The Democratic Deficit in the (Economic) Governance of the European Union

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Is a strengthening of legitimation at the national level, rather than the European Parliament, what we have to do to overcome the deficit? Or is there a continuous gap in that very legitimation? [. . .] In fact, the Union is on the path of progressive democratisation, but it is still a long way to go. (Massimo Vari)[1]

1 Democracy as a Guiding Principle of Reform for the European Union

Common European legal thinking reveals itself especially in the existence of a common European constitutional law (*Ius Publicum Europaeum Commune*[2]).[3] It denotes the ensemble of individual constitutional principles that are – written or unwritten – a common heritage of the various national constitutional states. With regard to the principle of democracy, the Jubilee, when conducting a comparative law study, found there to be a "relatively heterogeneous picture" among national constitutions, even though one can find "core elements of a 'common European democracy'". According to *Albrecht Weber*, these include periodic elections of State institutions, legally ensured responsibility of public decision making with the possibility for parliamentary minorities to gain power as well as representative party democracy.[4] Besides these elements, the equal participation of all governed in the exercise of public authority and constitutional freedoms is a mainstay of European "self-government".[5] The decision for parliamentary democracy in the European

[1] Vari 2013, p. 708, 719 (our translation).
[2] This Latin terminology, that connects *Hagemeier*'s traditional term of "Ius Publicum Europaeum" with the attribute "Commune", is traced back by von Bogdandy and Hinghofer-Szalkay 2013, p. 217, to *Ch. Starck*. In doing so, they refer to Martínez-Soria 2004.
[3] Cf. Weigand 2008; Häberle 1995.
[4] Weber 2010, Chap. 7, para 20. Well before the inclusion of the idea of a political union in the Treaties, the ECJ recognised the principle of democracy as a general legal principle; see Case 138/79, *Roquette Frères* (ECJ 29.10.1980) para 33.
[5] Calliess 2005a, p. 283.

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Union (Art. 10.1 TEU) is thus predetermined by the Member States' forms of government and therefore belongs to the fundamental laws (*Grundgesetze*), to the "essentials"[6] of the EU's constitutional compound.[7]

Common constitutional law is derived mainly from the national constitutions, from the London Treaty establishing the Council of Europe (1949) and the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) as its most prestigious outcome, and from Community law (Union law), which is often spurred by the pioneering decisions of the European Court of Justice.[8] Constitutional and European law as well as their special disciplines play a crucial role in the development of a common European constitutional law. At the interface between national constitutional law and European law the mutual "permeability" of both orders (*entgrenzter Verfassungsstaat*)[9] calls for reflection particularly with regard to the principle of democracy. It contains a cultural juridical commonality that next to human rights is well anchored in the minds of Europeans. The constitutions of all Member States are based on the structural principle of democracy. The Union itself acknowledges the core concept of democracy as a general European constitutional tradition[10] (Art. 3.1 of the Additional Protocol to the ECHR[11]) by placing corresponding structural requirements on the Member States and declaring their factual continued existence to be a precondition for participating in the European integration (Art. 2 TEU). Nonetheless, it was only with the Treaty of Lisbon that the democratic principles of the Union (Art. 10–12 TEU) have been incorporated into primary law on the basis of Union citizenship (Art. 9 TEU).

In the Union's political reality, however, the question of the necessary level of democratic legitimation of supranational policy determines the debate in political science and in constitutional and European law. The crisis of the Union has given new impetus to this debate, especially in view of the dominance of the European Council and the marginal role of the European Parliament in crisis management.

This deficiency is based in the Union's current order of competence, i. e. the lack of competence on the part of the Union for economic policy, which is merely economic policy *coordination* (Art. 5.1 and 119.1 TFEU). This coordination remains in the realm of the Member States, namely their executive branches. This entails a lack of participation by the Union's legislative branch, including both the European Parliament and national Parliaments. A reform of the Union thus needs to tackle the substantive distribution of competences between the Union and the Member States, including the stronger involvement of parliamentary bodies in the legislative procedure. Moreover, the democratic foundation needs to be enhanced. Decisions which

[6] See the contribution by *Cruz Villalón* in this volume.
[7] Cf. also Sommermann 2005, p. 208 et seq.; with a critical view Nettesheim 2005, p. 188, who opinioned the EU's constitutional system "designed by an uninspired hand". Benz 2005, p. 261 holds that a presidential rather than a parliamentary system is more suitable for the EU.
[8] Häberle 1991, p. 262, 264.
[9] Sommermann 1998, p. 404 et seqq.; Sommermann 2005, p. 192 et seqq.; on the whole see Wendel 2011.
[10] Cf. BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 271 – Lisbon.
[11] BGBl 2002 II p. 1072.

are taken to consolidate EMU require democratic legitimacy and accountability. This contribution seeks to analyse the way in which democratic legitimation can be provided for the EU's economic and monetary governance.

From a long-term perspective, the involvement of the European Parliament is vital to convey democratic legitimation and to build a genuine EMU. This needs a fundamental reform of the Treaties including a uniform electoral system for EP elections or at least a uniform electoral procedure (cf. Art. 223.1 TFEU), although *equal* voting rights for all EU citizens do not seem to be an achievable aim.[12] Only such a system – by replacing the 1976 "Direct Elections Act"[13] – would lead to legitimation by the European Parliament that exceeds its current role of merely "complementing"[14] the democratic legitimation provided by national Parliaments and governments. Such a harmonised framework would lead to a politisation of negotiations in Parliament. Moreover, it would enhance public debate in the Union at large due to a genuine confrontation of government and an opposition at the European level with respect to the political preferences of national societies.[15]

Conversely, a uniform electoral procedure can be set up only when the peoples of the Union and their national political parties regard themselves as *one* political community.[16] In view of the obvious and manifest deficiency of the sense of a common European identity, the role of national Parliaments cannot be neglected. Their

[12] See Art. 14.3 TEU, which does not include the principle of *equality* of elections. Cf. Schorkopf, in Kahl et al. (2011), Art. 23 GG para 44; Hölscheidt, in Grabitz et al. (2011), Art. 223 AEUV para 47.

[13] Cf. Act Concerning the Election of the Members of the European Parliament by Direct Universal Suffrage, Council Decision of 20 September 1976 (Federal Law Gazette 1977 II p. 733); last amended by the Council Decision of 22 June 2002 and 23 September 2002 (Federal Law Gazette 2003 II p. 810; 2004 II p. 520).

[14] Cf. BVerfG 2 BvR 2134, 2159/92 (judgment of 12 October 1993), para 97 and 100: "At the same time, with the building-up of the functions and powers of the Community, it becomes increasingly necessary to allow the democratic legitimation and influence provided by way of the national parliaments to be accompanied by a representation of the peoples of the member-States through a European Parliament as the source of a supplementary democratic support for the policies of the European Union. [. . .] In the federation of States formed by the European Union, therefore, democratic legitimation necessarily comes about through the feed-back of the actions of the European institutions into the parliaments of the member-States; and within the institutional structure of the Union there is the additional factor (increasing to the extent that the European nations grow closer together) of the provision of democratic legitimation by way of the European Parliament elected by the citizens of the States."; BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 262 – Lisbon: "As long as, and in so far as, the principle of conferral is adhered to in an association of sovereign states with clear elements of executive and governmental cooperation, the legitimation provided by national parliaments and governments complemented and sustained by the directly elected European Parliament is sufficient in principle.".

[15] This has been the appropriate conclusion of the German Federal Constitutional Court (FCC) in its decision on the Treaty of Maastricht (BVerfGE 89, 155 [184 f.]). However, in its judgment on the Treaty of Lisbon as well as in its decisions of 9 November 2011 (BVerfGE 129, 300 – 5 % threshold for EP elections) and of 26 February 2014 (BVerfGE 2 BvE 2/13 et al. – 3 % threshold for EP elections), the FCC has erected high obstacles for the EP to evolve into a "full-fledged parliament". Calliess 2005a, p. 300, who already in 2005 concluded that with regard to the grown competences of the EP, the lack of a uniform and equal electoral procedure is no longer justified.

[16] Cf. Blanke and Pilz 2014, p. 557.

influence on the decisions taken in the European institutions can be strengthened by mechanisms which provide a vertical legitimation, endowing national Parliaments with the right to "define" the positions that the national government has to take over in its votes, especially in the European Council, the Council and the Euro Group. Moreover, a horizontal coordination of national Parliaments within a conference (e. g. COSAC – Sect. 5.4) or a second chamber (a "Congress" of national Parliaments – Sect. 5.3) is partially seen as a trigger to convey democratic legitimation to EU policy in EMU.

Consequently, in order to enhance democratic legitimation of decision making also in economic governance, national Parliaments should play a more vital role within the process of conferring democratic legitimation in those areas where the Union has a mere coordinating competence, namely employment and social policy (Art. 5.2 and 5.3 TFEU) and economic policy (Art. 5.1 TFEU). Secondly, it is the European Parliament we should focus our attention on (Sect. 5.1). We therefore propose a two-tiered approach: the introduction of new elements at European level by strengthening the national Parliaments in their current position (Sect. 5.2) and a Treaty reform (Sect. 6) that leads to enhanced economic coordination with the right of the European Parliament to be heard in the economic policies of the Member States. To reform the Union in a credible way means the results can be shared by the citizens. However, one should be aware that such a deep reform is neither feasible nor recommendable before the end of the crisis.

2 The Democratic Legitimation of the European Union

The preliminary question is the standard against which the level of democratic legitimacy of the Union is evaluated. To answer this, we will look at the theoretical foundations that democratic legitimation of a supranational polity requires as well as the requirements laid down by German constitutional law and jurisprudence.

2.1 Elements of a Democratic Theory for the European Union

Asking for democratic legitimation of an international organisation no longer comes as a surprise. Once international organisations can set binding rules without the need for transposition into national law at the national level (in general, the national Parliament), those decisions need to be backed democratically. A direct effect vis-à-vis the citizens of Member States, an element of supranationality, needs a legitimatory backup at the international level, i. e. at the source of the rulemaking.[17] This requires the consent of the governed, which means those who are affected and bound by these decisions. This includes first and foremost the citizens of the

[17] Cf. Ruffert and Walter 2015, para 100; cf. also Rawls 1993, p. 214.

Member States. With regard to the character of the Union as an international organisation, this, in some respect, also comprises the Member States themselves as legal entities, as rulemaking at the supranational level affects them in a way that they can no longer exercise some sovereign rights they have transferred to the supranational level. At the starting point of this analysis a supranational entity has to be understood as a constitutional compound of states and a union of citizens (*Staaten- und Bürgerunion*).[18] A highly integrated, supranational organisation is thus best interpreted as a federal-type organisation, an "institution of federalism",[19] or even a "Federation".[20]

Legitimation of an international organisation by citizens *and* by states in effect means that the legitimation of the organisation's action has to come from the citizens of the Member States, as they themselves – in a national context – form the democratic basis of the national polity that in turn would provide – as "State" – legitimation for the organisation. The question is how the electorate can be construed so as to be used as a foundation at both the national and supranational level. Most democratic polities are based on the principle of people's sovereignty, i. e. that all state authority is derived from the people.[21] However, this does not preclude the idea that the actual bearer of sovereign power is the individual. Historically, sovereign power in the sense of *J. Bodin*'s and *Th. Hobbe*'s *suprema potestas* was regarded as a unitarian concept of uniform and indivisible sovereignty of the State (i. e. the monarch) over the governed. The transfer of sovereign power to the people is not the mere transposition of this power as indivisible *suprema potestas*. The basis is not necessarily "the people" as subject of legitimation that is characterised by relative homogeneity or collective identity, but rather as a "pooling of legitimation" (*Legitimationszusammenschluss*).[22]

To grasp this idea, one has to depart from the traditional concept of people's sovereignty that can only be exercised by a pre-existing ethno-national or ethno-cultural community which is based on the idea of a "cultural nation" (*Kulturnation*).[23] Rather, one should go back to the original concept of state-nation (*Staatsnation*) as a constitutional summary of individual subjects of legitimation,[24] i. e. the term *demos* for the sum of the citizens that form the polity.[25] As *J. Habermas* puts it:

[18] Blanke, in Blanke and Mangiameli (2013), Art. 1 para 1, 4; see also Calliess 2014, Part 3, C, para 14.

[19] See the contribution by *Luther* in this volume.

[20] Cf. Schönberger 2004, p. 98 et seqq., 117 et seqq.; Schmidt 2005, p. 772.

[21] Cf. e. g. Art. 3.1 and 3.2 French Constitution; Art. 20.2 first sentence German Constitution; Art. 1.2 Italian Constitution; Art. 6.1 Irish Constitution.

[22] Schliesky 2004, p. 745; cf. also Oeter 2010, p. 67; Peters 2001, p. 657 et seqq.

[23] Thus apparently Isensee 1997; Isensee 2009; along the same line see also Franzius and Preuß 2012, p. 43 et seqq.

[24] Cf. Schliesky 2004, p. 745; cf. also Oeter 2010, p. 71, Calliess 2014, Part 3, C, para 16.

[25] Cf. Pernice 1993, p. 477 et seq.; Maurer 2013, p. 3 et seq.; in more detail Augustin 2000, especially p. 63 et seqq., 393 et seqq.; Peters 2001, p. 657 et seqq., 700 et seqq.; v. Komorowski 2010, p. 1014 et seqq., who from the perspective of the Basic Law reconstructs the model of dual legitimation as a model of off-centred, but also territorially uniform (*staatsgebietseinheitlich*) people's sovereignty.

"A nation of citizens must not be confused with a community of fate shaped by common descent, language and history. This confusion fails to capture the voluntaristic character of a civic nation, the collective identity of which exists neither independent of nor prior to the democratic process from which it springs."[26]

In a compound of states and citizens, democratic legitimation that stems from the individual can be constructed along two strands.[27] The first strand ties to the representation of the states in the organisation. The individuals, according to national (constitutional) law, elect the national Parliament, which in turn elects the national government, thereby forming a "chain of legitimation". The representatives of the states can thus base their legitimation on the national vote. They can convey democratic legitimation on the international organisation through government representatives meeting in a special body. This strand of legitimation has its normative anchor within the legal order of the Union in Art. 10.2 (2) TEU.

The second strand is the direct connection between the individual and the supranational level. This is done by an assembly of directly elected representatives. In a Union that is based on sovereign states, this can be done by way of an assembly of national MPs that come together with a sort of "double hat". The other possibility would be a directly elected assembly at the supranational level. In this respect, the individuals from the different Member States of the organisation can be perceived as a collective that exceeds the individual collectives at the domestic level. This direct conferral of democratic legitimation finds its normative expression in Art. 10.2 (1) TEU. However, the Treaty lacks a clear concept of how these two strands tie together and complement one another in the conferral of democratic legitimation.

These two pillars that have the potential to provide democratic legitimation can be examined along two dimensions (*F. Scharpf*) regarding the participation of the governed (input) and the effectiveness of the decisions taken (output).[28] As long as decision making of an organisation applies only to mere intergovernmental issues, i. e. binds the States in their international context, the principle of "one state, one vote" in the state chamber can suffice to live up to this requirement of equality.[29] However, as soon as the organisation can set binding rules with direct effect in the domestic legal order, equality can only be ensured if the population of the component states is duly taken into account, i. e. by realising the principle of "one citizen, one vote" in the parliamentary assembly.[30] Input legitimation in this regard aims at the inclusion of all citizens in the election of the representatives on the basis of common electoral rules. Those rules should apply equally to all citizens and ensure electoral equality. This comprises equality of the votes cast, but also equality in representation so that in essence the vote of every citizen has the same weight not only in the determination of the representatives, but also in the actual decision-mak-

[26] Habermas 2001, p. 15 et seq.; cf. also Oeter 2010, p. 70.
[27] Cf. Schorkopf, in Kahl et al. (2011), Art. 23 GG para 43, Calliess 2014, Part 3, C, para 14.
[28] Scharpf 1970; Scharpf 1999; see also Zürn 1996.
[29] See also the contribution by *Tomuschat* in this volume.
[30] Cf. Ruffert and Walter 2015, para 337–338.

ing process (i. e. that one elected representative represents more or less the same number of citizens).

If the Union is submitted to a state-analogous way of democratic legitimation, this requires public debate and the formation of a public opinion, channelled by political parties and organised interest groups, in the context and within the polity in which the respective elections take place. While identity of the governed in the sense of cultural identity and homogeneity is not a necessary prerequisite for input legitimation, legitimation will be stronger if there is a certain collective identity and identification with and acceptance of decisions.[31] As the constitutional development of an organisation is usually successive and gradual as compared to a state (usually in the context of a revolution), one needs to bear in mind the effect and feedback this development may have on the formation of a sort of collective identity of the sum of citizens gathered in this polity.[32] This includes elements of participatory democracy, i. e. the participation of the citizens in the democratic life of the polity by way of exchange of views among one another and the pooling of opinions but also an exchange of views with the governing institutions. This will eventually lead to the forming of what one could call a public opinion within the polity.[33] EU law approaches this element when in primary law it refers to citizens' participation – also through political parties at Union level (Art. 10.3 and 10.4 TEU) and the dialogue of the institutions with the citizens (Art. 11 TEU).[34]

Conversely, output legitimation refers to the outcomes of the decision-making process. Decisions are regarded and accepted as legitimate if they produce an effective outcome as an answer to the aims and requirements that the constitution of the polity postulates. Authority is reviewed with a view to concrete decisions regarding the rationality of the content and the effective orientation towards common interests.[35] Output legitimacy may be of special relevance in complex and technical areas, which are characterised by elements of rationality and inherent predictability and thus justify a certain independence from political evaluation,[36] for example financial and monetary policy (ECB, ESM). In this context, however, complex decision making should be designed in a way that enables the individual to attribute accountability for decisions. This includes transparency of deliberations and votes (and thus public control) and can take the form of parliamentary control of the bu-

[31] Cf. Höreth 1999, p. 88 et seq.
[32] Cf. in this sense also Maurer 2012 and Maurer 2013, p. 4; see also Franzius and Preuß 2012, p. 23.
[33] On this element see Eder and Trenz 2007.
[34] Cf. also Franzius and Preuß 2012, p. 24 et seqq.
[35] Cf. Schliesky 2004, p. 599 et seqq.
[36] Cf. Ipsen 1972, p. 1045. With regard to the US-American regulation commissions, *G. Majone* speaks of a "fourth branch of government". He holds that also the Community Treaties have established a "fourth branch of government", namely with the instrument of harmonisation (Art. 114 TFEU), which characterises the Union as a "regulatory State". See Majone 1994, p. 77 et seqq.; Majone 1996, passim; Majone 1998, p. 5 et seqq.; Majone 1999, p. 1 et seqq.; Majone 2001, p. 57 et seqq.; cf. in this respect also Case C-62/14, *OMT* (Opinion of AG Cruz Villalón of 14 January 2015) para 109 et seqq. with regard to the European Central Bank.

reaucracy/executive,[37] but also an unbundling of decision making. One needs to bear in mind that a potential enhancement of the problem-solving capacity and effectiveness of decision making (e. g. by qualified majority) does not necessarily enhance output *legitimation* but instead can tend to decrease legitimation by outvoting a minority.[38]

Input and output legitimation are not mutually exclusive, but instead can complement one another. Moreover, they must be viewed within the context and design of the polity. A certain level of output legitimation may suffice, as long as the organisation can be perceived in the words of *H. P. Ipsen,* as a mere "special-purpose compound of functional integration" (*Zweckverband funktionaler Integration*).[39] The more extensive competences become, especially with direct effect on the citizens, the more the need may arise for legitimation on the input level.[40] Technocratic governance and regulatory decision making end where conflicts on values and distribution cannot be solved or reconciled by experts, but rather need politically legitimised decisions. This becomes evident when legitimation by consensus or unanimity is compromised for the sake of effectiveness of the decision-making procedure and replaced by votes by a qualified majority (e. g. Art. 114.1 TFEU). This dynamic interpretation of the Treaties in light of the *effet utile*, which further distinguishes them from their origin in public international law, underlines once more the need for direct democratic legitimation by the citizens of the Member States. More and more this seems to collide with the procedure for the elections to the European Parliament, which is not based on the equality of votes by Union citizens. This can be – partially – compensated for if there is a broad consensus by the governed and thus the political system of complex organisations or polities is better constructed along the lines of consociationalism rather than the strict application of the majority rule.[41]

Taking all these elements together, legitimation of a polity can be summarised in the words of *Abraham Lincoln*[42] as government of the people (minimal consensus), by the people (input) and for the people (output).[43] These different paths for legitimising policy-making can, however, be pursued only in a credible way if people are not alienated from political decisions, but they are convinced that they are truly governing themselves and that they are *autonomous*, that is when they can reason self-consciously, be self-reflective, be self-determining and thus debate and deliberate different views and courses of action in private and public life.[44]

[37] Oeter 2010, p. 73, with reference to Max Weber 1918, p. 39–43, 99–105.
[38] Glaser 2013, p. 98; cf. also Scharpf 2006.
[39] Ipsen 1972, para 8, 24 et seqq. and 54, 124; Glaser 2013, p. 96; Nettesheim 2005, p. 166 et seq., holds that the Union is steadily on its way from functional integration to statehood.
[40] Cf. Nettesheim 2005, p. 154 et seq., who restates the views of authors from the late 1990s, holding that input and control should be given less attention in favour of expectations of results conducive to the common good (output) (p. 181 et seq.); Nettesheim 2014, para 14.
[41] Oeter 2010, p. 74; cf. also von Bogdandy 2012, p. 322.
[42] See also Art. 2 of the French Constitution: gouvernement du peuple, par le peuple et pour le peuple.
[43] Cf. Höreth 1999, p. 81 et seqq.; Schmidt 2005, p. 768.
[44] Kohler-Koch and Rittberger 2007, p. 13.

2.2 Requirements of German Constitutional Law

The starting point of this legal analysis is Art. 20 of the Basic Law (GG), which provides in paragraph 1 that the Federal Republic of Germany "is a democratic and social federal state" and in paragraph 2 that "[a]ll state authority is derived from the people [and] shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies". We find here the principle of popular sovereignty, which is the core element of the principle of democracy. The subject of legitimation for the ruling polity is thus the people – here the German people. Democracy and popular sovereignty as understood by the Basic Law is democratic popular sovereignty which is exercised by democratically legitimised institutions.[45] The decisive element is that all state authority can be traced back to the will of the people. In terms of this "theory of derivation" which was mainly spelt out in the German constitutional theory in order for this uninterrupted chain of legitimation *(ununterbrochene Legitimationskette*) to be valid, it needs to ensure that the people can exert effective influence on the exercise of state authority.[46] In the context of the Union this proves to be difficult as it seems impossible to trace the decisions made by its institutions back to the "will of a European people".[47]

Concerning European integration, one needs to take further into account the preamble to the Basic Law in which the German people states its determination to promote world peace "as an equal partner in a united Europe". This "openness towards European integration" is spelled out in Art. 23 GG which also refers to the democratic principle.[48] At first glance, this may seem circular and lead to the conclusion, that any polity that exercises sovereign rights transferred to it from the national (German) level needs to observe the same standards and requirements of popular sovereignty included in Art. 20 GG that apply to German state authority. However, this is not the case. Art. 23.1 GG is the constitutional *lex specialis* for European integration and needs to be a point of reference for legal

[45] Grzeszick, in Maunz and Dürig (2010), Art. 20 II GG, para 12.

[46] Böckenförde 2004, § 24, esp. para 11–25; Grzeszick, in Maunz and Dürig (2010), Art. 20 II GG, para 61; Sommermann 2005, p. 203 et seqq., proves that the doctrine of derivation is not the prevailing model in the constitutional law of the Member States of the Union. With a critical view Nettesheim 2005, p. 178, who rejects this model as "chain-of-legitimation fetishism" and who, not without irony, refers to Luhmann 2000, p. 36, when speaking of the inept idea of the people as a sort of overarching entity in which the miracle of the fusion of the individual wills to common will can happen.

[47] Nettesheim 2005, p. 178; Nettesheim 2014, para 11.

[48] Art. 23.1 GG reads as follows: "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law [which] shall be subject to paragraphs (2) and (3) of Article 79". According to the aforementioned paragraph 3 of Art. 79 GG, amendments to the Basic Law "affecting [. . .] the principles laid down in Articles 1 and 20 shall be inadmissible". Art. 79.3 GG protects the so-called "inviolable core content of the Basic Law's constitutional identity" which is excluded from any transfer of sovereign rights.

analysis. As a constitutional reserve clause, it aims to safeguard the substantive requirements of Basic Law, i. e. the constitutional core principles, against essential amendments within Germany's participation in the building of a united Europe. In other words, this "structural safeguard clause" refers to the identity-securing clause (*Identitätssicherungsnorm*) of Art. 79.3 GG[49] which in turn refers to the *principles* laid down inter alia in Art. 20 GG and contains the outermost limits for the German *pouvoirs constitués*. Hence, from the point of view of constitutional law, the European Union can be said to be democratic, if its constitutional design observes the *fundamentals* of the principle of democracy laid down in and the sovereign statehood of Germany required by Art. 20 GG. What is required is a democratic elaboration commensurate with the status and the function of the Union.[50]

This includes, that in the end, the Federal Republic of Germany needs to retain substantial national scope of action for central areas of statutory regulation and areas of life.[51] The questionable statement which the German Federal Constitutional Court (FCC) delivered regarding the realms "which are not open to integration"[52] does not mean, as the FCC puts it, that the principle of democracy "may not be balanced against other legal interests" and that "it is inviolable".[53] Rather, the German constitution itself includes modifications of the democratic principle, e. g. for local self-government (Art. 28 GG), for functional self-government (Art. 86, 87.2 and 87.3, 130.3 GG) and – in the relevant case – for European integration (Art. 23 GG).[54] Sure, the FCC's approach is questionable with regard to the *specific* elements it lists as "not open to integration". The basic argument comes down to a question of whether certain legal matters, that usually fall within the competence

[49] Di Fabio 1993, 210.

[50] Cf. BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 228, 347, 266 et seq. – Lisbon. This view is shared by the European Commission in its letter in response to the Opinion of the House of Lords concerning the role of national Parliaments in the EU, C (2014) 4236 final of 23 June 2014. p. 3: "This general principle goes hand-in-hand with a second general principle, namely that 'in developing EMU, the level of democratic legitimacy always needs to remain commensurate with the degree of transfer of sovereignty from Member States to the European level'."

[51] BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 351 – Lisbon.

[52] BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 235, 239, 255 – Lisbon; see before BVerfG, 2 BvR 2134/92, 2 BvR 2159/92 (12 October 1993) para 101 – Maastricht. In the words of the FCC, in its judgment on the Treaty of Lisbon (para 249), these "essential areas of democratic formative action" include, among others, "citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology".

[53] BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 216 – Lisbon.

[54] Grzeszick, in Maunz and Dürig (2010), Art. 20 II GG, para 294.

of the national legislator, can be subject *in principle* to a supranational organisation with the applicability of qualified majority voting (Sect. 3.2.2).[55]

3 The Current Institutional Design of the Union for the Purpose of Democratic Legitimation

With the current level of integration, it can hardly be observed that there is either the political will or the legal (national constitutional) basis to transform the international organisation "European Union" into a federal state.[56] It is also true that the European Union does not comprise a single *demos* and can thus not rely on "an independent people's sovereignty for all Union citizens".[57] At the current stage of European integration, the democratic legitimation thus rests on "the continuing sovereignty of the people which is anchored in the Member States and from the circumstance that the states remain the masters of the Treaties".[58] The Union is partly considered as an "association of sovereign states" (*Staatenverbund*),[59] a "compound of Constitutions" (*Verfassungsverbund*),[60] partly as an "intensive alliance of states" (*intensive Staatenverbindung*)[61] or just as an entity *sui generis*.[62] All of these concepts are characterised by the assumption of "the precarious, the hovering, the intermediate" in the description of the constitutional and organisational design of the Union[63] and at the same time by the openness in its development.[64] Its constitutional categorisation and development prospects are indissolubly linked to the question of the suitable model of democratic legitimation of its sovereign power.

As long as this organisation is viewed as a mere "association of sovereign states", it may suffice to meet democratic standards that are below those required of a full-fledged nation state.[65] Accordingly, the German FCC in its decision on the Lisbon Treaty stated mainly with a view to the lacking democratic basic rule of equal

[55] Affirmatively Niedobitek 2009, p. 1271; Nettesheim 2013, p. 51 et seqq., holds that this can only be subject to a sector-specific evaluation. He criticises the FCC for being too undifferentiated when requiring plebiscitary legitimation in every case.
[56] BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 113, 277 et seq., 334 – Lisbon.
[57] BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 281 – Lisbon; cf. also see also Franzius and Preuß 2012, p. 30 et seq.
[58] BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 334 – Lisbon.
[59] Cf. the wording of the German FCC, BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) – Lisbon and BVerfG, 2 BvR 2134/92, 2 BvR 2159/92 (12 October 1993) – Maastricht.
[60] Pernice 1995, p. 261 et seqq. and Pernice 1996, Calliess 2014, Part 3, C, para 14: "Staaten- und Verfassungsbund".
[61] Cf. Schorkopf, in Kahl et al. (2011), Art. 23 GG para 42.
[62] Cf. Calliess 2010a, p. 167 et seq.; on the problems of developing a theory of European democracy in the light of the uncertainty of the Union's finality see Nettesheim 2005, p. 164 et seqq. (166) with reference from international literature.
[63] Cf. Schönberger 2004, p. 87; cf. already Ipsen 1972, Chap. 9 para 63, with reference to Schmitt 1928, p. 379; see also Blanke 1993, p. 420.
[64] Cf. Schorkopf, in Kahl et al. (2011), Art. 23 GG para 34.
[65] Scharpf 2007, p. 9; Schmidt 2005, p. 772.

opportunities of success ("one man, one vote") in the Union[66] that "democracy of the European Union cannot, and need not, be shaped in analogy to that of a state", but instead "the European Union is free to look for its own ways of reducing the democratic deficit[67] by means of additional, novel forms of transparent or participative political decision-making procedures". This holds true as long as "European competences are ordered according to the principle of conferral in cooperatively shaped decision-making procedures, and taking into account state responsibility for integration (*Integrationsverantwortung)*, and as long as an equal balance between the competences of the Union and the competences of the states is retained".[68]

In its rulings the FCC draws inspiration from the common model of legitimation of modern territorial states, i. e. of an electoral democracy (Art. 10.1 TEU).[69] This seems to be justified, since the Treaty of Lisbon codifies in primary law a state-analogous way of democratic legitimation of political power. This approach, however, is reaching limits, as becomes evident in the deviation from the territorially based democratic basic rule of equal opportunities of success. With the Treaty of Lisbon – notably with the consolidation of the principle of degressive proportionality (Art. 14.2 [1] sentence 3 TEU) – it has even become less probable that the Union will approach the ideal of an electoral democracy. As a consequence of this rule, the weight of the vote of a citizen from a small Member State may be about twelve times the weight of the vote of a citizen from a larger Member State.[70] At the same time, however, degressive proportionality is a viable compromise to reconcile the equality of states and the representation of the citizens and a concession to the current lack of responsiveness of the process of opinion making and policy forming due to the lack of a comprehensive political public.[71]

The question is whether the current design of the Union provides sufficient democratic foundation when measured against the criteria outlined above or whether it is still deficient.[72] The European Parliament and the Council are often seen as representatives of one and the same subject of legitimation[73] that occurs in two legal entities. As Union citizenship is accessory to national citizenship (Art. 9 TEU, 20 TFEU), the peoples of the Member States and the Union citizens comprise the same conglomerate of individuals. Authorship for the thesis of "transnationalisation of people's sovereignty", i. e. the "idea of people's sovereignty

[66] BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 279 – Lisbon; see also the contribution by *Tomuschat* in this volume.
[67] For the whole panorama of arguments about the democratic quality of the EU and on the question if there is a democratic deficit (G. Majone, R. Dahl, P. Graf Kielmansegg, A. Moravcsik, R.M. Lepsius, A. Follesdahl and S. Hix et al.) see Kohler-Koch and Rittberger 2007, p. 6 et seqq.
[68] BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 265 et seqq. (272) – Lisbon; see also di Fabio 2014, p. 13.
[69] Cf. Schorkopf, in Kahl et al. (2011), Art. 23 GG para 42.
[70] See BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 284 – Lisbon; von Achenbach 2014, p. 426; Arndt 2008, p. 258.
[71] Cf. Schorkopf, in Kahl et al. (2011), Art. 23 GG para 44.
[72] The claim of an "objective" democratic deficit, with regard to both public accountability and legitimacy, is rejected by Moravcsik 2008; cf. also Schmidt 2005, p. 767.
[73] Cf. von Bogdandy 2012, p. 322.

that is divided at the root" between the citizens of the European Union and the peoples of the Member States is claimed by *Habermas*.[74] This is closely connected to the approach that in the EU's "multilevel constitutionalism"[75] the same people are the point of reference for the different levels of action.[76] Union citizenship is an additional element that the peoples of the Member States have created themselves (through their governments by means of an international treaty).[77] Such a common citizenship can function as an overarching and connecting element of the otherwise unrelated national collectives without merging and melting them into one.[78]

This construction seems to be in accordance with the European Treaties (Art. 10.2 [1] TEU) concerning the *representation of citizens in the European Parliament*; with regard to the exercise of competences by other institutions and bodies of the Union, however, it may be contested (Sect. 2.2).[79] It is questionable also because in national law the texts of the constitutions do not directly refer to the individual citizen (voter) as a subject of legitimation.[80] While in Germany, public authority is exercised by the state organs, the French approach is based on *Rousseau*'s idea, articulated in Art. 3 of the Declaration of the Rights of Man and of the Citizen (1789)[81] and Art. 1 of Title III of the Constitution of 1791,[82] according to which the nation is the bearer of sovereignty.[83] The idea that only the individuals

[74] Habermas 2011, p. 62.
[75] Pernice 1998, p. 40 (43 et seqq.).
[76] Cf. Pernice 2005, p. 759 et seq.; Pernice 2002; Pernice 2009, p. 376; Peters 2001, p. 566; von Achenbach 2014, p. 416 et seq.; Uerpmann-Wittzack, in von Münch and Kunig (2012), Art. 23 para 14–16, 18; Härtel 2014, para 85; von Bogdandy 2010, p. 48. With a view on these two entities as separate and not coinciding see BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 346 et seqq. – Lisbon.
[77] Pernice 1999, p. 717, 720 et seqq.; von Achenbach 2014, p. 420; cf. also Pernice 2009, p. 374 et seqq.
[78] Cf. Franzius and Preuß 2012, p. 79; Joerges 2014, p. 37 et seq., with a sceptical view of the assumption of Habermas regarding a "convergence" of the European *demoi* and an "ever-more-Europe" option.
[79] See also BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 249, 251 et seqq. – Lisbon.
[80] Cf. Art. 3.1 and 3.2 of the French Constitution: "National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum. No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof." Art. 1.2 of the Italian Constitution: "Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution". Art. 6.1 of the Irish Constitution: "All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good".
[81] "Le principe de toute souveraineté réside essentiellement dans la nation. Nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément.".
[82] "La Souveraineté est une, indivisible, inaliénable et imprescriptible. Elle appartient à la Nation; aucune section du peuple, ni aucun individu, ne peut s'en attribuer l'exercice.".
[83] In the current Constitution of the Fifth Republic (1958) it says in the preamble: "Le peuple français proclame solennellement son attachement aux Droits de l'Homme et aux principes de la souveraineté nationale tels qu'ils ont été définis par la Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946 [...]". Art. 3 of the French Constitution: "La souveraineté nationale appartient au peuple qui l'exerce par ses représentants et par la voie du référendum. Aucune section du peuple ni aucun individu ne peut s'en attribuer l'exercice." On the

in their simultaneous status of national and Union citizens are the only subject of legitimation,[84] especially meets the concern that legitimation cannot be conferred by a political atomisation (of the citizens of each Member State towards the citizens of all the other Member States), but rather that it needs the inclusion of the citizens in an overarching – transnational – political context that is viewed by constitutional law in the *pouvoir constituant* of the people in the sense of Abbé *E. J. Sieyès*. The European Union lacks a linguistic community and thus a "pre-political, ethical communality";[85] in the consequence it (still) does not have a collective identity and it does not constitute a political community of solidarity which is oriented to a process of public opinion[86] and formed as a "voluntary nation" by means of communication on common challenges (Sect. 2.1).[87]

3.1 The Status of the European Parliament

There are a number of functions a parliament generally performs in order to generate democratic legitimacy or rather contributes to the legitimacy of the political system at large:[88] it represents the citizens, it takes part in legislation, including the national budget, and it elects the executive/government and controls it, thereby making it accountable to the citizens. Especially the role of the European Parliament – the genuine parliamentary law-making body of the Union – has increased steadily and significantly over time. Post Lisbon, the European Parliament meets a number of these criteria. It is the representation of the Union's citizens, the MEPs being elected in European elections (Art. 14.2 TEU), although, certainly, these are not (yet) genuine European elections as they follow the respective domestic electoral law. Moreover, even though seats are attributed to Member States in certain contingents, the EP does represent citizens rather than Member States. Most prominently, Art. 22.2 TFEU provides that Union citizens shall have the right to vote and to stand as a candidate in EP elections in the Member States in which they reside, regardless of their nationality. MEPs of one national contingent thus represent the Union citizens residing in one Member State, not the nationals.[89] The deficit in representation is that MEPs do not represent the citizens of "their" states according to electoral equality, but degressive proportionality (sentence 3 of Art. 14.2 [1] TEU). However, other (democratic) Member States know (significant) deviations from the

meaning of "nation" as subject of legitimation see Duguit 1921, § 48; Sommermann 1997, p. 86 et seq.

[84] von Bogdandy 2010, p. 48.

[85] Nettesheim 2005, p. 172.

[86] Heller 1963, 176.

[87] See Di Fabio 1993, 202 et seqq., who speaks of the European Parliament as a "State convention"; Nettesheim 2005, 170 et seqq. (172 et seq.), and others, see the chance for the formation of a political community in the Union, if it's action is based on universalistic principles such as freedom, equality, minority protection, neutrality or the commitment to *neminem laedere*.

[88] Cf. Hrbek 2012, p. 131 et seq.

[89] Halberstam and Möllers 2009, p. 1248 et seq.; von Achenbach 2014, p. 437.

principle of electoral equality as a necessary prerequisite of democracy, e. g. the United Kingdom or Spain.[90]

Secondly, the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions (Art. 14.1 TEU). As the co-decision procedure has become the default legislative procedure ("ordinary legislative procedure", Art. 289.1, 294 TFEU), the European Parliament is now a full-fledged co-legislator in the Union's political system in most policy areas. However, within the legislative procedure the EP still lacks a core prerogative of a parliament, i. e. the right to legislative initiative. This is justified with a view to the special function of the Commission's right to initiative (Art. 17.2 TEU) in the institutional system of the Union, as it is concerned with the protection of outvoted parliamentary minorities and the Commission's obligation to guard the Union's interests.[91]

Thirdly, the European Parliament now has a decisive say in the Union's budgetary procedure but is still, however, sharing this right with the Council (argumentum Art. 314 TFEU). However, it is true that the Union currently does not dispose of the competence to raise taxes and thus the parliamentary body of the Union – the EP – does not have the power to effectively generate revenue. In parallel to the limited sovereign rights that the Union disposes of and relies on the transfer from its members, the EP does not have "budgetary sovereignty" in that it could pass a budget without the consent of the Member States of the Union.

Fourthly, the President of the European Commission now is elected by the European Parliament by absolute majority (Art. 17.7 [1] TEU) and, following that, the Commission as a body is subject to a vote of consent by the European Parliament (Art. 17.7 [3] TEU). In addition, the Commission as a body shall be responsible to the European Parliament. Accordingly, the European Parliament may vote on a motion of censure of the Commission (Art. 17.8 TEU, Art. 234 TFEU). Moreover, the European Parliament, because of the federal nature of the Union, resembles a sort of counterweight to the Commission and the Council and acts as an institutionalised opposition in the democratisation of the Union.[92]

This summary shows that, even though the European Parliament does not have the position a national Parliament has in the domestic sphere, it contributes strongly to the Union's democratic legitimation. Quite euphorically, the European Court of Human Rights has stated that the European Parliament, "which derives democratic legitimation from the direct elections by universal suffrage, must be seen as that part of the European Community structure which best reflects concerns as to 'effective political democracy'".[93]

From an overall consideration of the relevant decisions of the FCC, its rulings seem to play down the European Parliament's growing importance. Still in "Maastricht", the Court stated that "[a]lready at the present stage of development, the

[90] On this see Classen 2009, p. 883; cf. also Scharpf 2007, p. 6; Franzius and Preuß 2012, p. 53.
[91] Cf. Härtel 2006, § 18 para 12 et seq., who is in favour of a right of initiative for the EP; v. Komorowski 2010, p. 1080.
[92] Franzius and Preuß 2012, p. 56 et seq.
[93] Appl. No. 24833/94, *Matthews v. United Kingdom* (ECtHR 18 February 1999) para 52 with regard to Art. 3.1 of the Additional Protocol No. to the ECHR.

legitimation provided by the European Parliament has a supporting effect; this effect could become stronger if the European Parliament were elected by electoral rules consistent in all Member States [...], and if the Parliament's influence on the policies and legislation of the European Community were to increase".[94] Since then, Parliaments significance has grown, but the FCC does not seem to take notice of this fact in the Lisbon judgment. With this ruling, however, the FCC at the same time diminishes the EP's role in the conferral of democratic legitimation. In the Court's view, "the European Parliament is an additional independent source of democratic legitimation".[95]

Instead of positively describing the lines of legitimation the current set of EU constitutional law provides, the Court points out time and again, that the EU's democratic legitimation suffers from a deficit "when measured against requirements of democracy in states" while before the Court even admits that the EU "complies with democratic principles as a qualitative assessment of the organisation of its responsibilities and authority reveals that its structure is precisely not analogous to that of a state".[96] This deficit in the strand of direct democratic legitimation of the Union leads to the question of whether it can be compensated by indirect democratic legitimation, or, reversely, if an enhanced democratic legitimation that the European Parliament could provide when it would contribute as a co-legislator could compensate the "minus" of democratic legitimation by the Council (i. e. the Member States and thus the national Parliaments).[97]

3.2 Democratic Legitimation through the Council and the Involvement of National Parliaments

3.2.1 The Organisational-Personal Legitimation from the National Electorate to the Council Representative

The indirectness of democratic legitimation of Union (legislative) acts through the Council requires a different evaluation of its power due to the multistage electoral feedback and thus a longer "chain of legitimacy".[98] When looking at domestic

[94] BVerfG, 2 BvR 2134/92, 2 BvR 2159/92 (12 October 1993) para 100 – Maastricht.
[95] BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 265 et seqq. (271) – Lisbon. See before BVerfG, 2 BvR 2134/92, 2 BvR 2159/92 (12 October 1993) p. 18 et seq. – Maastricht. In the Maastricht judgment the judges have regarded the European Parliament's "complementary" function in providing "the basis for democratic support for the policies of the European Union" and thus they have made the national legislative bodies the relevant organs to convey democratic legitimacy in the context of Germany's participation in the process of European integration; see later on BVerfG, 2 BvR 2236/04 (judgment of 18 July 2005) para 81 – European Arrest Warrant.
[96] BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 289, 278 – Lisbon; see Schönberger 2009, p. 1213 et seq.
[97] Brosius-Gersdorf 1999, p. 167 et seq.; Huber 2002, p. 69, para 39; Calliess 2005b, p. 314 et seq.; Calliess 2014, Part 3, C, para 15.
[98] Cf. von Achenbach 2014, p. 19 et seq., 403.

peoples, the delegation of power is first made to the national Parliament and from those national MPs to the government and thirdly to the responsible government official voting in the Council.[99] This provides organisational-personal legitimation from the national electorate to the Council representative.[100] In that respect, it is only the individual Council representative, but never the Council as a whole, who is subject to democratic legitimation by the national peoples.[101]

Moreover, the concentration of democratic representation to one person means for the democratic subject a minimisation of pluralistic capacity in legislative decision making. This implies less institutional and procedural capacity to politically articulate a number of political preferences. Thus, in legislation the representation of the democratic subject by one person lacks an essential legitimising aspect, i. e. pluralistic capacity. Its legitimising capacity falls short of that of a parliamentary assembly.[102] This situation changes fundamentally if the decision of the European Council or Council representative – as foreseen by the German Responsibility for Integration Act (notably Sects. 4 to 9) – is bound to a previous formal act of parliament. However, the German standard is almost unique in that the national acts accompanying the ratification of the Treaty of Lisbon far exceed the European requirements for the participation of national Parliaments (Art. 12 TEU).

3.2.2 The Qualified Majority Voting Rule

In this context, the qualified majority as a default voting rule in the Council (Art. 16.3 TEU) has some specific democratic implications. Parts of the literature do not regard it as undemocratic, but rather as a core element of democratic exercise of power. Accordingly, at the European level the acceptance of majority decisions would not establish "heteronomy".[103] In this regard, majority rule itself is not a limitation to democratic legitimation of decisions, but rather an inherent mode of democratic decision making.[104]

Undoubtedly, majority rule can lead to one or more Member States being outvoted. The mere possibility of being outvoted cannot be democratically deficient.[105] It can, however, infringe the principle of democracy, especially when the vote of the Council representative is based on a decision from its national Parliament.[106] This could be compensated by the requirement that the qualified majority comprises at least 55 % of the members of the Council (and at least 15) and representing Member States comprising at least 65 % of the population of the Union (Art. 16.4 TEU). This again is a sign of a balance between the "union of states" and the "union of

[99] von Achenbach 2014, p. 439 et seq.
[100] Böckenförde 2004, para 16.
[101] Rightly so Doehring 1997, p. 1133 et seq.
[102] von Achenbach, p. 405 et seq., 441.
[103] Mayer 2012, p. 69 et seq.
[104] von Achenbach 2014, p. 445.
[105] Ruffert 2004, p. 184.
[106] This is probably meant by Weber 2010, Chap. 7, para 54, and Nettesheim 2013, p. 49.

citizens" character of the EU. But here as well, one can imagine situations where the (narrow) majority supporting a Council decision does not necessarily reflect the majority of the Union's citizens.[107] Hence, the democratic legitimacy provided by national Parliaments when transposed through the Council is thus dissimilar to that at the national level. Thus far, the Council lacks democratic accountability with regard to content and subject matter.[108] However, it is recognised that such a weakness in legitimation can be compensated by the co-decision procedure and thus the equal participation of the European Parliament at Union level.[109]

3.2.3 The Role of National Parliaments in the European Union

Over the years, national Parliaments have acquired a more active role, namely in the scrutiny of EU legislation. An important step was the introduction in 2006 of the Political Dialogue with the Commission (the so-called Barroso procedure).[110] In its context, national Parliaments may submit to the Commission any comments on draft legislative acts. Most recently, the role of national Parliaments in the European Union has been reinforced by the Treaty of Lisbon (Art. 12 TEU and Protocols No. 1 and 2 TEU), confirming that national Parliaments "are an integral part of the institutional architecture of the EU".[111] This is due to the fact that they, too, are part of the democratic foundation of the Union. Especially the so-called early warning mechanism,[112] laid down in Art. 3 and 4 of Protocol No. 1 TEU in conjunction with Art. 6 of Protocol No. 2 TEU, has endowed national Parliaments with the right to submit to the Union – within a deadline of eight weeks – a reasoned opinion on EU law initiatives on whether they comply with the principle of subsidiarity or not. However, under the current early warning mechanism, a national Parliament only has the right to "reject" but not to amend a proposal. Moreover, national Parliaments or chambers may challenge an act before the European Court of Justice on grounds of infringement of the principle of subsidiarity (Art. 8 of Protocol No. 2 TEU). However, national Parliaments cannot – and should not – use the early warning mechanism to perform a *legal* review with regard to substance of draft EU legislation; this is not the task of a national Parliament, but of the (national or European) judiciary.[113]

Protocol No. 2 TEU outlines the objectives of subsidiarity and proportionality[114] in the form of a procedure that tries to make operational these principles as parame-

[107] In analogy to the criticism voiced by the German FCC with regard to the European Parliament; see BVerfG, 2 BvE 2/08 et al. (judgment of 30 June 2009) para 281, 292 – Lisbon.
[108] von Achenbach 2014, p. 443 et seq.
[109] Calliess 2014, Part 3, C, para 15.
[110] Cf. COM(2006) 211; Pierafita 2013, p. 6 et seqq.
[111] Hrbek 2012, p. 130; cf. also Baach 2008, p. 183 et seqq., 191 et seqq.
[112] See e. g. Pierafita 2013, p. 4 et seqq.; with a critical view De Wilde 2012.
[113] In this respect also De Wilde 2012, p. 12.
[114] On the relevance of these two parameters, see Blanke in Blanke and Mangiameli (2013), Protocol No. 2 TEU para 61 et seqq., 68 et seqq.; Kiiver 2006, p. 162: "and other criteria".

ters for the review of European draft legislation. It bestows national Parliaments and chambers with the right to initiate a scrutiny procedure. All in all, however, the direct role envisaged for the national Parliaments in the EU decision-making process turns out rather modest.[115] This is confirmed by the number of reasoned opinions issued under the Article 6 subsidiarity monitoring procedure by national Parliaments and chambers, notably the Swedish *Riksdag*, the Dutch *Eerste* and *Tweede Kamer* or the French *Sénat*.[116] Instruments of a *collective* role of the national Parliaments in the subsidiarity monitoring – beyond the toothless institution of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC – sub V. 4) in Art. 9 and 10 of Protocol No. 1 TEU – cannot be identified in the Treaty.[117] Though, fostering subsidiarity monitoring runs the risk of bringing about "a re-nationalization and therefore particularization of European decision making to the detriment of Council efficiency".[118]

Moreover, a strengthening of the role of national Parliaments under the early warning mechanism would run the risk of introducing more "veto players" in the decision-making process and thus "multi-institutional rivalry" and increases the complexity of the EU's institutional design and law-making procedure.[119] However, justified by the will to retain or even regain national sovereignty, the British government has argued that giving greater weight to national parliaments in the EU's system of checks and balances "is one essential element in reconnecting Europe with ordinary citizens".[120] Therefore, they propose a "red card" mechanism, that would entitle a suffiencent number of national parliaments, not only for reasons of subsidiarity, but also proportionality and other factors, to actually block EU legislation in a given field.[121] The British proposal would be a clear opposition to the current attempt to establish cooperation between the EP and national parliaments,

[115] Kiiver 2006, p. 158 et seqq. who speaks in terms of a "COSAC subsidiarity experiment" and the "phantom collective".

[116] Since the entry into force of the Treaty of Lisbon, 318 reasoned opinions have been issued by national Parliaments/chambers under the Article 6 procedure. The Swedish parliament has issued a total of 51, the Dutch House of Representative 20, the Dutch Senate 17 and the French Senate 21. Germany accounts for 13 reasoned opinions, of which 10 originate from the *Bundesrat* and only 3 from the *Bundestag*. However, it is difficult to establish whether these reasoned opinions find there to be an infringement of the *principle of subsidiarity*, as foreseen by Art. 6 of Protocol No. 2 TEU, or if they claim there to be other shortcomings of the draft, such as the material scope, content etc. Conversely, since 2006 a total of 1,174 opinions have been issued under the (informal) "political dialogue" initiated by the Commission (data as of 18 February 2015).; on the latter see Casalena, in Blanke and Mangiameli (2013), Protocol No. 1 TEU para 18.

[117] Kiiver 2006, p. 158 et seqq. who speaks in terms of a "COSAC subsidiarity experiment" and the "phantom collective".

[118] Kiiver 2006, p. 168.

[119] Cf. Stratulat et al. 2014, p. 6 et seq.

[120] UK House of Lords, Evidence taken before the Select Committee on the European Union, Inquiry on "Renegotiation and Referendum on UK Membership of the EU", 30 June 2015, evidence by Mr David Lidington MP, p. 27.

[121] This is a crucial point within the approach by British Prime Minister D. Cameron for the reform of the EU: "...National parliaments able to work together to block unwanted European legislation..."; see The Telegraph (telegraph.co.uk) of 15 March 2014, "The EU is not working and we will change it". A similar idea had been voiced by then British Foreign Secretary W. Hague at a

since a red card system is rather confrontation between national parliaments and the EU.

Nonetheless, the weak forms of involvement of the national Parliaments in European decision making reveal a legal vacuum at the European level, which has caused national legislators to strengthen this indirect strand of democratic legitimation (especially in Denmark, Finland, Sweden, Great Britain, Austria and Lithuania).[122] This tendency of the national legislator to exceed the requirements of the Treaties to convey democratic legitimation for the legislation of the Union via the national Parliaments (*überschießende Binnentendenz*) is particularly strong in the German legal order, which takes on the requirements by the German FCC. The vocabulary for this "exceeding" need for legitimation according to German constitutional law includes "responsibility for integration" and "budgetary responsibility" in EU matters (Sect. 3.3).

3.3 The "Competition" between the European Parliament and the National Parliaments

Against this background, the key question is the relationship between the national Parliaments and the European Parliament as provider of democratic legitimation for the Union. The controversy essentially takes on the question of whether the European Parliament is the exclusive or at least primary source to provide democratic legitimation for the Union, or whether the democratic legitimacy of the Union is provided primarily by the national Parliaments (Sect. 3.1). This debate shows that the Treaty of Lisbon lacks a sophisticated concept on the relationship between these two parliamentary levels and that the Union does not (yet) have a mature form of government.

In the Lisbon judgment, the German FCC recognised the comprehensive right of the individual to participate in the democratic legitimation of German public authority – a "right to democracy". At the same time, with regard to the German Parliament's responsibility for integration in EU matters, the Karlsruhe Court affirmed the need that "the German Bundestag, which represents the people, and the Federal Government sustained by it, retain a formative influence on the political development in Germany". This is the case "if the German Bundestag retains its own responsibilities and competences of substantial political importance or if the

speech given on 31 March 2013 in Neuhardenberg near Berlin: "Maybe we should go ahead and think about a red card, granting national Parliaments the right to block EU legislation."

[122] Norton 1984, p. 201 distinguishes the types of parliaments (policy-making, policy-influencing and advisory). In recent literature cf. Buzogány and Stuchlik 2012, S. 359 et seq.; on the Danish model see Buche 2013, p. 367 et seqq. and Finke and Melzer 2012; cf. (without an analysis of the Baltic States) Mayer 2012, p. 177 et seqq., 210. Participation rights of the national Parliaments in Finland, Ireland, Malta, the Czech Republic and in some respect in Hungary, Poland and Slovenia are similar to those of the German *Bundestag* (Sect. 5.3); see Grabenwarter 2011, p. 112.

Federal Government, which is answerable to it politically, is in a position to exert a decisive influence on European decision-making procedures."[123]

These conclusions of the highest German court, however, seem to contrast with the Union Treaty of Lisbon regarding the role of the European Parliament and the Treaty's definition of the role of national Parliaments. According to the core provision of Art. 12 TEU "national Parliaments contribute actively to the good functioning of the Union". Also, as a consequence of the national judicial interpretations of the future competences and prerogatives of national Parliaments, on the one hand, and of the European Parliament's role in the process of legitimation of the Union (and in the inter-parliamentary cooperation) on the other hand, parliamentary participation will be structured in the Union mainly in a vertical dimension, between each executive and each Parliament, or in a horizontal dimension, that is, among national Parliaments. Solutions for this "multi-level parliamentary field" will depend on whether the enhanced involvement of national Parliaments, deriving from the Treaty of Lisbon, would result in an enrichment of the EU decision-making process or, on the contrary, would lead to a potential new brake in its functionality.[124] It is without any doubt that the participation of national Parliaments would make it more difficult for the citizens to establish accountability for and exercise democratic control over decisions.[125]

4 The Democratic Dilemma of the Union in the Crisis

Without prejudice to the analysed deficits, it can be concluded that, in general, at the current level of integration the Union provides for a reasonable basis for democratic legitimation. This is also true with regard to the regulations and the directive which the Union has adopted as a consequence of the economic, financial and budgetary crisis, to reform the Stability and Growth Pact and to strive for a greater macroeconomic surveillance. Thus, the double pack of European legislative measures, called "Six-pack" and "Two-pack", both based on Art. 121.6 TFEU and Art. 126.14 TFEU respectively (partly in conjunction with Art. 136.1 TFEU) have been adopted in the ordinary legislative procedure, i. e. with the participation of the EP. But deficits of this involvement are obvious when it comes to more political matters of the crisis management. This can be highlighted by two details of the reform package on issues of EMU.

[123] Cf. BVerfG – 2 BvE 2/08 (30 June 2009) para 246, referring to BVerfG – 2 BvR 2134/92 – Maastricht. As a result of this judgment the German *Bundestag* has enacted the "Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union" of 22 September 2009 (BGBl. I, p. 3022), amended by Art. 1 of the law of 1 December 2009 (BGBl. I, p. 3822).

[124] Fasone and Lupo, in Blanke and Mangiameli (2013), Protocol No. 1 para 179; Kiiver 2005, p. 168, with a negative perspective.

[125] Benz and Auel 2007, p. 57; Benz 2005, p. 276, therefore prefers an ex post control by national Parliaments.

The European Semester establishes a new system of control and sanction with regard to the national budgets.[126] The rules imposed by the reform package are supposed to help avoid macroeconomic imbalances and budgetary deficits and in essence are the basis for the establishment of the financial solidarity instrument in the form of the European Stability Mechanism.[127] The political debate on the national budget is no longer a mere domestic one between a national government and its parliament. Rather, before government submits its draft budget to parliament, it has undergone coordination with the European Commission and within the Council. Thus, governments will have less room to manoeuvre and are most likely less willing to negotiate with parliament the issues that have already been discussed at European level regarding the national budget.[128] In the end, given its "budgetary responsibility" the formal vote on the domestic budget is taken by the national Parliament.[129] However, neither the national Parliaments nor the European Parliament have a say in the preliminary process of the European Semester.[130]

Even though the surveillance of the national budgetary draft by the European level is strict, there are no actual sanctions that could be imposed in case the national government disregards the Commission's recommendations. Sanctions only apply in case of an excessive deficit. But here as well there is no actual parliamentary involvement in case they should be imposed one day by the Commission. While the European Parliament could shape the legislative process of the reform (co-legislator for most of the legal acts), it did not end up with a decision-making power in the operative process. However, the European Parliament is well aware that economic governance in the Union needs to be backed by parliamentary decisions. In response to two Commission Communications[131] the EP reaffirms "that governance in the EU must not infringe on the prerogatives of the European Parliament and the national parliaments, especially whenever any transfer of sovereignty is envisaged" and stresses "that proper legitimacy and accountability require democratic decisions and must be ensured at national and EU levels by national parliaments and the European Parliament respectively".[132] It furthermore reiterates that "the Commission needs to take full account of Parliament's role as a co-legislator" since "Parliament is a legislative and budgetary authority on an equal footing with the Council".[133] As a consequence, it asks the Commission to be included in the new

[126] See Weber 2011, p. 936; Weber 2013, p. 378 et seq.
[127] Cf. Deubner 2014, p. 24.
[128] Deubner 2014, p. 25.
[129] Cf. most recently BVerfG, 2 BvR 1390/12 et al. (judgment of 18 March 2014) – ESM, for example para 163.
[130] Cf. Deubner 2014, p. 35: "serious gap in parliamentary attendance".
[131] European Commission, Ex ante coordination of plans for major economic policy reforms, COM(2013) 166 and European Commission, The introduction of a Convergence and Competitiveness Instrument, COM(2013) 165.
[132] European Parliament resolution of 23 May 2013 on future legislative proposals on EMU: response to the Commission communications, P7_TA(2013)0222, point 5.
[133] P7_TA(2013)0222, point 7.

ex ante coordination instrument in order "to be given a role in ensuring democratic accountability".[134]

As a consequence of this development, the Union citizenship and the European Economic Union do not seem to be in good shape. The loss of political influence of citizens through their representatives in the national Parliaments as a result of the dominance of the financial and economic governance of the heads of States and governments marks the weak position of the European *demoi*. This situation is only part of a general shift to the executive,[135] mainly in the form of a "de-parlamentarisation". This democratic deficit in a negative sense "unifies" the European peoples. There has been a downright loss of sovereignty by all Member States whose decisions in terms of budget policy have been "shifted" into the hands of the representatives of the national executives (convened in the European Council, in the Council and the Euro Group) and in favour of the European Commission ("Economic Government").[136] In terms of democracy these executive bodies are only indirectly legitimised and, therefore, not directly accountable to the citizens affected by the decisions taken in the area of economic and budgetary *governance*.[137] This leads to a new democratic deficit, as the European Parliament remains largely a passive observer while national Parliaments can only to some extent compensate this deficit since only some of them are able to exercise effective scrutiny over their national government.[138]

Recognising the strong demand for a "parliamentarisation" within the EU's multilevel system cannot ignore the fact that a stronger involvement of the European Parliament in the decisions on the EMU would boost democratic legitimacy only if the reform measures on the EMU and the decisions on bailout ("Financial Facilities") were to be taken within the institutional framework of the Union. If the debate on reforms in the EMU had taken place in the European Parliament and the Council, it would have led to provisions (under the Union's legislative procedure) that would have been embedded in the EU Treaties (*acquis*) so that no Member State could unilaterally draw them into question.[139] As is known, a number of Member States currently oppose these ideas. For various reasons, the Treaty on Stability, Coordination and Governance in Economic and Monetary Union (Fiscal Compact Treaty) as well as the Treaty Establishing the European Stability Mechanism have been

[134] P7_TA(2013)0222, point 16.

[135] Bauer 2005, p. 9; Sommermann 2005, p. 216 et seq., also sees parliamentary countermovements in some Member States; for the "increasingly compound and accumulated 'order' of executive power in Contemporary Europe"; see also Curtin 2014, p. 206 et seqq.; but in her opinion, "there is no single, comprehensive and unitary European executive institution or body that can in any meaningful way be described as an EU government…" ("fragmentation").

[136] See also Kadelbach 2013, p. 495 et seq.; Pinon 2013.

[137] Cf. Mangiameli 2013, sub 3 b, d, e.

[138] Cf. Maurer 2013, p. 5 et seqq.

[139] The institutional binding effect of a treaty revision would naturally be greater than the durability of a treaty under public international law, notwithstanding Art. 62 VCLT; with the same view apparently Kingreen 2015.

agreed on as international treaties outside the Union's legal framework.[140] Seen in this light, it seems logical that the European Parliament recommends to evolve the ESM "towards Community-method management and (to make it) accountable to the European Parliament" (Sect. 5.1).[141] The Commission shares this view in its Communication of 28 November 2012 "A blueprint for a deep and genuine economic and monetary union. Launching a European Debate" when it emphasises that democratic legitimacy and accountability are the "cornerstone of genuine EMU".[142] Any call for the enhancement of the role of the European Parliament leads to the question of what role national Parliaments should play in European integration and how their relationship to the European Parliament should be characterised (Sects. 3.2 and 3.3). In that respect, there is an undeniable tension with regard to the budgetary sovereignty and budgetary responsibility of the national Parliaments in the "poly-dimensional institutional order" (*A. Benz*) of the Union.

5 Options for a Deeper Democratisation of the European Monetary Union

In search of ways how the preponderant executives on national and Union level can be counterbalanced by enhanced parliamentary involvement, i. e. by the involvement of a parliamentary body with decision-making powers, several proposals have been put forward.

5.1 The European Parliament as the Institutional Point of Reference

A main group of proposals strives for improving parliamentary participation in the inter-governmental EMU in a horizontal setting which links the enhancement of democratic legitimation in economic governance to the European level. In this view the parliamentary decision-making centre of and for the Union is and should be the European Parliament. In this respect, the European Parliament points out "that the currency of the Union is the euro, that its parliament is the European Parliament

[140] Cf. Weber 2013, p. 381 et seqq.; Mangiameli 2013, sub 4 b, c, d; on the political development of the participation of national Parliaments in European policy-making up to the Constitutional Treaty cf. Maurer 2002.

[141] European Parliament resolution of 20 November 2012, P7-TA-2012-430, Recommendation 2.7 on ensuring democratic oversight of the ESM. The Parliament adds, that "key decisions, such as the granting of financial assistance to a Member State and the conclusion of memorandums, should be subject to proper scrutiny by the European Parliament." See also European Parliament resolution of 12 June 2013 on strengthening European democracy in the future EMU, P7_TA-PROV(2013)0269, point 11.

[142] European Commission, A blueprint for a deep and genuine economic and monetary union. Launching a European debate, COM(2012) 777 final/2, p. 36 et seq.

and that the future architecture of the EMU must recognise that Parliament is the seat of accountability at Union level; demands that whenever new competences are transferred to, or created at, Union level or new Union institutions established, a corresponding degree of democratic control by, and accountability to, Parliament be ensured".[143]

This is supported by the rationale and wording of the Treaties. According to Art. 3.4 TEU, the Union shall establish an economic and monetary union whose currency is the euro. In Title VIII of the TFEU on economic and monetary policy, Art. 139 ("transitional provisions") provides that "Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the Euro shall hereinafter be referred to as 'Member States with a derogation'". Hence, although the extension of the Euro to the whole of the EU appears illusory alone on account of the permanent opt-out of Denmark and Great Britain, it is foreseen by the treaty that in the end, all Member States of the Union adopt the Euro as currency. Thus, it seems natural that the parliament of the Union (the European Parliament) has to be included in the overall decision-making process on the coordination of the national economic policies, eventually having full co-decision rights on the new secondary law in the realm of EMU, once the Contracting States have adopted a treaty reform aiming at a "parliamentarisation" of the EMU. However, this step is intrinsically linked to an intrusion into the budgetary sovereignty of national Parliaments. The Treaty of Maastricht had left this untouched, as the Contracting States have decided that budgetary, fiscal and economic policies will all remain within the national competence – with EMU limited to a coordinating function (Art. 5 TFEU).[144] Moreover, these are important elements to influence the competitiveness of the Member States. This reveals also that the "horizontal dilemma" (*Ch. Deubner*) is two-fold: that not all Member States belong to the Eurozone – and yet the EU's institutions make decisions about Euro matters with all of its members as a matter of principle. As a result, although decisions on EMU's matters ever-deeper interfere in the national budgetary competence, only a limited number of Member States is directly affected by the decisions of the Council.

It may be characteristic of the legal and political constitution of the Union and namely of the decision-making culture of the European Parliament,[145] that the efforts of the academic literature to carve out elements of a theory of democracy for the European Union have so far not led to proposals for institutional reforms of the European Parliament. Instead, they build standards of "confidence-building practice", which can only to a limited extent be ensured institutionally.[146] The aim of this approach is to make the "existence of a European citizenship" the starting-point of a lively and credible democracy in the Union. In that context, the challenge of European politics is a form of parliamentarism that is rooted democratically

[143] European Parliament resolution of 12 June 2013 on strengthening European democracy in the future EMU, P7_TA-PROV(2013)0269, point 10; see most recently, European Commision, *5-Presidents-Report 'Completing Europe's Economic and Monetary Union'*, 2015, p. 17.
[144] Blanke 2011, p. 402 et seqq.
[145] Nettesheim 2013, p. 49.
[146] Nettesheim 2013, p. 41 et seq.

and substantially in the Union citizens through necessary provisions of control and participation.[147] Ideas of justice, morally founded preliminary decisions on the relationship of the Union towards its citizens and the exercise of power that is oriented towards the common good are thus determinants of European governance that is founded on trust[148] ("social legitimacy").

Deliberative discoursivity and decision making, transparency, free and equal participation in the procedures, reciprocal generality of all those affected by decisions, clear responsibilities and accountability as well as a decision-making ethos of supranational officials are indispensible provisions for this.[149] This concept, which is oriented towards the theory of supra-individual state purposes (*J. J. Rousseau*, *I. Kant*, *L. vom Stein*, *G. F. W. Hegel*, *Ch. Taylor*), classifies the decisions on the future of democracy of the Union into the overall context of the relationship of the individual and the societal side and thus is linked to the traditional idea of the human being as *zoon politicon*. The European Parliament only has a chance for stronger involvement in the economic governance of the Union in the medium term if such a reform can be thoroughly explained to the European electoral citizens. It is thus the task of the Strasbourg parliamentarians to explain to the citizens that the parliament of the Union is willing to exercise this competence expertly, close to the citizens and responsively and therefore also with the aim of reconciling the different interests of the Member States. At the same time this would change European integration into a citizens' project.[150]

5.2 Strengthening the Role of National Parliaments

As a consequence of the budgetary sovereignty of the Member States, national Parliaments must retain control of fundamental budgetary decisions even in a system of intergovernmental governing[151] and in a multilevel-governance system which becomes manifest in the EMU. Hence, an essential path could be the strengthening of parliamentary influence on their national governments and their position in EU decision making.[152] Putting too much emphasis on directly scrutinising EU legislation might distract national Parliaments from this parliamentary function and responsibility in the domestic context.[153] As outlined above, one major function of a parliament is controlling the executive/government (Sect. 3.1). Here, there is

[147] Nettesheim 2013, p. 47 et seqq.
[148] Nettesheim 2005, p. 172, 154; Nettesheim 2013, p. 44.
[149] Nettesheim 2005, p. 180 et seqq., p. 184; Nettesheim 2014, para 18; Sommermann 2005, p. 220 et seq.
[150] Cf. on the call for stronger participation of the citizens Huber 1999, p. 34, 55; Benz 2005, p. 274.
[151] Cf. in the case of Germany BVerfG, 2 BvR 1390/12 et al. (judgment of 18 March 2014) para 162 – ESM.
[152] Deubner 2014, p. 33 et seq.; Stratulat et al. 2014, p. 7 et seq.; Kreilinger 2013, p. 21.
[153] Similarly De Wilde 2012, p. 4, 8 et seq. and Franzius and Preuß 2012, p. 52.

room to alleviate the overall democratic shortcoming of the Union.[154] But this has to be done in a national context. As the Preamble to Protocol No. 1 TEU on the role of national Parliaments recalls, "the way in which national Parliaments scrutinise their governments in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State". Therefore, scrutinising and shaping the national government's position (in the Council, the co-legislating body) may seem a viable way to proceed. In addition, this path could ensure national Parliaments' influence even in intergovernmental decision making. Mandating the national government can also give national Parliaments another form of "red card": a minimum of four negative votes in the Council is necessary to form a blocking minority [Art. 16.4 (2) TEU]. Moreover, objections of national Parliaments via a mandated government in the Council are not limited to subsidiarity aspects, as is the case in the early warning mechanism, but can comprise also questions of proportionality or even substance.[155]

Nonetheless, one should not disregard the fact that national Parliaments across Europe vary deeply in their capacity to control and influence the executive in EU decision making and within the conclusion of international agreements that supplement EU law or that have a specific close connection to it.[156] Their institutional strength is dependent on elements such as "access to information", "processing of information" and "oversight".[157]

The United Kingdom has adopted a regulation with its European Union Act 2011, which provides that a "Minister of the Crown may not vote in favour of or otherwise support a decision [regarding the passerelle clauses] unless [...] the draft decision is approved by Act of Parliament [and] the referendum condition is met" [Sects. 6 (1) and 7 (3)].[158] Similarly, Art. 23i of the Austrian Constitution, introduced by the "Lissabon-Begleitnovelle" (laws accompanying the Lisbon Treaty) of July 2010 provides that in the case of use of the passerelle clauses, the Austrian Council representative is obliged to require the authorisation of the two Chambers (two-thirds majority) before voting for it.[159]

A rather strong parliamentary scrutiny of the national government, i. e. a parliamentary mandate-based scrutiny of EU policy, exists also in other national Parliaments, among them the parliaments of the Baltic States, the Finnish *Eduskunta*

[154] Corbett 2013.

[155] Kiiver 2006, p. 162 who emphasises the right of the national Parliaments to scrutinise "proportionality and other criteria" notwithstanding the fact that in his opinion there is "no protocol or treaty provision authorizing [...] to do so".

[156] Cf. Sects. 5–9 EUZBBG on the broad range of matters that activate the *Bundestag*'s right to early notification and involvement by the federal government as well as to deliver opinions to the federal government. A sign of the mainly weak role of national Parliaments beyond matters concerning the European Union *stricto sensu* is the fact that only four national Parliaments (Finland, Estonia, Germany and The Netherlands) had to consent to the bilateral financial aid for Greece (international treaty).

[157] See the instructive study conducted by Auel and Tacea 2014.

[158] Cf. Denza, in Blanke and Mangiameli (2013), Art. 48 para 51; Casalena, in Blanke and Mangiameli (2013), Protocol No. 1 TEU para 96.

[159] Olivetti, in Blanke and Mangiameli (2013), Art. 12 para 72.

and the Danish *Folketing*.[160] In the case of Denmark, the parliament can issue instructions to the minister for the voting in the Council[161] for the most important proposals.[162] The consent of the Danish parliament is deemed granted as long as there is no majority *against* the position of the minister (negative parliamentarism).[163] At the end of their debate, the European Affairs Committee draws up a report on the agreed Danish position and a description of the minister's discretion to deviate from that. However, the mandate does not contain a *legal*, but merely a political obligation. Because of the lack of a legally binding character of the mandate, the most important instrument in the ex-post control is the possibility of the *Folketing* to issue a vote of no confidence against single minsters (Art. 15.1 of the Danish Constitution), which is an effective means of pressure in minority governments.[164]

It cannot be ignored that effective parliamentary control of the Council representative by national Parliaments collides with the organisational status and intergovernmental logic of decision making in the Council.[165] The parliamentarian positions can have an immense effect when unanimity is required, but mandatory voting remains also questionable in case of qualified majority in the Council of ministers,[166] as "tying the hands of the responsible minister" for the sake of strict scrutiny can hinder necessary flexibility and bargaining power in Council negotiations.[167] The political decision-making power of the Council as a constitutional institution of the Union, namely its ability to find a political compromise in controversial issues, should not be impaired by binding decisions of a parliamentary organ of a Member State towards the representative of the national executive in the Council. Otherwise this would lead to an encroachment of the domestic constitutional order on the institutional independence of the Council (Art. 13.2 in conjunction with Art. 16 TEU). This institutional independence is democratically moderated by Art. 10.2 (2) TEU in the sense of a responsibility of its members towards the national Parliament or the citizens of its country of origin. This does not include, however, a limitation by the right of national Parliaments to give the Council representative an imperative mandate. In that case, the Council would be downgraded to a mere body of coordination of votes that have been predetermined by the parliaments in the Member States. At the same time, this would be an infringement of the principle of sincere cooperation of the Member States in the Council [Art. 4.3 (2) and (3) TEU].

[160] Cf. Grabenwarter 2011, p. 110.
[161] Raunio 2005, p. 322 et seq.
[162] Cf. Mayer 2012, p. 191.
[163] Cf. Møller Sousa 2008, p. 432.
[164] Cf. Mayer 2012, p. 197 et seq.
[165] Cf. Baach 2008, p. 183 et seqq.; von Achenbach 2014, p. 442 et seq.; see also Dann 2004, p. 254 et seqq., who regards the collision of the logic of negotiation and decision making in the Council with effective parliamentary participation on the basis of the model of executive federalism (p. 269), which is founded on efficient, flexible negotiation and compromise (p. 95 et seqq.); on structural problems of control of international organisations or institutions by national Parliaments see Krajewski 2008, para 14.
[166] Finke and Melzer 2012, p. 10.
[167] Auel and Benz 2005, p. 373; cf. also Møller Sousa 2008, p. 434 et seq.; Mayer 2012, p. 207 et seqq.

Considering these integration policy aspects, the German legislator has provided an adequate instrument in the "Responsibility for Integration Act" (IntVG),[168] the core of the German legislation accompanying the ratification of the Treaty of Lisbon. Together with two supplementary Acts it governs the rights of the *Bundestag* and the *Bundesrat* in EU matters. With Art. 23.2 GG and 23.3 GG in conjunction with Sect. 8 of the supplementary Act on Cooperation between the Federal Government and the German *Bundestag* in matters concerning the European Union (EUZBBG)[169] on the one hand and Art. 23.2 GG and 23.4 GG in conjunction with Sect. 5 of the supplementary Act on Cooperation between the Federation and the *Länder* in matters concerning the European Union (EUZBLG)[170] on the other, the German constitutional order includes different sets of rights of the *Bundestag* and the *Bundesrat* to give their opinion to the federal government. They influence to different degrees the negotiations of the German federal government in the institutions and (preparatory) bodies of the Union (Sect. 4.2 EUZBBG and No. II.1 of the Annex to Sect. 9 EUZBLG). According to a general opinion, the federal government only has to "take into consideration" these opinions without being formally bound by them. The *Bundestag*'s right to submit opinions to the federal government for its deliberations in the Council is supposed to facilitate "the exercise of the responsibility for integration in a constructive and critical dialogue" [171] and thus to concretise the principle of democracy in the sense of the structural safeguard clause laid down in Art. 23.1 first sentence GG. However, the *Bundestag*'s opinion directly affects the government's deliberations in the Council "if the main interests expressed in the decision of the Bundestag cannot be asserted". In that case, the

[168] Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union (*Integrationsverantwortungsgesetz* – BGBl. I p. 3022) as amended by Art. 1 of the Act of 1 December 2009 (BGBl. I p. 3822); cf. Casalena, in Blanke and Mangiameli (2013), Protocol No. 1 TEU para 100; on the whole see also Calliess 2014, Part 3, C, para 32 et seqq.

[169] Section 8 (4) EUZBBG (emphasis added): "If the Bundestag avails itself of the opportunity to deliver an opinion [...], the Federal Government shall invoke the requirement of prior parliamentary approval in the negotiations if the main interests expressed in the decision of the Bundestag cannot be asserted. The Federal Government shall notify the Bundestag thereof without delay in a special report. In its form and content, this report must lend itself to discussion by the bodies of the Bundestag. Before the final decision, the Federal Government shall endeavour to reach agreement with the Bundestag. [...] *The foregoing provisions shall not prejudice the right of the Federal Government, in awareness of the Bundestag's opinion, to take divergent decisions for good reasons of foreign or integration policy.*".

[170] Section 5 (2) EUZBLG (emphasis added): "To the extent that a project primarily affects the legislative powers of the Länder and the Federation has no legislative power, or a project primarily affects the structure of Land authorities, or the Land administrative procedures, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position [...]. This is without prejudice to the responsibility of the Federation for the nation as a whole, including matters of foreign, defence and integration policy. [...] If agreement with the Federal Government is not reached and the Bundesrat confirms its opinion by a majority of two thirds, the Bundesrat's opinion is decisive. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.".

[171] Cf. Saberzadeh, in von Arnauld and Hufeld (2011), Chap. 11 para 34 et seq.

federal government shall invoke the requirement of prior parliamentary approval in the negotiations (Sect. 8.4 EUZBBG).

Section 9 IntVG provides that in cases where the European Treaties foresee the possibility of an emergency brake procedure, the German representative in the Council must table a motion that the matter (e. g. legislation in the field of social security necessary to provide freedom of movement for workers or with regard to the national criminal justice system) be referred to the European Council if the *Bundestag* has adopted a decision instructing him or her to do so. A different approach is foreseen with regard to bridging and competence clauses (Sects. 4 through 7 IntVG) and the flexibility clause of Art. 352 TFEU (Sect. 8 IntVG). In this last case, the German representative in the Council or the European Council may take an affirmative vote or abstain from voting only after a law to that effect has been adopted. As a consequence, the German parliamentary assembly can exert a decisive influence on the European decision-making procedure.

Conversely, if a Union project primarily affects the legislative or administrative competencies of the *Länder*, the federal government must "duly take into account" the opinion delivered by the *Bundesrat*. This means that the *Bundesrat*'s opinion is binding *in that respect* and that the *Bundesrat* maintains the right to take final decisions in certain cases of national concurrent legislation (cf. Art. 72.2 GG).[172] With regard to the opinions by the *Bundestag* and the *Bundesrat*, German law recognises the primacy of the federal government in Council deliberations for matters of foreign and integration policy (Sect. 8.4 sentence 5 EUZBBG) or with regard to the *Bundesrat*'s opinions the "responsibility of the Federation for the nation as a whole" (Art. 23.6 second sentence GG in conjunction with Sect. 5.2 sentence 2 EUZBLG). Thus, the opinions of the German legislative bodies do not establish an imperative mandate, which frankly, would weaken instead of strengthening the position in the Council in case of majority votes.[173]

The "renationalisation" of decision-making in the Council that is linked to the participation of national Parliaments raises the question of how the stronger involvement of national Parliaments in enhanced coordination of economic policy will influence the interplay of Council and European Parliament. With a future involvement in European economic policy (Sect. 6), even in the form of the right to consultation, the European Parliament as a quasi-unitarian institution would enter into an even stronger institutional opposition to the Council as the federal institution of the Union. It would primarily be the responsibility of the European Parliament to lay down and voice the Union's interests in its opinion that would leave political positions of national Parliaments unconsidered or would even contradict them.

[172] Cf. Saberzadeh, in von Arnauld and Hufeld (2011), Chap. 11 para 42 with further reference.
[173] Calliess 2010b, p. 23.

5.3 Establishment of a New Parliamentary Body

A third option to strengthen the democratic legitimation on the EU level is the establishment of a genuine Eurozone parliament,[174] especially in connection with the idea of a genuine Eurozone budget.[175] It would be a new parliament with representatives elected by the citizens of the Eurozone countries. This assembly would be separate from the European Parliament, i. e. a second parliamentary institution solely for Eurozone matters as a sort of mirror for the Eurozone Council formation (Euro Group). However, this approach is hardly reconcilable with the principle of unity of the European Union. Moreover, this could lead to calls for separate parliamentary *fora* for other areas of variable geometry of Union law, such as the Schengen area.

One proposal aims to transpose the logic of the Euro Group to the European Parliament. According to this idea, a sort of intra-parliamentary "Euro chamber" would be established.[176] The underlying idea is that only those MEPs, who are elected from Eurozone countries, may take part in the votes on Eurozone issues. This idea however, practical as it may seem, contradicts the rationale of Art. 14 TEU according to which the "European Parliament shall be composed of representatives of the *Union's citizens*".[177] This view is shared by Parliament itself, e. g. in its latest attempt for European parliamentary election provisions when it called for the establishment of a "European" contingent in the Parliament, elected by all citizens alike.[178]

A second proposal puts the attention on the democratic legitimation of national Parliamentarians and calls for the establishment of a parliamentary assembly for the Euro area in the form of an assembly of delegations of national Parliaments of Eurozone Member States.[179] This proposal has to be seen in the broader context of a "third chamber" of national Parliaments in the EU legislative process.[180] It resembles the European Parliament of the early years when it had been a mere parliamentary assembly of national delegates. This assembly as well would be a parliamentary mirror of the executive Euro Group. However, doubts remain as to

[174] Cf. U. Guérot and R. Menasse, Es lebe die europäische Republik, F.A.Z. of 24 March 2013, p. 24; M. Roth, Der Euro braucht ein Parlament, 17 November 2011.

[175] Cf. See The Spinelli Group/Bertelsmann Stiftung, A Fundamental Law of the European Union, 2013; cf. also Andrew Duff (who was a member of the Federalists project group), A Fundamental Law of the European Union, Speech to the Federal Trust in London on 10 January 2012, http://www.fedtrust.co.uk/filepool/Andrew_Duff_Speech_10thJanuary2013.pdf

[176] See for example Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain, Final Report of 17 September 2012; cf. also Deubner 2014, p. 41.

[177] Emphasis added. Cf. also Maurer 2013, p. 6.

[178] See Parliamentary Resolution *on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI))*, A7-0027/2012. For genuine European (transnational) elections see Franzius and Preuß 2012, p. 118 et seqq.

[179] Cf. J. Fischer, Die ZEIT of 10 November 2011; see also Deubner 2014, p. 42.

[180] See with a similar idea Kadelbach 2013, p. 499 et seqq.

the added value of this parliamentary institution vis-à-vis the executive (Council). As national governments generally rest on the support of the majority in the national Parliament, national delegations to this Eurozone assembly would tend to be a mirror image of the national governments and hence the Euro Group.[181] Moreover, it is questionable whether this assembly of national delegates would come to genuine European debates. Such proposals want to give rise to a general overhaul of the European constitutional architecture that may lead to an actual representation of national Parliaments within the Union's system of government, going well beyond a *Network of national Parliament representatives.*[182] When debating on a Constitution for Europe these ideas have been presented by *Joschka Fischer* and *Tony Blair*[183] as well by *Lionel Jospin* who wished to set up a congress of national Parliaments.[184] All of them remained unheard[185] and have not found any repercussion in the present drafts on the future institutions of the Union.[186] Against the will of the national Parliaments and against the resistance of the European Parliament there will be no renaissance of this proposal.[187] A second (parliamentary) chamber with a real power to participate in the decision making of the Union would hinder the European Parliament's evolution towards a front-ranking body of democratic legitimation of Union decisions. Moreover, this would over-complicate the EU institutional framework, creating overlapping roles and functions, add to the complexity of the EU decision-making process and present a challenge to the activity of the EP.[188]

5.4 Transnational Procedures of Democratic Accountability at EU Level as a Happy Medium – a Solution via COSAC?

Considering the political and legal difficulty of a Treaty revision, it is worth considering changes below the threshold of a formal Treaty change that can help improve the Union's democratic foundation. The legislative procedures of the EU are a ver-

[181] This is the criticism with regard to the general idea of a national chamber at EU level voiced by Corbett 2013.
[182] Cf. Mangiameli 2013, sub 4 b, c, d.
[183] Cf. the speech delivered by J. Fischer 2000 and by T. Blair, Rede vor der Warschauer Börse v. 6.10.2000, http://www.europa-digital.de/aktuell/dossier/reden/blair.shtml
[184] L. Jospin, L'Avenir de l'Europe, 28.5.2001.
[185] Cf. Mayer 2012, p. 554 et seq.
[186] Cf. however the position of Valéry Giscard d'Estaing, who declared already in June 2011: "Or, le Parlement européen n'est pas directement en contact avec le milieu politique des Etats : c'est un milieu européen en fait. Il faudrait donc faire un congrès une fois par an – je crois que je suis raisonnable – avec les députés européens et deux fois plus de députés nationaux choisis selon les mêmes critères de représentation." (http://www.euractiv.fr/avenir-europe/valery-giscard-destaing-leurope-interview-506089).
[187] Cf. Blanke 2013, sub 4; already before the Constitutional Convention Blanke 2002; the idea of a Euro-Chamber is also rejected by Maurer 2013, p. 8.
[188] Cf. also Fasone, in Blanke and Mangiameli (2013), Protocol No. 1 TEU para 159.

tical point of reference for national Parliaments to present common positions after a horizontal coordination among them. This is clearly recognised by the Treaty of Lisbon, though it restricts these competences of national Parliaments to a mere right to information (Art. 12 lit. a TEU in conjunction with Art. 1 and 2 of Protocol No. 1 TEU). More powerful are only the competences of the national Parliaments within the scrutiny of legislative proposals of the Union under the aspects of subsidiarity and proportionality (Sect. 3.2.3). But also in these situations national Parliaments act as individual institutions without having to coordinate their positions within a network of parliaments. In this atomisation, it is hardly possible that the national Parliaments reach the quorum for triggering a subsidiarity complaint procedure (18 votes in favour of the so-called "yellow card"). This weakens their position, particularly in relation to the Commission.[189]

In providing democratic legitimation in EU affairs through an additional horizontal dimension, the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union appears to be a possible institutional point of reference. The COSAC is an inter-parliamentary advisory body and composed as a forum of cooperation between the European Affairs Committees of the national Parliaments (Art. 10 of Protocol No. 2 TEU) and at the same time a facility in which the cooperation between national Parliaments and the EP shall be strengthened.[190] This ambiguous mandate for COSAC provides opportunities for an inter-parliamentary Union, but makes at once visible the limits of such cooperation. The chance of inter-parliamentary cooperation between national Parliaments and the European Parliament is to be seen in particular, in the exchange of information and in a network between the EP committees and the corresponding committees of the national Parliaments. The Lisbon Treaty permits with the explicit mention of the Common Foreign and Security Policy far more than just a cooperation between the European Affairs Committees of the national Parliaments and the EP (inter-parliamentary ad hoc conferences under Art. 10 sentence 2 of Protocol No. 2 TEU).[191]

Always, however, the role of COSAC is limited to an advisory body for a mere exchange of information (Art. 10.4 of Protocol No. 1 TEU). Despite their non-binding effect, resolutions of the COSAC need unanimity. In institutional terms, COSAC's biggest problem is that its tasks are not compatible with the EP's membership in COSAC. The objectives that the European Parliament pursues in the framework of COSAC often contrast with the interests of national deputies in safeguarding national sovereignty. Here again, the EP makes clear that it does not intend to withdraw from COSAC, but "to intensify the cooperation with national Parliaments on the basis of Protocol No. 1".[192] This, however, is to be interpreted as the EP's claim for leadership in the process of democratic legitimation of European policies. Proposals to develop COSAC institutionally – at least in terms of a transition to majority decisions when developing *mere standpoints* in the name of national

[189] Cf. Becker 2013.
[190] See Kreilinger 2013, p. 4 et seqq.
[191] Cf. Maurer 2013, p. 11 et seqq.; See Kreilinger 2013, p. 6 et seq.
[192] Decision 13.

Parliaments – have been predominantly rejected by the national Parliaments as they want COSAC to play only a minor role as a platform for the exchange of information and mutual inspiration.[193] On this point, most national Parliaments agree with the European Parliament. If this analysis is correct, increasing the democratic legitimation of European (crisis) policy through inter-parliamentary cooperation is "purely wishful thinking".[194]

In light of this sobering analysis the 25 Contracting Parties of the Fiscal Compact Treaty should ask whether the provision of Art. 13 of this Treaty will not have a mere placebo effect. According to this provision, the European Parliament and the national Parliaments will together determine the organisation and promotion of a conference of representatives of the relevant committees in order to discuss budgetary policies and other issues covered by the Treaty.[195] Hence, it is considered possible that not only the governments of the Member States, but also Parliaments discuss and agree on future European decisions regarding competitiveness and growth. Currently, the Conference meets twice a year to discuss sector-specific reform programmes (early summer) and debate national budget proposals (autumn). Ideally, the joint resolutions could serve as a reference for both the European Parliament and national Parliaments vis-à-vis the European or national executive, respectively.[196] But the success of such proposals taken within this inter-parliamentary budgetary conference depends on the European Parliament which has to enforce these standpoints in the European arena. To avoid another "impotent talking shop"[197] in the dialogue between the European Parliament and national Parliaments, the EP's competences in the area of budgetary governance would have to be strengthened. Hitherto the "budgetary" conference of representatives of the relevant committees of the EP and of national Parliaments reflects the powerlessness of the Union in the realm of domestic economic and financial policy. Nonetheless, enhanced inter-parliamentary cooperation, also in economic and financial matters, can help build "mutual understanding and common ownership for EMU as a multi-level governance system"[198] and could also be a point of reference for parliamentary participation in EU economic and financial matters, including in the future the European Semester and the ESM, via the European Parliament.[199] On a larger scale, one can even think about extending this inter-parliamentary Fiscal Compact Conference in a comprehensive way so as to include representatives of the relevant economic, financial, social and employment affairs committees and building on the structures of the existing EU Economic and Social Committee (Art. 301 et seqq. TFEU)[200] and the Employment Committee (Art. 150 TFEU).

[193] Cf. Mayer 2012, p. 170 with further reference in footnote 110.
[194] In that sense Mayer 2012, p. 173.
[195] Cf. Maurer 2013, p. 10 et seqq.; see also Kreilinger 2013, p. 8 et seqq.
[196] Maurer 2013, p. 11.
[197] Norman 2003, p. 98.
[198] European Commission, A blueprint for a deep and genuine economic and monetary union. Launching a European debate, COM(2012) 777 final/2, p. 36.
[199] Cf. Deubner 2014, p. 37 et seqq.
[200] With this proposal Maurer 2013, p. 13.

Thus, inter-parliamentary cooperation can be a starting point to better coordinate national Parliaments vis-à-vis the European level and counter-weight the decline of national parliamentary sovereignty.[201] It could promote truly European debates even in the domestic sphere and thus make a contribution to the Union's democratic foundation. Moreover, the exchange of information can help scrutinise the respective national government.[202] In addition, inter-parliamentary exchange of information and concerns may help to streamline arguments for and against certain legislative proposals that may result in consorted action of (chambers of) national Parliaments that more easily reaches the threshold of the yellow or orange card mechanism. As diverse as they may be throughout the Member States,[203] this would enable national Parliaments to speak with one voice instead of 28 (or around 40, when we take into account individual chambers). This could be done by annual or bi-annual meetings of national Parliaments or – even better – specialised parliamentary committees to discuss, for example, the Commission's annual work programme.

In this context, some national parliaments have proposed the introduction of a "green card" mechanism.[204] This proposal has been picked up by COSAC for further elaboration.[205] According to this idea, a certain number of national parliaments (similar to the yellow and orange card mechanism) could ask the European Commission to present proposals for new EU legislation or amendments to or withdrawal of existing EU legal acts, thereby granting national parliaments as an entirety the right to legislative initiative. However, *de constitutione lata* this could not be done in a way that would legally bind the Commission to either present a proposal or give reasons for not doing so. While this is the case with the EP (Art. 225 TFEU) and the Council (Art. 241 TFEU), granting such a right to national parliaments would disturb the institutional balance and legislative system of the existing Treaties. Consequently, the Commission rejects the "green card" as a binding instruments, but points out its readiness "to consider national Parliament's input on whether there is a need for new or modified rules in any policy field"[206] and suggests to integrate any new mechanism into an informal inter-institutional agreement. In contrast, the EP's Committee on Constitutional Affairs (AFCO) has welcomed the idea of a "green

[201] Cf. See Kreilinger 2013, p. 17.
[202] Peidrafita 2013, p. 8.
[203] Cf. Kiiver 2006, p. 185 et seqq.
[204] Danish *Folketing*, Twenty-three Recommendations – to strengthen the role of national parliaments in a changing European governance, January 2014, p. 2–3; UK House of Lords, European Union Committee, Report on "The Role of National Parliaments in the European Union" of 24 March 2014, para 55; Dutch *Tweede Kamer*, "Ahead in Europe. On the role of the Dutch House of Representatives and national parliaments in the European Union" see the final report on "democratic legitimacy" of 9 May 2014, p. 29; Lord Boswell of Aynho (Chairperson of the UK House of Lords European Union Committee), letter of 28 January 2015 to the national parliaments' European Affairs Committees, "Towards a 'green card'".
[205] COSAC, Twenty-second Bi-annual Report, 4 November 2014, p. 33 et seqq.; Twenty-third Bi-annual Report, 6 May 2015, p. 31 et seqq.
[206] European Commission, letter in response to the Opinion of the House of Lords concerning the role of national Parliaments in the EU, C(2014) 4236 final of 23 June 2014. p. 2.

card" as a positive suggestion to enhance the existing political dialogue as long as it does not amount to a real right of legislative initiative of national Parliaments on EU level. While according to the existing proposal the EP should not be formally involved, it nonetheless could be a valuable cooperation partner via its right of Art. 225 TFEU.

However, as outlined above (Sect. 5.3), it is not desirable to create a "chamber of national Parliaments" with actual decision-making powers in the legislative process at EU level (such as a "red card"), as they are each endowed with one national mandate "and not with [one twenty-eighth of] a European mandate".[207] Nonetheless, by better coordinating national Parliaments in the spirit of "deliberative supranationalism" one would establish a "virtual" third chamber, i. e. they do not meet together in the same physical space, but to some extent they fulfil the function of a parliamentary chamber at EU level.[208]

6 A Reform of the European Treaties as a Precondition for a Democratisation of Economic Governance in the Union?

Whatever institutional option will be chosen, a Treaty reform seems inevitable to strengthen the Union's democratic foundation with regard to economic governance. This reform needs to go hand in hand with a general reform of the EMU in order to achieve the aim of not only establishing a monetary, but also a genuine economic union. A reform of the European Treaties is thus twofold and comprises both a transfer of policy competences as well as a restructuring of the institutional design at Union level.

As a way out of the dilemma of democratic legitimacy deficit, a major reform of the European treaties has been proposed. Especially representatives of the southern European countries support the idea that EMU governance within the Union's institutional framework and an empowerment of the European Parliament as a body for democratic control are the necessary consequences of the loss of national sovereignty during the fiscal and financial crisis.[209] The European Parliament has pushed forward such demands.[210]

One element of a Treaty reform could be a shift of competences in the area of economic governance which is inseparably connected with other political items within the competence of the nation-state. At present, the Union's competence in employment (Art. 5.2, Art. 145 et seqq. TFEU) and social policy (Art. 5.3, Art. 151 et seqq. TFEU) is very limited. Member States shall, when coordinating their economic policies, regard these as a matter of common concern and conduct them with

[207] Kiiver 2006, p. 187.
[208] On the term see Cooper 2006, p. 283; Cooper 2012, p. 441 et seq.; Joerges 2014, p. 40 et seq., with a similar account.
[209] See for example the speech delivered by the Italian President Napolitano in October 2012: http://www.italianieuropei.it/italianieuropei-9-2012/item/2806-unione-politica-ed-europeizzazione-della-politica.html
[210] European Parliament resolution of 20 November 2012, P7-TA-2012-430, Decision 13.

a view to contributing to the achievement of the Union's objectives laid down in Art. 3 TEU (cf. Art. 121.1, 120 TFEU). However, these *political* commitments do not lead to any *legally binding* obligations for the Member States. The new macroeconomic imbalance procedure, the new surveillance and enforcement mechanism set up as part of the so-called "Six-Pack" legislation, can only be part of the solution. The corrective part, the Excessive Imbalance Procedure (EIP), can only respond to singular countries and responds only if excessive macroeconomic imbalances already occur.

However, national economic and social models are diverse.[211] The current Treaties bear evidence of this fact when they say that coordination of those polices shall have regard to national practices related to the responsibilities of management and labour (Art. 146.2 TFEU) and shall take account of the diverse forms of national practices, in particular in the field of contractual relations (Art. 151.2 TFEU). In employment policy, the EP is consulted when the Council draws up the national guidelines on employment policy (Art. 148.2 TFEU). In the realm of social policy, the EP and the Council can adopt directives in the ordinary legislative procedure for certain areas (Art. 153.2 [1] and [2] TFEU), while in others the EP is merely consulted (Art. 153.2 [3] TFEU), but a passerelle can be used to make most of these areas, too, subject to the ordinary legislative procedure (Art. 153.4 TFEU). For stronger democratic input, these passerelles should be made use of.[212] However, when adopting the broad guidelines of the economic policies according to Art. 121 TFEU, the EP is merely informed. As these broad economic policy guidelines form the basis for other measures in employment and social policy, we propose that the EP shall be at least consulted on these to have the possibility to give its input (and thus represent the Union's interests) as early as possible. This change could be achieved via a simplified revision procedure (Art. 48.6 TEU).

Secondly, it seems inevitable that in the long term the Fiscal Compact Treaty and the ESM-Treaty be incorporated into the EU's legal framework. For the former, this is expressly foreseen in its Art. 16. The same should apply to the ESM-Treaty, which would then have to be coordinated more closely with the rules on *no bail out*. An incorporation of the ESM into EU law would most likely entail dependence on the EU budget. When doing so, one should review how the European Parliament (as co-budgetary institution) could be incorporated into this framework, including a potential participation in a reformed European Semester.

7 Conclusions

This analysis seems to encourage those who consider that a competence of the European Parliament is essential to convey democratic legitimation to EMU governance. The European Parliament – in full consensus with the European Commission –

[211] Cf. Wagener and Eger 2014, Chap. 11.
[212] With the same result Maurer 2013, p. 6.

"considers it necessary to place the governance of the EMU within the institutional framework of the Union, which is a precondition for its effectiveness and for filling the current political gap between national politics and European policies." Therefore, it "stresses the full legitimacy of Parliament, as parliamentary body at the Union level for a reinforced and democratic EMU governance".[213] However, one should bear in mind that a strengthening of the rights of the EP can increase the risk of mutual blockades between the Council and the EP as the two law-making bodies, because in both institutions decisions along transparent lines of conflict would become less predictable and therefore coordination of policy-forming towards concerted decisions would become extremely difficult and complex.[214]

Without a doubt a stronger political role of the EP in the budgetary and fiscal policy of the Member States would mean running the risk of a collectivisation of sovereign debt. Among the Member States a more powerful role of European Parliament in budgetary and monetary governance is mainly supported by those debtor countries which are deprived in parts of their sovereignty as a consequence of the recommendations of the (former) "European Troika" consisting of IMF, European Commission and European Central Bank. Other countries, however, feel confirmed in their position that the fiscal policy has to be merely coordinated toughly and not smoothly at European level, though, the last word on decisions about expenditure must lie in their opinion in the hands of the national Parliaments. Both these approaches are variants of a common basic concept which is underpinned by the logic of strengthening the political institutions *together with* the civil society.

The conflicting political interests and constitutional positions of the Member States about the question of the extent to which national budgetary responsibility should be transferred to the European Union and the creation of a proper fiscal capacity for the EMU are highlighting one fact: In the medium term, the fiscal, financial and tax policy will remain in the responsibility of the Member States as "nation-states". Therefore, coordination at EU level with regard to economic and fiscal governance needs democratic legitimation and accountability which is rooted in the peoples of the nation-states. The European Parliament will only be able to attain a stronger position in this field – to the detriment of national Parliaments – if trust of the citizens of all Member States in the Union's institutions grows. This requires in particular both immediate responsivity in the decision-making processes in the European Parliament and the founding of transnational political parties.

Though, one cannot preclude that due to the complexity of decisions in financial, economic and monetary policy as well as concerning sustainable budgetary consolidation, a countermovement may form in the long run that considers that the significance of *government for the people* and thus the general welfare in those

[213] Cf. European Parliament resolution of 20 November 2012, P7-TA-2012-430, Decisions no. 1 and 13. Cf. also Decision no. 9: "The European Parliament [c]onsiders a substantial improvement of the democratic legitimacy and accountability at Union level of the EMU governance by an increased role of Parliament as an absolute necessity and a precondition for any further step toward a banking union, a fiscal union and an economic union" See most recently, European Commission, *5-Presidents-Report 'Completing Europe's Economic and Monetary Union'*, 2015, p. 17.

[214] Benz 2005, p. 276.

matters can only be ensured effectively by technocratic decisions. Admittedly, in these years of crisis another development seems to emerge, namely scepticism by a growing number of citizens towards all institutionalised forms of parliamentary democracy. It is characterised by protest ("Occupy" and "Blockupy") which strives to express the felt powerlessness against all forms of social and economic inequality and the refusal of "global capitalism" (embodied by "the banks"). As an alternative concept, they advocate "global justice". The fight against "TTIP" is one of the most significant ciphers of these protest movements and marks the shift towards an "autonomous and spontaneous sub-system of civil society"[215] which wants to keep open the political process and, therefore, rejects to set out its "results" in a legal framework.

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[215] Cf. Lord 2007, p. 150 who adds, that "the representative qualities of parliamentary policies can be achieved by filtering bottom-up initiatives".

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