

Nationale parlementen in de Europese Unie

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SUMMARY

National parliaments in the European Union. A legal comparison between the Dutch and the German parliament in EU affairs.

The purpose of this dissertation is to compare the activities of the Dutch and German parliament in EU affairs. The role of national parliaments in the European Union has been extensively discussed in academic literature, particularly in relation to the EU's democratic deficit. This democratic deficit is supposedly a consequence of, among other things, the small role that national parliaments play(ed) in the EU. However, this role has shifted over time. National parliaments have received more and more powers in EU affairs, not lastly through the scrutiny of their own governments and the newly introduced possibilities to intervene in the legislative process at the European level. This dissertation focusses on the use of the powers of the Dutch *Tweede Kamer* and *Eerste Kamer* and the German *Bundestag* and *Bundesrat* to scrutinize their national governments and the European Commission in the legislative process, with a particular focus on the Dutch parliament.

The first question to be asked is: *In what way does the Dutch parliament make use of its powers under national and European Law in EU affairs?*

Based on the conclusions for this question, the research question is formulated to be able to make some recommendations to the Dutch parliament: *Can the Dutch parliament improve its scrutiny of EU affairs, in order to do justice to its role under the EU Treaties and its own national role with regard to democratic control and representation?*

According to article 12 TEU “national parliaments contribute actively to the good functioning of the Union”. To fulfill this duty, national parliaments have several powers at their disposal. The first type of powers is laid down in EU law itself. The EU Treaties provide every parliament of an EU member state with the right to review draft legislation of the EU for its compatibility with the subsidiarity principle (Early Warning System), the right to start a political dialogue with the European Commission, as well as the possibility to take part in interparliamentary cooperation. The existence of these powers is the same for all member states. If, and how, they are used is, however, a national matter. As a consequence, national parliaments can and do differ in the application of the powers given to them by the EU Treaties. After the introduction in chapter 1, chapter 2 takes a closer look at these powers and their application by the German and Dutch parliaments. Firstly, the political dialogue is discussed. It is found that the political dialogue is not an instrument that provides national parliaments with much power to influence European decision-

making. It is merely a dialogue, as the title indicates. The European Commission (EC) is not likely to change its opinion or draft legislative proposal based on the opinions sent to the EC by one or more national parliaments within the framework of the political dialogue. On the other hand, when a large group of national parliaments send a joint opinion to the EC, it is more willing to take the opinion of that group into account and act in accordance with that opinion. In the years that are included in this study, 2010 to 2016, national parliaments have sent an average of 19 reasoned opinions per year and per national parliament in the political dialogue. The *Bundesrat*, the upper house of the German parliament, has been one of the most active chambers of national parliaments by sending an average of 34 reasoned opinions per year. The reason for this is the fact that the *Länder*, the states of the German federation, prescribe the *Bundesrat* when to send a reasoned opinion. According to the *Länder*, the political dialogue is the main instrument for them to influence European decision-making. The German lower house, the *Bundestag*, the Dutch lower house, the *Tweede Kamer*, and the Dutch upper house, the *Eerste Kamer*, are less active than the *Bundesrat*, but their activities are average in comparison to other national parliaments in the EU.

Next to the political dialogue, national parliaments have the option to send a reasoned opinion in the context of the Early Warning System. When used correctly, this instrument can be effective for national parliaments in influencing European decision-making. The key to this instrument is interparliamentary cooperation. Each national parliament has two votes – in bicameral systems each chamber is allocated one vote – and when at least one third of such votes are cast, a so-called yellow card is triggered. National parliaments need to reach this threshold of one third of votes cast before the EC must consider whether to revise a draft legislation. There is, however, often a lack of cooperation between national parliaments to work together to reach this threshold and thus to make use of this instrument. None of the chambers of the German and Dutch parliaments is aiming to exercise this power extensively. Especially in Germany, this instrument is not seen by parliament as a useful instrument. Both the German and the Dutch parliament are more inclined use the powers under their own domestic legal framework to scrutinize their own government as opposed to using the powers laid down in EU law.

Lastly, chapter 2 discusses interparliamentary cooperation. According to article 12 TEU, national parliaments have a duty to contribute actively to the good functioning of the EU by also taking part in interparliamentary cooperation between national parliaments and with the European Parliament. There are several different forms of interparliamentary cooperation. Members of national parliaments are able to participate in one or more of the formal conferences. Next to that, members of national parliaments meet with other members of national parliaments in smaller, bilateral settings.

In addition to the powers given to national parliaments at EU level, national parliaments have also been vested with powers at national level to participate in EU affairs. These powers can vary from one member state to another. Examples of this type of power include the existence of a scrutiny reserves or the right to ask questions to the government. Chapter 3 analyzes the powers of the Dutch parliament, whereas chapter 4 does the same for the German parliament. In chapter 5 the powers and their application by the German and Dutch parliament are compared.

It is found that the Dutch parliament has only two powers focusing on EU affairs. These powers are the right of consent and the scrutiny reserve. The right of consent can only be used when the EC drafts new legislation in the area of freedom, security and justice. This means that this power can only be invoked by the Dutch parliament as a response to specific actions by the EC. On the other hand, the power of scrutiny reserve can be applied at all times. Members of parliament are able to decide whether or not to place a scrutiny reserve on new draft legislation. However, the process of deciding to place a scrutiny reserve is unclear and its application largely depends on a member of parliament having an interest in the subject of the draft legislation.

Next to these aforementioned powers, the Dutch parliament, the *Tweede Kamer* and *Eerste Kamer*, has more general scrutiny powers, like the right to ask written or oral questions, enshrined in national law, which can be used to scrutinize the Dutch government both national and EU affairs. However, according to the collected data on the use of these powers, it can be concluded that these powers are only infrequently used to scrutinize the government in EU affairs. There are two main reasons for that. Firstly, there is little reason for parliament to use the powers in cases where the government, i.e. the minister in acting in Council negotiations, has little to no power to affect a change in the matter at hand at EU level. Secondly, there is little focus on the European Union as a topic in the Dutch parliament in general as members of parliament are more concerned with national matters than European ones.

The German parliament has similar powers to the Dutch parliament when it comes to general national scrutiny powers vis-à-vis the government. Percentagewise the numbers of how often the German parliament used its powers to scrutinize the government in EU affairs are higher in Germany than in the Netherlands. However, the numbers still show that general national scrutiny powers are not often used in EU affairs. The reason for this is the fact that the German parliament has been vested with particular powers to scrutinize the government on EU affairs. So for scrutiny of EU affairs those particular powers are used and not so much the general national scrutiny powers. The German basic law assigns a role to the German parliament in EU affairs in article 23 GG. This article determines the right of parliament to state its position before the government participates in EU legislative acts. The Bundestag states an average of 30 positions a year and the Bundesrat an average

of 180 a year. This right to state its position is the right most frequently used by the Bundesrat when it comes to its participation in EU affairs. Next to this right, the Bundestag also has several more options to participate in EU affairs, like the right ask questions (major interpellations and minor interpellations) and the right to hold a debate or put questions tot the government on ‘matters of topical interest’.

Another factor that contributes to parliament’s ability to scrutinize EU affairs is the size of its civil service. Both parliaments are very dependent on their civil servants. They support the members of parliament in their activities on every level. A large difference between both parliaments is noticeable in size of staffing. In general, the German parliament is 3.5 the size of the Dutch parliament. There are also more civil servants working in the German parliament than there are members of parliament. More than 3000 civil servants work for the Bundestag, which is four to five civil servants per member of parliament. The number of civil servants of the Bundesrat is around 200, which means almost three civil servants per member (not taking into account the civil servants working for the different governments of the states). The Dutch Tweede Kamer has approximately 100 fulltime employees available to support its members, which is less than one civil servant per member. Only twenty-five civil servants are working at the Dutch Eerste Kamer. The significantly smaller workforce of the Dutch parliament will most certainly have an impact on its productivity.

Overall it is found in this dissertation that while the Dutch parliament is less active than the German parliament when it comes to EU affairs, this difference can be explained by virtue of the differences between both parliaments. The German parliament is in every sense bigger than the Dutch. Not only in members but also in civil servants working for parliament. Next to that, some powers of the German parliament are used automatically. For example, when the Bundestag states its position to the government, the government will automatically put a scrutiny reserve on EU level.

Lastly, the role of the German parliament in EU affairs is laid down in legislation. The advantage of this is that it creates a clear overview of powers, procedures, rights and duties of parliament (and the government). Also, this provides clarity in the relationship between those two institutions and the procedures that have to be followed.

As mentioned before, the research question is formulated to be able to make some recommendations to the Dutch parliament. The question *Can the Dutch parliament improve its scrutiny of EU affairs in order to do justice to its role under the EU Treaties and its own national role with regard to democratic control and representation?* is answered in the following nine recommendations.

The first recommendation is to lay down all the powers of the Dutch parliament in EU affairs (i.e. the agreements between parliament and government and the procedures

regulating the powers and agreements) in one document like the rules of procedure of parliament or a statutory act. Currently, there is no formal document or act in the Netherlands with all these aforementioned matters in it. This means that there is no overview of all the powers of parliament in EU affairs and agreements made between parliament and the government. The recommendation is to follow the German example and collect all the matters (right, obligations, agreements, powers) that play a role in EU affairs in one statutory act in order to make it easier for parliamentarians to make use of it.

Second, the procedures for the use of such powers should be improved/elaborated. For some important powers, such as the scrutiny reserve, there are no formal procedures on how and when to use these powers. Such procedures could facilitate the members of parliament to make more and better use of their powers. This could then have the effect of a more solid and effective role of the Dutch parliament in the EU.

Third, the civil service of the Dutch parliament should be expanded. To improve the work of parliament and to implement the previous recommendations, the parliament requires more staff. Compared to other parliaments in the EU, Dutch members of parliament are supported by (too) few staff. This has an impact on the productivity of the Dutch parliament, making its members unable to participate in EU affairs even where they might wish to do so.

Fourth, statistics of the Tweede Kamer are not open to the public. There are no public records of activities of members of the Tweede Kamer. It is recommended to keep track of statistics and make them available for the public. Not only will researchers benefit from it but also the general public. Based on those statistics, the public can track the activities of their representatives and hold them accountable for it. Lastly, statistics are also needed for the Tweede Kamer itself in order to evaluate its own activities. Thus, keeping track of statistics is also in its own interest.

Fifth, in the *Tweede Kamer* one or more members can be appointed as rapporteur. This rapporteur will delve more deeply into a subject or dossier in order to inform the *Tweede Kamer*. A rapporteur is particularly important for European dossiers because of their complexity. The *Tweede Kamer* therefore regularly deploys a rapporteur for this purpose. However, already prior to the rapporteur's appointment, it is determined when the rapporteurschip will end, with the consequence that a rapporteur might have to relinquish their file even if the European dossier has not yet brought to an end. It is therefore recommended that the rapporteurschip only ends when the European dossier ends, or when the rapporteurschip is no longer needed, instead of on a predetermined date.

Sixth, as mentioned before, "national parliaments contribute actively to the good functioning of the Union", according to article 12 TEU. To fulfil this duty national parliaments have the right to review draft legislation of the EU for its compatibility with the subsidiarity principle. To know whether or not draft legislations is compatible national

parliaments should actually review the draft legislation. The recommendation for the *Tweede Kamer* is therefore to review all draft legislation for its compatibility with the subsidiarity principle. Only then one can know if it's compatible.

Seventh, in order to be able to exercise effective scrutiny parliaments need information. And in order to be well informed about the activities on European level it is useful to be well connected to the actors at EU level, in particular within the European Parliament. This recommendation concerns the contact between members of the *Tweede Kamer* and *Eerste Kamer* and members of the European Parliament. More concretely, it is recommended that a few members of the European Parliament sit on the parliamentary committees for European Affairs of the *Tweede Kamer* and *Eerste Kamer*, as is done in Germany. The advantage of this is the direct contact between the members of the different parliaments so information is easily and quickly passed.

Eighth, the 'normal' European legislative process is not followed for the conclusion of trade agreements between the EU and third countries. There is a separate process that is specifically designed for trade agreements. This means parliament (in practice, the *Tweede Kamer*) cannot use its competences laid down in EU law. This does not mean, however, that parliament is left empty handed since it can use its 'ordinary' scrutiny competences vis-à-vis the Dutch government, such as the right to ask questions. It is nevertheless recommended to create a procedure on the role of parliament with regard to trade agreements. On the one hand, this makes clear that there is a role for parliament and what this role entails. On the other hand, this ensures that parliament actually performs its scrutiny tasks.

Finally, the last recommendation is to establish better interparliamentary cooperation. The aim of better interparliamentary cooperation is to enhance the role of national parliaments in the EU. The Early Warning System and the Political Dialogue are two instruments that require cooperation between national parliaments to be effective. The more use is made of these instruments, the more likely it is the EC will take the opinion of the national parliaments into account. By that, national parliaments can have a say in the EU.