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# Out of time? – National parliaments and early decision making in the European Union

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## Abstract

*Co-decisions between the Council of Ministers and the European Parliament are increasingly adopted as early agreements. Recent EU studies have pinpointed how this informal turn in EU governance has altered the existing balance of power between EU actors and within EU institutions. However, the implications of accelerated EU decision-making are expected to have repercussions beyond the EU system and among other institutions impinge on the role of national parliaments. This study examines the implications of an alteration of EU political time on national parliaments' ability to scrutinize their executives in EU affairs. A mixed method approach has been applied. This strategy combines survey data on national parliaments' scrutiny process and response to early agreements for EU-26<sup>1</sup> with case study examination of national parliaments in Denmark, United Kingdom and Germany. Theoretically, the burgeoning research agenda on EU time-scapes is applied. This study finds that the clock of national parliaments are out of time with the EU decision mode of early agreements which severely hampers their ability to scrutinize national governments.*

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<sup>1</sup> All national chambers responded, except Spain.

# Out of time? – National parliaments and early decision making in the European Union

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## Introduction

As competences are transferred to the European Union (EU) and the ordinary legislative power of the European Parliament (EP) increases, national parliaments – once the main locus of democratic legitimacy – are fundamentally challenged. The scholarly literature has closely examined how national parliaments have adjusted to the European integration process. However, the literature is split in its estimation of the overall power of national parliaments in EU affairs. One branch of the literature reaches the conclusion that national parliaments are the main losers in the European integration process (Judge 1995; Rometsch & Wessels eds 1996; Katz & Wessels 1999; Raunio 1999; Maurer & Wessels 2001; Wessels et al. 2003; Auel 2007). This branch relies on the so-called ‘deparliamentation thesis’, according to which the powers of national parliaments have been eroded by the shift of ever more policy areas to the EU; the increased use of supranational decision-making rules; and the opaque nature of EU decision-making (Ibid).

The other branch of the literature argues that though national parliaments have responded slowly, they have steadily learned to play the European game (Raunio & Hix 2000; Duina and Oliver 2005; Auel & Benz eds 2007; O’Brennan & Raunio eds 2007). These scholars question the ‘deparliamentation thesis’, arguing that the shift of power from legislators to executives is a general feature of European democracies in the post-war period (Raunio & Hix 2000; O’Brennan & Raunio eds 2007; Auel & Benz eds 2007). This current in the literature paints a more optimistic picture, where national parliaments have gradually claimed power back by institutionalising various mechanisms of parliamentary oversight (Ibid). Some scholars have even proposed that national parliaments have been strengthened by European integration, as it has opened doors for influence on new policy domains and facilitated cross-national learning (Duina & Oliver 2005). The jury is still out, however, as other scholars have rebutted the claim by pointing out the dominance of the executive branch in EU affairs (Goetz 2000; Wessels et al. 2003; Raunio 2006; See also Goetz and Meyer-Sahling 2008 for an overview).

Meanwhile the European decision-making process has undergone significant change, where formal institutional amendments have led to informal institutional turns producing *early agreements* between the European Parliament (EP) and the Council (Farrell and Hertier 2004).

The possibility to conclude co-decision already by its first reading was introduced by the Amsterdam Treaty in 1999 in order to speed up inter-institutional decision-making. Early agreements, however, have implications beyond efficiency gains. Compromises are negotiated in informal settings and imply an additional level in the delegation chain of EU policy making, where the Council presidency and the rapporteur for the European Parliament become the entrusted negotiators (Shackleton & Raunio 2003; Farrel & Héritier 2004; Rasmussen & Shackleton 2005; Rasmussen 2011). Such turn towards greater informalization of the EU decision-making process is likely to have considerable implications for national parliaments' ability to scrutinize and influence EU affairs. By adding another level to the delegation chain, national parliaments face increased risk of information asymmetries and possible agency loss (Auel 2007). The *research aim* of this paper is to explore the implications of EU early agreements for national parliaments' ability to scrutinize their executives' decision-making in EU affairs.

In order to follow this research aim, a mixed method approach will be used. Survey data on national parliaments' scrutiny process and response to early agreements have been collected for EU-26<sup>2</sup> and combined with case study examination of national parliaments in Denmark, United Kingdom (UK) and Germany, comparing scrutiny grounds on a set of parameters. The paper first examines how decision-making has been accelerated in the EU and suggests more general implications. The burgeoning research agenda on EU timescapes is applied. The research design and data is then presented. Subsequently, the survey analysis on national parliaments and early agreements is conducted, followed by the three case studies. Finally some concluding remarks are provided.

## **Out of time?: National Parliaments and Early Decision-making in the EU**

Early agreements demonstrate how the EU timescape, defined as 'the manner in which political time in the EU is institutionalized along the dimensions of polity, politics and public policy' (Goetz and Meyer-Sahling 2009: 325, for the research agenda on timescapes see in particular Goetz and Meyer-Sahling 2009; Goetz 2009; Meyer-Sahling and Goetz 2009), for decision-making has been profoundly changed during the last decade. The timescape of supranational governance

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<sup>2</sup> All national chambers responded, except Spain.

deeply affect the political time in the surrounding multi-level setting. Political time<sup>3</sup> is a profound feature of national parliaments' ability to scrutinize their governments' in EU affairs, as the frequency and timing of scrutiny is essential to carry out this parliamentary task. Early agreements imply an acceleration of decisions (Goetz and Meyer-Sahling 2009: 180) and highlight the importance of the temporal rules which govern political decision-making:

*“If we understand how ‘the EU ticks’, we will also gain insights into how it distributes opportunities for effective participation in decision-making” (Goetz and Meyer-Sahling 2009: 181).*

As will be demonstrated below, early agreements are significant to political time in the EU and have quite fundamentally changed not only the ‘basic rhythm’ (Goetz and Meyer-Sahling 2009: 206) but also the locus and actors of EU decision-making. By inquiring into contemporary political time in the EU, we will also inquire into the distribution of power, system performance and legitimacy.

So far the study of EU timescapes has mainly concentrated on the EU level (Goetz and Meyer-Sahling 2009; Goetz 2009; Meyer-Sahling and Goetz 2009), but this examination will demonstrate how time at the EU and national level have become increasingly desynchronized – with implications for the ‘dual legitimacy’ of EU politics (Benz 2004; Töller 2006).

### ***Accelerated decision-making; EU early agreements***

The Maastricht Treaty introduced the co-decision procedure in an attempt to democratise the EU, granting the EP co-equal legislator status within a defined set of policy areas (Shackleton & Raunio 2003). Since then, the co-decision procedure has been extended to an increasing number of policy areas. With the Lisbon Treaty, it has become the main legislative mode, now referred to as ‘the ordinary legislative procedure’.<sup>4</sup> The increased involvement of the EP could potentially ‘render European decision processes, already much too complicated and time-consuming, even more cumbersome’ (Scharpf 2010 (1994): 67). Despite such expectation, the co-decision procedure

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<sup>3</sup> As Goetz and Meyer-Sahling point out, “political time is intimately connected to power, system performance and legitimacy” and the way time is institutionalized is critical to the way a political system works (Goetz and Meyer-Sahling 2009: 183).

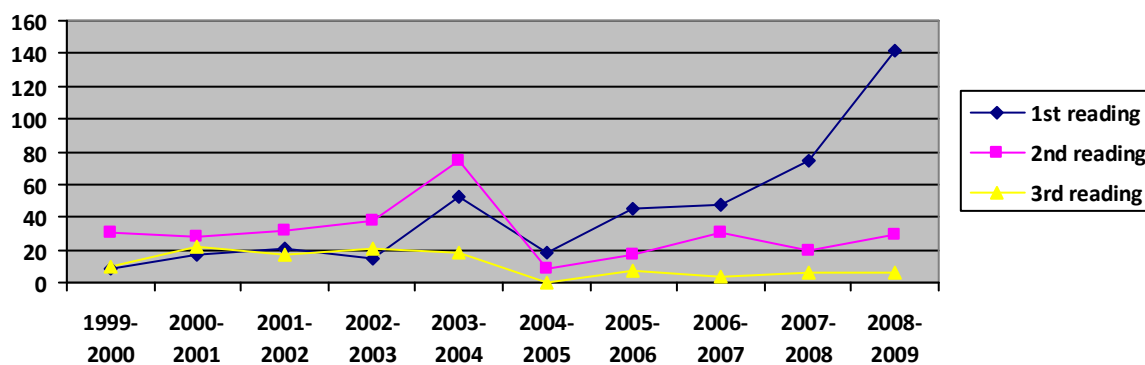
<sup>4</sup> The Maastricht Treaty had 15 articles regulated according to co-decision. This increased to 38 articles with the Amsterdam Treaty and to 44 articles with the Nice Treaty (Rasmussen & Shackleton 2005). The Lisbon Treaty means that 89 articles are now regulated according to the now called ‘ordinary legislative procedure’.

has proved to work efficiently (Maurer 2003). Efficiency has been secured by formal institutional amendments and ‘informal institutional turns in shared decision-making’ (Farrell & Héritier 2004: 1209). The Amsterdam Treaty amended the co-decision procedure and hereby the temporal rules that governed decision-making and thus interaction. Since 1999, it has thus been possible to adopt proposals after the first reading in the EP and the Council (Rasmussen & Shackleton 2005). As Farrell and Héritier point out, this amendment of the co-decision procedure introduced an important innovation by means of ‘early agreements’, making it possible to fast-track proposals and avoid a second reading or conciliation (Farrell & Héritier 2004). Early agreements are made possible by informal trialogues in which key actors from the Council and the EP meet regularly and gradually form the contours of a compromise together with the Commission before formal political positions are taken by national ministers and MEPs. Scholars have pointed out these trialogues to have considerable implications for democratic legitimacy:

*“The trilogue is the biggest challenge to democratic legitimacy, for it centralises power in those actors who represents the Council and the Parliament in the trilogue” (Chalmers et. al. 2006: 155).*

The frequency of fast-tracked EU decision-making has increased considerable, as demonstrated in Figure 1:

**Figure 1: Number of cases under the Co-decision procedures concluded after:**<sup>5</sup>



From being a procedure applied to technical and less controversial proposals (Farrell & Héritier 2004: 1197), early agreements have grown to be the dominant decision mode of co-legislation and is increasingly applied to controversial and important proposals (House of Lords, 2008-09: 12). In the legislative year 2008-2009, 80 % of all co-decision dossiers were concluded at 1<sup>st</sup> reading.

<sup>5</sup> Source: [http://ec.europa.eu/codecision/concluded/index\\_en.htm](http://ec.europa.eu/codecision/concluded/index_en.htm).



Early agreements mean efficiency gains, but they also have considerable consequences for the legislative process and likely to have implications for the ‘dual legitimacy’ of EU decision making (Benz 2004; Töller 2006). The decision mode has decisive consequences for the EU institutions involved, implying de facto decisions being negotiated, detailed and prepared by a smaller set of key actors; the rapporteur and eventually shadow rapporteurs in the EP, the Council presidency and sometimes mediated by the Commission officials. As Farrell and Héritier point out, the decision mode clearly empowers a selected set of actors, allowing the EP rapporteur and the Council presidency to command their own sets of information, exchange views, build reciprocal trust and thus accelerate decision making (Farrell & Héritier 2004: 1200-1204).

In order to conclude a dossier by its first reading, negotiations will begin as soon as the Commission has presented its proposal (Rasmussen 2011: 43). An informal triologue meeting is held when the EP has appointed its rapporteur and the Council working group has had a first look at the text. This meeting will be followed by others, in which the representatives will report back to their institutions on the progression in the discussion. When the vote in the relevant parliamentary committee approaches, the representatives will begin to exchange compromise texts (Farrell and Hertier 2004: 1198). If the representatives can reach an informal compromise, the EP can include the Council’s position in its first reading amendments and the Council can later adopt the proposal as amended by the EP (Reh et. al. 2013 forthcoming). However, as the informal negotiations unfold and disagreements are gradually closed, it becomes increasingly difficult for the formal arenas such as Coreper or the parliamentary committee to reopen the negotiations as this will imply that all the prepared details are up in the air again. The final stage - where the compromise text is presented to the Council of Ministers and voted on in the plenary of the EP - will generally simply approve what has been put in place long time before.

Over the years, the institutional familiarity with the co-decision procedure has increased and the European institutions have established more regular and better contact with one another (European Parliament report 2009: 11).

*“The trend to early agreements certainly plays an important role in the sense that early agreements require intensive inter-institutional contacts in the first place. The more the institutions then work together the more likely further early agreements become”* (European Parliament report 2009: 27).

The dense and early contact between the institutional representatives is foremost an informal one, which makes it difficult for the non-involved to size up how far negotiations have developed (ibid.). However, informal decision-making seems to be preferred by both legislators. The EP has greater ability to influence the compromise negotiated when put together in close contact with far fewer Council actors. The Council has its own motivations to prefer to close a deal early. In a Council with 27 member states it has become increasingly difficult to find a common position,

meaning that an early input from the EP may facilitate internal consensus-building in the Council (European Parliament report 2009: 11). Furthermore, the rotating *Council presidencies* are eager to close an early deal during their presidency, and seem “to favour 1<sup>st</sup> reading negotiations for which the arrangements are much more flexible than in later stages of the procedure” (European Parliament report 2009: 12).

In sum, the modus operandi of early agreements is characterised by *pace* and *delegation* of mandates to negotiate to representatives. This means that much *fewer actors* are the de facto negotiators, trusted to strike a deal with the other co-legislator. Inter-institutional relations are characterised by much *more regular*, but also *informal contact* between the representatives. Moreover, the *mutual dependence* has grown between the institutions. Finally, a key aspect of the decision-mode is *timing*. The *earlier* negotiations set out, the more likely a successful and efficient outcome is. Early agreements are thus likely to affect key dimensions in contemporary EU affairs; power, performance and democratic legitimacy.

Fast-tracked decision-making, unfolding between the few also have direct consequences for external actors, trying to influence and control EU policy making. The national parliaments are among these external actors. The informal contact and meetings in which decisions are prepared and negotiated are essentially secluded policy spaces to all other EU and national actors. Established checks and balances in EU multi-level governance to a large extent depends on that negotiations take place in a transparent and predictable way, where there is *time* to form opinions and access information to again pose the relevant questions as means of control. The changed EU timescape implies a need for national parliaments to adapt their scrutiny process.

## Research design and data

This paper utilises a mixed-method strategy by combining survey data and three case studies (Lieberman 2005). The survey provides a descriptive chart on how national parliaments are involved in pre-legislation and early decision making, how they scrutinise, and the resources available for scrutiny. The data has been gathered via an online survey conducted in late 2009 and early 2010. The survey questions were derived from the existing corpus of literature; through reports compiled by the COSAC and on the basis of explorative interviews with parliamentarians and staff working in the field. Before the survey was officially sent out, it was tested on a group of people with expertise in data collection and/or parliamentary control. The survey was then sent via e-mails addressed personally to the academic secretary of the European Affairs Committees (EAC) in the respective national parliaments of the EU-27 using the COSAC network contact

information.<sup>6</sup> In the vast majority of cases the academic secretary of the EAC is the respondent. A total of 39 surveys were sent out, 37 of which were answered. Up to four reminders were sent to those who had not yet replied to the survey, which increased the response rate significantly. Data were ultimately collected for all of the parliaments with the exception of the two chambers of the Spanish legislature. Where possible, the data were later validated against indices derived from the COSAC reports and existing studies (i.e. Raunio & Hix 2000; Maurer & Wessels 2001; Raunio 2005). After triangulation, the data were processed in a descriptive manner by automatically grouping parliaments that had provided the same answers and then aggregating the frequencies.

Based on the survey data we conducted three explorative cases studies on how the Danish, British and German parliaments scrutinise their respective governments. The three parliaments display considerable variation on the abovementioned dimension and they score differently in the scrutiny level assessment by Raunio; Denmark ranked highest, Germany in between and the UK ranked as a relatively weak scrutiny model (Raunio 2005: 335). Moreover, they are representatives of the ‘majoritarian’ and ‘consensual’ government configuration (Lijphart 1999; Auel & Benz eds 2007) and because they represent different scrutiny systems (Sprungk 2010). The three parliaments are examined by applying ‘the method of structured-focused comparison’, where the three cases are studied and contrasted regarding the same parameters, examining the main remedy for scrutiny, number of cases examined, grounds for scrutiny, role of special committees, pre-legislation as well as involvement in early agreements (George & Bennett 2004: 67-72). Each case is comprehensively examined and compared by applying the process-tracing method, where a number of sources such as interviews conducted in 2009-2010 with key respondents<sup>7</sup>, i.e., parliamentary staff and individual members of the EACs, official reports for the EACs, and secondary literature are used and triangulated to obtain the most accurate picture possible

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<sup>6</sup> See <http://www.cosac.eu/en/mailbox/parliaments/>.

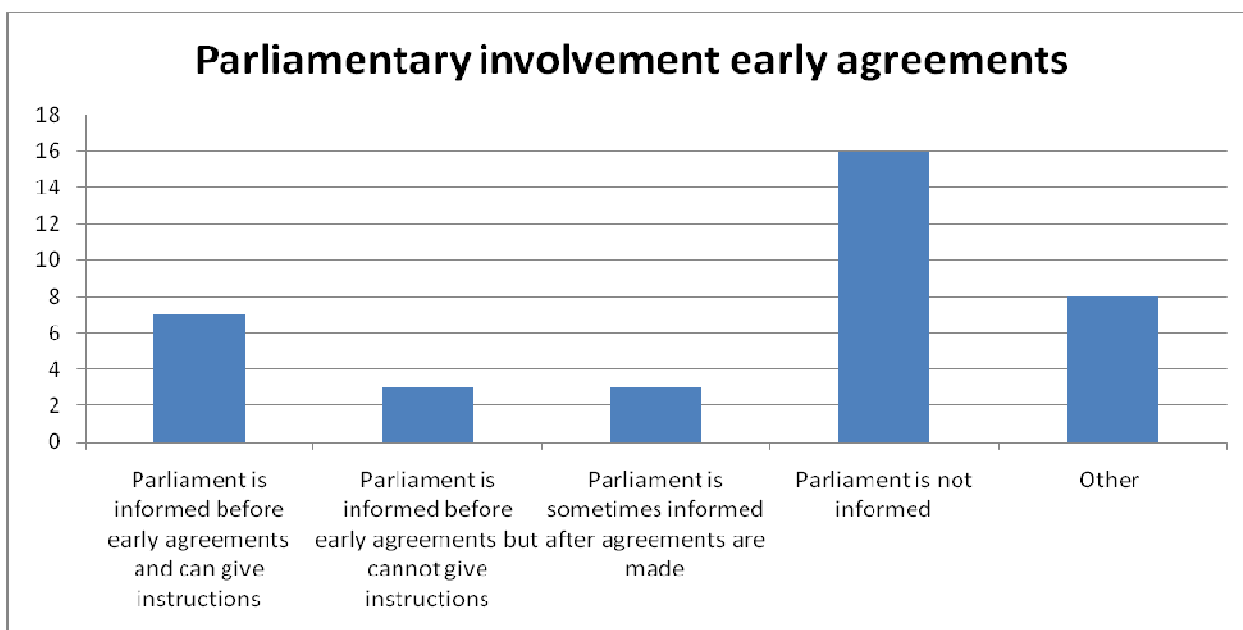
<sup>7</sup> Members of the European Affairs Committee in the Danish Parliament, August 2009; Policy advisers to the European Affairs Committee in the Danish Parliament, October 2009; Policy Analyst, EU Select Committee, House of Lords, September 2009; Chair, EU Select Committee, House of Lords, September 2009; Clerk of the European Scrutiny Committee, House of Commons December 2009; Ministerialrätin, Bundesrat Büro des Ausschusses für Fragen der Europäischen Union February 2010, Referentin im Sekretariat des Ausschusses für die Angelegenheiten der Europäischen Union, Deutscher Bundestag, February 2010.

(George & Bennett 2004: 205-232). The mixed-method strategy thus aims to produce new insights into the status of parliamentary involvement and control in EU affairs.

## Early agreements: National parliaments left out?

According to the survey data, most national parliaments are not involved in early agreements. For this reason, they have no information on and cannot control the drifts of the EU decision making taking place in this fast-track form.

**Figure 2: Parliamentary involvement early agreements<sup>8</sup>**



The chambers of parliaments which are labelled ‘not informed’ amounts to sixteen whereas three note that they are sometimes informed *after* agreements are made. Three chambers are informed before early agreements are closed but cannot give instructions. Seven parliaments note that they are involved in early agreements and can issue binding instructions on their governments. The remaining eight chambers of parliaments have answered ‘other’ in which they could elaborate their answers. The Estonian *Riigikogu* notes that the information flow depends on the sensitivity of the issue. The Danish *Folketing* is to be informed about all cases and can in principle instruct the government; in practice, however, information arrives too late and instructions are only given

<sup>8</sup> Question 21 was formulated: ‘How is parliament involved in early agreements, i.e., first reading agreements between the European Parliament and the Council?’. The categories indicated in the figure were given as possible answers.

in a minority of cases. The Dutch *Eerste Kamer* and Slovenian *Državni svet* write that they are informed if they request such information. The Hungarian *Országgyűlés* writes that involvement depends on the cooperation with the government. In sum, these parliaments are not involved in early agreements on a systematic basis, which makes their ability to exert control conditional. The Latvian *Saeima*, on the other hand, notes that if the EAC has already approved a national position but early agreements imply changes or shifts in national positions, the government is obliged to receive a new mandate.<sup>9</sup> Finally, the Swedish *Riksdag* has responded ‘other’. Its response appears to encapsulate some of the main challenges to parliamentary scrutiny when decision making is fast-tracked:

*“The co-decision procedure poses difficulties from the point of view of parliamentary scrutiny. In its practical application, the procedure is lacking in transparency, and any “real” negotiations are only as an exception taking place when the proposal is on the table at Council meetings. These difficulties are particularly pronounced in the case of deals being struck in the early stages of the procedure, when the content of the deal has been negotiated in informal dialogues with no “natural” points at which to apply parliamentary scrutiny’ (survey, answer to question 21).*

In a secluded actor space, national parliamentarians represent a set of actors which are left out. The decision mode is characterised by its own flow, whereas parliamentary scrutiny requires a temporal ‘stand still’, allowing control to be exerted. Informal contact and dialogues between the mandated representatives leave no ‘natural’ point of intervention for national parliaments. In the informal dialogue setting, the emerging consensus between the Council presidency and EP representatives renders the state of flux even more pronounced. The original Commission proposal which the national parliaments face may no longer be the relevant text, but de facto negotiations are likely to proceed on the basis of a significantly different text (House of Lords 2008-09: 16). As concluded by the House of Lords, informal dialogues and rapid decision making render parliamentary scrutiny ‘very difficult’ due to a lack of transparency and the fact that the Council presidency appears to hold the upper hand in this decision mode and ‘hold its cards close to its chest’ (Ibid).

### **A call for early involvement. Accelerating national scrutiny?**

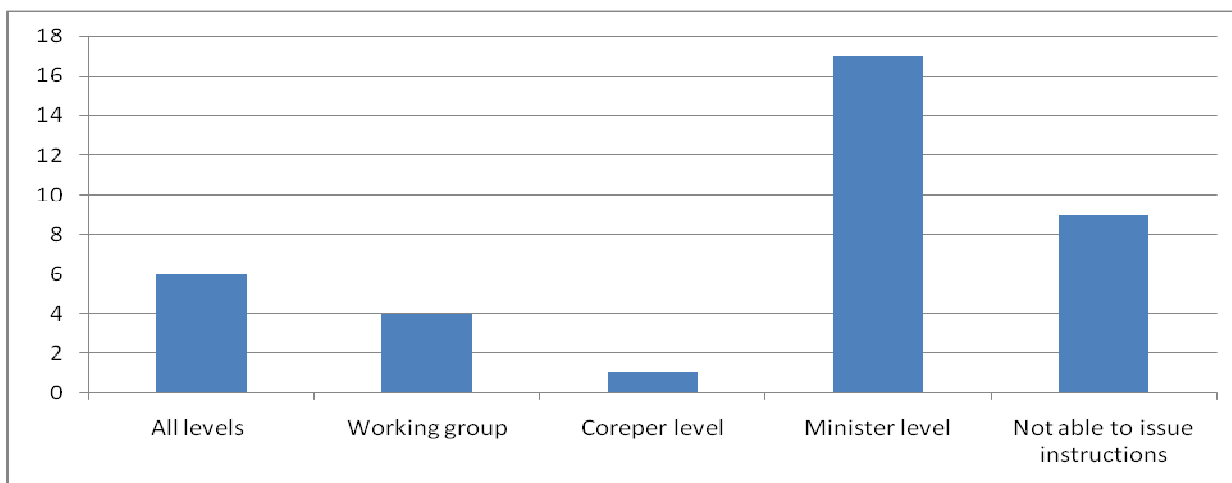
Early decision making calls for the earlier involvement of national parliaments. As noted in the survey, “real” negotiations are an exception once the proposal is on the table at Council meetings’ (Survey data, answer to question 21). The ministerial level tends to approve what has already been

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<sup>9</sup> The Belgian House of Representatives has not answered this question.

agreed upon (Hayes-Renshaw & Wallace 2006; Häge 2007). The survey data substantiates that the majority of the national parliaments issue binding instructions to their respective governments in EU matters in the late stage of decision making. In other words, instructions are given at the ministerial level immediately before agreements are adopted in the Council.

**Figure 3:<sup>10</sup> Instruction level**



Nine chambers are not able to issue instructions at all. Seventeen chambers give instructions at the level of the Minister. Five chambers note that they provide instructions when negotiations start in the relevant Council working group or at the Coreper level. Six chambers state that they provide instructions at all levels depending on the character of the dossier. Not only are national parliaments latecomers in the control of policy making in the decision mode in early agreements, but when instructions fall at the minister level, before the Council meeting, it appears to be *too late* to exert scrutiny with the executive. Real deals are made much earlier. The increased use of early agreements suggests that the working group is a more relevant instruction level.

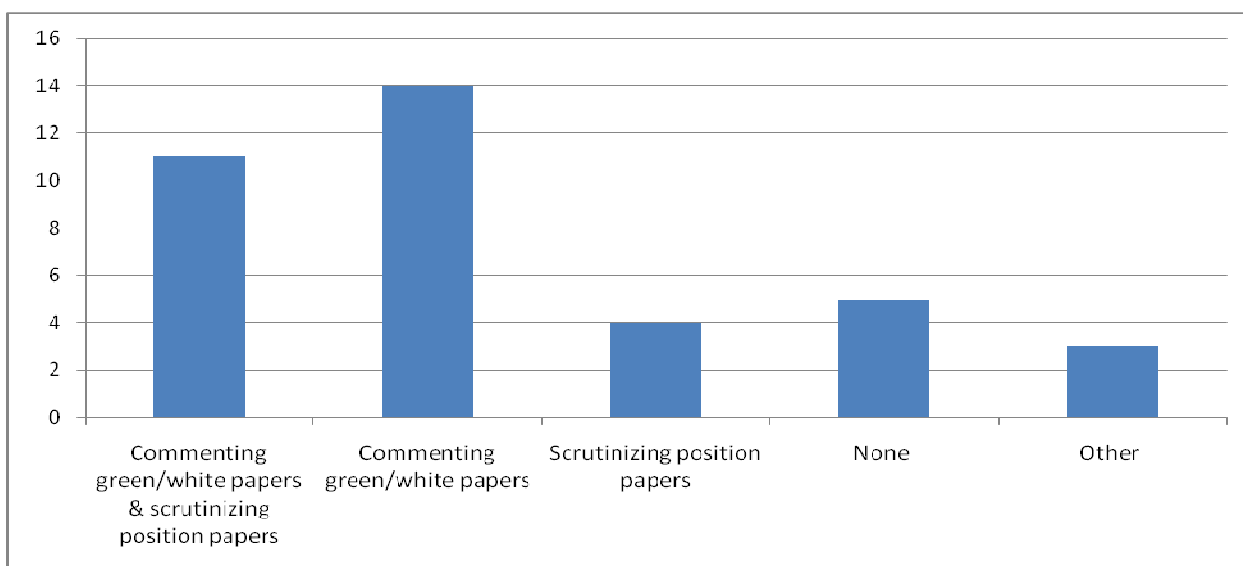
This development also suggests that in order to be able to respond adequately at the earliest stage in the decision-making process, national parliaments would need to gain information *before* the Commission presents its proposal. This means that agenda-setting becomes an increasingly relevant part of the policy process for all actors seeking to influence or control the flow of EU affairs (Börzel 2002, 2005; Wallace 2005).

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<sup>10</sup> Question 11 was formulated: ‘At what level in the EU decision-making process does the instruction generally take place?’ The question only addresses the parliaments that are able to issue binding instructions on their governments. The categories indicated in the figure were given as possible answers.

The survey data demonstrate how national parliaments inform themselves regarding the Commission's Green and White Papers in the policy design phase. Some parliaments also scrutinise early position papers from their governments. Only the Belgian *Chambre des Représentants*, the Hungarian *Országgyűlés*, the Maltese *Kamra tad-Deputati*, the Polish *Sejm*, the Polish *Senate* and the Slovakian *Národná rada* note that they are not involved in the policy design phase.

**Figure 4:<sup>11</sup> Parliament involvement in the policy design phase**



Such pre-legislative involvement prepares the national parliaments to some extent as to what may come. However, early agreements are likely to disorient the actors in the policy design phase, since Green and White Papers may at best weakly indicate how negotiations will proceed. Pre-legislative involvement does not tackle the state of flux of early agreements which challenge the ability of parliaments to control and scrutinise what is essentially a fast-moving target.

We will now turn to the case studies of Denmark, the UK and Germany in order to inquire further into how their national parliaments have organised their scrutiny process and – eventually – adapted to the new timescape characterizing EU decision-making.

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<sup>11</sup> Question 16 was formulated: 'Is the parliament involved in the pre-legislation phase?' The categories indicated in the figure were given as possible answers.

## Parliamentary scrutiny and early agreements: Denmark

Denmark is often held to be the member state in which the national parliament has the greatest power in EU affairs and been considered the ‘scrutiny leader’ (Raunio 2007; Holzhaecker & Albæk eds 2007: 147-148; Sprungk 2010). The centre of gravity in the parliamentary control with the government in EU affairs is the European Affairs Committee (EAC). The Danish control system is a procedural system focusing on the government position in the Council and giving direct mandates (COSAC 2007). According to the procedure, the government must present a position paper in cases of considerable impact and must inform the committee about important cases (Market Committee 1974). The government however presents position papers on most cases and get this accepted by the EAC in approximately 90-95 per cent of the cases due to the comprehensive consultation of affected interest beforehand and the anticipation of the mandate allocation (Jensen 2003: 156). *On the Friday before the Council meeting*, the relevant minister will go to the EAC and make an oral presentation of the proposed negotiation position. The position is approved (mandated) unless members of the EAC representing 90 mandates or more explicitly express that they are against (Damgaard & Jensen 2006).

A recurring demand from the EAC has been a request for more detailed information and the need for consultation *earlier* in the negotiation process (Esmark 2002; Sousa 2008; Jensen 2011). It has, however, proven difficult to institutionalize a work-mode to its realization and early agreements thus pose significant challenges to the Danish model. Early agreements imply that giving a mandate at the Minister level, is one stage far too late. It would be reasonable to give the mandate at the Coreper level or better yet to give the mandate at the working group level in the Council – and to renew such mandates when informal negotiations produce new positions. At the ministerial level, it is almost impossible to alter an agreement between the Council and EP in cases where the Danish government fails to obtain its mandate.

It has also been pointed out that although early positions are formulated in the government, they are not systematically presented to the parliament (Interview I). In some situations, the government holds that the establishment of compromise involving dialogues prior to the first reading in the EP is a delicate and rather confidential process which renders the presentation of positions impossible (Interview IV). In other situations, the government may not have sufficient information itself from the Council presidency (Interview VII). The EAC members have noted that first reading agreements are an increasing problem for parliamentary control, since the information provided by the government to the Parliament is too little, too late – often after Coreper has mandated the Presidency (COSAC 2009, Annex: 30; Interview VII). At this stage, the Danish government as a Council member has already given the Presidency a mandate to



negotiate, without any mandate from the Danish parliament. This development severely challenges the ability of the parliament to de facto control the government.

As early as March 2006, the former president of the EAC pointed out that early agreements had outdated the Danish (late) mandating system (Auken 2006). In light of fast-track policy making, he suggested that parliamentary mandates should be given much earlier. This was followed by an official request from the European Affairs Committee to the government to present its position as early as possible (EAC, Beretning, 23 June 2006). The government responded by noting that in cases of early agreement, it would aim to present its position before Coreper mandates the presidency to negotiate (Danish Foreign Ministry 2006). Ideally, this would mean that the government would request its mandate from the EAC when the presidency asks for a mandate from Coreper to *initiate* negotiations in the 1<sup>st</sup> trialogue. However, in reality the government appears to request its mandate when the presidency asks Coreper for a mandate to *close a deal* with the EP (Interview VII). Issuing a mandate in the late phase of Coreper negotiations stands out as another stage too late, since negotiations between Council representatives must have begun far earlier in order to reach a common position in the Council. To take part in such negotiations, the individual governments must have formed their positions at an earlier stage, presumably when the relevant working group starts to act. Furthermore, the government response does not consider the flow of fast-track decision making and does not guarantee that it will return to the EAC when positions change during negotiations. However, not even the government may have sufficient information to present, as it may be far from fully informed itself regarding the progress in trialogues.

Finally, the Danish European Affairs Committee is not very engaged in the preparatory stages of EU policy-making. The involvement of the EAC is limited when it comes to influencing the European Commission on a more direct, concrete level by uploading own regulatory models or attempting to shape proposals which are in the pipeline (Survey question 16). The general view seems to be that actions taken by ministers before proposals are officially launched by the European Commission fall within the jurisdiction of the government (Interviews I, II, III).

## **Parliamentary scrutiny and early agreements: United Kingdom**

In contrast to Denmark, the British parliamentary scrutiny system is not mandating the minister before agreements can be made in the Council (Survey question 10). The British system is the classical example of a document-based system (COSAC 2007) in which EU documents are sifted through at the early stage of the decision-making process. The model has by some scholars been found to have a low level of scrutiny (see for example the scoreboard of Raunio 2005: 335) and by others to actually carry out quite detailed parliamentary scrutiny (Auel 2007: 501-502).

As such, the British scrutiny system does not control the executive in a strict sense, instead examining the content and impact of proposals through scrutiny. This form of parliamentary scrutiny is divided between the House of Commons and House of Lords. The two chambers have each established a European Affairs Committee (EAC) responsible for holding the government accountable. The main mechanism is the so-called scrutiny reserve which implies that the government is not allowed to give consent to EU cases which the two houses have not yet examined or are still examining (Hazell & Paun 2006: 5; Cygan 2007: 172-173). The government must await the clearance of the scrutiny reserve before taking action.

Beginning with the *House of Commons*, which is the elected body of the two chambers, its European Scrutiny Committee processes more than 1000 documents annually (House of Commons 2008). According to the rules of procedure, the government must submit documents from the Commission within two days of receiving them (Cygan 2007: 165-169). The government must then submit a so-called explanatory memorandum within two weeks with a description of the proposal and its implication (Ibid). Based on this information, the committee will decide whether the document is politically and/or legally significant (Interview VI). All documents deemed politically and/or legally important are reported on at length in the Committee's weekly Reports. The Committee also has the power to recommend documents for debates, which take place in a European Committee or (more rarely) on the Floor of the House. Under the scrutiny reserve resolution passed by the House, Ministers should not vote in the Council of Ministers on proposals which the Committee has not cleared or which are awaiting debate. Moreover, the committee may refer documents to departmental select committees, though the most common option is to refer the documents to one of the sub-committees on EU affairs. As the House of Commons apply a document based scrutiny system, the earliest stage at which it gets activated is when the Commission launch a Green or White paper (Survey question 16). However, the system is not animated before a formal proposal is placed on the table. The House of Commons should be informed before an early agreement is reached but it not in a position to instruct (Survey question 21). Initially, the House of Commons assumed that contentions proposals would not be subject to early agreements (Interview VI). This assumption, has however, been challenged as first reading agreements is prevalent and also used on proposals which are politically salient (Ibid.). Early agreements thus challenge the scrutiny system due to the fast speed and the opaque nature of the decision mode which makes it difficult to apply the scrutiny reserve. The House of Commons have informed the government about the difficulty but no concrete measures have been installed to better synchronize the European and the national timescape (Ibid.).

*The House of Lords*, which is the unelected, second chamber of the UK parliament, exercises control via its EU Committee. Every week, the committee chair and legal adviser sift through all of the documents which the government has deposited (Interview V). Approximately half of the

cases of a routine nature are cleared by the committee chair, meaning that the government can go ahead and decide on them. The other dossiers, which raise political or legal questions, are allocated to one of the seven sub-committees under the select committee. The subcommittees meet weekly, where a background note will be prepared for each case by a committee clerk (Ibid). Committee clerks will also prepare a draft letter for the minister if something must be clarified before the committee can lift the scrutiny reserve. Based on the information provided by the minister, the committee will decide whether to clear the proposal or to investigate further by inviting the minister to provide evidence before the committee (Cygan 2007: 169-171). Before the minister arrives at the session, committee clerks and specialists will have prepared a number of questions, which are divided between the members. In cases of greater significance, the committee will produce a report. In the 2007-2008 session, for example, the sub-committees produced reports on fourteen topics, including the Lisbon Treaty, the EU and Russia, and organ donation (House of Lords, Annual Report 2008). In comparison with the House of Commons, many members of the House of Lords European Union Committee has considerable expertise in EU matters, as they have held high positions such as Commissioner, Coreper ambassadorships and EP presidency in the course of their professional lives (Interview V).

The extended use of early agreements and the informal dialogues have caused considerable concern in the House of Lords as to how to respond to these challenges in order to hold the government accountable. These concerns are raised in one of the House of Lords' reports, dealing exclusively with co-decisions and national parliamentary scrutiny (House of Lords report on the co-decision procedure and national parliamentary scrutiny 2008). In order to deal with the challenges implied by co-decisions and early agreements, the EU Committee suggests adjusting the existing systems of parliamentary scrutiny in a number of ways (Ibid.). First, it suggests that the government must update the parliament without any delay when there have been changes in the proposal with policy implications. Second, it is suggested that the House of Lords office in Brussels should be allowed access to documents being negotiated under the co-decision procedure in the Permanent British Representation in order to maintain a fast track with how the negotiations evolve. Third, the British government is expected in the future to send documents from the Council which are marked LIMITE. Fourth, the importance of the above-mentioned need for sending reports to MEPs who are involved in cases negotiated under the co-decision procedure is emphasised together with the need to inform other national parliaments via a common database. Despite these explicit recommendations from the House, the amendments have so far not been effectuated (Interview X).

The two Houses are different as to how scrutiny is exercised. The House of Lords carries out in-depth enquiries *early* in the decision-making phase of a limited number of key cases, whereas the House of Commons produces a weekly report summarising the background notes of all of the

proposals under scrutiny. The established division of labour between the houses and their respective manners of EU dedication mean that Parliamentary EU control is tackled from different angles and forums. The document-based system may therefore contain different ways of tackling new challenges to parliamentary scrutiny that the mandating system has not (yet) fully developed.

## **Parliamentary scrutiny and early agreements: Germany**

Like the British system, and in contrast to the Danish system, the German system is a document based system in which proposals from the EU institutions are singled out for scrutiny (COSAC 2007: 15). The German Parliament has been criticized for not making full use of its formal rights to scrutinize the government and thus to perform relatively weakly compared to other models (Auel 2007: 493; Töller 2004; 2006; Sprungk 2010).

The Committee on the Affairs of the European Union (*Ausschuss für die Angelegenheiten der Europäischen Union*), also called the EU Committee, is the hub of coordination in the *Bundestag*. The committee is responsible for cases concerning European integration, whereas the specialised committees are responsible for scrutinizing sector specific proposals from the EU. All documents from the government go through the EU Committee, which is allocating them to relevant committees (Interview VIII). The transmitted documents have attached forwarding letters with information on the main substance, the legal basis, the applicable procedure and the leading federal ministry (EUZBBG section 5). A special administrative unit under the auspices of the EU committee called PA<sub>1</sub> (*Europa Referat*) sifts the documents and suggests a prioritisation to the parliamentary groups (Interview VIII).

The prioritised dossiers will then together with the political groups be allocated to the special committee(s) of the *Bundestag* which the case concerns. The responsible committee(s) will make use of questions to the government, together with written reports, as the basis for its scrutiny before crafting a resolution. The EU Committee can suggest amendments or adjust the resolution from the lead committee before transmitting it to the plenary (Rules of Procedure: Rule 93b (7)). Based on the resolution the plenary adopts a motion, which the federal government must follow in the Council of Ministers (EUZBBG section 9). However, the government can deviate from that motion for compelling reasons, in which case it will have to appear before relevant committee in the *Bundestag* to explain the reasons for the deviation (Survey question 10; Linn & Sobolewski 2010: 59-62).

On 28 September 2006, the *Bundestag* made an agreement with the government that tightens the procedural demands. This agreement was adjusted on 30 September 2009 to accommodate the 30

June 2009 ruling from the German Federal Court (*Bundesverfassungsgericht*) which found the role of the two chambers of parliament to be insufficient to counteract the transfer of power to the European level. This implied that the agreement governing the relationship between the parliament and the government was changed, most significantly by making it legally binding (Beichelt 2010: 6-8). The adjusted cooperation law also stresses the importance of subsidiary check, according to which the Bundestag should consider within eight weeks whether or not a case fulfils the principle following the Treaty of Lisbon.

Despite the empowering of the Bundestag following the ruling from the Constitutional Court, the parliament has severe problems dealing with early agreements. There is no advanced system in place in the Bundestag which can keep up with fast speed legislation at the European level and the chamber is only informed sometimes after an agreement is made (Interview VIII; survey question 21). The Bundestag only receives non-papers (i.e. informal and nonbinding papers) regarding early agreement, if it receives any information at all from the government (survey question 16). This makes it extremely difficult for the Bundestag to monitor and control what is happening and in the vast majority of cases the government is not held accountable.

The government is obliged to inform the *Bundesrat* about new dossiers emanating from the EU as early as possible. Upon receipt, the EU Secretariat of the *Bundesrat* shifts the proposals and decides on which to scrutinize (Interview IX). On average, 100 to 150 documents are preselected for inspection per year. Based on the preselection process, the Secretary General on behalf of the President of the *Bundesrat* allocates the proposals to relevant sector committee(s). The sector committees then scrutinize the proposals and give statement to the Committee on European Union Questions (EU Committee) (*Ausschuss für Fragen der Europäischen Union*). The federal government will appear before both the sector committees and the EU Committee to engage in dialog. Founded on the views given by the relevant sector committees, the EU Committee deliberates the proposal. It is the EU Committee that is competent to decide whether or not to support the views from the sector committees.

After the deliberation, a report is produced and sent to the plenary for a decisive vote. A Chamber for European Affairs (*Europakammer*) exists in the *Bundesrat* according to Article 52 (3a) of the Basic Law, which mirrors the composition of the plenary and may take a decision on behalf of it in cases that are either pressing or classified. The *Bundesrat* comments on Green and White Papers (survey question 16). As for early agreements the *Bundesrat* is even more challenged than the Bundestag because it is not informed and there is no infrastructure in place which is synchronised with the fast track decision making at the European level (Interview IX; survey question 21).

## Conclusion

Co-decision is now the ordinary legislative mode in a European Union enlarged to 27 member states. Scholars have noted that neither the increased powers of the EP, nor enlargement have slowed down supranational decision-making, which seems to operate according to 'business as usual' (Wallace 2007; Meyer-Sahling and Goetz 2009: 329). This is, however, not the case. The accelerated and growing informalization of decision-making has wide implications beyond time-estimated performance. Performance by means of efficiency may be largely intact, but the distribution of power and democratic legitimacy are not. The analysis in this paper has demonstrated how EU early agreements have considerable implications for national parliaments' ability to scrutinize their executives.

EU decision-making and the national scrutiny hereof operate in many cases according to different, desynchronized timescapes. It has been pointed out that 'EU institutions do not run the same clock' (Goetz 2009: 210), but even less so is the political time shared with national political systems. The changes in the decision-mode upset national models of parliamentary scrutiny as they were institutionalized at a very different point in political time, where member states were fewer, the EP had much less power and decisions were normally taken on basis of consensus. National executives were thus more directly responsible for their EU actions, whereas today many decisions are prepared and de facto taken *on behalf* of the large majority of national executives. The minister may not be very well informed, now represented by the rotating presidency, acting on behalf of issued mandates to keep the pace of complex decision-making and close a deal as early as possible. The degree of closure in the informal setting may essentially sideline the object of control itself, i.e., the government.

The three case-studies point out that none of the scrutiny models are at pace with the accelerated EU decision-making. Nevertheless, important differences are evident, which may better enable the House of Lords in the UK system to tackle the increased need for early action. When comparing the scrutiny process on different parameters, the House of Lords stands out as the more pro-active chamber:

Table I: Comparing parliamentary scrutiny

Country	Denmark	United Kingdom		Germany	
Parliament	Folketinget	Commons	Lords	Bundestag	Bundesrat
<b>Main remedy</b>	<i>Mandating procedure:</i> Government must present a position paper which there cannot be an expressed majority against	<i>Document-based procedure:</i> Government must not take action in the EU before the two chambers have scrutinised a proposal, i.e., the scrutiny reserve		<i>Document-based procedure:</i> The Government must notify the parliament comprehensively and as early as possible. If necessary the government should apply the scrutiny reserve to allow time for the parliament to deliberate the proposal and issue an opinion,	
<b>Number of cases examined</b>	Most cases are examined	Most cases are examined	A selected number of cases are examined	Most cases are examined	Some cases are examined
<b>Grounds for scrutiny</b>	On the basis of basic, topical and summary notes formulated by the government	On the basis of explanatory memorandum formulated by government	On the basis of background note and possible reports formulated by the House of Lords	Notes produced by the government	Notes produced by the government
<b>Special committees</b>	Special committees sometimes involved	Departmental committees sometimes involved	Special EU subcommittees highly involved	Sector Committees highly involved	Sector Committees highly involved
<b>Pre-legislation</b>	EAC may examine green and white papers	EAC examines green and white papers	Subcommittees conduct enquiries, summarised in reports to the Commission. Also increasingly sending own reports to the EP	Commenting on green and whitepapers	Commenting on green and white papers
<b>Early agreements</b>	No systematic information on early governmental position. Information given to parliament at times after COREPER has mandated the presidency to negotiate and the Danish government thus de facto has committed itself to a position	May be informed, but cannot give instructions. Not necessarily updated when negotiation positions change. Do not have access to all relevant documents.	May be informed, but cannot give instructions. Not necessarily updated when negotiation positions change. Do not have access to all relevant documents.	Arbitrary scrutiny of position papers	No involvement in regard to early agreements

The Lords treat a limited, selected number of cases but subsequently invest significantly greater resources in the scrutiny process and carry out much more detailed examination. Furthermore, their grounds for scrutiny do not depend on explanatory memorandums or summary notes from the government, operating instead on the basis of their own reports or notes worked out by their own employees. Thus, the independent analytical capacity is higher. Moreover, the high involvement of special committees enhances the scrutiny capacity of the House of Lords. The Lords proactively attempt to influence both the Commission and the EP by scrutinising developments and initiatives and sending their own reports to the agenda-setters in the Commission and the decision makers in the EP, among these the powerful rapporteurs. In this manner, the House of Lords appears to have adapted to the increased need for early action in the EU policy cycle. In contrast the EAC in Denmark continues to concentrate on the late stage of decision making where a mandate is given to the minister. Although Denmark is renowned for its strong model of parliamentary control, it lags behind in its efforts to adapt to the new temporal rules of EU decision-making. Germany as well has not yet accelerated its national scrutiny, and experience a lack of information on position formation in the informal dialogues. So far no infrastructure has been put in place which is synchronised with fast track decision making at the European level.

This paper has examined the implications of early agreements in EU decision-making for the national legislators' ability to scrutinize their executives. The temporal rules that govern EU politics have changed (Goetz 2009), but many national clocks have far from adapted and are out of time. Whereas the performance of the system may be intact, the implications for power and democratic legitimacy stand out. Concerning the distribution of power, these findings give evidence to 'de-parliamentation thesis'. More than half of the national legislator has lost power, but this time not to the executive (Goetz 2000; Wessels et al. 2003; Raunio 2006), but instead to the few actors of delegated responsibility. Concerning democratic legitimacy, the findings suggest that the 'dual legitimacy' of EU politics (Benz 2004; Töller 2006) is more challenged than often assumed.



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