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## Abstract

*Parliamentary scrutiny reserves have become a popular parliamentary instrument for the scrutiny of EU documents over the last two decades. While the exact provisions for them vary between the member states and according to their parliaments' overall scrutiny system, parliamentary reserves generally mean that government representatives do not, or cannot, officially agree to a proposal in the Council (or COREPER or the working groups) while the parliamentary scrutiny process is ongoing. Yet despite the proliferation of reserve provisions, we actually know very little about them. The paper will therefore provide an overview over the specific features of scrutiny reserves in different member states. In addition, it investigates whether scrutiny reserves actually are an effective instrument to safeguard parliamentary influence in EU affairs by looking at how they are being dealt with at different levels of the Council negotiations.*

# Lost in Transaction? Parliamentary Reserves in EU bargains

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## Introduction

Parliamentary scrutiny reserves have become a popular parliamentary instrument for the scrutiny of EU documents over the last two decades. While the exact provisions for them vary between the member states and according to their parliaments' overall scrutiny system, parliamentary reserves generally mean that government representatives do not, or cannot, officially agree to a proposal in the Council (or COREPER or the working groups) while the parliamentary scrutiny process is ongoing. In fact, the term 'parliamentary' or 'scrutiny reserve' refers to two different instruments, the domestic parliamentary provision designed to give parliament enough time to complete the scrutiny process and the instrument government representatives use in the European negotiations to indicate that they are not yet able to agree to a proposal. In the latter sense, reserves can be put down in the Council (COREPER or the working groups) by government representatives for other reasons as well, for example to indicate disagreement on general or more specific points (formal reserves) or because of translation issues (linguistic reserves).

Although a number of parliaments have adopted procedures for a scrutiny reserve, and although they are frequently mentioned in the literature, we actually know very little about them. The aims of the paper are therefore fairly modest: The first aim is to provide an overview over the specific features of scrutiny reserves in different member states to understand the rationale behind their establishment and whether their proliferation can be seen as a sign for a greater harmonisation of scrutiny procedures among member states parliaments. The second aim of the contribution is to investigate whether these reserves actually are an effective instrument to safeguard parliamentary influence in EU affairs by looking at how they are being dealt with at different levels of the Council negotiations.

The paper is based on a comparison between member states that have implemented specific scrutiny reserve systems, namely the UK, the Czech Republic, Malta, France, Germany, Italy and the Netherlands. In addition, parliaments with a mandating system usually have an inbuilt reserve system, as the government can only negotiate in the Council once it has received a parliamentary mandate. Regarding the empirical data, it draws on the secondary literature, official Council documents and expert interviews with members of the Permanent Representations as well as members of the Council General Secretariat.

On this basis the first section of the paper shows that the rationale for the establishment, the specific design and the use of parliamentary reserve provisions differs greatly between national parliaments. Parliamentary reserves thus provide a good illustration of the domestic differences of national parliaments' adaptation to the EU beyond formal similarities. At the same time, our investigation shows parliamentary reserves have a very weak impact on the Council negotiations regardless of the specific institutional design. As the second part demonstrates, where the rationale for the introduction was to increase parliamentary influence on the government's EU negotiations, parliamentary reserves remain a rather ineffective instrument. However, at the same time parliamentary reserves can help to develop informal cooperation between parliament and government, both at the political and administrative level.

## **I. Scrutiny reserve systems within the Member States**

As mentioned in the introduction, explicit scrutiny reserves have been introduced in a number of other member states. Starting with the UK, where the parliamentary scrutiny reserve is a – if not the – key element of the scrutiny procedure, the following will give an overview over different domestic provisions regarding parliamentary reserves and analyse the rationale behind their establishment. The first part will outline these provisions in member states that have established explicit scrutiny systems, examining differences between member states and the extent to which the original UK reserve mechanism has served as a blueprint for institutional development. The second part will turn to the so-called mandating systems that have something of an inbuilt parliamentary reserve.

### ***1.1 Learning from the UK? Domestic Provisions on the Scrutiny Reserve***

#### **The United Kingdom: the cornerstone of parliamentary scrutiny**

The scrutiny reserve of the House of Commons (and the House of Lords) is not the oldest (see below), but certainly the most famous of the parliamentary reserve provisions. Originally based on the voluntary commitment of successive governments from 1974 on<sup>1</sup>, the reserve was first formalised by a Resolution of the House on 30 October 1980 and is currently based on Resolution of 17 November 1998. It constrains government representatives from agreeing to legislative proposals, which the European Scrutiny Committee has not cleared or which are awaiting consideration by the House, usually through a debate in a European Committee or – more rarely – on the Floor of the House. Importantly, the reserve is automatic, i.e. parliament does not have to

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<sup>1</sup> House of Commons Debate of 02 May 1974, vol 872 cc523-525; Debate of 11 June 1974, vol 874 cc1425-1552.

select the documents it wants to put under the reserve. Rather, the reserve applies to all European legislative proposals until parliament has officially cleared them.

The reserve system is a result of the debate over the consequences of EU membership on the principle of parliamentary sovereignty and can be seen as compensation for the constraints on the latter by EU integration.<sup>2</sup> The main aim of the reserve is to impose ‘a general discipline on Ministers and Departments to provide [Explanatory Memorandums], to respond to the Scrutiny Committee’s requests for information and to arrange debates in advance of consideration by the Council’.<sup>3</sup> A Minister may override a reserve, i.e. agree to a proposal before it has been cleared by parliament for ‘special reasons’, provided that he or she explains those reasons to the Scrutiny Committee at the first opportunity after deciding to give agreement. In practice Ministers do so at least by sending a letter to the Chair of the related committee.

The reserve can be regarded as the cornerstone of the scrutiny procedure and as a strong incentive for the government, both at the administrative and the ministerial level, to provide Parliament with full information on a legislative proposal. Theoretically, the right to authorise the Government to commit to a legislative proposal in the Council is an important parliamentary prerogative. Yet interviews and documents point to the fact that MPs first concern is scrutiny rather than influence. The scrutiny reserve is seen as a tool to secure time and information but not for pushing cabinet members to change their views. MPs have an important tool in their hands, but they do not use it to become a policy player. Detailed information of the negotiation process rather allows MPs to alert government on potential problems in its negotiation position at an early stage. Interviews indicate that parliament plays this role especially on ‘horizontal issues’ affecting more than one EU policy.<sup>4</sup>

And the procedure is indeed taken quite seriously both by the government and the parliament. For instance, a Cabinet Office guide on Parliamentary Scrutiny of EU Documents explains in much detail the government’s obligations and the limited circumstances under which a Minister may override the reserve.<sup>5</sup> It also provides the EU Committees of both Houses with a bi-annual report on all breaches of the scrutiny reserve. Overrides of both House of Lords and House of Commons reserves still occur fairly frequently, on 281 (House of Lords) and 299 (House of

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<sup>2</sup> A. Cygan, EU affairs before the United Kingdom parliament: a case of scrutiny as substitute sovereignty? In O Tans et al. (eds.), *National parliaments and European democracy: a bottom-up approach to European constitutionalism*, Groningen: Europa Law Publishing, 2007: 75-96. On questions of parliamentary sovereignty related to the EU see T. Hartley, *Constitutional problems of the European Union*, Oxford: Hart Publishing, 1999, pp. 123-183.

<sup>3</sup> House of Commons, *The European Scrutiny System in the House of Commons - A short guide for Members of Parliament* by the staff of the European Scrutiny Committee, April 2010, online at: <http://www.parliament.uk/documents/commons-committees/european-scrutiny/ESC%20Guide%20Revised%202010.pdf>.

<sup>4</sup> Member of the Permanent Representation of the UK, interview A by phone on 17 February 2012.

<sup>5</sup> Cabinet Office, *Parliamentary Scrutiny of European Union Documents - Guidance for Departments*, 20 April 2009, online at: <http://europeanmemorandum.cabinetoffice.gov.uk/files/parliamentary-scrutiny-departments.pdf>

Commons) occasions between January 2006 and June 2011.<sup>6</sup> However, the fact that the government is able to give precise numbers on the breaches by department tends to confirm that every breach is recorded and that the scrutiny system is taken seriously. In turn, the European Scrutiny Committee tends to investigate breaches of the scrutiny reserve very closely, even inviting Ministers to public sessions where they have to face the Committee's questions on the reserve breach.<sup>7</sup> As a Chairman of the European Scrutiny Committee of the Commons put it, 'our job is to hunt them'.<sup>8</sup> The Chairman of the European Union Committee of the House of Lords also regularly enquires about the number of breaches through formal parliamentary questions 'to bring them to the wider notice of the House and the public'.<sup>9</sup> Especially blatant instances of reserve overrides have even received broader media attention.<sup>10</sup> Overall, the attitudes towards the scrutiny reserve mirror the role of individual reputation in political careers, the great proximity between parliament and cabinet members (who remain MPs) and the highly symbolic place of parliament within the British political culture.

### **Czech Republic and Malta: the UK as the blueprint**

In the Czech Parliament, both Houses have the opportunity to place a legislative proposal under a scrutiny reserve. While the procedure in the Chamber of Deputies is, as mentioned, very similar to the one in the UK, with an automatic reserve placed on all documents under scrutiny and no time limit (§ 109b (3) Chamber Standing Rules), the rules for the Senate are more constraining. A reserve is placed on all documents under scrutiny (i.e. where parliament decides not simply to take note of it), but the decision to start the scrutiny process needs to be taken within 5 days of receipt of the document (§ 119d (1) Senate Standing Rules). In addition, the maximum period during which the government may not agree to a European legislative proposal has been set in accordance with the 8-week period stipulated in the Lisbon Treaty (§ 119d (2) Senate Standing Rules). In practice, however, the government seems willing to apply the time limit more generously: 'given the fact that the proposal must pass through at least one Committee and through the plenum, this deadline is sometimes difficult to keep, the government accepts the decision being taken later. ... According to the directive of government, the government applies

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<sup>6</sup> Lord Pearson of Rannoch in stenographic minutes, House of Lords, Wednesday 16 May 2012, column 402, online at: [www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120516-0001.htm#12051640000062](http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120516-0001.htm#12051640000062).

<sup>7</sup> K. Auel and A. Benz, *The Politics of Adaptation: The Europeanisation of National Parliamentary Systems*, *Journal of Legislative Studies* 11 (3-4), 2005.

<sup>8</sup> Interview with ESC Chairman, cited from Auel and Benz, *The Politics of Adaptation*, op. cit. fn 7, p. 382.

<sup>9</sup> House of Lords European Union Committee, *First Report, Report on 2010-12*, p. 31, online at <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/13/13.pdf>.

<sup>10</sup> For example, the override of a reserve on the EU draft council framework decision on the transfer of prisoners under Home Office Minister Joan Ryan in March 2007 was reported on both by the BBC and some newspapers.

the parliamentary scrutiny reserve if any of the chambers announces that it has yet to deal with the proposal in question”<sup>11</sup>.

The Maltese parliament has also used the UK system as a blueprint for its own scrutiny reserve. The relevant Minister may not take a definite position on a document, which has been deposited in Parliament but has not yet been cleared from scrutiny by the relevant working group of the European and Foreign Affairs Committee. As the Committee points out in its 2007 annual report, the system ‘is similar to the Scrutiny Reserve Resolution applicable in the UK House of Commons’, and as in the UK the reserve is not legally binding and can be breached in special cases, but is aimed at ensuring ‘that Ministers exercise political discipline’.<sup>12</sup>

### France: a symbolic bone for Parliament?

In France, the government’s commitment not to agree to a proposal in the Council until Parliament has completed its scrutiny was initially made in 1994<sup>13</sup> by the centre-right Balladur government at a time where the parliamentary majority was sharply divided between Maastricht supporters and opponents. It was therefore a signal by pro-EU party leaders to sovereigntist backbenchers that their concerns were taken into account. Since 1994, several directives (*circulaires*) issued by the Prime Minister have amended the initial provisions (the latest in 2010<sup>14</sup>) and have detailed the conditions under which the government has to put down a reserve, but without substantially changing the procedure. According to the current system of the *reserve d’examen parlementaire*, the government gives parliament four weeks to submit a draft resolution<sup>15</sup> on a European document – a period that has been extended to eight weeks for legislative proposals that fall under the new early warning system on subsidiarity. If a draft resolution is submitted, the government will try to postpone the decision in the Council or, if this is not possible, place the French vote under a parliamentary reserve until the resolution is formally adopted.<sup>16</sup>

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<sup>11</sup> V. Knutelská, Working Practices Winning Out over Formal Rules: Parliamentary Scrutiny of EU Matters in the Czech Republic, Poland and Slovakia, *Perspectives on European Politics and Society*, 12 (3), 2011, 320-339, p. 332.

<sup>12</sup> European and Foreign Affairs Committee, Annual Report 2007, p. 40, online at:

<http://www.parlament.mt/feacrelateddocuments?!=1>.

<sup>13</sup> Premier Ministre, Circulaire du 19 juillet 1994 relative à la prise en compte de la position du Parlement français dans l’élaboration des actes communautaires, *Journal Officiel* n°167, 21 July 1994, page 10510.

<sup>14</sup> Premier Ministre, Circulaire du 21 juin 2010 relative à la participation du Parlement national au processus décisionnel européen, *Journal Officiel* n°0142, 22 June 2010, p. 11232.

<sup>15</sup> Draft resolutions have to be dealt with first by the Commission for European Affairs, then by the relevant permanent committee. Unless a final debate and vote on the draft resolution takes place in the plenary, the decision on the resolution by the permanent committee is considered final.

<sup>16</sup> In detail, the circulaire stipulates the following: when the decision by the Council Presidency to put the legislative proposal on the agenda is made less than fourteen days before the Council meeting, the French Permanent Representation is asked to oppose this. If the Presidency drafts the agenda including the legislative proposal more than 2 weeks before the meeting, Member States are not allowed to oppose to the agenda. In this case, French representatives should nonetheless work towards a postponement of the decision or, if unsuccessful, must put a parliamentary reserve on their vote. Premier Ministre, Circulaire du 21 juin 2010, op. cit. fn 14.



Thus, rather than having a – theoretically – unlimited time for scrutiny as in the UK, Parliament is given a maximum period to complete the initial scrutiny of a proposal and to draft a resolution. After the elapse of this period, the reserve system simply ensures that parliament can complete the process of adopting (or rejecting) the final resolution. And even though the rules do not indicate a time limit for this second stage, the shared view is indeed that the whole scrutiny process should be completed within the eight (or four) week period. As the 2010 circulaire stipulates: ‘If a draft resolution has been introduced but not yet been adopted close to the end [of the eight week period], the government will inform Parliament about the schedule for adoption of the proposal’<sup>17</sup>, which implies that after the delay the European schedule takes precedence over the scrutiny rights of the Assemblée.

In addition, the system is based on a directive (‘circulaire’) of the Prime minister, i.e. a simple self-commitment of the government. Not only does it fail to create a similar sense of obligation both at the political and administrative level as in the UK, but Ministers and MPs are also not even really aware of it. It was only on one occasion, when the procedure was first established in 1994, that French MPs publicly refused to clear a document for a few days.<sup>18</sup> Overall, French MPs have mainly focussed on their right to issue resolutions on an expanded range of EU documents, or on the competences and status of the EAC. In the end, both governmental and parliamentary civil servants see the reserve as a formal procedure. They check that a minimum period has been given to both houses and cooperate actively in order to clear the reserves so that French representatives are not hampered in their negotiations in Brussels.

### **Germany: a tool for securing influence**

In Germany, the formal scrutiny reserve system was first implemented by an inter-institutional agreement between the Bundestag and the Government in 2006 and was then integrated into the ‘Act on the Cooperation between the Federal Government and the German Bundestag in Matters of the European Union’ implemented in 2009 with the Lisbon Treaty.

The provisions are twofold: On the one hand, the rules stipulate very broadly that the government shall give the Bundestag the opportunity to issue a resolution *before* participating in the decision-making process at the EU level and shall provide the Bundestag with a deadline until when parliamentary resolutions are appropriate given the EU negotiation schedule.<sup>19</sup> However,

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<sup>17</sup> Premier Ministre, Circulaire du 21 juin 2010, op. cit. fn 14, translation by the authors.

<sup>18</sup> As a result, the Council adopted the related text a few days later than initially planned. See J.-D. Nuttens, *Le Parlement français et l’Europe: l’article 88-4 de la Constitution*, Paris, Librairie générale de droit et de jurisprudence, 2001, pp. 142-144.

<sup>19</sup> ‘Vor ihrer Mitwirkung an Vorhaben gibt die Bundesregierung dem Bundestag Gelegenheit zur Stellungnahme. Hierzu teilt die Bundesregierung dem Bundestag mit, bis zu welchem Zeitpunkt eine Stellungnahme wegen der sich aus dem

while this implied scrutiny reserve applies to practically all decisions at the EU level (and is thus not limited to legislative proposals), it is rather restricted given that the scrutiny process has to fit the EU legislative schedule. So far, there is no rule obliging the government to delay a decision in the Council or to enter a parliamentary reserve if the scrutiny is not completed by the time the Council makes a formal decision.

On the other hand, the rules also state that the Government has to base its negotiations on European *legislative proposals* on the Bundestag's resolution. And if an important aspect or demand of a Bundestag resolution proves unachievable in the Council, the Government has to put down a parliamentary reserve in the Council and try to find an agreement with the Bundestag.<sup>20</sup> The purpose of the procedure is to give the Bundestag a chance to have a look at a negotiation situation where the government cannot (or does not want to) follow the resolution. In addition, it forces to government to explain itself to parliament before possibly ignoring their resolution. There is – again - no explicit rule on what happens if such an agreement cannot be found.

The current system can be understood as a compromise between the Government that wanted to preserve its room of manoeuvre during EU bargains and some political actors (in particular the CSU and the Left List) that pushed for a mandating system during the last years. It is difficult, however, to assess how the reserve procedure works in practice. Anecdotal evidence does suggest that the government does not strictly adhere to its obligation of entering reserves in cases of conflict.<sup>21</sup> In addition, internal (unpublished) monitoring reports from the Bundestag's EU administrative unit PA 1 Europe have been cited as pointing out, inter alia, a lack of information on how the Bundestag resolutions were taken into account in the Council negotiations.<sup>22</sup> Indeed, a member of the German Permanent Representation cannot remember such a reserve in the recent period in COREPER I.<sup>23</sup> That members of the Bundestag take their right to scrutinise legislative proposals more seriously, at least when these proposals are of great importance, is demonstrated by the fact that the Green Party have filed action before the Constitutional Court on the grounds that the government failed to provide the Bundestag with timely information on

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Verfahrensablauf innerhalb der Europäischen Union ergebenden zeitlichen Vorgaben angemessen erscheint.' § 9 (1) 'Act on the Cooperation between the Federal Government and the German Bundestag in Matters of the European Union'.

<sup>20</sup> The right of the Government to decide against the opinion of the Bundestag where important foreign affairs or integration issues are concerned remains untouched. Thus, legally the resolutions of the Bundestag remain non-binding, and the parliamentary reserve put down by the government will only postpone the governmental decision in the Council to find an agreement with the Bundestag.

<sup>21</sup> For example, in March 2009 the Greens criticised that the government failed to enter a parliamentary reserve and to try to find an agreement with the Bundestag in the case of the negotiations on emission trading despite the fact that very specific parliamentary demand could not be achieved, see Bündnis 90/Die Grünen, Zwei Jahre Europa-Vereinbarung – Bundesregierung muss ihre Verpflichtungen unverzüglich vollständig erfüllen, Bundestagsdrucksache 16/12109, 4 March 2009; The point is also made more broadly in: CDU/CSU, SPD und FDP, Vereinbarung über Zusammenarbeit in Angelegenheiten der Europäischen Union ist einzigartig in Europa – Auslegungsfragen müssen geklärt, noch bestehende Defizite beseitigt werden, Bundestagsdrucksache 16/13169, 27 May 2009.

<sup>22</sup> For example, Bundestag Plenary Debate, 224. Session, 28 May 2009, online at: [dipbt.bundestag.de/dip21/btp/16/16224.pdf](http://dipbt.bundestag.de/dip21/btp/16/16224.pdf).

<sup>23</sup> Member of the Permanent Representation of Germany, interview B by phone on 6 February 2012.

both the EMS and the ‘Euro Plus Pact’ (and thus, implicitly, with the opportunity to scrutinise these proposals) before the relevant meetings of the European Council. In its decision of 19 June 2012<sup>24</sup>, the Court decided for the claimants, and while it did not specify the rules regarding the scrutiny reserve any further, it did reaffirm the Bundestag’s right to receive information in time to scrutinise EU issues fully and publicly before the government made any binding decision.

### **Italy: A tool for the government?**

In Italy<sup>25</sup>, the scrutiny reserve system was first introduced in 2000. While Parliament demanded a procedure explicitly modelled on the UK system, the government only agreed to a watered down version (Art. 6 of Law 422/2000): The government was obliged to indicate explicitly the expected date of the adoption of a legislative proposal and unable to express the formal Italian position on the proposal before that date. This did not, however, prevent the government from committing itself in ‘preliminary agreements’. If Parliament had not indicated its opinion on the proposal before the relevant Council meeting, the government was free to vote on the proposal. No minimum time limit was agreed for parliamentary scrutiny (and thus there was no obligation from the government to enter a reserve at any time), but at least parliament was informed about the schedule at the EU level and able to organise the scrutiny process accordingly. In 2005, the process underwent a reform, mainly due to conflicts over the European Arrest Warrant.<sup>26</sup> According to Art. 4 of the Stucchi-Buttiglione Law (Law 11/2005), once parliament has started the scrutiny process of a legislative proposal, it can request that the government enter a parliamentary reserve in the Council. Interestingly, the Government also has the option to enter a reserve on its own initiative and inform Parliament about this action, thereby ‘implicitly inviting [Parliament] to offer its views on the subject matter’.<sup>27</sup> In both cases, Parliament is given a period of 20 days to issue a resolution, a period that starts as soon as the government has informed Parliament that it has entered a scrutiny reserve on the document. According to Bindi, the new procedure can be seen as an illustration of the government’s changed attitude towards parliamentary scrutiny in EU affairs: ‘The parliament is no longer seen as an antagonist but as an ally, and its control is not an unwelcome interference but a tool to reinforce the quality and effectiveness of the Italian position within Council negotiations’.<sup>28</sup> Still, so far the system does not seem very effective, especially as the responsible standing committees have found it difficult to adapt to the short period provided for the scrutiny process.

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<sup>24</sup> BVerfG, 2 BvE 4/11, 19.6.2012, online at: [http://www.bverfg.de/entscheidungen/es20120619\\_2bve000411.html](http://www.bverfg.de/entscheidungen/es20120619_2bve000411.html).

<sup>25</sup> On the following see F. M. Bindi, *Italy and the European Union*, Brookings Institution Press, Washington, 2011, pp. 99-101; D. Giroto, *Parliamentary Procedures in Italy concerning EU drafts and Community Law Implementation*, UNIDEM Seminar "European Integration – Constitutional and Legal Reforms", Trieste, 10–13 September 2007.

<sup>26</sup> F. Impalà, *The European Arrest Warrant in the Italian legal system Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice 1 (2)*, 2005, 56-78.

<sup>27</sup> Bindi, *Italy and the European Union*, op. cit. fn 25, p. 100.

<sup>28</sup> Bindi, *Italy and the European Union*, op. cit. fn 25, p. 100.

## The Netherlands: an early warning system

Contrary to popular belief, it was not the UK parliament, but the Dutch Tweede Kamer that established the first scrutiny reserve in January 1967 in its first ever parliamentary resolution: The House, (...) judges that the Dutch Government shall not agree to definitive decisions in the Council on Community measures concerning the size and distribution of the tax burden unless it has previously consulted the Dutch Parliament.<sup>29</sup> However, the reserve system does not seem to have had much impact. Indeed, ‘important as this precedent may be for the history of European integration, it has largely been forgotten in the Netherlands itself.’<sup>30</sup>

In 2009, the Dutch Parliament established the current scrutiny reserve system.<sup>31</sup> Until then, something of a scrutiny reserve existed for the ‘Third Pillar’ of the EU, as decisions on Justice and Home Affairs (later Police and Judicial Cooperation in Criminal affairs) required the consent of the Dutch Parliament. When the pillar structure was abolished with the Lisbon Treaty, the Dutch Parliament decided to retain the ‘consent procedure’ only for a narrow range of issues legislated at the EU level under the consultation procedure – and thus outside of the ordinary co-decision procedure. Instead, the current scrutiny reserve system was established: Whenever the Tweede Kamer<sup>32</sup> finds a ‘European legislative proposal to be of such importance that it wants to be accurately informed and updated of all steps taken by the government in the negotiation process’<sup>33</sup>, the government is obliged to send an explanatory memorandum (fiche) on the proposal within three weeks of its publication. If parliament then decides, within two months after the publication of a proposal, to place the document under a scrutiny reserve, the government is also obliged to enter a parliamentary reserve in the council negotiations. Once the scrutiny reserve has been formally approved by the plenary, the Tweede Kamer has four weeks to scrutinise the proposal and to consult with the government, generally in the form of a debate with the responsible minister in the relevant standing committee, upon which the reserve is lifted. Although any legislative proposal can be subject to a scrutiny reserve, the aim of the system is to filter out important proposals as early as possible. Each year, based on proposals from the Standing Committees and coordinated by the EAC, the Tweede Kamer draws up a list of prioritised legislative proposals from the European Commission’s legislative and working program, indicating which proposals may be subject to a scrutiny reserve or a subsidiarity check. Thus, in late 2011, the Dutch Parliament examined the European Commission’s Work Program for

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<sup>29</sup> Cited from L. F.M. Besselink and B. van Mourik, *The Parliamentary Legitimacy of the European Union: The Role of the States General within the European Union*, *Utrecht Law Review* 8 (1), 2012, 28-50, p. 31.

<sup>30</sup> Besselink and van Mourik, *op. cit.* fn 29.

<sup>31</sup> On the following Besselink and van Mourik *op. cit.* fn 29, Davor Jancic, *Caveats from Karlsruhe and Berlin: whither democracy after Lisbon*, *Columbia Journal of European Law* 6 (3), 2010, 337-384.

<sup>32</sup> The procedure in the Eerste Kamer is rather similar, see references in fn 29.

<sup>33</sup> Dutch House of Representatives: List of prioritized proposals from the European Commission’s 2012 Work Programme, online at: [http://www.tweedekamer.nl/images/EU\\_Scrutiny\\_2012\\_118-228129.pdf](http://www.tweedekamer.nl/images/EU_Scrutiny_2012_118-228129.pdf).

2012, pre-selecting 7 documents for the subsidiarity check and 12 documents for the parliamentary reserve.<sup>34</sup> The procedure can thus also be understood as an early warning system that helps the Tweede Kamer to signal to the government which documents MPs expect to be of high salience.

## ***1.2 Mandating systems: the (usually) inbuilt reserve***

The overview would remain incomplete without a look at what could be called the strictest, albeit usually implicit, scrutiny reserve, namely the mandating systems. The Danish scrutiny system is famous for the ability of the European Affairs Committee of the Folketing to mandate the negotiating minister, or rather to accept or amend the negotiation strategy presented by the minister before the EU committee. The mandating takes place in a meeting of the EAC at least one week prior to the Council meeting and usually applies to European issues of ‘major importance’<sup>35</sup>, although the latter is interpreted broadly. On average, the government requests a mandate on about one third of all legislative proposals.<sup>36</sup>

At the domestic level, the mandating system implies that the government minister cannot agree to a legislative proposal until s/he has received a parliamentary mandate. The system thus has not an explicit, but an in-built, scrutiny reserve. At the European level, this means accordingly that a minister will enter a parliamentary reserve in two cases: first, at the level of COREPER if the government plans to obtain a negotiation mandate for the final decision in the Council and second, at the level of the Council if the government needs to adapt its original negotiation position and thus needs to ask for an altered mandate from the EAC.

Similar systems can be found in Austria, Estonia, Finland, Lithuania, Poland, Slovakia, Slovenia and Sweden. As in the Danish Folketing, the reserve is usually implicit, while parliamentary Standing Rules or other relevant documents do not contain any formal rules on a parliamentary reserve. As a result, it is difficult to obtain information on the obligation of their governments to enter parliamentary reserves in the Council bodies and on how this is handled in practice. Although our interviews indicate that the Polish government, for example, has recently entered parliamentary reserves fairly frequently at the COREPER level, ‘the Sejm does not control whether the government does so [enter a reserve] before the Sejm’s Committee has adopted an opinion’.<sup>37</sup>

Only in Lithuania have we found more explicit rules. Here, parliament can put a proposal under a scrutiny reserve until the national position ‘is co-ordinated with the Seimas of the Republic of

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<sup>34</sup> Dutch House of Representatives: List of prioritized proposals, op.cit. fn 33.

<sup>35</sup> Folketing, The European Affairs Committee of the Folketing – Parliamentary control of government policy in the EU, Copenhagen, Folketing, 2010.

<sup>36</sup> D. Finke and M. Melzer, Parliamentary Scrutiny of EU Law Proposals in Denmark: Why do Governments request a Negotiation Mandate? Institute for Advanced Studies, Vienna, Political Science Series, 127, 2012.

<sup>37</sup> Knutelská, Working Practices Winning Out over Formal Rules, op. cit. fn 11, p. 332.

Lithuania' (Art. 180-18 1. Statute of the Seimas) and thus for example in cases of conflict with the government over the national negotiation position, but also if parliament feels that EU issues 'call for deeper and broader debates with the public and social and economic partners'.<sup>38</sup>

In Hungary, in contrast, Article 4 (6) of the 'Act on the cooperation of the Parliament and the Government in European Union affairs' even rules out the possibility of a parliamentary reserve, at least beyond the eight-week period guaranteed by the Lisbon Treaty: 'If the Parliament fails to adopt a standpoint concerning the position of the Government by the deadline required by the European Union's agenda for decision-making, the Government will decide in its absence on the position to be represented in the decision-making process of the European Union.'

As this first section shows, the UK scrutiny reserve provision has been something of a model or inspiration for provisions in other member states, but, only the Czech Chamber of Deputies and the Maltese House of Representatives have copied the formal obligation of the government not to agree to a legislative proposal in the Council until parliament has cleared the proposal, i.e. until a point in time decided by parliament. In most of the member states that follow this system, parliaments are rather granted a limited period during which the reserve applies. In addition, France, Germany, the Netherlands, and Italy all have implemented provisions somewhat similar to and often inspired by the UK model, but with specific national characteristics. Here, we find innovative changes, such as the pre-selection of documents to be placed under scrutiny on the basis of the Commission's annual program in the Netherlands, which turns the provision into a kind of 'early warning system' for both, the parliament and the government.

While the rationale for most scrutiny provisions has mainly been to provide adequate time and information for parliamentary scrutiny, some provisions, such as the German one, but especially the mandating systems, mainly aim at securing parliamentary influence on the government's negotiation position. Those systems, where parliaments can bind the government to a specific negotiation mandate, usually contain only implicit provisions for the scrutiny reserve. Here, it clearly makes a difference whether the government is *obliged* to obtain a mandate – at least on important proposals – as in Denmark, or whether the government is bound to a parliamentary resolution only if parliament actually issues one. In the latter case, the lack of a formal reserve provision leaves open the question to what extent the government can engage in negotiations at the EU level before parliament has expressed an opinion. Finally, although mandating systems strengthen the position of parliaments in EU affairs (at least in theory, if not always in practice) a potential drawback compared to the explicit scrutiny provisions above is that parliamentary scrutiny basically has to follow the EU legislative schedule. Mandates have to be given before the

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<sup>38</sup> Seimas of the Republic of Lithuania (without year), Parliamentary scrutiny of European Union matters in Lithuania, online at: <http://www.eic.lrs.lt/index.php?1650178686>.

final adoption of a proposal in the Council regardless of when this decision takes place. Parliaments with specific scrutiny reserves, in contrast, usually have an – albeit often short – guaranteed period for scrutiny. In addition, at least some parliaments have the possibility of upholding a scrutiny reserve until and beyond the final decision in the Council if they have not finished their scrutiny. In practice, this difference, however, may not be all that important given that overrides are possible in both systems, and that parliamentary majorities usually have no interest in tying the hands of their governments and weaken the member state's influence in the Council negotiations.

## 2. Reserves in the Council in practice

Domestic procedures related to the scrutiny reserve tell us little, of course, about their actual impact on the negotiations at the EU level, which depends not only on the rules governing the use of reserves in EU negotiations, but also on the incentives for national government representatives to employ and adhere to them. In this section we will therefore first look at the provisions for parliamentary scrutiny at the EU level including the eight-week scrutiny period accorded to national parliaments under the Early Warning System of the Lisbon Treaty. We will then discuss the formal provisions and procedures for parliamentary and other reserves in COREPER or Council negotiations, followed by a discussion of the actual impact parliamentary reserves have on governmental negotiations. Finally, we will assess parliamentary reserves as a means to strengthen domestic executive-legislative cooperation in EU affairs.

### 2.1. The eight-week period: an 'EU reserve'

The idea that national parliaments should be given sufficient time to scrutinise EU draft legislation has been progressively acknowledged at the EU level. In 1999, the Amsterdam Treaty protocol on national parliaments introduced the first minimum scrutiny period by stipulating that a period of six weeks should be respected between the proposal of the Commission and the meeting of the Council<sup>39</sup>. Ten years later, Article 4 of the 'Protocol on the Role of National Parliaments' of the Lisbon Treaty reaffirmed and expanded this rule:

*'An eight-week period shall elapse 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 agenda for the Council for its adoption or for adoption of a position under a legislative procedure. [...] Save in urgent cases for which due reasons have been given, a ten-day period shall elapse between*

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<sup>39</sup> More precisely: a minimum period of six weeks must elapse between the Commission's adoption of a legislative proposal and the date when that proposal can be placed on the Council's agenda for the adoption of a common position or for its adoption as a legislative act.



*the placing of a draft legislative act on the provisional agenda for the Council and the adoption of a position’.*

This provision can be seen as an institutional transfer of domestic provisions to the EU level. Indeed, the first ‘reserve’ of six weeks included in the Amsterdam Treaty Protocol originated from a proposal of the UK House of Commons in 1995.<sup>40</sup> Beyond the fact of granting a minimum scrutiny period, the provision implicitly supports the view that the relevant moment for national parliaments to look at EU documents is early in the EU decision-making process. It legitimates the idea, repeatedly expressed by political and academic actors, that to express views late in the process is inefficient in terms of impact.

However, this provision is rather symbolic since it does not have much effect on the regular Council procedures. First, apart from the provisions for a minimum period during the decision-making process, the treaties and protocols say nothing about the practice of parliamentary reserves by individual Member States at the level of the Council of ministers. Clearly, the issue is regarded as a domestic one - that is, a matter of national sovereignty - and thus as relevant to the political and coordination processes within the member states.

Second, this provision is rather symbolic since it does not have much impact on the regular Council procedures. The European legislative process takes time and always lasts months. For instance in the case of co-decision, even legislative proposals adopted after the first reading (which tend to become the norm<sup>41</sup>) take around 14 months to conclude<sup>42</sup>. Providing national parliaments with eight weeks for scrutiny therefore do not come at a great cost for national governments and EU institutions. However, what is more relevant for national parliaments, is how soon after the submission of a Commission proposal deliberations start in the Council’s preparatory bodies, the Working Groups and COREPER, and how soon informal (i.e. not yet final) agreements are found on a proposal or decision. In the case of early agreements, the crucial negotiations take place in private long before the Council of Ministers reaches its common position. Although we lack clear data, it can be assumed that the time period during which parliaments can have a potential impact is thus far shorter.

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<sup>40</sup> A. Cygan, *The Role of National Parliaments in the New Constitutional Order*, in T. Tridimas and P. Nebbia (eds), *EU Law for the 21st Century: Rethinking the New Legal Order*, 154 -169, p. 158

<sup>41</sup> O. Costa, R. Dehousse, A. Trakalova, *La codécision et les accords précoces: progrès ou détournement de la procédure législative ? Notre Europe* 84, 2011.

<sup>42</sup> Data covering 1999-2008. See the Memorandum by the Council of the EU, 20 April 2009, submitted to the House of Lords European Union Committee for its 17th Report of Session 2008-09 on Co-decision and National Parliamentary Scrutiny, 21 July 2009, p. 87 (annexe). Toshkov and Rasmussen also calculated that the average duration for non-trivial first reading agreements was 11.2 months. See D. D. Toshkov, A. Rasmussen: *Time to Decide: The Effect of Early Agreements on Legislative Duration in the European Union*. European Integration online Papers (EIoP), 16 (11), 2012, pp. 14-15. Online at: <http://eiop.or.at/eiop/texte/2012-011a.htm>.



## 2.2. The procedure in COREPER and Council meetings

As mentioned in the introduction, governments can enter a number of different reserves on EU documents:

*'In the Council informal practice, Council members usually characterise their "reserves" by an adjective, the purpose of which is to give some indication to other Council members of the nature of their reserve. There are "waiting reserves", "scrutiny reserves", "substance reserves", "linguistic reserves" and "parliamentary reserves". The latter indicates that the delegation in question has triggered its national internal procedure of associating its national parliament to the process'.<sup>43</sup>*

However, the whole system of reserves and their actual use in the Council or COREPER, and this includes parliamentary reserves, is somewhat shrouded in mystery due to both the lack of public information and the prevalence of informal practices. In 2002, the General Secretariat of the Council indicated: 'The Council Secretariat does not keep statistics about reserves, which are of a transitory nature'<sup>44</sup>. Yet in 2009, the Secretariat did make the following available to the British House of Lords:

**Table I** Number of parliamentary reserves on files conducted under the co-decision procedure during the 45 COREPER I meetings of 2008

France	UK	Denmark	Malta	Slovakia	total
27	11	6	1	1	46

Source: General Secretariat of the Council of the EU<sup>45</sup>

The figures show that, on average, a parliamentary reserve was entered once per meeting of the COREPER I, which indicates that it cannot be regarded as a marginal procedure, at least in terms of the frequency of use by some member state governments. For the more recent period, an experienced official of the Council estimated that in the COREPER I Polish and French representatives use this procedure often, British, Danish and Dutch representatives once in a while and German officials only very rarely.<sup>46</sup>

<sup>43</sup> Information from the General Secretariat of the Council, Working group IV, working document 33, European Convention, 8 October 2002, p.5.

<sup>44</sup> Information from the General Secretariat of the Council, op. cit. fn 43, p. 5. Our repeated requests for updated data on the use of parliamentary reserves, however, also received the reply that such data was not collected by the Secretariat.

<sup>45</sup> Memorandum by the Council of the EU, op. cit. fn 42, p. 88.

<sup>46</sup> Senior Official, Council General Secretariat. Interview C by phone, 24 and 26 January 2012. For the EU-15, Cygan mentions the UK, Denmark, Sweden and The Netherlands as the most frequent users of the scrutiny reserve, and Greece, Portugal and Pain as the most infrequent, see A. Cygan, The Role of National Parliaments, o. cit. fn 40, p. 160.

What does putting down a parliamentary reserve by a national civil servant or a minister actually mean? Reserves are communicated by the delegations in writing in the preparation of COREPER, in the so-called Mertens and Antici groups. These notifications of reservations are then used by the General Secretariat to compile a list that is read out at the beginning of the COREPER meeting. At the COREPER meetings, reserves or even parliamentary positions as such are rarely mentioned during the discussion themselves - especially since the 2004 enlargement, the negotiations between 27 member states are too formalised to leave much space for explanations.<sup>47</sup>

The main rationale of entering a reserve is to inform the other negotiation partners about ongoing domestic consultation on a proposal. As such, it has no immediate consequences regarding the negotiation process. This is underlined by the fact that up to and including the COREPER level reserves do not prevent the representative of the Member State from bargaining and even from accepting a political agreement, which is de facto binding for the member state, even if the proposal is formally adopted in the Council only after the parliamentary reserve is lifted (see below).<sup>48</sup> Even in the UK, where the reserve procedure is strictly applied, an official memo explains: 'At levels below the Council, it is acceptable for the Government, if content with the document, to indicate general agreement subject to the Parliamentary reserve'.<sup>49</sup>

The consequences of parliamentary reserves in the following stage of the Council proceedings are less clear. According to the General Secretariat of the Council, a 'parliamentary reserve, like all other types of reserves, if not lifted by the member concerned, counts, *according to the Council's Rules of Procedure*, as a "no" vote'.<sup>50</sup> However, the 2009 Rules of Procedure of the Council do not, in fact, mention reserves of any kind.<sup>51</sup> This was also confirmed by a former member of the Council Secretariat.<sup>52</sup> The only provision on reservations can be found in the Comments on the Rules of Procedure of 2000, an internal document from the General Secretariat, which stipulates that:

*'A member of the Council may wish to receive confirmation from his/her national authorities of the position to be adopted or the internal formalities for defining the position may not be completed. He/she will then enter a reservation which may subsequently be withdrawn; the reservation must be withdrawn*

<sup>47</sup> S. Hagemann and J. De Clerck-Sachsse, *Old Rules, New Game. Decision-Making in the Council of Ministers after the 2004 Enlargement*, CEPS Special Report, Brussels, p. 12.

<sup>48</sup> R. Zbíral, *Expressing Disagreement in the Council of the European Union*, *Contemporary European Studies* 1/2008, 40-62, p. 52.

<sup>49</sup> Cabinet Office, *Parliamentary Scrutiny of European Union Documents*, op. cit. fn 5, p. 59.

<sup>50</sup> Memorandum by the Council of the EU, op. cit. fn 42, p. 87, italics added.

<sup>51</sup> Council Rules of Procedure 2009, online at: [eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:325:0035:0061:en:PDF](http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:325:0035:0061:en:PDF). Working Group IV of the Convention on the Future of Europe dealing with the role of national parliaments had indeed recommended in its final report that parliamentary reserves be given a clearer status in the Council's rules of Procedure, a recommendation that has obviously not been implemented. Report online at: <http://register.consilium.europa.eu/pdf/en/02/cvoo/cvoo353.eno2.pdf>.

<sup>52</sup> Former Director, Legal Service, Council General Secretariat. Interview D by phone, 8 February 2012.

*during the same [Council] meeting. If at the end of the meeting the reservation is not withdrawn and the required majority has therefore not been achieved, the item is not adopted. It is deleted from the provisional agenda and added to the provisional agenda of another meeting.*<sup>53</sup>

Thus, a reserve does not prevent the Presidency to place an item on the Council agenda – even as an A point.<sup>54</sup> It does, however, seem to prevent the government representative from agreeing to a proposal on the day of the Council meeting, even if this is not a strictly formal rule. If this threatens to be the case, national representatives, Council Secretariat and the Presidency work closely together, either to clear a reserve before the scheduled Council meeting, or alternatively to reschedule the dossier at a later meeting.<sup>55</sup> According to the General Secretariat of the Council: ‘When such a [parliamentary] reserve is raised, the practice is to try to accommodate the delegation concerned by delaying the final adoption of the act in question’.<sup>56</sup> As a result, the reserve may delay the decision on a dossier for two to three weeks. While this suggests that reserves are taken seriously and not easily breached, such a rather short delay does not have much of an impact on the full legislative process, and even less so on the content of the final act, according to Council actors.

Yet it also happens that the final adoption cannot be delayed. This can be the case at the end of the year when decisions need to be taken for the coming one, for instance regarding fishery quotas. In addition, government representatives may find themselves with an open parliamentary reserve on the day of the Council decision if Parliament refuses to clear a proposal, but also if ‘somebody simply overslept’<sup>57</sup>, or in phases in which the coordination with the competent parliamentary committee at home is especially difficult to organise, e.g. in times when parliament is in recess.<sup>58</sup> Government representatives then need to decide whether to uphold the parliamentary reserve or to override it. If they decide to uphold the reserve, they cannot agree to a proposal, but have to at least abstain. Under unanimity vote, abstention is not counted as a no vote. Under qualified majority vote, abstention is counted as a no vote, but this is unlikely to have an impact unless majorities are very narrow. The mere fact that a legislative proposal *can* be adopted under QMV even if one or more member states have placed a parliamentary reserve, whereas it *cannot* be adopted if a linguistic reserve has been entered<sup>59</sup>, indicates that the

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<sup>53</sup> COUNCIL GUIDE, Internal document, II. Comments on the Council’s Rules of Procedure, - September 2000 - General Secretariat, DG F — Information Policy, Transparency and Public Relations, p. 22, online available at: <http://aei.pitt.edu/8824/1/8824.pdf>.

<sup>54</sup> Interview B. Interestingly, the practice is very different from interpretation in the British Guide on scrutiny reserves: ‘The effect of placing a scrutiny reserve (in the Council sense) should be to prevent the Presidency putting the item to the Council as an ‘A’ point’. Cabinet Office, Parliamentary Scrutiny of European Union Documents, op. cit. fn 5, p. 57.

<sup>55</sup> Member of the Permanent Representation of France. Interview E by phone, 6 February 2012.

<sup>56</sup> Information from the General Secretariat of the Council, op. cit. fn 44, p. 5.

<sup>57</sup> Interview C.

<sup>58</sup> Interview A.

<sup>59</sup> A ‘linguistic reserve’ means that the document is not available in all official languages. ‘Except as otherwise decided unanimously by the Council on grounds of urgency, the Council shall deliberate and take decisions only on the basis of

parliamentary scrutiny of governments is considered as a purely domestic procedure with only little direct impact on the Council proceedings.

Given the lack of empirical information on the actual use of reserves, it is difficult to assess how often the Council adopts a measure even though a parliamentary reservation is upheld, i.e. where the government decides not to override the domestic scrutiny reserve and to lift the reserve in the Council. A member of the Council Secretariat from 1992 to 2009 only remembers two - unspecified - occasions when the Council took decisions even though a member state upheld a parliamentary reserve.<sup>60</sup> A member of the British Permanent Representation mentions two cases for the period since 2010: the Comitology decision in February 2010 and an EU-Mozambique fisheries agreement in January 2011, where the UK representative had to (or rather decided to) abstain due to an upheld reserve.<sup>61</sup> In these examples, the government was in favour but knew that the text would be approved without its support anyway. This, of course, is not new. Using abstentions in the Council when it does not have any negative consequences is a classic strategy.<sup>62</sup>

### **2.3. A marginal procedure in the Council negotiations**

MPs and clerks often stress that they can support their government in the Council by scrutinising EU documents<sup>63</sup>, and there is indeed some anecdotal evidence that government representatives use parliamentary resolutions or mandates to strengthen their bargaining position: in our interviews, officials explained that they may use parliamentary positions in the Working Groups if they are useful for them to back up their point of view.<sup>64</sup> A member of the Italian Permanent Representation even says that he regularly goes through the reasoned opinions on subsidiarity sent to the Commission to have them as background information for the negotiations in the working group.<sup>65</sup>

The above seems to support Schelling's 'paradox of weakness', further developed by Putnam's two level game theory, which postulates that international-level negotiators can use their domestic constraints strategically to exert concessions from their negotiation partners.<sup>66</sup> And indeed, a number of studies have shown that domestic ratification constraints (e.g. referendums or

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documents and drafts drawn up in the languages specified in the rules in force governing languages' (Art. 14.1 of the Council's Rules of Procedure).

<sup>60</sup> Interview D.

<sup>61</sup> Interview C.

<sup>62</sup> Golub, Jonathan, *In the Shadow of the Vote? Decisionmaking in the European Community*, International Organization, 53, 1999, pp. 733-64.

<sup>63</sup> See for example interview material in R. Holzhaecker, *National Parliamentary Scrutiny over EU Issues Comparing the Goals and Methods of Governing and Opposition Parties*, *European Union Politics* 3 (4), 2002, 459-479.

<sup>64</sup> Interview A, B, E, and Member of the Permanent Representation of Italy. Interview F by phone, 6 February 2012.

<sup>65</sup> Interview F.

<sup>66</sup> Th. C. Schelling, 1960, *The strategy of conflict*. Cambridge, Massachusetts, Harvard University Press; R. D. Putnam, *Diplomacy and Domestic Politics - The Logic of Two-Level Games*, *International Organization* 42 (3), 1988, 427-460.

parliamentary ratification) can have an impact on the negotiations during EU summit meetings or Treaty negotiations.<sup>67</sup> The same, however, is not the case for legislative negotiations in the Council of the EU, where research has shown that parliamentary constraints play a minor role during bargaining.<sup>68</sup> In a recent study by Johansson, for example, only a minority of permanent representatives interviewed were willing to signal parliamentary constraints in the negotiations and considered them useful to demonstrate the importance of a particular issue while at the same time being ‘careful not to become annoying’.<sup>69</sup>

According to Johansson

*‘Most respondents acknowledged that the counterparts’ positions were considered but did not attach any particular importance to the domestic constraints of other parties... Partly for the same reasons that some respondents would not signal domestic constraints, they would recognise that signalling from others would not matter as they all have domestic situations and interests to deal with. [Only] two respondents said that when someone is referring to the national parliament it gives certain weight to the argument but maintained that it is other factors that determine what action that is taken.’<sup>70</sup>*

As our interviews indicate, this is certainly the case for parliamentary scrutiny reserves. First, a scrutiny reserve as such is not a parliamentary statement on the content of a legislative proposal and thus cannot be used to back up a governmental position. Rather, the reserves simply indicate that parliament has not yet completed the scrutiny process. As indicated in a report by the House of Lords

*‘It is important to stress here that the Reserve is not a device requiring Ministers to agree with the Committee. Hence a proposal which we have considered, to which we have strong objections, but on which we have completed scrutiny, would not be subject to a reserve. Any proposal which we are still considering, however, even if we have no objection to it, remains subject to a reserve.’<sup>71</sup>*

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<sup>67</sup> S. Hug and Th. König, In view of ratification: Governmental preferences and domestic constraints at the Amsterdam Intergovernmental Conference, *International Organization* 56 (2), 2002, 447-476; J. B. Slapin, Who Is Powerful?: Examining Preferences and Testing Sources of Bargaining Strength at European Intergovernmental Conferences, *European Union Politics* 7 (1), 2006, 51-76.

<sup>68</sup> S. Bailer and G. Schneider, 2006, Nash versus Schelling? The Importance of constraints in legislative bargaining, in R. Thomson (ed.), *The European Union decides*, Cambridge: Cambridge University Press, 153-177; G. Schneider, D. Finke and S. Bailer, Bargaining Power in the European Union. An Evaluation of Competing Game-theoretic models, *Political Studies* 58 (1), 2010, 85-103.

<sup>69</sup> Markus Johansson, Behavioural effects of Domestic Constraints in EU Council Negotiations’, Paper presented at the ECPR general conference, Reykjavik 25-27 August 2011, page 18.

<sup>70</sup> Markus Johansson, Behavioural effects of Domestic Constraints, op. cit. fn 69, p. 19.

<sup>71</sup> House of Lords, 1st Report of the Select Committee on the European Union - Review of Scrutiny of European Legislation with Evidence, 3 December 2002, p. 18, online at: <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldecom/15/15.pdf>.

However, theoretically government representatives could, of course, use parliamentary reserves to influence the content of the negotiations by indicating that their own parliament will only lift a reserve once specific parliamentary demands have been met. As mentioned above, a parliamentary reserve that is not lifted could hamper the decision making process in the Council – at least with regard to decisions under unanimity or where qualified majorities are very narrow. However, there are rather few parliaments that can uphold a scrutiny reserve indefinitely and thus until disagreements over the domestic negotiation position are settled. As outlined above, most reserves systems have a built-in deadline. In addition, domestic rules on parliamentary reserves reserve a right for the government to override a parliamentary reserve in cases of urgency and/or to safeguard important national interests. And as our interview partners indicated, explaining during negotiations in COREPER or the Council that the government finds itself in difficulties with its parliament on a given issue may actually lower the bargaining position of the representatives. Where domestic parliaments can put strong constraints on the government, such as in Denmark, it could indicate that the representatives are as yet unable to make credible commitments. In most cases, however, mentioning problems in Parliament will simply not be considered a credible claim.<sup>72</sup> This is powerfully illustrated by the fact that the Finnish government even decided not to use the term ‘parliamentary reserve’ at all. Despite a mandating system similar to the Danish one, ‘the Government has indicated that it does not use so called “parliamentary scrutiny reserves” in the Council, since the latter is often interpreted as if the Government agreed with the proposal and it had no substantial objection against political agreement’.<sup>73</sup> The Finnish Parliament has accepted this practice, realising that the important issue is ‘that the influence of the Parliament is secured by keeping the question de facto open until the national position is fully formulated’.<sup>74</sup>

This should not imply that parliamentary reserves are *never* a useful tool in the negotiations. As Bindi points out regarding the introduction of the scrutiny reserve system in Italy: ‘Legend has it that Rocco Buttiglione [minister for EU policies in the Berlusconi II government] noticed at a certain point that the wise use of certain forms of parliamentary scrutiny reserve could be very useful for the negotiating delegations; he thus began acting as if Italy had one too, and then began working on a law that would actually allow Italy to use the parliamentary scrutiny tool’.<sup>75</sup>

In general, however, our impression is that government representatives may mention a parliamentary resolution to support their views but tend to avoid presenting a parliamentary reserve as a matter of domestic problems. Thus, if mentioned at all, the typical claim seems to be

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<sup>72</sup> Interview D.

<sup>73</sup> Paper by Kimmo Kiljunen, Working group IV, working document 16, European Convention, 22 July 2002, p. 4.

<sup>74</sup> Paper by Kimmo Kiljunen, op. cit. fn 73.

<sup>75</sup> Bindi, Italy and the European Union, op. cit. fn 25, p. 100.

‘my parliament is behind me’ rather than ‘I still need to sort out trouble with my parliament’. According to our interviews, representatives therefore usually simply inform their colleagues of the fact that their reserve has a parliamentary origin.

Within the domestic arena this does not, however, prevent governments from presenting reserves as a serious obstacle to their negotiation aims, especially when having to explain scrutiny overrides to their parliamentary committees. As Michael Meacher (former British environment minister) argued out in a public evidence session of the House of Commons European Scrutiny Committee:

*‘All that I would say is that, if I had maintained the reserve, which, in principle, there is absolutely no question I would prefer to have done, and that is and will remain the situation, but if I had done so in these unusual circumstances, in the face of other Member States voting under Qualified Majority Voting, I do believe it would have severely damaged our reputation as a strong supporter of the emissions trading.’<sup>76</sup>*

While parliamentary reserves can thus hardly be used to influence the content of a decision in the Council, they can be useful to delay a decision.<sup>77</sup> The emphasis in the Lisbon Treaty on the strengthened role of national parliaments provides governments with a strong normative argument that can be used to delay or slow down the decision-making process. According to a member of the British Permanent Representation,

*‘In a Transport Council last year [2011], on a dossier on trans European networks that the Polish presidency wanted to push, we evoked the spirit of the protocols on parliamentary involvement and subsidiarity to argue that this was going too quickly. The proposal had only been tabled one month before the Council. We used this argument three times during the last twelve months and we are not the only government doing this.’<sup>78</sup>*

The impression is that while reserves are not seen as a serious obstacle to the bargaining process as such, the fact that some representatives have to negotiate under parliamentary scrutiny reserves is generally respected. As a UK Permanent Representative put it, ‘People recognise it is ultimately a job for the Presidency and the Secretariat to record and observe scrutiny reserves. I have not detected a sense in which there is a lack of sympathy or understanding for what is

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<sup>76</sup> House of Commons, Uncorrected Evidence presented by Rt Hon Michael Meacher MP on 6 November 2002 - Scrutiny Reserve Breaches, HC 1308-I.

<sup>77</sup> Examples are difficult to find, but see Jörg Monar, Justice and Home Affairs, *Journal of Common Market Studies* 46, Annual Review 2007, 109–126.

<sup>78</sup> Interview A.



involved.<sup>79</sup> Still, he also pointed out that representatives may come under quite some pressure to lift the reserves when the Presidency or a group of member states push for a quick decision:

*‘Particular cases do arise; one which obviously created difficulties with your Committee was over the Arrest Warrant (...) where the Heads of Government gave Ministers in the Justice and the Home Affairs Council, and those of us who work for them, a very clear mandate (...) to get a set of legislative measures agreed, if possible, by a certain deadline.’<sup>80</sup>*

As Cygan argues, the system of rotating presidencies often leads to presidencies producing an ‘artificial peak of activity towards the end of each six-month period as Presidencies apply political pressure to ensure agreement in priority policy areas’.<sup>81</sup> What has been pointed out as problematic in this regard, is that not all member states have the same rules on parliamentary involvement and on scrutiny reserves in particular:

*‘If there were a kind of equal perception of the importance of parliamentary scrutiny across the European Union, that would help. If you are in a situation where the UK, Denmark, one or two others, are the ones who most often have scrutiny reserves, it is frankly easier for a presidency, whose interest is clearly getting the business done, to put the pressure on you, than if 14 Member States were saying, sorry, they cannot agree because they have not completed the parliamentary scrutiny.’<sup>82</sup>*

In the end, interviews with both Permanent Representation members and Secretariat General officials show that the reserve procedure is not a significant tool at the stage of the COREPER and Council meetings. As a member of the French Permanent Representation admitted quite openly: ‘The reserves are a legal obligation that we have. In some meetings, I have to put a reserve at one out of two points. There is no further use of them. We simply fulfil an obligation’<sup>83</sup>.

## **2.4. A means for enhancing cooperation between Government and Parliament at domestic level**

The above paints a rather bleak picture when it comes to the actual impact of parliamentary reserves on EU decision-making. This does not come as a surprise given the culture of compromise within EU institutions including the most intergovernmental ones.<sup>84</sup> Given that

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<sup>79</sup> House of Commons, Democracy and Accountability in the EU and the Role of National Parliaments, 33. Report of the European Scrutiny Committee, HC 152-xxxiii, minutes of evidence Here: examination of Sir Nigel Sheinwald, 26 February 2002, question 135.

<sup>80</sup> House of Commons, Democracy and Accountability in the EU, op. cit. fn 79.

<sup>81</sup> A. Cygan, The Role of National Parliaments, op. cit. fn 40, p. 161.

<sup>82</sup> House of Commons, Democracy and Accountability in the EU and the Role of National Parliaments, 33. Report of the European Scrutiny Committee, HC 152-xxxiii, minutes of evidence. Here: examination of Stephen Wall, 20 March 2002, question 413.

<sup>83</sup> Interview E.

<sup>84</sup> Stéphanie Novak, La prise de décision au Conseil, Paris, Dalloz, 2011.



actual voting in the Council is rather rare<sup>85</sup>, a procedure aimed at preventing them from agreeing to a decision through a formal vote without authorization has a limited impact. In addition, the reserve procedure does not change the fact that MPs and clerks do not participate in and do not belong to the closed world of COREPER and Councils of ministers. They are neither in contact with other governments nor with the Council Secretariat, and their contacts with their Permanent Representations are limited. Within the Council bodies, delegates act on formal instruction from their governments, and it is only through the filter of the coordination processes within the government that parliamentary opinions may be taken into account in national positions - or not.<sup>86</sup>

However, even if the parliamentary reserve procedure appears to be of generally marginal importance in the Council, it should be noted that it helps increase formal and informal cooperation and communication between EACs and national governments. The common aim of Council officials, government delegates and, in most cases, of parliamentary clerks and MPs consists in clearing the reserves quickly, and definitely before the final Council meeting. This has had a two-fold impact: First, the reserve systems can have a disciplining effect on government administrations leading to better and earlier information of parliaments by the responsible government officials following a dossier. The reserve increases the incentives for desk officers in the ministries or in the executive coordination units to get sufficient information early to the competent parliamentary committee and to ensure that parliament can work quickly enough so as to prevent the national delegation from running into trouble with a pending parliamentary reserve in the Council at the end of the process. Indeed, the clearing of the procedure in due time makes a lot of communication necessary, notably at the administrative level, through letters, phone calls and e-mails. The British system also calls for the exchange of frequent letters between the concerned minister and the chairs of the EACs. This is, for instance, systematically the case when the government plans to override a reserve. This disciplining effect is also demonstrated by the fact that some administrations have set up special units for the cooperation with their parliaments. In France, a unit within the French General Secretariat for European Affairs (SGAE) is responsible – inter alia - for the coordination with the Assemblée and the Senate. Before their participation in EU negotiations, Ministers now have to enquire with the SGAE whether parliament intends to issue a resolution.<sup>87</sup> In addition, the SGAE keeps an electronic file on all reserves, which is updated through regular contacts with both Houses. In the UK, the unit responsible for coordinating the Government's work on Parliamentary scrutiny of EU business is the European and Global Issues Secretariat within the Cabinet Office. In addition, the

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<sup>85</sup> M. Mattila, *Contested decisions: Empirical analysis of voting in the European Union Council of Ministers*, *European Journal of Political Research* 43 (1), 2004, 29–50, pp. 30–31.

<sup>86</sup> Interviews B and F.

<sup>87</sup> Premier Ministre, *Circulaire du 21 juin 2010*, op. cit. fn 14.

Government established a new executive unit within the Europe Directorate in the Foreign and Commonwealth Office whose task is to take care of the smooth information of and the coordination with the two Houses. According to an official, the political will to enhance relations between Parliament and the new administration resulted both in a steadier information flow towards both parliamentary Houses and in a closer coordination with their committees involved in the scrutiny of EU affairs. The official also indicated that overrides of reserves occur less frequently than they used to do, as the increase of information enables both Houses to clear the reserves at an earlier stage.<sup>88</sup>

Second, reserves – especially those with a clear time limit – have helped to push the assemblies to speed up the scrutiny phase and to professionalise their scrutiny procedures. In general, reserves thus call for better coordination but also better cooperation, as parliamentary majorities are not interested in reducing the capacity of a government to vote in the Council. Therefore, in some Members States the implementation of the reserve procedure has strengthened the capacity to adopt resolutions and to lift reserves in time. The House of Lords, for example, has adopted a special procedure for times when parliament is in recess, and the House of Commons is currently working on a similar procedure.

Procedures granting scrutiny time to national legislatures may thus foster cooperation on EU documents between national parliaments and their governments. Yet they do not automatically produce that effect since there are a number of means for national representatives to override reserves. The British example indicates that in order to be taken seriously by the government, the reserve system should be carefully protected by the EACs on a day-to-day basis. Here, the potential threat for the government is either to be in an uncomfortable situation in the Council if the document on the table has not been cleared yet at home, or to risk giving the impression of not showing the proper respect for parliamentary rights. And Ministers are indeed concerned about showing respect for Parliament, not least because MPs do tend to demonstrate cross-party solidarity in cases where they feel that the prestige or dignity of parliament is at stake. As a home office official pointed out, executive actors are aware of such ‘institutional patriotism’: ‘Our ministers can pull rank on our MPs [i.e. override a reserve], but only under exceptional circumstances – and every time we do that, it causes substantial controversy’.<sup>89</sup>

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<sup>88</sup> Interview A. However, the data does not really confirm this yet: From July 2010 to June 2011, there were 50 overrides of scrutiny, compared to 86 overrides between July 2009 and June 2010, and 35 between July 2008 and June 2009. While the dissolution of Parliament during parts of April and May 2010 probably accounts for the greater number in the first semester of 2010, the numbers so far do not indicate a drastic decrease in overrides. See House of Lords, First Report, op.cit. fn 9, p. 31.

<sup>89</sup> UK Home Office official, cited from J. de Maillard and A. Smith, Projecting national preferences: police co-operation, organizations and politics, *Journal of European Public Policy* 19 (2), 2012, 257-274, p. 267.

As mentioned earlier, in most parliaments, in contrast, clerks and MPs do not even seem to know whether government representatives entered a reserve or not. The Polish example provides a good illustration: ‘While the government sometimes uses the parliamentary scrutiny reservations in the Council deliberations when it is awaiting the Parliament’s position, the Sejm is not aware of the fact that such a reservation is held.’<sup>90</sup>.

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<sup>90</sup> Knutelská, *Working Practices Winning Out over Formal Rules*, op. cit. fn 11, p. 332.

## Conclusion

The study of the reserve procedure offers a mixed picture of the Europeanisation of national parliaments in terms of convergence. On the one hand, scrutiny reserve provisions are an obvious case of institutional transfer. Introduced in the United Kingdom in the mid-1970s and formalised as early as 1980, the instrument has been adopted by several other Member States that have what is called a document-based scrutiny system. Similarly, the Danish mandating system with its implicit scrutiny reserve has been the model for the procedures adopted by a number of member states, most prominently in Scandinavia and the new member states. Finally, the idea of a scrutiny reserve was also partly transferred to the EU level by granting national parliaments a minimum period for scrutiny before an agreement in the Council.

On the other hand, the comparison both of the legal provisions and actual practices demonstrates that there are significant national differences in the way the reserves are designed and implemented. The main differences are related to the mechanism of the procedure (automatic reserve vs. those that have to be activated; formally unlimited vs. limited time for scrutiny, formal provisions vs. implicit reserves), the actual impact of the provisions on government delegations (with officials in the Council avoiding or accepting reserves to hamper their votes), the aim of the procedure (information or influence) and, at a more subtle level, on the degree of political commitment towards it. Those differences both confirm the non-mechanical aspect of the institutional transfers and the impact of national interpretations of the procedures aimed at involving national parliaments in EU affairs.

The comparison between national provisions regarding the parliamentary reserves and the actual procedure within the various bodies of the Council stand in sharp contrast. In the domestic arena, scrutiny reserves are presented as a means for effective scrutiny or even influence. In Brussels, however, the reserves do not keep government representatives from bargaining and even from finding agreements. Regarding the impact of scrutiny reserve provisions, we also have to distinguish between the impact on the government representative's behaviour within the Council bodies and the impact on the actual negotiations and their outcome. Representatives may be very diligent in entering parliamentary reserves, but the impact on the negotiations will remain negligible during very early stages of the legislative process or if the final agreement is likely to be carried by a large majority anyway. The key question in terms of parliamentary impact is, of course, whether government representatives uphold reserves - against their own interests - even if this may hamper the negotiation process, for example by delaying a decision or even by risking a majority agreement to fail due to the obligation to abstain from the vote. Although we lack specific data, our interviews indicate that this is hardly ever the case. Interestingly, our investigation also showed that parliamentary reserves are not even used for strategic means by

the governments, in the sense of strategically binding their hands to strengthen their negotiation position. Generally, governments can use reserves only to slow down the legislative process.

It is thus tempting to conclude that parliamentary reserves have mostly, if not completely, to do with symbolic politics. Governments have generally accepted the introduction of reserve procedures as a (symbolic) compensation for the loss of parliamentary competencies, often in the context of Treaty revisions where national parliaments were in a veto position. As a result, MPs were able to claim publicly to have safeguarded parliamentary prerogatives even if the implementation of the reserve does not have any major consequences. Yet seeing parliamentary reserves only as symbolic politics would be missing a part of the picture. First of all, the slow but steady success of the UK scrutiny reserve model is a sign for the growing awareness that national parliaments should have the opportunity to scrutinise EU proposals and to provide their input before governments commit to EU legislation at the EU level. And given the fact that the EU Treaties have for a long time considered national parliaments activities as a purely domestic affair, the obligation of the EU institutions to provide national parliaments with a minimum time for scrutiny is rather remarkable and can be understood as a successful upload of national provisions to the EU level. Second, the introduction of a scrutiny reserve provision can serve as an incentive to enhance cooperation between parliaments and their governments. As mentioned above, agreements in the Council where reserves are still pending are very rare. This is, of course, both good and bad news. On the one hand, it indicates that parliamentary reserves will, when push comes to shove, have very little impact at the EU level and will simply be overridden. On the other hand, this also indicates not only that parliaments try to clear reserves in time and avoid obstructing the European legislative process, but also that reserve provisions may have a disciplining effect on governments as regards providing their parliaments with adequate and timely information. Finally, and unsurprisingly, our investigation suggests that the impact of scrutiny reserve provisions - both in terms of the representatives' negotiation behaviour and the efficient cooperation with government - depends on the formal rules, but mainly on whether parliaments actually monitor the use of their reserves. For example, both the UK and the French representatives seem to enter parliamentary reserves fairly frequently, but as the literature as well as our interviews show, the provisions have far more meaning in the UK. In the UK, government representatives know that breaches of the reserve are investigated by the European Scrutiny Committee and may lead to a potentially rather uncomfortable questioning by the committee. In France, in contrast, officials openly admit that entering a reserve is a purely technical obligation without any major consequences.

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