

## **Questionnaire for Topic 1:**

### **“The European and National Parliaments<sup>1</sup>”**

#### **Portuguese Report**

By Gustavo Gramaxo Roseira<sup>2</sup>

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<sup>1</sup> Professor Mirosław Wyrzykowski, Warsaw University.

<sup>2</sup> Ph.D. in Law, European University Institute (2009). Attorney-at-law before the Portuguese Bar.

# 1. Materially-Constitutional Regulation of the Parliament's Participation in EU Legislation

1.1 Does the constitutional regulation impact directly or indirectly on the relations between the European parliament and the national parliament?

Yes. Since the accession on Portugal to the European Communities (in 1986) several references to the European integration process have been introduced to the Portuguese Constitution in subsequent constitutional amendments. Regarding the specific domain at issue, the following constitutional norms are directly appurtenant to the relations between the national parliament [*Assembleia da República*] and the European Parliament:

- Article 7, § 6, states that Portugal may, “on condition of reciprocity, with observance of the fundamental principles of the rule of law and of the principle of subsidiarity, [...] accord the exercise, in cooperation or by the [European] Union’s institutions, of the necessary powers to the construction and furthering of the European union.”
- Article 161, item n), empowers the national parliament to emit its opinion “on matters pending for decision before organs of the European Union that fall under the sphere of [Parliament’s] reserved legislative competence.”
- Article 163, item f), further assigns parliament the power to “accompany and assess, as determined by law, Portugal’s participation in the process of construction of the European union.”
- Article 164, item p), assigns parliament the exclusive power to legislate on the appointment procedure of Portuguese members of the European Union’s organs, with the exception of the Commission.
- Article 197, § 1, item i), directs the government to submit to parliament, “in a timely fashion,” any “information regarding the process of construction of the European union.”

1.2 Did the decisions of the Constitutional Court or the Supreme Court concerning membership touch the problem of relations between the European parliament and the national parliament?

The Constitutional Court has not yet been called to directly adjudicate on the very sensitive issue of transfer of sovereignty from the national level towards the European level or the relationship between the national Parliament and the European Parliament *vis-à-vis* the process of normative production.

However, in 2004, the national parliament decided to propose a referendum on the ratification of the Treaty establishing a Constitution for Europe, having formulated the following question: “Do you agree with the Charter of Fundamental Rights, the qualified-majority voting rule and the new European Union institutional framework, as regulated by the Constitution for Europe?”

This question's constitutional and legal validity was submitted to the Constitutional Court's assessment, leading to the Court's dismissal of the proposed referendum, having found the question formulation equivocal, unclear and ambiguous. However, in its ruling, the Court did incidentally rule that the issue to be submitted for referendum did not imply an infringement of the Constitution nor did it interfere with any of parliament's exclusive legislative competences (*see* Acórdão N° 704/2004).

### 1.3 What is the statutory regulation of the relation between the European parliament and the national parliament?

The relations between the national Parliament and the European institutions in general are the subject of a specific law adopted in 2006 that replaced a previous statutory instrument on the same subject dated from 1994. This law (Law No 43/2006) is designated as Law on the Accompaniment, Assessment and Consultation by the Parliament in the Context of the Process of Construction of the European Union" (*Lei de Acompanhamento, Avaliação e Pronúncia da Assembleia da República no Processo de Construção Europeia*).

This law sets forth a wide range of parliamentary competences *vis-à-vis* the decision-making process within the European institutions.

Firstly, it imposes, within the national parliament, the creation of a Committee of European Affairs in charge of accompanying and assessing all parliamentary business relating to the European Union (Article 6).

Secondly, it establishes a set of obligations of consultation between the government and the parliament regarding European affairs. The government must submit to parliament, in a timely manner, all the information relating to deliberative procedures pending before the European institutions (Article 5, §1). The government is also required to submit a yearly report regarding Portugal's participation in the process of construction of the European Union (Article 5, § 3), and to be present for a parliamentary debate, before the full chamber, after each European Council meeting and to discuss the government's yearly report (Article 4, § 1, items a) and b)). At least one week before the European Council meetings, government ministers must also appear before the Committee of European Affairs to discuss the preparation of the European Council's meeting (Article 4, § 1, item c)). Government ministers must also appear before a joint meeting of the Committee of European Affairs and other relevant parliamentary standing committees before each meeting of the Council of the European Union (Article, § 1, item d)).

Thirdly, the law empowers the national parliament to emit opinions relating to any decision-making procedures pending before the European institutions. These opinions are mandatory and must be deliberated by the whole chamber when the subject matter of any procedure falls within parliament's exclusive legislative competence (Article 2). Parliament may also submit to the European parliament, the Council, the Commission or even the Committee of the Regions or the Economic and Social Committee an opinion on the infringement of the principle of subsidiarity by any legislative proposal pending before the European institutions (Article 3). The adoption of opinions on any other matters is not mandatory and a full chamber deliberation is not required – although also not excluded –, a deliberation of Committee of European Affairs sufficing for that effect (Article 7).

Fourthly, the law imposes parliamentary scrutiny of all candidates submitted by the government to fill positions in any bodies or agencies of the European Union, with the exception of candidates to the European Commission, Committee of the Regions, Economic and Social Committee and any positions that are to be filled via open competition (Article 9).

#### 1.4 Is there a by-law regulation of the parliament concerning its functions in respect of the European affairs?

The Portuguese parliament's by-laws form a single, comprehensive regulatory instrument called, in the Portuguese parliamentary tradition, "regiment" (*Regimento da Assembleia da República*). It addresses all aspects of parliamentary business, from the parliament's internal organization to its many different deliberative procedures. It is a very thorough legal instrument comprising environs 270 articles. It includes a specific chapter on the "accompaniment, assessment and consultation by the Parliament in the context of the process of construction of the European Union" (chapter VIII of Title IV). This chapter is made of a single, generic article (Article 261) whose § 1 empowers parliament to "adopt opinions on matters within the sphere of its reserved legislative competence pending for decision before organs of the European Union and in conformity with the principle of subsidiarity, besides accompanying and evaluate Portugal's participation in the process of construction of the European Union." Section 2 of this Article 261 instructs the parliament and the government to establish regular consultations in order to allow for the implementation of section 1 of the same article.

A few of the regiment's other norms also deal incidentally with the subject of the relations between the national parliament and the European parliament or, more generally, with the process of European integration. For example, Article 62 inscribes these matters as "matters of relative priority" in the tabling of parliament's order of business.

#### 1.5 How did the statutory regulation evolve and how substantive was the impact of changes on the activity and efficiency of the parliament?

After Portuguese accession to the European Communities, in 1986, the first statutory instrument relating to this subject was adopted in 1987 (Law N° 28/87), and subsequently in 1988 (Law N° 111/88) and in 1994 (Law N° 20/94). All these laws are substantially similar and instituted a regulatory approach much simpler than the one presently in force. Essentially, these statutory instruments were specifically concerned with consultations between the government and the national parliament and between parliament and Portuguese members of the European Parliament.

#### 1.6 How structured is the organization of the national parliament in the scope of European affairs (*e.g.* is there a 'European Committee', is the European Affairs Committee's composition regulated and how &c.)?

For a very long time now, among the parliament's standing committees there has been a specific Committee of European Affairs (*Comissão de Assuntos Europeus*). Although the number and scope of parliamentary committees is subject to change – and does change – with

each new seating of parliament, the Committee of European Affairs is provided for by a statutory instrument and, therefore, its existence is mandatory (*see* 1.3, above).

The committee's composition and functioning is regulated no differently from any other parliamentary committee. Its membership is assigned to the different political groups in proportion to their parliamentary representation. Currently (since 2009), membership is as follows (for each member an alternate member is also appointed):

- 9 members, Partido Socialista (PS), affiliated with the Party of the European Socialists.
- 8 members, Partido Social Democrata (PSD), affiliated with the European People's Party.
- 2 members, Centro Democrático e Social (CDS), affiliated with the European People's Party.
- 1 member, Bloco de Esquerda (BE), affiliated with the European United Left/Nordic Green Left.
- 1 member, Partido Comunista Português (PCP), affiliated with the European United Left/Nordic Green Left.

Parliamentary committees' chairmen and deputy chairmen are also assigned to political groups in proportion to their respective parliamentary representation. Thus, the Committee's current (since 2009) chairman and deputy chairmen are, respectively, Mr Vitalino Canas (PS), and Mr Carlos Costa Neves (PSD) and Mr Pedro Brandão Rodrigues (CDS).

Members, including the chairman and deputy chairmen, are freely appointed and removed by the political groups' leaderships without any election or ratification from the full chamber or the committee.

The committee adopts its own internal by-laws and may establish subcommittees or working parties, none having been established in the present parliamentary seating. There is also a small group of aides that work directly with the committee, as well as the assistance from personnel from parliament's secretariat-general.

1.7 What are the mechanisms of cooperation between the 'European committee' and the regular committees of the parliament in cases of overlap of the subject of prospective legislation?

Wherever the subject-matter of a procedure pending before the Committee of European Affairs is related to the scope of another parliamentary standing committee, the former shall consult with the latter and, if necessary, obtain its opinion. However, only the Committee of European Affairs' position is final and deliberative. Nonetheless, the Committee must attach to its own opinion any opinion issued by other parliamentary committees.

1.8 In cases of a bicameral parliament – what is the division of competences in European affairs between both chambers; what are the procedures of coordination; who has the 'last word'; is there any consensus-reaching mechanism?

Not applicable, given that the Portuguese parliament is unicameral.

1.9 Are there any regulations concerning specific procedures or *modus operandi* depending on the area (e.g. the question of the principles of subsidiarity and proportionality, or the issues of vetoing the European Council's initiatives to authorise the so-called 'simplified revision procedure' or proposals for the amendment of the Treaty)?

Yes. As mentioned *supra* at 1.3, Law N° 43/2006 establishes three specific procedures.

*Primo*, a procedure relating to European initiatives whose subject falls within the national parliament's sphere of exclusive legislative competence. According to the Portuguese Constitution parliament exercises exclusive legislative powers on a certain number of subjects, namely criminal law, elections, fundamental rights, etc. This means that practically all initiatives on the fields of the (former) second and third pillars must be dealt with under this specific procedure. Any European initiative relating to these subjects must be assessed according to this procedure, under which the emission of an opinion is mandatory and must be deliberated upon by the whole chamber. A draft opinion is prepared by the Committee of European Affairs, if necessary in consultation with other subject-relevant standing committees, and then submitted for consideration before the whole chamber where it is debated and voted. Exceptionally, in urgent cases, the parliament's opinion may be adopted solely by the Committee of European Affairs.

*Secundo*, a specific procedure relating to infringements of the principle of subsidiarity. If it believes this principle is being infringed by any initiative pending before the European institutions, parliament may adopt a reasoned opinion and address it to the presidents of the European Parliament, the Council, the European Commission and, the case being, the Committee of the Regions and the Economic and Social Committee. This opinion must be adopted by the full chamber and in the form of a resolution, which means that it must be published in the national official journal (*Diário da República*). Exceptionally, in urgent cases, the parliament's opinion may be adopted solely by the Committee of European Affairs.

*Tertium*, a specific procedure relating to the appointment of Portuguese candidates to European positions. This procedure is applicable whenever the government submits a candidate to a position in a European body or agency, with the exception of the European Commission, the Committee of the Regions, the Economic and Social Committee and any position that is to be filled through an open competition. According to this procedure, the government must transmit to parliament the candidates' curricula and the Committee of European Affairs subsequently conducts an hearing. However, the parliament holds no power of veto nor may it adopt an opinion on the suitability of the candidate proposed.



## 2. The Document- and Procedure-Based Model and Practice of Parliamentary Scrutiny.

2.1 Would the overall system in place in your country correspond to the document-based or the procedure-based model of scrutiny of EU lawmaking and governments' position?

The scrutiny system adopted by the Portuguese parliament is clearly modelled out on the document-based model of scrutiny, although without any clause of scrutiny reserve. However, one may argue that a few elements of the procedure-based model are also present. Such is the case of the statutory requirement that government ministers meet with the parliament's Committee of European Affairs at least one week in advance of every meeting of the European Council and of the Council of the European Union to address all questions tabled for these meetings' agendas. Overall, the system adopted in Portugal does not allow nor admit any type of parliamentary mandate for the government's positions in the European decision-making process.

2.2 Are the scrutiny procedures sector- or policy-specific (*e.g.* depending on area or voting method)?

Generally speaking, there is a single scrutiny procedure that is generally applicable to all policy areas.. However, there is a sector-specific parliamentary scrutiny procedure for any European initiative whose subject falls within parliament's constitutionally reserved legislative competence. This requires some further explanation. According to the Portuguese Constitution, government and parliament are concurrently empowered to enact legislation. In general, government legislation does not require previous legislative delegation from parliament nor is it subject to any form of subsequent ratification or confirmation. However, legislating on a certain number of subjects (those with more fundamental implications) is constitutionally reserved to parliament. This is designated, in Portuguese legal jargon, as parliament's reserved legislative competence. This reserve may be absolute (without the possibility of delegation to government) or relative (government may enact legislation on some subjects if previously authorized by parliament). The subjects that fall within parliament's reserved legislative competence are vast, but are essentially connected to the definition of the most fundamental societal political options, such as institutional governance, elections, fundamental rights, criminal law and procedure, etc.

Therefore, any European initiative on any of these matters must be evaluated through this specific procedure. This procedure's two most distinctive aspects are, on the one side, the fact that parliament is mandated to adopt an opinion and, on the other side, the opinion being debated and voted by the full chamber. Also, the government must inform parliament on the position it intends to adopt, if it has already adopted one. The opinion is prepared by the Committee of European Affairs, if necessary in consultation with other sectoral standing committees, and then forwarded to the full chamber, where it is debate and voted upon. Exceptionally, in case of urgent matters, the final opinion may be directly adopted by the Committee.

2.3 Is the scrutiny formalized by the possibility of ‘mandating the government’ or of announcing a ‘scrutiny reserve’? How is the government’s conduct in relation to the instruments of parliamentary scrutiny sanctioned in law and practice?

There is no legal mechanism, statutory or customary, providing for the possibility of the government requiring, or asking for, a parliamentary mandate for its positions in the European decision-making procedures. Also, there is no mechanism of scrutiny reserve.

2.4 Is there any substantial difference between parliamentary scrutiny over the European and domestic issues?

Yes. Parliamentary scrutiny on domestic issues tends to be of a strictly political nature and takes form, primarily, through parliamentary debates before the full chamber. The prime-minister is required to attend a parliamentary debate every two weeks, and sectoral debates are held very frequently. Political groups are also entitled to demand a certain number of debates per each parliamentary session, according to their representation. Contrary to parliament’s scrutiny on European affairs, these debates do not include the discussion or voting of any opinion nor is a rapporteur appointed for the debate. Political scrutiny on domestic issues also takes place at committee-level and, again, it is conducted rather differently than scrutiny on European issues. On domestic issues ministers and high ranking civil servants are routinely called for hearings before committees to discuss specific issues or questions. Again, no rapporteur is appointed nor is there any opinion or draft opinion under discussion. Hence, domestic scrutiny is essentially focused on parliamentary debates which tend to be extremely adversarial and raucous, whereas European scrutiny is almost exclusively document-based and centred on the drafting of opinions, which tend to be consensual.

2.5 Does and should the constitutional sensitiveness of Justice and Home Affairs Policy lead to an increased activity of the parliament in this area?

Yes. Although not directly, European initiatives within the policy field of Justice and Home Affairs are generally dealt with through a specific scrutiny procedure. As stated above (*see* 2.2), initiatives whose subject falls within the sphere of parliament’s reserved legislative competence are subject to a more intense scrutiny. Although this procedure is not, per se, directly aimed for Justice and Home Affairs initiatives the reality is that most, if not all, such initiatives fall within parliament’s reserved competences, and so will be subject to a more rigorous and intense parliamentary scrutiny calling for the participation of the whole chamber.

However, given the fundamental importance of all issues involved in this policy a stronger and much more intense scrutiny appears to be in order. In fact, European legislation in the field of Justice and Home Affairs is directly binding on the national parliament, whose legislative discretion may thus be significantly compressed by the outcome of the European law-making process. This happens, precisely, in an area where the power of transposing European legislation is solely, or predominantly, vested in the national parliament. Hence, one may argue that parliament’s input in such a process should be more binding on the government and that, for the most sensitive and fundamental policies, governmental positions in the Council should require a specific parliamentary mandate.



2.6 Have there been any proposals to reform parliamentary scrutiny in your country? What are the grounds (reasons) of such proposals? Which are the directions of the proposals? Who presented the proposal – parliamentary committees, the government, the public, legal or political scientists, &c?

Presently, there are no such proposals pending before parliament, and none has been announced. Reforming parliamentary scrutiny in Portugal has also not been a frequent topic in academia or public opinion.

2.7 What are the specific measures adopted by the national parliament to meet requirements concerning efficiency of the scrutiny?

None have been adopted.

2.8 How can the practical effects of parliamentary scrutiny be assessed? What criteria should apply in such assessment? What lessons – if any – can be drawn from such assessment?

The main goal of parliamentary scrutiny is to enhance the participation of national parliaments in the European decision-making process in a purposeful and fruitful manner. The amelioration of proposed draft legislation through the intervention of national parliaments should be the criterion under which the practical effects of parliamentary scrutiny could be assessed. This, of course, implies that such assessment has to be conducted on a case-by-case basis. Any European legislative act whose content was directly influenced by the outcome of national parliaments' scrutiny is a demonstration of the scrutiny's effectiveness and usefulness, thereby showing that national parliaments contributed positively to the decision-making process and that European institutions were receptive to more intense scrutiny and participatory mechanisms. Of course, this assessment can only be done by scholars and academic institutions through legal research projects.

2.9 Are there any mechanism of checking the effectiveness of the scrutiny within in the national parliament? Is there any formal regulation in this respect (by-law of the parliament; regulations of the European committee, &c.)? What would be the criteria that could apply to checking the effectiveness of scrutiny?

No specific mechanism exists for such purpose. However, the Committee of European Affairs submits to the full chamber a regular report about its scrutiny activities.

### **3. The Government-Parliament Informational Asymmetry**

3.1 What were the deficiencies of the mechanism of submitting the Commission's legislative proposals to the parliament by the government in your country?

By law, the government is required to forward parliament any relevant European documents "as soon as they are presented or submitted to the Council [of the European Union]." Parliamentarians may request from the government any additional documentation or information, namely any follow-up documents produced by the Council. These documents are generally submitted in a timely fashion and there do not appear to be any major deficiencies.

3.2 Based on the regulation that legislative initiatives should be sent directly to national parliament, how effective is the mechanism of requiring the government to submit additional information deemed essential to take a proper decision or issue an opinion by the parliament and its bodies?

The government usually complies in a timely manner with all parliamentary requests for additional information necessary for the parliament's scrutiny of European initiatives.

3.3 How and to what extent is the government obliged to explain the detail of a legislative initiative both for the country and for European integration? Are there any criteria applicable to such explanations? Is there any mechanism to force the government to present more detailed information and explanation?

There is a general duty of information to parliament on European foreign policy impending on the government, including the duty to submit to parliament any follow-up documentation produced by the European institution in the course of the decision-making process, complemented by the government's obligation to submit a yearly report on Portugal's participation in the process of European integration. This report must refer, among any other relevant topics, all European Union deliberations with major impact in Portugal adopted in the previous year and all measures the government adopted to implement such deliberations.

The Committee of Foreign Affairs and each parliamentary individually may request specific information or documents from the government, which by law is required to oblige.

3.4 Is there a formal hearing of the ministers before the Council's meetings?

Yes. Government ministers are required to meet with the Committee of European Affairs in the week prior and subsequent to any European Council meeting. The government must also be present at a parliamentary debate, before the full chamber, after each European Council meeting. The Committee of European Affairs, when applicable together with any relevant sectoral standing committee, also meets with the relevant ministers in the week prior to each meeting of the Council, in its different formations.

3.5 In case of ‘instructions’ for the ministers on voting in the Council, what are and what were the criteria of this kind of decision of the parliament or its committees?

Currently, parliament may not issue binding instructions to ministers on how they should exercise their vote in the Council nor are government ministers required to observe or respond to any (non binding) voting recommendation made by parliament.

3.6 Do parliamentarians have access to relevant administrative research, diplomatic services’ information, or other relevant policy-making props?

In general, yes. Through normal parliamentary channels members may access any non-reserved information that is available to or was produced by the Public Administration. And although parliamentarians may not directly address the diplomatic service or other administrative bodies and direct them to produce specific documents or research, the government tends to oblige to such requests when made by the Committee of European Affairs or even by individual parliamentarians.

3.7 What kind of timing and management mechanism and instruments are to be implemented to avoid the risk of EU documents overflow?

Parliament must exercise its judgement in discerning those documents and initiatives that merit a more intense and rigorous scrutiny. It is essential that the main focus of scrutiny should be primarily reserved to the assessment of those major pieces of draft legislation with the most implications on fundamental rights and institutional balance and more intense long term consequences. This is particularly the case of initiatives adopted in the area of justice and home affairs which are those meriting more debate and assessment.

3.8 What are the requisites for the parliament to be able to perform the new tasks effectively, *e.g.*:

- human and material resources (including access to communication, &c.);
- improvement of the dialog between the national parliament and the national government;
- new procedures that would allow for influencing the content of the European legislation and policy at an early stage;
- extensive use of information-flow as a basic instrument of influence on legislation and policy-making?

The Committee of European Affairs’ work would be significantly improved by the addition of a larger pool of research staff as well as a direct access to the main sources of European documentation and information. The possibility of the European institutions appointing parliamentary liaison officers with national parliaments could optimise the flow of information and the direct exchange of points of views as well as serve as points of contact with national parliaments.

3.9 What consequences will the changes adopted in the Lisbon Treaty have on the organization of parliamentary scrutiny in your country?

So far no changes have been implemented or can be foreseen. However, the current seating of parliament inaugurated in October 2009 and, as of December 2009, parliament is not yet operating on “cruise speed.”

## **4. Democratic Legitimacy of European Governance**

4.1 Does the new role of the national parliaments increase the democratic legitimacy of the European Union? What kind of criteria might be useful to assess the quality of those changes?

A deeper, more intense scrutiny of European legislation by national parliaments arguably represents a reinforcement of European Union’s democratic legitimacy. The added value of the expected increases in transparency and participation is not negligible and one feels would translate into more visibility and understanding of the European Union’s competence and functioning by national public opinions. The perception that national parliaments were totally alien to the deliberative mechanisms of European lawmaking has been equated by European public opinion to a lack of democratic commitment on the part of the European institutions. Although the aggregate of national parliaments is not a substitute for European institutions, parliaments should not be left out of the decision-making process. Democratic legitimacy in the European Union is both a participatory and a deliberative process. The participation of a wide array of relevant political actors, national parliaments chief among them, strengthens the democratic legitimacy of the outcome of the deliberative procedures and adds a new level of political accountability, particularly in the those sectors or policy areas where the democratically elected European Parliament fails to have a decisive deliberative power.

There is however no single criterion that could be adopted to assess whether democratic legitimacy of the European Union has been enhanced by the new role awarded to national parliaments by the Lisbon Treaty. In any case, a stronger participation of national parliaments in the decision-making process and a more fruitful relationship between them and the European institutions will be a particularly good indicator of the democratic quality of the European integration process.

4.2 Are there in your parliament any proposals to change procedures of cooperation with other parliaments in order to meet the requirements of the Lisbon Treaty?

So far no changes have been implemented or can be foreseen. However, the current seating of parliament inaugurated in October 2009 and, as of December 2009, parliament is not yet operating on “cruise speed.”

4.3 How far may the requirements of the Lisbon Treaty concerning relations between the European parliament and the national parliament influence the mechanism of parliamentary (political) accountability and control of the government?

The new, enhanced mechanisms of parliament's relationship with the European institutions in general, and the European Parliament in particular, will undoubtedly reinforce national parliaments' intervention in the European decision-making process and, thus, increase scrutiny on governments' European policies and institutional participation. A more interventional parliament will be one that will focus more intensely on governmental policies towards participation in the process of European integration.

4.4 Does the new role of the national parliaments increase the efficiency of the process of enhanced integration in the European Union?

This new role of the national parliaments is certainly not risk-free, and it may very well be that its implementation would carry a toll on the efficiency and expediency of the European decision-making process. However, one may argue that this is a cost worth supporting.

## **5. Democratic Legitimacy of National Governance**

5.1 May the new role of national parliaments increase the level of scrutiny of national governments (*viz.* lead to strengthening, as a side effect, the overall parliamentary control over the government)?

I believe that any effect on Member States internal governance should not be a consequence or a goal of increasing the level of national parliaments' scrutiny of the European decision-making process. The sole purpose of this new and more intense scrutiny level is to actively engage the somewhat valid criticism of the European Union's lack of democratic legitimacy. Allowing for the national parliaments' input to influence the outcome of the European decision-making process is paramount to increasing the Union's democraticity and transparency. However, European participatory instruments should not, and can not, be construed as instruments for internal politics. The aim is to elevate national parliaments to the status of full participants in the European legislative process, not to create new avenues and instruments of domestic parliamentary control over the government. The internal balance of power between governments and parliaments is a matter that is best left exclusively to the internal constitutional regulation of each State's political institutions. European law (and, foremost among it, the European treaties) should not be drafted with the aim, however indirect, of shifting Member States' internal balance of institutional power. What is both necessary and relevant to European law is that national parliaments' role in the European decision-making process be significantly upgraded: the relationship between national parliaments and national governments, however fundamental, should not be dealt with directly by, or result as a consequence of, any European legal instrument.

5.2 Does the new role of national parliaments increase the standing of the parliamentary opposition as an element of the democratic participation in the legislative activity on national and European level? Are there any specific regulations in the parliament's by-laws concerning enhanced participation of the political opposition in European Committees and the like?

The new role of national parliaments does not appear to enhance significantly the standing of the parliamentary opposition, as it does not provide for mechanisms of by-passing the parliamentary majority. However, as in the current parliamentary seating the government does not have a parliamentary majority support it is not unlikely that the Committee of European Affairs or the full chamber may adopt different positions from those adopted by the government.

Opposition participation in the Committee of European Affairs is regulated by the parliament's by-laws. First and foremost, opposition political groups are entitled to appoint a certain number of committee's chairmen and deputy chairmen according to their representation and to set the agenda of a certain number of both full chamber and committee meetings. These powers are not specific to the Committee of European Affairs, but rather a general principle of committee work in the Portuguese parliament.

5.3 Is there any special regulation concerning access to government information in the field of the Common Foreign and Security Policy and in the field of Police and Judicial Co-operation in Criminal Matters?

There is no specific regulation on this particular type of information. However, government is legally obliged to submit to parliament any relevant information or documents on "any subjects and positions to be debated before the European institutions, as well as any proposals under discussion and the ongoing negotiations." This generic mandate is statutorily construed as expressly including i) draft treaties or agreements to be adopted by the European Communities or by the Member States in the framework of the European Union; ii) any resolution to be adopted as a Council common position; and iii) any proposed binding or non-binding acts to be adopted by the European Union institutions, with the exception of those acts of ordinary administration.

5.4 Are there any suggestions in your country concerning improvements to be made in the democratic scrutiny and control (e.g. publicity of the European Committee's proceedings; the possibility of the Committee to give instructions to the government to bring proceedings before the Court of Justice on subsidiarity or proportionality grounds; possibilities of direct discussion between the committee members and members of the European Commission &c.)?

The subject of European integration in general, and more specifically of parliamentary scrutiny of the European decision-making process, is not a frequent topic of concern either in academia or in the public opinion. The most relevant question typically invoked relates to the



scrutiny of the selection of appointees to positions in the European institutions, bodies and agencies

## 6. The Lisbon Treaty and the Protocols

6.1 What is the meaning and function of the new Article 7(3) of the Protocol on the Application of the Principles of Subsidiarity and Proportionality? Are the obligations cumulative or alternative with those arising under Article 7(2) (the Protocol's "furthermore")?

From the text of Article 7(3) of the Protocol it appears that obligations set forth within it are cumulative to those arising from Article 7(2). As has already been pointed in the legal literature, paragraph (2) suggests a "yellow card" procedure, whereas paragraph (3) creates a more stringent "orange card" procedure. The activation of the "yellow card" procedure impends on the proponent the need to review its proposal and justify its revised position (whether to amend, maintain or withdraw the original proposal). The "orange card" procedure, on the other hand, creates two additional obligations in the case where in the framework of the ordinary legislative procedure the proponent (the Commission) decides to maintain its original proposal: i) the proponent must specifically justify why it feels its proposal does not infringe on the principle of subsidiarity; ii) the European legislator must conduct a mandatory assessment of the proposal's compatibility with the principle of subsidiarity. Therefore, application of Article 7(3) does not appear to be an alternative from application of Article 7(2) but rather a complement of the latter. In fact, whereas the "yellow card" procedure encompasses all legislative initiatives (as defined by Article 3), the "orange card" procedure applies only to a fraction of those. Furthermore, it appears the justification provided for in Article 7(3) is supplemental to the "reasons" specifically required under Article 7(2). That is, the proponent must give the reasons for its review of the original proposal, whether it decides to maintain it, withdraw it or amend it. Additionally, if the proposal was presented in the framework of the ordinary legislative procedure, if a majority of national parliaments objected to it, and if the Commission decides to maintain the original draft then a further two requirements must be fulfilled: the Commission's decision to maintain the proposal must be duly justified and the European legislator must specifically deliberate on its compliance with the principle of subsidiarity.

6.2 What is your opinion on 'the power to block legislation' (Article 7(3) (b) of the Protocol? Will the role of the national parliament be enhanced or will it be of a rather symbolic character (*i.e.* the adoption of proposed legislation will not be effectively stopped)?

Article 7(3)(b) of the Protocol does not appear to grant national parliaments a power to block legislation. Rather it is incumbent on the part of European legislation to decide, by a separate deliberation, whether a specific draft legislative act infringes the principle of subsidiarity. The fact that a certain number of chambers representative of the majority of national parliaments claims such an infringement justifies that the European legislator should adopt a specific deliberation on that precise issue. However, this mechanism does not appear to grant national parliaments the last word on the assessment of subsidiarity compliance. And, it should be

stressed, the European legislator's decision is political in its essence and not juridical, which arguably does not preclude the possibility of a judicial adjudication on the validity of the compliance decision or of the legislative act subsequently adopted.

### 6.3 Are there any new changes to the mechanism of activity of the national parliament proposed or under way as a response to the regulations of the Lisbon Treaty?

At the moment, there are not any bills pending before parliament on this specific subject and none have been proposed since 2006. However, it is expected that the entry into force of the Lisbon Treaty will lead to the revision of the statutory regulation currently in force, but this process has not yet been started.

### 6.4 Is there any legislative initiative concerning the new role of the national parliament under the Lisbon Treaty? What is the substance of such proposals?

*See 6.3. above.*

### 6.5 Concerning subsidiarity control:

a/are there specific rules of procedure?

b/ are there portfolio arrangements?

c/ are there agreements between the government and the parliament?

There is, since 2006, a specific parliamentary procedure on control of observance of the principle of subsidiarity. This procedure differs from the regular procedure of parliamentary scrutiny on several aspects. Thus, whenever parliament believes that a European draft legislative act infringes the principle of subsidiarity it may adopt a reasoned opinion and submit it to the presidents of the European Parliament, the Council and the European Commission. In this event, the opinion is adopted, by the full chamber, as a parliamentary resolution, implicating that it will be published in the national official journal. If the subject-matter of the proposed legislative act is of interest to the autonomous regions of Azores and Madeira, parliament must also consult with the regional legislative assemblies. In case of an urgent matter the opinion may be adopted solely by the Committee of European Affairs.

However, it must be stressed that the Portuguese parliament has not yet adopted any opinion on the infringement of the principle of subsidiarity.

### 6.6 What kind of area-specific criteria may be applied to control of subsidiarity?

N/A.

## **7. The National Parliaments' Involvement and the Construction of a European Polity.**

7.1 Did the Lisbon Treaty raise awareness of the magnitude of the fundamental issues of the European integration to be discussed and solved in the years to come?

The Lisbon Treaty, having been adopted during the Portuguese Presidency and signed at Lisbon in 2007, had a tremendous impact in the public opinion and on the public's perception of the European integration process. The final stages of its preparation and the signature ceremony were closely followed by the Portuguese public and the Treaty's conclusion is generally celebrated as one of Portugal's most important achievements in foreign policy. However, one may argue that the underlying substantive issues and the need for reform of the European treaties has never been the focal point of the media frenzy around the Lisbon Treaty. In the aftermath of Treaty's signature the most important issue publicly debated was whether its ratification should be by referendum, as had been promised by most political parties, or solely by a parliamentary vote. The substantive issues of institutional reform and reallocation of competences were not heavily discussed and, in general, were not grasped by the public opinion.

In any event, the ratification process was the one European topic most closely followed ever in Portugal and the idea that missing out on its ratification would constitute a monumental setback in the process European integration was clearly understood by the media and the public opinion. This in a certain sense lead the way to a somewhat fuzzy awareness that European integration is at a crossroads and that there are several issues whose discussion and decision is still unsolved.

7.2 What are the European policy issues under discussion within the national parliament? Is the national parliament ready to become a substantial actor in the European policy making that also includes the strategy of integration?

The Portuguese parliament does not seem eager to play a more determinant or interventional role in the European decision- and policy-making processes. Although the Portuguese parliament does carry out a fair number of scrutiny procedures, on a general note the substantive aspects of specific European deliberative procedures are not closely assessed. The tonic in most of parliament's scrutiny opinions is predominantly formal. Therefore, it is expectable that the parliament's, under the new rules adopted by the Lisbon Treaty, the parliament's role would not be substantially different from the one it is has played so far.

7.3 Are there any special regulations or proposals of regulations concerning participation of representatives of NGOs, trade unions or organizations of employers in the activity of *e.g.* the European Committee of the parliament?

Apart from a generic mandate to the Committee of European Affairs to “promote hearings and debates with representatives from civil society on European issues, thereby contributing towards the creation of a European public sphere on the national level,” there are no statutory arrangements regarding the mandatory participation of non-parliamentary actors in the process of parliamentary scrutiny of European legislation, nor are there any proposals pending for the adoption of such participatory mechanisms. However, the Committee of European Affairs does regularly consult, on a case-by-case discretionary basis, with civil society’s institutions, and even occasionally with scholars or reputed specialists, depending on the subject-matters of the issues pending before it.

7.4 Are there any proposals to include voices and opinions of interested groups of society before *e.g.* the European Committee of the parliament so as to enhance the level of democratic legitimacy by annexing concerns thus voiced to the parliament’s final statement on the European matters?

*See* 7.3 above. There are currently no proposals pending before parliament for the modification of the rules of participation in the scrutiny procedures.

7.5 To what extent may the new mechanism of involvement of the national parliaments into European affairs have impact on hitherto prevailing understanding of domestic and European politics?

Specifically in the Portuguese case, so far the national parliament has not been a full player in European politics, its interactions with the European decision-making process being necessarily intermediated by the government. The new mechanisms of involvement of the national parliaments will allow the Portuguese parliament to play its own part as an actor on the European political process. With the exception of treaty ratification, the Portuguese parliament has not had a direct voice in the definition of Portugal’s positions in the Council has government is not required to obtain a parliamentary mandate. Even if it still lacking such mandate power, parliament will hence able to voice its concerns directly into the deliberative process through parliamentary scrutiny procedures.

[7.6 Is there any detectable evolution in the practices of implicating Members of the European Parliament in national parliamentary work or in the political parties’ personnel policy concerning European and national elections?]

## **8. The National Parliament under the Lisbon Treaty and Beyond**

8.1 Considering that legislation in the field of Justice and Home Affairs comes to be an ever more vital aspect of the development of European integration, are there any concepts or proposals for a more intense influence of the national parliament on these matters?

*See 7.4 above.*

8.2 What kind of conditions should be met to make national parliaments more influential in setting the agenda of the European Union?

Undoubtedly national parliaments should not be kept at bay from the decision-making process in the European Union and their participation should be actively sought in an effective manner. However, there is arguably a limit for such national parliaments' influence in the definition of the decision-making procedures as national parliaments are not, and should not become, the European legislator. Within the European Union the legislative function resides with the European institutions, not with national parliaments. While exercising this function the institutions should consult frequently with national parliaments, and this consultation should both take place in a formal, institutional setting and be effective and productive, but one would argue that the definitive decisional legislative power must be left solely to the European legislator.

The one area where national parliaments should be the most influential is precisely the observance of the principle of subsidiarity, which is a fundamental principle of European Union law and a constitutional limitation to the European legislator.

The mechanisms set forth by the Lisbon Treaty appear to be balanced and reasonable. National parliaments' avenues of participation in the European decision-making process were increased and strengthened and, within limits, they are able to block proposed legislation infringing the principle of subsidiarity, whereas the institutions' deliberative legislative power remains fundamentally untouched. Hence, one would argue that after Lisbon there appears to be no need to make national parliaments even more influential in setting the legislative agenda of the European Union.

8.3 Is there any discussion concerning the possibility of the model of parliament evolving from one of a rather reactive towards a more policy-formulating body?

There is currently no such discussion ongoing in Portugal.