**WITH GREAT POWER, COMES NO RESPONSIBILITY? THE “POLITICAL EXCEPTION” TO DUTIES OF SINCERE COOPERATION FOR NATIONAL PARLIAMENTS**

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**Abstract**

*As national parliaments gain power in relation to the Union legislative process, we must ask what legal obligations might attach to this increased influence. For Union institutions, obligations apply based on a model of internal immunity and external responsibility; their internal deliberations benefit from a “political exception” to duties of sincere cooperation and it is their external actions for which they are held accountable. This model works for national parliamentary influence on a Council representative; such influence is part of the internal action of the Council and thus ought to benefit from the “political exception”. However, for aggregative power, such as the “early warning system” and the “red card”, this model is problematic, because such power is not accompanied by an externally-facing institutional architecture which can be held accountable. However, this potential for imbalance between rights and obligations ought not be remedied by imposing duties on individual national parliaments: they are actors within a legislative power and thus ought to benefit from the “political exception”.*

**1. Introduction**

Ahead of the United Kingdom’s In/Out referendum on European Union membership, the deal agreed in the European Council included a so-called “red card” power for national parliaments.[[2]](#footnote-2) This was yet another attempt to increase the power of national parliaments at the EU level, in addition to the direct role they were given in the Union’s legislative process following the Lisbon Treaty.[[3]](#footnote-3) Alongside this, we can also perceive a domestic-based growth in the power of national parliaments in relation to their representatives at the Council. Most notably, some parliaments have gained vetoes over the ability of their Council representatives to vote in favour of Union measures.[[4]](#footnote-4) With power, comes responsibility. In the Union context, the exercise of power by legislative institutions is bound by obligations in order to protect the institutional balance of the legislative process. Notably, each legislative power is under a duty of sincere cooperation in relation to other actors in the legislative process.[[5]](#footnote-5) In this context, the question is: are national parliaments bound by the duty of sincere cooperation in their exercise of power in relation to the Union’s legislative process?

In the present article, two types of national parliamentary power are discussed (section 2); scrutiny of their Council representative, on the one hand, and scrutiny of Union institutions, on the other. In order to consider how obligations may attach to these actions, we examine how they apply to Union institutions as a point of comparison (section 3). Such obligations follow a pattern, with a distinction between the institution’s internal and externally-facing actions. For the internal deliberations of institutions, there is a “political exception”[[6]](#footnote-6) to the duty of sincere cooperation. This applies particularly to Member States when defending their national interest in negotiations within the Council.[[7]](#footnote-7) It is likely that this is due to the deeply political nature of such negotiations, which makes judicial scrutiny inappropriate. Instead, it is through their externally-facing actions that the institutions are held to account. The actions of Union institutions, or of their representatives, are subject to duties of sincere cooperation in the way that they interact with the other institutions. Could this distinction between obligations for internal and external actions apply to the power exercised by national parliaments in relation to the Union legislative process?

In relation to the scrutiny of their Council representatives (section 4), the “political exception” as applied to the Council ought to extend to national parliamentary scrutiny. Each national parliament is merely influencing the vote of an individual Council representative. This forms part of the internal deliberations of the Council, and thus this scrutiny ought to be exempt from duties of sincere cooperation. In relation to their scrutiny of Union institutions (section 5), individual national parliaments ought also to benefit from the “political exception”. This raises a clear problem in relation to this second type of national parliamentary power. The aggregative, collective power provided to national parliaments does not have a single, externally-facing institutional architecture to which duties of sincere cooperation can attach. Thus, the model we apply to the institutions cannot apply to this type of power, and we are left with no obvious way to hold the aggregative power of national parliaments to account. The result may be an imbalance between their rights and obligations. However, the “political exception” should still apply to individual national parliaments because they are acting within an overarching, collective legislative power. Such action can be seen as *internal* and thus ought to remain immune from judicial scrutiny because of its political nature.

**2. The growing role of national parliaments in the Union legislative process**

National parliaments have different rights and responsibilities within their domestic constitutional systems. Despite this, it is still possible to categorize the types of power that national parliaments can exercise, even though each may be in a different position to interact with the Union’s legislative process. This section considers two types of that power.[[8]](#footnote-8) The first is “Union institution scrutiny”: the actions of national parliaments taken directly in relation to the Union institutions. The second is “Council representative scrutiny”: the action taken by national parliaments in scrutinizing their representative at the Council. In both areas, national parliaments are becoming more active and exercising greater influence.

*2.1. Union institution scrutiny*

The proposal for a “red card” for national parliaments was the latest in a long line of initiatives intended to increase their interaction with the institutions in the Union legislative process. Historically, this role had been very limited, beginning with the founding Treaty in which each national parliament was able to send a representative to the European Assembly.[[9]](#footnote-9) This was an institution with limited powers[[10]](#footnote-10) and was replaced by the directly elected European Parliament in 1979,[[11]](#footnote-11) leaving no formal role for national parliaments to participate directly in Union decision-making. While a Declaration attached to the Treaty of Maastricht[[12]](#footnote-12) and a Protocol attached to the Treaty of Amsterdam[[13]](#footnote-13) aimed to encourage greater involvement, a clear change of attitude towards national parliaments was not evident until the Laeken Declaration.[[14]](#footnote-14) This posed the question of what role national parliaments should play in the Union following future Treaty reform. This led to serious consideration of their role in the drafting of the Constitutional Treaty, of which the provisions relating to national parliaments were salvaged and then enacted with the Lisbon Treaty.[[15]](#footnote-15) At this point we can note a marked change in the Treaty-based power of national parliaments. Article 12 TEU states that national parliaments “contribute actively to the good functioning of the Union”.[[16]](#footnote-16) The Treaties now guarantee a place for “representatives of the national parliaments” in any future ordinary revision procedure under Article 48 TEU. This gives them a seat at the table in future Treaty negotiations, which may allow them to argue for stronger formal powers.

The most significant reform was the introduction of the first direct role in the legislative process for national parliaments through the “early warning mechanism”.[[17]](#footnote-17) Under this system, each national parliament has two votes which are split between chambers in bicameral systems. They cast this vote by submitting a reasoned opinion stating that the draft legislation does not comply with the principle of subsidiarity.[[18]](#footnote-18) If a third of total votes are cast, the initiator[[19]](#footnote-19) of the legislation must review its draft and decide to maintain, amend or withdraw it, giving reasons for this decision.[[20]](#footnote-20) Further, in the ordinary legislative procedure, where the votes cast represent half of those allocated to national parliaments, the proposal must be reviewed and the Commission must justify its decision if it wishes to maintain the proposal. This opinion and those of national parliaments are submitted to the “Union’s legislators”, who then vote on the compliance of the proposal with subsidiarity.[[21]](#footnote-21) This “early warning mechanism” is supplemented by the possibility for Member States to bring actions on behalf of national parliaments, or a chamber thereof, against a legislative act on ground of infringement of the principle of subsidiarity.[[22]](#footnote-22)

Research has shown that the powers provided at Lisbon have had certain positive effects on national parliaments. Many have altered their institutional architecture and are more engaged in the Union legislative process than ever before.[[23]](#footnote-23) However, the “early warning mechanism” itself has not enjoyed extensive use. The threshold of a third of national parliamentary votes has been reached on just three occasions.[[24]](#footnote-24) On the first occasion,[[25]](#footnote-25) the Commission withdrew the proposal in question, but did so on the basis that it was “unlikely to gather the necessary political support within the European Parliament and Council to enable its adoption”.[[26]](#footnote-26) It denied the effects of the national parliamentary complaints, stating that many had not been based on subsidiarity.[[27]](#footnote-27) The two activations since then have both been rejected by the Commission for the same reason and the drafts have continued.[[28]](#footnote-28) These examples call into question the strength of the “early warning system”, given that the ultimate power rests with the Commission and that the opinions of national parliaments can be dismissed on the mere basis of disagreement on subsidiarity.[[29]](#footnote-29)

Perhaps because of the weakness of the “early warning mechanism”, there has been support for a stronger power for national parliaments: a legislative veto.[[30]](#footnote-30) Some have suggested a “third legislative chamber” in the Union, similar to the Assembly in the original Treaty settlement of European integration, but with stronger powers.[[31]](#footnote-31) Alternatively, the extension of the “early warning mechanism” to include veto effects could provide a looser, aggregative system. Such a “red card” system was specifically considered, and dismissed, by the Working Group that eventually created the “early warning system”.[[32]](#footnote-32) However, this proposal was revived by the British government in the negotiations which preceded the UK’s In/Out referendum[[33]](#footnote-33) and a “red card” was eventually agreed in the European Council conclusions.[[34]](#footnote-34) The procedure agreed was intended to act as an extension of the “early warning mechanism” in Protocol No. 2, albeit one taken outside the structure of the Treaties. If 55 percent of the votes allocated to national parliaments were cast, Council representatives would withdraw support for the proposal unless the draft was altered to reflect the concerns of the national parliaments. The procedure also aimed to increase the time available for consideration by national parliaments from 8 to 12 weeks. This proposal was not ultimately adopted, following the outcome of the UK’s referendum, but this agreement may signal a political will for a Treaty-enshrined “red card” power in the future.

*2.2. Council representative scrutiny*

In the Union legislative process, a representative of a Member State sitting in the Council is accountable to his or her national parliament. This is based on the principle of ministerial accountability,[[35]](#footnote-35) whereby national parliaments scrutinize the power of the national executives and hold them to account.[[36]](#footnote-36) The principle is, subject to exceptions, common to national parliaments in the European Union.[[37]](#footnote-37) It holds that ministers can be called to account and held responsible for their conduct and, ultimately, that ministers must resign if a vote of no confidence is passed in parliament. Many view this relationship in terms of agency theory. National parliaments are the principal, because of their election by the citizens, and they must be able to retain some control over their agents, the Council representatives.[[38]](#footnote-38) This ultimately underpins the democratic basis of the Council, offering a link from their actions back to the citizens through a chain of accountability via the national parliaments.[[39]](#footnote-39)

Many argue that scrutiny of their Council representatives is the “main role”[[40]](#footnote-40) of national parliaments in the Union. Despite its importance, national parliaments generally were slow to take up the task,[[41]](#footnote-41) and have historically not held national executives to account in Union decision-making.[[42]](#footnote-42) One clear exception to this was the Danish *Folketing* which, since Denmark’s accession in 1973, has strictly enforced the ministerial responsibility of their Council representative through a mandate system. An approved mandate binds the representative in their negotiations. This is ultimately supported by the ability of the Danish Parliament to remove ministers through a vote of no confidence.[[43]](#footnote-43) Over time, other national parliaments have become more active. This may have been aided by increased information rights, which have gradually been extended through a history of favourable Treaty revisions.[[44]](#footnote-44)

In recent years, some national parliaments have started to develop stronger powers to bind the votes of their Council representative, through a legal requirement of parliamentary approval. In effect, national parliaments are individually empowering themselves with localized “red cards” to control the vote of their Council representative.[[45]](#footnote-45) In qualified majority voting areas, the threshold for a Council blocking minority could be reached by national parliaments from as few as four countries.[[46]](#footnote-46) In areas of unanimity voting, the requirement of parliamentary approval before the Council representative can vote is equivalent to a veto for that national parliament. Furthermore, in this context, national parliaments are not bound by the restrictions on their power in Protocol No. 2. Their intervention can be general, and is not limited by a need to complain on the basis of non-compliance with the principle of subsidiarity.

Two examples, from Germany and the United Kingdom, demonstrate how national parliaments can exercise domestic rights to dictate their Council member’s vote. The first are the German acts which determine the relationship between the German parliament and its government following the Treaty of Lisbon.[[47]](#footnote-47) These statutes were revised, following the *Lisbon* judgment of the Bundesverfassungsgericht,[[48]](#footnote-48) to include a veto for the German houses of parliament over measures passed under Article 352 TFEU. The UK’s Parliament also has the power to exercise control over Article 352 TFEU as part of the European Union Act 2011.[[49]](#footnote-49) Under Section 8 of the Act, the Council representative can only vote in favour of a draft decision under the Article where it has received approval by an Act of Parliamentor by a motion in both houses where the matter is urgent.[[50]](#footnote-50) The EUA also contains parliamentary controls over a number of other areas of Union competence, including some requiring qualified majority voting[[51]](#footnote-51) as well as some requiring unanimity.[[52]](#footnote-52) While the UK is soon to be engaged in the process of withdrawing from the Union and this Act may no longer apply, it serves as a useful indicator of the extent to which national parliaments can place controls on their Council representatives.

It is clear that such controls can have a significant impact on the Union’s ability to act. This was most notable in the recent threat of the Wallonian parliament[[53]](#footnote-53) to block the EU-Canada trade deal.[[54]](#footnote-54) The risk to a comprehensive trade deal due to the intransigence of one regional parliament highlights the fact that parliaments can exercise genuine influence over EU policy-making.[[55]](#footnote-55)

In summary, in both areas discussed, there is a move towards an increase in the power of national parliaments to influence legislative outcomes. This is particularly the case since the Lisbon Treaty, which not only brought new formal powers to national parliaments, but has also had a “significant indirect effect”[[56]](#footnote-56) on the way that national parliaments interact more holistically with Union legislation. Many national parliaments have more infrastructure in place and are better equipped to understand and to influence the Union’s legislative process than ever before. This enhanced aptitude, combined with more formal powers, means that national parliaments are increasingly able to exercise power in relation to the Union legislative process. Given their growing influence, the question emerges as to what legal obligations could, or should, accompany their power? This question will be discussed in the remainder of the article. In the following section, we will consider how obligations apply to the exercise of legislative in the Union.

**3. The obligations incumbent on the exercise of legislative power**

This section describes how the ECJ applies legal obligations to the exercise of legislative power. For Union institutions, such obligations apply on the model of internal immunity and external responsibility; internal immunity covers the actions Member States take when they are acting in the legislative process as Council members. This internal/external division is likely due to the deeply political nature of intra-institutional matters, which makes judicial intervention inappropriate.

*3.1. The application of Article 13(2) TEU to Union institutions*

The obligations of the Union institutions in the legislative process were first developed by the ECJ under the heading of “institutional balance”.[[57]](#footnote-57) This is now enshrined in Article 13(2) TEU and the subsequent case law has confirmed that this provision “reflects the principle of institutional balance, characteristic of the institutional structure of the European Union”.[[58]](#footnote-58) The two sentences of this article reflect the two aspects of institutional balance that emerged in the case law.

“Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practise mutual sincere cooperation.”

The first sentence of Article 13(2) is the principle of conferral as applied to the institutions;[[59]](#footnote-59) it emphasizes the need for institutions to comply with the rules laid down in the Treaty,both in terms of specific Treaty procedural rules[[60]](#footnote-60) and in terms of the general Treaty roles assigned to institutions. A recent example was in *Commission* v. *Council (Air Transport Agreement)*[[61]](#footnote-61) where, in relation to a mixed international agreement, the Council adopted a solitary decision that confirmed both its approval, and the approval of the Member States as a collective. Article 218 TFEU, the Treaty article in question, only allowed for the Council’s approval, so the combination of both Council and Member State action in a single procedure breached the procedural rules in that Treaty basis. The Treaty roles assigned to institutions may also be relevant. For example, *Commission* v. *Council (Greenhouse Gas Emissions)*concerned the Council’s ability to lay down negotiating guidelines for the Commission in relation to international agreements. The attempt by the Council in these guidelines to reserve powers for its committee to “establish negotiating positions” was held to breach the Treaty because it would “deny the negotiator [the Commission] the power which it is granted in Article 17(1) TEU”.[[62]](#footnote-62) This case confirms that the Treaty roles of institutions as well as the procedural limits of specific Treaty articles are relevant to the first sentence of Article 13(2).

The second sentence of Article 13(2) expresses the need for institutions to act in a cooperative spirit towards each other in the exercise of their legislative power. The duties of cooperation found in Article 4(3) TEU originally bound the Member States to “facilitate the achievement of the Community’s aims” and “abstain from any measure likely to jeopardize the attainment of the objectives of this Treaty”.[[63]](#footnote-63) The Court extended these “mutual duties of sincere cooperation” not only to the Member States, but also to the “decisions of the Parliament”, which must have regard for the Member States.[[64]](#footnote-64) Subsequently, the Courtheld that dialogue between institutions “is subject to the same mutual duties of sincere cooperation which, as the Court has held, governs relations between the Member States and the Community institutions”.[[65]](#footnote-65) This appears to make legislative power *conditional* on acting in a cooperative manner in relation to the other legislative actors. So, for example, in *Parliament* v. *Council (Generalized Tariff Preferences*),[[66]](#footnote-66) the Parliament’s failure to act cooperatively led to the Court denying its right of consultation. Similarly, in *Council* v. *Commission (Macro Financial Assistance),[[67]](#footnote-67)* it was held that the Commission’s ability to withdraw a proposal is *dependent* on the cooperativeness of its actions in the lead-up to withdrawal.

If legislative power is in some sense conditional on cooperation, how does the case law define “acting cooperatively” in practice? In *Generalized Tariff Preferences*, the Council requested that a legislative matter be dealt with as a matter of urgency and Parliament responded by placing the matter under its procedure in cases of urgency. However, the Parliament did not debate the measure in its plenary session within the timeline required by the Council. By failing to hold this debate at a time when a quick resolution was needed, the Parliament “failed to discharge its obligation to cooperate sincerely with the Council.”[[68]](#footnote-68) This can be contrasted with *Macro-Financial Assistance.*[[69]](#footnote-69) After holding that the Commission had the right to withdraw a legislative proposal (first sentence of Art. 13(2) TEU), the Court found that the Commission had done so in a sufficiently cooperative manner because it sought to “take the concerns of the Parliament and the Council into account” and communicated clearly its intention to withdraw.[[70]](#footnote-70) Overall, this case law suggests some general obligations: to communicate and provide information,[[71]](#footnote-71) to take into account the concerns of the other institutions and to avoid unnecessary delay.

Article 13(2) clearly imposes obligations on legislative power, but more precisely, to what actions do these obligations attach? A review of the case law shows that it is the external actions of institutions that are bound by obligations, rather than their internal deliberations. This can be seen in cases relating to the first sentence of Article 13(2). For example, when Parliament has a right of consultation and substantial amendments are made to a proposal, re-consultation is requiredunless those amendments “correspond to the wishes of Parliament itself.”[[72]](#footnote-72) The “wishes” of Parliament are determined on the basis of its collective acts, for example, an “express request” of Parliament.[[73]](#footnote-73) Internal activities, such as “opinions expressed by parliamentary committees”,[[74]](#footnote-74) are not relevant in determining the “wishes” of parliament. This line of case law clearly looks to the Parliament as a whole, rather than to its internal activities.

The same applies to the obligation in the second sentence of Article 13(2). Documents produced by institutions are assessed, for example, a letter of the Council, a Commission working document or a European Parliament report.[[75]](#footnote-75) The actions of representatives are also imputed to the institution as a whole.[[76]](#footnote-76) This is not to say that the Court will not look into internal activity, only that it will not apply obligations to internal actors. So, for example in *Generalized Tariff Preferences,*[[77]](#footnote-77) the European Parliament’s failure to debate the urgent Council proposal was deemed to be a failure to discharge its obligation. However, the duty of cooperation did not fall on the fourteen members of Parliament who requested that the debate be adjourned. Rather this is what the “Parliament decided”[[78]](#footnote-78) and it thus failed to act in a sufficiently cooperative manner *as an institution*. The overall evidence from the case law clearly shows that the Court will focus on the institution as a whole, not internal actors. We next consider how the Member States fit into this model of internal immunity and external responsibility.

*3.2. The duty of sincere cooperation and Member States in the Union legislative process*

We have seen that under Article 13(2), Union institutions are bound by duties of sincere cooperation. Under Article 4(3) the duty of sincere cooperation applies to the Member States. Does this duty extend to their role in the creation of legislation? Here, we can consider the distinction offered by Schermers and Pearson on the “double role of Member States”,[[79]](#footnote-79) as both “insiders” (“On the one hand [Member States] are part of the internal machinery, they are elements of the organisation, they act as the Community. They are responsible for the functioning of the Council”) and “outsiders” (“On the other hand, they are the opposing party in many of the Community’s activities. The Community’s Directives are addressed to them and they have the obligation to transform them into the national legal order”).

When Member States are in their “outsider” position, loyalty has played an “important role”, particularly in establishing the implementation and enforcement of Union law at the national level.[[80]](#footnote-80) Space precludes a full examination of the duties stemming from Article 4(3) TEU, but it is clear that they are widespread and detailed.[[81]](#footnote-81) One example is the use of the duties as the “methodological anchor”[[82]](#footnote-82) to underpin the reasoning establishing the principle of the supremacy of Union law in *Costa*. The Court held that EU law cannot give deference to domestic law without“*jeopardizing the attainment of the objectives* of the Treaty set out in [ex] Article 5(2) and giving rise to discrimination”.[[83]](#footnote-83) Other principles underpinned by Article 4(3) TEU, such as “indirect effect”[[84]](#footnote-84) and “State liability”,[[85]](#footnote-85) also support the implementation and enforcement of substantive Union norms.

It is clear that the duties in Article 4(3) TEU have had a significant effect on Member States as “outsiders”,[[86]](#footnote-86) but to what extent have these duties had an effect on Member States when they are acting as part of the internal machinery of the Union? As we saw above, internal action *within* institutions is not bound by duties of cooperation. This includes the negotiations of Member States within Council. This exception applies because the actions of individual Council members are “purely political”[[87]](#footnote-87) and thus ought not be bound by legal duties. In this vein, Temple Lang has stated: “[I]t would be difficult if not impossible to use [Article 4(3)] to determine when or how a Member State should vote in the Council.”[[88]](#footnote-88)

Support for the notion of a “political exception” of this type can be found in *Portugal and Spain* v. *Council*.[[89]](#footnote-89) This was a fisheries case concerning the allocation of catch quotas in Greenland waters.[[90]](#footnote-90) The quota had been set by a Regulation passed before the accession of Portugal and Spain, and was to be decided each year by a qualified majority of Council. After their accession, the Member States other than Portugal and Spain in Council chose to continue the current share of quotas, excluding the newly acceded Member States. Portugal and Spain brought a number of claims against the legality of the catch quotas. One of these was based on Article 4(3) TEU and labelled as “Community solidarity” by the appellants.[[91]](#footnote-91) The Court rejected the attempt to apply the duty of sincere cooperation to the internal workings of Council:

“The adoption of a legislative measure by the Council cannot constitute either a breach of the obligation imposed on the Member States to guarantee the application and effectiveness of Community law, the defence by each Member State of its interests within the Council manifestly not falling within the scope of that obligation, or a breach of the duty of sincere cooperation attaching to the Council as an institution.”[[92]](#footnote-92)

The way that the Member States defend their interests in the Council is “manifestly” not within the scope of their duties to ensure the application and effectiveness of Union law. The Court thus reinforces the idea of a “political exception” to duties of sincere cooperation. This is despite the fact that the action taken by the Member States could clearly be seen as uncooperative. There was a blatant disregard for the interests of Portugal and Spain by the other Member States. However, this is a clear example of action that, while uncooperative, should not be placed under legal duties of sincere cooperation due to its deeply political nature. The case is inseparable from its political context. The situation arose as a result of the political negotiations preceding the accession of the States where the EEC drove a “hard bargain”[[93]](#footnote-93) in relation to fisheries resources. When it comes to such negotiation, vigorous and uncooperative political tactics should be accepted, indeed, they should be expected within a well-functioning democracy.

In fact, the defence of national interests in the Council is something actively encouraged by the ECJ. In *Westzucker*, a case was brought against the Commission on the basis that it “yielded to the improper pressures from the French and Italian Governments to promote certain interests of those States”.[[94]](#footnote-94) However, the Court held that Member States *should* “emphasize their interests” and that it is the role of the Commission to arbitrate toward the general interest. This is “consonant with the very idea of the Community”.[[95]](#footnote-95)

Further, it is necessary to allow arguments of national interest at this stage in the process, because once legislation has been passed and the issue is about the implementation and enforcement of Union law, those arguments must clearly be rejected in the name of its uniform application. So for example, the Court rejected the national interest as a reason for failing to apply a Council regulation because Member States are provided with the opportunity to defend their interests through “the Community institutional system”.[[96]](#footnote-96) Thus, while national interests offer no defence in the “outsider” role of Member States, this is actively encouraged in the creation of that legislation. It is in the “Community institutional system” that Member States get the chance to express their national interests in a legitimate manner. This contributes to the arguments for a “political exception” for the defence of Member State interests in Council. It is those Member States who will later have to comply with any legislation passed in Council and this is the only forum in which their full and free defence is possible.

This does not completely rule out the application of Article 4(3) TEU to the Member States in the Council. While the Court clearly respects the “defence by each Member State of its interest”, we might suggest that if Member States go beyond this and disrespect the institutional system in which they operate, they may breach their duties of cooperation. In *Luxembourg* v. *Parliament*, the Court stated that Member States must have “due regard” for Parliament when they make a collective decision.[[97]](#footnote-97) However, this point does not detract from the fundamental idea that Member State defence of national interest should not be bound by such duties. As we will see in the next section, *any* attempt of judges to interfere in this area may have undesirable implications.

*3.3. The “feedback effects” of judicial review*

The previous section demonstrates that the Court applies legal obligations using a model of internal immunity and external responsibility. It can be argued that it chose this path because any attempt to intervene in the internal affairs of institutions would be too political for judicial review. Further, the implications of this type of review on future institutional actions may be significant and undesirable.

To consider how such judicial review might affect legislative actors, we can look to the work of Stone Sweet.[[98]](#footnote-98) He has considered the growth of constitutional courts with the ability to strike down legislative acts and the subsequent effect this may have on the behaviour of legislators. With the courts having the “final say” on the constitutionality of norms, legislators are aware that their substantive norms must comply with judicial standards of constitutionality. Thus, they legislate “in the shadow” of judicial review and this creates certain “feedback effects”, impacting upon their future behaviour.[[99]](#footnote-99) Overall, Stone Sweet notes a general change in the way that legislatures conduct decision-making due to the awareness of judicial control. Legislators begin to govern *like* judges: they “absorb the behaviour norms of constitutional adjudication, and the grammar and vocabulary of constitutional law”[[100]](#footnote-100) in the act of seeking constitutional compliance. While it may not be the intention of the courts to alter the behaviour of future legislative actors, it is clear that such review will have indirect “feedback effects”.

A focus on the procedure by which legislation is made is likely to create more “direct” feedback effects.[[101]](#footnote-101) If certain judicial standards are set for procedure, legislative actors will proceed with that knowledge in mind. On this basis, we could expect direct “feedback effects” from the Article 13(2) TEU case law on the actions of institutions. With judicial review in place and the potential of striking down action not done in good faith, institutions are likely to alter their behaviour to ensure compliance. In our earlier example, the European Parliament lost its right to consultation because of a failure to act cooperatively.[[102]](#footnote-102) This incentivizes them to act in a more cooperative manner in the future, thus benefiting the overall effectiveness of the legislative process.

However, we can speculate as to why the Court may not apply these duties to internal actors. The first point to note is that it is unclear how such an intervention would take place. Would the obligations apply to the bodies and individuals acting within an institution? To whom are they bound to be cooperative? Is it towards the other institutions or other actors within their institution? It is difficult to imagine any such review taking place. Further, it can be contrasted with inter-institutional disputes, where the discourse is based on a formal legal document. The Treaties have always laid out the legislative process and the rights of each participant and applying duties of cooperation can be seen as part of how these rights are protected.[[103]](#footnote-103) By contrast, the detail of how institutions formulate their own decisions is not covered by the Treaty. Rather, it is an area of political negotiation that ought to lie beyond the scope of judicial review, and particularly of broadly framed requirements of “cooperation”.

This argument is strengthened by considering the possible implications of such judicial intervention. As stated earlier, political bodies and actors within institutions would act with an awareness that their conduct must comply with certain standards in order to be legally valid; placing such action “in the shadow” of judicial review. This would be particularly inappropriate for the European Parliament and the Council whose legitimacy is based on their democratic credentials. Council Representatives and Members of the European Parliament are elected, or appointed, to represent and defend certain interests.[[104]](#footnote-104) Placing judicial obligations of cooperation on their actions would limit their ability to fulfil this role. This would be highly inappropriate in areas of deliberation where the vigorous defence of interests is to be expected as part of democratic negotiations. Overall, such judicial intervention might undermine this democratic basis, and thus the legitimacy of those institutions.

It is argued below that individual national parliaments form part of actions taken *within* legislative power. Thus, the same arguments discussed in this section - about the implications of applying judicial review to internal legislative negotiations - also apply to individual national parliaments. This question is particularly relevant for duties of sincere cooperation. If national parliaments were censured for failing to act in a cooperative manner in the Union legislative process, the future actions of all national parliaments would be taken in the awareness that their actions may breach those duties. This would affect the political autonomy of national parliaments and their ability to defend the national interest in legislative negotiations.

**4. Applying the duty of sincere cooperation to national parliaments in their “Council representative scrutiny” role**

This section asks whether the duty of sincere cooperation can apply to national parliaments in the scrutiny of their Council representative. First, we consider arguments that this action must be bound by duties of cooperation in order to ensure the effectiveness of EU law. Ultimately, such arguments are rejected on the basis of a “political exception” to the duty. This is because national parliamentary scrutiny merely forms part of the internal action of the Council. This exception is supported both in the case law and in the Treaties and is reinforced by the implications of judicial review in this area.

*4.1. The case for applying duties of sincere cooperation to the “Council representative scrutiny” role of national parliaments*

It is clear that national democratic mechanisms can disrupt the functioning of the EU’s legislative process. For example, the 2016 referendum in the Netherlands risked leading to the collapse of the EU-Ukraine trade deal.[[105]](#footnote-105) As mentioned before, such disruption can also stem from national parliaments, as is seen from the threats of the Wallonian parliament to block the CETA deal.[[106]](#footnote-106) This latter example shows clearly that a national (or regional) parliament provided with power at the domestic level is essentially equivalent to a veto. It is in this context that we can question whether such a powerful decision-making capability should be bound by duties of cooperation.

Both of the above examples concern decisions agreed at Council level that must be approved *ex post* “in accordance with national constitutional requirements”.[[107]](#footnote-107) The European Union Act 2011 also contained referendum and parliamentary controls of a similar nature. This led to a debate over whether such controls should be bound by duties of cooperation.[[108]](#footnote-108) However, the EUA also gave the UK Parliament a number of *ex ante* controls over the decisions of Council representatives. Craig argues that it is “highly questionable” whether such controls should be regarded as lawful under EU law.[[109]](#footnote-109)

Craig’s argument has two strands, firstly that the Treaties contain “no provisions authorizing such national controls”. This can perhaps be given more weight by an argument made by Piris in relation to the referendum requirements in the Act.[[110]](#footnote-110) The Treaties, as agreed by Member States, set out objectives. They also set out the procedural rules on how these objectives are to be achieved, with different rules for different areas. Thus, due to their sensitivity, certain areas are reserved for unanimity while others specifically allow for ratification of the Council vote, *after* it has been agreed at European level, “in accordance with national constitutional requirements”, as we saw above.[[111]](#footnote-111) These dispensations have been pre-agreed by all Member States. The EUA’s *ex ante* controls, on the other hand, are a unilateral self-empowerment within one Member State without the agreement of the others. In Craig’s words, “each national parliament could of its own volition arrogate to itself a role in EU decision-making”.[[112]](#footnote-112) Thus, the EUA may breach the objectives of the Treaty, and the procedure by which those objectives are to be achieved, as previously agreed by all Member States in good faith.

The second strand of Craig’s argument is the damage that the “over-activity” of national parliaments might cause the legislative process. Craig argues that allowing such national parliamentary controls could lead to a “floodgate” effect whereby other Member States might adopt similar measures. According to Craig, the impact on EU decision making would be grave; “there would be countless EU legislative initiatives floating in limbo awaiting the outcome of the national legislative process”. Ultimately, these pragmatic problems may have “fundamental implications for the institutional balance” of the decision-making process.[[113]](#footnote-113)

Craig’s arguments against *ex ante* controls must also apply to the *ex ante* controls of the German Parliament in relation to Article 352 TFEU. Further, it may also call into question the mandate system as applied by the Danish Parliament, and, in fact, any system which aims to place national parliamentary controls on Council representatives.[[114]](#footnote-114) This argument may make most sense if we consider it in terms of a “balancing” approach similar to the one conducted in the area of national remedies and procedure.[[115]](#footnote-115) While national parliamentary actions would fall within the scope of duties of sincere cooperation, there would be a presumption that national parliaments are free to act autonomously. However, where national parliaments are uncooperative and thus frustrate the effectiveness of the legislative process, action may be deemed incompatible with Union law. As we will see in the remainder of this section, even this more nuanced argument does not receive support from the case law or the Treaties, both of which suggest that national parliamentary action in relation to Council representatives falls outside the scope of duties of sincere cooperation.

*4.2. The political exception to the Council representative scrutiny role of national parliaments*

In this section, the arguments presented in the prior section 4.1. are refuted, on the basis of the case law and the Treaties. In the first place, we can look to the Treaties to dispute the idea that there is no authorization for the placement of controls on Council representatives by national parliaments. For example, Article 10(2) TEU recognizes the ministerial accountability of national parliaments as a key democratic principle underpinning of the Union. It is listed under “Title II Provisions on democratic principles”:

“Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.”

This offers normative support for the value of the democratic input of national parliaments. Further, while Article 10(2) TEU describes ministerial accountability, this is a principle of domestic law and ought to be respected as such. Indeed, Article 4(2) TEU states that “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures,” and we could view ministerial accountability as part of those “fundamental structures”. Any attempt by the Union to place obligations on this principle would surely engage Article 4(2) TEU and offer a normative pull towards non-interference with ministerial accountability.

The clearest indication that ministerial accountability ought not be qualified by Union law comes from the Preamble to the Protocol on the Role of National Parliaments:

“The way in which national Parliaments scrutinize their governments in relation to the activities of the European Union is a matter for the particular constitutional organization and practice of each Member State.”[[116]](#footnote-116)

It reflects the desire of the Member States to retain procedural autonomy over the way that national parliaments scrutinize Union law. As a result, the balancing method described in section 4.1. is not appropriate. Ministerial accountability should not be tested against its cooperation with the Union; it is a matter of democratic control over the actions of a national executive whose legitimacy is owed to those conducting the scrutiny. The ordinary defence of the national interest by national parliaments should be considered outside the scope of EU law. This is backed up by the view of Kiiver on the Article 352 TFEU controls in the German Acts (EUZBGG): “It is a matter of domestic constitutional arrangements whether and how ministers seek domestic backing for their actions at EU level.”[[117]](#footnote-117)

Further, we might consider *Portugal and Spain* v. *Council,* discussed earlier, which protects the defence of national interests by Member States from duties of cooperation. It is natural that the logic of this case extends to the “Council representative scrutiny” role of national parliaments. The way a national parliament scrutinizes its Council representative is merely part of the formulation of the vote of that Council minister. Part of the conception of national interest may naturally stem from the view of the national parliaments. We have also discussed case law which showed that the Court encourages the defence of the national interest because the “institutional system” is the only forum in which their defence of the national interest is possible. In the case of national parliaments, they will later have to comply with legislation passed in Council, and they cannot legitimately raise their national interest at the stage of the enforcement of an established norm. They should be granted the full opportunity to defend their interests at that earlier stage without being limited by duties of cooperation.

Craig’s concern seems to be that such national parliamentary action might disrupt the effectiveness of the legislative process. However, more significant practical implications might arguably arise from judicial intervention in this highly political area. To place limits on the influence that the national parliament is able to apply would be a contentious area for the ECJ to step into, concerning as it does the formulation of a vote within the Council. For the Court to exert influence in such matters would essentially amount to judicial pressure on political actors to behave in a particular way in the creation of policy. As noted before, this would lead to strong feedback effects, with future Council representatives aware that they must attenuate their representation of national interest lest their actions be censured by the ECJ. This would undermine the democratic legitimacy of the Council, something which, as we have noted, is specifically stated by the Treaties to be one of the democratic bases of EU decision-making.

To summarize, while increased national parliamentary action may affect the legislative process, this should not naturally lead us to place duties of cooperation on such action in order to limit it. The Treaty and the case law indicate that national parliaments ought to be free to perform such scrutiny, and this is reinforced when we consider the practical implications of judicial intervention.

**5. Applying the duty of sincere cooperation to national parliamentary action in their “Union institution scrutiny” role**

This section will discuss the extent to which duties of sincere cooperation ought to apply to national parliaments in their scrutiny of Union institutions. First, it will note that an imbalance of rights and obligations is created though the aggregative power given to national parliaments. Their power can be enforced, but due to their lack of institutional architecture, it is not possible to attach obligations to that power taken as a whole. However, this article argues that this should not be remedied by applying obligations to *individual* national parliaments who ought to benefit from the “political exception” to duties of sincere cooperation outlined above.

*5.1. Collective national parliamentary action in the Union legislative process: The power without an institution*

The rights of national parliaments in the “early warning mechanism” are Treaty-based and could be enforced before the ECJ. For example, if the one-third threshold of national parliamentary votes was reached and the Commission decided to maintain the proposal[[118]](#footnote-118) but it failed to give reasons for its decision, this would be a clear breach of Article 7(2) of Protocol No. 2. Any national parliament would be free to argue that the Commission breached its obligations to the detriment of national parliaments, who are entitled to reasons under the mechanism. On this basis, any national parliament could bring an action for annulment via their Member State[[119]](#footnote-119) against the legislation in question for a breach of an essential procedural requirement under Article 263(2) TFEU. The rights in the “early warning mechanism” can in this sense be legally enforced.

Despite this potential for enforcement, it is not clear whether obligations of cooperation could attach to national parliaments when they exercise this power. In principle, obligations ought to apply. National parliaments possess a Treaty-based legislative power and this should be exercised with “due regard” for the other holders of legislative power in the Union legislative process. Successful threshold activation could lead to a Commission decision to withdraw or alter the legislation. Just as the legislative powers discussed in section 3 are bound, so should the actions of national parliaments. Further, there is no clear Treaty exemption to the application of duties of sincere cooperation for legislative power exercised in relation to Union institutions. The Protocol discussed in the previous section applies to the way national parliaments “scrutinize *their* governments”[[120]](#footnote-120) and thus does not apply to this action.

However, in practice, when attempting to impose such duties of cooperation, there is a difficulty not present in relation to the other institutions. While there is a collective national parliamentary power, there is no institution on which duties can be imposed, nor is there a representative or representative body to which the duties could be applied vicariously as we saw in the institutional balance case law in section 3.1. There is only an aggregate of individual powers and no institutional architecture. In this climate, there may be a temptation to apply the duties of loyal cooperation to individual national parliaments. However, we must note that this will be an issue that concerns not the relationship between different legislative powers, but one that takes place *within* the exercise of a legislative power. It will concern the way that the national parliament chooses to cast its vote; the way it defends its national interest. We must offer to it the same defence as we did to the individual members of Council. If the defence by each Member State of its interest in Council does not fall within the duties of cooperation, why would the defence of that interest by each national parliament be different? Both Council members and national parliaments submit “votes” which, if accumulated, can trigger effects on the legislative process. This suggests that individual national parliaments ought to benefit from the “political exception” to duties of sincere cooperation. Overall, the result is an inability to bind the aggregative power of a collective of national parliaments to duties of cooperation. There is no “top down” representative of the power which can be bound, and the alternative, to bind the “bottom up” powers of individual national parliaments, would breach the rationale behind the “political exception”.

We can consider how such an issue might arise in practice. For example, national parliaments are given an eight-week period in the Treaty during which they can submit a reasoned opinion.[[121]](#footnote-121) However, situations where a more urgent decision needs to be taken may arise. In *Generalized Tariff Preferences,*[[122]](#footnote-122) discussed above, the European Parliament activated its urgency procedure but did not debate the proposal in time and thus failed to discharge its obligation to cooperate. Returning to national parliaments: they have no urgent process to deal with such a scenario. Their aggregative power lacks an institutional architecture, leaving us without the external facet to which obligations usually attach. There may be a temptation to apply duties of cooperation to individual national parliaments instead, demanding that each must act cooperatively with the request for urgency, but this may be inappropriate. Each has a right to cast its vote, and ought not to be bound individually by duties of sincere cooperation to the other legislative institutions. Like individual Council members and Members of European Parliament, they ought to be free to act without judicial oversight. This example demonstrates the practical difficulties of attaching control to the aggregative power of national parliaments.

It is unclear whether we ought to extend our “political exception” to actively uncooperative behaviour of national parliaments that disrespects the institutional system. Whilst uncooperative defence of national interest should be expected, if national parliaments were to systematically disrespect the system this might raise the question of whether the duty of sincere cooperation ought to apply to such actions. If, for example, national parliaments were to reverse the burden of proof in voting, and raise complaints for all proposals without justifying them on the basis of subsidiarity, would such a systematic disregard for Treaty rules be allowed? It can be imagined that this disrespect for the functioning of the institutional system may not benefit from the “political exception” defence. Such a defence is designed to allow for the vigorous defence of national interest within the decision-making framework, not for the systematic disrespect of that framework.[[123]](#footnote-123) However, this point should not detract from the idea that individual national parliaments acting within their powers should be free to defend their national interest vigorously, without judicial oversight.

*5.2. The prospects of further national parliamentary empowerment*

As mentioned above, in the negotiations which preceded the UK’s In/Out referendum, the Member States agreed on a new “red card” power for national parliaments in the EU. As the agreement was contingent on the UK voting to remain in the Union in the referendum, this power will not come into force. However, we should note that this agreement signals that a political will exists amongst the Member States to further empower national parliaments. This may be boosted by the most recent “yellow card” activation by national parliaments, which once again displayed the ineffectiveness of the mechanism, where the Commission disagrees with the interpretation of subsidiarity offered by national parliaments. This has led to more calls for a stronger role for national parliaments.[[124]](#footnote-124) The remainder of this article reflects on what such empowerment might look like and, in particular, whether the ECJ could enforce any such powers, and whether national parliaments would be bound by obligations in the exercise of such powers.

To consider what the legal response to further national parliamentary empowerment may be, we can look at the “red card” system as it was agreed by the Member States in February 2016.[[125]](#footnote-125) This power was to act as an extension of the “early warning mechanism” contained in Protocol No. 2, calculating votes of national parliaments on the basis of reasoned opinions on the non-compliance of a proposal with subsidiarity. Where 55 percent of national parliamentary votes were cast, the “red card” process was to be triggered and national parliaments had twelve weeks, as opposed to eight in the Protocol, in which to submit their objections. Where the threshold was reached, the Council Presidency was to include the item on the agenda of the Council and, following discussion, “the representatives of the Member States acting in their capacity as members of the Council” were to “discontinue the consideration of the draft legislative act in question unless the draft is amended to accommodate the concerns expressed in the reasoned opinions”.[[126]](#footnote-126) Ultimately, this power was confined within the Council. Rather than challenging the Commission’s ability to submit a proposal, it was aimed at forcing the Council to use its veto over a particular measure. It has been noted that the majority required to block legislation by national parliaments is below that of the average Council blocking minority.[[127]](#footnote-127)

In any case, the arrangement was political; it was agreed by the Heads of Statemeeting in the European Council, and thus taken outside the official legal structure of Union decisions. The “red card” aspect of the agreement did not specify the further legal entrenchment.[[128]](#footnote-128) Rather, the agreement appeared to rest on the political will of Council representatives, on whom responsibility for the use of the mechanism fell.[[129]](#footnote-129) Significantly, the agreement chose to maintain the dependence of the aggregative mechanism on reasoned opinions submitted for non-compliance with subsidiarity. If this were to be included in a future “red card” system implemented through Treaty reform, this might make the legal *enforcement* of the rights of national parliaments more difficult.[[130]](#footnote-130) This is due to the political nature of the questions that may arise in interpreting those rights. For example, do national parliamentary votes need to be based on subsidiarity? What happens if the Council disagrees with their interpretation? How would the need for Council to “accommodate the concerns of the national parliaments” work in practice? Would a majority of national parliaments have to raise the same subsidiarity concern? These questions are political, and the ECJ may be unwilling to challenge the conclusion of the Council in any given case.[[131]](#footnote-131) In any future empowerment of national parliaments, the removal of the need to base objections on considerations of subsidiarity - as a fetter to their dissent - may ensure that their rights can be more easily enforced by the ECJ.

As we saw above in relation to the European Parliament’s consultation rights, enforcement by the Court can depend on whether the institution discharges its obligation to act in a cooperative manner. So, if the national parliamentary power, whatever it may be, can be enforced, what obligations might accompany that power? It may be prudent at this point to consider the *type* of power we want national parliaments to have in the Union, and shape the reforms on this basis. Ultimately, if we are to offer a veto, or “quasi-veto”, to national parliaments, we must consider what obligations should attach to the exercise of that power, so that the Court is able to retain control of the institutional balance, which characterizes the Union’s legislative process. In this vein, two models of power are offered for consideration, with different purposes for each, and different obligations attaching to each. Is the power intended to create a constructive dialogue between “national parliaments” and Union institutions, or is it intended to act as an aggregate of democratic dissent, whereby the disagreement of a majority of national democratic institutions is able to block legislation?

From one perspective, we may want national parliaments to become institutionalized into a constructive participant in the legislative process. This is closer to the idea of a “third chamber” that has been proposed at various points throughout the history of European integration.[[132]](#footnote-132) The agreed “red card” system did not appear to create much space for dialogue; however, it is important to note that it did allow for the continuation of a draft legislative act where it “accommodated the concerns” of national parliaments. This suggests that the views of national parliaments could be used to alter legislation. A way to embed this more clearly would be to institutionalize that power, with actors able to represent national parliamentary power as a whole. This could be through the creation of a new institution, or perhaps by utilizing COSAC[[133]](#footnote-133) to perform this role. In this way, a new actor could become a representative of national parliaments, able to argue for their preferred changes to legislation under the threat of a veto. There may be many problems with this model; would it make the process more cumbersome? Would it add any legitimacy to the legislative process? How could a representative be said to speak for all of the national parliaments in the Union? While such concerns may be valid, it is clear that this type of power would at least lead more easily to the placing of judicial obligations on national parliamentary action. A “representative” of national parliamentary power - enshrined in the Treaty - could fit more easily the type of obligations of cooperation discussed in section 3 above.

Seen from another perspective, national parliaments can act as an aggregate of democratic dissent. This view is reflected in the “red card” power. National parliamentary dissent can offer an indication that there is a lack of democratic support across Europe for a particular measure. There may be many different reasons for the objection of national parliaments, but collectively their dissent will act as a legislative block. As we have noted above, such aggregative power may create an imbalance of rights and obligations, whereby national parliaments are free to act without legal responsibility, but where their actions can have significant legal consequences. This would depend on the ability of national parliaments to mobilize and use the power effectively, but in this event, there could be some risk to the institutional balance of the Union’s legislative process. Despite this issue, we may still doubt whether institutionalization is a satisfactory alternative. While it may offer us familiarity, through the model of internal immunity and external responsibility, the doubts over its utility may outweigh this benefit.[[134]](#footnote-134)

**6. Conclusion**

National parliamentary power in relation to the Union legislative process is growing. Will any judicial obligations apply to their power? In considering the way that obligations apply to Union institutions, there is evidence of an internal/external distinction. An institution’s internal deliberations benefit from a “political exception” to duties of sincere cooperation; obligations attach instead to their external facing actions. This is supported by policy arguments: intra-institutional negotiations may be too political for judicial intervention and may undermine the ability of democratic actors to defend the interests that they were elected or appointed to represent.

Can this model of internal immunity and external responsibility apply to power exercised by national parliaments in the Union legislative process? The “political exception” to duties of sincere cooperation for internal legislative actions ought to apply to both types of power exercised by national parliaments. In the scrutiny of their Council representative, national parliamentary action is taken to influence the vote of an individual actor *within* the institution. This forms part of the internal deliberations of the Council, and thus ought to be exempt from duties of sincere cooperation. Here, the internal/external model works; the internal deliberation is shielded, but the Council as a whole is still accountable for its actions. However, the model does not fit so well for national parliamentary scrutiny of Union institutions, at least in its current aggregative form. The difficulty arises because there is no externally facing representative of the collective national parliamentary power. This leaves a procedural gap in which it is difficult to attach legal responsibility to their actions. The result may be an imbalance between their rights and obligations. However, this article argues that this should not be remedied by applying obligations to *individual* national parliaments. Each is an actor *within* the overarching legislative power and ought to be free to defend its interests without judicial scrutiny.

1. \*University of Liverpool. I am grateful to Michael Dougan, Thomas Horsley and Katy Sowery as well my anonymous reviewers for their helpful comments on earlier drafts. [↑](#footnote-ref-1)
2. Decision of the Heads of State or Government, meeting within the European Council concerning a new settlement for the United Kingdom within the European Union, EUCO 1/16, 19 Feb. 2016, Annex I, p. 17. [↑](#footnote-ref-2)
3. Protocol No. 2 annexed to the TEU and TFEU on the application of the Principles of Subsidiarity and Proportionality, O.J. 2012, C 326/206. [↑](#footnote-ref-3)
4. See European Union Act (EUA) 2011 (c. 12) of the UK Parliament, and the German Act[s] on Cooperation between the Federal Government and the German Bundestag [and the Bundesrat] in Matters concerning the EU, 2009 amendment (Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union – EUZBBG). [↑](#footnote-ref-4)
5. Case C-204/86, *Greece* v. *Council*, EU:C:1988:450. See section 3 *infra*. [↑](#footnote-ref-5)
6. Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014), p. 25. [↑](#footnote-ref-6)
7. Joined Cases C-63 & 67/90, *Portugal and Spain* v. *Council*, EU:C:1992:381 [↑](#footnote-ref-7)
8. There are, of course, other types of power exercised by national parliaments. One example is their implementation of directives at the national level under Art 288 TFEU. [↑](#footnote-ref-8)
9. Treaty establishing the European Economic Community (EEC), Rome Treaty, 25 March 1957, Art. 138. [↑](#footnote-ref-9)
10. Arts. 7 and 203 EEC provided consultation powers and some budget oversight. [↑](#footnote-ref-10)
11. As envisaged by Art. 138(3) EEC. [↑](#footnote-ref-11)
12. Treaty on European Union, Treaty of Maastricht, 7 Feb. 1992, O.J. 2002, C 325/5, Declaration on the role of national Parliaments in the European Union. [↑](#footnote-ref-12)
13. Treaty of Amsterdam amending the Treaty on European Union, O.J. 1997, C 340/40, Protocol on the Role of National Parliaments. This recognized at Point 6 “The Conference of European Affairs Committees” (COSAC), a collective body with representatives of both the European Parliament and national parliaments. This body was given the right to “address to the European Parliament, the Council and the Commission any contribution which it deems necessary on the legislative activity of the Union.” [↑](#footnote-ref-13)
14. Presidency Conclusions - European Council Meeting in Laeken (Laeken Declaration), 14-15 Dec. 2001, SN 300/1/01 REV 1. [↑](#footnote-ref-14)
15. Barrett, “‘The king is dead, long live the king’: The recasting by the Treaty of Lisbon of the provisions of the Constitutional Treaty concerning national parliaments”, 33 EL Rev. (2008), 66. [↑](#footnote-ref-15)
16. See evaluation of policies in the area of freedom security and justice (Art. 70 TFEU), the scrutiny of the activities of Eurojust and Europol (Arts. 85 and 95 TFEU),and notification of applications for accession (Art. 49 TFEU). Further, see inter-parliamentary committees on Common Foreign Security Policy (Protocol No. 1 on the role of national parliaments in the European Union, Art. 10) and Economic Monetary Union (Art. 13 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union). For commentary, see Hefftler and Gatterman, “Inter-parliamentary cooperation in the EU: Patterns, problems and potential” in Hefftler et al. (Eds.), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave, 2015). [↑](#footnote-ref-16)
17. Protocol No. 2, cited *supra* note 2. For commentary, see Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge, 2012); Cooper, “A ‘virtual third chamber’ for the European Union? National parliaments after the Treaty of Lisbon”, 35 *West European Politics* (2012), 441–465; Cygan, “The parliamentarisation of EU decision making? The impact of the Treaty of Lisbon on national parliaments”, 36 EL Rev. (2011), 480; Davies, “Subsidiarity: The wrong idea, in the wrong place, at the wrong time”, 43 CML Rev. (2006), 68. [↑](#footnote-ref-17)
18. On subsidiarity see Bermann, “Taking subsidiarity seriously: Federalism in the European Community and the United States”, 94 *Columbia Law Review* (1994); Davies, “Subsidiarity: The wrong idea, in the wrong place, at the wrong time”, 43 CML Rev. (2006), 68. Its inclusion in this mechanism was based on the combination of two separate working groups on subsidiarity and national parliaments. See Weatherill, “Better competence monitoring”, 30 EL Rev. (2005), 23. [↑](#footnote-ref-18)
19. The initiator could be the Commission, another institution or group of Member States from whom the draft originated. See Protocol No. 2, cited *supra* note 2, Art. 7. [↑](#footnote-ref-19)
20. Ibid., Art. 7(2). [↑](#footnote-ref-20)
21. Ibid., Art. 7(3): “Before the first reading, if 55% of members of Council or a majority of votes cast in European Parliament are of the opinion that the draft does not comply with subsidiarity, the legislative proposal shall not be given further consideration.” [↑](#footnote-ref-21)
22. Ibid., Art. 8. [↑](#footnote-ref-22)
23. See many of the individual chapters of Hefftler, et al., op. cit. *supra* note 15. [↑](#footnote-ref-23)
24. For an in-depth analysis of the first two activations, see Jancic, “The game of cards: National parliaments in the EU and the future of the early warning mechanism and the political dialogue”, 42 CML Rev. (2015), 939. [↑](#footnote-ref-24)
25. Proposal for a Council Regulation on the exercise of the right to collective action in light of the freedom of establishment and freedom to provide services, 21 Mar. 2012, COM(2012)130, SWD(2012)63 and SWD(2012)64. [↑](#footnote-ref-25)
26. See <www.ec.europa.eu/dgs/secretariat\_general/relations/relations\_other/pdf/pdfletters/uk\_house\_of\_lords\_\_letter\_vp\_sefcovic\_on\_monti\_ii\_withdrawal\_procedure\_com20120130.pdf> (last visited 23 May 2016). For support of this view, see Fabbrini and Granat, “’Yellow card, but no foul’: The role of the national parliaments under the Subsidiarity Protocol and the Commission proposal for an EU regulation on the right to strike”, 50 CML Rev. (2013), 116. [↑](#footnote-ref-26)
27. The withdrawal was celebrated by some national parliaments as a success. Notably, the Latvian Parliament, stated that “Saeima halts EU regulation proposal”, Latvian Parliament, Press release, 6 June 2012, <www.saeima.lv/en/news/saeima-news/19783-saeima-halts-eu-regulation-proposal> (last visited 23 May 2016). [↑](#footnote-ref-27)
28. Communication from the Commission to the European Parliament, the Council and the national parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No. 2, 10 July 2016, COM(2016)505; Communication from the Commission to the European Parliament, the Council and the national parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No. 2, 27 Nov. 2013, COM(2013)851. [↑](#footnote-ref-28)
29. Weatherill noted this might lead to the mechanism becoming “redundant”,op. cit. *supra* note 17 at 38. [↑](#footnote-ref-29)
30. Note, at its most extreme this advocates a unilateral veto for each Member State. For academic support, see Chalmers, “Democratic self-government in Europe”, *Policy Network Paper* (2013): “Individual national parliaments should also be able to pass laws disapplying EU law where an independent study shows that EU law imposes higher costs than benefits for that member state.” [↑](#footnote-ref-30)
31. Laeken Declaration, cited *supra* note 13: “Should they [national parliaments] be represented in a new institution, alongside the Council and the European Parliament.” [↑](#footnote-ref-31)
32. Working Group on the Role of National Parliaments CONV 353/02, 22 Oct. 2002. See further Weatherill op. cit. *supra* note 17. [↑](#footnote-ref-32)
33. Letter of David Cameron to Donald Tusk, 10 Nov. 2015. [↑](#footnote-ref-33)
34. Decision on a new settlement for the United Kingdom, cited *supra* note 1. [↑](#footnote-ref-34)
35. Also referred to as ministerial responsibility: See Tans, Zoethout and Peters, *National Parliaments and European Democracy* (Europa Law Publishing, 2007). [↑](#footnote-ref-35)
36. Tans, “Conclusion: National parliaments and the European Union; coping with the limits of democracy” in ibid. [↑](#footnote-ref-36)
37. This does not apply to all national parliaments but the vast majority of those of the Member States. See ibid., p. 229: “All of the scrutiny systems that have been analysed in this volume depend, in one way or another, on the constitutional principle of ministerial responsibility.” See also Hefftler et al., op. cit. *supra* note 15, which confirms that 25 of 28 Member States rely on the parliamentary scrutiny of Council ministers, albeit to varying degrees. [↑](#footnote-ref-37)
38. See Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP, 2011); Smith (Ed.), *National Parliaments as Cornerstones of European Integration* (Kluwer Law International, 1996). [↑](#footnote-ref-38)
39. See Art. 10(2), TEU. [↑](#footnote-ref-39)
40. Weatherill “Using national parliaments to improve scrutiny at the limits of EU action”, 28 EL Rev. (2003), 909, 912. Some national parliaments, such as Finland’s, see this as its only real role: Raunio “The Finnish Eduskunta and the European Union: The Strengths and Weaknesses of a Mandating System” in Hefftler, et al. op. cit. *supra* note 15. [↑](#footnote-ref-40)
41. Harlow, *Accountability in the European Union* (OUP, 2002), p. 81: “Many national parliaments did not initially recognize the need to play a part in the governing process of the Community.” [↑](#footnote-ref-41)
42. See Maurer and Wessels (Eds.), *National Parliaments on their Ways to Europe. Losers or Latecomers?* (Baden-Baden, 2001). [↑](#footnote-ref-42)
43. Damgaard and Sonne Norgaard, “The European Union and Danish parliamentary democracy”, 6 *Journal of Legislative Studies* (2000), 48. The Dutch Parliament exerted similar powers over ministers in the field of justice and home affairs; this was abolished together with the approval of the Lisbon Treaty. See Besselink, “The Netherlands”, in Besselink et al. (Eds.), *Constitutional Law of 28 EU Member States* (2014, Kluwer). [↑](#footnote-ref-43)
44. See Treaty of Maastricht and Treaty of Amsterdam. Under Protocol No. 1, cited *supra* note 15, Arts. 1 and 2, national parliaments now have access to Commission consultation documents and draft legislative acts “at the same time as the European Parliament and the Council”. [↑](#footnote-ref-44)
45. In the area of Economic Monetary Union, former European Council president Herman Van Rompuy noted the influence of national parliaments over decision-making: “In meetings of the European Council, one feels the presence around the table of all the parliaments.… Many national leaders, in our discussions, refer to the position of their parliament, to defend specific amendments.” Speech by President Herman Van Rompuy to the inter-parliamentary committee meeting on the European semester for economic policy coordination, 27 Feb. 2012. EUCO 31/12. See further, Auel and Höing, “National parliaments and the Eurozone crisis: Taking ownership in difficult times”, 38 *West European Politics* (2015), 375. [↑](#footnote-ref-45)
46. Art. 16(4) TEU: “A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.” [↑](#footnote-ref-46)
47. EUZBBG, *supra* note 3*.* See further Höing, “With a little help from the Constitutional court” in Hefftler, et al., op. cit. *supra* note 15*,* p. 192. [↑](#footnote-ref-47)
48. 2 BvE 2/08, 30 June 2009. The decision held that due to the “non-specificity of possible cases of application of the flexibility clause, by constitutional law its use requires the ratification by the German Bundestag and the Bundesrat”. Kiiver notes the unusual nature of this power, applying, as it does, not to Treaty ratification but to the adoption of secondary law: Kiiver, “The Lisbon Judgment of the German Constitutional Court: A court-ordered strengthening of the national legislature in the EU”, 16 ELJ (2010), 578. [↑](#footnote-ref-48)
49. See Craig, “The European Union Act 2011: Locks, limits and legality”, 48 CML Rev. (2011), 1915; Gordon and Dougan, “The United Kingdom’s European Union Act 2011: Who won the bloody war anyway?”, 37 EL Rev. (2012). [↑](#footnote-ref-49)
50. EUA, cited *supra* note 3, Section 8(6) also includes certain situations exempt from parliamentary approval. [↑](#footnote-ref-50)
51. Ibid., Section 10(1)(a) on Art. 56 TFEU. [↑](#footnote-ref-51)
52. Ibid., Section 7(4)(c) on Art. 64(3) TFEU. [↑](#footnote-ref-52)
53. As Belgium is federalized, its “constitutional requirements” include powers for regional parliaments. See further Delreux and Randour, “Belgium: Institutional and administrative adaptation but limited political interest”, Hefftler, et al., op. cit. *supra* note 15*,* p. 153. [↑](#footnote-ref-53)
54. Officially titled the “Comprehensive Economic and Trade Agreement”: www.trade.ec.europa.eu/doclib/docs/2014/september/tradoc\_152806.pdf (last visited 13 Nov. 2016). [↑](#footnote-ref-54)
55. Another, subtler example is how the controls in the European Union Act 2011 may have led to the UK’s choice not to take part in the Fiscal Compact Treaty. See Gordon, “The United Kingdom and the fiscal compact: Past and future”, 10 EuConst (2014),28. [↑](#footnote-ref-55)
56. Hefftler, et al., op. cit. *supra* note 15*,* p. 397: “The Austrian Nationalrat deals with EU issues with more committee meetings and early engagement with the policy process post-Lisbon.” This experience is noted elsewhere. In Portugal, the introduction of the Barroso Initiative has “significantly contributed to activating parliament’s democratic control over the government and EU institutions”; ibid., p. 385. [↑](#footnote-ref-56)
57. See Case C-70/88, *Parliament* v. *Council (Chernobyl)*, EU:C:1990:217 and Case C-204/86, *Greece* v. *Council*. For academic commentary, see Chamon, “The institutional balance, an ill-fated principle of EU law?”, 21 EPL (2015), 371; Jacqué, “The principle of institutional balance”, 41 CML Rev. (2004), 348; Lenaerts and Verhoeven, “Institutional balance as a guarantee for democracy in EU governance” in Joerges and Dehousse (Eds.), *Good Governance in Europe’s Integrated Market*, (OUP, 2001), p. 47; Bieber, “The settlement of institutional conflicts on the basis of Article 4 of the EEC Treaty”, 21 CML Rev. (1984), 509. [↑](#footnote-ref-57)
58. Case C-409/13, *Council* v. *Commission (Macro-Financial Assistance)*, EU:C:2015:217, para 72. See also Case C-425/13, *Commission* v. *Council,* EU:C:2015:483, para 69; Case C-73/14 *Council* v. *Commission*, EU:C:2015:663, para 61. This formulation recognizes institutional balance as “a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions”, echoing the wording of Case C-70/88, *Chernobyl*, para 22. [↑](#footnote-ref-58)
59. See Opinion of A.G. Sharpston in C-660/13, *Council* v. *Commission*,EU:C:2015:787, para 89, stating that the first sentence of Art. 13(2) embodies “the principle of the distribution of powers”. [↑](#footnote-ref-59)
60. Note: The focus is on whether the *procedure* within the Treaty article is complied with. This differs from “legal basis” disputes, where the assessment concerns whether the *content* of legislation matches that permitted in the legal basis. See Case C-124/13, *Parliament* v. *Council*,EU:C:2015:790, para 40. One exception to this rule is in the case of “secondary legal bases”; legislation containing further legal bases for action must be assessed to determine whether the grant of power complies with the procedural requirements of the Treaty. See Case C-133/06, *Parliament* v. *Council*, EU:C:2008:257. [↑](#footnote-ref-60)
61. Case C-28/12, *Commission* v. *Council*, EU:C:2015:282. See also Case C-65/90, *Parliament* v. *Council,* EU:C:1992:325; Joined Cases C-317 & 679/13, *Parliament* v. *Council,* EU:C:2015:223; Case C-658/11, *Parliament* v. *Council (Pirates),* EU:C:2014:2025. [↑](#footnote-ref-61)
62. Case C-425/13, *Commission* v. *Council,* EU:C:2015:483, paras. 7 and 91. [↑](#footnote-ref-62)
63. Old Art. 5 EEC. [↑](#footnote-ref-63)
64. Case C-230/81, *Luxembourg* v. *European Parliament,* EU:C:1991:449*,* para 38. [↑](#footnote-ref-64)
65. Case C-204/86, *Greece* v. *Council*, para 16. This was later extended from the budgetary procedure to the legislative procedure in Case C-65/93, *Parliament* v*. Council*,EU:C:1995:91. [↑](#footnote-ref-65)
66. Case C-65/93, *Parliament* v*. Council*. [↑](#footnote-ref-66)
67. Case C-409/13, *Macro-Financial Assistance*. [↑](#footnote-ref-67)
68. Case C-65/93, *Parliament* v*. Council*, para 27. [↑](#footnote-ref-68)
69. Case C-409/13, *Macro-Financial Assistance*. [↑](#footnote-ref-69)
70. Ibid., para 102. [↑](#footnote-ref-70)
71. See Opinion of A.G. Kokott in Case C-263/14, *Parliament* v. *Council*,EU:C:2015:729, para 102: Council’s failure to immediately inform the Parliament after passing a decision and lack of justification breached the duty of sincere cooperation. [↑](#footnote-ref-71)
72. Joined Cases C-13-16/92, *Driessen*,EU:C:1993:828, para 16. [↑](#footnote-ref-72)
73. Ibid., para 24. [↑](#footnote-ref-73)
74. Case C-388/92, *Parliament* v. *Council*, EU:C:1994:213, para 17. [↑](#footnote-ref-74)
75. Respectively, Case C-65/93, *Parliament* v*. Council*,para 24, and Case C-409/13, *Macro-Financial Assistance*, paras. 101 and 26. [↑](#footnote-ref-75)
76. E.g. the Letter of the Commission President to the President of the Parliament and the President of the Council in Case C-409/13, *Macro-Financial Assistance.* [↑](#footnote-ref-76)
77. Case C-65/93, *Parliament* v*. Council*. [↑](#footnote-ref-77)
78. Ibid., para 26. [↑](#footnote-ref-78)
79. Schermers and Pearson, “Some comments on Article 5 of the EEC Treaty” in Baur, Hopt and Mailänder (Eds.), *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990* (de Gruyter, 1990), pp. 1360-1361. [↑](#footnote-ref-79)
80. Temple Lang, “Article 10 EC: The most important ‘general principle’ of Community law” in Bernitz, Nergelius and Cardner (Eds.), *General Principles of EC Law in a Process of Development* (Kluwer Law International, 2008), p. 77. [↑](#footnote-ref-80)
81. See Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014). See Temple Lang, “Development by the Court of Justice of the duties of cooperation of national authorities and Community institutions under Article 10 EC”, 31 *Fordham International Law Journal* (2007), 1483-1532; Temple Lang, “Community constitutional law: Article 5 EEC Treaty”, 27 CML Rev. (1990), 645. [↑](#footnote-ref-81)
82. Klamert, op. cit. *supra* note 80, p. 72. [↑](#footnote-ref-82)
83. Case C-6/64, *Costa* v. *ENEL*, EU:C:1964:66, 594, emphasis added. [↑](#footnote-ref-83)
84. Case C-14/83, *von Colson*, EU:C:1984:153. See also Case C-54/96, *Dorsch Consult,* EU:C:1997:413. [↑](#footnote-ref-84)
85. Joined Cases C-6 & 9/90, *Francovich,* EU:C:1991:428. [↑](#footnote-ref-85)
86. This is so even in areas where the duty has played a significant role, e.g. external relations. In this area, it has been held that even before legislation has been passed at the Union level, Member States can be under an obligation to refrain from passing legislation contrary to Union objectives in Case C-266/03, *Commission* v. *Luxembourg (Inland Waterways),* EU:C:2005:341, and Case C-433/03, *Commission* v. *Germany*,EU:C:2005:462. [↑](#footnote-ref-86)
87. Klamert¸ op. cit. *supra* note 80, p. 25. [↑](#footnote-ref-87)
88. Temple Lang (2007), op. cit. *supra* note 80,1524. This comment came in relation to the *UK* v. *Council* cases concerning voting rights in the Schengen area: Case C-137/05, *United Kingdom* v. *Council*, EU:C:2007:805 and Case C-77/05, *United Kingdom* v. *Council*, EU:C:2007:803. In these cases, the UK claimed that Art. 4(3) TEU could be used to determine when the UK was able to vote in relation to Schengen areas in which they took no part. The Council rejected this option as insufficient to protect against potential abuse by the UK, being able to vote in areas they had not opted into, and were thus not affected by. Ultimately, the Court did not directly address the issue, but did choose the interpretation of the Framework which limited UK involvement. This could perhaps have been partly influenced by the recognition that the use of Art. 4(3) in individual cases to determine when the UK ought to vote would be politically contentious. [↑](#footnote-ref-88)
89. Joined Cases C-63 & C-67/90, *Portugal and Spain* v. *Council*, EU:C:1992:381. [↑](#footnote-ref-89)
90. Council Regulation (EEC) No. 4054/89 of 19 Dec. 1989 allocating, for 1990, Community catch quotas in Greenland waters, O.J. 1989, L 389/65. [↑](#footnote-ref-90)
91. Joined Cases C-63 & 67/90, *Portugal and Spain* v. *Council*, para 51. [↑](#footnote-ref-91)
92. Ibid., para 53. [↑](#footnote-ref-92)
93. Churchill, annotation of Joined Cases C-63 & 67/90, *Portuguese Republic and Kingdom of Spain* v. *Council*, 30 CML Rev. (1993), 1259. [↑](#footnote-ref-93)
94. Case C-57/72, *Westzucker* v. *Einfuhr und Vorratsstelle Zuker*, EU:C:1973:30, para 16. [↑](#footnote-ref-94)
95. Ibid., para 17. [↑](#footnote-ref-95)
96. Case C-39/72, *Commission* v. *Italy,* EU:C:1973:13. Confirmed in Case C-128/78, *Commission* v. *United Kingdom,* EU:C:1979:32. [↑](#footnote-ref-96)
97. Case C-230/81, *Luxembourg* v. *European Parliament*. [↑](#footnote-ref-97)
98. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, 2000); Stone Sweet, *The Judicial Construction of Europe* (OUP, 2004). Note, it is not necessary to agree with Stone Sweet’s assertion that the ECJ is a constitutional court, simply that it has judicial review powers and can thus create “feedback effects”. [↑](#footnote-ref-98)
99. For example, Stone Sweet (2000) p.79: “auto-limitation”, whereby the legislature sacrifices policy objectives for fear that they will be deemed constitutionally non-compliant by the Court. See also, p.84: “corrective revision”; where, after legislation is deemed unconstitutional by the Court and it suggests alternative interpretations which would satisfy constitutionality, the legislator adjusts the legislation to take judicial concerns into account resulting in “court-written statutes”. [↑](#footnote-ref-99)
100. Stone Sweet(2000). 203. [↑](#footnote-ref-100)
101. Note, in this vein, the trend towards judicial review of what decision-makers considered in terms of policy and evidence. This is distinct from inter-institutional disputes, which focus on how the institutions interact with each other. See Case C-73/08, *Bressol,* EU:C:2010:181; Joined Cases C-92 & 93/09, *Volkus und Markus Schecke GbR*, EU:C:2010:662. For a discussion of process review, see generally Lenaerts, “The European Court of Justice and process-oriented review”, *College d’Europe Research Papers in Law*, 1/2012; Nic Shuibhne and Maci, “Proving public interest: The grown impact of evidence in free movement case law”, 50 CML Rev. (2013), 96; Meuwese and Popelier, “Legal implications of better regulation: A special issue”, 17 EPL (2011), 455. [↑](#footnote-ref-101)
102. Case C-65/93, *Parliament* v*. Council*. [↑](#footnote-ref-102)
103. Case C-70/88, *Chernobyl*, para 22: “Each of the institutions must exercise its powers with due regard for the powers of the other institutions.” [↑](#footnote-ref-103)
104. See Arts. 14(2) and 10(2) TEU. [↑](#footnote-ref-104)
105. This issue is not resolved at the time of drafting. For a similar example, we can also note Malta’s blocking of the Gambling Convention in the Council of Europe, preventing the EU from ratifying the Convention as an entire bloc. [↑](#footnote-ref-105)
106. Comprehensive Economic and Trade Agreement, cited *supra* note 53. [↑](#footnote-ref-106)
107. Art. 218 TFEU. [↑](#footnote-ref-107)
108. Piris in “Written evidence to the House of Commons European Scrutiny Committee” in *The EU Bill and Parliamentary Sovereignty*,7 Dec. 7 2010, HC 633-II, and Craig, op. cit. *supra* note 48. [↑](#footnote-ref-108)
109. Craig, op. cit. *supra* note 48 at 1934. [↑](#footnote-ref-109)
110. Piris, op. cit. *supra* note 107. [↑](#footnote-ref-110)
111. See e.g. Arts. 25, 223(1) and 262 TFEU. [↑](#footnote-ref-111)
112. Craig, op. cit. *supra* note 48 at 1935. [↑](#footnote-ref-112)
113. Ibid. [↑](#footnote-ref-113)
114. Though Craig does note that “it can be accepted that a Member State may well give instructions to its Council representative as to how to vote”, ibid. at 1934. [↑](#footnote-ref-114)
115. See Dougan, *National Remedies before the Court of Justice* (Hart Publishing, 2004). [↑](#footnote-ref-115)
116. This provision stems from the Maastricht Declaration, cited *supra* note 11. [↑](#footnote-ref-116)
117. Kiiver, op. cit. *supra* note 47 at 585. [↑](#footnote-ref-117)
118. Or whoever the draft legislative act originates from. Protocol No. 2, cited *supra* note 2, Art. 7. [↑](#footnote-ref-118)
119. Ibid., Art. 8. See, Case C-547/14 *Philip Morris* EU:C:2016:325, para 215, addressing requirements to consult national parliaments as part of assessment of compliance with the principle of subsidiarity. [↑](#footnote-ref-119)
120. See Protocol No. 1, cited *supra* note 15. Emphasis added. [↑](#footnote-ref-120)
121. Protocol No. 1, cited *supra* note 15, Art. 4: “An eight-week period shall elapse between a draft legislative act being made available to national parliament in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure.” [↑](#footnote-ref-121)
122. Case C-65/93, *Parliament* v*. Council*. [↑](#footnote-ref-122)
123. See, in the context of State Liability, Case C-173/03, *Traghetti del Mediterraneo,* EU:C:2006:391. [↑](#footnote-ref-123)
124. The Polish Prime Minister Beata Szydlo, in response to the Commission’s rejection of the yellow card on the Posted Workers Directive, commented that "national parliaments should be the ones that ultimately approve the changes, which the EU wants to make”: Eriksson, “EU failed to learn lesson from Brexit, Poland says”, 22 July 2016 www.euobserver.com/economic/134458 (last visited 3 Aug. 2016). [↑](#footnote-ref-124)
125. “A new settlement for the United Kingdom”, cited *supra* note 1. [↑](#footnote-ref-125)
126. Ibid. [↑](#footnote-ref-126)
127. This was pointed out by Derek Wyatt during the negotiations, and he suggested a lower threshold requirement “40% of votes allotted to national parliaments, or 25% of votes allotted to national parliaments of Member States whose population comprises at least 33% of that of the EU”; see Wyatt, “What can the UK reform/renegotiation package really hope to achieve?”, *DELI Blog*, 20 Nov. 2015. [↑](#footnote-ref-127)
128. This is in contrast to many other aspects of the deal. E.g. the agreement to alter the Eurozone voting rules was supplemented by an agreement to incorporate the negotiation into the Treaties: “The substance of this Section will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States.” See “A new settlement for the United Kingdom”, cited *supra* note 1. [↑](#footnote-ref-128)
129. This would create its own issues of legal enforcement, with the rights of national parliaments being enforced as against individual Council representatives. This creates issues, with the Court looking into the actions of individual actors within institutions. Overall, this can perhaps be seen as a consequence of the political nature of the agreement. Any legally entrenched “red card” agreement ought to place obligations on the Union institutions, rather than on its individual members. [↑](#footnote-ref-129)
130. In relation to a “red card”, see Hagemann, “Cameron’s red card system for national parliaments sends a political message”, *The UK in a Changing Europe*, 22 Feb. 2016. [↑](#footnote-ref-130)
131. Case C-84/94, *UK* v. *Council*, EU:C:1996:431. [↑](#footnote-ref-131)
132. See section 2.1. *supra.* [↑](#footnote-ref-132)
133. For COSAC, see *supra* note 12.Notably, COSAC are credited with helping to activate thresholds in the “early warning mechanism”. See Cooper, “A yellow card for the striker: National parliaments and the defeat of EU legislation on the right to strike”, 10 *Journal of European Public Policy* (2015), 1406. See also Commission communications cited *supra* note 27. [↑](#footnote-ref-133)
134. See Ch. 5 “The call for a congress of parliaments” in Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution Building* (Kluwer Law International, 2006). [↑](#footnote-ref-134)