating in each case that *a European Union institution* is to be responsible for forwarding draft legislative acts to national parliaments.[130]

125. Article 2, Indent 1 of Protocol No. 1
126. See for a general discussion of the concept of draft legislative acts, Pennera, *loc. cit.* at n. 1, pp. 100 to 101.
127. Article 2, Indent 2 of Protocol No. 1.
128. More precisely, the old Amsterdam Protocol on the Role of National Parliaments in the European Union referred only to "Commission proposals for legislation as defined by the Council in accordance with Article 151(3) of the Treaty Establishing the European Community." (See Article 2 of the Amsterdam Protocol.)
129. Article 2 of Protocol.
130. This is the case even as regards draft legislative acts originating from a group of Member States, in which case responsibility for their being forwarded to national parliaments is placed on the Council.

Thus, for the first time, national parliaments and European institutions are made partners in a legal relationship. Under Article 2,

> "draft legislative acts originating from the Commission shall be forwarded to national Parliaments directly by the Commission, at the same time as to the European Parliament and the Council.
>
> Draft legislative acts originating from the European Parliament shall be forwarded to national Parliaments directly by the European Parliament.
>
> Draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank shall be forwarded to national Parliaments by the Council."

In practice, the Commission sends all of its draft legislative acts (and its consultation documents, which are looked at in the text below) to national parliaments electronically, at the same time as they are sent to the European Parliament and/or the Council.[131] The different language versions, as requested by each national parliamentary Chamber,[132] are sent successively and according to their availability.[133]

The Possibility of Sending Reasoned Opinions

Under Article 3 of Protocol No. 1,

> "National Parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality."

The inclusion of this provision in Article 3 overlaps curiously with Article 6 of Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality. Indeed, there may be said to be a mild contradiction. Article 6 of the latter Protocol does not envisage reasoned opinions on *whether* draft legislative acts comply with the principle of subsidiarity (as does Article 3 of Protocol No. 1), but merely reasoned opinions stating why the national parliament or chamber in question considers that the draft

131. See *Practical Arrangements for the Operation of the Subsidiarity Control Mechanism under Protocol No 2 of the Treaty of Lisbon* (Annex to letter published by the President and Vice-President of the Commission on 1 December, 2009. Both the letter and the Annex are available online at the time of writing at http://ec.europa.eu/dgs/secretariat_general relations/relations_other/npo/docs/letter_en.pdf). Note that IPEX – the Interparliamentary EU Information Exchange – is also sent a copy of such documents and draft legislative acts.

132. At the time of the coming into force of the Lisbon Treaty, each Chamber of national parliaments of the European Union was asked for confirmation of the language or languages in which it wished to receive the Commission documents and to which electronic address it wished the Commission to send these documents.

133. At the end of each week, the Commission also sends a recapitulative list of documents that have been sent to each national Parliament in the course of the preceding week. The idea here is that if a national Parliament then realises that it has not received all documents contained in this list, it should immediately inform the Commission, which will then resend the documents in question. (See Practical Arrangements for the Operation of the Subsidiarity Control Mechanism under Protocol No 2 of the Treaty of Lisbon, loc. cit. at n. 131 above.)

in question *does not* comply with the principle of subsidiarity. Interestingly, the Dáil and Seanad rules of procedure adopted at the end of 2010 envisage only the latter kind of opinion.

Echoing the approach adopted in the Protocol of specifically assigning responsibility to a named institution for forwarding draft legislative acts to national parliaments, Article 3 of the Protocol avoids any danger of reasoned opinions going astray by carefully stipulating that, if a draft legislative act "originates from a group of Member States, the President of the Council shall forward the reasoned opinion or opinions to the governments of those Member States." Furthermore, if it originates from the Court of Justice, the European Central Bank or the European Investment Bank, "the President of the Council shall forward the reasoned opinion or opinions to the institution or body concerned." Any danger of legislative acts – or reasoned opinions which concern those acts – not reaching their intended target is therefore carefully avoided in the Protocol.

Eight Week Hiatus

Apart from providing for the direct forwarding of draft laws to national parliaments,[134] and for the possibility of intervention by national parliaments with reasoned opinions,[135] Protocol No. 1 seeks to ensure the effectiveness of these provisions by requiring – at least as a general rule – the lapsing of an eight-week period between a draft legislative act being made available to national parliaments in the official languages of the Union and the date when it is placed on a provisional Council agenda for its adoption or for adoption of a position under a legislative procedure.[136] This is to be understood as merely a general rule, however: exceptions are to be permitted in cases of urgency, the reasons for which must be stated in the act or position memo of the Council.

It is forbidden even to reach *agreement* on a draft legislative act during those eight weeks – although, again, this has to be qualified as a mere general rule, in that an exception is made for "urgent cases for which due reasons have been given".[137] Who exactly this rule binds is not made clear. It would seem to be aimed only at the member states, since the relevant article of the Protocol [138] is, to all intents and purposes, exclusively concerned with the Council. Passos, however, has queried whether it applies to the European Parliament and has speculated regarding Committees of the Parliament not being permitted to adopt reports relating to legislative proposals during this period of time.[139]

The lapsing of a further ten-day period is then required between the placing of a draft legislative act on the provisional agenda for the Council and the adoption of a position. (Once more, this is a mere general rule. An exception is made for "urgent cases for which due reasons have been given".[140]) In practice, this should translate into fourteen days rather than ten, as the Council's own Rules of Procedure require

134. Articles 2 of Protocol No. 1.
135. Article 3 of Protocol No. 1. See also Article 6 of Protocol No. 2 on the application of the principles of subsidiarity and proportionality, which imposes an eight-week time limit for the sending of reasoned opinions for the purposes of that Protocol. See further the text below.
136. Article 4 of Protocol No. 1.
137. *Ibid.*
138. Article 4
139. *Loc. cit.* at n. 56 above, p. 38.
140. See in relation to all of the foregoing, Article 4 of Protocol No. 1.

the provisional agenda for each meeting to be sent to the other members of the Council and to the Commission at least fourteen days before the beginning of the meeting, and further stipulate that it shall be forwarded to Member States' national parliaments at the same time.[141]

Violation of the time limits stipulated in the Protocol is likely (at least going by the case-law of the European Court of Justice relating to the need to consult the European Parliament) [142] to induce the Court of Justice to deem the legislation to be void in its entirety for infringement of an essential procedural requirement. It should be noted, though, that national parliaments themselves may not be able to get the Court to establish such invalidity since, absent the use of creativity in this regard by the European Court of Justice, they will not be regarded as having *locus standi* to challenge a measure before the Court.[143] However, other legal persons with standing – including the member state of the parliament in question – will be able to do so.[144]

The eight-week-plus-ten-day minimum hiatus is probably most useful in (a)facilitiating the operation of the subsidiarity review process under Protocol No. 2. It also (b) facilitates political dialogue to some degree by enabling national parliaments to express their views before legislation hardens into near-final form – although it has to be said that views expressed a mere eight weeks before the placing of a draft legislative act on the provisional agenda of the Council seem unlikely to have much impact, even if they emanate from national parliaments. The argument may also be made that, to some extent, the eight-week hiatus period will assist member state parliaments in (c) exercising their traditional role of exercising oversight over the ministers who represent their member state in the Council. The idea here is that it will compensate for the decline in the effectiveness of national parliamentary scrutiny reserves or mandates, which used to prevent agreement on measures at European Union level until their examination had been finished in a state imposing a national scrutiny reserve or until agreement on terms matching the relevant national parliamentary mandate had been attained. However, with the spread of qualified majority voting and the resulting increased possibility of individual member states being outvoted, scrutiny reserves and mandates are less guaranteed to have this effect.[145]

It may be noted that the sole substantive change of any kind between the Protocol annexed to the 2004 Constitutional Treaty (which of course never entered into force) and Protocol No. 1 is that the "six-week period" (which was required under the earlier Protocol[146] to elapse between a draft legislative act being made available to national parliaments in the official languages of the Union and the date when it was placed on a provisional agenda for the Council) was changed to an "eight-week period".[147]

141. See Article 3(1) of Council Decision 2009/937/EU of 1 December, 2009, adopting the Council's Rules of Procedure. [Official Journal of the European Union L 325/35 (11 December, 2009)] and see Ferrer, *loc. cit.* at n. 38, p. 164.
142. See, for example,, Case 138/79 *Roquette Frères v. Council* [1980] ECR 3333 in which the Court first annulled a measure on the grounds of failure to consult the European Parliament during the legislative process leading to the adoption of the measure.
143. See Article 263 TFEU and Ferrer, *loc. cit.* at n. 38, p. 164.
144. See in this regard, for example,, Case 138/79 *Roquette Frères v. Council* [1980] ECR 3333
145. Passos has thus opined that the new European-level system will be of more use in member states used to this kind of approach than in others where no such scrutiny/mandate system operates. (Passos, *loc. cit.* at n. 56 above, p. 34).
146. See Article 4 thereof.
147. See now Art.4 of the Protocol. This change was envisaged in the Brussels Presidency conclusions of June, 2007. (See para.11 of Annex I ("Draft IGC Mandate") to the Presidency Conclusions of the Brussels European Council June 21-22, 2007, p.17 thereof)

Concerns had been expressed regarding the practicability of adhering to the shorter time limit provided for in the earlier Protocol.[148] It seems likely that adhering even to this lengthened period will present challenges for national parliaments, and yet, obviously, there have to be limits on the extent to which national parliaments can be facilitated in this regard – for the interests of legislative efficiency also have to be accommodated.

B) Related Documents

Beyond legislative acts, what we may call 'related documents' form a second category of documents required to be forwarded directly by European Union institutions to national parliaments. Essentially, what we mean by 'related documents' are the *travaux préparatoires* to legislation. Hence, and going beyond what was envisaged under the Amsterdam Protocol, the agendas for and the outcome of meetings of the Council – including the minutes of meetings where the Council is deliberating on draft legislative acts – are now required by Protocol No. 1 to be forwarded directly to national Parliaments at the same time as they are forwarded to member state governments.[149]

Far more usefully - since matters will frequently be at an advanced or even fixed state by the time they appear on the agenda of Council meetings - documents which belong to an earlier phase in the production of legislation are also required to be sent to national parliaments. Further, Commission consultation documents – green and white papers, and communications – must be forwarded by the Commission directly to national Parliaments on their publication. As has been seen, the forwarding of these documents to member state parliaments was already required under the Amsterdam Protocol on the role of national parliaments in the European Union. However, not everything in the new Protocol replicates the provisions of its predecessor – the Commission is now further required to forward the annual legislative programme, as well as "any other instrument of legislative planning or policy", to national Parliaments and, moreover, to do so at the same time as it forwards them to the European Parliament and the Council.[150]

C) Other Documents

In an expansion of the requirements of the old Amsterdam Protocol, certain other documents and pieces of information which have nothing to do with the production of legislation – but which are, nonetheless, of considerable political or constitutional significance – are now required to be forwarded to national parliaments under Protocol No. 1.

Hence, the Court of Auditors is required to forward its annual report to national parliaments – for informational purposes – at the same time as it forwards it to the European Parliament and to the Council.[151]

148. Note the concerns expressed by national parliaments in this regard in the COSAC Report on the Results of COSAC's Pilot Project on the Third Railway Package to Test the "Subsidiarity Early Warning Mechanism". This was presented to the XXXIII COSAC, Luxembourg, May 17-18, 2005, and reproduced in G. Amato and J. Ziller, *The European Constitution* (Cheltenham: Edward Elgar, 2007), p.217.
149. Article 5 of Protocol No. 1.
150. See in relation to all of the foregoing Article 1 of Protocol No. 1.
151. Article 6, second indent.

Furthermore, where the European Council intends to adopt a decision authorising the Council to act by qualified majority vote instead of by unanimity, or to act by co-decision instead of by some special legislative procedure – in other words, to make use the simplified revision procedures provided for in the Treaty on the Functioning of the European Union [152] – national Parliaments are to be informed of the European Council initiative at least six months before any decision is adopted.[153]

Overall, it is not inaccurate to say that, under Protocol No. 1, national parliaments now have a right to information on a vast scale.[154] Curiously enough, Protocol No. 1 (like the Amsterdam Protocol) does not set out *why* national parliaments are given this information. However, in a fairly clear hint, its preamble does note the member states' desire

> "to encourage greater involvement of national Parliaments in the activities of the European Union and to enhance their ability to express their views on draft legislative acts of the Union as well as on other matters which may be of particular interest to them".[155]

Such is the scale of material being forwarded to national parliaments that it is now imperative for national parliaments to operate or have access to some kind of filtering process, in order to ensure that priority is given by them to the most important legislative acts. Otherwise, as Passos has observed, "there is a risk of submerging national parliaments in a mass of non-prioritised information which is incapable of being digested."[156] There are various possibilities in this regard. A United Kingdom-style filtering by the national executive at the request of the national parliament is one option. The parliament itself carrying out the sifting process is another. The optimisation of the latter approach requires the involvement of specialist knowledge within parliament, however, and therefore specialised committees.[157]

Two final comments may be made. One is that, notwithstanding the far greater degree of attention which has been paid to the introduction of the subsidiarity control mechanism (examined below in the context of Protocol No. 2), the information rights guaranteed under Protocol No. 1 seem likely to have as great an impact in practice as in theory, by providing national parliaments with the ability to intervene more effectively in the legislative process and to control the activities of their national executive in relation to European affairs. There is, in contrast, little evidence that the principle of subsidiarity is regularly breached at European level, and it seems unlikely much can be expected from interventions arriving as late as those provided for in the subsidiarity control mechanism - especially where these interventions will often have to defy the views of the national executive if they are to have legal consequences which make any difference.

That much said, a second comment is also apposite. The main element of what is guaranteed under Title I of Protocol No. 1 is that national parliaments will receive the information provided for. After this,

152. See Article 48(7) thereof.
153. Article 6 of Protocol No. 1.
154. See Pennera, *loc. cit.* at n. 1, p. 99.
155. See also Pennera, *loc. cit.* at n. 1, p. 99.
156. Passos, *loc. cit.* at n. 56 above, p. 37.
157. *Ibid.*

however, the onus is on national parliaments to make effective use of that information. In other words, Protocol No. 1 is no guarantee of effective parliamentary oversight of the national executive in European affairs or of useful national parliamentary participation in the European legislative process. Instead, the degree of influence exercised by national parliaments will depend crucially on national parliamentary resolve and practice. Title I of Protocol No. 1 is properly seen as no more than an invitation to relevance, which must be accepted by each national parliament. It may well lead national parliaments to the water, but it is up to each individual parliament to demonstrate its will to drink of the opportunities on offer and to set up systems, mechanisms and practices which enable it to do so.[158]

c) Interparliamentary Cooperation

Under Article 12 of the Treaty on European Union, national parliaments "contribute actively to the good functioning of the Union…by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union."[159] Title II of Protocol No. 1 on the Role of National Parliaments in the European Union provides some details here, copying word-for-word Title II of the identically-styled Protocol which was annexed to the Constitutional Treaty.[160] Its provisions are also somewhat similar to those of the similarly-entitled Amsterdam Protocol.[161]

The 1999 Protocol, however, focused expressly on the role of the Conference of European Affairs Committees (COSAC). The new Protocol is less specific in this respect. Article 9 thereof stipulates merely that the European Parliament and national parliaments shall together determine the organisation and promotion of effective and regular interparliamentary co-operation within the Union.[162]

In reality, as has already been seen, interparliamentary co-operation predated the 1999 Protocol by some time. It has by now taken on a variety of forms and is not confined to COSAC.[163] Other notable fora for cooperation include the Conference of Speakers of the Parliaments of the European Union, and the Interparliamentary European Union Information Exchange (IPEX).[164] There are also forms of co-operation specific to particular member states which may include forms of participation by European Parliament members in national parliamentary activities. In addition, there is scope for participation by national parliamentarians in the work of the European Parliament.[165]

Article 10 of Protocol No. 1 goes on to specify three modest roles for what it terms merely "a conference of Parliamentary Committees for Union Affairs".[166] In the first place, it stipulates that such a conference

158. See further, J. Martínez Sierra, "*Los Parlamentos Nacionales en la Unión Europea*" (1998-9) 90 Revista de la Facultad de Derecho de la Universidad Complutense 235 cited in Ferrer, *loc. cit.* at n. 38 above, p. 164.
159. See paragraph (f) of Article 12.
160. And also the Treaty Establishing the European Atomic Energy Community Treaty.
161. See text above at n. 37 *et seq.*
162. See Article 9 of Protocol No. 1.
163. The Conference of Community and European Affairs Committees of Parliaments of the European Union
164. Some details of co-operation between national parliaments and the European Parliament are to be found in Pennera, *loc cit.* at n. 1, pp. 115-117.
165. See more particularly Ferrer, *loc. cit.* at n. 38 above, p. 160 at n. 54 and the authorities referred to therein.
166. *i.e.* rather than COSAC

may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission (the European Council being mentioned nowhere).[167] The significance of any such contributions is limited, however. As was the case under the Amsterdam Protocol, it is specifically stipulated that contributions from the conference are not to bind national parliaments or prejudge their positions. Secondly, it is provided that a conference of Parliamentary Committees for Union Affairs "*shall* in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees".[168] Thirdly, it *may* also organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. The second and third points are new, although they were scarcely calculated to bring about much change – COSAC has been engaging in such activities for years.

The mention of the European Parliament in Article 9 of the Protocol is significant. National parliaments can seek to exercise influence in the European policy-making process through a number of institutions. One of these is the Council. National parliaments can seek to wield influence here by exercising traditional parliamentary oversight over national ministers concerning the positions they adopt in Council. The second route is via the Commission, where national parliaments can seek to exercise influence through the subsidiarity review[169] and, potentially far more effectively, by engaging in the process of political dialogue with the Commission (a process which began life as the so-called Barroso initiative).[170] The third route is through engagement with the European Parliament, which is what Article 9 is about. There can be no doubt that the European Parliament has long sought to make itself the privileged interlocutor of national parliaments.[171] The relationship is one which has the potential to be mutually beneficial to national parliaments on the one hand and the European Parliament on the other. Thus for example, the European Parliament provides resources which are essential to keep COSAC well-functioning. It also provides facilities in Brussels in which the national parliaments' permanent representatives can meet every Monday morning. National parliaments, for their part, provide a possible means of influence for the European Parliament in policy areas – such as the Common Foreign and Security Policy – where the role of the European Parliament is at its weakest.

167. The 1999 Amsterdam Protocol referred merely to 'the institutions' in this context, and the failure of the new Protocol to reflect this wording gives the impression that the European Council was carefully exempted from the obligation to receive any such submissions on its promotion to the ranks of an official institution with the coming into force of the Lisbon Treaty. The specific stipulation in Article 5 of the 1999 Protocol that COSAC could examine any legislative proposal or initiative in relation to the establishment of an area of freedom, security and justice which might have a direct bearing on the rights and freedoms of individuals has not been retained, although this appears to be without legal consequences. Similarly without legal consequences is the failure of the new Title II to repeat the stipulation which used to be found in Article 4 of the 1999 Protocol that COSAC could make contributions "in particular on the basis of draft legal texts which representatives of governments of the Member States may decide by common accord to forward to it, in view of the nature of their subject matter." Nor – and once again this seems to be without legal consequence – is there any repetition of the old Article 6 provision that "COSAC may address to the European Parliament, the Council and the Commission any contribution which it deems appropriate on the legislative activities of the Union, notably in relation to the application of the principle of subsidiarity, the area of freedom, security and justice as well as questions regarding fundamental rights."
168. Emphasis added.
169. This is examined in the text below.
170. This is also examined in the text below.
171. Borrowing a phrase of Passos'. (*Loc. cit.* at n. 56 above, p. 39.)

Overall, a striking point about Title II is how little novelty it actually brings to the topic of interparliamentary co-operation over and above what was set out in the Amsterdam Protocol. This exhibits a lack of ambition which, on one hand, seems to reflect very divergent ideas among national parliaments in relation to what the scope of such co-operation should be, while, on the other, reflecting the limited role the law plays in supporting and stimulating interparliamentary co-operation. Most such cooperation – whether it involves COSAC, the Conference of Speakers, national parliamentary representatives in Brussels or IPEX – takes place on a voluntary basis in the absence of anything resembling a formal legal framework.

iv. The Role of National Parliaments under Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality

The second Protocol of relevance in the present context is Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality, which was annexed at Lisbon to the Treaty on European Union and to the Treaty on the Functioning of the European Union.[172]

Under Article 5(3) of the Treaty on European Union,[173] national parliaments "ensure compliance with the principle of subsidiarity in accordance with the procedure set out in the Protocol on the application of the principles of subsidiarity and proportionality." Somewhat redundantly (other than for its symbolic value and perhaps the avoidance of doubt) Article 69 TFEU further stipulates that national parliaments "ensure that the proposals and legislative initiatives submitted under the relevant Treaty chapters on judicial cooperation in criminal matters and on police cooperation comply with the principle of subsidiarity", in accordance with the arrangements laid down in the same Protocol.

Both of these provisions are survivors from the Constitutional Treaty, albeit with some remodelling to create a less imperatively-worded form.[174] We have already seen that a provision which appears just as redundant as Article 69 TFEU (apart from the signposting or declaratory value which either provision has) was added by the Lisbon Treaty, in the form of Article 12 TEU which provides – as part of a general declaration on the role of national parliaments – that national parliaments "contribute actively to the good functioning of the Union…by seeing to it that the principle of subsidiarity is respected" in accordance with the same Protocol's procedures. Thus the Protocol on the application of the principles of subsidiarity and proportionality is referred to by three separate Treaty provisions.

In all but two respects,[175] the Protocol is an effectively verbatim reproduction of an identically-named

172. But, unlike Protocol No. 1 on the Role of National Parliaments in the European Union, not, for some curious reason, to the Treaty establishing the European Atomic Energy Community.

173. Diverging slightly but significantly from the wording of Article I-11 of the Constitutional Treaty, which stipulated that "National Parliaments '*shall* ensure' compliance"

174. Their respective predecessors, Article I-11 and Article III-259 of the Constitutional Treaty stipulated that "National Parliaments '*shall* ensure' compliance". See in this regard n. 117 above.

175. The only two substantive changes made at Lisbon were (a) the extension from six to eight weeks of the period given to national parliaments to send a reasoned opinion on subsidiarity, and (b) the reinforcement of the subsidiarity mechanism by what is colloquially referred to as the 'orange card' procedure, both of which topics are examined below.

Protocol which was annexed to the text of the Constitutional Treaty.[176] It provides a means for national parliaments to intervene directly at European level in order to check for compliance with the principle of subsidiarity.

This Protocol involves a far more radical departure from pre-Lisbon Treaty law than does the Protocol on the role of national parliaments in the Union, although whether the ultimate impact of the Protocol on the application of the principles of subsidiarity and proportionality on the European Union's legislative process will be any greater remains to be seen. The Protocol's name is somewhat misleading as its provisions are actually far more concerned with subsidiarity than they are with proportionality.[177] Indeed, the control processes which the Protocol provides for which involve national parliaments apply only for the purposes of ensuring compliance with the former principle. The Protocol's requirements regarding proportionality are confined to the stipulations that each European Union institution shall ensure constant respect for it,[178] that draft legislative acts shall be justified with regard to it and, further, that each such act shall contain a detailed statement making it possible to appraise compliance with it.[179]

Prior to the coming into force of the Lisbon Treaty, national parliaments' options in terms of enforcing subsidiarity were limited. They were confined to the use of whatever powers were given to them by their relevant national law in order to hold Government ministers to account for their actions at European level. The Amsterdam Protocol additionally stipulated that "COSAC may address to the European Parliament, the Council and the Commission any contribution which it deems appropriate on the legislative activities of the Union, notably in relation to the application of the principle of subsidiarity…" A similarly-worded stipulation of COSAC's right to address the Parliament, Council and Commission – but not the European Council – is still to be found in Article 10 of the Lisbon Protocol on the Role of National Parliaments in the European Union. However, it now comes minus the suggestion that this right of address can be deployed in relation to the application of the subsidiarity principle.[180] Legally, of course, COSAC's right of address could still be used for this purpose, but the provision of the new subsidiarity review mechanism should make this superfluous.

Insofar as concerns national parliaments, the most relevant provisions of the Protocol concern the following issues.

a) The Duty to Forward Draft Legislative Acts and Amended Drafts to National Parliaments

Under Article 4 of the Protocol on the application of the principles of subsidiarity and proportionality,

176. See generally G. Barrett, " *'The King is Dead, Long Live the King': the Recasting by the Treaty of Lisbon of the Povisions of the Constitutional Treaty Concerning National Parliaments*" (2008) 33 EL Rev 66 at pp. 74-75.
177. See, in relation to the latter principle, the Protocol's Preamble, Article 1 and Article 5 thereof.
178. See Article 1 of the Protocol.
179. Article 5 of the Protocol. Article 5 further specifies that "draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved."
180. Article 10 states, *inter alia,* that "a conference of Parliamentary Committees for Union Affairs may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission". This echoes the identically-worded position under Article 10 of the Protocol on the Role of National Parliaments in the European Union which was intended to have been annexed to the Constitutional Treaty and the Euratom Treaty.

a number of institutions are required to forward documents to national parliaments.[181] Hence the Commission is required to "forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator".[182] In practice, the Commission sends all draft legislative acts to national Parliaments electronically, at the same time as they are sent to the European Parliament and/or the Council.[183] The European Parliament is also expressly required to "forward its draft legislative acts and its amended drafts to national Parliaments".[184] Beyond this, it is expressly stipulated that the Council must "forward draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments".[185] Finally, "upon adoption, *legislative resolutions* of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments."[186]

For the purposes of the Protocol, 'draft legislative acts' means "proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank, for the adoption of a legislative act"[187] - an identical definition to that contained in Protocol No. 1 on the Role of National Parliaments in the European Union.

A) A Limitation on Scope of the Protocol – the Principle of Subsidiarity

In considering the foregoing it must be remembered that the scope of the Protocol is limited by the scope of the principle of subsidiarity itself. Article 5(3) TEU provides that

> "under the principle of subsidiarity, *in areas which do not fall within its exclusive competence*, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

This means that neither the principle of subsidiarity nor the provisions of the Protocol applying the principle have any application in areas falling within the exclusive competence of the European Union. Instead, they apply merely – as the Commission have put it – to "all draft legislative acts in the field of shared competences."[188] This makes sense. The idea of subsidiarity, after all, only arises where there is a choice between undertaking some EU-level action and taking action at national level.

181. See generally Pennera, *loc. cit.* at n. 1, pp. 104-105.
182. Article 4, indent 1.
183. See *Practical Arrangements for the Operation of the Subsidiarity Control Mechanism under Protocol No 2 of the Treaty of Lisbon* (*loc. cit.* at n. 131 above).
184. Article 4, indent 2.
185. Article 4, indent 3.
186. Article 4 indent 4. Emphasis added.
187. Article 3
188. See *Practical Arrangements for the Operation of the Subsidiarity Control Mechanism under Protocol No 2 of the Treaty of Lisbon*, *loc. cit.* at n. 131 above.

Bearing that point in mind, the drafting of Articles 3 and 4 nonetheless seems rather poorly thought out. Why, for instance, does Article 4 of the Protocol stipulate that the European Parliament shall forward its "draft legislative acts" to national parliaments, when such initiatives do not seem capable of raising subsidiarity issues?[189] Why does Article 3 of the Protocol deem requests from the Court of Justice a form of "draft legislative act" when such requests seem inherently unlikely to involve issues of subsidiarity?[190] Furthermore, even an institution which does sometimes produce material which, depending on its content, is capable of violating subsidiarity does not *always* do so. Staff regulations adopted by the European Parliament and the Council for EU officials – under Article 336 TFEU – will have to be forwarded to national parliaments under the Protocol, although it is difficult to imagine how a subsidiarity issue could ever arise. Here again, a more refined approach could clearly have been taken in terms of what national parliaments need to see under Protocol No. 2.

The response might of course be made that the acts to be forwarded under Protocol No. 2 were simply intended to be the same as those required to be forwarded by Protocol No. 1. But it seems strange to repeat an obligation already contained in Protocol No. 1 merely for its own sake. Moreover, if Protocol No. 2 is simply intended – for whatever reason – to repeat the contents of Protocol No. 1 in terms of the acts to be forwarded, it actually does a poor job of it, as the next section illustrates.

B) Amended Drafts – An Issue of Practicability

Unlike Protocol No. 1 on the role of national parliaments in the European Union, Protocol No. 2 requires, in each case, not only the forwarding of draft legislative acts but also what it refers to without explanation as "amended drafts".[191] This would appear to apply where (i) the relevant institutions meet their duty – stipulated elsewhere in Protocol No. 2 [192] – to take account of the opinions of national parliaments but, in doing so, amend the original proposal. It would also apply where (ii) legislative drafts change by virtue of the operation of the ordinary (co-decision) legislative procedure, through the alignment of the views of the European Parliament and the Council.[193] Finally, it would also seem to apply (iii) when the Commission uses the power it enjoys under Article 293 TFEU to alter one of its legislative proposals at any time during the process of legislation, as long as the Council has not yet acted.

By requiring the forwarding of amended drafts to national parliaments, it could be said that the Protocol, on one level, does no more than require what an appropriate standard of subsidiarity control would

189. The European Parliament has a right of initiative under Article 223(2) TFEU concerning the laying down of the regulations and general conditions governing the performance of the duties of its Members; under Article 226, Indent 2, TFEU concerning the detailed provisions governing the exercise of the Parliament's power to set up temporary Committees of Inquiry; and under Article 228(4) TFEU concerning the laying down the regulations and general conditions governing the performance of the Ombudsman's duties.

190. Under Article 281 TFEU, the European Parliament and the Council may amend most of the provisions of the Statute of the Court of Justice of the European Union and, in doing so, must act either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice.

191. Long-standing case-law of the European Court of Justice concerning the role of the European Parliament in the European Union legislative process indicates, however, that even without this express provision, a radically altered measure might have had to be processed through the subsidiarity review procedure a second time, on democratic grounds (See in this regard the ruling of the Court of Justice in Case C-65/90 *Parliament v. Council* [1992] ECR I-4593.)

192. See Article 7(1).

193. See generally Article 294 TFEU.

demand. Yet here again, the Protocol seems not very well thought out – the eight-week time limit stipulated to allow for the sending of reasoned opinions by national parliaments may clash with other time limits, especially in respect of the length of time for which EU institutions are allowed to consider a draft law.[194] This prospective clash could render very difficult the functioning of the legislative process.

b) The Reasoned Opinion

Under Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality,

> "any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.
>
> If the draft legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.
>
> If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned."

A number of observations can be made about the foregoing. The first is that, under Article 6, the opinions of national parliaments are required to be reasoned. Thus, it was always clear that some form of dialogue or, at the very least, communication of views was envisaged, rather than a simple totalling of votes against any particular measure. In practice, opinions from national parliaments on proposals which are subject to the subsidiarity control mechanism are published on the Commission's website after the eight-week deadline has expired.[195]

Further, and as shall be seen later in this chapter, the Commission has built on the relevant Treaty provisions with the development of the extra-Treaty 'political dialogue' process, through which it has sought to engage national parliaments in European matters in dialogue concerning all aspects of documents sent to national parliaments, and not merely the subsidiarity question. However, this 'political dialogue' process operates alongside – and goes far beyond – the Treaty-based subsidiarity control mechanism. To keep clear water between the two processes, the Commission has invited national parliaments "to distinguish in their opinions as far as possible between subsidiarity aspects and comments on the substance of a proposal, and to be as clear as possible as regards their assessment on a proposal's compliance with the principle of subsidiarity."[196]

194. See *e.g.*. Article 294 TFEU, paras. 7, 8, 12, 13 and 14.
195. See *Practical Arrangements for the Operation of the Subsidiarity Control Mechanism under Protocol No 2 of the Treaty of Lisbon*, *loc. cit.* at n. 131 above.
196. *Ibid.*

Secondly, a few observations may be made about the 'eight week' period envisaged in Article 7. The first is that this period – although extended beyond the equivalent, and unfeasibly short, six-week period envisaged by the Constitutional Treaty's Protocol [197] – is a very brief period of time for a national parliament to arrive at and submit its views and it will require a high degree of organisation in order for it to be adhered to.

The second, however, is that in practice – at least where the originator of a proposal is the Commission – the period during which a national parliament (particularly a national parliament employing one of the more widely-used European languages) can send its opinion may prove somewhat longer than eight weeks. This is because the Commission sends the various language versions[198] of draft legislative acts which fall under the scope of the subsidiarity control mechanism "successively, according to their availability."[199] And, as far as the Commission is concerned, the eight-week limitation period starts running only with the transmission of an accompanying letter which is sent at the same time as the transmission of the *last* language version of a given document.[200] This is the *lettre de saisine* which, it is worth highlighting, always explicitly mentions the subsidiarity control procedure and specifies the precise deadline involved.[201] It should also be noted that, in order to take account of national parliaments' summer recesses, the Commission does not include the month of August in calculations determining the deadline referred to in Protocol No. 2, and specific reference is systematically made to this point in *lettres de saisine*. Further, should the non-receipt of a document by a national Parliament have an impact on the deadline, the Commission will fix a new deadline on an ad-hoc basis (taking into account the respective delay) and inform the national Parliament accordingly. In this event, however, the original deadline will still apply for any other national Parliament.[202]

The third observation is that notwithstanding the above, and given the relative brevity of the period for sending a reasoned opinion, national parliaments would probably be well advised to use the Commission consultation documents (which they have a right to receive under Protocol No. 1 on the Role of National Parliaments in the European Union) in order to, in effect, provide themselves with advance notice of some of the subsidiarity issues which could arise when the time comes to consider the relevant draft legislative proposals under the Subsidiarity Protocol.[203] In other words, the provision of Commission consultation documents – including green and white papers, and the Commission's annual legislative programme – under Protocol No. 1 provides an opportunity for national parliaments to find out about draft legislation before it is formally proposed by the Commission and, thus, for national parliaments not to come cold to the subsidiarity review process under Protocol No. 2. This is an opportunity national parliaments would do well to grasp, as the eight-week period could otherwise prove an excessively short

197. See Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Constitutional Treaty.
198. At the time of the coming into force of the Lisbon Treaty, each Chamber of national parliaments of the European Union was asked for confirmation of the language or languages in which it wished to receive the Commission documents and to which electronic address it wished the Commission to send these documents.
199. See *Practical Arrangements for the Operation of the Subsidiarity Control Mechanism under Protocol No 2 of the Treaty of Lisbon*, *loc. cit.* at n. 131 above.
200. *Ibid.*
201. *Ibid.*
202. *Ibid.*
203. See *e.g.*, Passos, *loc. cit.* at n. 56 above, p. 36.

time in which to complete their review to an appropriate standard. National parliaments would also do well, however, to engage with certain sources of information *not* apparently covered by the Protocol on the Role of National Parliaments in the European Union but which are, nonetheless, available online. An example source would be the Work Programmes submitted by individual Council Presidencies.[204]

c) The Yellow Card System

Under Article 7(1) of Protocol No. 2, "the European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament."[205]
Article 7, however, gives more force to the collective opinions of national parliaments than this. Indeed, it sets up two systems for doing so. The first of the two systems, provided for in rules copied virtually verbatim from the equivalent Protocol which was annexed to the defunct Constitutional Treaty, is colloquially and metaphorically known as the 'yellow card' arrangement – referring to the card used by referees in football matches to signal misconduct. Article 7(1) stipulates that "each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote."[206]

Article 7(2) then stipulates thresholds for review, providing that "where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments…the draft must be reviewed". This threshold is reduced to a quarter of the votes allocated where the draft legislative acts have their legal basis in Article 76 TFEU on the area of freedom, security and justice. A generous approach seems to be taken in practice to how votes are counted in this respect, the Commission having indicated that it

> "has always favoured a political interpretation of opinions received from national Parliaments and will therefore consider all reasoned opinions raising objections as to the conformity of a legislative proposal with the principle of subsidiarity towards the thresholds indicated in the Treaty, even if

204. (See in this regard Passos, *loc. cit.* at n. 56 above, p. 37.) For a recent example of such a programme, see Note from Presidency of the Council of the European Union, *Work Programme of the European Union Economic and Financial Affairs Council during the Hungarian Presidency* (18048/10 ECOFIN 863, Brussels, 11 January, 2011), available online at the time of writing at http://register.consilium.europa.eu/pdf/en/10/st18/st18048.en10.pdf .

205. This obligation is over and above that stipulated in Article 5, which stipulates that: "draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved."

206. A bicameral state such as Ireland thus has one vote allocated to the upper House (the Seanad) and one to the lower (the Dáil). Should, as is now proposed, the upper House be abolished, then, under Article 7(1), both votes would belong to the remaining House in what would then be a unicameral legislature.

the different reasoned opinions provide different motivations as to the non-compliance with the principle of subsidiarity or refer to different provisions of the proposal."[207]

The way in which matters proceed is that the Commission analyses each negative opinion and checks whether or not the threshold has been reached.

- As regards initiatives *for which the threshold has been reached*, once the deadline has expired, the Commission provides a political assessment of the files and confirms the triggering of the subsidiarity control mechanism. National parliaments, the European Parliament, the Council and IPEX are then informed accordingly.[208]

- *Where thresholds are not met after eight weeks or if opinions arrive after the deadline has expired,* the Commission replies to the respective national Parliaments in the context of the political dialogue.

Article 7(2) then indicates the – potentially rather modest – legal impact of the review process, stipulating that "after such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision." The Commission has indicated that it will give reasons for any such decision in the form of a Commission Communication, which will be sent to all national Parliaments, as well as to the European Union legislator and to IPEX.[209]

As the 'yellow card' analogy would suggest, then, the effect of a collective warning triggering the application of Article 7(2) is merely that of a warning of difficulties to be addressed. It does not mean the end of the proposed legislation. Indeed, far from it, the possibility of the initiator of the legislation maintaining the draft is specifically envisaged, even if it must provide justification for taking this (or any other) course of action. The third of or quarter of votes is, thus, best qualified as an 'obstructive minority' of national parliaments and chambers rather than a full-blown blocking minority.

A subsidiarity review system such as that described above is not without its difficulties. To adapt Maurer and Wessels, in many ways it seems like an invitation to national parliaments to second-guess the positions which will be adopted by ministers in Council, each of whom however will normally enjoy the confidence of a majority in the national parliament.[210] The likelihood that most national parliaments will normally, and perhaps invariably, endorse the approach of their national representative

207. See *Practical Arrangements for the Operation of the Subsidiarity Control Mechanism under Protocol No 2 of the Treaty of Lisbon*, *loc. cit.* at n. 131 above.
208. *Ibid.*
209. *Ibid.* The Commission has indicated that this same course will also be followed in the case of the so-called orange card procedure, which is discussed in the text below. In the case of the orange card procedure, the Commission has stated that the reasoned opinions received from national parliaments on a particular file will be annexed to this Communication. This undertaking has not for some reason been given in relation to the yellow card procedure.
210. See comments made by Maurer and Wessels concerning the then-mooted idea of a European-level subsidiarity chamber in Maurer and Wessels, *loc. cit.* at n. 20 above, at p. 470.

in the Council has to be very strong.[211] In itself, this is not necessarily a bad thing as long as a general expectation is not created that things will be different from this, since it seems inadvisable to create great hopes of change on the part of national parliaments only to dash them.

The first opportunity for national parliaments to try out the incoming subsidiarity early warning system came in November 2004 – in the first COSAC meeting after the Constitutional Treaty was signed – when COSAC agreed to conduct a pilot project to allow national parliaments to accumulate experience in operating such a mechanism. The Commission's Third Railway Package was made the subject of this experiment, and the results were discussed at the COSAC meeting held in Luxembourg in May, 2005. The experience proved useful enough to repeat, with COSAC co-ordinating a further seven 'subsidiarity checks' between then and the end of 2009.[212]

d) The Orange Card System

An additional paragraph was added to Protocol No. 2 at Lisbon, providing a further system of subsidiarity control.[213] This new control, unlike the yellow card procedure, applies only to proposals which involve the co-decision or 'ordinary' legislative procedure.[214] The newer system has been referred to as an 'orange' card system, with the rather mixed metaphor here being that of a traffic light.[215] The 'orange card' designation, however, is perhaps apt for the further reason that the original idea for this system came from a Dutch parliamentarian and constitutes part of the response to the Dutch and French referendum votes against the Constitutional Treaty. The system is less than a red card (or a red traffic light) to the extent that a majority of votes cast by national parliaments will not, on its own, be enough to put an end to a legislative procedure.

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211. See further in this regard House of Commons European Scrutiny Committee, *Subsidiarity, National Parliaments and the Lisbon Treaty* (thirty–third report of 2007–08 Session, 8 October 2008) at paras. 19 to 24 thereof.

212. COSAC thus coordinated subsidiarity checks on (i) the Commission's proposed Third Railway Package; (ii) the proposed Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM(2006) 399 final); (iii) the proposed Directive of the European Parliament and of the Council amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services (COM(2006) 594 final); (iv) the proposed Council Framework Decision on combating terrorism (COM(2007) 650 final); (v) the proposed Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final); (vi) the proposed Directive of the European Parliament and of the Council on standards of quality and safety of human organs intended for transplantation (COM(2008) 818 final); (vii) the proposed Council Framework Decision on the right to interpretation and translation in criminal proceedings (COM(2009) 338 final); and (viii) the proposed Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154 final). (See http://www.cosac.eu/en/info/earlywarning/ The 43rd Madrid COSAC in June, 2010, decided to cease engagement n such try-outs.)

213. The only change introduced by that Treaty that (barring any intervention by the Court of Justice) will make any practical difference is the two-week extension of the period for national parliaments and chambers to send their reasoned opinions stating why there has been a breach of subsidiarity. It is not entirely clear if the 'orange card' provisions are cumulative or alternative to those of the 'yellow card' system, although all that appears to hinge on that point is whether the Commission would be obliged to offer reasons for any decision to amend or withdraw draft legislation under the ordinary legislative procedure if a majority of member state parliaments objected to a measure on subsidiarity grounds, since that obligation only exists under Article 7(2)'s yellow card procedure but not Article 7(3)'s orange card procedure. (See Barrett, *loc. cit.* at n. 176 above, pp. 75-76.)

214. See Article 7(3), first indent of Protocol No.2.

215. J.-V. Louis, "*National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits*" in I. Pernice and E. Tanchev (eds.), "*Ceci n'est pas une Constitution - Constitutionalisation without a Constitution?*" (Nomos 2009), 132 at p. 141.

The new rule stipulates that, "where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity *represent at least a simple majority of the votes allocated to the national parliaments*, then that proposal must be reviewed."[216]

This does not mean that the proposal is finished. Indeed, "after such review, the Commission may decide to maintain, amend or withdraw the proposal."[217]

If it chooses to maintain the proposal, the Commission will have to justify, in a reasoned opinion, why it considers that the proposal complies with the principle of subsidiarity.[218] This specific requirement might seem to add little, if anything, to similar obligations in existence elsewhere in the Protocol – and, indeed, the Commission has indicated that its procedure here will be the same as that deployed when the yellow-card procedure is used[219] – but it does at least guarantee that the Commission will have a chance to respond to any new concerns about subsidiarity expressed by national parliaments.[220] However, what comes next *is* new.

The Commission's reasoned opinion, as well as the reasoned opinions of the national parliaments, must be submitted to the European Parliament and the Council for consideration.[221]

These institutions are then required – before concluding the first reading in the co-decision procedure[222] – to consider whether the legislative proposal is compatible with the principle of subsidiarity. The fulfilment of this role by the European Parliament and the Council, a role assigned to them under the orange card procedure, is thus made a condition precedent to concluding the first reading in the co-decision procedure. In all likelihood, the failure to fulfil this duty would render the EU measure adopted, in consequence, open to challenge by the European Court of Justice on grounds of infringement of an essential procedural requirement.[223] In considering the subsidiarity issue, the Council and the European Parliament must take particular account of the reasons expressed and shared by the majority of national parliaments as well as the reasoned opinion of the Commission.[224] Crucially, if the opinion of a 55 per cent majority of the members of the Council *or* a majority of the votes cast in the European Parliament is that the proposal "is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration."[225] In other words, it will be struck from the legislative agenda. This

216. *Ibid.* Emphasis added.
217. *Ibid.*
218. Article 7(3), second indent.
219. See above at n. 209.
220. See the obligations in this regard set out in Article 5 and Article 7(2) of the Protocol and see Barrett, *loc. cit.* at n. 176 above, pp. 77-80. If, however, Article 7(2) and Article 7(3) are taken to provide alternatives rather than to set out cumulative provisions, then this obligation may be regarded as giving the Commission an opportunity (which it might otherwise lack) to respond to concerns expressed by national parliaments.
221. Article 7(3), second indent.
222. For details of how the European Parliament and the Council have reacted to this obligation in their internal rules, see Pennera, *loc. cit.* at n. 1, paras. 93-95.
223. See Article 263 TFEU and see Case 138/79 *Roquette Frères v. Council of the European Communities* [1980] ECR 3333. Cf. however Case C-65/93 European Parliament v. Council [1995] ECR I-643. See also Pennera, *loc. cit.* at n. 1, para. 89.
224. Article 7(3)(a).
225. Article 7(3)(b). For criticism of these vote thresholds which, somewhat bizarrely, simultaneously make it easier for the European Parliament to block legislation under Article 7(3) than is normally the case under the ordinary legislative procedure, but more difficult for the Council to do so, see Barrett, *loc. cit.* at n. 176 above, pp. 80-81.

is the first time the subsidiarity-compliance monitoring system has expressly envisaged the possibility of legislation actually being blocked on the grounds that it violates subsidiarity.

The limits of this orange card process should, however, be borne in mind. A majority of national parliaments cannot alone decide that a proposal has violated subsidiarity for the purposes of the procedure. Such a decision requires the agreement of either Parliament or Council as well. Furthermore, the voting rules mean that the votes of only 13 of the 27 states represented in the Council, added to a majority of those which happen to be cast in the European Parliament on a given day (not a majority of that Parliament's members), can save a legislative proposal.[226]

e) Conclusion on the Ex Ante Subsidiarity Control Mechanisms

A) More Dignified Than Efficient?

It seems legitimate to pose the question of why the *ex ante* subsidiarity control mechanisms were actually adopted in the first place. Their existence appears to be rooted in the political need to involve national parliaments in the activities of the Union as a means of responding to criticisms of European Union decision-making processes as lacking in transparency, and to the suspicion existing in some member states "that the Union institutions try to increase their powers to the detriment of national parliaments."[227] The difficulty here, however, is that the latter criticism in particular has little basis in reality.[228] Put another way, the mechanisms taken at face value seek to ensure an absence of problems in a field in which there appears to be an absence of problems to begin with. The only problem is one of perception. The mechanisms are probably more correctly viewed as a response to a political need than a response to any systemic failing.[229] Some confirmation of this can be seen in the evidence given by Andrew Duff, MEP, to the House of Commons European Scrutiny Committee, in which he went so far as to say of the subsidiarity early warning mechanism that

> "it was understood by those of us involved in its drafting and, then, re-drafting that the mechanism, although a necessary addition to the system of governance of the Union, was not really intended to be used. It is, in Bagehot's terms, more a dignified part of the European constitutional settlement than an efficient one." [230]

This does not mean that the subsidiarity control mechanisms in Protocol No. 2 are of no value, however. In the first place, their very existence may serve to dissipate fears (however baseless) of a grab for power by European Union institutions and, hence, go some way toward allaying fears and distrust of the European Union legislature.[231]

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226. See for some reflections in this regard, Barrett, *loc. cit.* at n. 176 above, pp. 82-83.
227. Passos, *loc. cit.* at n. 56 above, p. 35.
228. *Ibid.*
229. A subsidiarity control mechanism put in place by the Finnish parliament in 1995 at the time of that country's entry to the European Union has rarely found that a Commission proposal violated the principle of subsidiarity. (See House of Commons European Scrutiny Committee, *Subsidiarity, National Parliaments and the Lisbon Treaty* (33rd report of 2007–08 Session, 8 October, 2008) at para. 20 thereof.)
230. *Ibid.* at para. 21.
231. See also Passos, *loc. cit.* at n. 56 above, p. 35.

Secondly, it is to be hoped that the existence of the subsidiarity control mechanisms will lead to more debate on European matters – and more 'downward' communication of information about European matters – in national parliaments.

Thirdly, it is to be hoped that the awareness that there is now a system such as this – one under which the input of national parliaments could potentially make a difference at European level – may motivate and stimulate national parliaments and governments into better equipping and resourcing national legislatures. Thus, they would be enabled to take seriously any domestic or European-level role they have to play in relation to the European legislative process. This has certainly proved to be the case in Ireland to date.[232]

Finally, the existence of the subsidiarity mechanism may constitute a method of transmission for the communication of a groundswell of popular opinion in the Member States against the adoption of a particular draft law [233] – although it might well be asked whether it is necessarily a good idea to force the square peg of popular opposition to individual European legislative proposals through the metaphorical round hole of a procedure focusing on the highly technical legal question of whether the principle of subsidiarity has been breached or not.

There are, it must be said, also some challenges and risks associated with the introduction of the new processes – in particular, the subsidiarity review procedure.

First, in terms of the challenges they present, the new processes require national parliaments to organise themselves effectively in order, for example, to be able to provide a reasoned opinion on subsidiarity within the short period of eight weeks. Optimum use of the subsidiarity processes also involves, for example, the setting up of institutional arrangements to facilitate effective sharing of expertise between members of national parliaments (and, indeed, presupposes that the requisite degree of expertise is available to national parliaments). Effective use of the procedure will also require networking between national parliaments. The response of the Irish parliament to date to such challenges is recorded elsewhere in this volume.

Secondly, in terms of risks, each national parliament will have to find a happy medium between two dangers: on one hand, the danger that excessive collective zeal on the part of national parliaments in the discharge of their new responsibilities will block the European Union's legislative process and, on the other, the risk of a growth in national parliamentary disillusion or indifference to the whole subsidiarity review process.

As regards the former danger, any mechanism which creates the possibility of proposed European Union legislation being permanently derailed is obviously of significance and the orange card procedure

232. See the relevant chapter of this study concerning Ireland's response to the Lisbon Treaty reforms.
233. Opposition of the kind seen, for example, in relation to the original draft version of the Services Directive, subsequently adopted in heavily amended form as Directive 2006/123 of the European Parliament and of the Council on services in the internal market [2006] OJ L376/36.

certainly lends the subsidiarity control mechanism a serious 'bite', even if the Lisbon Treaty drafters also sought to avoid excessive disruption of the legislative process by the careful assignment of crucial roles in the process to the Commission, the Council and the European Parliament.

As regards the latter danger, disillusion or indifference on the part of national parliaments regarding the subsidiarity process would equally be a matter of concern; disillusion could, for example, lead to increased problems of acceptance of European Union measures by both parliament and citizens. The risk of disillusionment in this context is arguably a possibility in that the European Union does not, in reality, appear to be engaged in any ongoing subsidiarity-violating power grab from member states, and thus, as already noted, there is no real systemic *raison d'être* for the subsidiarity control mechanism, beyond the political. Furthermore, there appears relatively little likelihood that the subsidiarity control mechanism will ever be successfully deployed in a situation in which a measure would not be outvoted in any case in the Council – the majority view of national parliaments, after all, would normally be expected to support the position of their government and its member in the Council.

National parliamentarians will, of course, have to show sufficient interest in the subsidiarity provisions in order to make them work. Such interest ought not be automatically assumed. A central problem to date in securing the involvement of national parliaments in the scrutiny of European legislation has been, as Kiiver has observed, that

> "...voters do not seem to reward [work] on European scrutiny. The Commons had...even to reduce the planned number of European Standing Committees from five to three due to a shortage in volunteering MPs. Also in the other national parliaments, the vast majority of incoming EU documents is either left unattended, is immediately cleared as requiring no further scrutiny, or is merely taken note of without debate. The sectoral committees in the French parliament reportedly greet EU documents with a mix of scepticism and boredom. Even in the Nordic mandate-giving parliaments...the draft mandates are usually approved of in the form proposed by the government."[234]

It is, therefore, perhaps not unduly pessimistic to suggest that the subsidiarity review powers conferred on national parliaments at Lisbon may have to function in the absence of a great deal of electoral interest in their exercise. How well these powers are capable of functioning in such an environment may turn out to be an important issue.

Overall, it seems more probable than not that blockage of legislative proposals under Article 7(3) will be a highly exceptional and unusual situation, and the collective challenge of securing a sufficient number of the votes which have been assigned to national parliament and chambers to result either in an Article 7(2) yellow card or an Article 7(3) orange card will be considerable. This is not necessarily a bad thing. A certain level of difficulty in blocking proposals is appropriate if one wishes to avoid hindering the adoption of legislation at European level to an excessive degree. One should also be aware of political realities, however. The Commission will obviously have to tread carefully if a proposal it puts forward

234. Kiiver, *op. cit.* at n. 3, p. 68.

attracts *significant* opposition from national parliaments, even if this is not of a sufficient scale to trigger an orange or even a yellow card.[235] Overall, it remains to be seen whether the member states have gotten the balance right between avoiding the generation of excessive national parliamentary zeal for interference in the European legislative process and providing sufficient powers to national parliaments to justify efforts to implement the control processes.

B) Political Dialogue – the Barroso Initiative

No mention of the subsidiarity review provisions would be complete without making at least some note of their political contextualisation through the process of political dialogue with the Commission. In 2006, the European Commission, going beyond the uncontroversial (and rather unambitious) provisions concerning national parliaments set forth in the increasingly defunct-seeming Constitutional Treaty, set up a mechanism for a process of political dialogue – the Barroso Initiative, named after the then Commission President. This had as its objective the putting in place of a privileged channel of communication between the Commission and national parliaments. A series of annual reports on relations between the European Commission and national parliaments were subsequently produced by the Commission, detailing an impressive account of dialogue, contacts and visits between these institutions.[236]

The 2009 *Annual Report on Relations between the European Commission and National Parliaments* (the last available at the time of writing) reported that 250 opinions had been sent to the Commission in the context of the political dialogue that year (compared to 200 in 2008), asserting this to be "a clear upward trend", and bringing to a cumulative total of 618 the number of opinions which had been received from 35 out of 40 national parliamentary chambers between September, 2006, (when the process began) and December, 2009.[237] The process thus appears to have enjoyed some success, although some qualifications must be noted. Throughout the process, some chambers have been far more active than others. Taking the year 2009 as an example, 12 parliamentary chambers were responsible for three-quarters of all opinions received by the Commission. Thirteen chambers limited themselves to opinions adopted in the context of the COSAC-coordinated subsidiarity tests and ten chambers sent no opinions at all. Five of the 40 chambers had never participated in the dialogue in a period of more than three years leading up to the end of 2009.[238]

It may be that the growing extent of the political dialogue engaged in between the Commission and national parliaments, combined with the unlikeliness of national parliaments keeping their opinions on European Union legislative initiatives to within the uncomfortable confines of the subsidiarity issue, may ultimately gain some form of Treaty recognition in the event of the Treaties ever again being subjected to a thorough revision. Even should this not happen, however, the process of political

235. Pennera has speculated that the combined opposition on subsidiarity grounds of the lower Houses of parliaments in a major state – *e.g.,* the *Bundestag*, the House of Commons and the *Camera dei deputati* - would be impossible for the Commission to ignore.(Pennera, *loc. cit.* at n. 1, p. 107.)

236. These are available online at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm

237. COM (2010) 291 final (Brussels, 2 June, 2010). Kaczyński has asserted that Opinions communicated from national parliamentary chambers to the Commission rose five-fold (from 53 to 250) between 2006 and 2009. (See P. Kaczyński, *Paper Tigers or Sleeping Beauties? National Parliaments in the Post-Lisbon European Political System* (Centre for European Policy Studies, Brussels, 2011) at p. 10).

238. *Viz.* both of the houses of parliament in Spain and Romania, as well as the Slovenian upper chamber.

dialogue between national parliaments and the Commission seems set to continue to be a very real part of European Union life. The Commission has made it clear that the Treaty-based subsidiarity review mechanism which was agreed upon at Lisbon, and which involves national parliaments, is now to be applied side-by-side with the non-Treaty based, but nonetheless politically-significant, process of political dialogue.[239]

f) Recourse to the European Court of Justice for the Annulment Procedure

As well as the *ex ante* system of subsidiarity control involved in the yellow and orange card procedures, the Protocol on the application of the principles of subsidiarity and proportionality also provides for an *ex post* system of control. Under Article 8 of the Protocol

> "the Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof." [240]

This provision reproduces, effectively verbatim, a similar provision contained in the equivalent Protocol annexed to the Constitutional Treaty. The measure has its origins in the Constitutional Convention which produced the first draft of that Treaty. Yet it does not embody explicitly the original ideas of the Subsidiarity Working Group within that Convention that (a) "recourse to judicial proceedings must be able to occur only in limited and probably exceptional cases, when the political phase has been exhausted without any satisfactory solution being found by the national parliament(s) involved" and (b) national parliaments *themselves* should be able to refer questions of the violation of the subsidiarity principle to the European Court of Justice.[241]

Article 8 does not explicitly state that member state governments are to be bound in European law by a notification from a national parliament or parliamentary chamber.[242] In Ireland, the matter has become largely moot as Article 7(4) of the European Union Act 2009 now provides that

> "where either House of the Oireachtas is of opinion that an act of an institution of the European Union infringes the principle of subsidiarity provided for in the treaties governing the European Union and wishes that proceedings seeking a review of the act concerned be brought in the Court of Justice of the European Union in accordance with Article 263 of the Treaty on the Functioning of the European Union, it shall so notify the Minister in writing for the purposes of Article 8 of

239. See letter by Commission President Barroso and Vice-President Wallström of 1 December, 2009, available online at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/letter_en.pdf
240. Article 8 also provides (although less relevantly for present purposes) that in accordance with the rules laid down in Article 263 TFEU, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that the Committee be consulted.
241. See European Convention, *Report on the Conclusions of Working Group I on the Principle of Subsidiarity* (CONV 286/02 WGI 15, Brussels, 23 September 2002) at pp. 7-8, and see Pennera, *loc. cit.* at n. 1, p. 109.
242. Passos has argued they do. (*Loc. cit.* at n. 56 above, p. 30.)

> Protocol No. 2 to that treaty and the Treaty on European Union *and the Minister shall, as soon as may be after being so notified, arrange for such proceedings to be brought*."[243]

Other states have taken a different approach, however. In Spain, for example, the Government may reject such a demand, although it must provide reasons and justify its decision before a special commission if requested to do so.[244] The implication of such divergences is that the subsidiarity control system is perhaps not quite as uniform in its application across the European Union as it might first appear.

Pennera has noted the peculiarity involved in giving a member state and its parliament (or a chamber thereof) a route for bringing a challenge to a legal act on subsidiarity grounds, noting that a government generally has the support of its parliament anyway and suggesting that the system makes the most sense where the government has no majority in one of the parliamentary chambers.[245] It seems possible to make exactly the same criticism of the *ex ante* subsidiarity procedure, however.

Certainly some interesting questions are raised by Article 8. Will, for example, the notification by a member state of an action on grounds of infringement of the principle of subsidiarity deprive a member state of its right to intervene in a case – possibly supporting the other side? [246]

The reaction of certain national legal systems to the Article 8 procedure for recourse to annulment proceedings is of considerable interest. Under German law, the lower House of the German parliament, the *Bundestag,* is obliged to lay proceedings under Article 8 – and the Government to refer them immediately to the European Court of Justice – at the request of only a *quarter* of the membership of the *Bundestag.*[247] A somewhat similar rule has been written into Article 86-6 of the French Constitution. The relevant rule, which came into force on the same day as the Lisbon Treaty, provides for either House of the *Assemblée Nationale* to bring a challenge (which must then be referred to the Court of Justice by the Government) on the application of only 60 of its members.[248]

These member states appear to have used the process of reception of the Article 8 procedure into their legal systems in order to turn it into something which was not envisaged when the Article was drafted – a system for the protection of *minority* views in national parliaments. In other words, they have enabled, and indeed required, the votes assigned to their parliaments to be cast in favour of the view that subsidiarity has been violated even when the view of a clear majority in the relevant chamber may be that there has been no such violation.

Only the fact that this type of approach has not been adopted on a widespread basis saves this from being a development of more serious concern. The inclusion of a major role for national parliaments in

243. Emphasis added.
244. See Article 7(2) of the law 24/2009 of 22 December, 2009, and see further Pennera, *loc. cit.* at n. 1, p. 111.
245. *Loc. cit.* at n. 1, p. 109.
246. This right is guaranteed by Article 40 of the Statute of the Court of Justice. See further Pennera, *loc. cit.* at n. 1, p. 112.
247. See § 12 of the *Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union* (22 September, 2009, *Bundesgesetzblatt* Part I p. 3022, as subsequently amended by the law of 1 December, 2009).
248. See Pennera, *loc. cit.* at n. 1, pp. 110-111.

the subsidiarity review process seems to have been predicated on, and to be justified by, the democratic representativity of those institutions, rather than the idea that national legal systems would, in effect, delegate the voting powers of their national parliamentary chambers to an unrepresentative minority of the membership of these institutions. If adopted on a more widespread basis, the Franco-German approach would lead to an increase in the risk of disruption of the legislative process at European Union level and would appear hard to justify on the basis of the requirements of democracy. The European Court of Justice has, to date, declined to invalidate any measures on subsidiarity grounds, several challenges notwithstanding. But it cannot be guaranteed that such a conservative approach will always be taken by it.[249]

v. The Role of National Parliaments in the Treaty Amendment Process

Up to this point, we have looked at the general Treaty provisions concerning democracy and national parliaments – Articles 10 and 12 of the Treaty on European Union, respectively – and have looked in some detail at the main provisions found in Protocol (No. 1) on the Role of National Parliaments in the European Union and Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality. However, these are by no means the only provisions concerning the role of national parliaments to be found in the Treaties following the changes enacted by the Lisbon Treaty. It is proposed to briefly examine the other roles conferred on the Oireachtas, explicitly or implicitly, by European law as it now stands.

The first such role is that of national parliaments' involvement in the Treaty amendment process. One significant change which came about as a result of the coming into force of the Treaty of Lisbon was the replacement of the provision which set out a single main route for the amendment of the Treaties – the old Article 48 of the Treaty on European Union – with a veritable four-lane highway, consisting of the traditional amendment procedure (now, however, enhanced with some additional features) plus three simplified amendment procedures.[250] In all of these amendment procedures, national parliaments have a significant role to play. It is proposed to examine each briefly in turn.

a) The Role of National Parliaments in the Ordinary Revision Procedure: An Involvement in Each of Three Stages

A) An Initial Role

National parliaments have always played a role in the creation of primary law by virtue of the need, derived originally from public international law, to ratify treaty agreements. This role has been seen in (a) the adoption of constitutive treaties (whether as an original party[251] or by a state adhering to its own

249. See more generally on the approach taken by the Court to date, T. Hartley, *The Foundations of European Community Law* (sixth edition, Oxford University Press, 2007) at pp. 113-116.

250. See further G. Barrett, *Creation's Final Laws: The Impact of the Treaty of Lisbon on the 'Final Provisions' of Earlier Treaties* (2008) 27 Yearbook of European Law 3 at pp. 7 to 27.

251. Hence, Article 247 of the Treaty of Rome provided that "this Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional rules…" Effectively identical provision is now made by Article 54 TEU and Article 357 TFEU.

accession treaty), (b) the adoption of later treaties amending these Treaties,[252] and (c) the adoption by existing member states of treaties providing for the accession of new member states. Since the coming into force of the Treaty of Lisbon on 1 December, 2009, the role of national parliaments in the latter two processes has been increased. The manner in which this has been done forms part of the subject matter of this section and the next.

Since the coming into force of the Treaty of Lisbon on 1 December, 2009, the role of national parliaments in the process of amendment of existing treaties has been expanded upon. Article 48 of the Treaty on European Union has provided for a modified form of the old pre-Lisbon Treaty amendment procedure, known as the 'ordinary revision procedure'. Under Article 48(2) of the Treaty on European Union, it is now possible for the Government of any Member State, the European Parliament or the Commission to submit proposals to the Council for the amendment of the Treaties. Vitally for present purposes, according to Article 48(2), "these proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified." Although Article 48(2) does not explicitly say so, presumably the notification of the national parliaments is – like the submission to the European Council – to be effected by the Council of Ministers. At any rate, this notification guarantees national parliaments the opportunity, for the first time, to be aware of Treaty changes proposed under this procedure and to express a view thereon from the very outset of the process of Treaty revision: an opportunity which did not exist prior to the Treaty of Lisbon entering into force.

B) A Convention Role

Once the proposal has been made and submitted, and the appropriate parties have been notified, a second role in the ordinary revision procedure is envisaged for national parliaments by Article 48(3) of the Treaty on European Union. As has already been seen in the text above, this copies an approach which was originally used without any Treaty basis in order to provide the initial drafts of the Charter of Fundamental Rights of the European Union and, indeed, the Constitutional Treaty.[253] The innovation consists of a so-called 'convention', modelled on the 1787 Philadelphia Convention which drafted the United States Constitution. The perceived success of employing such a body in a European Union context led the member states – first, in the Constitutional Treaty[254] and then, when that Treaty failed to secure ratification, at Lisbon – to provide that "if the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention".[255]

Under Article 48(3), this Convention is to be composed of: the heads of state or government of the member states;[256] representatives of the European Parliament and of the Commission; "and of representatives

252. See now Article 48 TEU, examined in more detail in the text below.
253. See generally concerning the Convention on the Future of Europe, Norman, *op.cit.*at n. 65.
254. See Article IV-443(2) of the Constitutional Treaty.
255. See now Article 48(3) of the Treaty on European Union which repeats verbatim the relevant sentence of Article IV-443 of the Constitutional Treaty.
256. It will therefore include the very heads of state and government who will have decided to convene it.

of the national Parliaments".[257] The purpose of such a Convention is to "examine the proposals for amendments" and to "adopt by consensus a recommendation to a conference of representatives of the governments of the Member States".[258] The practical importance of such a role can be seen in the large number of amendments proposed by the Convention on the Future of Europe which survived into the final version of the Constitutional Treaty and, ultimately, into the Treaty of Lisbon. Maurer and Wessels have described the convention idea as a move toward assigning national parliaments a share of a kind of 'para-constituent authority'.[259]

The role of national parliaments – participating at this point of the ordinary Treaty amendment process by having representatives at such a convention – is inherently vulnerable, however, in that "the European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments".[260] This provision was invoked on the first occasion this amendment process was deployed after the coming into force of the Lisbon Treaty, thereby depriving national parliaments of any role at this point of the amendment process.[261]

C) A Role in the Ratification Process

The final part of the ordinary amendment procedure is set out in Article 48(4) of the Treaty on European Union, which stipulates that

> "a conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.
>
> The amendments shall enter into force *after being ratified by all the Member States in accordance with their respective constitutional requirements*."[262]

In Ireland, as in other member states, the ratification process normally involves a parliamentary vote (in Ireland's case sometimes accompanied by a referendum). The role of parliament at this point in

257. The European Central Bank is also required to be consulted in the case of institutional changes in the monetary area. See generally, Article 48(3), first indent.
258. Article 48(3) of the Treaty on European Union.
259. See Maurer and Wessels, *loc. cit.* at n. 52 above, p. 25.
260. See Article 48(3) second indent. In this case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.
261. See G. Barrett, *First Amendment? - The Treaty Change to Facilitate the European Stability Mechanism* (Institute of International and European Affairs, Dublin, 2011) at 3-4. Briefly, on 23 June, 2010 – a mere six months after the Lisbon Treaty entered into force - an intergovernmental conference was convened in Brussels by the then Spanish Presidency of the Council for the purpose of determining by common accord an amendment to the Treaties. The aim of that particular amendment was to create a transitional arrangement lasting until the end of the 2009-2014 parliamentary term, whereby 12 member states who between them *would* have obtained 18 additional seats in the European Parliament if the Lisbon Treaty had - as originally intended - entered into force before the June 2009 European Parliament elections, would not now be made to wait until the next (2014) elections to get them by reason of the delay on the part of several countries in ratifying that Treaty.) Pennera has expressed concerns that this avoidance of a convention may set a precedent. See Pennera, *loc. cit.* at n. 1, p. 91.
262. Emphasis added.

the Treaty amendment process has always provided a guarantee that there would be at least some parliamentary involvement in the Treaty amendment process.

It can be seen that the changes effected by the Lisbon Treaty mean that national parliaments now have a role role in shaping the Treaty, not only at the end of a Treaty amendment process – acting as the rather crude and unwieldy instrument through which it is decided whether or not to ratify an amending treaty, the terms of which have already been agreed – but also, potentially more influentially, at the beginning and (at least normally) in the middle of the ordinary Treaty amendment procedure as well.

b) The Role of National Parliaments in Simplified Revision Procedures

The Lisbon Treaty provides for three accelerated or simplified procedures for amending the Treaties. A role has been provided for national parliaments in all three procedures.

A) The Role of National Parliaments in the First Simplified Revision Procedure

Under Article 48(6) of the Treaty on European Union, the Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. This is a very considerable part of this Treaty, governing the large field of internal policies and actions of the Union - which covers, inter alia, the internal market; agriculture and fisheries; freedom, security and justice; common rules on competition, taxation and approximation of laws; and economic and monetary policy as well as many other policy areas.[263]

The 'simplified' element of this Treaty amendment procedure relates to the fact that, rather than there being a need for an intergovernmental conference (or indeed a convention), the European Council is empowered to adopt a decision – amending all or part of the provisions of Part Three – by unanimity.[264] The input for national parliaments stems from the specific provision in Article 48(6) that such a decision "shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements."[265] In Ireland, as in other member states, this will normally involve parliamentary approval at the very least, with, in appropriate cases, a referendum also being necessary.[266] Like the ordinary amendment procedure, therefore, the first simplified revision procedure involves a veto power being given to national parliaments at the end of the amendment process. Unlike the ordinary amendment procedure, it involves no more than this. One of the ways in which the amendment procedure is 'simplified' therefore is by refraining from creating the potential for debate at national level created by the obligation in the ordinary revision procedure of notifying national parliaments of proposed amendments.

263. The possible impact of the amendment procedure is reduced by the express provision in Article 48(6) third indent that such a decision is not to increase the competences conferred on the Union in the Treaties.
264. After consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area.
265. See second indent of Article 48(6).
266. See in this regard *Crotty* v. *An Taoiseach* [1987] IR 713.

At the time of writing, Article 48(6) has been deployed for the first time. This occasion, the proposed amendment facilitating the creation of the European Stability Mechanism, will involve only parliamentary ratification.[267]

B) The Role of National Parliaments in the Second and Third Simplified Revision Procedures

A role is also provided for national parliaments under what one might call the second and third simplified revision procedures. According to the second simplified revision procedure, where provision is made either in the Treaty on the Functioning of the European Union or in Title V of the Treaty on European Union (which relates to the Union's Common Foreign and Security Policy and to external action by the European Union) for the Council to act by *unanimity* in a given area or case, the European Council may adopt a decision authorising the Council to act by a *qualified majority*.[268]

According to the third simplified revision procedure, where provision is made in the Treaty on the Functioning of the European Union for legislative acts to be adopted by the Council in accordance with a *special* legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the *ordinary* legislative procedure (in other words co-decision).[269]

In relation to the deployment of both procedures, a power of veto is reserved for each individual national parliament. Hence, Article 48(7) provides that

> "any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision…shall not be adopted. In the absence of opposition, the European Council may adopt the decision."[270]

Two observations may be made about this. The first is that, although technically Treaty-amending power is transferred from national level to European level in Article 48(7)'s two simplified revision procedures, the effect of these provisions is that each national system is facilitated in retaining a parliamentary veto over the use of the amendment power. In this way, each national system is permitted to recreate the power previously enjoyed by national parliaments through the process of Treaty ratification that normally accompanied Treaty amendments.

The second observation is that this invitation by Article 48(7) is facilitative rather than mandatory. In other words, the invitation which it extends to permit national parliaments to decide on whether or not to exercise veto power over Article 48(7) Treaty amendments is one which must be accepted by each national system. Thus, national parliaments must be enabled to exercise this discretion by the relevant

267. See further Barrett, *op. cit.*, at n. 261 above.
268. Article 48(7) of the Treaty on European Union, first indent.
269. Article 48(7) of the Treaty on European Union, second indent. Note that in the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.
270. Article 48(7) of the Treaty on European Union, third indent. This is an effectively verbatim reproduction of a provision found in Article IV-444(3) of the defunct Constitutional Treaty.

national rules applying to them and by the political parties which control their operation. Absence of national parliamentary opposition for any reason – including the failure of national legal and political systems to facilitate national parliamentary consideration of the amendment – enables the European Council to take the Treaty-amending decision.

A kind of addendum is provided to the third simplified revision procedure by Article 81(3) of the Treaty on the Functioning on the European Union.

Under Article 81(3), the Council, on a proposal from the Commission, "may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure."[271]

Precisely the same powers, it may be noted, are reserved for national parliaments under Article 81(3) as under the second and third simplified revision procedures, and raise precisely similar issues. Thus Article 81(3) provides that any such proposal

> "shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision."[272]

Article 81(3) owes its separate existence to historical reasons. It is the latest evolution of a more restrictive measure which was originally inserted into the Treaty of Nice. Through successive alterations stemming both from the Constitutional Treaty period and the Treaty of Lisbon, however, Article 81(3) has now been aligned, in terms of its effects, with the third simplified revision procedure – the only difference being that the deciding body under Article 81(3) is the Council, rather than the European Council.[273]

C) The Role of National Parliaments in Specialised Revision Procedures

The coming into force of the generalised revision procedures under the Lisbon Treaty notwithstanding, a number of specialised revision procedures have also survived the coming into force of that Treaty, many providing a role for national parliaments. Some of these are analogous to the first simplified revision procedure in that they permit the amending or supplementing of Treaty or Protocol text.[274] Only one such specialised revision procedure, however, appears to even implicitly envisage a role for national parliaments. This is Article 25 of the Treaty on the Functioning of the European Union, which provides that the Council may adopt provisions to strengthen or to add to the rights of European

271. In doing so, the Council acts unanimously after consulting the European Parliament. Article 81(3) second indent.
272. Article 81(3), third indent.
273. See for a more detailed examination of the history of Article 81(3), Pennera, *loc. cit.* at n. 1, p. 94.
274. See Article 82(2) paragraph (d) of the Treaty on the Functioning of the European Union; as well as Article 83(1) third indent TFEU; Article 86(4) TFEU; Article 126(14) TFEU; Article 129(3) TFEU; Article 281 second indent TFEU; Article 300(5) TFEU; and Article 308(3) TFEU. These are discussed in more detail in Pennera, *loc. cit.* at n. 1, pp. 92-93.

Union citizens which are listed in Article 20(2).[275] The implicit role for national parliaments here stems from the stipulation that "these provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements."[276]

Similarly, notwithstanding the enactment of Article 48(7) – with its second and third generalised *passerelles* – some specialised *passerelles* have also survived or originated with the coming into force of the Lisbon Treaty.[277] One of these *passerelles*, Article 81(3) of the Treaty on the Functioning of the European Union, is so closely linked to the third general *passerelle* that it has already been examined in that context. As has already been seen, this expressly envisages a veto role for national parliaments.

No other specialised *passerelle* appears to envisage, expressly or implicitly, any role at all for national parliaments. It is, of course, possible that any given national legal system might itself demand a role for its national parliament in relation to any other *passerelle* or specialised revision procedure – something which the German Federal Constitutional Court (the *Bundesverfassungsgericht*) has demanded in its *Lisbon* judgment of the German legal system, where treaty amendment is allowed without a ratification procedure.[278]

vi. The Role of National Parliaments Regarding Applications to Join the European Union

Because of the need to ratify accession treaties – a requirement only now stipulated in Article 49 of the Treaty on European Union, but reflecting one which had already existed in public international law – national parliaments have always had a role in relation to the entry of new states to the European Union. The coming into force of the Treaty of Lisbon has led to national parliaments being given an additional Treaty-acknowledged place in relation to applications to join the European Union, however.

Article 49 of the Treaty on European Union now provides that any European State which respects the values referred to in Article 2 of that Treaty,[279] and which is committed to promoting them, may apply to become a member of the Union. It then further stipulates that both "the European Parliament and national Parliaments shall be notified of this application."[280] Thus, national parliaments are to be made aware of any such application at its outset rather than, as has historically been the case, simply being presented with the take-it-or-leave-it option of ratifying an accession treaty at the end of already-concluded negotiations.

275. In doing so the Council must act unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament. It must also act on the basis of the Article 25 first indent requirement that the Commission report every three years on the application of the provisions of Part Two of the Treaty on the Functioning of the European Union (which concerns non-discrimination and citizenship of the Union), a report which must take account of the development of the Union.
276. See Article 25 second indent.
277. Apart from Article 81(3) TFEU, there is also Article 31(3) TEU; Article 153(2) final indent TFEU; Article 192(2) final indent TFEU; and Article 312(2) second indent TFEU.
278. See the Lisbon judgment of the *Bundesverfassungsgericht* (BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), available online at the time of writing at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html
279. Article 2 provides that "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."
280. Copying verbatim a provision first included in Article I-58 of the Constitutional Treaty.

The ratifying role of national parliaments is also retained, however. In wording taken verbatim from the old Article 49 of the Treaty on European Union (i.e. as it stood in its pre-Lisbon form), it is stipulated that

> "the conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. *This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.*"[281]

Implicitly, this acknowledges the continued existence of the role which national parliaments have always enjoyed at the end of the accession process.

vii. The Role of National Parliaments in Decisions to Withdraw from the European Union

In a provision introduced by the Lisbon Treaty (and in a rather telling commentary on the perceived locus of sovereignty within the European Union), Article 50 of the Treaty on European Union now provides that any member state may decide to "withdraw from the Union in accordance with its own constitutional requirements." The normal anticipated procedure is that "the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union."[282] No role is stipulated for the national parliament of any other member state in this regard. Instead, Article 50(2) merely stipulates that the agreement "shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament". However, in the departing member state, the normal requirement in public international law pertaining to ratification of international treaties, in addition to political reality, would ensure a role for the national parliament concerned.

viii. The Role of National Parliaments in the Operation of the Flexibility Clause

From the beginnings of the European Economic Community, a so-called 'flexibility clause' formed part of the Treaty structure, empowering the adoption of measures where Treaty objectives had been set out, but the necessary powers to attain those objectives had not been provided. In its current manifestation – Article 352(1) of the Treaty on the Functioning of the European Union [283] – this 'flexibility clause' provides (insofar as is relevant) that

> "if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided

281. Article 49 of the Treaty on European Union. Emphasis added.
282. See Article 50(2) of the Treaty on European Union. The failure to reach an agreement is anticipated, however, since, under Article 50(3) it is provided that the Treaties "shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the [notification by the relevant member state to the European Council of its intention to withdraw] unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."
283. Replacing and repeating effectively *verbatim* the proposed Article I-18(1) of the Constitutional Treaty.

> the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures…"

Article 352(2) provides for a role for national parliaments in this regard,[284] by stipulating that

> "using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article."[285]

This provision will clearly be useful for the purposes of alerting national parliaments before any use is made of the 'flexibility clause' (a provision the use of which has caused some controversy in Denmark in particular.) It should, therefore, facilitate an appropriate level of debate in national parliaments and the exercise of accountability over the individual members of the Council. On the other hand, it is not clear what precisely the reference to the use of the subsidiarity monitoring procedure is supposed to add to matters. Is an eight-week delay envisaged here as under the subsidiarity monitoring procedure? Are justifications for recourse to Article 352 – equivalent to the justifications of draft legislative acts with regard to the principles of subsidiarity and proportionality – to be required? None of this, let alone the yellow and orange card procedures, is expressly envisaged by Article 352(2), even though these are the most important elements of the subsidiarity procedure.

ix. The Role of National Parliaments in the Justice and Home Affairs Field

At European Union level, justice and home affairs co-operation has always been an area of particular sensitivity given the closeness of policing and criminal law to what have traditionally been seen as the functions of a state. Indeed, for this very reason, from the coming into force of the Treaty of Maastricht in November, 1993, until the entry into force of the Treaty of Lisbon in December, 2009, a separate 'pillar' of the European Union was constructed to accommodate justice and home affairs co-operation.[286] As time passed, however, and experience and trust grew, it gradually came to be accepted that justice and home affairs co-operation did not need a separate 'pillar' for itself within the European Union structure. The coming into force of the Treaty of Amsterdam, in particular, saw large areas of justice and home affairs co-operation moved out of its special corral.[287] The Lisbon Treaty has now largely finished this process, although indications of the sensitivity of this area – and its centrality to the notion of what constitutes a state – remain. National parliaments gain more mention in the Treaty provisions here than they do elsewhere and, in some respects, are also given a larger role.

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284. Replacing and repeating effectively *verbatim* the proposed Article I-18(2) of the Constitutional Treaty.
285. Insofar as is relevant, Article 5(3) of the Treaty on European Union provides that: "the institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol."
286. See by the author regarding the origins of justice and home affairs cooperation, "*Cooperation in Justice and Home Affairs in the European Union – an Overview and a Critique*" in G. Barrett, *Justice Cooperation in the European Union* (Institute of European Affairs, 1997).
287. See regarding the impact of the Treaty of Amsterdam, G. Barrett, "*Justice Cooperation in the European Union After Amsterdam*" (1998) 2 Contemporary Issues in Irish Law and Politics 239.

One example of this added mention of national parliaments has already been seen in this text – namely, Article 81(3)'s provision for a veto for each national parliament[288] on proposals which purport to determine which aspects of family law with cross-border implications may be the subject of the ordinary legislative procedure. Article 81(3) has now been aligned with the third simplified revision procedure.[289] But this has not led to Article 81(3) into the general provision. Instead, it remains a separate provision – visible evidence of the special nature of justice and home affairs co-operation.

Another example of the highlighting of the role of national parliaments in the Treaty provisions on justice and home affairs area is the effective restatement by Article 69 TFEU[290] that national parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 (governing judicial cooperation in criminal matters) and 5 (governing police cooperation) of Title V of that Treaty comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality. Article 69 adds nothing in *substance* to the provisions on subsidiarity already examined in the text above. Rather, it seems to have been inserted merely to highlight or underline the role of national parliaments in an area which is of considerable sensitivity, particularly on the basis of national sovereignty concerns.

Another provision of note in the area of justice and home affairs, however, does have a substantive impact. It will be recalled that, under Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, where reasoned opinions by national parliaments or chambers on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all of the votes allocated to national parliaments in accordance with that Protocol, then the draft must be reviewed.[291] This threshold, however, is different in the case of certain draft legislative acts submitted in the area of freedom, security and justice.[292] Here, the draft must be reviewed where reasoned opinions on non-compliance total merely a *quarter* of all votes.

Some other limited provisions relating to the role of national parliaments were inserted in Title V of the Treaty on the Functioning of the European Union (which governs the area of freedom, security and justice) at Lisbon.

Article 70, for example, provides for some facilitation of national parliaments in the justice and home affairs field. Under Article 70, the Council may, on a proposal from the Commission, adopt measures laying down arrangements whereby member states, in collaboration with the Commission, evaluate

288. Exercised, as we have seen, by the national parliament making known its opposition within six months of being notified of the proposal.
289. As has already been seen, the only difference is that the deciding body in Article 81(3) is the Council, rather than the European Council.
290. Repeating effectively *verbatim* the provision which had been made in Article III-259 of the defunct Constitutional Treaty.
291. Article 7(2) of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.
292. *Ibid.* These are the acts referred to in Chapter 4 (judicial cooperation in criminal matters) and 5 (on police cooperation) of Part III Title V of the Treaty on the Functioning of the European Union (which relates to the areas of freedom, security and justice) together with measures referred to in Article 74 of the Treaty on the Functioning of the European Union (which ensure administrative cooperation in the areas covered by these Chapters).

the implementation by member states' authorities of Union policies in the Title V area.[293] The role for national parliaments derives from the fact that Article 70 specifically provides that "national Parliaments shall be informed of the content and results of the evaluation" – a measure which seems to be designed to stimulate national-level debate on member state performance in implementing European Union justice and home affairs policies.[294]

Further, Article 71 of the Treaty on the Functioning of the European Union provides that national parliaments are to be kept informed of the proceedings of a standing committee, which it requires to be set up within the Council in order to ensure that operational co-operation on internal security is promoted and strengthened within the Union (and in the proceedings of which representatives of the Union bodies, offices and agencies concerned may be involved).[295]

There is also Article 85 TFEU, which makes provision for regulations determining arrangements for involving national parliaments in the evaluation of Eurojust's activities.[296] Similarly, Article 88 TFEU provides that regulations are expected to lay down the procedures for scrutiny of Europol's activities by national parliaments.[297]

Some evidence of the sensitivity of this area is, arguably, also demonstrated by the inclusion of provisions stipulating the use of directives, rather than more general-term measures in the field of police co-operation,[298] judicial control in criminal matters,[299] and criminal law harmonisation.[300] This adds a degree of discretion to each state in terms of implementation. However, whether it actually leads to national parliamentary involvement will depend on the member state involved. In Ireland, for example, there has been a pattern of directives being implemented via secondary legislation over which the Oireachtas exercises no more than theoretical control.

x. The Role of National Parliaments in the Adoption of Certain Highly Significant Sub-Treaty Laws or Measures

Finally, a role for national parliaments seems to be envisaged, at least implicitly, by specific Treaty provisions dealing with the adoption of certain highly significant sub-treaty laws or measures.[301]

293. This is provided to be without prejudice to Articles 258, 259 and 260 of the Treaty on the Functioning of the European Union, all of which relate to the bringing of proceedings against a member state on the grounds that it has failed to fulfil an obligation under the Treaties.
294. This provision repeats verbatim the provision of Article III-260 of the Constitutional Treaty. Note that the European Parliament is also required to be informed under Article 70.
295. This repeats - effectively word for word - the provisions of Article III-261 of the Constitutional Treaty. Again, the European Parliament is also to be kept informed.
296. Article 85 final indent. The regulations make similar provision regarding the European Parliament. Similar provision was made in Article III-273(1) final indent of the defunct Constitutional Treaty.
297. Again, together with the European Parliament. See Article 88(2) final indent. Similar provision was made in Article III 276(2) final indent of the defunct Constitutional Treaty.
298. Article 82(2) TFEU.
299. *Ibid.*
300. See Article 83(1) TFEU. See generally Pennera, *loc. cit.* at n. 1, p. 114.
301. See more generally Pennera, *loc. cit.* at n. 1, pp. 95-96

First, there is Article 42(2) of the Treaty on European Union. This stipulates that "the European Union's common security and defence policy shall include the progressive framing of a common Union defence policy, and will lead to a common defence, when the European Council, acting unanimously, so decides." Article 42(2) TEU stipulates that the European Council "shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements."

In Ireland, it may be noted, the adoption of such a decision by the State would involve not only the intervention of parliament but the actual amendment of the Constitution by referendum, since Article 29.4.9° of the Irish Constitution specifically provides that "the State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 42 of the Treaty on European Union where that common defence would include the State."

Secondly, there is Article 218(8) of the Treaty on the Functioning of the European Union. Article 218 generally deals with agreements between the European Union and non-member states or international organisations. Under Article 218(8), it is provided that the Council decision, which is to conclude the envisaged agreement on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms,[302] shall enter into force only "after it has been approved by the Member States in accordance with their respective constitutional requirements." It seems likely that in most member states this will involve some form of parliamentary approval.

Thirdly, Article 223(1), second indent, of the Treaty on the Functioning of the European Union provides for the Council[303] laying down the provisions necessary for the election of the European Parliament's members by direct universal suffrage, either in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States. Here, again, it is provided that "these provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements." Once again, parliamentary approval seems to be envisaged here.

Fourthly, Article 262 of the Treaty on the Functioning of the European Union provides that the Council[304] may adopt provisions to confer jurisdiction on the Court of Justice of the European Union in disputes relating to the application of Treaty-based acts creating European intellectual property rights. Once again raising the same expectation of some national parliamentary involvement, "these provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements."

302. Under Article 6(2) of the Treaty on European Union, the Union "shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms."
303. Acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which is to act by a majority of its component Members. Under Article 223(1), the Parliament also draws up the proposal to lay down the provisions.
304. Acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament.

Finally, there is Article 311, third indent, TFEU, according to which the Council is required to adopt a decision laying down provisions on the system of "own resources"[305] of the Union.[306] This, once more, is a decision which "shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements."

6. Conclusion

Passos has described the European Union as being based on a dual legitimacy "in the sense that the will of the citizens and the States is reflected by the joint presence of the European Parliament and the Council in the legislative process".[307] The Lisbon Treaty has sought to reinforce such dual legitimacy, both further extending the powers of the European Parliament through the extension of the use of co-decision – to such an extent that it has come to seem appropriate to deem this the 'ordinary legislative procedure'[308] – and enhancing the role of national parliaments in the various ways which have been detailed *in extensu* in this chapter. In this respect, Lisbon has represented a considerable step in the direction of what may be called 'joint parliamentarisation'. In particular, national parliaments have now explicitly been made actors in the European Union legislative process. The main enhancement of their role effected at Lisbon, however – namely their function in the subsidiarity review process, with its metaphorical yellow and orange cards – does not provide national parliaments with the opportunity to make a direct input into the content of European-level legislation. Instead, their input is indirect: in the place of being given the legal power to shape legislation directly, national parliaments have been given the power merely to control or monitor its enactment by the European Union legislature. Furthermore, there is a somewhat unreal aspect to these powers. The ubiquity of the rule that national parliaments operate under the control of the executive right across European Union makes it seem questionable that yellow or orange cards will ever be deployed in circumstances where European legislation would not have been defeated anyway (i.e. by reason of failure to secure a majority in Council).

Nevertheless, the subsdiarity review mechanism will provide an opportunity for national parliaments to have their voices heard, and not just in relation to questions of subsidiarity. Indeed, the construction of a broad context of political dialogue for the subsidiarity mechanism – in the form of the Barroso initiative – makes it clear that it is not expected that national parliaments will restrict themselves to commentary on questions of subsidiarity when dealing with initiatives at European level. Whether national parliaments will use the opportunity presented to them, and whether what we have been left with in the wake of Lisbon will amount to more than merely the combination of "considerable

305. This simply means that the Union is to provide itself with the means necessary to attain its objectives and carry through its policies. (See Article 311 first indent.)
306. The Council acts in accordance with a special legislative procedure in this context, acts unanimously and acts after consulting the European Parliament. It is permitted to establish new categories of own resources or abolish an existing category.
307. Passos, *loc. cit.* at n. 56 above, p. 34.
308. See in more detail Art. 294 TFEU.

legal constitutionalisation and institutional adaptation" with "a modest impact with regard to the real patterns of participation",[309] are a different matter, however.

It is, to some extent, a question of what national parliaments want for themselves. As has already been noted in the text above,[310] despite the claim sometimes made that "national parliaments would prefer a larger scope for their control – to be able to raise issues of the appropriate legal basis, the delimitation of competences between the Union and the member states or whether there has been respect for the principle of proportionality",[311] national parliaments have not always impressed with their enthusiasm for a greater role in European policy. Although national parliaments were very heavily represented in the Convention on the Future of Europe,

> "notwithstanding some discussion, little ultimately came in the Convention of a range of proposals which would have involved national parliaments in the appointment process of persons in leadership positions in the European Union such as the President of the Commission. Moreover the Convention was surprisingly restrained in terms of the extent to which it was prepared to require the involvement of national parliaments in forming the policy agenda prior to the proposal of any actual individual item of legislation. It has also been observed that the members of the Convention generally demonstrated little interest in parliamentary deficits concerning the Common Foreign and Security Policy or the European Security and Defence Policy; enhanced cooperation; and the Open Method of Coordination."[312]

We are in something of a trial period in relation to *whether* the new powers for national parliaments will work and *how* they will work. If the value of the new provisions is to be optimised, as Passos has observed, "national parliaments will need to show that they can successfully work together and with European institutions in order to intervene efficiently in European Union affairs."[313] Of course, the performance of individual national parliaments in all this is likely to vary. Ferrer has correctly observed that "these provisions established at the European level will have more or less efficacy, depending on the organisation and constitutional practices of each member state."[314]

309. The description by A. Maurer and W. Wessels of the *pre*-Lisbon situation. (*Loc. cit.* at n. 52 above, p. 17).
310. See text at n. 234.
311. Passos, *loc. cit.* at n. 56 above, p. 39.
312. Barrett, *loc. cit.* at n. 176 above, p. 67. See also Maurer, *loc. cit.* at n. 93 above at pp. 79-81, 82-83 and 78 respectively.
313. *Loc. cit.* at n.38, at p. 40.
314. Ferrer, *loc. cit.* at n. 38 above, p. 171.

CHAPTER 4

Reacting to Lisbon: Developments in the Lifetime of the 30th Dáil Concerning the Future Role of the Oireachtas in European Affairs

Introduction

The Treaty of Lisbon, which entered into force on 1 December, 2009, had a major impact on the role of the Oireachtas in relation to European affairs. The provisions of the Treaty itself and, more especially, the two Protocols which were adopted with it are significant enough in their own right. However, they have also produced a cascade of further reactions within Ireland's domestic legal order, each with its own consequences, beginning with (a) the amendment of Article 29.4 of the Constitution; continuing with (b) the coming into force of the European Union Act 2009; and further continuing with (c) the provision of interim arrangements (subsequently made permanent) establishing procedures within the Oireachtas for implementing the Lisbon Treaty, successively addressed by resolutions of each House in December, 2009, then by amendments to the Standing Orders of the Dáil and Seanad relative to public business in November and December, 2010, respectively.

Apart from this reaction on the part of the *legal* system to the coming into force of the Lisbon Treaty provisions on national parliaments, there was also a political response in the form of two Sub-Committee Reports, one of which – *Ireland's Future in the European Union: Challenges, Issues and Options* – was partly concerned with the future role of the Oireachtas in European affairs. The other, the *Report of the Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs*, was entirely focused on this future role. The contents of these Reports are only to a limited extent an attempt to reflect on how to accommodate the provisions of the Lisbon Treaty and its associated Protocols. They are also the response to the stimulus provided by the Lisbon Treaty to the Oireachtas to reflect on its own role in relation to European Affairs. These reflections were shown to be more necessary than ever by the initial 'No' vote to the Treaty in the June 2008 referendum.

The remainder of this chapter is divided into two Parts. Part I involves an assessment of the modifications made, during the lifetime of the 30th Dáil and in response to the Treaty of Lisbon, to the Irish rules concerning the role of the Oireachtas in European affairs. Part II examines the attempts made by the Oireachtas to envisage its own future role in European affairs and is, therefore, principally concerned with the contents of the two Sub-Committee Reports mentioned above.

1. In The Beginning – the Original Legal Position of National Parliaments Analysed

The Modification of the Irish Rules Concerning the Role of the Oireachtas in European Affairs in Response to the Treaty of Lisbon - an Assessment of the Changes to Date

The extensive provisions found in the Lisbon Treaty concerning national parliaments have already been examined elsewhere in this work. The call of these provisions – which came into force on 1 December, 2009 [1] – has now found several answers at national level in Ireland. More specifically, three reforms impacting on the role of the Oireachtas have been introduced into the Irish legal system in order to accommodate the coming into force of the Lisbon Treaty.

The first was that, on 1 December, 2009, Article 29.4 of the Irish Constitution was amended through the insertion of new sub-sections: 4° 6°, 7°, 8° and 9°.[2] This amendment was effected by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009, which had been approved by the electorate in referendum two months earlier.[3] The second reform was the coming into force – also on 1 December, 2009 - of the relevant provisions of the European Union Act 2009.[4] The third took the form (at least initially) of the adoption of virtually identical resolutions by each House of the Oireachtas on 10 December, 2009, establishing interim arrangements for the implementation of the Lisbon Treaty.[5] The terms of the resolutions indicated that they were originally intended to apply only until each House was adjourned for the 2010 summer recess. However, as later events transpired, they endured for most of the remaining life of the 30th Dáil and, by the time of the dissolution of that Dáil, the system they embodied looked set to become a quasi-permanent feature of Oireachtas life. The application of the December 2009 resolutions was subsequently extended until December, 2010, by resolutions adopted in the Dáil and the Seanad on 5 May, 2010.[6] The continuation of these arrangements on a more permanent

1. In accordance with Article 6(2) of the Treaty of Lisbon, which stipulated that the Treaty enter into force on 1 January, 2009, provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step. This was the Czech Republic, which deposited its instrument of ratification in Rome on 13 November 2009.
2. More precisely, Article 29.4.3° of the Constitution as it then stood was amended, subsections 4°, 5°, 6°, 7°, 8°, 9°, 10° an 11° of Article 29.4 were repealed, and new subsections 4°, 6°, 7°, 8° and 9° were inserted. (See s. 1(1) of the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009.) Note also that Article 29.4.5º, which provides that "The State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007 ("Treaty of Lisbon"), and may be a member of the European Union established by virtue of that Treaty." was inserted in the Constitution on an earlier date than the other provisions in order to facilitate ratification – *viz.* on the date of the Act's signature by the President on 15 October. (See s. 1(1) and 1(2) of the 2009 Act.) Until 1 December, it was numbered subsection 12°. (S. 1(3) of the 2009 Act.) The dates on which all of the foregoing amendments took effect were stipulated in s. 1(2) of the Act itself.
3. The referendum, held on 2 October, 2009, was carried by 1,214,268 votes to 594,606, corresponding to a 67.1% to 32.9% vote, with the majority in favour, on a turnout of 59%. This effectively reversed the result of the previous referendum held on 12 June, 2008, in which the initial proposal to amend the Constitution to facilitate ratification of the Lisbon Treaty was defeated by 862,415 votes to 752,451 corresponding to a result of 53.4% to 46.6% against , on a turnout of 53.1%.
4. Under Article 2 of the European Union Act 2009 (Commencement) Order 2009, sections 1, 2, 3, 4, 5, 6, 7 and 9 of the European Union Act 2009 came into operation on 1 December, 2009. Section 8 of the 2009 Act (a provision relating to the interpretation of statutory instrument of little relevance for present purposes) has not yet been brought into force.
5. The text of each resolution was set out in Vol. 698 Dáil Debates 1 (10 December, 2009) and Seanad Debates Volume 199 No. 6 (10 December, 2009) respectively. See, in particular, paragraph (f) of both resolutions.
6. See Vol. 202 *Seanad Debates* (5 May, 2010) and Vol. 708 *Dáil Debates* (5 May, 2010). In their original form, the resolutions had been intended to remain in effect only until the Oireachtas Summer recess in 2010. The May 2010 resolutions amended the December 2009 resolutions by making them applicable until the Christmas recess in 2010.

basis was then facilitated by modifications to the Standing Orders of Dáil Éireann and Seanad Éireann relative to public business,[7] made on 25 November and 2 December, 2010, respectively.

It is proposed in this section to examine the cumulative effect of these three separate sets of provisions. It should be noted that the intention of this section is not to examine the relevant provisions of the Lisbon Treaty, since that was done in Chapter 3. Rather, the intention is to look at the direct responses of the Irish legal system to the legal challenges provided by the Lisbon Treaty. This response had six aspects: (i) facilitiating either House of the Oireachtas providing a reasoned opinion as to why a legislative draft does not comply with subsidiarity; (ii) facilitiating either House of the Oireachtas bringing a review action before the Court Of Justice of the European Union for infringement of the subsidiarity principle; (iii) facilitiating both Houses' non-opposition to/prior approval of any European Council agreements changing the decision-making procedure from one at Council level to one by qualified majority; (iv) facilitiating both Houses' non-opposition to/prior approval of European Council/Council measures changing decision-making at council level to decision-making by co-decision ('the ordinary legislative procedure') (v) facilitiating both Houses' authorisation of certain decisions at European Union level in the area of justice and home affairs; and (vi) facilitiating both Houses' authorisation of enhanced co-operation.

i. Facilitating the Provision of a Reasoned Opinion from Either House of the Oireachtas as to Why a Legislative Draft Does Not Comply With Subsidiarity

By way of introduction, it may be recalled that Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality – annexed at Lisbon to the Treaty on European Union and the Treaty on the Functioning of the European Union – establishes a procedure enabling the chambers of national parliaments to ensure that draft European legislative acts comply with the principle of subsidiarity. The chambers carry out a subsidiarity review, the result of which is they may send reasoned opinions explainging why a particular measure is incompatible with the principle of subsidiarity. A certain minimum number of such reasoned opinions triggers what are colloquially referred to as 'yellow' and 'orange' cards, whereby a stipulated number of votes allocated to national parliaments or chambers reflect the view that a draft does not comply with subsidiarity.[8]

The detailed rules concerning the Irish implementation of the subsidiarity procedure were set out in s. 7(3) of the European Union Act 2009, and together with Dáil Standing Order 103C and Seanad Standing Order 98C.[9] S. 7 (3) of the 2009 Act provides that

7. See Vol. 723 *Dáil Debates* (25 November, 2010) and Vol. 206 *Seanad Debates* (2 December, 2010. See generally regarding th changes to the Dáil Standing Orders, Dáil Éireann, *Modifications and Amendments in Effect to the Standing Orders Relative to Public Business (2007 Edition)* (2 December, 2010). Because of time constraints, no account has been taken in this chapter of changes to the Standing Orders occurring after these dates.
8. See Articles 6 and 7 thereof.
9. Which carry the title 'Draft legislative acts: eight week limit to express opinion on infringement of subsidiarity ("yellow and orange card")' These replace paragraphs (a) and (b) of the respective resolutions adopted by each House of the Oireachtas on 10 December, 2009, for the purposes of establishing interim arrangements for the implementation of the Lisbon Treaty.

> "either House of the Oireachtas may, not later than 8 weeks after the transmission of a draft legislative act referred to in Article 6 of Protocol No. 2 to the Treaty on European Union and the Treaty on the Functioning of the European Union, send to the Presidents of the European Parliament, the Council and the European Commission a reasoned opinion in accordance with that Article if the House concerned passes a resolution in respect of the draft legislative act concerned authorising the House to so do."

In this, it largely copies the wording of Article 6 of Protocol No. 2 itself. The reference to "a reasoned opinion in accordance with that Article" seems to imply that s. 7(3) authorises the Oireachtas only to send 'a reasoned opinion stating why it considers that the draft in question does *not* comply with the principle of subsidiarity'.[10] No other kind of opinion is referred to in Article 6. This view of s. 7(3), if it is correct,[11] seems sensible from a functional standpoint. The subsidiarity review procedure functions as a blocking mechanism for draft European Union legislation, and only negative opinions have blocking value. On the other hand, it seems curious to limit the Oireachtas – in carrying out its subsidiarity review – merely to sending criticisms rather than also sending approval of the approach the European Union legislature has taken. There is, admittedly, probably nothing preventing the Oireachtas also sending a positive view in relation to the subsidiarity issue. However, it will not be acting under s. 7(3) where it does so. No provision was made for this under Dáil Standing Order 103C or Seanad Standing Order 98C,[12] indicating that it was not anticipated that this would happen.

S. 7(3) of the 2009 Act tells us nothing whatsoever about how the subsidiarity mechanism will work in an Irish context other than informing us that, for a reasoned opinion to be sent in accordance with Article 6, the relevant House of the Oireachtas must pass a resolution authorising the House to do so. More detailed provisions in this regard were set out in Dáil and Seanad Standing Orders.[13]

Hence, Dáil Standing Order 103A and Seanad Standing Order 98A provided that there should stand established – following, respectively, the reassembly of the Dáil after a general election or the commencement of every Seanad – a select committee. This is this same select committee which is to stand conferred with powers relating to a series of matters (dealt with later in this chapter), namely proposals to use the so-called *passerelle* procedure, the *ex post facto* procedure for requesting review for violations of subsidiarity by the European Court of Justice, and the *ex ante* subsidiarity review procedure. Presumably to avoid tying the hands of future administrations excessively, and to enable the distribution of the various Lisbon Treaty-related functions under discussion here among different select committees, the select committee in question was not named. But various provisions were made in relation to it. For a start, an end was brought to the situation which formerly obtained of months passing after the Dáil and Seanad elections before committees commenced their work. These select committees were required to come into existence quickly. The Dáil was to appoint 13 members to its select committee no later than the third sitting day following its reassembly, five of whom were to

10. See Article 6 of Protocol No. 2. (Emphasis added).
11. It is a view reinforced by paragraph b, point (ii) of both the Seanad and Dáil resolutions of 10 December, 2009, which refer to a reasoned opinion being submitted by the Select Scrutiny Committee of either House only where the Committee is of the opinion that a draft legislative act is in breach of the principle of subsidiarity.
12. Or the predecessor resolutions of 10 December, 2009.
13. More specifically, Dáil Standing Orders 103A, 103B and 103C, and Seanad Standing Orders 98A, 98B and 98C.

constitute a quorum. The smaller Seanad had to appoint six members to its equivalent select committee, three of whom were to constitute a quorum. Each Seanad, too, had to do this no later than the third sitting day following its commencement. Each House is required to define the functions to be performed by its select committee, and the powers to be devolved on it, above and beyond those set out in the Standing Orders themselves.[14]

Whether the select committee appointed by each House worked separately from that appointed by the other House (or, indeed, separately from other committees appointed by the same House) was left to the select committees themselves. Under Dáil Standing Order 103B and Seanad Standing Order 98B, the relevant select committee on which powers are conferred[15] was to have the power to request of another select committee of *either* House – on which such powers have been similarly conferred – that a joint meeting of both committees be held to consider "a specific matter or matters of common activity".[16] Rules were even set out for such joint meetings: the Chairman of the requesting committee was normally to act as chairman,[17] the quorum rules were modified,[18] and the orders of reference of the two committees were to apply only insofar as they were common to both.[19]

Joint meetings were not mandatory, however. Both Houses' Standing Orders specified that a select committee which had been joined with a select committee appointed by the other House to form a joint committee "may nevertheless decide to act as a Select Committee of [its own House] in respect of a specified matter or matters or for a specified time period for the purpose of exercising the said powers."[20]

Under the December 2009 resolutions, each Scrutiny Committee was specifically required, 'in the interests of efficiency', to work jointly with their counterparts in the other House in order to carry out their responsibilities under the respective resolutions.[21] This injunction was not repeated in the later amendments to the Standing Orders but the weight of precedent was such that it seemed difficult to envisage the relevant select committees acting separately from their counterpart in the other House, at least where the committees concerned were the European Scrutiny Committees of either House.

The procedure in each House was for draft legislative acts forwarded to the House[22] to be referred to "a Select Committee empowered under the Standing Order." Which select committee this was to be was not

14. Dáil Standing Order 103A(2); Seanad Standing Order 98A(2). The devolution of powers in question would be under Dáil Standing Order 83 and Seanad Standing Order 70.
15. i.e. under Dáil Standing Orders 103C, 103D or 103E, or Seanad Standing Orders 98C, 98D or 98E.
16. See Dáil Standing Order 103B(3); Seanad Standing Order 98B(3).
17. See Dáil Standing Order 103B(3)(a); Seanad Standing Order 98B(3)(a).
18. The rule is that the quorum provisions of the Committees shall apply, with the modification that each such quorum shall be halved and then rounded up to the next nearest whole number. [See Dáil Standing Order 103B(3)(b) and Seanad Standing Order 98B(3)(c)].
19. See Dáil Standing Order 103B(3)(c); Seanad Standing Order 98B(3)(c).
20. Dáil Standing Order 103B(1); Seanad Standing Order 98B(1).
21. See paragraph (a) of each December 2009 resolution.
22. This is a requirement imposed under Article 2 of Protocol (No. 1) on the Role of National Parliaments in the European Union – annexed at Lisbon to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty Establishing the European Atomic Energy Community – and under Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, annexed at Lisbon to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

identified any more precisely than this in the Standing Order but, under the December 2009 resolutions, the relevant committee was the Select Committee on European Scrutiny. The select committee was then empowered to form a reasoned opinion as to whether a draft legislative act complied with the principle of subsidiarity.[23]

Under Dáil Standing Order 103C and Seanad Standing Order 98C,[24] the respective select committees were required – in forming this reasoned opinion – to consult with such other committees and stakeholders as it saw fit. This opened up a role, albeit a lesser one, for sectoral committees in the subsidiarity process, as well as creating the possibility of consulting 'stakeholders'. Curiously, it did not make specific provision for the consultation of experts in the field, although such consultation might, perhaps, be facilitated by employing a broad interpretation of the concept of 'stakeholder'.[25] Under the December 2009 resolutions, the select committee (identified in those resolutions as the relevant House Select Committee on European Scrutiny) was also required to consult with the Joint Committee on European Affairs. The perhaps necessary vagueness of the new Standing Orders did not allow for the repetition of this requirement. Nor however did they preclude such consultations being voluntarily undertaken.

Where the select committee was of the opinion that a draft legislative act did not comply with the principle of subsidiarity, it was required to submit a reasoned opinion to this effect by way of a report which had to be laid before the relevant House.[26] In keeping with the approach adopted in the 2009 Act, no provision was made for a report where the committee was of the opinion that a draft legislative act was *not* in breach of the principle of subsidiarity.[27]

Once such a report had been laid, the committee chairman[28] was required to table a motion on it 'forthwith' under s. 7(3) of the European Union Act 2009,[29] and this motion was required to be given priority on the House Order Paper.[30] The degree of urgency required for dealing with such motions was clearly driven by the eight-week deadline under the Subsidiarity Protocol for transmitting reasoned opinions by national parliaments or chambers.

Where the House agreed the motion, the Ceann Comhairle (in the case of the Dáil) or the Cathaoirleach (in the case of the Seanad) had to cause a copy of the consequent resolution, together with a copy of

23. See Standing Order 103C(1) and (3)(a), and Seanad Standing Order 98C(1) and (3)(a). Formerly paragraph (b) of each December 2009 resolution.
24. More precisely, Order 103C(3)(a) and Order 98C(3)(a), respectively.
25. A lacuna which was also to be seen in the earlier resolutions. See paragraph (b), point (i) of each of the December 2009 resolutions.
26. See Order 103C(3)(b) of the Dáil Standing Orders and Order 98C(3)(b) of the Seanad Standing Orders, respectively, following, in this respect, paragraph (b), point (ii) of each December 2009 resolution.
27. Again, this was also the case under the December 2009 resolutions.
28. *Sic.*
29. See Order 103C(3)(c) of the Dáil Standing Orders and Order 98C(3)(c) of the Seanad Standing Orders, respectively.
30. *Ibid.* This latter requirement is to be seen in the published *Modifications and Amendments in Effect to the Standing Orders Relative to Public Business (2007 Edition)*, although not, curiously, in records of the relevant debates in either Dáil or Seanad. It follows the rule which applied under the December 2009 resolutions. See paragraph (b), point (iii) of each December 2009 resolution.

the select committee's report, to be sent to the Presidents of the European Parliament, the Council and the Commission.[31]

ii. Facilitating a Review Action for Infringement of the Subsidiarity Principle being Brought Before the Court of Justice of the European Union at the Instigation of Either House of the Oireachtas

It will be recalled that Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, annexed at Lisbon to the Treaty on European Union and the Treaty on the Functioning of the European Union, establishes that the Court of Justice of the European Union is to have "jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought...by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament of a chamber thereof."[32]

This provision of European Union law leaves some doubt – given its use of the words 'in accordance with their legal order' – as to whether a national parliament can compel such an infringement action to be brought. The Irish implementing provisions, however, leave no such ambiguity. Under s. 7(4) of the European Union Act 2009,

> "where either House of the Oireachtas is of opinion that an act of an institution of the European Union infringes the principle of subsidiarity provided for in the treaties governing the European Union and wishes that proceedings seeking a review of the act concerned be brought in the Court of Justice of the European Union...it shall so notify the Minister in writing for the purposes of Article 8 of Protocol No. 2 to that treaty and the Treaty on European Union and the Minister shall, as soon as may be after being so notified, arrange for such proceedings to be brought." [33]

No further information is provided by s. 7(4). Once again, therefore, the further details of this process were spelled out by the Standing Orders of Dáil Éireann and Seanad Éireann relative to public business, succeeding the 10 December 2009 resolutions of each House.

Under the earlier 2009 resolutions, somewhat curiously, although the yellow card/orange card element of the subsidiarity review process was made the primary responsibility of the respective House Select Committees on European Scrutiny, this litigation part of subsidiarity control was made the responsibility of either of *two* committees in each House. The respective Select Committees on European Affairs and Select Committees on European Scrutiny of the two Houses were *each* given the power to consider whether an act of a European Union institution infringed the principle of subsidiarity for the purposes

31. See Order 103C(3)(c) of the Dáil Standing Orders and Order 98C(3)(c) of the Seanad Standing Orders, respectively. This follows Paragraph (b), point (iv) of each of the December 2009 resolutions.
32. Article 8 of Protocol No. 2.
33. Such proceedings are – under both Article 8 of Protocol No. 2 and under s. 7(4) of the European Union Act 2009 – brought under Article 263 of the Treaty on the Functioning of the European Union.

of section 7(4) of the 2009 Act.[34] This curious arrangement was not repeated (in so many words) in the, apparently, deliberately vaguely-worded amendments of the Dáil and Seanad Standing Orders of November and December, 2010. Under the newer arrangements, each House could empower *a* select committee to consider whether any act of a European Union institution infringes the subsidiarity principle,[35] although, presumably, that select committee could be chosen on an *ad hoc* basis depending on the legislation under consideration.

In so considering, the select committee was required to consult with such other committees and stakeholders as it saw fit.[36] Again, however, somewhat curiously, it was not thought to include legal experts (or experts in any other field) in this list of those whom it was required to consult.

Where the select committee was of the opinion that an act of a European Union institution infringed the principle of subsidiarity, and wished that proceedings seeking a review of the act concerned be brought to the Court of Justice of the European Union, the select committee was to lay a report to this effect before the relevant House.[37] Once this was done, the Chairman of the committee was required 'forthwith' to table a motion under s. 7(4) of the 2009 Act (presumably a motion to notify the Minister). Like the motion discussed in the previous section, this motion was required to be given priority on the House Order Paper.[38] The urgency here seemed to be injected not by anything to be found in the (Lisbon) Subsidiarity Protocol itself, but rather in the general Treaty provision regarding judicial review which stipulates that review proceedings before the Court of Justice of the European Union must, generally, be brought within two months of the publication of the measure.[39]

Once the House approved the motion, the Ceann Comhairle – or the Cathaoirleach of the Seanad, as the case may be – was required to send a copy of the consequent resolution to the relevant minister.[40] Under the December 2009 resolutions, it was stipulated that the Minister in question was the Minister for Foreign Affairs, who was entitled to be sent not alone a copy of the resolution of the House, but also a copy of the committee resolution.[41] Both stipulations seemed sensible. Neither was subsequently repeated in the amended Dáil or Seanad Standing Orders.

34. This previous empowerment of either of two Committees to initiate the process of judicial review, in effect, required each item of legislation to run a gauntlet of double jeopardy in terms of the initiation of the process of litigation. See paragraph (e) of both resolutions of 10 December, 2009.
35. See Order 103E(1) of the Dáil Standing Orders and Order 98E(1) of the Seanad Standing Orders, respectively.
36. See Order 103E(2)(a) of the Dáil Standing Orders and Order 98E(2)(a) of the Seanad Standing Orders, respectively, copying, in this respect, paragraph (e), point (i) of both of the December 2009 resolutions.
37. See Order 103E(2)(b) of the Dáil Standing Orders and Order 98E(2)(b) of the Seanad Standing Orders, respectively, copying, in this respect, paragraph (e), point (ii) of both of the earlier December 2009 resolutions.
38. See Order 103E(2)(c) of the Dáil Standing Orders and Order 98E(2)(c) of the Seanad Standing Orders, respectively, copying, in this respect, paragraph (e), point (iii) of both of the earlier December 2009 resolutions. Once again, this requirement is to be seen in the published *Modifications and Amendments in Effect to the Standing Orders Relative to Public Business (2007 Edition)*, although not, curiously, in records of the relevant debates in either Dáil or Seanad on the November and December 2010 amendments of the Standing Orders.
39. See Article 263, paragraph 6 TFEU.
40. See Order 103E(3) of the Dáil Standing Orders and Order 98E(3) of the Seanad Standing Orders, respectively.
41. See paragraphs (e)(iv) of both December 2009 resolutions.

iii. Facilitating Both Houses' Prior Approval of (or Non-Opposition to) European Council Decisions Which Apply Qualified Majority Voting to Decision-Making at Council Level

It may be recalled that one of the innovations of the Treaty of Lisbon was the creation of many new simplified revision procedures for certain Treaty changes. The effect of this was that such Treaty changes – although still only capable of being adopted by unanimous agreement of the member states – could now be adopted without the full formalities previously associated with the process of Treaty change. One aspect of this is the generalised *passerelle* procedure found in Article 48(7) of the Treaty on European Union, which now provides that, where provision is made for the Council of Ministers to act by unanimity under the Treaty on the Functioning of the European Union or under Title V of the Treaty on European Union (which relates to external action and the Common Foreign and Security Policy),[42] "the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case." [43]

Article 48(7) stipulates, however, that any such initiative taken by the European Council is required to "be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision...shall not be adopted. In the absence of opposition, the European Council may adopt the decision."[44]

In other words, a role for each national parliament is specifically envisaged by the Treaty – as a matter of European Union law – under this simplified revision procedure. The details of how it is to be exercised, however, are left to national law and practice. In Ireland's case, as shall be seen presently, these details have now been filled in by Constitutional and statutory provisions, as well as by the terms of the Standing Orders of each House Relative to Public Business following their amendment in November and December, 2010.[45]

Two other, more specific, provisions were inserted in the Treaties at Lisbon establishing '*passerelles*' to qualified majority voting.

Under Article 31(3) of the Treaty on European Union, the European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in the Common Foreign and Security Policy area.[46] In contrast to Article 48(7) TEU, no role is stipulated for national parliaments by Article 31(3) TEU, however.

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42. Article 48(7) TEU does not apply to decisions with military implications or those in the area of defence.
43. Article 48(7) TEU, Indent 1. The European Council acts by unanimity in this situation after obtaining the consent of the European Parliament, which has to be given by a majority of its component members. (Article 48(7) TEU Indent 4)
44. Article 48(7), Indent 3.
45. Prior to the amendment of the Standing Orders, the relevant details had been provided by the Dáil and Seanad resolutions of 10 December, 2009.
46. This is above and beyond those limited areas in which Article 31(2) TEU expressly stipulates that the Council act by qualified majority. Neither Article 31(2) nor Article 31(3) apply to paragraph 4. Paragraphs 2 and 3 apply to decisions having military or defence implications.

A further example of a specific *passerelle* to qualified majority voting is provided by Article 312(2) TFEU, which empowers the Council to adopt a regulation laying down a multiannual financial framework, lasting at least five years, with which the annual budget of the Union must comply. The normal rule is that the Council acts unanimously in this regard after obtaining the consent of the European Parliament,[47] but Article 312(2) establishes that "the European Council may, unanimously, adopt a decision authorising the Council to act by a qualified majority when adopting the regulation..." Again, here, no role is stipulated for national parliaments.

The Irish response to the foregoing changes at Lisbon comes on several levels. Article 29.4.8° (inserted in the Constitution by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009) provides, *inter alia,* that

> "the State may agree to the decisions…
>
> i under the Treaty on European Union and the Treaty on the Functioning of the European Union authorising the Council of the European Union to act other than by unanimity...
>
> but the agreement to any such decision...shall be subject to the prior approval of both Houses of the Oireachtas."

This establishes, therefore – above and beyond what is to be found in Article 48(7) TEU – that *mere lack of opposition* on the part of the Irish parliament to such a proposed such decision may suffice to facilitate it for the purposes of *European Union* law, but it does not suffice for the purposes of domestic *Irish* constitutional law. As far as the latter is concerned, it seems that, without positive acts of prior approval of both Houses of the Oireachtas, any Irish agreement to such a decision would be unconstitutional. Again, what we find here is a case – far from being unique to Ireland – of powers accorded to national parliaments by European Union law being augmented at the level of national law. It fits into a broader European context whereby rights granted to national parliaments are sometimes implemented at national level in a way that involves a rebalancing of the interests of parliamentary involvement in European-level lawmaking with the efficiency of the European integration. All this in a manner other than that originally anticipated when designing the relevant rights for national parliaments in the first place. A somewhat similar exercise has been engaged in a number of other countries. In Germany, for instance, a minority of members of the Bundestag can trigger a negative vote on subsidiarity in the subsidiarity review process. In Austria, a super-majority of two thirds of legislators is required before assent can be given to the operation of the '*passerelle*' procedure under Article 48 TEU.[48]

In one way, Article 29.4.8° of the Irish Constitution is distinguishable from these situations in other member states because it also confers on the Oireachtas the right to have its positive approval required

47. Which is given by a majority of its component members.
48. See, generally, concerning the relevant Austrian rules, the Austrian national report (authored by Alina Lengauer) on the topic "*The role of national Parliaments in the European Union*", given to the Fourteenth Congress of FIDE held at the Faculty of Law, Madrid Complutense University from 3 to 6 November, 2010.

even when the Treaties have anticipated the deployment of a *passerelle* without specifying any role *at all* for national parliaments – which is the case under Treaty articles inserted at Lisbon such as Article 31(3) of the Treaty on European Union,[49] and Article 312(2) of the Treaty on the Functioning of the European Union.[50]

Curiously, however neither the provisions of the European Union Act 2009 nor those of the Standing Orders of both Houses relative to Public Business – as amended since November and December, 2010[51] – reflect in any way this Constitutional requirement of prior approval of both Houses of the Oireachtas. Instead, both reflect the position (more permissive of Treaty amendments) set out in Article 48(7) TEU that all that is necessary for the purposes of the simplified revision procedure is that no opposition be expressed to the introduction of qualified majority voting being proposed.

Hence, s. 7(1)(a) of the European Union Act 2009 provides that "either House of the Oireachtas may, not later than 6 months after receiving a notification under the third subparagraph of Article 48(7) of the Treaty on European Union, pass a resolution opposing the adoption of the decision to which the notification relates."

No mention is made of the possibility of a resolution *approving* the adoption of such a decision, which is what Article 29.4.8° of the Constitution seems to envisage. As if to highlight this lacuna, s. 7(1)(b) stipulates merely that "a resolution referred to in *paragraph (a)* shall constitute an opposition to the decision concerned for the purposes of the third subparagraph of Article 48(7) of the Treaty on European Union, and the European Council shall be informed accordingly thereof." No mention is made of the possibility of a resolution constituting prior approval of a decision for the purposes of Article 29.4.8° of the Constitution.

This puzzling lack of attention to the provisions of the Constitution was also found in the Standing Orders of both Houses relative to Public Business as amended since November, 2010,[52] in which it was stipulated that each House could empower a select committee to consider such notifications – under the Article 48(7) TEU[53] general *passerelle* to qualified majority voting "as applied by section 7(1) of the European Union Act 2009" – as might be referred to the committee from time to time by the House.[54] It was only where the committee is *opposed* to the decision to which the notification refers that it was stipulated that it should lay a report to this effect before the relevant House.[55]

49. According to which, as has been noted in the text above, the European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in the Common Foreign and Security Policy area.
50. Which, as has been noted in the text above, empowers the Council to adopt a regulation laying down the multiannual financial framework and according to which the European Council may unanimously adopt a decision authorising the Council to act by a qualified majority when adopting this regulation.
51. And reflecting a similar omission in the resolutions of both Houses of 10 December, 2009.
52. As it was in both of the resolutions of the Houses of 10 December, 2009.
53. More specifically the third sub-paragraph thereof.
54. See Order 103D(1)(a) of the Dáil Standing Orders and Order 98D(1)(a) of the Seanad Standing Orders, respectively.
55. See Order 103D(2)(b) of the Dáil Standing Orders and Order 98D(2)(b) of the Seanad Standing Orders, respectively, following, in this regard, the example set in para. (c) , point (ii) of both December 2009 resolutions.

Once this report was laid by the committee, the Chairman was required to "forthwith table a motion thereon" under section 7(1) of the Act, which was to be given priority on the Order Paper.[56] The urgency *here* seems to be provided by the fact that Article 48(7) of the Treaty on European Union envisages a period of only six months from the date of notification of an initiative to switch away from unanimity voting in which national parliaments can make known their opposition.

Where the House approved the motion (of opposition to the decision), then the Ceann Comhairle (in the case of the Dáil) or the Cathaoirleach (in the case of the Seanad) was required to cause a copy of the consequent resolution to be sent to the President of the European Council or the Council as appropriate, together with a copy of the report to which the resolution referred.[57]

All that was required where the committee was *not* opposed to the decision to which the notification referred, however – something which might be expected to be the more normal situation – was that it send a message to this effect to the other House.[58] Remarkably, there was no requirement to notify the Government, even though, under Article 29.4.8° of the Constitution, the prior *approval* of both Houses of the Oireachtas was required in order to empower the Government's representative in the Council of Ministers to agree to any such decision of the European Council!

The only other innovation of note for present purposes in the Orders of each House consisted of the stipulation that, in considering such notifications, the relevant select committee – which, under the December 2009 resolutions, was the Joint Committee on European Affairs –was required to "consult with such other committees and such stakeholders as it considers appropriate."[59] Again, no mention was made of experts, which seemed as curious here as it did anywhere else in the amended Standing Orders.

iv. Facilitating Both Houses' Prior Approval of (or Non-Opposition to) European Council (or Council) Decisions Which Apply Co-Decision ('the Ordinary Legislative Procedure') to Decision-Making at Council Level

It will be recalled that Article 48(7) of the Treaty on European Union also provides for a simplified revision procedure which permits – where the Treaty on the Functioning of the European Union provides for EU-level lawmaking by special legislative procedure – the European Council to make decisions "allowing for the adoption of… acts in accordance with the *ordinary* legislative procedure".[60]

56. See Order 103D(2)(c) of the Dáil Standing Orders and Order 98D(2)(c) of the Seanad Standing Orders, respectively, following, in this regard, the example set in para. (c), point (iii) of both December 2009 resolutions.
57. See Order 103D(3) of the Dáil Standing Orders and Order 98D(3) of the Seanad Standing Orders, respectively, following in this regard, with some improvements, the approach adopted in para. (c), point (iv) of both December 2009 resolutions.
58. See Order 103D(2)(d) of the Dáil Standing Orders and Order 98D(2)(d) of the Seanad Standing Orders, respectively, following in this regard the example set in para. (c), point (v) of both December 2009 resolutions. Note the point made in the text, at n. 88 below, about inbuilt bias in the system put in place by the Standing Orders in favour of European-level change. This point applies with precisely the same force here.
59. See Order 103D(2)(a) of the Dáil Standing Orders and Order 98D(2)(a) of the Seanad Standing Orders, respectively, corresponding to the substance (if not the precise wording) of para. (c), point (i) of both December 2009 resolutions.
60. Article 48(7), Indent 2 TEU. (Emphasis added.) Once again, the European Council acts by unanimity in this situation after obtaining the consent of the European Parliament, which has to be given by a majority of its component members. (Article 48(7), Indent 4 TEU)

The 'ordinary legislative procedure' is the new name for the European Union law-making procedure previously referred to as "co-decision" prior to the coming into force of the Lisbon Treaty.[61]

As is the case regarding switches to qualified majority voting, however, Article 48.7 specifically confers a role on national parliaments, stipulating that any such initiative taken by the European Council is required to "be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision...shall not be adopted. In the absence of opposition, the European Council may adopt the decision."[62]

Again, therefore, a role for each national parliament is specifically envisaged in this simplified revision procedure as a matter of European Union law. The details of how it is to be exercised, however, are left to national law and practice. In Ireland's case, these details were, once more, filled in by Constitutional and statutory provisions, and by the terms of the Standing Orders of each House Relative to Public Business following their amendment in November and December, 2010.[63]

This is not the only such provision in the Treaties as they stand since the coming into force of the Treaty of Lisbon in December 2009. Another *passerelle* to the ordinary legislative procedure was created at Lisbon, also involving a Treaty-imposed requirement of the involvement of national parliaments. Under Article 81(3) of the Treaty on the Functioning of the European Union, the Council (not the European Council this time), "on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure."[64]

Once again, specific provision is made for national parliamentary involvement here. Article 81(3) stipulates that "the Council shall act unanimously after consulting the European Parliament. This proposal shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision."

Two other *passerelles* for a switch to the ordinary legislative procedure are also provided for in the Treaties as amended at Lisbon – but this time without any involvement by national parliaments required. The first is found in Article 153(2) TFEU,[65] which relates to the social policy field. Article 153(2) empowers the Council, "acting unanimously on a proposal from the Commission, after consulting the European Parliament", to decide to apply the ordinary legislative procedure to acts supporting and complementing the activities of the member states in the following areas: (a) protection of workers whose employment contract has been terminated; (b) representation and collective defence of the interests of workers and

61. See generally Articles 289 and 294 TFEU.
62. Article 48(7), Indent 3.
63. The relevant details having been previously – i.e. prior to the amendment of the Standing Orders – provided by the Dáil and Seanad resolutions of 10 December, 2009.
64. The Council is required to act by unanimity after consulting the European Parliament. See also, for example, Article 192(2) TFEU.
65. Indent 6.

employers, including co-determination;[66] and (c) conditions of employment for non-Union nationals legally residing in Union territory.

The second such measure allowing for change to co-decision is Article 192(2) TFEU, which relates to certain areas in the field of environmental policy which are reserved to unanimous voting and a special legislative procedure.[67] Under Article 192(2) it is provided that

> "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph."

Again, the Irish response (or rather responses) to all of these *passerelle* provisions made during the lifetime of the 30th Dáil is to be found in Article 29.4. 8° of the Constitution (as amended to facilitate ratification of the Lisbon Treaty), in the European Union Act 2009, and in the Standing Orders of both Houses relative to Public Business as amended since November, 2010.[68] Somewhat remarkably and regrettably,[69] however, neither the statutory provisions nor the amended provisions of the Houses' Standing Orders appeared to take any account of the provisions of the Constitution.

Article 29.4.8° of the Constitution provides that

> "the State may agree to the decisions...
>
> ...ii under those treaties authorising the adoption of the ordinary legislative procedure...
>
> but the agreement to any such decision...shall be subject to the prior approval of both Houses of the Oireachtas."

Once again, this establishes that mere lack of opposition on the part of the Irish parliament to any such proposed decision may well suffice to facilitate the accepting of the decision for the purposes of European Union law (more specifically, Article 48(7) TEU), but it will not suffice for the purposes of the Irish Constitution: without *positive* acts of prior approval of both Houses of the Oireachtas, any Irish agreement to such a decision will be unconstitutional.

66. Article 153 does not apply to "pay, the right of association, the right to strike or the right to impose lock-outs" under sub section 5 thereof.
67. Under Article 289(2) TFEU, "in the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure."
68. Following, in this respect, the transition provisions contained in the resolutions of the Oireachtas adopted on 10 December, 2009.
69. And echoing the position regarding the *passerelles* to qualified majority voting.

This, once again, is a case of powers accorded to national parliaments by European Union law being considerably augmented at national level.[70] Furthermore, here again, Article 29.4.8° of the Constitution confers an equal right (indeed, a requirement) of intervention on the part of the Oireachtas even when the Treaties have provided for the deployment of a *passerelle* without specifying *any* role for national parliaments – as is the case under certain Treaty articles of pre-Lisbon Treaty origin, such as Article 153(2) TFEU (according to which the ordinary legislative procedure can be applied by the Council to certain decisions in the social policy field) and Article 192(2) TFEU (according to which the ordinary legislative procedure [co-decision] can be applied by the Council to certain decisions in the environmental field).

Regrettably, as has already been noted, no mention or facilitation of the provisions of Article 29.4.8° of the Constitution concerning *passerelle*s to the ordinary legislative procedure was to be seen in either the provisions of the European Union Act 2009 or the Standing Orders of both Houses relative to Public Business as amended since November, 2010 [71]

Further, not only did these various provisions confine their attention to Treaty provisions, but they *further* confined them to those Treaty provisions which set out a role for national parliaments. The 2009 Act and the Standing Orders of the Houses as amended in November and December, 2010, referred to only *two* of the four Treaty *passerelles* to the ordinary legislative procedure: the Article 48(7) TEU (generalised) *passerelle* and the Article 81(3) TFEU (family law) *passerelle.* No reference was made to the Article 153(2) TFEU (social policy) *passerelle* or the Article 192(2) TFEU (environmental policy) *passerelle*, the implementations of which were therefore regulated at national level solely by the relevant portions of Article 29.4.8° of the Constitution.

What do the statutory provisions and resolutions provide? S. 7(1) of the 2009 Act makes specific provision regarding the Article 48(7) generalised *passerelle.*[72] It simply stipulates that either House of the Oireachtas may, no later than six months after receiving a notification under the relevant subparagraph of Article 48(7) TEU, pass a resolution *opposing* the adoption of the decision of which they were notified.[73] S. 7(1) further provides that such a resolution is to constitute an opposition to the decision concerned for the purposes of Article 48(7) TEU, and the European Council is required to be informed of it.[74] S. 7(1) makes no mention at all of the giving of prior approval to the State's agreement to the deployment of this *passerelle* (as required by Article 29.4.8° of the Constitution).

S. 7(2) makes specific – and very similar – provision for the Article 81(3) TFEU (family law) *passerelle.* It stipulates that either House of the Oireachtas may, no later than six months after receiving a notification under Article 81(3) TFEU, pass a resolution opposing the adoption of the notified decision.[75] Furthermore,

70. See text above at n. 48.
71. Nor was there, for that matter, in the resolutions of the Houses of 10 December, 2009.
72. i.e. under Article 48.7 TEU.
73. S. 7(1)(a) of the 2009 Act.
74. S. 7(1)(b) of the 2009 Act.
75. S. 7(2)(a) of the 2009 Act.

such a resolution is to constitute an opposition to the decision concerned for the purposes of Article 81(3) TFEU, and the Council is to be informed accordingly thereof.[76]

Separate but very similar provision was also made in the Standing Orders of the Houses as amended in November and December, 2010, regarding the Article 48(7) TEU (generalised) *passerelle* to the ordinary legislative procedure[77] and the Article 81(3) TFEU (family law) *passerelle.*[78]

In the case of the Article 48(7) TEU (generalised) *passerelle,* the Standing Orders provided that each House was enabled to empower a select committee to consider notifications under this provision "as applied by section 7(1) of the European Union Act 2009".[79] In other words, a select committee of each House (which, under the December 2009 resolutions, was the Select Committee on European Affairs of each House) was given responsibility for considering notifications – under Article 48(7) TEU – of European Council decisions, allowing the Council to adopt acts using the ordinary legislative procedure when these notifications are referred to it by the House under section 7(1) of the 2009 Act.[80]

In considering such notifications, the select committee was required to consult with such other Sub-Committees and stakeholders as it considered appropriate.[81] When opposed to the decision to which the notification referred (and not otherwise), the committee was required to lay a report to this effect before the House.[82] Once this was done, the committee chairman was to table a motion on the report "forthwith", which was required to be given priority on the Order Paper.[83] The rapidity of this procedure was, of course, a reflection of the six-month deadline stipulated in the Treaty on European Union for making known national parliamentary opposition to use of the generalised *passerelle* to the ordinary legislative procedure.[84]

The Ceann Comhairle in the case of the Dáil – or the Cathaoirleach in the case of the Seanad – was required to cause a copy of all consequent resolutions to be sent to the President of the European Council or the Council as appropriate,[85] together with a copy of the select committee report to which the resolution referred.[86] This, of course, would only be in instances where the House approved the motion of opposition.

76. S. 7(2)(b) of the 2009 Act.
77. As dealt with in S. 7(1) of the 2009 Act. And, before this, in the December 2009 resolutions.
78. As dealt with in S. 7(2) of the 2009 Act. And, before this, in the December 2009 resolutions.
79. See Order 103D(1)(a) of the Dáil Standing Orders and Order 98D(1)(a) of the Seanad Standing Orders.
80. This point was formerly governed by para. (c) of both of the December 2009 resolutions.
81. See Order 103D(2)(a) of the Dáil Standing Orders and Order 98D(2)(a) of the Seanad Standing Orders, respectively. This point was formerly governed by para. (c), point (i) of both of the December 2009 resolutions.
82. See Order 103D(2)(b) of the Dáil Standing Orders and Order 98D(2)(b) of the Seanad Standing Orders, respectively. This point was formerly governed by para. (c), point (ii) of both of the December 2009 resolutions.
83. See Order 103D(2)(c) of the Dáil Standing Orders and Order 98D(2)(c) of the Seanad Standing Orders, respectively.This point was formerly governed by para. (c), point (iii) of both of the December 2009 resolutions.
84. See Article 48(7), Indent 3 TEU. A similar six-month deadline operates in relation to the Article 81(3) TFEU family law *passerelle* to the ordinary legislative procedure. See Article 81(3), Indent 2 TFEU.
85. It is the Council of Ministers, rather than the European Council, which is the institution that decides on the use of the Article 81(3) TFEU (family law) *passerelle.*
86. See Order 103D(3) of the Dáil Standing Orders and Order 98D(3) of the Seanad Standing Orders, respectively. This point was formerly governed by para. (c), point (iv) of both of the December 2009 resolutions.

Where the select committee was *not* opposed to the decision to which the notification referred, i.e. where the committee had no objection to the switch to the ordinary legislative procedure[87] proposed at European level, the matter never went before the full House. All that was required – and the fact that this was all that is required could be said to build a bias into the system in favour of non-opposition to switches to the ordinary legislative procedure proposed at European level[88] – was simply that the select committee send a message to this effect to the other House.[89]

Somewhat bizarrely, no requirement to notify the Government was imposed even though, under Article 29.4.8° of the Constitution, the prior approval of both Houses of the Oireachtas is required in order to empower the Government's representative in the Council of Ministers to agree to any decision authorising under the Treaties the adoption of the ordinary legislative procedure.

In the case of the Article 81(3) TFEU (family law) *passerelle,* the procedure is precisely the same as that just outlined in relation to Article 48(7) TEU. It is interesting to note, however, that, under the now-defunct December 2009 resolutions, some differences in procedure applied depending on which *passerelle* was in issue. One such difference was that the Sub-Committee in each House charged with the responsibility of considering such notifications of Council decisions under Article 81(3) TFEU[90] – as were referred to it by the House under section 7(1) of the 2009 Act – was each House's Select Committee on Justice, Equality, Defence and Women's Rights,[91] rather than the Joint Committee on European Affairs. These committees, however, were required to consult with the Joint Committees on European Affairs and European Scrutiny, as well as with such other committees and stakeholders as they saw fit.[92]

It would have been legitimate to examine, under the present heading, the domestic Irish response to Articles 82(2) and Article 83(1) TFEU. Article 82(2) TFEU authorises decisions to be made by the Council identifying aspects of criminal procedure. Once thus identified, directives concerning these aspects may be adopted by the ordinary legislative procedure. Rather similarly, Article 83(1) TFEU permits decisions by the Council identifying areas of crime coming within that section.[93] Once this is done, directives can be adopted – in accordance with the ordinary legislative procedure – in order to establish minimum rules concerning the definition of criminal offences and sanctions in the areas in question. It may be noted in passing that both of these provisions have evoked a response in the text of the Irish Constitution. However, since both of these Treaty articles concern the field of justice and home affairs, further consideration of them has been left to the next section.

87. i.e. co-decision.
88. Opposition requires the support both of the select committee and of the full House. Non-opposition requires no more than the support of the select committee.
89. See Order 103D(2)(d) of the Dáil Standing Orders and Order 98D(2)(d) of the Seanad Standing Orders, respectively. This point was formerly governed by para. (c), point (v) of both of the December 2009 resolutions.
90. Determining the aspects of family law with cross-border implications which could be the subject of acts adopted by the ordinary legislative procedure.
91. This point was formerly governed by para. (d), point (i) of both of the December 2009 resolutions.
92. This point was formerly governed by para. (d), point (i) of both of the December 2009 resolutions. Again, no provision was made for consultation of experts.
93. *Viz.* "particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis". (See Article 83(1), Indent 1).

v. Facilitating Both Houses' Authorisation of Certain Decisions at European Union Level in the Justice and Home Affairs Field

One Treaty provision concerning decisions in the justice and home affairs field has already been looked at – Article 81(3) TFEU, which contains the ('family law') *passerelle* to the ordinary legislative procedure. As has already been noted, Article 81(3) specifies that Council decisions to activate this *passerelle* are to be notified to the national parliaments and, if a national parliament makes known its opposition within six months of the date of such notification, the decision is not to be adopted.[94]

In relation to the operation of several other Treaty provisions in the justice and home affairs fields, a role for the Oireachtas is now provided for. Four categories of such provisions are looked at below. The interesting point about this, however, is that in none of them – in other words, in no case specific to the justice and home affairs field other than Article 81(3) TFEU – is involvement of national parliaments required by the Treaties. Instead, what has come about here is the large scale importation, via the Irish Constitution and Irish statute law, of a role for the Oireachtas in this area. This is part of radically increasing sensitivity on the part of Ireland in the justice and home affairs area, even if the necessity for special Irish sensitivity in this regard is very far from evident.[95]

As regards the first two fields looked at below (concerning, respectively, certain decisions to shift to the ordinary legislative procedure in the justice and home affairs field, and certain decisions regarding a European Public Prosecutor's Office), it is noteworthy that domestic provision concerning them was to be found exclusively in the Constitution over the lifetime of the 30th Dáil. Neither House of the Oireachtas appeared to make any provision, either by resolution or in its Standing Orders, regarding the giving of Oireachtas approval for such decisions. This may be because the Standing Orders were drafted with a view to the European Union Act 2009, thus losing sight of the fact that the Constitution imposes its own requirements on the Oireachtas in the justice and home affairs field.[96] At any rate, there was something of a regulatory lacuna in relation to these two fields.

(a) Shifting Decision-Making to the Ordinary Legislative Procedure – Specific Provisions in the Justice and Home Affairs Fields

Two Treaty *passerelles* are at issue here. As has already been mentioned, Article 82(2) TFEU empowers the Council – acting by unanimity and having obtained the consent of the European Parliament[97] – to identify by decision aspects of criminal procedure. Once thus identified, directives concerning these aspects may be adopted by the ordinary legislative procedure.

Somewhat similarly, and also mentioned above, Article 83(1) TFEU permits decisions to be made by the Council – acting unanimously and after obtaining the consent of the European Parliament – which

94. Article 81(3), Indent 2 TFEU.
95. Former Taoiseach John Bruton has observed that "the opt-out from the justice and home affairs chapter was a colossal mistake on the part of Ireland". See debates of the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, 12 May, 2010.
96. The preamble of both resolutions refers to the legislation, but not to the provisions of the Consitution.
97. See Article 82(2) Point (d).

identify areas of crime coming within that paragraph.[98] Once this is done, directives can be adopted in accordance with the ordinary legislative procedure, establishing minimum rules concerning the definition of criminal offences and sanctions in the areas in question.

Article 29.4.8° of the Constitution, inserted in its present form by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009, provides that

> "The State may agree to the decisions, regulations or other acts—
>
> iii under subparagraph (*d*) of Article 82.2 [and] the third subparagraph of Article 83.1…of the Treaty on the Functioning of the European Union, relating to the area of freedom, security and justice,
>
> but the agreement to any such decision, regulation or act shall be subject to the prior approval of both Houses of the Oireachtas."

The prior approval of each House of the Oireachtas thus has to be granted before the Irish Minister in the Council of the European Union can give his or her consent to any such decision. No further guidance was provided by statute, Standing Orders or resolution of the House as to how this was to be done. The existing practice for fulfilling similar requirements under the pre-Lisbon Treaty amendment Constitutional rules was simply for each House to pass a resolution giving the approval of the House to the measure in question – in the vast bulk of cases, without so much as even one word of debate thereon.

(b) Decisions Concerning a European Public Prosecutor's Office

Article 86(1) TEU empowers the Council to establish, by means of a regulation, a European Public Prosecutor's Office in order to combat crimes affecting the financial interests of the Union. The Council is required to act unanimously and only after obtaining the consent of the European Parliament. Article 86(4) builds on this by empowering a different institution – the European Council – to amend parts of Article 86 itself[99] in order to extend the powers of the European Public Prosecutor's Office to include serious crime with a cross-border dimension. In this, the European Council is to act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

Reflecting an apparent sensitivity about such provisions in the justice and home affairs area, both steps were made subject – by Article 29.4.8° of the Constitution – to a requirement of prior approval of both Houses of the Oireachtas. Article 29.4.8º, inserted in its present form by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009, provides that

98. *Viz.* "particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis". See Article 83(1), Indent 1 for this definition and Article 83(1), Indent 3 regarding the *passerelle*.
99. *Viz.* paras. 1 and 2 thereof.

"the State may agree to the decisions, regulations or other acts—

iii under…paragraphs 1 and 4 of Article 86 of the Treaty on the Functioning of the European Union, relating to the area of freedom, security and justice,

but the agreement to any such decision, regulation or act shall be subject to the prior approval of both Houses of the Oireachtas."

No further provision has been adopted outside the text of the Constitution in this regard.

(c) Exercising Options under the Schengen Protocol

The Schengen system consists of a body of rules which had its original legal basis in the Schengen Convention of 1985 and the (more detailed) Schengen Implementation Convention of 1990. Entering into force in 1995 as a body of rules entirely outside the framework of European Union law, the Schengen *acquis* was absorbed into the Union framework by the Treaty of Amsterdam, which came into force in 1999. United Kingdom determination not to surrender its border controls led to the negotiation of what is now styled the 'Protocol on the Schengen *Acquis* Integrated into the Framework of the European Union'.[100] Options or discretions for the State provided for in the Protocol include the ability of this State to: request at any time to take part in some or all of the provisions of the *acquis*;[101] notify the Council in writing within a reasonable period that it wishes to take part in proposals and initiatives to build upon the Schengen acquis[102] or indicate *subsequently* a wish to take part in the area of cooperation in question;[103] notify the Council in writing within three months of either of the last two events (and notwithstanding them) that it does not wish to take part in such a proposal or initiative;[104] withdraw such notice;[105] or request, in the event of certain delays in giving effect to its notified wish not to participate, that the matter be referred to the European Council.[106]

Under Article 29.4.7° of the Constitution, inserted in its present form by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009,

"the State may exercise the options or discretions—…

100. Originally known as the Protocol integrating the Schengen acquis into the framework of the European Union, and annexed to the Treaty on European Union and the Treaty Establishing the European Community, this Protocol was retained in a somewhat amended form at Lisbon, and is now annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union (the renamed EC Treaty).
101. Article 4 of the Protocol. A request which is decided upon by unanimity by the participants in the Schengen arrangements, plus Ireland.
102. Article 5 of the Protocol. In this event, authorisation is deemed to be granted. Note, however, the effect of the ruling of the European Court of Justice in this regard in Case C-77/05 *United Kingdom* v. *Council ('Border Agency Regulation')* [2007] ECR I-11459 and Case C-137/05 *United Kingdom* v. *Council ('Passports Regulation')* [2007] ECR I-11593.
103. Article 5 of the Protocol.
104. Article 5(2) of the Protocol.
105. Article 5(5) of the Protocol.
106. Article 5(4) of the Protocol.

ii under Protocol No. 19 on the Schengen *acquis* integrated into the framework of the European Union annexed to that treaty and to the Treaty on the Functioning of the European Union (formerly known as the Treaty establishing the European Community)…

but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

There is no material change between this and the provision which was found in the Constitution prior to its amendment by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009.[107]

(d) Exercising Options or Discretions under Protocol No. 21

Also adopted at Amsterdam – and annexed to what are now the Treaty on European Union and the Treaty on the Functioning of the European Union – was a Protocol that has become known as the Protocol on the position of the United Kingdom and Ireland.[108] Article 29.4.7° of the Constitution, inserted in its present form by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009, now provides that

"the State may exercise the options or discretions...

iii under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, so annexed, including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State,

but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas."

This is a more legally accurate and detailed reference to the Protocol than that which existed prior to the amendment of Article 29.4 by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009. There is, however, absolutely no difference in terms of its legal effect from the earlier Constitutional provision.[109]

107. Article 29.4.6 formerly provided that "the State may exercise the options or discretions provided by or under...[the Protocol integrating the Schengen acquis into the framework of the European Union] set out in the said Treaty but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas."

108. What was originally known as the Protocol on the position of the United Kingdom and Ireland was annexed at Amsterdam to the Treaty on European Union and the Treaty Establishing the European Community. Recast with its present title at Lisbon, it is now annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union (the new name for the old EC Treaty).

109. Insofar as is relevant, Article 29.4.6° had earlier provided that "the State may exercise the options or discretions provided by or under...[the Protocol on the position of the United Kingdom and Ireland] set out in the said Treaty *(sic.)* but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas."

vi. Facilitating Both Houses' Authorisation of Enhanced Co-operation

The field of enhanced co-operation – or closer co-operation between a subset of the full membership of the European Union – received its clearest sanction yet in the Treaty of Amsterdam then, subsequently, clearer and more detailed treatment (and the name 'enhanced co-operation') in the Treaty of Nice.

According to what is now Article 29.4.7° of the Constitution,

> "The State may exercise the options or discretions—
>
> i to which Article 20 of the Treaty on European Union relating to enhanced cooperation applies…
>
> but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas."

This is a more generally-expressed iteration of the earlier version of this article and, other than being less cumbersomely expressed, seems to be different only to the extent that enhanced co-operation is more broadly available as an option under the Treaties since the coming into force of the Treaty of Lisbon.[110]

2. The Role of the Oireachtas in European Affairs – Envisaging the Future

While Part I of this Chapter has looked at the existing response of the Irish State to the challenges posed by the Treaty of Lisbon in its laws and administrative arrangements, this second Part focuses on the likely future response on the part of the Oireachtas to the ongoing challenges posed by the entry into force of the Lisbon Treaty and, more broadly, to the debate on the role of the Oireachtas in European affairs which was rekindled by the debate surrounding that Treaty. This is at least as important as the subject matter of Part I, for, as Jacobs has correctly observed, "in the longer run...the significance of the Lisbon Treaty for national parliaments is likely to lie less in any new formal powers and more in the stimulus it could provide for greater national parliament involvement in…European Union decision-making…"[111]

110. Article 29.4.8° previously provided that "the State may exercise the options or discretions provided by or under Articles 1.6 [which dealt with enhanced co-operation in the CFSP area], 1.9 [which dealt with enhanced co-operation in the JHA area], 1.11 [which dealt with enhanced co-operation generally], 1.12 [regarding enhanced co-operation], 1.13 [regarding enhanced co-operation] and 2.1 [which dealt with enhanced co-operation in the European Community law field] of [the Treaty of Nice] but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas."

111. F. Jacobs, "*Review of the Role of the Oireachtas in European Affairs*" (Undated submission to the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs), at p. 1 thereof. See, along similar lines, the present writer's own observation to the Sub-Committee in its meeting of 5 May, 2010, that "the bark of [the subsidiarity review] mechanism…is probably more significant than its bite, since European institutions to my mind do not appear to be serial abusers of subsidiarity but it is at the very least a first step and an opening of a crack in the door to greater generalised involvement of national parliaments in European matters."

Report of the Sub-Committee on Ireland's Future in the European Union

Following the electorate's referendum rejection of the Twenty-eighth Amendment of the Constitution Bill 2008 – which was designed to facilitate ratification of the Treaty of Lisbon[112] – the Sub-Committee on Ireland's future in the European Union was established by the Houses of the Oireachtas under the Chairmanship of Senator Paschal Donohoe.[113] It was established as a Sub-Committee of the Joint Oireachtas Committee on European Affairs and of the Joint Oireachtas Committee on European Scrutiny, and was intended to assess the implications of the result and the challenges facing Ireland within the EU and to consider Ireland's future in the Union.

The Sub-Committee's Orders of Reference, as agreed by the Houses of the Oireachtas, set out four specific objectives for the Sub-Committee. Significantly for present purposes, one of these objectives was "to make recommendations to enhance the role of the Houses of the Oireachtas in EU affairs".[114] In order to achieve its task, the Sub-Committee divided its work into four modules, the first of which was "the role of the Oireachtas in EU affairs".[115] The Sub-Committee's *modus operandi,* in its own words, was that

> "these modules were addressed through gathering evidence from invited speakers, inviting submissions from the public and commissioning a discussion paper from academic experts. All the Sub-Committee's hearings were held in public in the interests of openness and in an effort to encourage a full and frank public debate on Ireland's future in the EU. Over the eight weeks of its work, the Sub-Committee spoke to 114 people and organisations, consisting of practitioners, experts, academics and commentators representing a broad range of opinion, and received 94 submissions from the public. On the basis of the contributions from invited speakers and the submissions from the public and from UCD's Dublin European Institute, the Sub-Committee has agreed this report."[116]

The Sub-Committee's report was presented impressively quickly on 27 November, 2008. Its four chapters corresponded closely to the modules. Of primary interest for present purposes is Chapter Four of the

112. The turnout for the referendum was 53.1% (representing 1,614,866 valid votes) and the Bill was rejected by 53.4% (862,415 votes) to 46.6% (752,451 votes).

113. Senator Donohue was a member of Fine Gael, a party at this time in Opposition. The full list of members of the Sub Committee consisted of Deputies Thomas Byrne (Fianna Fáil), Joe Costello (Labour), Lucinda Creighton (Fine Gael), Timmy Dooley (Fianna Fáil), Beverley Flynn (Fianna Fáil), Michael McGrath (Fianna Fáil) and Billy Timmins (Fine Gael), as well as Senators Déirdre de Búrca (Green Party), Pearse Doherty (Sinn Féin), Paschal Donohoe (Fine Gael), Rónán Mullen (Independent), and Phil Prendergast (Labour).

114. The other three were: to analyse the challenges facing Ireland in the European Union following the Lisbon Treaty referendum result; to consider Ireland's future in the European Union, including in relation to economic and financial matters, social policy, defence and foreign policy, and our influence within the European institutions; and to consider measures to improve understanding of the European Union and its fundamental importance for Ireland's future. See, generally, para. 8 of the executive summary of the Report.

115. The second, third and fourth modules were, respectively, "the challenges facing Ireland and the implications of the Lisbon Treaty referendum result"; "Ireland's future approach to key EU policy areas of concern to Ireland" and, more generally, "Ireland's future engagement in the EU; and public understanding of the EU and Ireland's membership of the Union". See, generally, para. 8 of the executive summary of the Report.

116. See para. 9 of the executive summary of the Report.

Report, which was entitled "Enhancing the Role of the Oireachtas in EU Affairs".[117] It isobviously not possible to cover all of what the Sub-Committee had to say, but the major features of its Report may be pointed out.

In the first place, the Sub-Committee identified what it termed "some specific weaknesses in the way the Oireachtas can hold the government to account for its role in EU law making." Four areas were identified by it as needing to be addressed: (i) the lack of influence of the Oireachtas in the EU decision-making process; (ii) procedures giving effect to EU law in Ireland; (iii) the way EU business is handled in the Oireachtas; and (iv) sensitive policy areas, including workers' rights and socio-ethical issues.[118]

As regards the (i) the lack of Oireachtas influence in the EU decision-making process, the Sub-Committee noted that, at present, the Oireachtas scrutinises EU proposals only after they have been formally published by the EU. The Sub-Committee criticised this as a reactive approach, lacking any mechanism to enable the Oireachtas to have an influence on the content of EU proposals.[119]

Insofar as (ii) giving effect to EU laws was concerned, the Sub-Committee noted that the transposition of some EU laws in Ireland has been controversial, specifically in the instances of politically controversial issues like the Habitats Directive, the creation of criminal sanctions for fishery offences, restrictions on turf-cutting, and school water charges. It observed that representative groups, including the farming sector, had also outlined their concerns about the regular use of secondary legislation to give effect to far reaching proposals. The Sub-Committee further noted concerns about a lack of political and democratic oversight to prevent unnecessary red tape.[120] It also expressed concern about "a perception that Ireland implements or enforces its EU obligations more rigorously than some other Member States"[121] and about "the low rate of compliance with existing guidelines" on best practice in transposition of directives.[122]

As regards (iii) the way EU business is handled in the Oireachtas, the Sub-Committee's views are worth quoting in full. It noted that

> "scrutiny of EU proposals does not feature prominently in the overall work of the Oireachtas. There is a lack of debates in Dáil and Seanad Éireann on EU-related business. National and local issues dominate in parliament, which in turn impacts on what is subsequently reported by the media. There is also an over-reliance on the Committees within the Oireachtas to deal with EU-related matters. The media's coverage of Oireachtas Committees is very limited which reinforces the existing information deficit.
>
> There are also practical constraints on Oireachtas Members. Members have to juggle a range of competing demands for their attention. Multi-seat constituencies and the demands of constituents

117. Chapter One was entitled "After Lisbon: The Challenges"; Chapter Two, "Ireland's Future in the EU: Issues & Options"; Chapter Three, "Beyond Lisbon: Public Understanding of the EU & Ireland's Membership".
118. Chapter 4, Paragraph 11.
119. Chapter 4, Paragraph 12.
120. Chapter 4, Paragraph 15.
121. Chapter 4, Paragraph 16.
122. Chapter 4, Paragraph 17.

> for 'their' TDs to be seen locally can act as disincentives to active committee participation. Local politics matters more to most Irish people than any well meaning discussions on how to improve the institutional structure of the EU.
>
> In addition, parliaments in Member States are in an unequal relationship with governments who have vastly superior access to legal, administrative and specialist services. Given the range of issues and volume of information pertaining to EU matters, it is important that parliaments seek to prioritise issues which they believe are of most importance to the people they represent."[123]

Finally, in relation to (iv) sensitive policy areas, the Sub-Committee opined that there was "a particular need to ensure effective parliamentary oversight of any proposed EU actions impacting upon sensitive national issues." It instanced taxation laws, justice measures, workers' rights, socio-ethical issues and defence policy as examples,[124] and recounted that specific concerns had been expressed to the Sub-Committee in relation to the protection of Ireland's traditional policy of military neutrality.[125]

One of the most useful initiatives of the Sub-Committee was to look at the systems used in other States to achieve executive accountability in the field of European Union law. In the course of its deliberations, it heard from witnesses in relation to the British, Danish and German parliaments. The Sub-Committee considered – briefly – the relative merits of a Danish-style mandate system and a United Kingdom-style scrutiny reserve system and came down in favour of the latter. According to the Sub-Committee,

> "a mandate system would not be easily aligned with the Irish political system of majority government. The electoral system in Ireland has meant that majority governments have become the norm. This has led to the development of a strong executive which enjoys a majority in the Oireachtas. There is, therefore, less incentive for the Government to seek the approval of the Oireachtas in areas in which it has the power to decide under the constitution, such as policies at the EU level. If a mandate system was to be introduced, it would in practice have little effect as the Government would always secure its preferred mandate given that it has a majority in the Oireachtas.
>
> The Chairman of the Scrutiny Committee in the UK House of Commons told the Sub-Committee that the scrutiny reserve has worked well for them. It is provided for by parliamentary resolutions rather than legislation. The Irish system has similar features to the UK and the Sub-Committee notes that a 2005 Committee Report concluded that a mandate system was not suitable for the UK. Realistically it may be difficult to introduce a mandating system in Ireland, given that the constitutional responsibility for external policy is vested in the government."[126]

This is arguably the least convincing section of the Sub-Committee's Report, since it is eminently arguable that the process of dialogue used in obtaining a mandate from the Oireachtas would be of public benefit even if a Government could use its majority to get its way in the end. The *imprimatur*

123. Chapter 4, Paragraphs 18-20.
124. See, generally, Chapter 4, Paragraph 21.
125. Chapter 4, Paragraph 22.
126. Chapter 4, Paragraphs 29-30.

of the legislature is regarded as a *sine qua non* for the adoption of *domestic* legislation, and the idea that legislative approval of executive activity is not needed in the case of European Union law merely because Government participation happens at European rather than domestic level seems unconvincing. Moreoever, no-one has ever suggested that the need for the sanction of the legislature in relation to domestic legislation is superfluous or ineffective merely because a Government can use its majority to get its way in the end. Why, therefore, should such logic convince us in relation to European legislation? Nor is the argument of Constitutional difficulties convincing as, with cross-party support, amendment of the Constitution – particularly in the context of a referendum on a European Treaty – would probably be attainable (if such an amendment were actually needed). Indeed, the proposal of a mandate system might well increase the chances of gaining referendum support for the ratification of a European Union Treaty. Despite the rather unsatisfactory nature of the reasoning, and the over-emphasis placed on the approach of the United Kingdom in this regard, it seems clear that the recommendation in favour of a scrutiny reserve was broadly supported by the membership of the Sub-Committee. Indeed, the same recommendation was later to be made by the Creighton Sub-Committee. It is submitted that the Donohue Sub-Committee was correct to take the view that a scrutiny reserve system would arguably be better than what exists at present. It is also submitted, however, that a far more comprehensive analysis of the relative merits of a scrutiny reserve system as compared to those of a mandate system than was carried out by either Sub-Committee would be useful.[127]

Its analysis completed, the Sub-Committee passed on to making a series of recommendations.

To combat the lack of influence of the Oireachtas in the EU decision-making process, the Sub-Committee made four recommendations. First, that "a formal scrutiny reserve mechanism, in line with the model used in the UK Parliament, should be introduced".[128] The Sub-Committee claimed that this would "provide more influence for the Oireachtas in the negotiating positions adopted by Irish Ministers on draft EU legislation at Council meetings" but observed that the legal, resourcing and logistical implications needed to be examined further.[129] Secondly, the Sub-Committee demanded that national parliaments be consulted formally "about the European Commission's annual policy strategy and legislative work programmes" before these were finalised.[130] Thirdly, the Sub-Committee suggested – not, it is submitted, without some justification – that

> "there should be a more structured arrangement for Oireachtas Committees to meet with Ministers before Council meetings to consider the Government's negotiating positions on agenda

127. Varying views have been expressed on the merits of a mandate system. Former President of the European Parliament Pat Cox has been positive in his assessment of such a system – a view which concurs with that of the present writer, which were put to the Sub-Committee on Ireland's Future in the European Union. Note, however, the negative view of former Taoiseach John Bruton, expressed to the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, 12 May, 2010. The then Foreign Minister Micheál Martin articulated strong opposition even to the more limited proposal of a scrutiny reserve system when addressing the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, on 19 May, 2010. These views are examined briefly below at ns. 158 *et seq.*
128. Chapter 4, Paragraph 32.
129. *Ibid.*
130. The Sub-Committee suggested this proposal be pursued with our partners in other national parliaments in the Conference of European Affairs Committees (COSAC), although it is not clear why it was felt that this approach would be the most fruitful. (Chapter 4, Paragraph 33.)

> items. Ministers should also report back in writing to the appropriate Oireachtas Committee on theoutcome of the discussions and on specific decisions made."[131]

Fourthly, and very sensibly, it was suggested by the Sub-Committee that Oireachtas committees should focus more of their attention on non-legislative documents emanating from European Union institutions.[132] This was combined with a suggestion that the Oireachtas Working Group of Committee Chairmen should also be asked to prepare a report on how EU business can be mainstreamed across all Oireachtas committees. This question of mainstreaming was, as we shall see, taken up in more detail by the later Creighton Sub-Committee.

Under the rubric of giving effect to European Union laws, the Donohue Sub-Committee recommended, *inter alia*, that concerns about how Directives were implemented in Irish law needed to be addressed with more robust arrangements for the oversight of statutory instruments.[133] It also recommended that regulatory impact assessments be forwarded by the Government to the Oireachtas when significant EU laws were being considered[134] and that if statutory instruments were being used to give effect to an EU law, the text of the instrument (or at least the heads of the instrument) should be circulated to all Oireachtas members – a practice which, it was suggested, would bring more transparency to the process of giving effect to EU law and would enable Oireachtas members to highlight any potential problems at an early stage.[135]

The Sub-Committee then moved into what is clearly a more difficult arena, addressing the way European Union business is handled in the Oireachtas. The Sisyphean nature of the challenge faced in reform of this kind was touched upon by the observation of the Sub-Committee:

> "it is widely acknowledged that the current political system in Ireland focuses Members on local issues to the detriment of their national role as legislators. The Oireachtas must encourage members to take a far greater role in EU affairs. Members should be able to specialise and develop expertise in EU affairs. This needs a change in the political culture in Ireland...We need to find ways to bring our membership of the EU into national politics."[136]

The Sub-Committee recommended three changes. First, it was recommended that a new panel be constituted in the Seanad to which a minimum of five senators would be nominated on the basis of experience in European Union affairs, with the idea being that senators elected from this panel would participate in the Oireachtas European committees and build relations with the Irish MEPs and the European Union institutions. Secondly, it was recommended that the Standing Orders and procedures of Dáil and Seanad Éireann should be amended where necessary, with the main issues for

131. Chapter 4, Paragraph 34.
132. To include Green and White Papers and various Opinions and Reports by the non-institutional bodies of the European Union. In the latter respect, it can only be commented that a highly selective approach would obviously have to be taken. (Chapter 4, Paragraph 35)
133. Chapter 4, Paragraph 36.
134. Chapter 4, Paragraph 38.
135. Chapter 4, Paragraph 39.
136. Chapter 4, Paragraph 40.

inclusion being, *inter alia*: regular debates on European Union legislative proposals and developments; (unspecified) enhanced powers for Oireachtas Committees; provision for participation by MEPs in some debates; and informal monthly meetings between Irish MEPs and the European committees in the Oireachtas.[137] Finally, it was suggested that, as part of an improved communication strategy, the Oireachtas should establish its own EU Information Office, with the aim of providing "easy access to neutral information on the EU decision making process, and Ireland's role therein." [138]

The final category of recommendations related to 'sensitive policy areas', under which heading the Sub-Committee argued that

> "the current requirement in the triple lock for approval by a simple majority in Dáil Éireann should be strengthened. Dáil Éireann should be required to have a "super majority", where a two thirds majority is needed for any proposal to send Irish troops overseas on peacekeeping missions. This would provide a stronger parliamentary mandate for such decisions and enhance the role of the Oireachtas in a key area of interest to the Irish people." [139]

The underlying idea here was that the approval of Dáil Éireann should reflect not only the will of the Government supporters in the Oireachtas, but also of Opposition members of parliament.[140]

Overall, it may be said that the recommendations of the Sub-Committee on Ireland's Future in the European Union contained a number of very valuable recommendations, kick-starting a debate on issues such as the desirability of a scrutiny reserve mechanism. Its conclusions are also of particular value in that reaching them involved a fairly extensive process of consultation and, of course, because the Report itself was cross-party in nature. Nonetheless, it seeemed arguable that if the role of the Oireachtas in European affairs was to be reformed, and if the Oireachtas wished to play a valuable role in this debate, further and more detailed reflection on that specific topic would be required.

Report of the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs

Notwithstanding the broad scope of its recommendations concerning the enhancement of the role of the Oireachtas in European affairs, the Report of the Sub-Committee on Ireland's Future in the European Union has not been the only Report to date which has been of relevance to the role of the Oireachtas in European affairs, nor even the Report most concerned with this topic.

137. Chapter 4, Paragraph 42.The suggestion was that these meetings take place in the week per month when the MEPs were dealing with constituency work and, therefore, more likely to be in Ireland.
138. Chapter 4, Paragraph 43.
139. Chapter 4, Paragraph 44.
140. Chapter 4, Paragraph 22.

It has already been seen that resolutions were adopted – on 10 December, 2009 – by both Houses of the Oireachtas to establish interim arrangements implementing the Lisbon Treaty.[141] In these resolutions, more permanent arrangements were also anticipated. Both resolutions specifically anticipated that, within six months, the Joint Committee on European Affairs and the Joint Committee on European Scrutiny would review and report jointly back to each House on the operation of the interim arrangements and on such related matters as the Committees saw fit. The objective was that, thereafter, the Committee on Procedure and Privileges would recommend to each House whatever amendments might be required in relation to its Standing Orders and its Orders of Reference of Committees (which might not necessarily, of course, be the same thing as what the Joint European Committees might recommend).[142]

The Joint Committee on European Affairs and the Joint Committee on European Scrutiny subsequently agreed to the establishment of a Joint Sub-Committee of both – the Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, chaired by the Fine Gael TD Lucinda Creighton.

It will be noted that the political driving force for the establishment of the Sub-Committee was the Lisbon Treaty, rather than a home-grown wish for reform. This was the case in a direct sense (due to the requirements made of national parliaments by the Lisbon Treaty) and indirectly (because of the political ramifications of the initial rejection of the Lisbon Treaty by the electorate in June, 2008). Hence, the Sub-Committee's Terms of Reference observed that:

> "the Lisbon Treaty changes the relationship between the EU and the national parliaments of the Member States and for the first time, the Treaties formally recognise that national parliaments have a key role to play in the good functioning of the EU. This will have an effect on how the Houses of the Oireachtas conduct their business in relation to EU matters and will also impact on the cooperation between the Houses of the Oireachtas and the national parliaments of the 26 other EU Member States.
>
> In addition, and beyond the implementation of the Lisbon Treaty provisions, the Joint Committees recognise that the role of the Houses of the Oireachtas in EU affairs needs to be improved; a matter considered by the Sub-Committee on Ireland's Future in the European Union..."

The Joint Sub-Committee had ten members drawn from both Houses (six TDs and four Senators), evenly split between Government and Opposition supporters.[143] The Sub-Committee was vested with

141. See paragraph (f) of both resolutions. The text of each resolution is set out at Vol. 698 Dáil Debates 1 (10 December, 2009) and Seanad Debates Volume 199 No. 6 (10 December, 2009) respectively. The resolutions were adopted in the light of, *inter alia*, a report by the Joint Committees on European Affairs and European Scrutiny: "*Joint Report on Implementation of the Lisbon Treaty: Interim arrangements on the enhanced role of the Houses of the Oireachtas*". See paragraph (b) of each resolution. According to the terms of the resolutions, the interim arrangements were intended to apply only until the adjournment of each House for the 2010 summer recess.

142. See paragraph (f) of each December 2009 resolution.

143. The Joint Committees on European Affairs and European Scrutiny each nominated half of this component membership (i.e. three TDs and two Senators). See its Terms of Reference. The membership of the Sub-Committee consisted of DeputiesJoe Costello (Labour), Lucinda Creighton (Fine Gael), Timmy Dooley (Fianna Fáil), Michael Kitt (Fianna Fáil), Mary O'Rourke (Fianna Fáil) and John Perry (Fine Gael), as well as Senators Paschal Donohoe (Fine Gael), John Hanafin (Fianna Fáil), Terry Leyden (Fianna Fáil) and Alex White (Labour). All at a time when the Government was a Fianna Fáil-Green Party Coalition. The Sub-Committee had a quorum of four. See Orders 3 and 4 respectively of itsOrders of Reference.

powers which included the taking of evidence, the inviting of submissions from interested persons and bodies, and the requiring of members of the Government or Ministers of State to attend before it.[144] It heard from eleven expert witnesses during public hearings held on five occasions in April and May, 2010,[145] and received eight submissions, varying considerably in their length and quality. Four of these came from Fianna Fáil, Fine Gael, the Labour Party and the Green Party - i.e. one from each party - (the Sub-Committee having sought position papers from each of the Oireachtas political parties),[146] and three of the other four were submitted by politicians.[147] The remaining submission came from the Head of the European Parliament office in Dublin.[148]

The intention was that the Sub-Committee consider (a) interim arrangements in the Houses of the Oireachtas implementing the new powers granted to national parliaments under the Lisbon Treaty, and (b) the future role of the Oireachtas in European Union Affairs. It was then to report on these considerations to the Joint Committees within a period of slightly less than six months.[149] Ultimately, the Sub-Committee reported back in time to enable the consideration of its Report by the two Joint European Committees – at a joint meeting on 7 July, 2010 – and their agreement to report back to Dáil Éireann and Seanad Éireann. The Joint Committees agreed that the unamended Sub-Committee Report be laid before both Houses of the Oireachtas, and published on the Oireachtas website.

Six 'modules' encapsulating broad themes for consideration were set out in the Sub-Committee's terms of reference. The Sub-Committee took a fairly liberal approach to these modules, however, expanding on them in its Report and not adhering to the modules too exactly in the Report's structure.[150]

144. Order of Reference (2) referencing Standing Orders 83(1), (2) and (4) to (8) inclusive.

145. These were not identified by name in the final Report, although they were: Anthony Collins SC; Michael McDowell SC, former Tánaiste, Attorney General and Minister for Justice; Dr. Gavin Barrett, senior lecturer in European law, University College Dublin; Pat Cox, president of the European Movement International and former President of the European Parliament; Brendan Halligan, chairman of the Institute of International and European Affairs and a former Senator, TD and MEP; John Bruton, former Taoiseach and EU Ambassador to the United States; Alan Dukes, former Minister for Finance, Minister for Agriculture and Minister for Justice and leader of Fine Gael; Micheál Martin, TD, Minister for Foreign Affairs; as well as Irish MEPs Nessa Childers, Seán Kelly and Mairead McGuinness.

146. See Terms of Reference.

147. Namely, the Fianna Fáil MEPs Pat the Cope Gallagher, Brian Crowley and Liam Aylward; Bernard Durkan, TD, the Chairman of the Joint Committee on European Affairs; and Senator Joe O'Toole.

148. Francis Jacobs, well-known for his published work on the European Parliament. See Appendix IV to the Sub-Committee's Report in relation to the submissions received. The submissions themselves may be viewed, at the time of writing, at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/JEuropeanAffairs SubCtteeRoleofOireachtas/Publications/document1.htm

149. See Orders of Reference of the Sub-Committee available, at the time of writing, at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EuropeanAffairsSubCtteeRoleofOireachts/Orders_of_Reference/document1.htm The original idea was that the Joint Sub-Committee would finalise its work by 27 May, 2010, in order that the matter might be concluded by both Joint Committees within the supposed six-month deadline of the process of 10 June, 2010 See Terms of Reference of the Joint Sub-Committee of available, at the time of writing, at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EuropeanAffairs SubCtteeRoleofOireachtas/Terms_of_Reference/document1.htm

150. See Annex to the Sub-Committee's Report. They are, nevertheless, of interest in that they give an idea of the main focuses of concern which led to the establishment of the Sub-Committee. The first module was the one most directly related to the Lisbon Treaty. It was to be a review of the interim arrangements which had already been adopted in the Houses of the Oireachtas implementing the powers conferred by the European Union Act 2009 – enacted to give effect to the requirements of the Lisbon Treaty – in addition to looking at other roles conferred on the Oireachtas by the Lisbon Treaty, although not contemplated by the European Union Act 2009.The second module was also Lisbon Treaty-related. This module was to involve consideration of recommendations that had already been made by the earlier Donohue Sub Committee on Ireland's Future in the European Union – including that Sub-Committee's calls for (a) the introduction a scrutiny reserve mechanism, (b)consultation in advance of the publication of the European Commission's Annual Policy

Recommendations of the Sub-Committee

In its Report, the Sub-Committee produced no less than 28 separate recommendations, focusing on the issues of: (i) reviewing the interim arrangements already adopted to facilitate the coming into force of the Lisbon Treaty; (ii) prioritising the more important work carried out by the Oireachtas in the European Union field; (iii) early engagement in European Union policy-making; (iv) improving oversight of the executive; (v) improving inter-parliamentary co-operation; (vi) 'mainstreaming' European Union work into the life of the Oireachtas generally; (vii) improving the manner in which European Union law impacts on the public via the transposition of European Union directives; and (viii) improving the communication to the public of European Union matters.

Of these 28 recommendations, a majority (16) focused on three topics only, *viz.* topics (iv) (improving oversight of the executive) (vi) ('mainstreaming' European Union–related work into the life of the legislature) and (vii) (improvement of the domestic impact of implementing European Union law). These appear to be the areas in which the Sub-Committee felt the most changes were needed. The Sub-Committee put forward six recommendations regarding oversight of the Oireachtas, while mainstreaming and impact issues gave rise to five recommendations apiece, covering some of the main areas of concern of the Sub-Committee. The topic of resources also attracted five recommendations, albeit unnumbered ones, indicating obvious and justifiable concerns in this area, too. Recommendations naturally varied in their significance, with some of the most far-reaching suggested reforms having as their aim the improvement of oversight of the executive.

It is possible to criticise some aspects of the Sub-Committee Report. In the first place, there is little or no evidence of serious reflection or comparative study having taken place on how to optimise the functioning of the new powers given to the Oireachtas under the Lisbon Treaty and its associated Protocols, under the consequent amendment of Article 29.4 of the Irish Constitution, and under the European Union Act 2009. Instead, the Report largely rubberstamped the rather confused transitional arrangements which the Oireachtas had already been operating.[151] Secondly, no thought at all seems to have been given, in the drafting of the Sub-Committee Report, to how the Oireachtas might exercise some kind of controlling or accountability function in relation to vital areas of European Union activity which involve a reduced role, or indeed no role, in the legislative process at European Union level. Examples of this include the (vitally important) open method of co-operation,[152] and European-level

Strategy and the annual Legislative and Work Programme of the same institution, and (c) structured arrangements for pre-Council meetings with all sectoral Oireachtas Committees. The Sub-Committee on Ireland's Future in the European Union was set up in the wake of the failure of the first Lisbon Treaty referendum. The third module was to concern how interparliamentary co-operation could be enhanced. The fourth module was to be about optimisation of the consideration of European Union Affairs by the Houses of the Oireachtas, and was to include the topic of mainstreaming. The fifth module was on Oireachtas oversight of the transposition of European Union law and regulatory impact assessments**.** The sixth module was to concern resources and training, and was to include consideration of a European Union information office. See in relation to all of the foregoing the Terms of Reference of the Joint Sub-Committee, cited above at n. 149.

151. Discussed in Part I above.

152. See now variously Articles 145, 146 and 150 TFEU (dealing with the co-ordinated strategy for employment), Article 173 TFEU (dealing with industry), Articles 168 TFEU (dealing with public health), Article 181 TFEU (dealing with research and technological development activities), Articles 153(2) and 156 TFEU (dealing with social policy) and Article 171(2) TFEU (dealing with trans-European networks).

social dialogue.[153] This omission occurred despite these policy areas having been specifically brought to the attention of the Sub-Committee during its hearings.[154] One could also query the fact that the Sub-Committee made recommendations expressly aimed at guarding against the 'gold plating' of Irish implementation legislation without first having examined the somewhat dubious nature of claims that such activity was actually taking place.[155] In terms of its operation, the Sub-Committee can also be criticised for having engaged only in a relatively limited consultation process compared with that of the Sub-Committee on Ireland's Future in the European Union.[156]

On the other hand, the Sub-Committee had only a limited period of time in which to operate. It is also true that, given the overlap in the membership of the two Sub-Committees, the Sub-Committee could draw on the evidence already given to the Sub-Committee on Ireland's Future in the European Union. As regards its output, it certainly produced the most comprehensive examination of this area by any Oireachtas body in recent times. Furthermore, there can be little doubt that the recommendations made in the Report would, if adopted, certainly have a very significant positive impact on the treatment of European policy by the Oireachtas. It is now proposed to examine briefly each of the topics on which the Sub-Committee put forward recommendations.

i. Review of Interim Arrangements

Three recommendations were made concerning the interim arrangements, which had been put in place by the resolutions of 10 December, 2009, in order to implement the new powers given to national parliaments under the Lisbon Treaty. There was disappointingly little evidence of innovation or comparative reflection in the Sub-Committee's conclusions here, however. It is probably not unjust to comment that the Sub-Committee focused more on the broader picture of the role of the Oireachtas in European affairs than on how best to optimise the functioning of this role through exercising the new powers granted to it under the Lisbon Treaty, the relevant amendments of Article 29.4 of the Irish Constitution, and the relevant provisions of the European Union Act 2009, each of which came into force on 1 December, 2009.[157] In fairness, some of the Sub-Committee's broader recommendations – such as the need for mainstreaming – have some application in relation to the operation of the interim arrangements as well.

In its review of the interim arrangements, the first and most significant recommendation of the Sub-Committee was that these arrangements be put on a permanent basis through an amendment to

153. See now Articles 152 to 155 TFEU.
154. See the observations made by the present writer in this regard at the meeting of the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs of 5 May, 2010.
155. In his address to the Sub-Committee on 19 May, 2010, the then Foreign Minister Micheál Martin stated that he had seen little concrete evidence to support the claim that such 'gold plating' was taking place.
156. The Sub-Committee on the Review of the Role of the Oireachtas in European Affairs heard from eleven expert witnesses. (This is the author's calculation.) The witnesses are named at n. 145 above. The Sub-Committee on Ireland's Future in the European Union (admittedly with a far wider policy area to consider), in contrast, heard from 110 witnesses. (See chairman's foreword to that Report.) Not all of the latter witnesses would have been considered expert, however. This Sub-Committee, operating between two referendums, appears to have felt obliged to provide a hearing to both sides in the Lisbon referendum debate and, in choosing witnesses, representativity seems at times to have played as much a role as expertise.
157. The need to reflect on these issues and the desirability of comparative reflection (and a suggestion as to how this might be engaged in) were pointed out by this writer in his evidence to the Sub-Committee at its 5 May 2009 meeting.

the Dáil and Seanad Standing Orders. The Sub-Committee further recommended, however, that the relevant amendments to the Standing Orders also provide for an annual review of these 'permanent' arrangements, thus ensuring sufficient flexibility to reform the relevant rules on an ongoing basis in the light of experience. This rather sensible suggestion has not been followed in the November and December amendments of the Standing Orders relative to Public Business of the Dáil and Seanad, however. It is true that specific provision does not have to be made in the Standing Orders in order for regular reviews of their content to be undertaken. On the other hand, it is equally true that it is unrealistic to expect regular reviews of the provisions in the Standing Orders relating to European affairs unless provided for in the Orders themselves.

The second recommendation concerned the initiative of the Clerks of the Seanad and the Dáil in laying a weekly report in both Houses on all documents received from European Union institutions. The recommendation was that the weekly report on EU documents should be laid by the Leas-Cheann Comhairle and the Leas-Cathaoirleach, so as to emphasise that ownership of the Lisbon Treaty powers resided in the House as a whole rather than in particular committees. It was also recommended that the weekly report be published on the Oireachtas website. A third and related recommendation was that the Houses of the Oireachtas (Laying of Documents) Act 1966 should be amended so that documents could be laid electronically. This seems sensible given that it would increase ease of access to such documents.[158]

ii. Prioritisation

Two recommendations were produced by the Sub-Committee on the topic of prioritisation. This is a necessary objective in all member state parliaments, where the flood of documentation from the European Union institutions can threaten to overwhelm these institutions' capacities to deal with them. The first recommendation was that the current system employed by the Joint Committee on European Scrutiny be changed so that legislative proposals received in accordance with the 2002 Act be divided into two lists: a list of proposals of limited significance and a list of proposals of greatest significance/ implications for Ireland. This seems no more than common sense.

A second recommendation was that the European Union (Scrutiny) Act 2002 be amended so that each Government Department be obliged to prepare a six-monthly report on developments in the EU, on the measures proposed and progressed in that period and on the main priorities for the coming six months. In practice, the fulfilment of this recommendation seems likely to make little difference in that such Departmental reports – required under s. 2(5) of the European Union (Scrutiny) Act 2000 – already include a forward-looking element. In contrast, the Sub-Committee recommended that the requirement which currently exists under the 2002 Act to prepare an annual report should no longer exist, the grounds for this being that an annual report is largely a historical document.[159] Some

158. See, generally, Recommendations 1 to 3 of the Report on the Review of the Role of the Oireachtas in European Affairs at pp. 9 to 10 thereof.

159. See generally Recommendations 4 and 5 of the Report on the Review of the Role of the Oireachtas in European Affairs at pp. 10 to 11 thereof.

streamlining of reporting does, indeed, seem likely to take place, especially in view of the observations of the Minister for Foreign Affairs to the Sub-Committee that

> "under the [European Union (Scrutiny) Act], the Oireachtas receives six-monthly reports from every Minister, and in addition, my Department on behalf of the Government makes an annual report on developments in the EU. There seems to me to be a level of duplication in these reports which serves no useful purpose. In addition to these reports specifically on the EU, each Department is required to publish an annual report which incorporates substantial material on relevant developments at EU level. I would suggest that this aspect of the [Act] could be reviewed with the aim of producing a more streamlined system of reporting which meets the needs of the Oireachtas and lightens the administrative burden."[160]

Whether the kind of streamlining the Minister had in mind would correspond with the Sub-Committee's ideas, however, or indeed, would better serve the cause of transparency or administrative convenience remains to be seen.

iii. Early Engagement

Two recommendations were made reflecting the Sub-Committee's appreciation of the necessity for early intervention in order to influence policy at European level.[161] The first was simply the recommendation that the European Commission's Annual Policy Strategy should continue to be debated in the Joint Committee on European Affairs, but that, in future, a report should be prepared and laid before both Houses, and debated in plenary session, with the Standing Orders being amended to stipulate the requirement of a plenary debate. It was also proposed that only *after* this plenary debate was held should the Joint Committee make its final contribution to the Commission.[162]

The other recommendation concerned the Joint Committee on European Scrutiny. It stated, simply, that this Committee should continue to consider the Annual Legislative and Work Programme in detail. Again, however, certain innovations were suggested. One was that the Scrutiny Committee's consideration should always include a presentation on the Legislative and Work Programme by a Commission representative. Further, it was recommended that the Scrutiny Committee prepare a report on the Legislative and Work Programme to be laid in the Houses and circulated to all sectoral committees for consideration.[163]

iv. Better Oversight

Better oversight – or what the Sub-Committee referred to as a national parliament's "primary function of conducting oversight of government decisions and keeping Government ministers accountable in

160. See address by the then Foreign Minister Micheál Martin to the Sub-Committee on 19 May, 2010.
161. See the insightful submissions made in this regard in F. Jacobs, "*Review of the Role of the Oireachtas in European Affairs*" Undated submission to the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs) at p. 1-3 thereof.
162. Recommendation 6 of the Sub-Committee's Report at pp. 11-12.
163. Recommendation 7 of the Sub-Committee's Report at p. 12.

respect of EU matters" – constituted a major point of focus for the Sub-Committee, which made no less than six separate recommendations under this rubric.

The first of six recommendations made by the Sub-Committee involved the closing of a circle in relation to Oireachtas control over Ministerial actions at European Union level. The Sub-Committee recommended that *all* Government Ministers should be *obliged*, by way of an amendment to the EU Scrutiny Act 2002, to attend the relevant sectoral committee in advance of a Council meeting in order to discuss the Council agenda *and* to report back to that committee on the outcome of the Council meeting.[164] This would be a radical departure from existing behaviour in relation to committee meetings. As it stood, Ministers could be requested to appear before committee meetings but, in practice – with the exception of the Minister for Foreign Affairs who frequently appears in advance of General Affairs and External Relations Council meetings – are rarely invited to do so prior to Council meetings. Even the Minister for Foreign Affairs does not, at present, report back *after* the meeting.[165] And yet there is a strong democratic case to be made for appearances before Oireachtas committees both before and after Council meetings. Hence the support expressed by Brendan Halligan, chairman of the Institute of International and European Affairs, expressed to the Sub-committee for the idea of calling Ministers before Oireachtas committees *after* each Council meeting:

> "there are different views on how Ministers should be brought before...committees of the Oireachtas. I argue very strongly that, one way or another, every Minister who has attended a meeting of the Council of Ministers should be required to give an account orally thereof before a committee. I do not believe in written reports because they are primarily drafted by civil servants rather than politicians. For the sake of accountability, Ministers should be invited here in turn."[166]

More interesting still was the case for appearances by Government Ministers *prior* to Council meetings, which had been made to the Sub-Committee by former Taoiseach John Bruton:

"why would Ministers want to come and consult a committee of the House before they attend Council of Ministers meetings? From my experience of attending meetings of the Council of Ministers...one is handed the brief as one gets on the aeroplane... An official may say 'Minister, we could not give it to you earlier because we wanted to be absolutely up to date. We wanted to have the latest report from COREPER yesterday.' However, the first opportunity the Minister will have to read any of the material is when the brief is presented on the aeroplane. If a Minister was called before a committee the week before, the Minister would have to get the brief from the civil service. The Minister would

164. Recommendation 8 of the Sub-Committee's Report at p. 13. This followed a suggestion to this effect made by the present writer in his contribution to the Committee on 5 May, 2010. Support for the idea of calling Ministers before Oireachtas committees after each Council meeting was also expressed at the same meeting by Brendan Halligan, chairman of the Institute of International and European Affairs. Support for the idea of calling Ministers before Oireachtas committees prior to Council meetings was expressed by former Taoiseach John Bruton in his contribution to the Sub-Committee on 12 May, 2010.

165. Note the discussion of the relationship between Government Ministers and the Oireachtas insofar as concerns meetings of the Council of Ministers which took place in the Sub-Committee meeting of 12 May, 2010, particularly the contribution of Deputy John Perry. Note, further, that in his submission to the Sub-Committee on 19 May, 2010, the then Foreign Minister had done no more, however, than to refer vaguely to the possibility that current arrangements "could be enhanced by a more regular process of pre- and post-Council consultation of the Oireachtas."

166. Observations made to the Sub-Committee meeting of 5 May, 2010.

then find that he or she had more influence on what was going to be done by the country than is the case at present when the brief is given to them aboard the plane...There [is] a commonality of interests between Ministers and the committee."[167]

A parallel recommendation made by the Sub-Committee was that statements, questions and answers on the European Council take place in the Dáil *prior* to a European Council.[168] In the 30th Dáil, the practice was that the Taoiseach made a statement to the Dáil only on the outcome of a European Council meeting, usually followed by a session of questions and answers. This is a recommendation of particular importance given the increase in the frequency of European Council sessions since the coming into force of the Treaty of Lisbon.

Thirdly – and in a curious *renvoi* of what would one might have regarded as the Sub-Committee's own responsibilities – it was recommended that the Government come forward, as a matter of urgency, with proposals on how the Oireachtas would examine Ireland's Stability and Convergence Programme and budgetary framework before these are submitted to the Council and the Commission for assessment.[169]

The fourth recommendation made by the Sub-Committee in its report was one of the most significant, *viz.* that the the European Union (Scrutiny) Act 2002 be amended to include a scrutiny reserve system. The issue of scrutiny reserves and mandates has been looked at briefly above in examining the recommendations of the Donohue Sub-Committee. Varying views had been expressed on both suggested systems to the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs. Some witnesses had favoured a mandate system.[170] Others had expressed opposition to this.[171]

167. Contribution made to the Sub-Committee meeting of 12 May, 2010.
168. Recommendation 9 of the Sub-Committee's Report at p. 13.
169. Recommendation 10 of the Sub-Committee's Report at p. 13.
170. Former President of the European Parliament Pat Cox observed in his evidence to the Committee on 5 May, 2010: "Consider the difference between scrutiny reserve systems and mandate systems. Scrutiny reserve represents an improvement over what is in place at present. I have been privileged to have been in attendance at all the European affairs committees in each parliament in the Union and each parliament in every actual or likely accession state. Those states that operate the mandate system have very impressive systems. They are mainly, but not exclusively, Scandinavian. Ministers do not take lightly coming to a committee and contracting their margin of manoeuvre for Council debates. This matters in that if there is executive accountability, it should start as the journey starts and not later in the process. From what I have seen in committees, I am in favour of the mandate system." The present writer, who was invited to give evidence before the Sub Committee on the Review of the Role of the Oireachtas in European Affairs and the Donohue Sub-Committee (on three occasions), also supported the idea of a mandate system, before both Sub-Committees. See, for example, debates of the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs of 5 May, 2010.
171. Former Taoiseach John Bruton expressed fears to the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, on 12 May, 2010, that a mandate system "would make it very difficult to Ministers going to meetings to have the sort of room for manoeuvre that one needs to be able to negotiate with colleagues". Brendan Halligan, chairman of the Institute of International and European Affairs, was somewhat ambivalent in his views on the mandate systems in general in his evidence to the Sub-Committee, having no apparent objection to a Finnish-style system, while uncomfortable with the idea of the importation of the Danish version of a mandate system. He observed that "the Danish system puts a straitjacket on the Government and I do not agree with this" while also acknowledging that "it is worthwhile examining the Finnish system, which is sophisticated". See debates of Sub-Committee on the Review of the Role of the Oireachtas i European Affairs of 5 May, 2010.

One witness had favoured a scrutiny system.[172] Another witness, however - and –the most significant in this context, as he was the then Foreign Minister, Micheál Martin – was strongly opposed even to this.[173] The Sub-Committee's recommendation of a scrutiny reserve system, made in the light of all of this evidence, became the second favourable recommendation in less than two years for the introduction of such a system by an Oireachtas Sub-Committee.

Copying, in essence, the system which operates in the United Kingdom, the Sub-Committee suggested that the amendment include an urgency clause enabling a Minister to override the reserve. It would also require the Minister to justify this decision to the relevant committee in writing, with the committee retaining the right to oblige the Minister to appear before it if not satisfied with his or her explanation.

However, indicating what might be interpreted either as a certain lack of confidence in the Oireachtas as an institution or as a recognition of the extent of executive opposition to the introduction of a scrutiny reserve, the Sub-Committee further recommended that the proposed amendment to the 2002 Act should also include a provision to the effect that a scrutiny reserve imposed by an Oireachtas committee would automatically lapse within a certain period of time. The Sub-Committee's suggestion was that a suitable period would be within eight weeks of receiving the information note from the Government.[174]

Finally, the Sub-Committee also recommended that a Memorandum of Understanding be agreed between the Oireachtas and the Government, on the operation of the scrutiny reserve system.[175]

The Sub-Committee's final recommendation on the topic of oversight related to the organisation of the European affairs-related committee structure in the Oireachtas. The Sub-Committee recommended that, in the next Dáil period (the 31st), the Joint Committee on European Affairs and the Joint Committee on European Scrutiny be amalgamated, forming a new standing Oireachtas committee, to be known as the Joint Committee on EU Scrutiny and European Affairs. The Sub-Committee's idea was that this Joint Committee would have sub-committees dealing with EU legislation – under which heading it included the issue of transposition of Directives – and that it would have an overall co-ordinating role, including in relation to the work on EU matters carried out by sectoral committees. The Sub-Committee suggested that the proposed new Joint Committee would

172. Former Taoiseach John Bruton, speaking to the Sub-Committee on 12 May, 2010, pronounced himself "more favourable to the scrutiny reserve system" than to a mandate system. This, however, was as favourable a review as the scrutiny reserve system received from any witness to the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs. Nonetheless, the Sub-Committee – like the Sub-Committee on Ireland's Future in the European Union before it – came down in favour of recommending a scrutiny reserve system, and individual members of the Committee were clearly strongly in favour of this approach. See, for example, the opinions of Deputy Joe Costello as expressed at the meeting of the Joint Committee on 19 May, 2010. Many of the members of the Sub-Committee had, earlier, been members of the Sub-Committee on Ireland's Future in the European Union, and it may be that (a) the very strong support given before that Committee to a scrutiny reserve system, with witnesses such as Professor Deirdre Curtin and Sir John Connarty, the then Chairman of the Scrutiny Committee in the House of Commons, in addition to (b) the more radical-seeming approach involved in a mandate system continued to play a role before the later Sub-Committee.

173. See the views expressed by Mr. Martin to the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, 12 May, 2010, in which he raised fears of inflexibility in negotiations in addition to negative resource, workload, cost and constitutional implications.

174. Recommendation 11 of the Sub-Committee's Report at pp. 14-15.

175. Recommendation 12 of the Sub-Committee's Report at p. 15.

also deal with EU institutional questions as well as the pre-General Affairs and External Relations Council ministerial briefings.[176]

v. Better Co-operation

Spurred on by its (arguably correct) understanding that co-operation between national parliaments (and, it asserted, with the European Parliament) was needed to make Oireachtas powers under the Lisbon Treaty effective, the Sub-Committee made a number of recommendations in this regard. The first was that the Houses of the Oireachtas should host an interparliamentary meeting on an annual or bi-annual basis to discuss a topical EU policy area or legislative proposal.[177] The second was that the European Affairs and European Scrutiny Joint Committees should have regular meetings with Irish MEPs in order to discuss issues of mutual concern which appear on the EU's agenda. It was also suggested that there be regular meetings between the Irish MEPs who are members of key European Parliament Committees and the relevant sectoral committees in the Oireachtas.[178] Wisely, the Sub-Committee was also open to the idea of meeting with non-Irish MEPs, although it went no further in this regard than to recommend, somewhat timorously, that the European Affairs and Scrutiny Committees, as well as appropriate sectoral committees, consider holding consultations with the rapporteur of whichever European Parliament committee is dealing with the policy or legislative proposal under scrutiny.[179] Participation by MEPs in the work of Oireachtas Committees dealing with European issues would undoubtedly be valuable but, in practice, has proved notoriously difficult to secure over the years given the different *loci* of activity and the different schedules of members of the Oireachtas and of MEPs.

vi. Mainstreaming

The legislative output of the European Union is now so great that it has become impossible for one or two parliamentary committees to possess the expertise needed to deal effectively with it. It is little surprise, therefore, that research has shown that the most effective parliaments are those which 'mainstream' involvement in European affairs in such as way as to involve as much of their entire membership as possible.[180] Commendable awareness of this point was shown by the Oireachtas, and it put forward five recommendations in this regard under the heading 'mainstreaming'.

The first was that the powers of referral of EU documents by the two European Committees, and the powers of consideration by the sectoral committees, be rationalised. The Sub-Committee proposed

176. Recommendation 13 of the Sub-Committee's Report at pp. 15-16.
177. Recommendation 14 of the Sub-Committee's Report at pp. 16-17.
178. Recommendation 15 of the Sub-Committee's Report at p. 18
179. Recommendation 16 of the Sub-Committee's Report at p. 18. A series of useful recommendations relating to closer cooperation between the European Parliament and the Oireachtas are to be found in F. Jacobs "*Review of the Role of the Oireachtas in European Affairs*" (Undated submission to the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs) at p. 4-7 thereof.
180. See, for example, in this regard, T. Raunio, "*Ensuring Democratic Control over National Governments in European Affairs*" in G. Barrett (ed.) *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press, Dublin, 2008), 3 at 9. This issue was raised by the former President of the European Parliament, Pat Cox, in his contribution to the Sub-Committee meeting on 5 May, 2010, and by the present writer at the same meeting. See for a contrary opinion in this regard (offered at the same meeting) the views propounded by Brendan Halligan, chairman of the Institute of International and European Affairs.

that this be done by including appropriate reference to sectoral committees' European role in the Houses' Standing Orders. The Sub-Committee also recommended strengthening the generally sub-optimal performance of sectoral committees in relation to European affairs by including a requirement that sectoral committees *must* report back to the European Affairs and European Scrutiny Committee, rather than – as was the case under their then orders of reference – having an option in this regard.

The Sub-Committee envisaged the European Affairs and European Scrutiny Committees taking on a co-ordinating role to ensure that sectoral committees would receive proper support when considering European Union issues.[181]

Secondly the Sub-Committee recommended that a Rapporteur system be introduced for the consideration of important EU policy and legislative proposals, the suggestion being that any member of the Oireachtas could be appointed a Rapporteur on a case-by-case, voluntary basis.[182] The idea of rappporteurs was inspired by the system in use in the European Parliament and has already been deployed.

A further recommendation made by the Sub-Committee was that the Standing Orders of both Houses be amended so that reports of the Joint Committee on European Affairs and the Joint Committee on European Scrutiny, specifically recommended for debate in the Houses, be taken for debate within a certain period of time.[183]

Fourthly, it was also recommended that selected sectoral committees be obliged to report to the Seanad periodically in respect of their European Union-related work. The idea here was that the Chair of the sectoral committee would be expected to present the committee's work to the Seanad, and to have a discussion on it with the Seanad. The Sub-Committee viewed this as having the dual benefits of (a) facilitating debate on European Union issues within the Seanad, and (b) a policing role, helping to ensure that sectoral committees complete European Union-related work referred to them.[184]

Finally, the Sub-Committee also recommended that, every year, the week on which 9 May (Europe Day) falls be set aside by the Dáil as a week for debates and events on European Union-related topics.[185]

vii. Domestic Impact

The impact of the transposition of European Union Directives was clearly a question of considerable concern to Sub-Committee members. This was scarcely surprising, given that this is one of the areas of most concern from the standpoint of democratic accountability. Again, no fewer than five recommendations were made in relation to this issue.

181. Recommendation 17 of the Sub-Committee's Report at pp. 18-19.
182. Recommendation 18 of the Sub-Committee's Report at pp. 19-20. This was mentioned by former Taoiseach John Bruton in his evidence to the Sub-Committee on 12 May, 2010.
183. Recommendation 19 of the Sub-Committee's Report at p. 20.
184. Recommendation 20 of the Sub-Committee's Report at p. 20.
185. Recommendation 21 of the Sub-Committee's Report at p. 20.

The first was that the regulatory impact assessments – which, the Sub-Committee claimed, Government Departments are expected to prepare for all EU Directives[186] – should be circulated to the Joint Committee on European Affairs and the Joint Committee on European Scrutiny, as well as to the relevant sectoral committee. The idea was that, on the basis of the assessment, the relevant committees would advise the Minister on whether an EU Directive should be transposed by statutory instrument or by an Act of the Oireachtas.[187] The address made to the Sub-Committee by then Minister for Foreign Affairs Micheál Martin had indicated willingness to forward such assessments to Oireachtas committees, but only "when draft legislation, including statutory instruments, is being circulated". This was about as minimal a commitment as could be made to the Oireachtas in this regard since, by then, the decision would already have been taken on how to transpose the Directive.

A further recommendation was that statutory instruments should be circulated to all Oireachtas members six weeks before they are signed by the relevant Minister, which would be a considerable change from the present position whereby Oireachtas members have no opportunity to find out about statutory instruments until after they have been adopted.[188] The Sub-Committee also recommended that statutory instruments should be referred to the Joint Committee on European Affairs for scrutiny – presumably as draft instruments and at the same point in time – and, furthermore, that the Minister should provide an explanation of why he or she was transposing these measures by statutory instrument if requested to by the Joint Committee on European Affairs. Finally, in this regard, the Sub-Committee recommended that the Joint Committee on European Affairs should also have the power to decide to refer significant statutory instruments to either House for a full plenary debate. The Sub-Committee further recommended that the explanatory memorandum provided by Departments for every statutory instrument be used as a tool to explain clearly the measures that the statutory instrument was introducing.[189]

In one of several of its recommendations concerning the Seanad, the Sub-Committee also recommended that the Seanad play an important role in the area of monitoring the transposition of EU Directives.[190]

In its penultimate recommendation under the rubric of 'domestic impact', the Sub-Committee recommended that the Joint Committee on European Affairs should be briefed on infringement actions taken or pending against Ireland for the non-transposition, or improper transposition, of EU Directives. Perhaps reflecting the concern of Oireachtas members on being kept out of the loop in relation to questions relating to the transposition of Directives, the Sub-Committee observed that "in this respect, and in line with the previous two recommendations", there should be a constant exchange of

186. In reality, such assessments appear to be less frequently produced than this. In his address to the Sub-Committee on 19 May, 2010, the then Foreign Minister, Micheál Martin, noted that Government Departments "are required to conduct a RIA on all primary legislation involving changes to the regulatory framework. *In principle*, this also applies to secondary legislation transposing significant EU directives...*I see merit* in the [Donohue Sub-Committee] recommendation that RIAs be prepared on the transposition of all *significant* EU measures." (Emphasis added.) The last two sentences in particular clearly imply that research assessment exercises are not, at present, being carried out on secondary legislation transposing significant European Union directives.

187. Recommendation 22 of the Sub-Committee's Report at pp. 20-21.

188. Note the suggestions made to the Sub-Committee by the present writer in this regard at its meeting of 5 May, 2010.

189. Recommendation 23 of the Sub-Committee's Report at p. 21.

190. Recommendation 24 of the Sub-Committee's Report at p. 21. The idea of an enhanced role for the Seanad was advocated, for example, by former Tánaiste, Minister for Justice and Attorney General Michael McDowell SC in his contribution to the Sub-Committee on 28 April, 2010.

information between the Oireachtas European Committees and the Interdepartmental Co-ordinating Committee on European Union Affairs which oversees the transposition of EU Directives and which is chaired by the Minister of State for European Affairs.[191] The increased transparency which would result from the adoption of all of these proposals would be welcome. The Sub-Committee's observation that "a key aim of these recommendations would be to guard against so-called 'gold plating' (i.e. the inclusion of additional domestic regulations not required by the EU Directive)" is surprising, however. There appears to be little, if any, evidence that any such gold plating is actually happening.[192]

Indeed, the Sub-Committee's final recommendation was for a study apparently designed to establish whether there is any hard evidence of such activity taking place – or, more exactly, that the Joint Committee on European Affairs undertake a study of selected European Union Directives transposed in Ireland which have caused the greatest concern in terms of regulation.[193] This recommendation appeared to follow a suggestion which had been made by the then Foreign Minister Micheál Martin in addressing the Sub-Committee on 19 May, 2010. The Minister's suggestion had been motivated by a desire to see disproved what he felt were groundless allegations of 'gold plating' of statutory instruments in the implementation of European Union directives so as to achieve additional aims not included in the directives. The inclusion by the Sub-Committee of this recommendation may also be regarded as reflecting widespread genuine and legitimate concerns, however, about the manner in which European Union directives are being implemented in Ireland via statutory instrument.

viii. Public Communication

Communication of the role and functioning of the European Union continues to be a task which presents difficulties for most national parliaments. The Oireachtas is clearly no exception in this regard. Following on from some of the recommendations made by the Donohue Sub-Committee, the Creighton Sub-Committee made two recommendations of its own – first, that an EU information kiosk be established in the lobby entrance of the visitors' gallery of Leinster House, with the aim of providing information on the EU to the approximately 50,000 members of the public who visit Leinster House annually (a good proportion of whom are primary and secondary level students).[194] Although the point is unacknowledged in the Sub-Committee Report, this particular recommendation may be regarded as involving an example of parliamentary peer learning, since the step recommended has already been taken in the Danish Folketing, where the kiosk in question is reportedly the biggest centre of information on European affairs in that country.[195] It should be recalled, however, that very substantial resources have been allocated to the Danish undertaking.

Secondly, the Sub-Committee recommended that the Oireachtas form a more formal link with the

191. Recommendation 25 of the Sub-Committee's Report at p. 21-22.
192. See, in this regard, the address of the then Foreign Minister, Micheál Martin, to the Sub-Committee on 19 May, 2010.
193. Recommendation 26 of the Sub-Committee's Report at p. 22. The Committee recommended that the study include a comparative analysis of how these Directives had been applied in other EU Member States.
194. Recommendation 27 of the Sub-Committee's Report at p. 22.
195. See, in this regard, F. Jacobs, "*Review of the Role of the Oireachtas in European Affairs*" (Undated submission made to the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs) at pp. 7-9. Further useful recommendations on communicating on Europe are made by the same writer in the same location.

Representatives Offices of the Commission and the European Parliament in Ireland "in order to maximise their joint remit to communicate Europe".[196]

ix. Resources

Five unnumbered recommendations were made by the Creighton Sub-Committee in relation to the issue of resources. Noting the increased responsibilities and challenges for national parliaments which came about as a result of the Lisbon Treaty, and which "inevitably [placed] a greater burden on resources", the Sub-Committee also noted the increased burden on resources which would result from the full implementation of its own recommendations, "especially with regard to the oversight of transposition". The Sub-Committee pronounced itself "firmly of the position that more resources, and in particular staff, should be directed towards the EU area". It also expressed its belief that the Library and Research Service should be better resourced and should be available to the committees and/or rapporteurs involved in EU scrutiny.[197] These recommendations certainly have merit to them, although, in reality, questions can legitimately be raised as regards how much use Oireachtas members are presently making of existing research facilities to support Oireachtas committee work.[198]

The Sub-Committee identified specifically those of its own recommendations which it felt, if implemented, would require the allocation of additional resources.[199] First, there were its recommendations in favour of the introduction of a scrutiny reserve system.[200] The rapid and thorough analysis of legislative proposals and the timely preparation of scrutiny reports which such a system would require led the Sub-Committee to propose the addition of two policy advisors to the committees' secretariat.[201]

196. The Committee observed that "initiatives that could be considered include the establishment of a planned tour for studentswhich encompasses a visit to Leinster House and a visit to the EU Offices; the organisation by the Commission and/or European Parliament of outreach programmes, meetings and competitions, particularly in schools, which TDs and Senators could be invited to provide input." (See Recommendation 28 of the Sub-Committee's Report at p. 23.)
197. See, generally, para. 45 of the Sub-Committee's Report at p. 23.
198. Source: interview conducted by present writer on 1 December, 2010, with an Oireachtas staff member in which the Joint Oireachtas Committee on European Affairs was identified as one of the lightest users of the Service's facilities, in addition to observations by present writer of meetings of both Joint Oireachtas Committees dealing with European questions in 2010. Note also the observations in this regard by former Tánaiste, Minister for Justice and Attorney General Michael McDowell SC in his contribution to the Sub-Committee on 28 April, 2010, in which he contrasted his experience appearing as a Minister before the Oireachtas European Affairs Committee with his experience as a witness before the equivalent Committee of the House of Lords. Of the former Committee, he observed"it was my experience meetings were held early in the morning or late in the afternoon – they were more likely to be in the morning – at which the Minister arrived with a retinue of officials and a large volume of paperwork which had been given 24 or 48 hours earlier to members of the Committee. The background to the legislative proposals and the agenda items of the Justice and Home Affairs Council was not explored in any great detail...There was a tendency for those discussions to dilate onto more topical issues of justice and home affairs in this jurisdiction rather than concentrating on what Europe was proposing to do. When I was Minister for Justice, Equality and Law Reform I went to the House of Lords to appear as a witness before its committee` on European affairs, in conjunction with hearings it was having on justice and home affairs, the opt-out and the emergency brake clause which were then under negotiation. It struck me at the time...that this measure was receiving far more detailed consideration in Westminster than it received in Leinster House, although it was of equal importance to both jurisdictions. Arising from that encounter, it struck me that it had done a lot of work and had a good deal of research behind it by way of backup. When it invited me and other witnesses, including academics and European jurists, to talk about it, it was very well briefed on the subject it was discussing. Its questioning was particularly to the point and searching. That all points to what I consider is a real problem for the Oireachtas, based on my experience and observations...It occurs to me, in particular in the context of the passage of the Lisbon Treaty, that the Oireachtas has to up its game very substantially."
199. See para. 46 of the Sub-Committee's Report at p. 23.
200. Recommendations 11 and 12 of the Sub-Committee's Report
201. Para. 46 of the Sub-Committee's Report at p. 23.

Secondly, the proposal by the Sub-Committee to strengthen the role of sectoral committees led it to stress the importance of these committees receiving appropriate support to undertake this work efficiently and effectively,[202] although it made no specific recommendation in this regard other than to reiterate the desirability of assigning two additional policy advisors.[203]

Thirdly, the Sub-Committee backed up its recommendation for the appointment of rapporteurs[204] by stressing the need for such individuals to receive the proper support in terms of research and policy analysis, suggesting that an additional researcher be assigned to the Library and Research Service.[205]

Fourthly, the Sub-Committee noted that the consideration of statutory instruments prior to their entry into force by the Joint Committee on European Affairs as recommended by the Sub-Committee[206] would place a significant additional burden on the Joint Committee – the body which would be required to manage the information flow and provide analysis.[207] The Sub-Committee's suggestion was that two extra staff members (an administrator and a policy advisor) be assigned to undertake these duties.[208]

The increased levels of staff called for seem relatively modest in the light of the scale of the tasks which would be expected of the Oireachtas were the Sub-Committee's recommendations followed through. The Sub-Committee itself described its requests for additional staff as "indicative and...subject to proper analysis and the preparation of a full business case", although it is not clear who would carry out such analysis and preparation.

The Sub-Committee also recommended that, were European Union affairs to be mainstreamed across the Oireachtas, information and training seminars on EU matters should be more widely available to members of the Oireachtas and staff. Suggesting that Oireachtas members apparently feel extra training would be useful, the Sub-Committee recommended that "such seminars could focus on the functioning of the EU, and in particular the EU legislative process, the role of the Oireachtas and its powers in respect of the EU and how to use information sources on the EU (*e.g.*, IPEX, Prelex, EUR-Lex etc.)."[209]

Likely Political Reactions to the Sub-Committee's Report

All but seven of the 28 recommendations in the Creighton Sub-Committee Report require the input of the Government in order to be given effect to. The remainder will require the consent of the Government in some form. In other words, the implementation of the bulk of the recommendations made in the Report is dependent on the agreement of the executive. The seven recommendations which would appear *not* to necessarily require the consent of the Government in some shape or form

202. Recommendation 17 of the Sub-Committee's report.
203. Para. 46 of the Sub-Committee's Report at p. 23.
204. Recommendation 18 of the Sub-Committee's report.
205. Para. 46 of the Sub-Committee's Report at p. 24.
206. See Recommendation 22 of the Sub-Committee's report.
207. The Committee noted that, in 2009, 115 of 590 statutory instruments signed into law by a Minister were adopted under the European Communities Acts. A significant number of European Directives had also been transposed by statutory instruments brought under other primary legislation, however.
208. Para. 46 of the Sub-Committee's Report at p. 24.
209. See para. 47 of the Sub-Committee's Report at p. 24.

are recommendations 2 (the laying before the Oireachtas, and the online publication, of the weekly report on EU documents); 4 (the division of EU legislative proposals into two lists according to their significance); 7 (the consideration by Scrutiny Committee of the Commission's annual Legislative and Work Programme); 15 (regular meetings between the European Affairs, European Scrutiny Committees, sectoral Oireachtas committees and MEPs); 16 (the consideration of consultations between Oireachtas committees and European Parliament rapporteurs); 18 (the introduction of a rapporteur system for important EU proposals); and 26 (the study by the European Affairs Committee of directives of concern).[210]

The reaction of the Government will thus determine whether the bulk of the Creighton Sub-Committee recommendations are ever translated into action. However, the political context for reform is now nowhere near as propitious as on the last occasion major reforms were undertaken, in 2002. It will be recalled that the reforms which took place at this time included, but were not confined to, the adoption of the European Union (Scrutiny) Act 2002. At that time, the Government was still confronted with the need to secure the ratification of the Treaty of Nice, and the relative impotence of the Oireachtas in European affairs had become the stuff of political controversy.[211] Although the role of the Oireachtas subsequently became the focus of some attention in the period between the first and second Lisbon Treaty referendums,[212] executive action to deal with this issue was not regarded as politically necessary in order to secure the ratification of the Treaty of Lisbon. Now that that Treaty has been ratified, the reality is that there is less short-term political pressure to deal with the issue of the role of the Oireachtas in European affairs, although the issue seems capable of giving rise to political controversy in future referendum situations – the occurrence of which, moreover, seems not entirely improbable at the time of writing.[213]

Insofar as Labour and Fine Gael – parties which were in Opposition at the time of the deliberations of the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs – are concerned, only time will tell how well the relatively positive attitudes to enhancing the role of the Oireachtas, envisioned in each of these parties' submissions to the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, will survive the alteration in their status from Opposition parties (in which enhancement of the role of the Oireachtas empowers a political party) to Government parties (in which enhancement of the role of the Oireachtas is likely to hand political advantage to the Opposition). The views of the present and future Ministers for Foreign Affairs on the appropriate role of the Oireachtas in European affairs, and the willingness to put such views into practice against the short-term political interests of his or her political party, are likely to pay a decisive role in what becomes of the recommendations of the Report of the Sub-Committee on Ireland's Future in the European Union

210. It should be noted in this regard that recommendations 1 (the rendering permanent of interim arrangements for implementing role of Oireachtas in European affairs); 17 (the rationalisation and strengthening of consideration of EU documents by sectoral committees); and 19 (the debating of reports of the two European Committees) would all involve the amendment of the Standing Orders of the House – which, in practice, would require Government acquiescence. Note that a list of all of the recommendations in the Report is to be found at Paragraph 48 thereof.

211. See in this regard, G. Barrett, "*Oireachtas Control over Government Activity at European Union Level: Reflections on the Historical Context and the Legal Framework*", Chapter 6 in G. Barrett (ed.) *loc. cit.*, at n. 180 above at pp . 158 to 162; and L. O'Hegarty, "*Parliamentary Scrutiny of European Affairs in Ireland – the European Affairs Committee, the Scrutiny Committee and the European Union (Scrutiny) Act 2002*", Chapter 10 of the same volume.

212. Resulting in the recommendations of the Oireachtas Sub-Committee on Ireland's Future in the European Union in Chapter 4 of its report, which were examined in the text above.

213. See for an insightful article in this regard, P. Leahy, "*Make or Break for the Euro*", Sunday Business Post, 5 December, 2010.

and the Report of the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs. The latter Sub-Committee, in particular, was described by one of its own members as "one of the most important outcomes of the Lisbon Treaty".[214]

It remains to be seen whether the ultimate impact of the Creighton Sub-Committee report will end up justifying this rather flattering description. As has been seen, the manner in which the Irish executive chooses to exercise its discretion in this regard will be key. The manner in which that discretion has been exercised in the past, however, gives little reason for confidence.

214. Deputy Mary O'Rourke, speaking at the Sub-Committee on the Review of the Role of the Oireachtas in European Affairs meeting of 12 May, 2010.

ANNEX I TO CHAPTER 4

The main aspects of the revised Treaties which are of relevance for the purposes of the present chapter are

(i) Article 12 of the Treaty on European Union, which sets out how national parliaments are viewed as contributing actively to the good functioning of the Union;

(ii) Article 5 of the Treaty on European Union which, *inter alia,* recognises the principles of subsidiarity and proportionality;

(iii) Article 48 of the Treaty on European Union, with its provision in Article 48(3) for the involvement of national parliaments, via Conventions, in the ordinary revision procedure, and its provision in Article 48(7) for the involvement of national parliaments in the simplified revision procedure (or generalised *passerelle* procedure);

(iv) Article 49 of the Treaty on European Union with its specific provision for national parliaments to be notified of the application of a state to become a member of the Union;

(v) Article 81 of the Treaty on the Functioning of the European Union, providing for a right of veto on the part of each national parliament on any Council decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure;

(vi) Article 70 of the Treaty on the Functioning of the European Union, with its provision for national parliaments to be informed of the content and result of evaluations of the implementation of European Union policies in the freedom, security and justice area;

(vii) Articles 85 and 88 of the Treaty on the Functioning of the European Union, with their provision for the involvement of national parliaments in the evaluation of Eurojust's activities and the scrutiny of Europol's activities;

(viii) Protocol (No. 1) on the Role of National Parliaments in the European Union, annexed by the member states at Lisbon to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty Establishing the European Atomic Energy Community, with its provisions on information for national parliaments (including those necessary for the operation of the subsidiarity control mechanism) and for interparliamentary co-operation; and

(ix) Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, annexed by the member states at Lisbon to the Treaty on European Union and the Treaty on the Functioning of the European Union – although not, curiously, to the Treaty Establishing the European Atomic Energy Community – with its provisions regarding the subsidiarity control mechanism comprised of the so-called yellow card/orange card procedure.

ANNEX II TO CHAPTER 4

Articles 29.4.4º to 29.4.9º of the Irish Constitution came about as a result of the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009, approved in referendum by 1,214,268 votes to 594,606 on 2 October, 2009 (corresponding to a 67.1% to 32.9% vote on a turnout of 59%).

Article 29.4.7º and 8º, which are the articles of principal relevance for the purposes of this study, provide that

"7° The State may exercise the options or discretions—

i to which Article 20 of the Treaty on European Union relating to enhanced cooperation applies,

ii under Protocol No. 19 on the Schengen *acquis* integrated into the framework of the European Union annexed to that treaty and to the Treaty on the Functioning of the European Union (formerly known as the Treaty establishing the European Community), and

iii under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, so annexed, including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State,

but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

8° The State may agree to the decisions, regulations or other acts—

i under the Treaty on European Union and the Treaty on the Functioning of the European Union authorising the Council of the European Union to act other than by unanimity,

ii under those treaties authorising the adoption of the ordinary legislative procedure, and

iii under subparagraph (*d*) of Article 82.2, the third subparagraph of Article 83.1 and paragraphs 1 and 4 of Article 86 of the Treaty on the Functioning of the European Union, relating to the area of freedom, security and justice,

but the agreement to any such decision, regulation or act shall be subject to the prior approval of both Houses of the Oireachtas."

ANNEX III TO CHAPTER 4

Section 7 of the European Union Act 2009 provides that

"(1) (a) Either House of the Oireachtas may, not later than 6 months after receiving a notification under the third subparagraph of Article 48.7 of the Treaty on European Union, pass a resolution opposing the adoption of the decision to which the notification relates.

(b) A resolution referred to in paragraph (a) shall constitute an opposition to the decision concerned for the purposes of the third subparagraph of Article 48.7 of the Treaty on European Union, and the European Council shall be informed accordingly thereof.

(2) (a) Either House of the Oireachtas may, not later than 6 months after receiving a notification under the third subparagraph of Article 81.3 of the Treaty on the Functioning of the European Union, pass a resolution opposing the adoption of the decision to which the notification relates.

(b) A resolution referred to in paragraph (a) shall constitute an opposition to the decision concerned for the purposes of the third subparagraph of Article 81.3 of the Treaty on the Functioning of the European Union, and the Council shall be informed accordingly thereof.

(3) Either House of the Oireachtas may, not later than 8 weeks after the transmission of a draft legislative act referred to in Article 6 of Protocol No. 2 to the Treaty on European Union and the Treaty on the Functioning of the European Union, send to the Presidents of the European Parliament, the Council and the European Commission a reasoned opinion in accordance with that Article if the House concerned passes a resolution in respect of the draft legislative act concerned authorising the House to so do.

(4) Where either House of the Oireachtas is of opinion that an act of an institution of the European Union infringes the principle of subsidiarity provided for in the treaties governing the European Union and wishes that proceedings seeking a review of the act concerned be brought in the Court of Justice of the European Union in accordance with Article 263 of the Treaty on the Functioning of the European Union, it shall so notify the Minister in writing for the purposes of Article 8 of Protocol No. 2 to that treaty and the Treaty on European Union and the Minister shall, as soon as may be after being so notified, arrange for such proceedings to be brought.

CHAPTER 5

Great Expectations: But Why Should We Increase the Role of National Parliaments like the Oireachtas in European Affairs?

1. *What Are The Arguments Concerning Whether National Parliaments Ought to be Given an Increased Role in the European Union?*

The Empowerment of National Parliaments - An Idea Whose Time Has Come?

The observation that there is nothing more powerful than an idea whose time has come is commonly attributed to Victor Hugo.[1] One idea which has been gaining momentum for some time is that of augmenting the powers enjoyed by national parliaments in policy matters falling within the remit of the European Union. There are a variety of possible reasons for this gain in momentum. One is the gradual expansion of the European Union's activities into a wider and more politicised range of policy fields. Another is the perception that further action needs to be taken to compensate for the supposed democratic deficit at European level. A recent factor adding to the momentum has been the adoption and coming into force of several provisions of the Treaty of Lisbon.[2]

One of the ways in which the Lisbon Treaty has had an impact in relation to the role of national parliaments is that, for the first time in the near six-decade history of the European Union, the role of national parliaments has been made the subject of express provisions in the constitutive Treaties of the European Union. Article 12 of the Treaty on European Union now proclaims that

> "national Parliaments contribute actively to the good functioning of the Union:
>
> (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;

1. The observation appears (albeit in a markedly different shape) in V. Hugo, *The History of a Crime* (G. Munro, New York, 1877)
2. The historical circumstances which led to the adoption of the relevant provisions of the Lisbon Treaty are examined in other chapters of this study (see further the chapter of this study dealing with the evolution of the role of national parliaments in European Union law), as are the impact (insofar as is relevant) of the Treaty itself and of its tortuous implementation process on the Irish legal landscape.

(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;

(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;

(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;

(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union."[3]

Furthermore, Article 10 of the same Treaty highlights the function of national parliaments in rendering national executives accountable, pointing out that

"Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens."

Even taking account of the limited nature of the role accorded to national parliaments by the above provisions, and by various other individual Treaty provisions, many of which are referred to in Article 10,[4] Articles 12 and 10 of the Treaty on European Union involve a highly significant and symbolic elevation of the status of national parliaments after an almost six-decade absence of any mention of these institutions from the Treaties.[5]

The various Treaty provisions constitute evidence that change is happening in the role of national parliaments in European policy matters, and simultaneously act as instruments of that change. National parliaments are encouraged by these provisions to move from the heretofore largely marginal position

3. For an examination of the various treaty provisions and protocols mentioned in Article 12, see further the chapter of this study dealing with the evolution of the role of national parliaments in European Union law.
4. See the relevant chapter of this study.
5. As is seen in the relevant chapter of this study, however, the explicit mention of national parliaments in the text of the constitutive treaties was preceded by their mention in Declaration (No. 13) on the Role of National Parliaments in the European Union and Declaration (No. 14) on the Conference of the Parliaments, both agreed by the intergovernmental conference which adopted the Treaty of Maastricht in 1992, and Protocol (No. 13) on the Role of National Parliaments in the European Union adopted in the Final Act of the intergovernmental conference which adopted the Treaty of Amsterdam in 1997.

they have occupied in relation to European matters. Indeed, the idea that they ought to make greater efforts in this regard has been described by some as having, by now, become something of a truism.[6] And yet there has been a certain absence of debate about this. Far more ink appears to have been spilt in discussing the topic of *how* an enhanced role for national parliaments should be ensured than on justifying *why* national parliaments should have such a role. Instead, what we have has been described – with considerable justification – as "a shallow academic and political consensus that currently supports an enhanced role for national parliaments in the European Union".[7]

The fact that the empowerment of national parliaments happens to represent the broadest, most politically acceptable choice does not, however, guarantee that it is the optimal arrangement from a systemic perspective. Some have argued that the marginalisation of member state legislatures is an inherent effect of the system of executive federalism that is at the core of European Union governance and that it is therefore essentially an unavoidable phenomenon, however regrettable it might be.[8] Such views are not necessarily correct. The opposite view may also be taken that, given the broad range of issues the European Union now deals with, the politicisation of the European Union's decision-making process is both inevitable and necessary, and that national parliaments must play a role in this.[9]

Whatever our views, if the role of national parliaments in the European Union policy-making field is to be strengthened, it seems preferable to do so with a clear idea of what precisely is intended to be achieved by doing this. The mere bald assertion that the needs of democratic governance will automatically be advanced by a greater involvement of national parliaments hardly seems sufficient. In the first place, the precise procedural requirements needed to ensure democratic governance are not always clear, especially in a transnational context – even less so in a European Union context, where the democratic claims of national parliaments can be countered at European level with the sometimes competing claims of the European Parliament. Secondly, the meaning of democracy has also changed and evolved over time.[10] Thirdly, history is not short of examples of misguidedly simplistic approaches to the requirements of democracy leading to unexpected and undesirable results.[11] Careful reflection on the precise requirements of democracy in the European Union context is therefore needed. As Kiiver has penetratingly observed, "in a debate where the mere mentioning of the word 'democracy' buys support, analytical sensitivity is… priceless."[12]

6. P. Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building* (Kluwer, The Hague, 2008) at p. 71.
7. *Ibid.,* p. xiii.
8. See P. Dann, *Parlamente im Exekutivföderalismus* (Springer, Berlin, 2004) cited by Kiiver, *op. cit.,* at n. 6 above, and reviewed by A. Türk at (2010) 7 German Law Journal 525.
9. See P. Weber-Panariello, *Nationale Parlamente in der Europäischen Union* (Nomos, Baden-Baden, 1995)
10. For a recent historical analysis, see J. Keane, *The Life and Death of Democracy* (Norton, New York, 2009).
11. See the cases cited in F. Zakaria, *The Future of Freedom* (Norton, New York, 2003), especially at pp 169-172 where he notes of reforms designed to improve the openness and responsiveness of Congress that "reforms designed to produce majority rule have produced minority rule". For similarly critical examinations of the negative effects of the increasingly widespread use of referendums in the United States, see D. Broder, *Democracy Derailed – Initiative Campaigns and the Power of Money* (Harcourt, Orlando, Florida, 2000), R. Ellis, *Democratic Delusions* (University Press of Kansas, Lawrence, Kansas, 2002), P. Schrag, *Paradise Lost* (New Press, New York, 1998)
12. *Op. cit.,* at n. 6 above, p. 110.

The Case for the Further Empowerment of National Parliaments

The case for increased powers for national parliaments in the European policy field is generally justified by reference to the benefits, in terms of legitimacy, that such an increase is expected to involve.

Legitimacy has, classically, been divided into input legitimacy and output legitimacy. Output legitimacy requires, merely, that policies adopted offer effective solutions to the problems of the governed.[13] In other words, it requires no more than that government be 'for the people' – a standard attainable by many forms of rule. Input legitimacy, on the other hand, involves the rather different idea of government being adequately representative and sufficiently accountable. In simpler terms, it involves the idea of "government by the people".[14] It is this form of legitimacy that is, more usually, in dispute when the democratic legitimacy of the European Union is questioned. Calls for increases in the role of national parliaments in European matters are frequently justified by claims that such increases will improve the input legitimacy of the European Union. A wide range of such arguments have been put forward.

One argument for strengthening national parliaments' positions is that it is the function of a national parliament to supervise the government on behalf of the electorate in all the latter's activities, without exception. This includes policy fields falling within the broad field of European affairs, any shift to European level of the locus of decision-making in this policy area notwithstanding.

Secondly, it may be argued that increased supervisory powers are necessary to compensate for the shift in power from national legislature to national executive which, experience has shown,[15] is inherent in the process of integration in the European Union.[16]

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13. F. Scharpf, "*Problem-Solving Effectiveness and Democratic Accountability in the EU*" (Max-Planck-Institut für Gesellschaftsforschung Working Paper 03/1, February, 2003) available online at http://www.mpifg.de/pu/workpap wp03-1/wp03-1.html

14. As Lenaerts puts it
"input legitimacy is satisfied by means of the democratic principles of representation and accountability. What is at stake here is, on the one hand, direct representation of the people at the legislative level where the basic policy choices are made and indirect representation at the executive level, and, on the other hand, accountability of executive decision-makers vis-à-vis directly elected representatives at all levels of Union governance (even in case of outsourcing to private contractors). Accountability requires transparency as a pre-condition because executive or regulatory bodies may only be controlled or held accountable if the way they operate is known and can be scrutinized."
(K. Lenaerts, "*The Merits and Shortcomings of the Draft Constitution for Europe: a First Appraisal*" [Speech delivered at the occasion of the Faculty Colloquium on the EU's Draft Constitution, December 15, 2003, available online at http://www.law.kuleuven.be/ccle/pub_EU_draft_constitution_%28K._Lenaerts%29.php]).

15. And the design of the European Union's legislative process – with its recruitment of members of national governments into its principal legislative organ, the Council of Ministers – might have led one to expect.

16. There are limits to the accuracy of viewing national parliaments as the losers of European integration. (See for some interesting arguments in this regard, F. Duiana and M. Oliver, "*National Parliaments in the European Union: Are There Any Benefits to Integration?*" [2005] 11 European Law Journal 173). It should also be recalled, in this context, that some parliaments (notably the Oireachtas) had a relationship of pronounced subordination to their national executives long before European integration intervened. (See the chapter of this study which examines the historical evolution of the role of the Oireachtas in European Union affairs.) Moreover, it should be recalled that, even if European integration has led to some loss of influence on national parliaments, it may have merely served to accentuate a trend already present for a multitude of other reasons.

Thirdly, and very pragmatically – if, perhaps, also somewhat paradoxically – a strengthened role for a national parliament can result in a strengthened hand for national ministers negotiating in the Council of the European Union in the shape of (a) better rehearsed arguments more in tune with the wishes of the electorate and (b) a convenient excuse to adhere more tenaciously to a particular national position.

Fourthly, views on the feasibility of the creation of democratic governance by relying on European-level institutions alone can come into play. The argument may be made that the European Parliament is, either inherently or in practice (due to falling turnouts for European Parliament elections and the failure of such elections to transcend national issues and, thus, rise beyond the level of second-order national elections) incapable of providing sufficient democratic legitimacy for European-level decisions.

A fifth argument for an increased role for national parliaments derives from the proclamation in Article 10(1) of the Treaty on European Union that the Union shall be founded on *representative democracy*. *Representative democracy may be argued to be further strengthened by an increased role for national parliaments,* which alone are capable of imposing any kind of democratic accountability on members of the Council. This is because these members consist of representatives of each Member State at ministerial level - and such ministers are generally not answerable to any other institution.
A sixth argument can be made in view of the averment in Article 10(3) of the Treaty on European Union that every citizen shall have the right to participate in the democratic life of the Union and that decisions shall be taken as openly and as closely as possible to the citizen. It may be argued that *increases in the powers of national parliaments in European affairs bring the European Union closer to the citizen*. According to this argument, national-level debates on European issues will increase both transparency in decision-making and the acceptability of those decisions.[17]

Seventhly, it has also been argued that

> "the European level may have a pragmatic or technocratic interest in the national parliaments... The argument would essentially be based on cross-country comparisons which reveal that those parliaments which scrutinise EU legislative proposals *ex ante* are more efficient at implementing them into national law after their adoption. Thus, the backlog of non-transposed directives in the UK and Denmark is consistently low. Countries, such as France and Italy, on the other hand, tend to find themselves at the opposite end of the ranking."[18]

The empowerment of national parliaments has certainly involved a diversification in approach from the method originally used, more or less uniquely, to democratise the European Union – the deepening and broadening of a directly elected European Parliament's involvement in the legislative process.[19] The change in approach appears to have come about for a variety of reasons, including (a) the decreasing popular participation in European Parliament elections across Europe as a whole and (b) the failure, to date, of European Parliament elections to be driven by European issues and, therefore, to constitute much more than second-order elections on national issues (which may in turn be seen to be the result

17. *Cf.* text at n. 30 below, however.
18. Kiiver, *op. cit.*, at n. 6, p. 79.
19. See further the chapter of this study relating to the evolution of the role of national parliaments at European level.

of the absence of a single European political space). However, (c) structural reasons also seem to impede complete reliance on the European Parliament to vindicate the requirements of democratic governance. Unlike in a parliamentary democracy, the European Parliament does not appoint the executive.[20] Further, although the European Parliament enjoys a veto over legislation under the ordinary legislative procedure (a power it shares with the Council),[21] this procedure is not universally applicable.

The ascendant view thus appears to be that the democratic legitimacy of the Union requires the input *both* of national parliaments and of the European Parliament. Within the field of those who advocate increased powers for national parliaments, however, there appears to be plenty of scope for a variety of divergent views. Advocates of maximum national sovereignty "would like to see the national parliaments, or generally the member states, return to the driver's seat, which would transform the 'losers of integration' into the real 'masters of the Treaties'".[22] For many who hold such views, the only source of legitimacy is national institutions and, for those of this opinion, re-nationalisation of powers held at European Union level is the only valid way of improving the Union's democratic legitimacy.

However, the advocacy of increased powers for national parliaments also seems reconcilable with a viewpoint favourable to European integration. For example, a role for national parliaments can be envisaged where the reach of co-decision (or the 'ordinary legislative procedure, as it has come to be known since the coming into force of the Lisbon Treaty) and therefore of the European Parliament, does not yet extend. Alternatively, such a role can be seen as a permanent and necessary aspect of a multi-level governance structure of the European Union.[23] The view that empowerment of national parliaments is reconcilable with an integrationist perspective arguably received implicit support from the member states at Lisbon in that several provisions empowering national parliaments were included in the Treaty of Lisbon and its associated Protocols.[24]

20. Nor – unlike in non-parliamentary democracy – is the executive directly elected. In the European Union, executive power is split between the Commission and the Council. Under Articles 14 and 17(7) TEU, the European Parliament elects the President of the Commission (although, under Article 17(7), Indent 1, its choice is limited to a candidate who the European Council proposes to it. The European Council acts by a qualified majority in doing so, taking into account the elections to the European Parliament.) Under Article 17(7), Indents 2 and 3, the President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission are also then subject as a body to a vote of consent by the European Parliament. However, here again, its choice is limited. The Council, by common accord with the President-elect, adopts the list of the persons – other than the President – whom it proposes for appointment as members of the Commission (selecting them on the basis of the suggestions made by Member States). The Commission is then appointed by the European Council, acting by a qualified majority. In practice, the European Parliament has increased its powers in the latter process to the extent of exercising a veto on individual proposed Commissioners. It does this by holding hearings for all proposed members of the Commission, and rejecting the list as a whole if dissatisfied with any individual member proposed. In October, 2004, it prevented the appointment of the Italian Rocco Buttiglione to the Commission in this way.
21. See Article 294 TFEU.
22. Kiiver, *op. cit.,* at n. 6 above, pp. 81. The same writer has distinguished usefully between arguments in favour of the empowerment of national parliaments drawn from a national perspective (frequently, though, far from exclusively put forward by those who are sceptical as to the benefits of European integration) and arguments drawn from a European perspective (*op. cit.,* at n. 5, p. 72 *et seq.*) See for a recent general discussion of the impact of the European Union on national polities V. Schmidt, *Democracy in Europe - the EU and National Polities* (Oxford University Press, Oxford, 2006).
23. Kiiver, *op. cit.,* at n. 6 above, pp. 80 to 82.
24. See text below. See also the chapter of this study on the evolving role of parliaments at European Union level. See also Kiiver, *op. cit.,* at n. 6 above, pp. 77 *et seq.*

The Case Against the Further Empowerment of National Parliaments in European Union Affairs

If it is possible to make a case in favour of the further empowerment of national parliaments in the European Union, it must be acknowledged that a case against it – or at least elements of it – can also be made. The principal argument consists of *the dangers of increased polarisation and intergovernmentalism, and of decreased efficiency in decision-making to which such empowerment might lead*. In other words, the argument against empowering national parliaments is that

> "routinely sharpened domestic parliamentary polarisation in the run-up to negotiations emphasises the national stakes, and generally the intergovernmental element in EU decision-making, while decreasing EU decision-making efficiency and eclipsing right-left discourse on EU level with domestic we-they debates." [25]

In this context, it is worth bearing in mind that the Council of the European Union is, in practice,[26] a body dominated by the desire to achieve the widest possible consensus (with consensus-seeking adhered to by each state in order to reduce the danger of being outvoted on some future occasion) and in which vote-taking, although possible, rarely occurs. Increased parliamentary involvement at national level,[27] however, increases the risk of disruption to the delicate compromises needed to sustain European-level consensus by the accentuation of narrow national interests – a risk which is all the greater in a context in which the Council is required to meet in public when deliberating and voting on draft legislative acts.[28] Further, national parliaments, elected exclusively on the basis of national interests, are likely to judge executive performance solely by questioning how well national interests have been defended, without regard to any other factors (such as the need for compromise) which must, nonetheless, be borne in mind at European Union level.

Ultimately, and for the various reasons set out in the text above, the benefits of well-judged increases in national parliamentary powers at European level may well outweigh the disadvantages, but all and any forms of such increased involvement should not automatically be regarded as unalloyed positives. Depending on the form they take, increases in the powers of national parliaments at European Union level may imply risks to the efficiency of the European policy-making process,[29] disturb the delicate

25. *Ibid.,* p. xiv.
26. In relation to which, see D. Naurin and H. Wallace (eds.) *Unveiling the Council of the European Union: Games Governments Play in Brussels* (Palgrave Macmillan, Houndmills, 2008) and R. Thomson, *Resolving Controversy in the European Union: Legislative Decision-Making Before and After Enlargement* (Cambridge University Press, Cambridge, 2011).Bottom of Form See also F. Hayes Renshaw and H. Wallace, *The Council of Ministers* (second edition, Palgrave Macmillan, 2006)
27. Which may either formally or informally constrain the freedom of action of ministers to some extent.
28. See Article 16(8) TEU and Article 15(2) TFEU and compare in this regard the observations of Zakaria, *op. cit.,* at *loc. cit.,* n. 11 above.
29. See in this regard Anon.,"*Merkel darf in Brüssel nicht entscheiden*" Frankfurter Allgemeine Zeitung online edition, 20 October, 2011, where it was reported that the European Council meeting on Sunday, 23 October, 2011, would be unable to reach a formal decision regarding the eurozone crisis because the Chancellor had received no mandate from the Bundestag budgetary committee. This was by reason of the fact that the state of negotiations meant the Chancellor herself had been unable to give sufficient details of the negotiations to the Bundestag on Thursday, 20 October in order to enable parliamentarians to debate a mandate. Ultimately, the Committee provided the necessary negotiating mandate on Friday, 21 October, albeit in very hurried circumstances, and against the votes of the Opposition. (See Anon., "*Haushaltausschuss billigt Leitlinien*", Frankfurter Allgemeine Zeitung online , 21 October, 2011.) See also Anon., "*Merkel Begs for Time on Plans*",

institutional balance at European Union level, and raise questions as to the legitimacy of such intervention. Further, little evidence has been produced to suggest that an enhanced role for national parliaments goes hand in hand with increased popular acceptance of the relevant decisions at European Union level.[30]

Overall, it seems strongly arguable that

(a) not only should there be an appreciation of the expected benefits of any suggested increased roles for national parliaments (which may, as has been seen, be many), but also awareness of the possibility of risks to some such reforms, for example in terms of increased efficiency costs at European policy-making level;[31] and

(b) all forms of increase in the role of national parliaments are not equivalent and that, just as there is an appropriate role for the Commission, Council and Parliament in the law- and policy-making structures of the European Union, the same is true of national parliaments. In other words, the areas in the political process where national parliaments are empowered to intervene need to be carefully thought about.

2. *Assuming That Increasing the Role of National Parliaments in the European Union Legislative System is Desirable, What Difficulties and Challenges Should Be Borne in Mind?*

In order for any debate on the empowerment of national parliaments in European affairs to remain realistic, account must arguably be taken of a number of needs, challenges, difficulties and limitations which pertain to the exercise of a European vocation by such institutions. This section of the chapter attempts to set out some of these.

i. *Clarity is Needed in Defining Who is Intended to be Empowered by European-Level Reforms Concerning the Role of National Parliaments in European Policy-Making.*

Perhaps unexpectedly, there appears to be serious need for clarity in defining who is intended to be

Financial Times, 21 October, 2011, P. Spiegel and G. Wiesmann, "*Europe on Edge as Rescue Talks Stall*", Financial Times, 21 October, 2011, and A. Beesley, "*Franco-German Delay on Aid Plan Angers Partners*", Irish Times, 22 October, 2011. A planned summit in China between the European Union and China was postponed in consequence of the rescheduling. (See A. Beesley, "*Summit Between China, EU Postponed As Crisis Deepens*", Irish Times, 21 October, 2011). Two working days later, Chancellor Merkel was before the budgetary committee again, seeking a new mandate for a further summit meeting. (Reported on RTÉ news 25 October, 2011, (available online at the time of writing at http://www.rte.ie/news/2011/1025/bailout.html?view=print).

30. Proissl has noted that, in Germany, decisions taken during the present economic crisis relating to the financial rescue of eurozone states have tended to generate far more political controversy when subject to domestic parliamentary scrutiny than is otherwise the case. W. Proissl, "*Will Merkel Transform the Eurozone into a German Europe?*" Lecture delivered at the Institute of International and European Affairs on 22 February, 2011 (and, at the time of writing, available online at http:/www.iiea.com/events/germany-in-the-eu-tbc).

31. See previous footnote.

empowered by reforms relating to the role of national parliaments in European affairs.[32] The failure to provide such clarity at European level has led to some unsatisfactory divergences arising at national level in the implementation of the Lisbon Treaty reforms concerning the role of national parliaments, and to delegation of powers at national level to institutions which do not appear to correspond with the definition of a national parliament. One example of this is in the implementation of Article 8 of Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality, which was annexed at Lisbon to the Treaty on European Union and to the Treaty on the Functioning of the European Union,

> "the Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof."

The response of the German legislature to this obligation, however, has been to provide that the lower House of the German parliament, the *Bundestag,* is obliged to lay proceedings under Article 8 – and the Government to notify them immediately to the European Court of Justice – at the request of only a *quarter* of the membership of the *Bundestag.*[33] A somewhat similar rule has been written into Article 88-6 of the French Constitution, which has empowered either House of the *Assemblée Nationale* to bring a challenge (which must then be notified to the Court of Justice by the Government) on the application of only sixty of its members.[34]

As is noted elsewhere in this study, these member states thus appear to have used the process of the reception of the Article 8 procedure into their legal systems in order to turn it into something which was not envisaged when the Article was drafted – a system for the protection of *minority* views in national parliaments. In other words, they have enabled and, indeed, required the votes assigned to their parliaments to be cast in favour of the view that subsidiarity has been violated even when the view of a clear majority in the relevant chamber may be that there has been no such violation.

The difficulty with this, as is noted elsewhere in this study, is that the inclusion of a major role in the subsidiarity review process for national parliaments was predicated on, and justified by, the democratic representativity of those institutions, rather than the idea that national legal systems would, in effect, delegate the voting powers of their national parliamentary chambers to an unrepresentative minority of the membership of these institutions. If adopted more widely, the approach taken by France and Germany in this regard would risk disruption to the European Union law-making process. This would

32. See, more generally, Kiiver's valuable discussion of national parliaments in a European constitutional perspective (*op. cit.,* at n. 6 above, Chapter 1) and note, in particular, his observation of the potential usefulness of defining which bodies are to be regarded as constituting the parliaments of the various member states, and are thus empowered under the relevant Treaty provisions.

33. See § 12 of the *Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union* (22 September, 2009, *Bundesgesetzblatt* Part I p. 3022), as subsequently amended by the law of 1 December, 2009.

34. See C. Pennera, "*Les parlements nationaux dans le système de l'union européenne*" in G. Carlos Rodriguez Iglesias and L. Ortiz Blanco (eds.) *The Role of National Parliaments in the European Union* (Facultad de Derecho Universidad Complutense) pp. 110-111.

be difficult to defend as a requirement of democracy, and certainly does not appear to have been intended by the drafters of the Treaty.[35]

Nor is this the only example of an idiosyncratic national approach being taken to the assignation of rights allocated to national parliaments at European level and leading to a lack of uniformity in the manner in which the provisions agreed upon at Lisbon have been implemented. In a Declaration annexed to the Final Act of the 1997 intergovernmental conference, which agreed the Treaty of Lisbon, Belgium declared that

> "not only the Chamber of Representatives and Senate of the Federal Parliament but *also the parliamentary assemblies of the Communities and the Regions* act, in terms of the competences exercised by the Union, as components of the national parliamentary system or chambers of the national Parliament." [36]

The effect of this is that powers apparently intended for deployment by national legislatures are, in part, being delegated to regional parliaments by Belgium.

Here again, it is submitted that such a lack of uniformity should be of concern. Real European-level powers are being allocated here, and it does seem appropriate that an appropriate degree of attention and indeed regulation be devoted at European level to the questions of (a) who such powers should ultimately be exercised by (whether this be national parliaments, the representatives of minority groupings within such parliaments, or regional assemblies in individual states); and (b) how these powers should be exercised by the targeted institutions.

ii. A National Parliament is Best Seen as a Forum Rather Than an Actor. In a Parliamentary System, It is a Forum in Which the Majority Will Normally Support the Government Position.

In a parliamentary system of government, the idea that national parliaments are autonomous, unitary, independent actors is true only to a relatively limited extent. It is more accurate to view a parliament as a forum in which views supportive of the government perspective are ranged against the views of the opposition. Furthermore, it is normal to expect the majority view in that forum to be supportive of the Government position in relation to European affairs, as it is in other matters, since defeat of the Government on a question of European policy – rather like defeat over an item of domestic legislation – could lead to the fall of the Government.

This has two implications. The first implication is that the most important division in everyday political practice is not[37] that between executive and parliament: the normal functioning of party politics in

35. Another approach according to which parliamentary powers are used for the protection of minority views within parliament has been that of Austria, where the support of two thirds of parliamentary members is now required for Austrian approval of the use of a *passerelle* procedure under the Lisbon Treaty.
36. Declaration No. 51 by the Kingdom of Belgium on National Parliaments, annexed to the Final Act of the 1997 intergovernmental conference which agreed the Treaty of Lisbon. (Emphasis added.)
37. As a view founded on a separation of powers model might lead us to believe.

a parliamentary system will result in the executive and the majority in parliament normally being in agreement in relation to all major questions of policy. The second implication is that the most important duality in practice *is* between the executive – and its supporters in parliament – and the opposition in parliament.[38] What are the consequences of all of this for parliamentary control in relation to European affairs?

In the first place, it appears to follow that any provisions which require the existence of a simple executive-parliament duality in order to work at optimum efficiency are likely to be of limited practical impact, regardless of their symbolic importance. This holds true in relation to provisions of the Lisbon Protocol on the application of the principles of subsidiarity and proportionality, the operational efficiency of which appears to be predicated on the willingness of national parliaments to take a different view on the subsidiarity question to that of the national government.

A second consequence is that, in relation to European questions, one can expect different levels of accountability to be demanded of governments by different factions within national parliaments. Auel has usefully distinguished *monitoring scrutiny* – which involves the demanding of information on an executive's actions – and *political scrutiny*, which involves an assessment of how appropriate the government's approach is and, indeed, the outcome of debate in the Council of the European Union. To expect the parliament as a whole, or even a parliamentary committee with a pro-government majority, to engage in political scrutiny is to set an unrealistic standard. As Auel herself points out,

> "as in domestic politics, we can hardly expect the majority party or parties to engage regularly in such political scrutiny publicly, in particular if it involves criticising the government's actions. In parliamentary systems of government, the function of political scrutiny in terms of assessing and criticising the government's actions is mainly the responsibility of the parliamentary opposition, exercised through instruments such as parliamentary questions and public debate either in a committee or on the floor of the House...In parliamentary systems it is the opposition which acts as the public parliamentary 'police patrol' who can 'force the executive to defend publicly what it has proposed. In doing so, the opposition fixes accountability for the government's actions and puts itself in a position to assess the political costs for these actions at the next general election'."[39]

A third consequence of the very real divisions that exist within national legislatures in parliamentary systems is that measurements of the strength of national parliaments in the European policy field lose some of their relevance.[40]

38. This insight is central to the arguments made, for example, by Auel. (See K. Auel, "*Democratic Accountability and National Parliaments*" [2007] 13 European Law Journal 487 at pp. 500-501.)
39. *Ibid.*
40. Such as those advocated by writers like Mezey and Norton (both of whom focus on the policy-making powers of legislatures, including such factors as their ability to veto or modify policy proposals). See further A. Maurer, "*National Parliaments in the Architecture of Europe after the Constitutional Treaty*" in G. Barrett (ed.), *National Parliaments and the European Union – the Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press, Dublin, 2008) p. 47 at 66. Hence Kiiver has argued that notions of strength and weakness "imply an adversarial relation between government, on the one hand, and a unitary parliament, on the other hand, which may not be warranted in a parliamentary system." (See Kiiver, *op. cit.,* at n. 6 above, at p. 61.)

Gallagher has observed that

> "to consider parliament and government as two separate bodies competing with each other is to ignore the reality of party domination of parliament and government. Any effective increase in the role or power of 'parliament' *vis-à-vis* government means, in effect, an increase in the role or power of the opposition, not of parliament as a collective body. The role of government backbenchers, willingly accepted, is to sustain the government rather than to act as independent scrutinisers of it; government backbenchers do not seek additional means of holding their own ministers to account. The ongoing battle of government versus opposition is paramount and tangible; the notion of a contest for power between government and parliament bears little relation to political reality."[41]

It is important not to overstate the case, however. As closely aligned as the majority in a national parliament may be to the executive, the two are not the same institution. In some member states, the influence of the national parliament is augmented by its having powers which can be used *in extremis* to rein in an executive that strays too far from the views of a majority in the legislature, just as the influence of a national parliament is augmented by the national parliament's veto power over domestic legislation, even if the actual exercise of either power will be a rarity in practice. The existence of such powers is also of value in that it confers a measure of democratic legitimacy on the policy-making process.

Across the member states, two main methods are used to leverage the influence of member state parliaments in European affairs: (a) mandate systems (of the kind used most famously in Denmark) under which a parliament issues instructions to the executive determining the limits of the latter's negotiating position in Council; and (b) scrutiny reserve systems (of the kind used in the United Kingdom) according to which a national minister is precluded from reaching agreement in Council in relation to a proposal until the national parliament has completed its scrutiny of the proposal in question. Of the two, the mandate system gives the greater powers to national parliaments where it applies. However, even in Denmark – famously the member state with the most powerful mandate system – appearances can be deceiving. The level of duality between the Government and parliament is far less than meets the eye. The Danish executive itself decides where a mandate should be sought and where it should not,[42] then drafts its own mandate. Furthermore, the atmosphere in the Danish European Affairs Committee meeting is frequently so consensual as to have been compared in the past to an extended cabinet meeting.[43]

Ultimately, of course, it matters little how strong a national parliament's legal powers are in relation to European matters, if a majority in parliament never – or only very rarely – attempts to use them, or never even relies on the threat of their use to leverage influence. The mismatch between the constitutionally-

41. M. Gallagher, "*The Oireachtas*" , Chapter 7 in J. Coakley and M. Gallagher, *Politics in the Republic of Ireland* (fifth edition), p. 198 at p. 203.
42. See the evidence given on the Danish system by Mr. Svend Auken – a member of the European Affairs Committee of the Danish Parliament – to the Joint Oireachtas Sub-Committee on Ireland's Future in the European Union on 21 October, 2008 (available online at the time of writing at http://debates.oireachtas.ie/EUF/2008/10/21/00004.asp). See, also, J. Ørstrøm Møller, "*Danish EC Decision-Making: An Insider's View*" in (1983) 21 Journal of Common Market Studies 245 at p. 254 *et seq.* See more generally, regarding Nordic parliaments, T. Raunio and M. Wiberg, "*Too Little, Too Late? Comparing the Engagement of Nordic Parliaments in European Union Matters*" in Barrett (ed.), *op. cit.,* at n. 40, p. 379.
43. P. Weber-Panariello, *op.cit.,* at n. 9, cited in this respect by Kiiver, *op. cit.,* at n. 6 above, at p. 66.

conferred mandating powers of the Austrian parliament and its relative lack of influence in policy formation is a case in point in this regard.[44]

iii. National Parliaments Differ Considerably From One Another in Various, Highly Significant Respects.

National parliaments differ greatly from one another in terms of their functions, their construct and composition, the context in which they operate, and how they exercise powers conferred on them. This is another factor which needs to be borne carefully in mind in contemplating any increases in their European policy-related functions. In the first place, there is heterogeneity (a) *in terms of national parliaments' functions.* One simple example of this is that while, in most member states, the executive is responsible to the parliament, this is not universally so – the French *Assemblée Nationale* does not elect that country's president.

The functions of national parliaments, and the manner in which these are undertaken, are not of course, all determined by parliament's formal role, however. Various traditions may also have developed as regards the appropriate role of parliament in a particular national constitutional system, and the manner in which it organises itself (e.g. whether as a talking or a working parliament and whether with a weak or strong committee structure). The strength of the party political system may also vary considerably from one country to another.[45] Because of this, the impact of reforms may be very different in two different member states. There is a strong element of path dependency here.[46]
There is also variety (b) *in the institutional architecture of national parliaments*. To take one obvious example, the European Union is split between those 13 member states which have bicameral national parliaments – *viz.* Austria, Belgium, the Czech Republic, France, Germany, Ireland, Italy, the Netherlands, Poland, Romania, Slovenia,[47] Spain and the United Kingdom – and those 14 member states which have unicameral legislatures, namely Bulgaria, Cyprus, Denmark, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia and Sweden.

National parliaments are also varied (c) *in terms of their composition*. In particular, there is considerable variation in the membership of the upper houses in those 13 member states parliaments with bicameral

44. See in relation to the Austrian parliament, J. Pollak and P. Slominski, "*Influencing EU Politics? The Case of the Austrian Parliament*" (2003) 41 Journal of Common Market Studies 707, G. Falkner, "*How Pervasive are Euro-Politics? Effects of EU Membership on a New Member State*" (2000) 38 Journal of Common Market Studies 223 and Auel, *loc. cit.,* n. 38 above at p.493.
45. This has played a key role in how the Austrian parliament operates the constitutionally-ordained mandate system which exists in that country's legal order. (*Ibid.*) Contrast this with the operation of the Danish mandate system, as to which see the authorities cited in n. 42 above.
46. Where path dependency is defined as a situation whereby initial conditions affect subsequent behaviour indefinitely. See J. Kay, *The Truth About Markets* (Penguin, London, 2003), p. 115.
47. Slovenia's inclusion in this list is disputable. It should be explained that, apart from the powers given to the national assembly, an advisory or consultative function is given to the National Council, which represents important social groups. It is on the status of this Council that the question of whether Slovenia is bicameral turns. Slovenia's own constitutional court has characterised the Slovenian parliament as incompletely bicameral. (See decision of Constitutional Court U-I 295/07-8 of 22 October 2008.) See generally N. Borak and B. Borak, "*Institutional Setting for the New Independent State*" in M. Mrak, M. Rojek and C. Silva-Jáuregui, (eds.), *Slovenia – from Yugoslavia to the European Union Po avtorjih Mojmir Mrak,Matija Rojec,* (2004, World Bank, Washington), p. 53 at p. 56.

legislatures. Some upper houses[48] – like the Italian, Polish and Romanian Senates – are directly elected. The United Kingdom's House of Lords, in contrast, is entirely appointed. The Irish *Seanad* is part-elected and part-appointed.[49] Some upper houses, like the German *Bundesrat*, are neither elected nor appointed but, instead, consist of delegates from state governments (rather like national ministers in the Council of the European Union).

National parliaments also operate (d) *in very different political contexts*. These contexts can lead to differing approaches to the exercise of their powers in the European policy field. For example, a national parliament should normally be expected to demand more accountability in European affairs if it operates in a national context of Euroscepticism.[50] Further, the balance of influence has been argued to tilt more in favour of national parliaments in a situation of minority governments.[51] Finally, as has already been seen in the text above, there are significant differences (e) in *how national parliaments exercise powers which are conferred on them*, with some member states, for example, choosing to allow a minority of their membership to decide on the exercise of powers conferred on them by European Union law.[52]

The implication of all of this appears to be that efforts directed from European level to empower national parliaments may have effects which vary quite considerably from one national parliament to another.

iv. Various Serious Constraints Apply to National Parliaments in the European Policy Field.

Attempts to empower national parliaments in European policy matters are also subject to other constraints. An obvious first such constraint is that national parliaments are outsiders to the European-level policy-making process, being neither geographically close to the locus of decision-making at European level nor institutionally involved in the actual process of decision-making itself.[53]

A second constraint is that national parliaments are subject to major informational asymmetries *vis-à-vis* their national executives. Government ministers are, after all, members of a European Union institution (the Council), and national civil servants may participate in the Committee of Permanent Representatives (CoRePer). It is true that the coming into force of the Lisbon Treaty has brought with it provisions which are designed to rebalance such informational asymmetries and which require the

48. As to which see, for example, J. Coakley, and M. Laver, '*Options for the Future of Seanad Éireann*' in the All-Party Oireachtas Committee on the Constitution's *Second Progress Report: Seanad Éireann.* (1997, Government of Ireland, Dublin).
49. Article 18.1 of the Irish Constitution provides that "Seanad Éireann shall be composed of sixty members, of whom eleven shall be nominated members and forty-nine shall be elected members."
50. See here T. Raunio, "*Holding Governments Accountable in European Affairs: Explaining Cross-National Variation*" (2005) 11 Journal of Legislative Studies 319 at 332.
51. *Ibid.,* and note in particular in this regard the authorities cited by Raunio at p.333, n. 50 thereof.
52. See text above at n. 32 *et seq.*.
53. As opposed to being involved in review of draft legislative measures for breach of the subsidiarity principle, (as to which see Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed at Lisbon to the Treaty on European Union and to the Treaty on the Functioning of the European Union, analysed elsewhere in this study).

direct provision of information to national parliaments.[54] However, these provisions are not, of themselves, sufficient to enable the bridging of the information gap between national executives and parliaments. Such is the volume of information now reaching national parliaments that filtration systems are necessary to screen out the less important data. The efficiency of such systems, however, depends very much on the research and administrative resources available in the national parliament concerned. Furthermore, in order for information about European Union policy initiatives to be useful to national parliaments, the information must be contextualised by information which is normally available only to national executives, as with proposed national positions in relation to European Union policy initiatives. Thus, national parliaments still find themselves at an informational disadvantage when compared with national executives.

Over and above these limitations on a national parliament's ability to scrutinise comes a further limitation, which consists of the fact that a question mark hangs over the level of interest many – perhaps most – national parliamentarians have in engaging in scrutiny work on European policy initiatives.[55] The best parliamentary scrutiny and accountability system in the world can not operate successfully in the absence of parliamentarians willing to operate it.

Disinterest on the part of parliamentarians in operating the system is, to some extent, only to be expected in member states like Ireland where there has, historically, been a pro-European Union consensus, and little would be gained electorally by reining in the activities of an organisation that enjoys widespread public support (however constitutionally necessary such a check might be). However, even in relatively Eurosceptical countries, there appears to be little electoral recompense for such work.[56] It is therefore unsurprising that, across Europe, there tends to be a distinct lack of appetite on the part of many parliamentarians for engaging in European scrutiny work.[57] Historically, lack of interest has tended to be exacerbated among Irish parliamentarians by other factors, such as the particularly high premium apparently placed by the electorate on constituency work, and the requirement that parliamentarians engage in European-related committee work has tended to have to compete with the demands of membership of at least one other committee.

v. Effective Use of National Parliamentary Powers in the European Policy Field Requires an Appropriate Balance of Centralisation with Inclusiveness.

Across the European Union, there has been a gradual centralisation of national parliamentary powers in European affairs through the setting up, over time, of European affairs committees. The process began with the 1957 decision of the *Bundesrat* – the German parliament's upper house – to create a Committee

54. See Articles 1 and 2 to Protocol (No 1) on the Role of National Parliaments in the European Union, annexed at Lisbon to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community.
55. Norton has argued that "the inability [of national parliaments] to play a significant role is constitutional and, to a lesser extent, procedural. The unwillingness is essentially ideological and cultural." See P. Norton, "*Conclusion: Addressing the Democratic Deficit*" in P. Norton, *National Parliaments and the European Union* (Frank Cass, London, 1996) at pp. 186 to 191.
56. See Auken, cited above at n. 42.
57. See the evidence presented by Kiiver in this regard, *op. cit.*, at n. 6 above, at p. 68.

on the Common Market and the Free Trade Area.[58] Thereafter, however, progress was remarkably slow. The Belgian *Chambre des représentants* and the Italian Senate subsequently created similar such European affairs committees - but only in 1962 and 1968 respectively. It was only very gradually that the idea of establishing such a committee took root in all member states. By now, European affairs committees are to be found in all 27 member states of the European Union. Since many states are bicameral and have chosen to have a committee for each House, this means that there are 36 such committees across the 27 member states of the European Union (where there are a total of 40 parliamentary chambers).[59]

It is difficult to pinpoint exact dates for the creation of these committees as many national European affairs committees have been reorganised, reformed, renamed or re-established with broader remits over the years.[60] Taking the relevant date as being that on which the earliest European Union-related committee was formed in the relevant national parliament or parliamentary chamber, however, the date of formation of these committees can be dated as is shown in Table 1 below. A number of observations can be made in relation to such committees. The first is that the creation of these centralised, European issue-related committees got off to an extremely slow start. The European Coal and Steel Community Treaty was agreed in 1951. However, it took until 1957 for any House of any national parliament to have a European affairs committee of any kind. Indeed, by the time of the 20th anniversary of the signing of the Treaty of Paris in 1971, only four of the 11 national parliamentary chambers across the member states had such a body.[61]

The accessions of the United Kingdom, Ireland and Denmark in 1973 led to a spike in the creation of European affairs committees, with such bodies being set up in all three of the new member states, as well as in two of the original member states – France and Italy. Hence, by the end of the 1970s, ten such committees existed across a total of 16 national parliamentary chambers.[62]

During the 1980s, six additional committees were created (two in newly acceding member states, two in existing states, and the remaining two in lower houses of parliamentary structures whose upper house

58. The idea of this was to ensure the voice of the German *Länder* would be heard in relation to European affairs. See in this regard, A. Maurer "*National Parliaments in the Architecture of Europe After the Constitutional Treaty*" in Barrett (ed.), *op. cit.*, at n. 40, p. 47 at p. 49.

59. See generally for up to date information in this regard, COSAC, "*Size and Composition of the Committees on European Affairs of the EU National Parliaments*" available online at http://www.cosac.eu/en/info/scrutiny/eac/For_more_info/

60. Two examples may be given of the complications which exist here. Finland's Grand Committee was actually founded in 1906 but only took on its present EU-related functions in 1994. (*Ibid.*) Ireland's Joint Oireachtas Committee on European Affairs was formally created in 1995 after a two-year period during which its functions were carried out by the Joint Oireachtas Committee on Foreign Affairs. The date of the foundation of the European Affairs Committee is therefore given on the COSAC website as 1995. However, it seems more realistic to date the origins of the European Affairs Committee back to the foundation of the Joint Committee on the Secondary Legislation of the European Communities in 1973. See, in more detail, the chapter of this work relating to the evolution of the role of the Oireachtas in European affairs since accession to the original Communities in 1973.

61. Of the six founding member states, Luxembourg alone is unicameral.

62. There were, by the end of the 1970s, nine member states in the European Communities. Seven of these (Belgium, France, Germany, Ireland, Italy, the Netherlands and the United Kingdom) have bicameral legislatures. Two of them (Denmark and Luxembourg) have unicameral parliaments. Some care needs to be taken with the statistics here in that some bicameral states, such as Ireland, entrusted their accountability and scrutiny functions to a joint committee of both Houses.

already had a European affairs committee), leaving a balance at the end of the 1980s of 16 European affairs committees in 20 chambers.[63]

The 1990s saw a major rise in the number of European affairs committees in states which are now members of the European Union. Of the 36 European affairs committees which now exist in the European Union, 16 (44 per cent of the total number of committees) were founded in this decade, and a further four in the next decade – bringing the total since 1990 to 20 out of 36 or, in other words, 56 per cent of the total number of committees. This makes European affairs committees in national parliaments an institutional innovation which is, to a surprising extent, of relatively recent vintage. The sudden growth in the number of such committees in the 1990s appeared to take place for several reasons, but a key factor was clearly the process of enlargement of the Union, which has seen 15 of the current 27 member states (56 per cent of the total number of member states) join since 1995.

Austria, Finland and Sweden all acceded in 1995, with each of them creating European affairs committees in their parliaments just prior to, or just after, accession.[64] Further, and more significant, numerically, 11 European affairs committees were created during the 1990s in *anticipation* of future accession to the EU by states which would later join the Union in the 2004 and 2007 enlargements. This anticipatory approach mirrored the example which had already been set in this regard by Denmark, Finland and Sweden. It appears to have been seen as increasingly normal, from the time of the first enlargement onward, for acceding member states to create a European affairs committee around, or even before, the time of accession[65] – something which was clearly not the case when the Communities were founded in the 1950s. This may have been due to the fact that the wide economic significance of the Communities became more evident as time went on. Or it may have had something to do with the failure of the direct election and empowerment of the European Parliament to silence complaints of a perceived democratic deficit. The 1990s also saw a growth in concerns about the need to bring the European Union closer to its citizens, particularly in the wake of the traumatic initial Danish 'No' vote on the Maastricht Treaty. At any rate, by the end of the 1990s, European affairs committees of some description existed in 32 of the 36 parliamentary chambers in which they are now to be found, with the remaining four being created in the first years of the new century.

63. There were, by the end of the 1980s, 12 member states, Greece having acceded in 1981, Spain and Portugal in 1986. Of these states, Spain has a bicameral parliament, whereas Greece and Portugal have unicameral legislatures. Note that this figure of 16 includes Germany's *Unterausschuss des Auswärtigen Ausschusses für Fragen der Europäischen Gemeinschaften*, which technically, however, was a mere sub-committee of the Foreign Affairs Committee of the Bundestag. The establishment of a full European affairs committee, the *Ausschuss für die Angelegenheiten der Europäischen Union*, had to wait until 1991.

64. This amounted to four such committees in total, since Austria alone created one for each of its two Houses of parliament. The Finnish and Swedish parliaments are unicameral.

65. Greece is the sole exception to this trend. It joined the Communities in 1981, but only created its European affairs committee in 1990.

Table 1: Dates of creation of 36 existing European affairs committees or their predecessor committees in national parliaments [66]

Decade	*1950s*	*1960s*	*1970s*	*1980s*	*1990s*	*2000s*
Number of European affairs committees created in parliaments/ chambers of states now in EU	1	1	8	6	16	4
Details	**Germany** (*Bundesrat*) (1957)	**Italy** (*Senato*) (1968)	**Netherlands** (*Eerste Kamer*) (1970) **Italy** (*Camera dei Deputati*) (1971) **Denmark** (1972) **Ireland** (1973) **United Kingdom** (*House of Commons*) (1974) **United Kingdom** (*House of Lords*) (1974) **France** (*Assemblée Nationale*) (1979) **France** (*Sénat*) (1979)	**Portugal** (1980) Spain (1985) **Belgium** (*Chambre des Représentants*) (1985) **Netherlands** (*Tweede Kamer*) (1986) **Germany** (*Bundestag*) (1987) **Luxembourg** (1989)	**Greece** (1990) **Hungary** (1992) **Poland** (*Sejm*) (1992) **Poland** (*Senat*) (1992) **Slovenia** (*Državni svet*) (1993) **Sweden** (1994) **Finland** (1994) **Romania** (1995) **Latvia** (1995) **Malta** (1995) **Austria** (*Nationalrat*) (1995) **Austria** (*Bundesrat*) (1996) **Estonia** (1997) **Lithuania** (1997) **Czech Republic** (*Senát*) (1998) **Cyprus** (1999)	**Bulgaria** (2001) **Czech Republic** (*Poslanecká sněmovna*) (2004) **Slovakia** (2004) **Slovenia** (*Državni zbor*) (2004)

66. Source: author's own calculations based mainly on information provided on COSAC website at http://www.cosac.eu/en/info scrutiny/eac/For_more_info/ and Table 1 in Norton, *loc. cit.*, at n. 55.

Relatively speaking, the strongest European affairs committee in terms of its powers (*vis-à-vis* the executive) is that of the Danish parliament.[67] The Danish model also appears to have been the one mostimitated by states whose accession to the European Union has post-dated that of Denmark.[68]

The advantages of the creation of European affairs committees mirror, to some extent, those of the setting up of any parliamentary committee. They include: (a) the delegation of European Union-related tasks to a sub-group of a national parliament's total membership, whose smaller numbers facilitate more effective action; and (b) the facilitation of the development of expertise in European Union matters among parliamentarians. Such expertise enables them (i) to have an overarching understanding of the institutional workings of the European Union; (ii) to address what can sometimes be complex and substantive European questions; and (iii) to provide some kind of check on an executive branch with an enormously greater means of informing itself on such issues.

The difficulty in processing all European Union issues through European affairs committees, however, is that – given the application of European Union law to an increasingly broad range of disparate policy areas – expertise in European policy alone is not now, if indeed it ever was, sufficient to enable a parliament to maximise its influence. Furthermore, it 'quarantines' European Union law issues, excluding all but a small group of parliamentarians from any real role in relation to them.
A means for deploying subject-specific expertise and enhancing inclusiveness in dealing with European policy matters is therefore, arguably, needed. It is here that a role can arise for sectoral committees. As Raunio observes,

> "bringing specialised committees onto the scene means that all MPs, and not just the small minority in the [European Affairs Committee], become routinely involved in EU matters. As a result the parliament makes better use of its own policy expertise and is able to monitor the government's behaviour more effectively, a rationale that applies in general to the empowerment of committees."[69]

Indeed, it is possible to envisage European issues being dealt with entirely by a range of sectoral committees. However, as was discovered by the Dutch *Tweede Kamer*[70] – which, at first, had the intention of adopting exactly such an approach – there are potential disadvantages to a wholly sectoral approach that lacks any centralised co-ordination. The objectives of efficiency and of maintaining a uniform level of scrutiny across a range of committees may both be hindered by leaving European policy to a range of sectoral committees. Moreover, in practice, the experience in more than one member state has

67. It is also usually the committee which tends to win plaudits as the most successful – usually followed in this regard by the Finnish *Eduskunta* (See *e.g.,* Maurer, *loc. cit.,* in n. 58 above, p. 68) – although it is clear that this view is not universally shared. See in this regard, B. Hoetjes, "*The Parliament of the Netherlands and the European Union: Early Starter, Slow Mover*" in A. Maurer and W. Wessels, *National Parliaments on their Ways to Europe: Losers or Latecomers* (Nomos, Baden-Baden, 2001), p. 337 at p. 349, on the unfavourable attitudes expressed in the Dutch parliament to the Danish approach. See more generally on the Danish approach the authorities cited in n. 42 above. Note also that the source of the Austrian parliament's powers is a more powerful form of law since, unlike the Danish parliament's powers, those of the Austrian parliament are expressly anchored in the Constitution.
68. See Kiiver, *op. cit.,* at n. 6 above, at pp. 48 to 50.
69. T. Raunio, *op.cit.,* at n. 50 above, p. 321.
70. The directly-elected and dominant 'second chamber' of the Dutch parliament. See the discussion in Hoetjes, *loc. cit.,* at n. 67 above at p. 349 *et seq.*.

been that, within individual sectoral committees, European policy matters may end up being neglected in favour of more familiar domestic issues and, consequently, an inadequate standard of scrutiny is provided regarding European matters.[71] The building up of an adequate degree of European policy-making expertise among parliamentarians may also be hindered by dividing up the relevant issues across too many committees. For the same reason, it also seems inadvisable to divide up the minority of national parliamentarians who would normally be interested in European affairs. Overall, an entirely sectoralised approach runs the risk of becoming a disjointed, fragmented, incoherent and sub-standard approach to European issues.

The optimum arrangement, therefore, probably involves some method of combining the benefits of centralisation with those of inclusiveness. A centralised or 'sinkhole' approach to European matters on the one hand, and a decentralised or 'fragmented' approach on the other, should thus be seen as extremes, with the use of either one in exclusivity likely to result in a failure to provide the appropriate standard of national parliamentary accountability in respect of European affairs.

Various means have been found by national parliaments across the European Union of combining the merits of centralised and decentralised approaches.[72] Some such approaches do not involve the use of sectoral committees. One inclusive technique – used in the Oireachtas (and not merely in relation to European matters) – is to allow attendance at Committee meetings by parliamentary colleagues who are not committee members. Similarly, all members of the Austrian upper house, the *Nationalrat*, are permitted to attend sittings of that body's European Union Committee in an advisory capacity.[73]

An alternative approach somewhat along the same lines is that of the European Union Select Committee of the House of Lords. This has 19 members. However, it also has seven sub-committees with a collective membership of 82 parliamentarians[74] so that, in total, over 10 per cent of the membership of the House is involved in European policy matters.

The use of sectoral committees is one of the most widely used means of obtaining the involvement of large numbers of parliamentarians in European affairs. An example of involving sectoral committees in European scrutiny was seen in Ireland within the lifetime of the 30th Dáil, during which the Joint Oireachtas Committee on European Scrutiny enjoyed the power to refer draft European laws to

71. This has certainly been the experience in Ireland. See in this regard the remarks of John Perry, TD, to the Oireachtas Sub Committee on the Review of the Role of the Oireachtas in European Affairs regarding the sub-optimal standard of scrutiny work which, in his experience, was carried out by sectoral committees in relation to European matters, 5 May, 2010 (available online at http://debates.oireachtas.ie/EUR/2010/05/05/). The Dutch experience appears to have been similar. See the reported observations of its own activities by the General Committee on European Union affairs of the *Tweede Kamer* that, without these activities, "the necessary attention for EU affairs in the other standing committees would virtually disappear". (Quoted in Hoetjes, *loc. cit.,* at n. 67 above at p. 349.)

72. See Kiiver, *op. cit.,* at n. 6 above, pp. 48-51.

73. See website of the Austrian parliament at http://www.parlament.gv.at/ENGL/PERK/PE/MIT/EUBundesrat/index.shtml

74. These are (i) the Economic and Financial Affairs, and International Trade Sub-Committee (which has 12 members), (ii) the Internal Market, Energy and Transport Sub-Committee (which has 12 members), (iii) the Foreign Affairs, Defence and Development Policy Sub-Committee (which has 12 members), (iv) the Agriculture, Fisheries and Environment Sub Committee (which has 11 members), (v) the Justice and Institutions Sub-Committee (which has 11 members), (vi) the Home Affairs Sub-Committee (which has 12 members) and (vii) the Social Policy and Consumer Protection Sub-Committee (which has 12 members). Note that there is some overlap between the membership of the sub-committees and that of the Select Committee itself.

other committees for further scrutiny. The success experienced in engaging other parliamentarians in scrutiny by using this method was decidedly mixed, however.[75] In other parliaments – such as the Danish *Folketing* – the process of involvement of other committees is more automatic, in that the other sectoral committees of the *Folketing*, as well as its European Affairs Committee, receive memoranda from the Danish Government on European Union matters falling within their sectoral subject matter competence. The sectoral committees can issue statements supporting the European Affairs Committee's considerations and, for example, can issue joint responses to Commission Green and White Papers.[76]

Another approach to sectoral involvement has been that employed by Sweden, requiring that Swedish MPs be members of other committees besides the European Affairs Committee and, further, to expect the independent participation of those other committees in relation to draft European Union measures of relevance to their subject area. The resulting reports are required to be debated before either the full House or the European Affairs committee.[77] It has been reported that in reality, however

"the role of standing committees in the *Riksdag* [the Swedish parliament] has so far remained limited. Each standing committee has the right to receive information from the Government on issues falling within its competence. However, while the standing committees are sent the relevant documents, they very rarely bother to issue any opinions on the basis of that information. Most of the information between standing committees and the *EU-nämnden*[78] is exchanged within party groups." [79]

A stronger approach than that taken by the Swedish is that of Finland, which combines the conferring on 14 permanent sectoral committees a major role in scrutiny work with an expectation that those committees report to the Grand Committee of the *Eduskunta* (the largest committee in that parliament), which then has the role of preparing a mandate for the Government.[80] In the sample year of 2006 alone, 225 such reports were submitted by sectoral committees of the *Eduskunta*, with the most strongly engaged having been the Finance Committee (35 reports); the Administration Committee (32 reports); the Environment Committee (30 reports); the Commerce Committee (29 reports); and the Transport and Communications Committee (26 reports).[81]

vi. Effective National Parliamentary Involvement in European Policy Matters Requires an Adequate Structure.

It is, perhaps, stating the obvious to point out that effective national parliamentary involvement in European policy matters requires an adequate structure. Among the more evident structural requirements are: the provision of adequate information on European policy matters in order for national parliaments to perform their functions; adequate time to carry them out; and adequate means

75. See the comments attributed to the former Chair of the Scrutiny Committee, John Perry, TD, cited at n. 71 above.
76. See Folketinget, *The Folketing's European Affairs Committee* (available online at http://www.euo.dk/upload/application/pdf/77305369/euo_brochure_europaudvalg_gb_web.pdf) at p. 7.
77. Kiiver, *op. cit.,* at n. 6 above, at p. 49.
78. Note that this is the Riksdag's Advisory Committee on European Affairs.
79. Raunio and Wiberg, *loc. cit.,* n. 42 above, at p. 386.
80. See generally Parliament of Finland, *Parliamentary Scrutiny of European Union Matters in Finland*, available online at http:/web.eduskunta.fi/dman/Document.phx?documentId=xj09507113500110&cmd=download
81. *Ibid.,* p. 6.

of communication with the executive – which has been argued, for instance, to require the personal presence of Government ministers representing the executive in Council meetings before parliamentary committees for European affairs.[82] Additionally, dialogue with the executive also seems necessary if parliament is to exert any real influence, requiring both *ex ante* and *ex post facto* interaction between national parliaments and government ministers attending Council meetings.[83] An adequate incentive for the executive to engage in dialogue with the national parliament may also be needed, and many European states have provided such anincentive through the creation either of a mandate system or a scrutiny reserve system binding binding national ministers negotiating on the national behalf in the Council of the European Union.[84]

3. Conclusion

This chapter has concerned itself with the question of the appropriate role for a national parliament in the European Union. Arguments for an increased involvement on the part of national parliaments in European Union matters can be made on the basis of several grounds. The case is frequently made on the basis of the argued-for need to increase the representativity and accountability of the Union and its institutions. Even if arguments for the empowerment of national parliaments are underpinned at times by sceptical attitudes concerning the democratic legitimacy of the European Union, it nevertheless seems possible to reconcile many such arguments with a positive attitude *vis-à-vis* the process of European integration.

An increased role for national parliaments may not be entirely cost-free, however. Any such increase arguably needs to be carefully targeted and may, in any case, involve potential efficiency costs for the European policy-making process. Moreover, certain difficulties need to be borne in mind when attempting to enhance the powers of national parliaments. These include the non-unitary, forum-like nature of national parliaments and the invariable – and, in a parliamentary democracy, arguably necessary – tendency of parliamentary majorities to have greater loyalty to the Government than to their parliamentary colleagues in opposition. Further difficulties, such as a potential lack of interest of large proportions of the membership of national parliaments in engaging in European policy questions, may arise. National parliaments across the European Union also face a serious challenge in balancing the need for effectiveness – and, therefore, a degree of centralisation of their processes for dealing with European issues – with the competing need for inclusiveness and the involvement of sectoral committees. The Oireachtas is no different in this regard to many other national parliaments.
A more specific analysis of particular challenges which, arguably, must be met in order for the Oireachtas to properly confront the challenges of European Union membership is addressed in the concluding chapter of this study.

82. See the observations of Mr. Brendan Halligan, chairman of the Institute of International and European Affairs, to the Sub Committee on the Review of the Role of the Oireachtas in European Affairs, 5 May, 2010 (available online at http://debates oireachtas.ie/EUR/2010/05/05/)
83. See for an extensive discussion of some such issues, chapter 2 of Kiiver, *op. cit.*, at n. 6 above.
84. See in this regard the text above at n. 40 *et seq.*

CHAPTER 6

Conclusion: In What Respects Should We Augment the Role of the Oireachtas in European Affairs? [1]

1. *Introduction: An Agenda for the Oireachtas*

The questions of why national parliaments ought to have an increased role in European Union policy matters and of what factors should be borne in mind when creating any such increased role have been examined in some detail in the previous chapter of the present study. It is, perhaps, fitting to conclude this study by focusing on the particular features of the Oireachtas itself and examining the respects in which an increased role ought to be effected for the Oireachtas in European affairs, should it be felt that empowerment of Ireland's parliament in this policy field is a desirable course to pursue.

Ireland's membership of the European Union has given rise to a range of challenges for the Oireachtas.[2] This country has not been alone in confronting such challenges and in finding itself compelled to examine the relationship of parliament and executive in the context of European affairs. Similar issues have long occupied legislatures in most other member states. Moreover, as has been seen elsewhere in this work, the process of reflection has increased dramatically in tempo in recent times, with the agreement and subsequent coming into force of the Lisbon Treaty.[3] However, Ireland's failure in the past to address adequately issues such as the optimum means of establishing democratic accountability in European affairs – a failure which has led to its being (accurately) characterised as a 'slow adaptor' to European integration[4] – has meant that, even if one assumes the need to improve parliamentary involvement in and oversight of European policy matters, this country has more ground to make up in doing so than many other member states.

1. This chapter builds on the paper "*Reviewing the Role of the Oireachtas in European Affairs*" published by the Institute of International and European Affairs in May, 2010, and available online at the time of writing at http://www.iiea.com publications/reviewing-the-role-of-the-oireachtas-in-european-affairs
2. See further the chapter of this study dealing with the historical evolution of the role of the Oireachtas in relation to European affairs.
3. See, in this regard, *Annex No. 1 to the Tenth Annual Report by COSAC*: *Replies to the Questionnaire by the National Parliaments and the European Parliament* (XL Conference of Community and European Affairs Committees of Parliaments of the European Union, 3-4 November, 2008, Paris). See also generally G. Carlos Rodriguez and L. Ortiz Blanco, *The Role of National Parliaments in the European Union,* (Proceedings of the FIDE XXIV Congress Madrid, 2010, Vol. 1) (2010, Facultad de Derecho Universidad Complutense, Madrid).
4. See A. Maurer, "*National Parliaments in the Architecture of Europe After the Constitutional Treaty*" in G. Barrett (ed.), *National Parliaments and the European Union - the Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press, Dublin, 2008) p. 47 at p. 66.

The Challenges Ahead

Perhaps the greatest challenge has been – and continues to be – the need to establish a proper system of executive accountability in European affairs. It has become regrettably clear by now just how high the cost of not having appropriately rigorous and effective systems of oversight and accountability at all levels of Irish society, in both the public and the private sector, can be. This need to establish accountability may arguably apply as much in relation to the executive branch of government as in relation to any other institution or entity, and as much in relation to European affairs as in relation to any other policy area.

The need to implement and operate successfully the Lisbon Treaty reforms concerning national parliaments stands out as one of the other main challenges for the Oireachtas in the field of European policy. The efforts which have been made to do this in the Irish legal system to date form the subject of an earlier chapter of this study, however, and need not be further elaborated upon here. It will suffice to remind ourselves here that the Lisbon Treaty [5] – now elaborated on, in particular, by Article 29.4.7º and 8º of the Irish Constitution,[6] and by the provisions of the European Union Act 2009 [7] – provides for (a) the subsidiarity control mechanism with its so-called yellow and orange cards; (b) a national parliamentary veto on the use of *passerelle* provisions that provide for shifts at European level from unanimous decision-making to qualified majority voting, or from some kind of special legislative procedure to the ordinary legislative procedure;[8] (c) vast quantities of information to be supplied directly to the Oireachtas from the European Union; and (d) a role for national parliaments, when certain specified events occur, for example, when there is an application by a state to become a member of the Union.[9]

Five Desiderata for the Oireachtas in European Affairs

The foregoing two challenges, as considerable as they are, do not, however, tell us all we need to know about the agenda that needs to be considered once it is decided that an intensified role on the part of the Oireachtas in relation to European matters is a desirable course to pursue.[10] Arguably, there are at least five further areas which must be looked at.

5. See Annex I to Chapter 4 of the present study in which the main aspects of the revised Treaties which are of interest for present purposes are detailed
6. See Annex II to Chapter 4 of the present study in which the provisions of these Articles are set out.
7. See Annex III to Chapter 4 of the present study for the text of section 7 of the European Union Act 2009, which is the main provision of relevance for present purposes.
8. Which involves qualified majority voting and a role for the European Parliament as co-legislator with the Council of Ministers.
9. In relation to which, see Article 49 of the Treaty on European Union.
10. The Lisbon Treaty is, of course, not the only extant stimulus to change. On the purely national plane, its coming into force coincided in time with a fall in public confidence in the Oireachtas as an institution (see in relation to the fall in confidence in the Oireachtas which preceded the onset of the present crisis, G. Barrett, "*Oireachtas Control over Government Activity at European Union Level: Reflections on the Historical Context and the Legal Framework*" in Barrett (ed.), op. cit. at n. 4, p. 145 at p. 176) and in trust in the Government (see in relation to survey evidence of this, R. McGreevy, "*Most People No Longer Trust Church, Government or Banks*", Irish Times, 29 April, 2010). This, too, arguably demands a response on several levels – including reform of how the Oireachtas goes about its business, specifically in its oversight and scrutiny of how Irish Government ministers conduct themselves in relation to European Union matters.

First, the Oireachtas needs a system to deal with what might be referred to as the pre-legislative phase at European Union level – in other words, the period which precedes draft legislation being formally adopted, when legislation is in the offing, but has not yet been formally proposed.

Secondly, the Oireachtas needs a system to deal with what might be called the draft legislative phase – i.e. the period which follows draft legislation being formally proposed at European Union level. Thirdly, the Oireachtas needs a system to oversee the adoption of measures, in Ireland, intended to implement or aid in the implementation of Directives and regulations enacted at European Union level. The central issue of concern here involves the deployment of large numbers of statutory instruments to give effect to European law, with no real control worthy of the name coming from parliament – an unfortunate Irish tradition as old as this country's membership of what is now the European Union.

Fourthly, the Oireachtas needs a system to deal with the very considerable number of instances where European Union policy is sought to be advanced through initiatives which do not involve the adoption of legislation.

Fifthly, and as a result of the abolition of the National Forum on Europe in 2009, the Oireachtas needs to become an effective forum for the facilitation of a wider and deeper debate by the public on European issues.

Consideration of the Above Issues

Most of the above five issues have been subjected to consideration, in some manner or form, on three occasions over the last three years,. As has already been seen in this study, in the lifetime of the 30th Dáil, two Oireachtas sub-committee reports were produced involving consideration of many of the above issues and more besides. The first such report – *Ireland's Future in the European Union*: *Challenges, Issues and Options*[11] – was produced on 27 November, 2008, by the specially set-up Oireachtas Sub-Committee on Ireland's Future in the European Union, chaired by (then) Senator Paschal Donohue.[12] This report was partly concerned with recommendations on the future role of the Oireachtas in European affairs, with Chapter Four of the Donohue Report bearing the title "Enhancing the Role of the Oireachtas in EU Affairs".

The second report – the *Report of the Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs*[13] – was, like the Donohue Sub-Committee Report, a report produced by a (second) specially set-up Oireachtas Sub-Committee, this time under the chairmanship of then Opposition TD[14] Lucinda Creighton. Delivered on 7 July, 2010, this report, as its name would suggest, was entirely concerned with the future role of the Oireachtas in European affairs.

Given that the contents of both the Donohue and Creighton reports relating to the role of the Oireachtas have already been considered *in extensu* in another chapter in this study, they are not given further consideration here.

11. Available online at the time of writing at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/committees30thdail/j-europeanaffairs/Sub_Cttee_EU__20081127.doc
12. Subsequently Teachta Dála.
13. Available online at the time of writing at http://euaffairs.ie/publications/Sub-Committee-Report-Review-of-Role-of-Oireachtas-in-European-Affairs.pdf
14. Subsequently Minister of State for European Affairs.

The third occasion on which many of the issues raised above have received consideration is in the programme for government agreed following the general election held on 25 February, 2011. This election resulted in 113 of the 166 seats in Dáil Éireann being won by Fine Gael and Labour. The programme for government agreed by these two parties – *Government for National Recovery 2011-2016* – was published on 6 March, 2011,[15] with the election of Enda Kenny as Taoiseach and the appointment of the Fine Gael-Labour Government following three days later.[16]

A programme for government is obviously not the same kind of document as a parliamentary report, being a plan of action rather than a discursive document. Nonetheless, *Government for National Recovery 2011-2016*, like the reports that went before it, is in part a response to perceived *lacunae* in the existing approach of the Oireachtas in relation to European affairs. Further, the extensive series of proposals in the programme – *sub nomine* "*the National Parliament and the European Union*" – may be considered the executive answer to the agenda mapped out by the legislature in the Donohue and Creighton reports. It seems worth considering, therefore, what is anticipated by the programme and, as a result, it has been sought to integrate the proposals of *Government for National Recovery 2011-2016* into the discussion which follows in order to gain some idea of what the future is likely to hold in terms of responses to the five challenges set out above.

In some respects, the proposals made in this programme fall short of the ambitious targets outlined in the Donohue and Creighton reports – for instance, they contain no unambiguous commitment to the introduction of a scrutiny reserve system in relation to participation by Irish government ministers in the legislative process of the Council of the European Union.[17]

As will be seen below, the implementation of the proposals contained in *Government for National Recovery 2011-2016* will represent a considerable empowerment of the Oireachtas in European affairs.[18] Some idea of the overall ambition of the programme can be seen in the statement made by its drafters therein that "the Oireachtas must be given responsibility for full scrutiny of EU draft proposals, for proper transposition of EU legislation and for holding the Government accountable for the decisions it takes in Brussels."[19] Whether the means provided match the ambition stated is another question, however. On the other hand, the programme need not necessarily be seen as a kind of outer limit to the ambitions of the legislature. The proposals themselves are obviously incomplete given their programmatic nature. The detail of how they are to be implemented remains to be seen. Furthermore, there is nothing to prevent the programme proposals from being supplemented at some future stage.

15. Published by the Department of the Taoiseach and available online at the time of writing at http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.html
16. See Anon., "*Kenny elected Taoiseach, appoints Gilmore Tánaiste*", Irish Times, 9 March, 2011.
17. See further the text below.
18. Nor should it be ignored that other more general proposals relating to parliamentary reform contained in the programme (e.g. in relation to parliamentary questions) should also have the capacity to result in some improvements in the European policy field.
19. *Government for National Recovery 2011-2016, op. cit.,* at n. 15 above, p. 24.

2. A More Detailed Consideration of the Five Desiderata Referred to Above

In this section, it is proposed to consider each of the five *desiderata*, referred to in the text above, in somewhat more detail.

i. A System for Influencing Policy-Making in the Period before Draft Legislation is Formally Adopted at European Union Level

There can be little doubt that if one wishes to influence policy-making at European level it is necessary to intervene as early as possible. Intervening by the time draft legislation is proposed is too late a point to engage in fundamental elements of the policy-making debate, because the parameters of the debate will, to a large extent, already have been established by the time legislation is drafted.[20]

If the Oireachtas wants to exert influence regularly and systematically at European level, therefore, it must set up a system whereby it intervenes in debates conducted prior to the drafting of legislation at European level, preferably according to a pre-determined set of priorities. At Union level, a system has already been set up to ensure that contributions of this nature from national parliaments are given a receptive hearing. This is the system of 'political dialogue' between the European Commission and national parliaments – which was introduced as long ago as 2006, becoming known as the Barroso Initiative.[21] The Barroso Initiative[22] anticipated the formal information rights provided for national parliaments at Lisbon in that it required that the Commission send its consultation papers and its new proposals to national parliaments in order to enable them to provide an input thereon.

According to the latest Commission report, in the year 2010, 387 reports were received from national parliaments in the context of the political dialogue.[23] Of these reports, however, only three (0.76 per cent) came from the Oireachtas, placing it in joint 18th place out of 27 members state of the European Union – in other words, only marginally outside the worst-performing third of parliaments, and behind many other small states such as Portugal (which topped the count with 106 such reports), Austria (whose two parliamentary chambers produced 25 reports), Denmark (whose Folketinget produced 11) and Lithuania (which produced four).

20. See, generally, regarding the difficulties for a national legislature in exerting influence on the agenda in the field of European policy, T. Raunio, National Parliaments and European Integration – *What We Know and What We Should Know* (Arena Working Paper No. 02, Centre for European Studies, University of Oslo, January, 2009) at 16-17. See also T. Raunio, "*National Parliaments and European Integration: What We Know and Agenda for Future Research*" (2009) 15 Journal of Legislative Studies 317.
21. See Communication from the Commission to the European Council *A Citizens' Agenda – Delivering Results for Europe* (COM/2006/0211 final). Available online at the time of writing at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0211:EN:NOT See further the dedicated website created by the Commission concerning the political dialogue at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm
22. See Communication from the Commission to the European Council *A Citizens' Agenda – Delivering Results for Europe* (COM/2006/0211 final). Available online at the time of writing at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0211:EN:NOT) See further the dedicated website created by the Commission concerning the political dialogue at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm
23. *European Commission, Annual Report 2010 on Relations Between the European Commission and National Parliaments* (COM[2011] 345 final, Brussels, 10 June, 2011). Available online at the time of writing at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/ar_2010_en.pdf See, in particular, Annex I

Government for National Recovery 2011-2016 gives little indication that any improvement can be expected either, generally – in terms of early intervention by the Oireachtas in relation to EU-level initiatives – or, more specifically, in relation to engaging in the political dialogue process with the Commission. It does make provision for certain European Union-level proposals and initiatives to be debated at a relatively early stage in the Oireachtas on a once-annual basis, involving the full House in these activities. The programme undertakes that

> "the Oireachtas will devote a full week each year to debating major EU issues of concern to Ireland such as the Draft Annual Work Programme, Green and White Papers and proposals for EU budget co-ordination."[24]

It further elaborates that

> "the EU Commission produces its Draft Annual Work Programme in October/November for the following year. We propose that the week in which the 9th May, "Europe Day" falls will be the occasion for a week-long parliamentary debate on Ireland's priorities within the EU. The debate will review the national progress in implementing the current year's work programme and focus on identifying the major issues of concern to Ireland for inclusion on the following year's EU Draft Work Programme.[25]

The reference to Green and White Papers notwithstanding, it is difficult to imagine that a once-off annual debate of this nature can yield much in terms of a comprehensive strategy for early Oireachtas input concerning European initiatives, unless underpinned by a more comprehensive and year-round strategy of Committee reports in relation to these same issues. Government for National Recovery 2011-2016 makes no reference to such a strategy although, in fairness, nor does it rule it out. The proposals, in this regard, are better seen as a strategy for the involvement of the Oireachtas in its plenary form in European affairs rather than as a plan for intervention at an early stage in European Union policy-making.

A further challenge exists, both as regards creating a system for influencing policy-making in the period before draft legislation is formally adopted at European Union level and as regards creating a system for dealing with the position once draft legislation is formally proposed at European Union level. This is the challenge of filtering the more significant proposals and draft measures out of the veritable flood of European Union documentation now arriving at the Oireachtas under the terms of Title I of Protocol (No 1) on the Role of National Parliaments in the European Union and Article 4 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

Government for National Recovery 2011-2016 makes no provision for any filtration system, however. Instead it commits to no more than ensuring that

24. See *Government for National Recovery 2011-2016, op. cit.*, at n. 15 above, p. 24
25. *Ibid.*, p. 25.

> "all EU documents are forwarded to the Oireachtas through the Ceann Comhairle and the Cathaoirleach. They will transmit them to the Oireachtas library and the relevant Committees. Every TD and Senator will be informed of the documents as they arrive, so that they can engage in EU matters that concern or interest them."[26]

In fact, however, the volume of material arriving is so great, and the work rate of TDs so considerable, that it seems most unlikely that merely informing them of documents as they arrive – without also providing access to a filtered set of such documents, pre-selected for significance – will enable them to engage in EU matters of concern to them.

ii. A System Dealing with the Position Once Draft Legislation is Formally Proposed at European Union Level

Apart from a pre-legislative system, the Oireachtas also needs a system dealing with the position once draft legislation is formally proposed at European Union level.

This has two main aspects: (A) securing accountability in relation to what government ministers agree to in Council, and (B) the operation of the subsidiarity control mechanism.

(A) Securing Accountability in Relation to What Government Ministers Agree to in Council

Securing accountability in relation to what Government ministers agree to in Council is, and will remain, the main democratic function of national parliaments in relation to European Union affairs. At present in Ireland, however, it is difficult to argue that there is sufficient ministerial accountability.

In the 30th Dáil, the Minister for Foreign Affairs (or, alternatively, the Minister of State for European Affairs) met monthly with the Joint Oireachtas Committee on European Affairs for one meeting prior to the (i) General Affairs and (ii) Foreign Affairs Councils.[27] But, in relation to other Council configurations – namely, (iii) the Economic and Financial Affairs (Ecofin) Council; (iv) the Justice and Home Affairs (JHA) Council; (v) the Employment, Social Policy, Health and Consumer Affairs Council; (vi) the Competiveness Council; (vii) the Transport, Telecommunications and Energy Council; (viii) the Agriculture and Fisheries Council; (ix) the Environment Council; and (x) the Education, Youth and Culture Council - no such arrangement existed. This is in spite of the fact that, unless all relevant Ministers were being required to report back to Oireachtas Committees, the Oireachtas was simply not exercising any form of oversight in relation to what Irish ministers are agreeing to in these Council configurations.

A single Oireachtas Joint Committee, such as the European Affairs Committee (or, now, the European Union Affairs committee), can not realistically act as interlocutor with the large number of ministers concerned. Otherwise, its members would have time to do little else. The better approach – and, indeed,

26. See *Government for National Recovery 2011-2016, op. cit.*, at n. 15 above, pp. 24-25.
27. See Joint Committee on European Affairs and Joint Committee on European Scrutiny, *Joint Report on Implementation of the Lisbon Treaty* (8 December, 2009). Available online at the time of writing at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EUScrutiny/PublicationsNew/OthRpts20091208.doc) at p. 11 thereof.

probably the only feasible approach – is to devise a system which involves sharing the workload and the expertise in European affairs by obliging every minister participating in Council meetings to have meetings with the relevant sectoral committee. Research has shown that, Europe-wide, the better-functioning control systems have involved the spreading of work among parliamentary members, rather than concentrating it exclusively on one or two committees.[28]

Precisely this approach is envisaged by Government for National Recovery 2011-2016 which, under the heading 'Oireachtas Accountability', undertakes that "all Ministers will be obliged to appear before their respective Committees or before the Committee on European Affairs prior to travelling to Brussels for meetings of the Council where decisions are made."[29] The broader philosophy embodied in this requirement also appears in the programme, in its averment that "all Oireachtas committees must share the burden of dealing with EU policies and legislative proposals."[30]

Further detail of what is intended in order to implement this philosophy is provided in the proposal that

> "Oireachtas Committees will play the major role in scrutinising the EU in the coming years. Greater emphasis will be placed on deepening the involvement in EU matters of the Oireachtas committees that shadow the work of each Government Department. We will oblige all sectoral committees to deal with EU matters that come within their remit within a defined period of time."

The kind of internal organisation that is expected to support Oireachtas committees in this work is made clear by the intention expressed in the programme that "Committees will be supplemented by a system of subcommittees and a system of rapporteurs who have a particular interest in an area of policy or scrutiny and who volunteer to carry out an in-depth study for the relevant committee."[31]

An enhanced role for sectoral committees can only be one half of the story, however. Experience indicates that parliaments which provide for decentralisation in the form of a strong role for sectoral committees must balance that role with a continued central role in some shape or form for their European affairs committees.[32] The precise balance sought between centralisation and decentralisation varies from one state to another, and how this question will be addressed in the Oireachtas is an issue which Government for National Recovery 2011-2016 does not enter into, beyond the clear commitment for a role for sectoral committees strengthened well beyond current levels.

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28. See in this regard T. Raunio, National Parliaments and European Integration – *What We Know and What We Should Know* (Arena Working Paper No. 02, Centre for European Studies, University of Oslo, January, 2009) above, 4; T. Raunio, "*Ensuring Democratic Control over National Governments in European Affairs*" in Barrett (ed.), *op. cit.* at n. 4 above, 3 at 9; T. Raunio, "*The Parliament of Finland: A Model Case for Effective Scrutiny?*" in A. Maurer and W. Wessels (eds.), *National Parliaments on Their Ways to Europe: Losers or Latecomers?* (Nomos, Baden-Baden, 2001); and, more generally, I. Mattson and K. Strøm, "*Parliamentary Committees*" in H. Döring (ed.) *Parliaments and Majority Rule in Western Europe* (Campus and St. Martin's Press, Frankfurt and New York, 1995)
29. See *Government for National Recovery 2011-2016, op. cit.,* at n. 15 above, p. 25.
30. *Ibid.,* p. 24.
31. See *Government for National Recovery 2011-2016, op. cit.,* at n. 15 above, p.25.
32. See, in this regard, the chapter of this study examining the question of why and how the role of national parliaments ought to be augmented.

Beyond issues of providing an appropriate role both for sectoral committees and for the parliamentary committee charged with dealing with European affairs, a further challenge exists. The system that currently operates in Ireland (or, indeed, *will* operate when it is sought to make the practice of appearing before Committees more generalised) creates little or no incentive or compulsion for busy Ministers to appear before Oireachtas committees and to take seriously what those committees have to say. It can, and has, been argued that, for there to be effective oversight of Ministers, teeth need to be given to parliamentary committees in order to create an incentive.[33]

Both the Sub-Committee on Ireland's Future in the European Union[34] and the Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs[35] have recommended a scrutiny reserve mechanism analogous to that which has been enjoyed for years by the United Kingdom Houses of Parliament. Scrutiny reserve has been described as the linchpin of the United Kingdom system,[36] and involves "an undertaking by Ministers that, bar exceptional circumstances, they will not agree to anything in the Council until it has been cleared through parliament."[37]

Ireland lags very much behind other member states in assigning such powers to its parliament. Indeed, several member states have gone well beyond a United Kingdom-style scrutiny reserve system, and have established a mandate system in relation to important issues. According to this approach, parliament can actually deny a minister the mandate to negotiate in relation to particular issues although, in reality, such a mandate is rarely if ever denied by parliaments possessing this power. Instead, the system is used to give parliament an input into the formulation of a policy which will then be supported by it. Government for National Recovery 2011-2016 appears to contain a hint that a scrutiny reserve system may be on the way, proposing as it does that "systems must be put in place to ensure that Ministers do not bypass the Oireachtas and make decisions in Brussels on EU matters before these matters are subjected to scrutiny by the Oireachtas."[38] It is difficult to imagine how such assurance could be provided without the establishment of a scrutiny reserve system. On the other hand, it is also noticeable that the programme has stopped short of providing an express such commitment.

A further *lacuna* in the system of accountability (as existed in the 30th Dáil) needs to be pointed out. Although the Minister for Foreign Affairs or the Minister of State for European Affairs met monthly with the Joint Oireachtas Committee on European Affairs, even here 'the circle was not closed'. Having appeared before an Oireachtas Committee before going out to a Council meeting in Brussels, the Minister

33. The present writer has previously expressed the view that it is both possible and desirable to go beyond a scrutiny reserve system, and that a mandate system similar to that operated in numerous member states (including Finland, Austria and Denmark) should be introduced in this jurisdiction. See, in this regard, the hearing held by the Oireachtas Sub-Committee on Ireland's Future in the European Union on 15 October, 2008 (a transcript of which is available online at http://debates.oireachtas.ie/EUF/2008/10/15/). This view has also been expressed by former European Parliament President Pat Cox (speaking before the Oireachtas Sub-Committee on Review of the Role of the Oireachtas in European Affairs on 5 May, 2010 [available online at the time or writing at http://debates.oireachtas.ie/EUR/2010/05/05/]).
34. See report of Oireachtas Sub-Committee on Ireland's Future in the European Union, *Ireland's Future in the European Union: Challenges, Issues and Options* (November, 2008). Available at http://www.oireachtas.ie/documents/committees30thdail/j-europeanaffairs/sub_cttee_eu_01122008-3.pdf , at para. 30 thereof.
35. See *Report of the Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs, op. cit.,* at n. 13 above.
36. C. Kerse, *Parliamentary Scrutiny in the United Kingdom Parliament and the Changing Role of National Parliaments in European Union Affairs*, in Barrett (ed.), op. cit. at n. 4 above, p. 349 at p. 356.
37. D. Jones, *UK Parliamentary Scrutiny of UK Legislation* (Foreign Policy Centre, Confederation of British Industry, 2005) at 4.
38. See *Government for National Recovery 2011-2016, op. cit.,* at n. 15 above, p. 24.

did not, then, have to reappear before that same Committee to give an account of (a) what subsequently took place there and (b) of the extent to which it has been sought (if it had been sought at all) to give effect to the Committee's previously-expressed views. There was little real accountability in such a system. It was also demoralising for Oireachtas members (in addition to constituting a disincentive for taking Committee work as seriously as they ought to) not to be made aware of what, if any, impact their discussions with a Minister prior to Council meetings might have had. An obligation to give such an *ex post facto* account – preferably a verbal account, including a question and answer session, so as to avoid any danger of Ministers simply reporting back with statements provided to them by civil servants – has been argued to be a necessary part of any such system of ministerial accountability.[39] *Government for National Recovery 2011-2016* lays out no commitment in this regard, perhaps because it was felt this would tie down ministers excessively, or perhaps because its commitment to have all relevant ministers appear before their relevant sectoral committees before attending meetings of the Council of the European Union was felt to have been a sufficiently adventurous departure from existing practice.[40]

(B) The Subsidiarity Control Mechanism

The second aspect of an Oireachtas system dealing with draft legislation after it is formally proposed at European Union level involves the parliamentary operation of the subsidiarity control mechanism. This mechanism, and its implementation in the Irish legal system, are examined in two other chapters of this study. However, some further brief observations may be permitted here.

First, it is possible that the bark of the somewhat restricted subsidiarity control mechanism introduced by the Treaty of Lisbon is more significant than its bite, since European institutions do not appear to be habitual violators of the subsidiarity principle (which, moreover, is not of universal application in any case).[41] On the other hand, preliminary indications have been that national parliamentarians are inclined

39. See the writer, *loc. cit.*, at n. 31 above; See also B. Halligan (chair of the Institute of International and European Affairs) speaking before the Oireachtas Sub-Committee on Review of the Role of the Oireachtas in European Affairs on 5 May, 2010 (available online at the time of writing at http://debates.oireachtas.ie/EUR/2010/05/05/). O' Hegarty, *loc. cit.* at n. 3 above, 273 at 296. For an interesting study of the varying effects of *ex ante* and *ex post* parliamentary control mechanisms, see P. de Wilde, "*Designing Politicization*: *How control mechanisms in national parliaments affect parliamentary debates in EU policy formulation*" (Arena Working Paper No. 13, Centre for European Studies, University of Oslo, August, 2009).

40. See text at n. 29 above.

41. The principle of subsidiarity applies only in relation to areas that do not fall within the European Union's *exclusive* competence. (See Article 5(3) of the Treaty on European Union). This is a broad field indeed but, nonetheless, excludes the areas of (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the member states whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; and (e) the common commercial policy, competition rules, and customs union rule-making. (See Article 3 of the the Treaty on the Functioning of the European Union). See the discussion of the advantages of the proposed mechanism by Anthony Collins SC before the Oireachtas Sub-Committee on Review of the Role of the Oireachtas in European Affairs on 28 April, 2010 (available online at http://debates.oireachtas.ie EUR/2010/04/28/). See, generally, in relation to the principle of subsidiarity, A. Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press, Oxford, 2002). For a critical view, see G. Davies, "*Subsidiarity*: *The Wrong Idea, in the Wrong Place, at the Wrong Time*" (2006) 43 CMLRev 63. Note also that, under Article 5 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, draft legislative acts are required to be justified with regard to the principles of subsidiarity and proportionality, and draft legislative acts should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. The substantive obligation involved here is not new. Article 4 of the 1997 (Amsterdam) Protocol (No. 30) on the application of the principles of subsidiarity and proportionality provided that "For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators."

to give an extremely broad interpretation to the concept of subsidiarity.[42] If this perceived trend confirms itself, it will obviously make the subsidiarity control mechanism of correspondingly broader significance.

Secondly, whether broadly or narrowly applied, the introduction of the subsidiarity control mechanism is a significant step. This is because it enables national parliaments, for the first time, to be direct *interlocutors* with the Commission during the process of legislation – and should facilitate discussions of legislation in national parliaments which seem highly likely to range well beyond the confines of subsidiarity to other issues raised by legislation.

Thirdly, the possibility should not be ignored that the subsidiarity control mechanism may also represent the opening of a gap in the door to greater generalised involvement of national parliaments in European matters – a door which may be widened in the future. Indeed, if the mechanism is deemed a success and is one day expanded in scope, it *may* prove to be a route leading to national parliaments becoming a virtual third chamber at European Union level, i.e. beyond the Council and the European Parliament.[43]

iii. A System for Overseeing the Adoption of Measures in Ireland in Order to Implement European Union Directives and Regulations

A third essential element needed in any system aimed at providing oversight in relation to European matters relates to the development of democratic control over the use of secondary legislation – as opposed to acts of the legislature – in order to implement directives and regulations adopted at European Union level.

As may be seen in the relevant section of this study, there is already a system in place, under the European Communities Act 1972 (as amended by the European Communities Act 2007), which purports to establish democratic control over ministerial implementation of European Union law via statutory instruments. Indeed, the attempts to establish some form of control here have the longest pedigree of any Irish parliamentary oversight mechanism relating to European affairs, tracing their origins back to the adoption of the European Communities Act 1972 [44] and the subsequent establishment of the Joint Committee on the Secondary Legislation of the European Communities in 1973.[45] However, the system is, and always has been, dysfunctional. No real oversight is exercised by the Oireachtas in relation to secondary legislation. Part of the problem here is that members of the Oireachtas are not made aware of statutory instruments implementing European obligations until *after* they have been adopted.[46] Even

42. This emerged at a conference *sub nomine* "*Practical Application of the Subsidiarity Principle*"attended by the author and held in Trier, 9-10 June, 2011, where various reasoned opinions regarding proposals on a common consolidated tax base were examined.
43. An expression for this writer is indebted to Brendan Halligan.
44. The relevant provisions of which were quickly replaced by the European Communities (Amendment) Act 1973. See generally M. Robinson, "*Irish Parliamentary Scrutiny of EC Legislation*" (1979) 16 Common Market Law Review 9.
45. These developments are analysed elsewhere in this study.
46. Under s. 3A of the European Communities Act 1972, as inserted by s. 3 of the European Communities Act 2007: "every [implementing regulation] shall be laid before each House of the Oireachtas as soon as may be *after it is made* and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House sits after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder." (Emphasis added.)

then, there is little likelihood that members will actually find out about any given instrument's existence within the 21 days after its being 'laid before the House'[47] (during which period it is technically possible to annul it by a resolution of either House) since, despite the impression of publicity given by the name of this process, a document is deemed to have been 'laid' before a House simply by means of a copy of the document being delivered to the relevant clerk. Thus, in practice, the only way a Senator or TD will normally even find out about the existence of a statutory instrument is if he or she is a regular reader of the Iris Oifigiúil. Further, no special parliamentary time is allocated by Irish Governments for the purpose of debating the annulment of such statutory instruments.

The end result has been predictable: the ongoing, decades-long, large-scale use of statutory instruments by Irish ministers in order to implement all kinds of rules,[48] with virtually no Oireachtas control worthy of the name. These statutory instruments have been used even in those cases where an Act of the Oireachtas would have been a more appropriate implementation method, and even where the drafting of the legislation has been flawed or otherwise inappropriate.

Government for National Recovery 2011-2016 proposes to bring this situation to an end. Under the heading '*Transposing EU Legislative Measures*', the programme asserts that

> "the situation can no longer be tolerated where Irish Ministers enact EU legislation by statutory instrument. The checks and balances of parliamentary democracy are by-passed. The parliamentary treatment accorded home-produced draft legislation must be extended to draft legislation initiated within the EU institutions."[49]

A means of achieving this end is proposed:

> "the regulatory impact assessments prepared for Ministers on all EU directives and significant regulations will be forwarded automatically to the relevant sectoral Oireachtas committees. These committees should advise the Minister and the Joint Committee on European Affairs as to whether the transposition should take place by statutory instrument or by primary legislation. Where primary legislation is recommended the full Oireachtas plenary process should be followed."[50]

It remains to be seen how well the various sectoral committees will engage with this system once introduced, but if given effect to, this would be a highly significant reform. If it functioned properly, it just might have the potential to bring to an end an ingrained and anti-democratic legislative habit which has granted successive Irish governments the recourse of statutory instruments far too readily since Irish entry to the original Communities in 1973.

47. Details of this obscure procedure are provided in Appendix V of the Cabinet Handbook, as well as in the Standing Orders of Dáil Éireann and Seanad Éireann. Some details are also provided online on the Oireachtas website at: http://www.oireachtas.ie/ViewDoc.asp?fn=%2Fdocuments%2Flibrary%2FDocuments_Laid%2Fdocument1htm#Question 2
48. Including, since the coming into force of the European Communities Act, 2007, the creation of indictable offences.
49. See *Government for National Recovery 2011-2016, op. cit.*, at n. 15 above, p. 25.
50. *Ibid.*

At the same time, however, the programme also contains the following commitment:

> "we will commission an independent audit into the transposition and implementation of EU legislation, placing priority on laws and regulations that caused concern or [were] deemed burdensome to Irish business. We will put in place a mechanism across Government to accelerate implementation of directives, involving relevant Departments and the Attorney's Office."[51]

While such an audit would be of undoubted value, and the implicit commitment here to improvement in the quality of implementation of European Union directives seems welcome, the commitment to accelerate implementation of directives will be difficult to meet if it is also sought to adhere to the earlier commitment to engage in greater use of primary legislation in the implementation process.

iv. A System to Deal with European Union Initiatives Which do not Involve the Adoption of Legislation at All

A fourth challenge to democratic control is the need to review the operation of European Union-level activities in fields which do not normally or invariably give rise to legislative measures.

Such fields include (i) *the European Union's foreign affairs and security policy*, an area where the possibility of legislation does not legally exist.[52] They also include (ii) *the operation of the open method of co-ordination*[53] – a process of intergovernmental peer review which is being deployed to an increasing extent at European Union level as an apparently more palatable option for member states than the handing over of broader powers of legislative initiative to the European Commission under what would formerly have been referred to as the Community method.[54] A further field is (iii) *the process of social dialogue between the social partners* at European Union level in general or sectoral negotiations.[55] This may sometimes give rise to legislation – but it does not have to.

One possible approach in relation to the open method of co-ordination might be for hearings of participating Irish officials and Commission officials to be held in the Joint Oireachtas Committee on European Affairs, and for an annual report to be written on the operation of the open method of co-ordination. As regards the social dialogue process, inviting the social partners at both Irish and European level to discuss recent developments in the European Affairs Committee – either annually or at six-month intervals – might also be a useful idea, since these, rather than member state representatives, are the main players in this process. Common foreign and security policy matters are another area in which

51. See *Government for National Recovery 2011-2016, op. cit.,* at n. 15 above, p. 58.
52. Under Article 24(1), Indent 2 of the Treaty on European Union, the adoption of legislative acts is excluded in the common foreign and security policy field.
53. In relation to which see Articles 5, 150, 156, 168, 171, 173, 181 and 210 of the Treaty on the Functioning of the European Union.
54. There is a voluminous literature on the open method of co-ordination. See for some useful introductions to the subject, for example, I. Maher and D. Hodson, "*The Open Method as a New Mode of Governance*: *The Case of Soft Economic Policy Co-ordination*" (2001) 39 Journal of Common Market Studies 719; and D. Ashiagbor, "*Soft Harmonisation*: *The Open Method of Coordination in the European Employment Strategy*" (2004) 10 European Public Law 305.
55. In relation to which see Articles 152 and 155 of the Treaty on the Functioning of the European Union.

an approach to overview diverging from the normal approach is clearly required, with a premium being placed on both flexibility and, at times, confidentiality in this policy field.[56]

This particular issue has not been addressed specifically in Government for National Recovery 2011-2016.

v. A System for Making the Oireachtas an Effective Forum for a Wider and Deeper Debate by the Public on European Issues

The facilitation of a wider and deeper debate by the public on European issues was regarded as the terrain of the National Forum on Europe until the closure by the Government of that body, after just under eight years of existence, in April, 2009, in the lead-in period to the second referendum on the Treaty of Lisbon. The letter from then Taoiseach Brian Cowan to Senator Maurice Hayes, the chairperson of the Forum, announcing that body's closure, referred to "the Oireachtas' capacity for constructive debate about Europe, including hearing from a wide range of voices, from across civil society" and promised consultation "in relation to how we can optimise the Oireachtas' role". Similar ambitions appear to be harboured by the Government that entered office in 2011, since the 2011 programme for government proposes that "the Oireachtas...be linked up with the Irish offices of the European Commission and the European Parliament in communicating Europe to the Irish people", and further promises that "outreach programmes, meetings and competitions particularly in schools will be organised and TDs and Senators invited to participate".[57] It is true that, with its use of sub-committees, the Oireachtas did provide a forum for debate to some extent in the wake of the defeat of the first Lisbon Treaty referendum in 2008. Whether, in the long term, the Oireachtas – composed, as it is, of parliamentarians who are normally able to dedicate only part of their time to legislative or policy matters – is capable of replicating the work done by the Forum on a professional and continuous basis until 2009, however, is an entirely different matter, and remains to be seen.[58]

56. See B. Tonra, "*Democratic Oversight over the Irish Government in the Field of the Common Foreign and Security Policy*", Chapter 9 in Barrett (ed.), *op. cit.* at n. 4 above.
57. See *Government for National Recovery 2011-2016, op. cit.,* at n. 15 above, p. 24.
58. See for a discussion of the Forum's work, T. Brown, *Ireland's National Forum on Europe*: *Helping to Make Up for the Democratic Deficit?*", Chapter 12 in Barrett (ed.), *op. cit.* at n. 4 above.