

# Post-Legislative Scrutiny as a Form of Executive Oversight

## Tools and Practices in Europe

Elena Griglio\*

### Abstract

*Parliaments' engagement in post-legislative scrutiny can be considered either as an extension of the legislative function or within the framework of the oversight of the executive. This article makes use of the latter view to assess how parliaments in Europe approach post-legislative scrutiny and to which extent this function can be regarded as a form of executive oversight. Although rules and practices of parliaments in this realm are remarkably heterogeneous, the focus on some selected parliaments (Italy, France, Germany, Sweden, and the European Parliament) reveals three different conceptual categories. In the 'basic' approach (passive scrutinizers), parliaments limit their role solely to the assessment of the ex-post scrutiny performed by the government and external agencies. Differently, parliaments willing to engage in a more proactive approach might choose either to act on an informal basis, establishing ad hoc research/evaluation administrative units (informal scrutinizers) or to address post-legislative scrutiny in a formal and highly institutionalized manner (formal scrutinizers). As a matter of fact, the practise of parliaments often combines characters of different categories. While in all of these approaches post-legislative scrutiny shows potential for executive oversight, only the third can potentially lead to a kind of 'hard' oversight.*

**Keywords:** scrutiny of law enforcement, ex-post impact assessment, parliamentary oversight of the executive, post-legislative scrutiny.

### A Introduction. Framing Post-Legislative Scrutiny within Parliamentary Functions

Increased consideration of what has been described as the 'end-to-end' nature of an effective legislative process<sup>1</sup> has contributed to shedding light on the ex-post stage of the law-making cycle, most often referred to as 'Post-Legislative Scru-

\* Dr Elena Griglio is a Senior Parliamentary Official, Italian Senate and Adjunct Professor, Luiss Guido Carli University.

1 A. Brazier, 'Post-Legislative Scrutiny', in Global Partners Governance, *Guide to Parliaments. Paper 8*, 2017, p. 1, available at: [www.gpgovernance.net/publication/paper-8-post-legislative-scrutiny/9](http://www.gpgovernance.net/publication/paper-8-post-legislative-scrutiny/9) (last accessed 6 January 2019).

tiny'. This stage may include the factual evaluation of the law's formal implementation and the substantial assessment of its policy impact.<sup>2</sup>

Although different institutions are involved in this stage, keeping legal implementation under control is considered primarily a task for the parliament.<sup>3</sup> Post-legislative scrutiny can specifically be framed within two functions strongly rooted in the history of parliamentarism.

On the one hand, the task of monitoring how laws are implemented and what impact they produce can be considered as an extension of the legislative function.<sup>4</sup> This vision is based on a cyclic conception of the law-making process, whereby the entry into force of the statutory act continues in the law enforcement stage where premises for the inception of future legislative initiatives are also set.<sup>5</sup> Post-legislative scrutiny can therefore be referred to 'legisprudence' (or 'legistics'),<sup>6</sup> which is a theoretical and practical science dealing with law production and aiming at improving the quality of norms through a focus on the whole regulation cycle.<sup>7</sup> The objective of producing 'less but better' laws is a fundamental task of legislative assemblies in the classical liberal thought.<sup>8</sup> Nonetheless, it has gained momentum in the past few decades. The cyclic conception of law-making is instrumental to the better regulation discourse<sup>9</sup> that has become a perma-

- 2 F. De Vrieze, 'Principles of Post-Legislative Scrutiny by Parliaments', Westminster Foundation for Democracy, January 2018, p. 4, available at: <https://www.wfd.org/wp-content/uploads/2018/07/Principles-of-Post-Legislative-Scrutiny-by-Parliaments.pdf> (last accessed 6 January 2019). On ex-post evaluation as a stage instrumental to quality of legislation and part of the rule of law, see U. Karpen, 'Good Governance through Transparent Application of the Rule of Law', *European Journal of Law Reform*, Vol. 11, No. 2, 2009, p. 219.
- 3 U. Karpen, 'Comparative Law: Perspectives of Legislation', *Anuario Iberoamericano de Justicia Constitucional*, No. 17, 2003, p. 168.
- 4 To fulfil this task, parliaments often resort to specific legislative techniques, such as the introduction of sunset or review clauses. See A. Kouroutakis, *The Constitutional Value of Sunset Clauses: An Historical and Normative Analysis*, New York, Routledge, 2017.
- 5 On the 'comprehensive approach to legislation' see L. Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation', *Statute Law Review*, Vol. 22, No. 2, 2001, pp. 119 *et seq.* Theoretically, this vision turns out to be consistent with the procedural rationality advocated by N. Luhmann, *Legitimation durch Verfahren*, 6th ed., Frankfurt at the Main, Suhrkamp, 2006.
- 6 P. Noll, *Gesetzgebungslehre*, Hamburg, Reinbeck, 1973.
- 7 The regulatory cycle includes four phases: drafting and initiating, deliberation and adoption, implementation and enforcement, control and amendment. See U. Karpen, 'Introduction', in U. Karpen & H. Xanthaki (Eds.), *Legislation in Europe. A Comprehensive Guide for Scholars and Practitioners*, Oxford and Portland, Hart Publishing, 2017, p. 20.
- 8 See W. Bagehot, *The English Constitution*, 2nd ed., London, H.S. King, 1872, p. 195 and J.J. Rousseau, 'Considerations sur le gouvernement de la Pologne et sur sa réformation projetée (1771-1772)', in *Collection complète des oeuvres de J.J. Rousseau*, I, Genève, Société typographique de Genève, 1780-1789, ch. VII.
- 9 S. Weatherhill, *Better Regulation*, Oxford and Portland, Hart Publishing, 2007. On better regulation as a strategy against the democratic deficits of traditional lawmaking, see P. Popelier, 'Governance and Better Regulation: Dealing with the Legitimacy Paradox', *European Public Law*, Vol. 17, No. 3, 2011, pp. 55 *et seq.*

Elena Griglio

ment programme of the OECD<sup>10</sup> and a pivotal target in the institutional agenda of the European Union.<sup>11</sup>

On the other hand, post-legislative scrutiny can be framed within the oversight function that parliaments exercise with respect to the executive.<sup>12</sup> Oversight includes the control by parliaments of the action of another political body, the enforcement of its statutory or general accountability and the adoption of any necessary measures to restore infringed public interests.<sup>13</sup>

If it is framed within the domain of parliamentary oversight, post-legislative scrutiny is a relational function.<sup>14</sup> It specifically relates to two different conceptions of the oversight function. On the one hand, it can be interpreted and implemented as a form of 'hard' oversight available to parliaments in view of holding the government to account in a binding manner. The hard conception sees oversight as a vertical means to hold the government accountable vis-à-vis the parliament.<sup>15</sup> On the other hand, parliamentary oversight can be approached according to a 'soft' conception, which is instrumental to strengthening the informative prerogatives of parliament and to supporting its communicative functions.<sup>16</sup> In this conception, parliamentary oversight is interpreted instead as an

- 10 OECD has carried out more than 20 years of activity in this field after the first programme launched in the mid-1990s (OECD, 'Recommendation of the Council on Improving the Quality of Government Regulation', OECD/LEGAL/0278, 3 March 1995).
- 11 D. Jančić, 'The Juncker Commission's Better Regulation Agenda and Its Impact on National Parliaments', in C. Fasone, et al. (Eds.), *Parliaments, Public Opinion and Parliamentary Elections in Europe*, EUI MW Working Paper, No. 18, 2015, pp. 45 et seq., available at: <http://cadmus.eui.eu/handle/1814/37462> (last accessed 6 January 2019).
- 12 National Democratic Institute, 'Strengthening Legislative Capacity in Legislative-Executive Relations', *Legislative Research Series Paper*, No. 6, 2000, p. 24.
- 13 A. Manzella, *Il Parlamento*, Bologna, Il Mulino, 2003, p. 441. See also D. Olson, 'Legislatures and Administration in Oversight and Budgets: Constraints, Means, and Executives', in R. Stapanhurst, et al. (Eds.), *Legislative Oversight and Budgeting: A World Perspective*, Washington DC, World Bank, 2008, pp. 324 et seq. and Inter-parliamentary Union (IPU), *Global Parliamentary Report 2017. Parliament's power to hold government to account: realities and perspectives on oversight* (presented at the 137th IPU Assembly in October 2017, available at: [www.ipu.org/dem-e/gpr2.htm](http://www.ipu.org/dem-e/gpr2.htm) (last accessed 6 January 2019). p. 13.
- 14 Due to the lack of a universal definition of parliamentary oversight (N. Grandguillaume, *Théorie générale du contrôle*, Economica, Paris, 1994), the latter is sometimes deemed to include also parliament's participation in law-making, including the amending of bills. Examples of this blurred approach are offered by P. Furlong, 'Institutional Fragmentation in Parliamentary Control: The Italian Case', *The Journal of Legislative Studies*, Vol. 10, No. 2-3, 2004, pp. 174 et seq. and D. Arter, 'From "Parliamentary Control" to "Accountable Government"? The Role of Public Committee Hearings in the Swedish Riksdag', *Parliamentary Affairs*, Vol. 61, No. 1, 2008, pp. 122 et seq. Moreover, the interference between the legislative and the oversight function is at the basis of some studies on pre-legislative scrutiny of bills; see J Smookler, 'Making a Difference? The Effectiveness of Pre-Legislative Scrutiny', *Parliamentary Affairs*, Vol. 59, No. 3, 2006, pp. 522 et seq.
- 15 Grandguillaume, 1994.
- 16 On parliamentary "control" as a means for granting transparency and access to information, see F Meinel, 'Confidence and Control in Parliamentary Government: Parliamentary Questioning, Executive Knowledge, and the Transformation of Democratic Accountability', *The American Journal of Comparative Law*, Vol. 66, No. 2, 2018, pp. 318 et seq.

horizontal dimension serving parliament's attempt to exercise an influence over the executive.<sup>17</sup>

Confronting post-legislative scrutiny with these two conceptions of parliamentary oversight allows to assess whether it may either trigger legally binding sanctions to address governmental responsibility or act as a non-binding power that nonetheless may result in strong political commitments. Whereas literature on post-legislative scrutiny usually focuses on the tools and working methods that can be used by parliament to seek information, explanation and policy positions from government,<sup>18</sup> this article aims at going beyond that, including the impact of the scrutiny outcomes on the legislative-executive relationship.

The latter perspective is adopted in the article to assess how parliaments in Europe interpret this function, thus focusing on parliamentary governments only. A comparative overview is proposed, based on five cases (Italy, France, Germany, Sweden, and the European Parliament), selected in view of representing different explicative variables (§ II) and showing three different approaches to post-legislative scrutiny (§ III, IV, V), which highlight the inherently relational nature of this function (§ VI).

## B Post-Legislative Scrutiny in Comparative Perspective: The Explanatory Variables

Parliaments are not isolated actors in performing post-legislative scrutiny. This function may actually include both legal evaluation of the formal implementation of laws and impact assessment (IA) of their policy outcomes.<sup>19</sup>

The former must be confronted with the 'creeping loss of parliamentary power' in the exercise of the law-making function vis-à-vis governing bodies.<sup>20</sup> The latter relies on the common perception that better regulation is subject to

17 The notion of parliamentary "influence" (or "policy impact") acknowledges a long-standing theoretical background (B. Crick, *The Reform of Parliament*, London, Weidenfeld and Nicolson, 1964). It describes "what power parliament exercises in practice within or despite its formal constraints," M. Russell & M. Benton, 'Assessing the policy impact of parliament: methodological challenges and possible future approaches' (Paper for PSA Legislative Studies Specialist Group Conference, 2009, available at: [www.ucl.ac.uk/constitution-unit/research/parliament/policy-impact/policy\\_impact\\_parliament.pdf](http://www.ucl.ac.uk/constitution-unit/research/parliament/policy-impact/policy_impact_parliament.pdf) (last accessed 6 January 2019)). Different classifications and approaches have been advanced; see also *infra* at p. 27.

18 OECD, *Evaluating Laws and Regulations: The Case of the Chilean Chamber of Deputies*, OECD Publishing, 2012, p. 35.

19 *Supra* at 2.

20 Karpen, 2003, p. 145. On the phenomenon of the so-called rubber-stamp legislation, see J. Blondel, *Comparative Legislatures*, Englewood Cliffs, Prentice-Hall, 1973, pp. 11 *et seq.* Against this argument, T. Drinóczi, 'Legislative Process', in U. Karpen & H. Xanthaki (Eds.), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners*, Oxford, Hart, 2017, p. 39.

Elena Griglio

‘executive dominance’ and that empirical constraints stand against parliaments’ engagement in impact assessment.<sup>21</sup>

These reasons make parliament’s interaction with the government a strategic factor for understanding post-legislative scrutiny.

On the one hand, governments are co-actors of this function. Parliaments rely on them for information and data on legislative implementation.<sup>22</sup> Government or independent authorities are the preferred institutions for performing regulatory impact assessment.<sup>23</sup> This is particularly true in multilayer systems as the EU, where post-legislative scrutiny strongly relies on inter-institutional dynamics.<sup>24</sup>

On the other hand, governments are the addressees of parliamentary engagement in post-legislative scrutiny. The function strongly relies on standard scrutiny/oversight parliamentary mechanisms aiming at making the executive accountable.

Due to the structural interaction with the government, post-legislative scrutiny as an instance of parliamentary oversight is expected to be influenced by a number of structural and marginal factors that are assumed in the article as explanatory variables.

Structural factors are the exogenous conditions – constitutional and political – which contribute to shape the ‘oversight-accountability’ relationship.

One main factor is the form of government. Due to the constitutive differences that shape the oversight function in presidential and parliamentary forms of

21 A number of arguments, relating to political, resource, organization and time constraints, have been raised to demonstrate that parliaments may be unfit for exhaustive impact assessment. See A. Renda, *Impact Assessment in the EU. The State of the Art and the Art of the State*, Brussels, Centre for European Policy Studies, 2006, pp. 43 *et seq.* Even more radically, it is assumed that the control of standards cannot harness the “political” nature of parliaments’ engagement in law-making. U. Karpen, ‘On the State of Legislation Studies in Europe’, *European Journal of Law Reform*, Vol. 7, No. 1/2, 2005, pp. 68 *et seq.* Some counter-arguments are offered in E. Griglio, ‘Better Law-Making and the Integration of Impact Assessment in the Decision-Making Process: The Role of National Parliaments’, in A. De Feo & B. Laffan (Eds.), *Scrutiny of EU Policies*, Fiesole, European University Institute, 2017, pp. 63 *et seq.*

22 See *supra* at 4.

23 U. Karpen, ‘Parliamentarism, Legislation and Legisprudence in the Constitutional State’, *Humboldt Forum Recht Essays*, No. 4, 2015, p. 7.

24 Since 1994, the Council, the European Commission and the European Parliament have formally committed to better regulation standards through inter-institutional agreements or declarations. See the Interinstitutional Agreement on Better Law-Making adopted on 13 April 2016 (OJL 123, 12.5.2016, 1-14), which replaces a former agreement dating back to 16 December 2003 (OJC 321, 31.12.2003, 12-18). C.M. Meuwese, *Impact Assessment in EU Lawmaking*, The Netherlands, Kluwer Law International, 2008, pp. 51 *et seq.*

government,<sup>25</sup> the arrangement of the confidence principle is expected to exercise a major influence on post-legislative scrutiny.

Two other pivotal factors are the legislative capacity of parliament in law-making,<sup>26</sup> including legislative influence and policy impact,<sup>27</sup> and the standard oversight tools available.<sup>28</sup>

Pre-legal factors should be also taken into consideration. These include the party-system and the executive-parties dimension<sup>29</sup> (that represent how party groupings within parliament may influence the arrangement and work-out of post-legislative scrutiny),<sup>30</sup> the information capacity (including parliament's independence in the access to information and media relations), political motivation and technical expertise.

Last, it matters the unicameral or bicameral composition of parliament and, in the latter case, the characters and constitutional position of the two Houses.

Marginal factors consist of endogenous features or strategic choices met or set by parliament when facing post-legislative scrutiny.

Parliament's engagement in this function may be formally structured in its internal arrangement, when a formal legal basis, ad hoc parliamentary procedures and/or specialized political bodies exist. Or it could stem from informal practices, that is, the establishment of ad hoc administrative units or the access to privileged sources of information.

Post-legislative scrutiny may be interpreted as a purely legal dimension limited to verifying the enactment of the law (*narrow dimension*). Alternatively or additionally, it may be seen as a form of ex-post impact assessment whose pur-

- 25 K. Strøm, 'Delegation and Accountability in Parliamentary Democracies', *European Journal of Political Research*, Vol. 37, No. 3, 2000, pp. 271 *et seq.*; D. Olson, 'Legislatures and Administration', in R. Stapenhurst, *et al.* (Eds.), *Legislative Oversight and Budgeting: A World Perspective*, Washington, World Bank, 2008; P. Lavaux, 'Le contrôle, source du régime parlementaire, priorité du régime présidentiel', *Pouvoirs*, Vol. 134, No. 3, 2010, pp. 23 *et seq.* J. García Roca, 'Control parlamentario y convergencia entre presidencialismo y parlamentarismo', *UNED. Teoría y Realidad Constitucional*, Vol. 38, 2016, pp. 61 *et seq.*
- 26 S.M. Saiegh, 'Lawmaking', in S. Martin, T. Saalfeld & K. Strøm, *The Oxford Handbook of Legislative Studies*, Oxford, Oxford University Press, 2014, pp. 482 *et seq.*
- 27 See K. Meyer, 'Legislative Influence: Toward Theory Development through Casual Analysis', *Legislative Studies Quarterly*, Vol. 5, No. 4, 1981, pp. 563 *et seq.*; U. Sieberer, 'The Institutional Power of Western European Parliaments: A Multidimensional Analysis', *West European Politics*, Vol. 34, No. 4, 2011, pp. 731 *et seq.* A. Kreppel, 'Moving Beyond Procedure. An Empirical Analysis of European Parliament Legislative Influence', *Comparative Political Studies*, Vol. 35, No. 7, 2002, pp. 784 *et seq.*
- 28 R. Pelizzo & R. Stapenhurst, 'Tools for Legislative Oversight', *World Bank Research Paper*, 2004, available at: <http://dx.doi.org/10.1596/1813-9450-3388> (last accessed 6 January 2019); H. Yamamoto (Ed.), *Tools for Parliamentary Oversight: A Comparative Study of 88 National Parliaments*, Geneva, Inter-Parliamentary Union, 2007; R. Pelizzo & R. Stapenhurst, *Government Accountability and Legislative Oversight*, New York, Routledge, 2014; IPU, 2017, p. 11.
- 29 A. Lijphart, *Patterns of Democracy*, New Haven, Yale University Press, 1999.
- 30 As argued by A. King, 'Modes of Executive-Legislative Relations: Great Britain, France, and West Germany', *Legislative Studies Quarterly*, Vol. 1, No. 1, 1976, pp. 13 *et seq.*, if we wish to examine parliament's influences on the government, the unit of analysis should not be the parliament as a whole, but rather party groupings.

Elena Griglio

pose is to evaluate the effectiveness and efficiency of public policies (*broad dimension*).<sup>31</sup>

Finally, post-legislative scrutiny can have implications on the relationship of the assembly with the government, depending on the scrutiny of procedural outcomes.

Different combinations of the aforementioned structural and marginal factors are described by benchmark parliaments. These variables are assessed according to qualitative criteria, based on empirical data collected from parliamentary formal procedures and practices.

### C Classifying Parliamentary Approaches to Post-Legislative Scrutiny

Comparing rules and practices in selected parliaments, three main approaches to post-legislative scrutiny emerge. They are listed according to an incremental logic depending on how much independence and capacity of judgement is the parliament able to express in the fulfilment of this function. The third approach – ‘formal scrutinizers’ – is the most inclusive, as it is deemed to cover also the purposes and activities of the first two approaches. The second approach – ‘informal scrutinizers’ – comprise also the goals and tasks of the first approach.

#### I Passive Scrutinizers

In the ‘basic’ approach to post-legislative scrutiny, parliaments limit their role to the assessment of the scrutiny conducted by governmental bodies or external agencies. Under this ‘passive’ attitude, parliaments do not directly engage in monitoring legislative implementation and impact assessment, relying on ‘external’ reports and evaluations.

Since most OECD countries lack a strong parliamentary tradition in respect of impact assessment,<sup>32</sup> this approach may sound particularly attractive when post-legislative scrutiny covers the broad dimension.

The German *Bundestag* is deemed to fall under the category of passive scrutinizers.

Under the narrow dimension, due to the federal structure of Germany, the territorial House (*Bundesrat*) has formal constitutional rights both in authorizing regulations issued by the Federal Government<sup>33</sup> and in overseeing federal laws

31 These two approaches rely on different areas of legislation studies (see Karpen, 2005, pp. 62 *et seq.*): the narrow dimension relates to legal analytics, legal methodology and legal technique; the broader dimension is supported by the research of effectiveness. See S. Naundorf & C. Radaelli, ‘Regulatory Evaluation *Ex Ante* and *Ex Post*: Best Practice, Guidance and Methods’, in U. Karpen & H. Xanthaki (Eds.), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners*, Oxford, Hart, 2017, pp. 187 *et seq.*

32 OECD, *Better Regulation in Europe: Germany 2010*, OECD, 2010.

33 Art. 80(2) of the Basic Law. The *Bundestag* is completely excluded from this process. See N. Johnson, *State & Government in the Federal Republic of Germany: Executive at Work*, 2nd ed., Oxford, Pergamon Press, 2016, pp. 101 *et seq.*

being executed by the *Länder*.<sup>34</sup> By contrast, the *Bundestag* conducts ex-post review of law enactment mostly resorting to the standard scrutiny/oversight mechanisms. These comprise both formal (reporting duties, questioning, hearings) and informal channels (unofficial exchanges and contacts between MPs and members of government or agencies),<sup>35</sup> although the practical effects of this activity are remarkably limited by the parliamentary structure of government.<sup>36</sup>

As for the broad dimension of post-legislative scrutiny, the impact assessment in Germany is primarily a responsibility and a duty of the government.<sup>37</sup> Two independent bodies support the executive in this activity: the Federal Statistical Office and the National Regulatory Reform Council (NKR), established by a Federal Law in 2006<sup>38</sup> and modelled on the Netherlands' *Advies College Vermindering Administratieve Lasten* (ACTAL).

There is no obligation for the *Bundestag* to carry out its own impact assessment, not even on legislative initiatives started by MPs.<sup>39</sup> Therefore, the institution mostly resorts to indirect scrutiny of the ex-post assessment carried out either by the government or by the two independent bodies.<sup>40</sup>

In the former case, impact assessment arguments are preferably dealt with in parliamentary committees, usually through informal hearings of the responsible minister.<sup>41</sup> Questions and interpellations in the plenary can occasionally serve

34 The power to execute Federal Laws belongs to the *Länder* in their own right (Art. 83 of the Basic Law) or on delegation by Federation. In both cases, the *Bundesrat* is formally associated in the federal oversight of law execution and has the power to acknowledge violation of law by the *Land* (Art. 84 and 85 of the Basic Law).

35 S. Rose-Ackerman, S. Egidy & J. Fowkes, *Due Process of Lawmaking. The United States, South Africa, Germany and the European Union*, New York, Cambridge University Press, 2015, pp. 201 *et seq.*

36 *Ibid.*, p. 207.

37 See U. Karpen, 'Regulatory Impact Assessment: Current Situation and Prospects in the German Parliament', *Amicus Curiae*, Vol. 101, 2015, p. 17. Since the government tends to be considered as an emanation of the majority in the parliament, "in the spirit of neutrality, systematic scrutiny of assessments carried out by the executive branch is not considered appropriate" (OECD, 2010, pp. 100 *et seq.*).

38 Law of 14 August 2006 (Fed. Gaz. I 1866 – hereinafter NKR), amended by the Law of 16 March 2011 (Fed. Gaz. I 420). See H. Gröhe & S. Naundorf, 'Bürokratieabbau und bessere Rechtsetzung, Eckpunkte, Erfahrungen und Perspektiven', *Zeitschrift für Gesetzgebung*, Vol. 24, No. 5, 2009, p. 367. On the relationship between the NKR and the Federal Statistical Office, see Section 8 NKR.

39 See OECD, 2010, p. 101.

40 Ex-post IA is conducted in Germany in three cases: when it is so provided by the explanatory memorandum for the bill (Art. 44.7 of the Joint Rules of procedure of the Federal Ministries, hereinafter GGO); when legislative proposals overcome certain thresholds of annual compliance costs (Decision of State Secretaries 'Strategy for evaluation of new legislative proposals', in The Federal Government, *Better Regulation 2012: Reducing Regulatory Burden, Cutting Red Tape, Securing Dynamic Growth*, Berlin, Federal Chancellery, 2013, p. 62); when evaluation is provided by review or sunset clauses. See M. Rani Sharma, *et al.*, *Expert report on the implementation of ex-post evaluations. Good practice and experience in other countries*, Berlin, NKR, 2013. Available at: [www.normenkontrollrat.bund.de](http://www.normenkontrollrat.bund.de) (last accessed 6 January 2019).

41 See the case of the 2012 series of 38 questions tabled by the Green Party on the issue of the bureaucratic costs of offices for granting assistance to university students, reported in Karpen, 2015, p. 17.



Elena Griglio

these objectives.<sup>42</sup> In the latter case, the *Bundestag* can resort to the NKR in its advisory capacity, enforcing formal reporting duties provided by sunset or review clauses or implementing the standard rule on public hearings.<sup>43</sup>

The outsourcing of post-legislative scrutiny has apparently prevented the *Bundestag* from structuring an autonomous IA capacity. In fact, three parliamentary bodies have been able to gain expertise in the field: the Scientific Service,<sup>44</sup> the Office of Technology Assessment (OTA)<sup>45</sup> and the Parliamentary Advisory Council on Sustainable Development. None of them is specifically devoted to post-legislative scrutiny, but they all offer contributions instrumental to reinforced parliamentary scrutiny.

The activity of the Parliamentary Advisory Council on Sustainable Development should be carefully considered, because its opinions and impact assessment of Federal Government's sustainable policies are discussed and appraised in writing by the lead committee. This procedural outcome witnesses a significant trend towards in-house providing of IA by the *Bundestag*. The 'German' case, although solidly anchored on the 'passive' approach, is thus bridged towards patterns that are typical to informal and formal scrutinizers.

## II Informal Scrutinizers

Parliaments may decide to engage in a proactive approach that goes beyond the outsourcing of post-legislative scrutiny to the government or to external agencies.

The first step requires establishing ad hoc administrative parliamentary structures, such as research and evaluation units providing ex-post analysis of legislative implementation and impact assessment.<sup>46</sup> Whereas these tasks may be ordinarily fulfilled by 'traditional' administrative structures – such as research

42 The *Bundestag* addressed the annual progress report on bureaucracy reduction and better regulation drafted by the Federal Government. See Section 7 NKR and the latest Report on *Better Regulation 2016: more time for the essentials*, Berlin, Federal Chancellery, 2017.

43 See the Rules of Procedure (hereinafter RoP) of the *Bundestag* (as at May 2014), Art. 70.

44 The Service is the *Bundestag's* research administrative unit that supports individual MPs, committees and parliamentary groups, providing the basic knowledge and information to scrutinize government ex-post evaluations.

45 The OTA is an independent scientific institution serving the *Bundestag* in an advisory capacity on research and technology. See Karpen, 2015, pp. 17 *et seq.* For comparative purposes, M. Norton, 'Origins and Functions of the UK Parliamentary Office of Science and Technology', in J. Norman & H. Paschen (Eds.), *Parliaments and Technology: The Development of Technology Assessment in Europe*, New York, State University of New York Press, 2000, pp. 65 *et seq.*

46 For an overview of evaluation bodies supporting national parliaments, see E.M. Poptcheva, 'Policy and legislative evaluation in the EU', *Library of the European Parliament Briefing*, 3 April 2013, available at: [www.europarl.europa.eu/eplibrary/Policy-and-legislative-evaluation-in-the-EU.pdf](http://www.europarl.europa.eu/eplibrary/Policy-and-legislative-evaluation-in-the-EU.pdf) (last accessed 6 January 2019).

and documentation units,<sup>47</sup> the creation of ad hoc units not only confirms a strong commitment towards ex-post scrutiny<sup>48</sup> but also enables to channel technical expertise beyond the traditional legal-economic background of parliamentary officials.

Parliaments falling within this category are considered 'informal' scrutinizers insofar the connection with formal parliamentary procedures is a-systematic. There is no provision of ad hoc formal proceedings and tools addressing the government meant to follow up on the ex-post internal (administrative) analytical capacity.<sup>49</sup> Parliamentary bodies can nonetheless resort to these analytical resources in their standard scrutiny/oversight of the executive. Moreover, independently of their procedural outcome, large publicity is usually provided to the analytical results achieved.

The case of Italy is regarded to fall within this category. It offers a significant example of post-legislative scrutiny strongly rooted in the role of parliamentary administrations.<sup>50</sup> Both Houses have established ad hoc units in support of post-legislative scrutiny, however following rather different purposes, scopes and research/evaluation methodologies that result in asymmetric bicameralism.<sup>51</sup>

In the Lower House, the Chamber of Deputies, the Service for Parliamentary Oversight is in charge of evaluating law enactment as well as monitoring government reports. The body is expected to engage in a legal and narrow dimension of post-legislative scrutiny, "based on data provided by the government and by other competent institutions."<sup>52</sup> It is tasked to monitor the formal respect of government's implementing duties agreed in the parliamentary proceeding and set in statutory law. The outcomes of this 'administrative' scrutiny, originally included in the yearly report on legislation, are now published in the report on parliamen-

47 IPU and IFLA, *Guidelines for Parliamentary Research Services*, 2015, p. 20, available at: <https://www.ipu.org/resources/publications/reference/2016-07/guidelines-parliamentary-research-services.pdf> (last accessed 6 January 2019). R. Miller Robert, R. Pelizzo & R. Stapenhurst Rick, *Parliamentary Libraries, Institutes and Offices: The Sources of Parliamentary Information*, Washington, D.C., World Bank, 2004, pp. 2 *et seq.* On this issue, F. Fitsilis & A. Koutsogiannis, 'Strengthening the Capacity of Parliaments through Development of Parliamentary Research Services' (13th Workshop of Parliamentary Scholars and Parliamentarians, Wroxton, 2017).

48 S. Gailmard & J.W. Patty, 'Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise', *American Journal of Political Science*, Vol. 51, No. 4, 2007, pp. 873-889. C. Neuhold & S. Vahoonacker, 'Introduction' in C. Neuhold, *et al.* (Eds.), *Civil Servants and Politics*, Basingstoke, Palgrave, 2013, pp. 3-11.

49 On the functions of parliamentary bureaucracies instrumental to parliamentary decisions, see A.L. Högenauer, C. Neuhold & T. Christiansen, *Parliamentary Administrations in the European Union*, Basingstoke, Palgrave, 2016, p. 21.

50 On the role of Italian parliamentary administrations and legislative advisors in pre-legislative scrutiny, see G. Piccirilli & P. Zuddas, 'Assisting Italian MPs in Pre-Legislative Scrutiny: The Role Played by Chambers' Counsellors and Legislative Advisors in Enhancing the Knowledge and Skills Development of Italian MPs: The Assistance Offered to an Autonomous Collection of Information', *Parliamentary Affairs*, Vol. 65, No. 3, 2012, pp. 1 *et seq.*

51 G. Regonini, 'Parlamenti analitici', *Rivista Italiana di Politiche Pubbliche*, No. 1, 2012, pp. 45 *et seq.*

52 Art. 25 of the Rules on Services and Personnel of the Chamber of deputies, last amended in 2002.

Elena Griglio

tary oversight that the Chamber of Deputies released for the first time in 2017.<sup>53</sup> These reports provide background information, but they do not automatically trigger any procedural follow-up.

By contrast, in the Upper House, the Senate of the Republic, the ‘administrative’ approach to post-legislative scrutiny combines the narrow and the broad dimensions. On the one hand, the Service for the Quality of Regulations scrutini- zes the respect by the Government of its IA reporting duties and monitors the adoption of implementing acts, as provided in statutory law.<sup>54</sup>

On the other hand, significant efforts have been made in the past few years to structure an autonomous IA capacity covering a broader scrutiny. These led in 2016 to the establishment of a dedicated unit – the ‘Office for Impact Assessment’<sup>55</sup> – tasked with promoting studies, researches, training programmes for ex- ante and ex-post evaluation of public policies.<sup>56</sup> The office has an hybrid composition.<sup>57</sup> It is primarily tasked with research and documentation. Reports and docu- ments are published on a ‘dedicated’ website, but no procedural outcome is auto- matically provided. The reform of the Senate Rules of Procedure (RoP) approved in December 2017 has deliberately decided<sup>58</sup> to leave it to MPs to elaborate on specific evaluation outcomes resorting to the standard scrutiny and oversight tools.

For both Houses, it is extremely difficult to evaluate whether and to which extent this research and documentation activity strengthens the capacity of par- liament to scrutinize the government. However, the impact seems to be mostly ‘informal’.

Moreover, both parliamentary bureaucracies engage in ongoing monitoring of ex-post reporting duties of the government. Also at this stage, the procedural and political follow-up is very poor.<sup>59</sup>

This situation seems to contradict the principle that robust informative capacity is a prerequisite for effective parliamentary scrutiny. In fact, the ‘de-pro- cedimentalization’ of post-legislative scrutiny in the Italian case must be framed in the overall trends and limits of the Italian parliamentarism. It can be traced to

53 Camera dei deputati, *Rapporto sull'attività di controllo parlamentare 2016*, Roma, Camera dei depu- tati, 2017.

54 See Annex B of the internal rules concerning the personnel of the Senate, last adjourned on 17 January 2012 (*Testo unico delle norme regolamentari dell'amministrazione concernenti il personale del Senato della Repubblica*).

55 Deliberation of the Bureau no. 90/2016 of 28 June 2016; Decree of the President of the Senate no. 12480 of 19 July 2016.

56 G. Coppola & F.S. Toniato, ‘La valutazione delle politiche pubbliche’, in F. Bassanini & A. Man- zella, *Due Camere, un Parlamento: per far funzionare il bicameralismo*, Bagno a Ripoli, Passigli, 2017, pp. 160 *et seq.*

57 In the Managing Board, headed by the President of the Senate, sit both MPs selected from the Bureau and apical administrative officials; other members may be associated, either selected from senators or experts.

58 See the amendment to the RoP, approved on 17 December 2017 (published in *Gazzetta Ufficiale*, 19 January 2018, No. 15).

59 F. Rosa, ‘Le relazioni governative al Parlamento sullo stato di attuazione delle leggi’, in M. Carli (Ed.), *Il ruolo delle Assemblee elettive. Vol. I. La nuova forma di governo delle regioni*, Torino, Giappi- chelli, 2001, pp. 442 *et seq.*

the failure to structure a rationalized relationship between the government and its parliamentary majority,<sup>60</sup> reinvesting in the oversight function the energies traditionally vested in amending government bills.<sup>61</sup>

### III Formal Scrutinizers

In the most 'advanced' approach, parliaments address post-legislative scrutiny in a formal and highly institutionalized manner. The function is legally grounded, vested on parliamentary (political) bodies, supported by ad hoc procedures and inclusive of both the legal and the impact assessment.

The cases of Sweden and France are considered to fall within this category. They share a number of features.

In both countries, the parliament enjoys formal competence, which is established in constitutional clauses resulting from recent amendments, dating back to 2011 for Sweden<sup>62</sup> and 2008 for France.<sup>63</sup> Constitutional provisions are implemented through statutory legislation and parliamentary RoPs.<sup>64</sup> Both the formal and the substantial verification of law implementation and its outcomes are part of the scrutiny.<sup>65</sup>

The role of committees is strategic. Legislative committees are in charge of adopting statutory decisions and assessing their enactment. Follow-up and evaluation have thus become a natural task for standing committees that can rely on multiple sources of information and documentation. Beyond the access to governmental documents and reports, through their secretariats and administrative units parliamentary committees have developed autonomous evaluation and research capacities. These are complemented by the interaction with other

60 G. Rivosecchi, 'I poteri ispettivi e il controllo parlamentare a dieci anni dalla riforma del regolamento della Camera dei deputati', in *Il Filangieri. Quaderno 2007, Il Parlamento del bicameralismo. Un decennio di riforme dei regolamenti delle Camere*, Napoli, Jovene, 2008, pp. 201 *et seq.*

61 S. Fedeli & F. Forte, 'Measures of the Amending Power of Government and Parliament: The Case of Italy 1988-2002', *Economics of Governance*, Vol. 8, No. 4, 2007, pp. 309 *et seq.*

62 See Chapter 4, Art. 8 of the Instrument of Government that entered into force on the 1 January 2011.

63 Post-legislative surveillance is deeply rooted in the French parliamentary tradition. However, only the 2008 constitutional reform (Art. 24) recognized parliamentary evaluation of public policies as a constitutional obligation. P. Türk, *Le contrôle parlementaire en France*, LGDJ, Paris, 2011, pp. 176 *et seq.* J.F. Calmette, 'L'évaluation des politiques publiques: un moyen de control de l'action du gouvernement', in X. Magnon, *et al.*, *Pouvoir exécutif et Parlement: de nouveaux équilibres?*, Aix-en-Provence, PUAM, 2012, pp. 91 *et seq.*

64 In the case of Sweden, post-legislative scrutiny is further regulated by the *Riksdag Act* and the guidelines adopted by the *Riksdag* in 2001 and 2006, included in the report drafted by the Working Group on follow-up and evaluation (see *Riksdag, Forskning och framtid, uppföljning och utvärdering. Arbetsgruppen för genomförande av Riksdagskommitténs förslag*, Stockholm, Riksdagstryckeriet, 2006). For France, see the *Loi no. 96-517*, 14 June 1996, that strengthened the information and inquiry prerogatives of parliamentary committees, the *Loi organique no. 2001-692*, 1 August 2001, on the *lois de finances* (so-called *LOLF*), and the two Houses' RoP.

65 See Sénat, *Rapport d'information fait au nom de la délégation du Sénat pour la planification sur l'évaluation des politiques publiques en France*, Annexe au procès verbale de la Séance du 30 Juin 2004, No. 391, Ch. 1.

Elena Griglio

administrative units of the parliament<sup>66</sup> and with external agencies, namely the National Audit Office (NAO) in Sweden,<sup>67</sup> and the *Cour des comptes*<sup>68</sup> in France. Committees may rely on a large variety of oversight tools. French committees are particularly well suited in this regard as, beyond standard procedures (including questions and hearings), they have access to oversight tools that specifically serve evaluation and inquiry purposes.<sup>69</sup>

Another common feature is the close interaction of the evaluation of public policies with the ex-post budgetary control. The committees at *Riksdag* resort to two types of scrutiny<sup>70</sup>: they engage in thematic in-depth evaluations,<sup>71</sup> carrying out sectorial studies on a targeted issue or policy area and participate in ongoing follow-up and evaluation during consideration of the annual budget bill.<sup>72</sup>

In France, each standing committee in both Houses is responsible for scrutinizing the implementation of legislative acts within its domain. Budgetary ex-post scrutiny is instead vested on the Finance Committees.<sup>73</sup> For this purpose, in February 1999 the Finance Committee of the National Assembly created the so-called Evaluation and Control Mission (MEC)<sup>74</sup> whose main task is to conduct inquiry into the implementation of sectorial public policies.<sup>75</sup>

Beyond similarities, post-legislative scrutiny in France and Sweden differ in two ways.

66 This is the case of the Parliamentary Office for the Evaluation of Scientific and Technologic Options, a bicameral body established in France by the *Loi no. 83-609*, 8 July 1983.

67 Chapter 13, Art. 7 and 8 of the Instrument of Government. The Swedish NAO is an independent authority under the control of the *Riksdag* (see also the Act on Audit of State Activities, 2002:1022 and the Act containing Instructions for the Swedish National Audit Office, 2002:1023).

68 Art. 47 of the French Constitution and Art. 58.2 LOLF, allowing Finance committees to assign investigative tasks to the *Cour des comptes*. Assemblée Nationale, *Les enquêtes demandées à la Cour des comptes (Art. 58-2° de la LOLF)*, 2011, available at: [www.assemblee-nationale.fr/commissions/cfin\\_enquetes\\_Cour\\_comptes.asp](http://www.assemblee-nationale.fr/commissions/cfin_enquetes_Cour_comptes.asp) (last accessed 6 January 2019).

69 Pursuant to Art. 1 and 2 of the *Loi no. 96-517*, French standing committees can be conferred the same powers and prerogatives of an inquiry committee (the so-called mission). Scrutiny missions can be also assigned to a *rapporteur special* or to the whole of the *rapporteurs speciaux*. Sénat, *Guide de bonnes pratiques du controle budgétaire*, 2007, available at: [www.senat.fr/commission/fin/controle/controle\\_guide.html](http://www.senat.fr/commission/fin/controle/controle_guide.html) (last accessed 6 January 2019). Art. 57, 59 and 60 LOLF vest further scrutiny tools, including the dispatch of questionnaires to government officials, *in loco* controls and hearings, on the 'Evaluation and Control Mission' (*infra*).

70 C. Aström, 'Evaluation et qualité de la législation: Quel rôle pour les parlements?', *Actes de colloque*, No. 1, 5 December 2013, available at: [www.senat.fr/rap/evaluation\\_qualite\\_legislation\\_quel\\_role\\_pour\\_les\\_parlements-notice/evaluation\\_qualite\\_legislation\\_quel\\_role\\_pour\\_les\\_parlements-notice\\_mono.html#toc11](http://www.senat.fr/rap/evaluation_qualite_legislation_quel_role_pour_les_parlements-notice/evaluation_qualite_legislation_quel_role_pour_les_parlements-notice_mono.html#toc11) (last accessed 6 January 2019).

71 *Riksdag*, 2006, pp. 47 *et seq.*

72 *Ibid.*, pp. 38 *et seq.*

73 Art. 57 LOLF.

74 MEC is a joint committee co-chaired by one member from majority and one from opposition.

75 P. Amssek, 'Le budget de l'État et le parlement sous la V République', *Revue du Droit Public*, No. 5-6, 1998, p. 1449; I. Bouhadana, *Les commissions des finances des assemblées parlementaires en France: origines, évolutions et enjeux*, Paris, LDGJ, 2007, pp. 273 *et seq.*; A. Baudu, *Contribution à l'étude des pouvoirs budgétaires du Parlement en France: éclairage historique et perspectives d'évolution*, Paris, Dalloz, 2010.

On the one hand, the Swedish *Riksdag* entirely vests this function on standing committees, while the French Parliament has complemented ex-post scrutiny in standing committees with ad hoc bodies specifically responsible for the evaluation of public policies. This trend has seen rises and falls in the past two decades, moving from bicameral<sup>76</sup> to unicameral arrangements. Currently, only the Lower House, the National Assembly,<sup>77</sup> has a Committee for Evaluation and Control (CEC) delivering cross-sectional evaluations.<sup>78</sup> As a matter of fact, the hard core of post-legislative scrutiny still lies in standing committees.

On the other hand, there is a significant difference in the procedural outcomes of the scrutiny. In both parliaments, post-legislative scrutiny is carried out in a continuous dialogue with the government and the outcomes of scrutiny are documented in series of reports<sup>79</sup> submitted to the government.

However, only the reports of the *Riksdag* committees are submitted to the plenary for being debated and decided upon.<sup>80</sup> Parliamentary committees are allowed to adopt a formal position on the evaluation of government performance; this is usually expressed in draft resolutions or proposals for decision addressed to the plenary.<sup>81</sup>

In France, the yearly *Bilan* on law enforcement comprising scrutiny reports from all committees is instead submitted to the Conference of the Presidents, where an informal dialogue can be started with the government.<sup>82</sup> However, this is an unofficial interaction whose focus is more on the fulfilment of formal imple-

76 A bicameral body, the “Parliamentary Office for the evaluation of public policies”, was created in 1996 by the *Loi no. 96-517* and dismissed in 2000, due to the retirement of the National Assembly. The bill *Proposition de loi visant à instituer le Conseil parlementaire d’évaluation des politiques publiques et du bien-être*, currently under discussion in the French Senate. (Available at: <https://www.senat.fr/dossier-legislatif/ppl16-611.html> (last accessed 6 January 2019)) relaunched the idea of a bicameral body.

77 A “Commission for the scrutiny of law enforcement” was created by the Senate in November 2011 and abolished 3 years later (Art. XI bis of the *Instruction Générale du Bureau*, introduced by the Bureau Decree no. 2010-273 of 15 December 2010, repealed by the Bureau Decree no. 2014-280 of 12 November 2014).

78 CEC’s cross-sectional evaluations are meant to complement MEC’s control of individual budgetary units. See P. Avril, ‘Le contrôle. Exemple du Comité d’évaluation et de contrôle des politiques publiques’, *Jus Politicum*, No. 6, 2008; L. Baghestani, ‘A propos de la loi tendant à renforcer les moyens du Parlement en matière de contrôle de l’action du Gouvernement et d’évaluation des politiques publiques’, *Les Petites affiches*, No. 78, 2011.

79 See the series ‘Reports from the Riksdag’, available at: [www.riksdagen.se/en/documents-and-laws/docs-laws/reports-from-the-riksdag/](http://www.riksdagen.se/en/documents-and-laws/docs-laws/reports-from-the-riksdag/) (last accessed 6 January 2019) and the ‘Rapports sur la mise en application de la loi’, available at: [www2.assemblee-nationale.fr/documents/liste/%28type%29/rapports-application-loi/%28legis%29/14](http://www2.assemblee-nationale.fr/documents/liste/%28type%29/rapports-application-loi/%28legis%29/14) (last accessed 6 January 2019).

80 The evaluation process lasts 1 year, from December, when the decision to accomplish an evaluation is adopted, until the following December, when, after being approved by the committee, the report is submitted to the plenary for debate and decision. Aström, 2013.

81 Chapter 7 of the *Riksdag Act*. See A. Forsberg, *Contribution to the General Debate on ‘The work of parliamentary committees’* (Meeting of the Association of Secretary Generals of Parliament – Cape Town, April 2008, available at: [www.asgp.co/node/29843](http://www.asgp.co/node/29843) (last accessed 6 January 2019)).

82 Art. 60 LOLF calls the government to give, in 2 months, a formal written reply to committee reports.

Elena Griglio

menting duties than on the evaluation of the policy impact produced by each piece of legislation.<sup>83</sup>

Procedimentalization of post-legislative scrutiny in the *Riksdag* triggers formal discussion of the outcomes of the evaluation process. By contrast, in France ex-post evaluation has led primarily to the reinforcement of fact-finding and inquiry tools, with no major procedural follow-up and only occasional unofficial interaction with the government on required implementing measures.

#### IV Hybrid Approaches

The three proposed categories – passive, informal and formal scrutinizers – are not intended to be strict. Parliaments often change their approach and combine elements belonging to different formulas.

The European Parliament is a relevant example of an hybrid model sharing elements of the second and third categories. The ‘hybridization’ of the EP’s approach is partially due to the composite nature of the law-making process,<sup>84</sup> shared between the European and the national level.<sup>85</sup> It owes also to the atypical oversight/accountability cycle<sup>86</sup> linking the legislative power, composed of two channels fulfilling the requirements of parliamentary representation,<sup>87</sup> with the EU fragmented executive(s).<sup>88</sup>

Several features make post-legislative scrutiny in the EP a rather unique experience.

- 83 See Assemblée Nationale, ‘Fiche de synthèse n. 52: Le contrôle de l’application des lois et l’évaluation de la législation et des politiques publiques’, 6 Juin 2017, available at: [www2.assemblee-nationale.fr/decouvrir-l-assemblee/role-et-pouvoirs-de-l-assemblee-nationale/les-fonctions-de-l-assemblee-nationale/les-fonctions-de-contrôle-et-l-information-des-deputés/le-contrôle-de-l-application-des-lois-et-l-évaluation-de-la-législation-et-des-politiques-publiques](http://www2.assemblee-nationale.fr/decouvrir-l-assemblee/role-et-pouvoirs-de-l-assemblee-nationale/les-fonctions-de-l-assemblee-nationale/les-fonctions-de-contrôle-et-l-information-des-deputés/le-contrôle-de-l-application-des-lois-et-l-évaluation-de-la-législation-et-des-politiques-publiques) (last accessed 6 January 2019). On the limits of this experience, P. Preuvot, ‘Réflexion sur les remèdes aux difficultés d’application des lois’, 18 June 2011, pp. 16 et seq., available at: [www.droitconstitutionnel.org/congresNancy/comN6/preuvotTD6.pdf](http://www.droitconstitutionnel.org/congresNancy/comN6/preuvotTD6.pdf) (last accessed 6 January 2019).
- 84 L. Besselink, *A Composite European Constitution*, Groningen, Europa Law Publishing, 2007.
- 85 W. Robinson, ‘EU Legislation’, in U. Karpen & H. Xanthaki (Eds.), *Legislation in Europe. A Comprehensive Guide for Scholars and Practitioners*, Oxford, Hart, 2017, p. 229.
- 86 According to B. Crum, ‘Legislative-Executive Relations in the EU’, *Journal of Common Market Studies*, Vol. 41, 2003, p. 379; this is “overstretched on a range of accounts”. On the issue, *ex multis*, O. Costa, et al., ‘La diffusion des mécanismes de contrôle dans l’Union européenne: vers une nouvelle forme de démocratie?’, *Revue française de science politique*, Vol. 51, 2001, pp. 859-867; C. Harlow, *Accountability in the European Union*, Oxford, Oxford University Press, 2002; D. Curtin & A. Wille (Eds.), *Meaning and Practice of Accountability in the EU Multi-Level Context*, Mannheim, Connex Report Series, No. 7, 2008; L. Vehrey, P. Kiiver & S. Loeffen (Eds.), *Political Accountability and European Integration*, Groningen, Europa Law Publishing, 2009; M. Bovens, D. Curtin and P. ‘t Hart (Eds.), *The Real World of EU Accountability. What Deficit?*, Oxford, Oxford University Press, 2010.
- 87 See Art. 10 TEU. P. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State*, Oxford, OUP, 2010; S. Micossi, ‘Democracy in the European Union’, *CEPS Working Document*, No. 286, 2008, available at: <http://aei.pitt.edu/7586/> (last accessed 6 January 2019).
- 88 D. Curtin, ‘Challenging Executive Dominance in European Democracy’, *The Modern Law Review*, Vol. 77, No. 1, 2014, pp. 29 et seq.

The EP's role in post-legislative scrutiny is considered a fundamental component of the better law-making agenda.<sup>89</sup> In the better law-making cycle, the post-legislative stage stands for the evaluation of existing legislation and policy. It comprises both the formal verification of whether EU legislation has been implemented and transposed at national level and the substantial assessment of outcomes produced.<sup>90</sup>

The EP acknowledges two channels of participation. On the one hand, it is expected to scrutinize the ex-post evaluations of the European Commission – so-called fitness checks – which are carried out to assess the regulatory framework of a policy area.<sup>91</sup> According to the Interinstitutional Agreement on Better Law-Making of 13 April 2016,<sup>92</sup> the evaluation of existing legislation is subject to the Commission's multiannual planning, which is communicated to the EP and to the Council.<sup>93</sup>

On the other hand, the EP has its own ex-post IA mechanisms, unrolling in three steps. First, the EP Research Service produces 'Implementation Appraisals' aiming at assessing the state of implementation of all legislative acts listed for revision in the Commission Annual Work Programme.<sup>94</sup> Lately, the EP has invested considerable resources in the development of autonomous IA administrative capacity, thus invalidating the argument that representative assemblies are inadequate to serve better law-making enforcing mechanisms.<sup>95</sup>

In support to this capacity, the online platform URBIS – Unified Repository Base on Implementation Strategies – was started in 2015.<sup>96</sup> It aims at gathering contributions from national parliaments, regional entities, national interest groups and citizens on transposition and implementation procedures, but the results so far have proved inadequate.<sup>97</sup>

89 See *supra* at 23.

90 *Ibid.*

91 See the Regulatory Fitness and Performance Programme (REFIT), COM (2012) 746 fin.

92 Para. 21 *et seq.* (spec. 23 and 24).

93 See also the 'Resolution of 4th February 2014 on EU Regulatory Fitness and Subsidiarity and Proportionality – Better Law-Making' (2014) 2013/2077/INI.

94 I. Anglmayer, 'Evaluation and Ex-post Impact Assessment at EU Level', *European Parliament Research Service Briefing Better Law Making in Action*, September 2016, p. 7, available at: [www.europarl.europa.eu/RegData/etudes/BRIE/2016/581415/EPRS\\_BRI\(2016\)581415\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581415/EPRS_BRI(2016)581415_EN.pdf) (last accessed 6 January 2019).

95 For an overview of recent IA initiatives undertaken by the EP see A. Renda, 'European Union and Better Law-Making: Best Practices and Gaps', in A. Renda, *et al.* (Eds.), *Workshop on the Best Practices in Legislative and Regulatory Processes in a Constitutional Perspective*, European Parliament, Study for the AFCO Committee, 2015, pp. 5 *et seq.*

96 The initiative was presented in December 2015 through a letter of the EP Secretary-General addressed to the Secretaries General of the National Parliaments. This was followed by a request, submitted on 11 March 2016 within the ECPRD Network, titled 'Contributions of National Parliaments to the pre-legislative phase of EU law'.

97 For a critical appraisal of the main limits of the URBIS platform, see K. Auel, 'Quality of EU Legislation. The Role of National Parliaments', in A. De Feo & B. Laffan (Eds.), *Scrutiny of EU Policies*, 2017, pp. 52 *et seq.* and COSAC, 'Twenty-Third Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny', 6 May 2015, p. 40, available at: [www.cosac.eu/documents/bi-annual-reports-of-cosac/](http://www.cosac.eu/documents/bi-annual-reports-of-cosac/) (last accessed 6 January 2019).



Elena Griglio

Second, since 2008 parliamentary committees have adopted an Implementation Report, a specific category of the own-initiative reports introduced in 2008 and rooted in the EP RoP.<sup>98</sup> This tool allows parliamentary committees to scrutinize how EU legislation, soft law instruments and international agreements have been transposed into national law, implemented and enforced, in perspective also of the review of EU legislation.

Finally, Implementation Reports may lay the ground for a motion for resolution to be submitted to the plenary.<sup>99</sup>

On the whole, the procedural outcomes are quite poor, if compared to the evaluation capacity developed by the European Parliament. The engagement of the EP in the ex-post stage is mainly supported by an inter-institutional vision of better law-making, involving all the bodies participating in the legislative cycle.<sup>100</sup> The oversight/accountability purposes are much weaker, due to the institutional architecture of the EU<sup>101</sup> that makes the position of the EP vis-à-vis the 'executive power' not comparable to the legislative-executive arrangement featuring domestic democracies.

## D Conclusions

Under the label 'Post-Legislative Scrutiny' parliaments comprise a vast range of activities. Practices are quite inconsistent, which makes it challenging to trace a common line of development in different countries.

Framed in the oversight of the executive, post-legislative scrutiny unfolds through two different types of parliamentary tools: the fact-finding tools, aiming at seeking information, explanation and policy positions from the government, and the oversight tools directed at holding the government to account for the outcomes produced in the ex-post stage.

Different mix of these parliamentary tools might lead either to 'administrative' strategies, aiming at strengthening the research and evaluation capacity of parliament, or to 'political' strategies, whose purpose is to strengthen parliament's influence on the government, resorting to standard scrutiny/oversight tools or activating ad hoc procedures and bodies.

98 See the Annex XVII, Art. 1, indent 1(e) to the EP RoP, adopted by the Decision of the Conference of Presidents of 12 December 2002.

99 Art. 52.4 EP RoP (8th parliamentary term, as of July 2018).

100 The inter-institutional approach to better law-making is not an exclusive prerequisite of the EU. See also the OECD 'Recommendation of the Council on Regulatory Policy and Governance', 22 March 2012, available at: [www.oecd.org/gov/regulatory-policy/2012-recommendation.htm](http://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm) (last accessed 6 January 2019), p. 22 and, on the national level, Renda, 2006, pp. 43 *et seq.*

101 P. Magnette, 'Appointing and Censuring the European Commission: The Adaptation of Parliamentary Institutions to the Community Context', *European Law Journal*, Vol. 7, No. 3, 2001, p. 307; V. Schmidt, 'Federalism and State Governance in the European Union and the United States: An Institutional perspective', in K. Nicolaïdis & R. Howse (Eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, New York, OUP, 2001, p. 339; M. Goldoni, 'Politicising EU Lawmaking? The Spitzenkandidaten Experiment as a Cautionary Tale', *European Law Journal*, Vol. 22, No. 3, 2016, p. 285.

Three models have subsequently been identified to describe the main attitudes of parliaments with regard to these mechanisms. *Passive scrutinizers* mostly limit their role to the assessment of the scrutiny conducted by governmental bodies or external agencies. Differently, parliaments willing to engage in a more proactive approach might choose either to act on an informal basis, establishing ad hoc research/evaluation administrative units without automatically connecting them to follow-up procedures (*informal scrutinizers*), or to address post-legislative scrutiny in a formal and highly institutionalized manner, encompassing the participation of political bodies and the establishment of dedicated procedures (*formal scrutinizers*).

In all these cases, post-legislative scrutiny has a potential for executive oversight. The first approach is the weakest: since information is outsourced and the scrutiny is mediated by external bodies, independent evaluation of the work of the government is rarely allowed.<sup>102</sup> In the second case, parliamentary ability to develop ex-post evaluation skills is higher, but this does not automatically trigger an equivalent capacity to hold the government to account. Finally, the third attitude might result in instances of 'hard' oversight, given the formal involvement of political bodies both in the conduct of preliminary fact-finding and evaluation and in the channelling of scrutiny outcomes.

These categories should not be over-evaluated as in practise the differences turn out to be more blurred than one would expect. Beyond any categorization, parliaments' attitudes towards post-legislative scrutiny must necessarily be acknowledged within a broader picture, inclusive of the overall parliament-government interaction.

Under this perspective, it is easily understood why, under a parliamentary form of government, assemblies tend to use the outcomes of post-legislative scrutiny flexibly, leaving the follow-up of scrutiny outcomes open to the dialogue with the government. This trend towards the de-procedimentalization of post-legislative scrutiny is consistent with the inherently relational nature of the confidence relationship. In all three categories, the function turns out to be a manifestation of the 'soft' oversight power that is implicit to parliaments and that, even without triggering any sanction, is directing at assessing both administrative and political responsibilities.

This is the main option followed by informal scrutinizers: the de-procedimentalization of post-legislative scrutiny in the Italian Parliament is fully explained by the weaknesses of the Italian political scenario and the failures in parliamentary institutionalization.<sup>103</sup> However, some 'soft' procedural outcomes are identifiable also among passive scrutinizers, as the political appraisal of the opinions adopted by the Parliamentary Advisory Council on Sustainable Development in Germany confirms. Moreover, the French Parliament demonstrates that even for-

102 G. Loewenberg & S.C. Patterson, *Comparing Legislatures*, Boston, Little, Brown and Company, 1979, p. 164.

103 F. Russo, F. Tronconi & L. Verzichelli, 'Snipers and Switchers. The Difficulties of Parliamentary Representation in the Italian XVII Legislature', *Polis*, No. 1, 2014, pp. 85 *et seq.*

Elena Griglio

mal scrutinizers might prefer to trigger 'soft' rather than 'binding' procedural outcomes as a follow-up to post-legislative scrutiny.<sup>104</sup>

The idea supported in this article – that post-legislative scrutiny participates in the overall trends affecting the legislative-executive interaction, shaped by the confidence relationship – is not contradicted by the other two cases examined in the benchmark.

On the one hand, the de-procedimentalization of post-legislative scrutiny in the EP is clearly not grounded on the confidence principle, as this arrangement is not fully traceable in the architecture of the EU, but it is nonetheless supported by the inter-institutional logic featuring the better law-making discourse.

On the other hand, the Swedish *Riksdag* could be considered as an exception to this picture, as post-legislative scrutiny combines the allocation of robust administrative capacity with detailed ('hard') regulation of the procedural outcomes. In fact, at a closer look, it is easily demonstrated that this arrangement is in line with the peculiar setting of parliamentary oversight in the Swedish tradition, where instances of hard oversight result in the activation of binding tools.<sup>105</sup>

These comparative suggestions seem to confirm the connection between post-legislative scrutiny and the arrangement of executive oversight in parliamentary systems.

104 Calmette, 2012, pp. 108 *et seq.*

105 S. Stromholm (Ed.), *An Introduction to Swedish Law 1*, New York, Springer, 2013, p. 67; J. Matz, 'Parliamentary Decision Making and Foreign Policy: Sweden's Participation in International Armed Missions and the Crucial Role of the Riksdag', *Parliaments, Estates and Representation*, No. 33, 2013, pp. 186 *et seq.*