PADEMIA
PARLIAMENTARY
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IN EUROPE

Online Papers on Parliamentary Democracy 1/2014

Scrutiny of the European Commission's legislative proposals by national parliaments – example of COM(2012)10 on data protection in cooperation in criminal matters

Agnieszka Grzelak

This online paper series is published by the
PADEMIA: Parliamentary Democracy in Europe

It is funded by the European Commission.

ISBN: 978-94-91704-08-6

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Abstract

The general aim of this paper is to look at the effectiveness of scrutiny of the European Commission's legislative proposals by national parliaments. The main idea is not to discuss theoretical background, but to analyze the process from a national parliament's point of view. The first section of the paper discusses the choice of the 2012 proposal for a Directive on data protection in cooperation in criminal matters: COM(2012)10 has been selected for its significance as being part of a wider reform of the EU personal data protection system and influencing the rights and obligations of an individual citizen. The following section, being the core of the paper, consists of an analysis of the different ways in which national parliaments can respond to a legislative proposal, including formal and informal channels (political dialogue), and how effective these ways are. The last part focuses on whether and to what extent experts can stimulate or improve parliamentary scrutiny and what are the possible reasons for MPs' disinterest in the Commission's proposals.

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1. Introduction

The research literature about the Europeanization of national parliaments has grown quickly in recent years (Raunio 2009, Holzhacker 2007a,b, O´Brennan/Raunio 2007, Goetz/Mayer-Sahling 2008). However, one aspect of this topic has remained under-explored – namely, the communicative role of domestic legislatures, which evolves through public debate about decisions, policies and institutions of the European Union. Existing research has mostly justified this omission by pointing at the limited amount of plenary time devoted to EU issues, and some contributions have even developed theory-based explanations of the passive role of parliaments as arenas for debate about European integration (Raunio 2011). However, more recent contributions have begun to recognize public communication as an important element of the Europeanization of national parliaments (empirical contributions to this debate are found in Auel/Raunio 2012, Maatsch 2010, 2013, Wendler 2011, 2013d, 2014, see also Raunio 2011: 319, 2009: 319-22 for a discussion of this question).

In empirical terms, this appears justified by the clearly increased number and salience of parliamentary debates as highlighted during the recent Eurozone crisis, when parliamentary controversies about crisis management measures such as the Greek bailout and institutional innovations such as the European Stabilization Mechanism made headline news in several of the Eurozone countries. In normative terms, moreover, the communicative role of national parliaments is of obvious interest to scholars concerned with the role of public deliberation for the alleviation of the EU democratic deficit (Eriksen/Fossum 2002) and the potentially negative effects of European integration on domestic parliamentary democacy (Börzel/Sprungk 2007). At the intersection of these two debates, national parliaments are in a unique position as institutions that are both directly affected by Europeanization and represent the primary arena for the democratic legitimization of and public debate about decisions in the context of European governance. In this context, few other arenas for a direct exchange and discussion between political leaders about European governance come to mind at the level of domestic politics apart from national parliaments (including coverage in the media, where statements are both mediated and speakers unable to directly engage with each other). This assessment even extends beyond the national level and qualifies national parliaments as probably the only forum for public debate

about European integration between political elites at the current stage, as the communicative role of the European Parliament still appears limited.

Moreover, existing research has pointed to limitations on the activity of domestic legislatures within their scrutiny and mandating function towards domestic governments in the context of EU decision-making. Although control mechanisms are formally institutionalized in all European legislatures, they often remain unused or only partly effective as their application is inhibited by time and resource constraints, dilemmas between effective decision-making and executive accountability, and party political constraints particularly on the majority groups controlling parliamentary veto options (Beichelt 2012, Benz/Auel 2005, Pollak/Slominski 2009, Saalfeld 2005). The debating function of parliaments, in turn, may be less affected by these constraints, as the public discussion on European policies is not as strongly affected by decision-making dilemmas or time constraints, and is less dependent on parliamentary majorities to be enacted than scrutiny measures. Against this background, an interesting question both for researchers and practitioniers is whether a more active debating role could be a promising perspective for national parliaments beyond their role as scrutinizers of domestic executives. From this normative point of view, national parliaments could develop their role in European governance by strengthening what they are arguably good at: to speak to national publics and to expose competing political concepts for European governance through contentious public debate between speakers with different roles and party political affiliations. To develop this argument, however, we need more insights about the actual evolution of debates, concerning their intensity, the thematic content of debates and evolving styles of political interaction and polarization.

Against the background of these empirical and normative observations, this paper presents the theoretical approach, method and some empirical findings of a research project by the author that looks at the debating role of national parliaments in four EU Member States (the Austrian Nationalrat, the French Assemblée Nationale, the German Bundestag, and the British House of Commons). More specifically, the project approaches this topic by asking about the links between two aspects of public communication about European integration: the discursive content of argumentative justifications and related controversies on the one hand, and the patterns of political polarization that emerge between political actors and parties in the parliamentary arena, on the other. Through this approach, the project seeks to link the literatures dealing with the discursive justification of supranational governance towards the public (Neyer 2006, 2011, Manners 2011, Daase et al. 2012) with the debate on the party political contestation of European politics and its potentially emerging 'politicization' (Marks/Steenbergen 2004, Kriesi et al. 2008, Hooghe/Marks 2008, Zürn/de Wilde 2012, Statham/Trenz 2012). In this sense, the main question of the project is what links can be drawn between different kinds of argumentative justification for European governance, and various modes of political polarization discussed in the party politics literature. In this sense, the project also speaks to the question of a potentially

transformative effect of European integration on existing party political cleavages, as widely discussed in research about party politics in the EU (Marks 2004, for an overview of the debate, see also Statham et al. 2010). Beyond the main research question, the project also seeks to investigate differences between the various national parliaments as an addition to comparative research on legislatures (Arter 2007), and establish comparisons between various thematic segments of the debate on European integration. Against this background, the purpose of this particular paper is to acquaint the reader with the theoretical and methodical approach of the project, and to give an overview of some of the empirical findings at the present state. Some of these results have been published in working papers and journal articles, and are due to be summarized in a forthcoming book by the author. While some of the explanations in this paper therefore need to remain at a relatively general level because of restrictions of space, reference will be made to previously published results and to ongoing research within the project.

The remainder of the paper is structured in four parts: The two following sections present the theoretical framework (ch.2) and the empirical basis and methodology of the project (ch.3). The subsequent section gives an overview of the existing empirical findings (ch.4), which are summarized in a conclusion (ch. 5).

2. Scrutiny of the COM(2012)10 by national parliaments

Since the entry into force of the Treaty of Lisbon, national parliaments are generally responsible for each Member State of the EU, having only a certain degree of institutionalized influence on the EU law-making process. This influence is rather indirect – by ratification of treaties or transposition of the EU secondary law. The Treaty of Lisbon has extended their competences to a certain degree, especially with respect to the control over the execution of the subsidiarity principle. It has slightly changed the scope of subsidiarity control by extending the deadline for examination of the principle to eight weeks and – most importantly – introducing the so-called early warning mechanism (EWM), allowing national parliaments to interfere directly in the EU legislative process (De Wilde, 2012).

According to Article 5 of the Protocol (no. 2), 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. Accordingly, COM(2012)10, as drafted by the European Commission, provides the reasoning behind it against the subsidiarity principle. As stated by the European Commission, execution of the right to the protection of personal data requires the same level of data protection throughout the Union, especially with respect to data exchanged and processed at domestic level. The European Commission statement mentions also that there is a

growing need for law enforcement authorities in the Member States to process personal data and exchange it at rapidly increasing rates for the purposes of preventing and combating transnational crime and terrorism. The proposed EU legislative act is likely to be more effective than similar acts at the level of the Member States because of the nature and scale of the problem, which are not confined to the level of one or several Member States. In this context, clear and consistent rules on data protection at the EU level should help fostering co-operation between such authorities. According to the European Commission, Member States cannot reduce the problem themselves, particularly due to the fragmentation in national legislations. Thus, there is an evident need to establish a harmonised and coherent framework allowing for smooth transfer of personal data across borders within the EU while ensuring effective protection for all individuals across the EU. What is significant is that neither the proposal itself nor the impact assessment include any particular data (statistical or any other) justifying the necesity to adopt that act on the EU level.

When reading and analyzing the COM(2012)10 proposal, it becomes clear that it should raise many questions to be discussed at national level (Hijmans and Scirocco 2009, de Hert and Papakonstantinou 2012). The reasoning presented by the Commision is rather superficial and fails to provide a firm basis to clearly identify any European added-value of the proposal. On the contrary, it can be argued that the Member States are able to introduce adequate provisions on collection, storing or transfer of data within their individual legislative systems. It has hardly been demonstrated that the Member States would not be able to safeguard data protection within police and judicial authorities. Moreover, the problem of the EU's competence in the field could also be discussed, either as part of subsidiarity control or as a separate legal problem. However, the reaction of national parliaments fails to reflect any of the above problems.

When analyzing the scrutiny process for COM(2012)10, it is possible to distinguish at least five possible reactions of national parliaments. Due to the importance of the proposal, the first reaction to be discussed should be the one which formally complies with the subsidiarity principle scrutiny procedure.

Firstly, it should be noted that only two parliamentary chambers have issued formal reasoned opinions containing negative remarks regarding compliance of COM(2012)10 with the subsidiarity principle.

Table 1: Chambers of national parliaments that have adopted and presented reasoned opinions questioning the compliance of COM(2012)10 with the subsidiarity principle

No.	Chamber of the national parliament	Date of issuing a reasoned opinion
1.	Germany – *Bundesrat*	30/03/2012; decision 51/12
2.	Sweden – *Riksdag*	30/03/2012; decision 2011/12:JuU31

Source: IPEX database: http://ww.ipex.eu/IPEXLWEB/dossier/document/COM20120010.do#dossier-COD20120010

In the first case, it is the Bundesrat that consistently holds that submission of a reasoned opinion on non-compliance with the subsidiarity principle is deemed to raise also the question of the EU's competence. The Bundesrat emphasizes that the subsidiarity principle concerns principles pertaining to the exercise of competence and is violated if the EU is not competent to adopt legislation in the area in questions. For that reason, the question of legal basis must be the first one to be addressed when scrutinizing a proposal. In the case of COM(2012)10, the Bundesrat states that the European Commission's proposal does not fall under the legal basis stipulated in the proposal as it encompasses purely national exchange of information by police authorities. Domestic criminal law procedures are governed by the EU law only to a limited extent and the EU law on data protection should be applied only in cases where there is obviously EU competence to regulate the particular area. Hence, the restricted competence of the EU to adopt directives on criminal law matters constitutes another constraint on the data-protection competence of the EU in the law enforcement policy area. According to the Bundesrat, the Directive, if adopted, would lead to far-reaching encroachments on criminal procedural law which are not necessary in order to facilitate mutual recognition of decisions and cooperation in criminal matters with a cross-border dimension. The second part of the Bundesrat's reasoned opinion concerns violation of subsidiarity in a strict sense: it argues that it is not possible to identify any European added-value arising from the envisaged uniform provisions across Europe.

Another reasoned opinion came from the Riksdag. The Swedish parliament points out that it is difficult to justify the proposed extension of the application of the EU's rules on the protection of personal data in the field of crime prevention. There is a risk that extended legislation at the EU level which would cover the processing of personal data as part of preliminary investigations and prosecution of criminal offences would conflict with the Member States' national criminal law. Therefore, the Riksdag considers the parts of the Directive proposal that regulate processing of personal data on purely national level to be conflicted with the principle of subsidiarity.

Secondly, it should be made clear that there have been other parliamentary chambers that noticed the problem of subsidiarity, however did not formally issue a reasoned opinion. The

reason for it, in most of the cases, was the 8-week deadline for scrutiny. Due to practical issues, national parliaments are sometimes unable to meet the deadline and thus decide to present their comment by means of political dialogue. In the case of COM(2012)10, the Estonian Riigikogu has found that implementation of the proposed Directive might lead to the harmonization of criminal procedure law in certain issues which for now remain outside the competence of the European Union. Moreover, adoption of certain rules might lead to the categorization of parties in criminal procedure and to the establishment of relevant data processing rules, an example being the obligation to distinguish between the personal data of different data subjects, which would be stipulated by the Directive.

Another example comes from the Czech Senate, which adopted a relevant resolution also after the 8-week deadline. The Czech Senate is of the opinion that the proposal for a data-protection Directive is in breach of the principle of conferral set out in Article 5(2) of the TEU, as it lacks legal basis in regard to personal data processing in criminal proceedings without cross-border elements, that is, in fully intra-state cases. It also considers that, given the importance and limited comprehensibility of the proposed act, the explanatory statement should be more detailed and should better clarify the legal regulation.

Thirdly, in other parliaments, such as the Belgian Chamber of Representatives, the proposal has been scrutinized, yet no objections have been raised with respect to subsidiarity. Some remarks, however, have been made by the Belgian Chamber to the European Commission. The chamber has pointed out that the Directive should not reduce the existing level of protection and that it should establish specific rules on the protection of personal data of children.

The fourth reaction has been as follows: some parliamentary chambers have come to the conclusion and officialy declared that that there is no breach of the subsidiarity principle. For example, in the case of the Romanian Chamber of Deputies, the final opinion was not issued until 10th October 2012. In Spain, on 27th March 2012, the Joint Committee for EU Affairs of Cortes Generales adopted a resolution confirming compliance of the initiative with the principle of subsidiarity. The adopted document is referred to as a "reasoned opinion", but expresses no no reservations regarding the breach of the principle. There is a remark included in the conclusion that it would be necessary to clearly define the scope of the Directive, especially to specify the meaning and scope of the term "national security" in order to avoid any legal uncertainty in a field as important as that of the prevention, investigation, detection or prosecution of criminal offences in the EU. This is clearly not a matter of subsidiarity control.

Last, but not least, some chambers have scrutinized the document and made no remarks. That has been the case with both the Sejm and the Senate in Poland. One would expect that – taking into account the significance of the proposal – it should have been a matter of interest for all parliaments, but according to information from IPEX, the proposal has been subject to parliamentary scrutiny in only 21 Member States. From other Member States (Cyprus, Hungary, Latvia, Bulgaria, Luxembourg), as well as from some chambers of national parliaments (the Czech

Chamber of Deputies, the Romanian Senate and the Slovenian National Council), there has been no information whether the document has been discussed at all.

Table 2: Chambers of national parliaments that have scrutinized COM(2012)10, but not issued a reasoned opinion.

Chamber	Date	Notes
Austrian National Council	8.05.2012	After 8-week deadline
Austrian Federal Council	14.3.2012	
Belgian Senate	1.02.2012	
Belgian Chamber of Representatives	27.3.2012	Political dialogue
Czech Senate	24.05.2012	After 8-week deadline; Political dialogue
Estonian Parliament	3.05.2012	Comments sent to the European Commission
Finnish Parliament	No information	
French Senate	7.02.2013; still pending	After 8-week deadline
French National Assembly	7.03.2012	
German Bundestag	14.12.2012	After 8-week deadline
Hellenic Parliament	7.12.2012	After 8-week deadline
Irish Houses of Oireachtas	6.06.2012	After 8-week deadline
Italian Senate	13.06.2012	After 8-week deadline
Italian Chamber of Deputies	27.03.2012	
Seimas of the Republic of Lithuania	28.03.2012	
Maltese House of Representatives	16.07.2013	After 8-week deadline
Polish Senate	10.04.2012	
Polish Sejm	28.03.2012	
Portugal – Assembleia de Republica	4.04.2012	
Romanian Chamber of Deputies	22.02.	Political dialogue
National Council of the Slovak Republic	10.09.2012	After 8-week deadline
Slovenian National Assembly	23.03.2012	Comments sent to the European Commission
Cortes Generales	27.03.2012	Political dialogue; The document is called a "reasoned opinion", however no comments on the breach of the subsidiarity principle are made.
Dutch Senate	21.05.2012	Political dialogue
Dutch House of Representatives	4.04.2012	
UK House of Lords	26.04.2012	After 8-week deadline
UK House of Commons	30.04.2012	After 8-week deadline

Source:

IPEX database: http://ww.ipex.eu/IPEXL-WEB/dossier/document/COM20120010.do#dossier-COD20120010

In order to conclude on this point and make some general comments, it should be noted that national parliaments apparently appear not to scrutinize all documents being, for general and objective reasons, of high importance. Instead, they tend to follow their own agendas, taking into account their calendar and political interest, which is rarely the same to all, rather than the legal impact of the document.

In theory, the Treaty of Lisbon empowers national parliaments to play a pro-active role in the EU affairs and provides them with new means of political action not only at domestic (Neuhold and Strelkov 2012), but also at European level. However, national parliaments would be much stronger and could influence the decision-making process more effectively if the cooperation on subsidiarity matters were improved, for example by creating a platform that would facilitate not onlythe exchange of information, but also discussion of the main ideas and points of view. Till the end of September 2014 only in two cases the yellow card was triggered: on European Public Prosecutor and on the exercise of the right to take collective action. There were, however, several cases where the threshold was very close to be achieved. Obviously, in the case of COM(2012)10 the situation was far from reaching this point, but one can expect that timely information on objections raised by other Member States would have affected the depth of discussion in those parliamentary chambers in which there were some doubts, giving at least some "food for thought". The experience of two yellow cards and the views of national parliaments also show that reaching the Protocol no. 2 threshold requires closer cooperation between individual parliamentary chambers, which can be obtained through informal dialogue between chairmans of EU affairs committees, through improving the IPEX database by uploading timely opinions translated into the English language or even through introducing some kind of warning mechanisms (e-mails).

3. Political dialogue between the European Commission and national parliaments

The early warning mechanism is not the only means to enter into discussion with the EU institutions regarding legislative proposals and is not the only possible way to influence the decision-making process effectively in terms of having influence on the wording of the proposals. "Political dialogue" is another option to present the point of view of a national parliament regarding a particular document in a broader context – not only with respect to subsidiarity principle. The idea behind this instrument was that national parliaments should be more effectively involved in the legislative process of the EU – not just to guard the subsidiarity principle, but also present a variety of other comments on legislative proposals, thus having a real effect on their content.

Since its beginning political dialogue has had no legal basis in the treaties. As early as in the course of preparatory discussions for the reform of the European Union, the European Commission proposed closer cooperation with national parliaments. As a result, as of 1 September 2006 national parliaments started receiving not only consultative documents, but also legislative proposals directly from the European Commission. The Commission had resolved that whenever a national parliament issues any opinion or comment, an individual reply should be sent. The entry into force of the Treaty of Lisbon established the legal basis

for transmitting all proposals of legislative acts to national parliaments, however did not introduce any legal basis to oblige national parliaments and the European Commission to raise comments or reply respectively. Therefore, it is still an informal procedure. This informality causes some problems, while at the same time being very practical and useful, since it has become an important cooperation tool that can evolve in the future into a real legal instrument for cooperation which goes beyond the adoption of reasoned opinions on draft legislative acts. It would also enable national parliaments to invite the European Commission to develop legislative proposals which they believe to be necessary or to revise and adjust existing proposals as required.

In theory, political dialogue sounds very promising; however, as the example of COM(2012)10 clearly proves, it still requires some improvement in practice. In the discussed case, seven parliamentary chambers have presented their comments by means of political dialogue or at least of what has been classified as such in the IPEX database (the Belgian Chamber of Representatives, the Czech Senate, the German *Bundesrat*, the Spanish *Cortes Generales*, the Swedish Parliament, and the Dutch Senate). What is interesting is that according to the IPEX database, documents classified as political dialogue are those which have been responded to by the European Commission. However, comments made by the Estonian *Riikikogu* or the French Senate, which included significant remarks regarding the initiative, digressing from subsidiarity, should also be regarded as sent as part of political dialogue.

Table 3: Chambers of national parliaments that have presented their comments by means of political dialogue according to the IPEX

Chamber	Date	Notes	Date of reply from the European Commission
Belgium – Chamber of Representatives; doc number 53 2145/001	27 March 2012	The Justice Committee adopted an opinion that the proposal complies with the subsidiarity and proportionality principles. Nevertheless, the Committee presented some comments.	7 May 2013
Czech Republic - Senate; 614th Resolution of the Senate	24 May 2012	After 8-week deadline	18 March 2013
Estonia - *Riikikogu*; doc number 1-2/12-36/4	3 May 2012	Not classified as political dialogue by IPEX – no reply from the European Commission	No answer
Germany - *Bundesrat*; decision 51/12	30 March 2012	Subsidiarity reservations	No answer
Romania – Chamber of Deputies	3 April 2012 - 10 October 2012	The European Affairs Committee concluded, in its sitting of April 3rd, 2012, that the proposal complies with the principle of subsidiarity.☐General examination was completed on October 10, 2012, and the Chamber issued the final Opinion.	17 September 2013
Spain – *Cortes Generales*; document number 2/2012	27 March 2012	On 27 March 2012, the Joint Committee for EU Affairs adopted a Resolution confirming the compliance of the initiative with the principle of subsidiarity. However, the Joint Committee considered it necessary to make some other comments.	No answer
Slovenian National Council	23 March 2012	The Committee on EU Affairs of the National Assembly of the Republic of Slovenia adopted its position at its 12th meeting of 23 March 2012.	No answer
Sweden – *Riksdag*; Document number 2011/12:JuU31	30 March 2012	Subsidiarity reservations	22 October 2012
The Netherlands – Senate	21 May 2012	A letter was sent to the European Commission with additional questions and remarks about the European personal data protection proposal.	22 February 2013

Source: IPEX database: http://ww.ipex.eu/IPEXL-WEB/dossier/document/COM20120010.do#dossier-COD20120010

Analysis of comments presented by some parliamentary chambers with regard to this particular dossier leads to the conclusion that political dialogue is generally used in three situations:

– when the 8-week deadline, for some procedural reasons, cannot be met,

– when there is a need to exchange important information, opinions or views that cannot be classified as relating to the "subsidiarity issue",

– for any other purpose, mainly in order to achieve internal goals – especially when the MPs do not see any interest in adopting an opinion on subsidiarity or, for political reasons, are not willing to adopt it, but in fact do not agree with their government and the official position on a legislative proposal. This is reflected also in the findings of Neuhold and Strelkov (2012, p. 10) in regard to the EWM, who provide reasons as to why EWS can have both a negative and a positive effect on executive-legislative relations in EU affairs. One of the negative effects can be that EWM might hamper the development of a national position on a specific EU issue. In that case the parliament can in fact become a veto player – depending on the internal regulations regarding the position of the parliament in the EU scrutiny process in the given Member State.

The European Commission receives a lot of opinions through political dialogue and its work in dealing with the large number of comments should be acknowledged. However, from a national parliament's point of view, the European Commission should respond faster and focus more on the arguments contained in each document. As it can be noticed in Table 3, the average time of reply is over a year, which means that in practice, a response comes when ,the national parliament is probably not interested in the particular dossier anymore or, at best, the MPs do not remember the problem and are unable to continue the debate on it.

Not only time-limits, but also the quality of replies can be questioned both in the case of political dialogue and reasoned opinions on subsidiarity. The answers from the European Commission are in fact very general and do not really respond to particular questions raised by national parliaments. This seems to be a rather general problem and that does not refer exclusively to this particular example.

Moreover, in the case of subsidiarity reservations, the European Commission's responses should not only repeat the arguments presented earlier in the reasoning behind the given document, but also provide a deeper analysis to demonstrate that the principle of subsidiarity has not been breached. However, in practice, as it is clear in the case of COM(2012)10, the responses are rather general and the European Commission repeats the arguments that have been stated before and fails to address all specific comments raised by the given parliamentary chamber.

The above can be illustrated with specific examples. The first one are the comments made by the Justice Committee of the Belgian Chamber of Deputies, which points out that the Directive should not reduce the existing level of protection and that it should establish specific rules on the protection of personal data of children. The European Commission replied in a letter, addressing the problem in just one sentence, reassuring that the level of protection would not be reduced. It is evident that a more detailed explanation would be

expected as far as the level of protection is concerned – specifying how it would be safeguarded and on what grounds. In the case of the Czech Senate, the comments raise the problem of competence with respect to the processing of personal data at national level. The reply from the European Commission is general, referring to Article 16 TFEU and Article 8 of the Charter of Fundamental Rights. The European Commission explains that it believes that Article 16 TFEU allows the Union legislator to adopt EU rules on the processing of national data. Then the European Commission adds that the Directive would be useful from a practical point of view and finds it to be a valid argument for EU competence. In reply to the comments from the Netherland's Senate, the European Commission delivers more detailed explanations. In fact, it even tries to explain some legal issues, such as the notion of "authority", "privacy by default" or "prevention". However, the reply still fails to provide any new arguments, i.e. ones that could not be derived from the proposal and its justification. Finally, the European Commission provides no substantial response to any of the remarks received from the chamber. If it does, there is no evidence for it in available records of the legislative process concerning COM(2012)10. The above demonstrates that the theoretical concept of the influence of national parliaments on the EU legislative process is not put into effect in this case.

The last, but not least important issue regarding political dialogue is that in order to have an active discussion between parliamentary chambers and the European Commission, it is necessary to use some practical tools. Databases such as IPEX or network of correspondents in the European Parliament create a very important level of cooperation between administrative bodies. In practice, the IPEX supports the cooperation by facilitating electronic exchange of information and making the information available to the public. After 1 December 2009 national parliaments started to upload to the database most documents, including their reasoned opinions on the violation of the subsidiarity principle. Unfortunately, to date it has not been working perfectly. In the case of COM(2012)10, the information was uploaded with a considerable delay and therefore became rather not useful to experts in our parliamentary chamber. The information from the European Parliament correspondents, in turn, arrived in a timely manner and contained up-to-date and necessary data to allow efficient and effective action. This network allowed for further analysis as well – if more information was necessary, one could always turn to the relevant European Parliament's correspondent. Such exchange of information have real effect on the discussion on a particular document in the *Sejm*'s European Union Affairs Committee (EUAC), as it allows the Deputies to learn about the outcome of the debate in other parliaments.

There is one more practical conclusion that can be drawn from the case of COM(2012)10. A proper dialogue requires much more than national parliaments making their contributions to the early development of policies. It must involve mutual exchange of information. In order to take into account problems which have already been discussed by

other parliaments, it could be suggested that all replies coming from the European Commission should be translated into English or French by the services of the European Commission in order to enable other national parliaments to get acquainted with the problem and previously raised arguments.

To conclude on this point, it should be noted that there is clear evidence of the desire of national parliaments to engage in political dialogue with the European Commission. From the beginning of 2010 until the end of 2013 national parliaments submitted around 2000 written contributions under the Barroso initiative (House of Lords Report 2014). The European Commission should, however, make clear when and how national parliaments have influenced the development of policies, by identifying national parliaments' contribution in summary reports on consultation exercises and in subsequent communications on the policy. Information on how the policy has been shaped or modified in response to received comments should be made publicly available. The European Commission should also respond promptly to national parliaments' contributions through general political dialogue, possibly within three months rather than a year. As early as in 2010 the European Commission informed that it was working on the acceleration of this process and that the new system should be implemented in 2011, but the above review of replies regarding COM(2012)10 clearly demonstrates that it has not yet happened.

4. Impact of experts on the EU scrutiny process – the case of the Polish *Sejm*

After the above brief analysis of the involvement of national parliamentary chambers and the European Commission in the scrutiny process, the role of different types of experts should be discussed, because their participation in the legislative process plays a crucial role in the daily operation of modern democratic legislatures. The case of the Polish *Sejm* will be the only one discussed in this section; however, the example will also allow more general conclusions to be made.

In theory, independent and reliable policy and legal analysis should improve legislative decision-making and strengthen democracy. Reliable facts contribute to better understanding of problems, provide more realistic solutions to these problems and can help predict the impact of policies before they are adopted by parliaments. Proper and thorough research reinforces the legitimacy of the legislature, providing MPs with information to draft and amend legislation based on reliable facts. Considerable and still increasing impact of administrators and experts on the scrutiny process is common in contemporary parliamentary practice (Högenauer and Neuhold, 2013).

The fact that experts currently play a significant role in the law-making process is also reflected by various forms of their role in parliamentary activities. Expertise is delivered to

MPs, by various sources, including: a) expert officials or administrators employed at offices that provide services to MPs, b) specialists in a given discipline who work outside administration offices (practitioners and academics) and c) institutional entities that acquire, collect and disseminate knowledge as part of their activity (academic research centres, public and private think tanks, NGOs, trade and professional organisations, religious communities and finally – lobbyists, representing particular interests of their employers).

Expert assistance has also been noticeable in the case of COM(2012)10 in Poland (in the *Sejm*), but before going into detail, the role of experts in the Polish *Sejm* should be briefly reminded. According to the Resolution no. 28 of the Presidium of the *Sejm* of 19 April 1995, academic consultation for the *Sejm*, its bodies and Deputies shall consist of recruiting experts and providing expert reports, opinions or consulting services. Academic consultation shall be organised by the Chancellery of the *Sejm* from its allocated budget, and expert reports and opinions shall generally be ordered at the Bureau of Research of the Chancellery of the *Sejm* or from selected experts via the Bureau of Research of the Chancellery of the *Sejm*. Experts in the *Sejm* employed by the Bureau of Research should have sufficient expertise in a given area and are entrusted with specific tasks, consisting of expressing an objective and impartial opinion on a given issue. The expert's task is to provide the decision-maker with knowledge that is reliable and complete within the capacity of contemporary science. His/her role is also to present a view on future consequences of the planned solutions.

Scrutiny of the compliance of EU draft legislative acts with the subsidiarity principle constitutes an element of full scrutiny of EU draft legislative acts by the *Sejm* and is strongly supported by experts. The following documents are attached to each draft as a result of subsidiarity scrutiny:

– draft position of the Republic of Poland transmitted by the Council of Ministers *ex officio*(within a statutory deadline of 14 days of the receipt of the EU draft), accompanied by: substantiation including impact assessment, information on the type of the EU law-making procedure and on the voting procedure in the Council, as well as information on the compliance of the EU draft legislative act with the subsidiarity principle,

– opinion of the *Sejm*'s Bureau of Research concerning substantive and legal issues, including compliance with the subsidiarity principle – this is the moment when the role of experts is particularly significant.

The European Union Affairs Committee (EUAC) makes a decision based on the government's information and the expert opinion. Unfortunately, the "Standing Orders of the *Sejm*" (the Rules of Procedure) do not support active participation of other branch committees, except for organizing joint committee meetings, but without possibility to adopt joint reasoned opinions. If the EUAC decides that a draft legislative act infringes the principle of subsidiarity, it adopts an opinion in this regard and, at the next session ,a draft resolution

of the *Sejm* on non-compliance of the EU draft legislative act with the subsidiarity principle.

In reality, the EUAC obviously sometimes lacks insight into national policy in the field being the subject of the given COM, in view of which joint discussions with branch committees would be highly recommended. This practice, however, is very rare. Following European integration, branch committees should be becoming increasingly involved in the scrutiny of European affairs and the EUAC should be sharing a certain amount of incoming EU documents and information across them. However, the practice of the *Sejm* is that these committees are hardly involved in the scrutiny of EU affairs and become only sporadically involved in EU matters. This could possibly mean that there is no real correlation between the work done and its effectiveness – the number of documents discussed by the EUAC does not allow any deeper discussion on the consequences and impact of a given document on the national policy.

In the case of COM(2012)10, experts – on request from the EUAC – have in fact prepared two analyses: one dealing with the content of the draft and one on the procedural and legal problems relating to the Directive proposal. The draft Directive at issue was sent by the European Commission to the *Sejm* on 13 February 2012 and the opinions of relevant experts were ready as soon as a month later. The assessment methodology followed by the experts was standard for this kind of analysis: first they described the content of the proposal and then they assessed the proposal from the legal, social and economic point of view. Both opinions raised some doubts, such as the relation of the proposal to the existing rules of Eurojust, Europol or other international agreements. This opinion was distributed among the members of the EUAC.

The next step should have been a discussion during an EUAC session in the presence of the experts. The committee meeting during which COM(2012)10 was discussed was attended not only by experts from the Bureau of Research, but also experts representing the government and Inspector General for Personal Data Protection. The stenographic record of the session, however, shows no evidence of discussion on the COM(2012)10 taking place during the meeting. Not a single question was raised concerning the content of the proposal. Whilst it is, unfortunately, not a rare case that the Deputies do not have many questions concerning EU documents, it does not happen very often that they are not interested in a proposal at all. The reasons for the above could be as follows. The first reason is rather technical – under the above-mentioned Rules of Procedure, a committee meeting may coincide with a plenary session and, if that is the case, some Deputies take part in plenary meeting instead of coming to the committee meeting. The second reason might be that the subject of the document was very technical and difficult in its substance – not easily understood by a non-specialist. The third reason lies with the experts – experts' opinions can sometimes be too detailed and too technical and not easy to follow by non-specialists. The fourth reason is quite obvious: Deputies may simply not have been interested, as this is not a

politically sensitive problem that can help them gain votes in the next elections. Last but not least, no other branch committee was involved in this process. The scope of competence of the EUAC is too broad to discuss all possible problems and Deputies cannot specialize in all possible fields. The above findings are reflected in more general findings on the EU debate in national parliaments in academic literature (Maatsch, 2010).

Actually, the same problems concern the participation of non-governmental organizations in the process of scrutiny of EU documents. NGOs often play a critical role in advocating for changes in the law and policy elements. In the case of COM(2012)10, however, their contribution was hardly noticed by Deputies. In the discussed case, representatives of two NGOs (*Panoptykon* and *Fundacja Helsinska*) were invited to the EUAC meeting, but did not have a chance to take the floor (no questions were asked by Deputies). They also used the chance to send their comments directly to the president of the EUAC. Moreover, because of the significance of the reform, a special seminar was organised in the Senate on the reform of the European data protection system, during which NGOs, think-tanks and representatives of the government and parliament (both the *Sejm* and the Senate) could exchange their opinions on the proposal. Other occasions to discuss the data protection reform included a conference organised by the Inspector General for Personal Data in cooperation with the National School for Public Administration and the European Commission. Not only academics, but also Deputies and Senators were invited to attend the conference.

Based on the above observations, one can speculate that the role of an expert goes far beyond the role of a scientist. The task of an expert is not only to describe a given field in scientific terms; it is also to present a view on possible future consequences of the planned solutions against a scientific examination of the problem. Thus, an expert in the Polish system occupies a special place in the legislative process, between science and political decisions. Both of these functions (scientist and decision-maker's advisor) define the basic nature of expert activity and describe the most important elements of the role of an expert in the legislative process. An expert prepares an opinion which may be used by a decision-maker and may become the basis for a policy decision. It can be noted that experts' or NGOs' involvement in the EU scrutiny process looks well in theory. However, in practice, it does not have so much influence if the subject-matter is not of interest to Deputies or is not "politically sensitive". Yet, it is not an expert who makes the decision and the decision-maker must not shift the burden of his/her political decision on to the expert. The responsibility of an expert is, therefore, the responsibility for the quality of the opinion and not for the political outcome.

5. Conclusions

General conclusions regarding the effectiveness of scrutiny of legislative proposals by

national parliaments cannot be drawn from just one given example, but the case of COM(2012)10 illustrates a number of broader issues. There are at least five ways in which a chamber can react to the Commission's proposal. They vary depending on the level of formality, which, however is not the aspect that determines the effectiveness of the engagement of a national chamber in the EU decision-making process. For the time being national parliaments do not put any pressure on the Commission regarding its proposals.

The very first assumption made in this paper was that the dossier chosen as an example was significant from the legal point of view. This document should involve contribution not only from experts and civil society, but also from most of MPs who will later have to adopt a relevant national law implementing the Directive. The example of COM(2012)10 clearly shows that the subject of some EU proposals is complicated – not only politically, but also from the technical and legal point of view. Accordingly, cooperation on such documents should be well developed between all interested parties on various levels. As one can observe, the interest of the Deputies in the *Sejm* was rather low, which was caused by several reasons, including lack of direct insight into national policy. Thais means that the decision whether a document should be thoroughly scrutinized is not always taken on the basis of its legal significance, but is often driven by their own political interest.

The results of the scrutiny of COM(2012)10 clearly proves that national parliaments are not always as effective at political dialogue with the European Commission as they are at their national oversight functions. This is not only because of their lack of will to enter into discussion with the European Commission, but also because of some shortcomings on the side of the Commission. This example illustrates practical problems with political dialogue, such as the fact that the low quality of answers and the delays in passing them detract its significance. There is also no evidence that the inputs from national parliaments have actually affected outcomes of the proceedings and discussions at the EU level. The Commission does not take really into account the positions of national parliaments and it is not only the informal character of this instrument that creates problems with the quality of answers. The informality of this procedure should allow for more flexibility in terms of time, content of the document and its format, instead of leading to the shallowness and artificiality of the cooperation. Therefore, because political dialogue is, in principle, a good idea, on the occasion of any future treaty revisions, consideration should be given to introducing provisions on the procedure similar to those relating to the EWM, which would apply to all aspects of legislative proposals.

The participation of experts in the legislative process is perceived as an evident symptom of more and more decision-makers lacking necessary knowledge. This is due to several reasons, most of them being rather objective and relating to the level of complexity of the problems under discussion, caused, for instance, by technical progress in all aspects of life. A general understanding of and overall insight into a given discipline, as well as

experience gained at work, do not suffice to make decisions anymore. A remedy to those shortcomings is specialist knowledge and expert contribution into the decision-making process. However, the role of the experts as described in the case of COM(2012) 10 clearly shows that their political leverage still remains limited.

Last but not least, the numerous and substantial changes introduced by the Treaty of Lisbon to improve the participation of national parliaments in EU affairs appear to be insufficient. Individual scrutiny still varies in degree and effect across national parliaments and pursues domestic constitutional priorities. Despite evident improvements, national parliaments cannot be considered as central actors in EU decision-making. While the collective voice of a national parliament that speaks against breach of competence may promote democracy, it is incumbent upon national politicians (MPs) to engage in EU affairs more directly and frequently.

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Author

Agnieszka Grzelak

PhD, lawyer (2000, The Jagiellonian University, Cracow); Doctor of Law (The Jagiellonian University, Cracow 2006; thesis: "Legal instruments in the third pillar of the European Union"); expert in legislation at the Chancellery of the Sejm, assistant professor (adiunkt) at the Warsaw School of Economics (Szkoła Główna Handlowa w Warszawie). PADEMIA's partner of the Kozminski University, Warsaw, Poland. Author of several publications on EU law, especially on the legal aspect of the Area of Freedom, Security and Justice. Paper prepared as part of a project financed by the National Science Centre under decision DEC-2012/07/B/HS5/03908. The content of this article does not reflect the official opinion of any institution.

E-mail: agnieszka.grzelak@sgh.waw.pl