



The European Union: a democratic institution?

RESEARCH PAPER 14/25 29 April 2014

This paper asks questions about the democratic credentials of the European Union. The paper begins by looking at definitions of democracy and the historical development of democratic political systems. It then looks at the European Union's decision-making institutions and at a range of views from academics and politicians on the extent to which they conform to generally accepted norms of democratic government.

The paper acknowledges the EU's 'democratic deficit' and considers the causes of this. In the context of future EU Treaty reform, it considers possible remedies for the democratic deficit, including those proposed by the UK Government.

Vaughne Miller
Jon Lunn

Recent Research Papers

14/15	Economic Indicators: Budget Update	17.03.14
14/16	Ukraine, Crimea and Russia	17.03.14
14/17	Unemployment by Constituency, March 2014	19.03.14
14/18	Prospects for Afghanistan as ISAF withdrawal approaches	19.03.14
14/19	Wales Bill [Bill 186 of 2013-14]	27.03.14
14/20	Economic Indicators, April 2014	01.04.14
14/21	Direct taxes: Rates and Allowances 2014/15	04.04.14
14/22	Accident & Emergency Performance: England 2013/14. National and regional data	14.04.14
14/23	Unemployment by Constituency, April 2014	16.04.14
14/24	High Speed Rail (London-West Midlands) Bill[Bill 132-I & 132-II of 2013-14]	22.04.14

Research Paper 14/25

Contributing Authors: Steven Ayres, Social and General Statistics Section

This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as being up to date; the law or policies may have changed since it was last updated; and it should not be relied upon as legal or professional advice or as a substitute for it. A suitably qualified professional should be consulted if specific advice or information is required.

This information is provided subject to [our general terms and conditions](#) which are available online or may be provided on request in hard copy. Authors are available to discuss the content of this briefing with Members and their staff, but not with the general public.

We welcome comments on our papers; these should be e-mailed to papers@parliament.uk.

Contents

	Summary	1
1	Defining democracy	3
	1.1 Introduction	3
	1.2 Typology of democracy	3
	1.3 Genealogy of democracy	4
	1.4 Power, accountability, legitimacy and sovereignty	6
	1.5 Contemporary debates about democracy	9
	Is representative democracy broken at the national level?	9
	Can democracy reinvigorate itself at the international level?	10
2	What kind of union is the European Union?	11
	2.1 The EU aspires to be democratic	13
	2.2 EU Treaty guarantees	15
	2.3 The 'democratic deficit'	17
	2.4 National sovereignty and the primacy of EU law	19
3	Institutional issues	22
	3.1 European Commission	24
	Moves to democratise the Commission	25
	3.2 European Parliament	26
	From assembly of national politicians to directly elected parliament	27
	EP gains in legislative powers	28
	The turnout problem	30
	Why do EU citizens not vote in EP elections?	32
	Analysing the turnout issues	34
	3.3 The Council of the EU	38
	Council secrecy and moves towards openness	38
	The Ordinary Legislative Procedure	40
	Qualified Majority Voting	42
4	Participation by EU citizens and civil society	43
	4.1 EU citizenship	43
	4.2 Civil society	45
	4.3 Tackling the euro crisis	46
5	Dealing with the democratic deficit	47

5.1	Introduction	47
5.2	More 'differentiation' in the EU?	50
5.3	A bigger role for national parliaments?	53
5.4	Better parliamentary scrutiny of the EU	55
5.5	More interparliamentary cooperation?	58
5.6	A separate chamber for national parliaments?	62
6	UK Government and parliamentary views	63
6.1	Introduction	63
6.2	Bloomberg speech	64
6.3	A national veto mechanism: proposals for a 'red card' mechanism	65
7	Conclusions	69
	Appendix German Constitutional Court ruling on Lisbon Treaty	72

Summary

“While the real, philosophical, ideal or essential meaning of democracy remains the same, the actual practice of democracy may be said to be in the eye of the beholder”.

[Democracy and its practice: a general theory of democratic relativity](#), Daniel Tetteh Osabu-Kle, Carleton University, 2002

In order to assess the European Union’s democratic credentials, it is necessary first to define democracy. Of course, this is much easier said than done. Democracy is a complex and contested concept. Debate about its content and character may have originated in ancient Greece but it rages no less passionately today. There are arguably two primary types of democracy: direct democracy, in which all citizens directly participate in decision-making; and representative democracy, in which the power of the

people is delegated to periodically elected representatives.

Today, liberal democracy, with its strong affinity with the principle of representation and link to markets in the economic sphere, has become the dominant conception of democracy. But it has often been subject to criticism for not doing enough to address inequalities of wealth and power in society. Debates about democracy today can be said to have crystallised around two main questions: Is representative democracy broken at the national level? Can democracy reinvigorate itself at the international level? On that second question, there have long been major political disagreements about how much power can or should reside at the international level and what the basis of its legitimacy should be. Which brings us back to the subject of this paper – the EU as a democratic institution.

The democratic legitimacy of the EU has long been questioned - more so as successive EU Treaty amendments have limited the legislative powers of Member State governments by removing the national veto in decision-making, increasing the use of qualified majority voting and expanding the policy areas in which the EU has a role. Treaty amendments have on the other hand also enhanced the powers of the European Parliament and national parliaments, and provided for citizen consultations on major policy initiatives.

In spite of the European Parliament’s gains in legislative and oversight powers over the years, its relative weakness compared with the other decision-making bodies, the Council and Commission, as well as the low turnout for EP elections, tend to support the argument that, although it is directly elected, the EP also lacks democratic legitimacy.

The European Commission has long been criticised for being appointed rather than directly elected, and the Council for being secretive. Council transparency has been the subject of a number of reforms in the last two decades, which have resulted among other things in greater access to Council documents and Council sessions being opened to the public. Also, the next appointment of the Commission President will be linked to the May 2014 EP elections in accordance with the 2009 *Treaty of Lisbon*.

New roles and powers for national parliaments in the EU decision-making process have not convinced national politicians that they have any real power to influence EU decisions. National parliaments are responsible for scrutinising their governments and EU business, but there are questions about the efficiency and quality of their scrutiny.

There are now more opportunities for citizens to influence the EU through petitions and the new ‘citizens’ initiative’, but opinion polls indicate that these have not brought the EU much ‘closer’ to its citizens.

The UK Government believes national parliaments should have greater influence in EU decision-making, with a power of veto over EU legislative proposals. The Prime Minister intends to seek EU reforms that will put national parliaments in a stronger position in Europe.

1 Defining democracy

1.1 Introduction

The meaning of 'democracy' is highly complex and, to this day, much contested.

Bullock and Stallybrass usefully define it as "the rule of the *demos*, the citizen body: the right of all to decide what are matters of general concern."¹

Useful as this definition is, it leaves many questions unanswered. Who is included within the *demos*? How are decisions best made? What should be deemed matters of general concern? Is democracy fundamentally rooted in the state?

The same uncertainties arise whichever definition you propose – even that great democratic clarion call with the greatest popular reach: 'rule of the people, by the people, for the people'. In what follows, we do our best to explore these uncertainties and, by so doing, lay some foundations for our subsequent discussion of the European Union (EU) as a democratic institution.

1.2 Typology of democracy

There are arguably two primary types of democracy in the world today – although some make a case for including a third.

The first primary type is **direct democracy** – in which all citizens directly participate in decision-making. It is the oldest type, originating in Ancient Greece. The scope of Athenian citizenry did not extend to women, slaves and foreigners, but much more inclusive versions of the idea have been attempted in the modern era.² Referendums are an example of direct democracy today.

The other primary type is **representative democracy**, in which the power of the people is delegated to representatives periodically elected by them, who then assemble to make decisions on their behalf, usually through majority voting.³ Representative democracy is viewed as being part-and-parcel of a political order involving checks and balances, in which other key institutions such as the judiciary and the media also limit the power of government, where necessary challenging its decisions and actions. This is undoubtedly the dominant conception of democracy today.

A possible third primary type – perhaps the least familiar to people – is **associational democracy**, in which collective non-state bodies become involved in political decision-making. Examples of such organisations today are trades unions, human rights groups and business associations. Aware that some critics view democracies as vulnerable to lobbying -- or worse still, 'capture' – by powerful interests, advocates of associational democracy are

¹ A. Bullock and O. Stallybrass eds, *Fontana Dictionary of Modern Thought* (7th edition, London, 1981)

² Andrew Heywood, *Politics* (Basingstoke, 2002), p69

³ One version of representative democracy breaks with the majoritarian approach to decision-making. Consociational democracy, under which power is shared between elected representatives of all the main social groups in a country, has sometimes been introduced in post-conflict societies where it is feared a majoritarian approach to decision-making could trigger renewed violence. Past and present examples include Lebanon, Burundi and Northern Ireland.

keen to stress that, under the right conditions, it can be a powerful force for good as well as for ill.⁴

It is important to note that each of these types of democracy can be expressed across a wide spectrum, running from ‘minimalist’ at one end to ‘maximalist’ at the other – for example, direct democracy can involve an occasional referendum on the one hand, or a model based on almost perpetual participation on the other; representative democracy can sometimes extend to little more than periodic voting in a context where checks and balances barely exist in practice. Depending on where a person places themselves on this spectrum, views on whether a democracy is suffering from a ‘deficit’ – or, indeed, has even ceased to be democratic – will vary widely. Such considerations are also relevant today in debates about ‘democratisation’ – where countries undertake a transition from authoritarianism to democracy.⁵

1.3 Genealogy of democracy

Like all the central ideas shaping political society today, democracy has plenty of historical baggage. Democracy as an idea and practice had its origins in ancient Greece. However, even at its birth there were different and ambiguous definitions in play, ranging from a definition familiar to us today, ‘rule of the people, by the people, for the people’ (often ascribed to Cleon), to ‘all that is opposed to despotic power’ (Thucydides), to ‘a state where the freemen and the poor, being in the majority are invested with the power of the state’ (Aristotle).⁶

During the medieval period and subsequently in Europe, the predominant meaning of democracy was, according to Raymond Williams, drawn from Thomas Aquinas, “who defined democracy as popular power, where the ordinary people, by force of numbers, governed – oppressed – the rich, the whole people acting like a tyrant.” He argues that this meaning remained powerful until well into the 19th century and was used in the main as an argument *against* democracy because of the threat popular power might pose to property and security.⁷

Some academics have argued that the emergence from the mid-19th century onwards of representative democracy in which the representatives were entitled to be part of an assembly by virtue of having been elected by increasingly large sections of the population, was in part a defensive response by ruling elites to the growing threat from forms of popular power.⁸ Often under pressure from mass protests, representative democracies gradually extended the vote to larger groups of people: adult middle class men were first to gain the vote, followed eventually by working class men – and then ultimately, women.

But the supporters of representative democracy also had positive arguments they could make. Direct democracy, they argued, could not work in more complex, large-scale societies. For them, what the enemies of property and security failed to take into account was the fact that all men (and in due course, women and children too) have natural rights, over which

⁴ In his famous book *Democracy in America* (New York, 1945 [first published in 1835]), Alexis de Tocqueville argued that the web of voluntary associations and intermediate institutions existing in the early United States helped to prevent its democracy degenerating into a “tyranny of the majority”. For a more recent advocate of the positive case, see E.Olin Wright, *Envisioning Real Utopias* (London, 2010), pp152-53

⁵ Heywood, p81

⁶ R. Williams, *Keywords* (London, 1983), p93

⁷ Ibid, p94

⁸ See, for example: D. Reuschmeyer, E. Stephens and J. Stephens. *Capitalist Development and Democracy* (Cambridge, 1992)

untrammelled popular power, all too often manipulated by demagogues, can simply ride roughshod, with potentially disastrous consequences for a society.⁹

A philosophy and practice of *liberal democracy*, with a strong affinity with the principle of representation, gradually emerged from the 18th century onwards in opposition to this vision. This emergent philosophy placed political democracy within a set of restraining checks and balances in which the principle of periodic free election of representatives to a rule-based assembly was paramount. In the economic realm, markets were to be the capillaries of a free society.¹⁰

Nonetheless, some 19th century critics of liberal democracy rejected it on the grounds that the commitment to political equality did not extend sufficiently into the economic realm, stopping at equality of opportunity – well short of equality of outcome. Seeking to reconnect democracy with more radical conceptions of the term, many such critics were behind the rise of alternative political ideologies, including social democracy, out of which ultimately sprang a host of ‘reformist’ and revolutionary parties of the Left. However, during the 20th century, once in power, revolutionary parties of the Left abandoned political democracy, substituting themselves for ‘the people’, ostensibly in pursuit of maximum economic equality. Techniques of both direct democracy and representative democracy were deployed and abused to sustain those parties in power indefinitely in these ‘people’s democracies’.¹¹

20th century supporters of liberal democracy countered that it was perfectly possible under its aegis to address issues of wealth and power in society through a combination of markets and political action. More broadly, they insisted that it was a superior means of resolving the inevitable conflicts that arise between different groups in society in ways that all those groups would accept as legitimate – or, in the case of those who might have lost out, at least tolerate – on the grounds that their representatives might one day be in the majority in parliament and government and be able to shape decision-making in their favour.¹²

For at least 30 years after the end of the Second World War in 1945, most mainstream European parties across the political spectrum effectively endorsed a marriage of liberal and reformist social democracy in which associational variants (sometimes characterised as ‘corporatism’) gained significant ground. Of course, revolutionaries of the Left always viewed the positive case for liberal democracy as naive at best or self-serving at worst. But the fall of the Berlin Wall in 1989 heralded the collapse of most of the self-proclaimed people’s democracies and the marginalisation for a prolonged period of radical socialist politics. However, those who continue to adhere to this form of politics have argued that, since it was deprived of its historic enemy, the marriage of liberal democracy and reformist social democracy has come under strain; for them, the market has increasingly come to govern the state, generating a political economy of ‘neo-liberalism’ that is destructive of democracy.¹³ Since the 2007/08 global financial crisis, elements of this argument have got a hearing within more mainstream circles.¹⁴

⁹ Bullock and Stallybrass

¹⁰ Heywood, p77. The Nazi regime in Germany operated on a similar basis between the 1920s and 1945, leading Hannah Arendt after the Second World War to coin the concept of totalitarianism to describe what Nazism and Stalinism had in common.

¹¹ Heywood, p77

¹² B. Brivati, J. Buxton and A. Selsdon, *The Contemporary History Handbook* (Manchester, 1996), pp43-46

¹³ For a concise exposition of this argument, see: D. Harvey, *A Brief History of Neoliberalism* (Oxford, 2007)

¹⁴ M. Woolf, “[The big questions raised by anti-capitalist protests](#)”, www.ft.com, 27 October 2011

To sum up, over the centuries there has been a distinct reversal of fortune between the two main types of democracy identified earlier in our typology. Whereas until the 19th century, direct democracy was the predominant (but often negatively viewed) understanding of democracy, today it has been rendered relatively marginal by representative democracy, whose liberal variant is apparently now in the ascendant. The purchase on the human imagination of direct democracy has never been entirely extinguished. It has survived co-option by totalitarian governments over the past century and, indeed, has continued to operate in some form or other within many representative democracies. But it still carries a whiff of danger about it.

1.4 Power, accountability, legitimacy and sovereignty

By now it should be clear that there are a number of closely related political concepts which must also be addressed in order to enhance our understanding of the meaning(s) of democracy. Arguably amongst the most important of these concepts are *power* (some might prefer to use its synonym, authority), *accountability*, *legitimacy* and *sovereignty*.

Power

All forms of government involve the exercise of power by some people over others. As a concept and in practice, power has no intrinsic relationship to democracy. Power can be, and has often been, exercised absolutely and without limit, whether under absolute monarchies in the past or totalitarian states more recently. However, supporters of all types of democracy assert that one of its great virtues is precisely that it places limits upon the exercise of power through systems of checks and balances between different branches of government that have independence from each other.¹⁵ Supporters of democracy also claim that these systems of checks and balances increase the effectiveness of power whenever it is exercised.¹⁶

Accountability

Although forms of accountability can be found in political systems that may not qualify as democratic, supporters of democracy promote it as both the most desirable and effective means of ensuring accountability between citizens and those who hold power. It does so in essence by providing citizens with means (voting in elections) of removing those who hold power at their behest.¹⁷ By extension, this generates an incentive for power-holders to create, or at the very least acquiesce in, structures and processes of scrutiny and oversight (for example, parliaments and the media) through which their performance may be evaluated during periods when their electoral fate is not on the line. It follows from this argument that crucial preconditions for democratic accountability are official openness and transparency.¹⁸

Legitimacy

The legitimacy of a political and social system arises from the willingness of people to obey those who hold power because they have sufficient faith or trust in them. As with the concept of accountability, legitimacy can exist in non-democratic contexts, but advocates of democracy claim that freely and fairly electing those who hold power it is the most desirable and effective means of creating and sustaining legitimacy. Indeed, some of them go on to

¹⁵ Another way of describing these checks and balances is the separation of powers. For example, see Library Standard Note 6503, "[The separation of powers](#)" (last updated 16 August 2011)

¹⁶ The relationship between democracy and power has been a major preoccupation of political theorists over the decade. See, for example: B. Barry, *Democracy, Power and Justice: Essays in Political Theory* (Oxford, 1989)

¹⁷ Heywood, p70

¹⁸ "[Accountability and transparency: essential principles](#)", www.democracyweb.org

argue how well a democracy functions in practice can become an important test of the legitimacy of those in power. Nonetheless, even in well-established democracies, other bases for legitimacy, such as ‘tradition’ or the charisma of particular leaders, can remain influential.¹⁹ But it is not just political freedoms that bestow legitimacy. The vast majority of believers in the virtues of democracy also accept that, unless it also delivers a sufficient level of socio-economic benefit over time to sections of the population, its ability to create and sustain legitimacy will be damaged.

Sovereignty

Debate about the meaning of sovereignty has been no less fierce than debate about democracy itself. Sovereignty is about where and with whom power fundamentally resides. Its origins lie in kingship, or the rule of the sovereign. However, over the centuries it has become largely depersonalised. Today, sovereignty is often viewed as residing in three main – sometimes overlapping, sometimes conflicting – locations: in the people, in the state and/or in the nation.

Popular sovereignty

Unlike in the past, popular sovereignty is today largely used interchangeably with the concept of democracy, embodied by the mantra: ‘of the people, for the people, by the people’. But as we have already seen, agreeing what constitutes popular sovereignty is an altogether less straightforward matter.²⁰

*State sovereignty*²¹

State sovereignty has a complex and ambiguous relationship to democracy which has changed a lot over time. State sovereignty operates in two contexts: within a state and in relation to the rest of the world.

Within a state, where it is primarily expressed through popular (including parliamentary) sovereignty, its orientation is clearly democratic. But this has only become common over the last century. Prior to that, state sovereignty had little relationship to democracy.

When it comes to relations between states, state sovereignty is at first sight even less closely linked to democracy. Firstly, the *demos* may be hard to find (or create). Secondly, it is much more often the executive rather than the legislature (or some other form of popular power) that “acts as a sovereign” in the wider world.²²

Nonetheless, many believe today that there is an increasingly strong relationship between the two as a result of the evolution of international law.²³ The Westphalian state system that emerged during the 16th and 17th centuries established the principle of equality between sovereigns. It can be argued that, in doing so, it planted the seeds for the later emergence of ‘democratic elements’ within that system, which can be summed up by the phrase ‘international cooperation’.

¹⁹ “Political legitimacy”, Stanford Encyclopaedia of Philosophy, last updated April 2010

²⁰ A related formulation is “constitutional sovereignty”, which is often used in the context of the sovereignty of parliament. For example, see H.L.A. Hart, *The Concept of Law* (Oxford, 1994), pp149-50

²¹ For the sake of simplicity, the use here of the term ‘state’ should be taken to include the term ‘nation-state’.

²² S. Besson, “Sovereignty”, *Max Planck Encyclopedia of Public International Law*, para 72 [last updated April 2011 – available on request from the Library]

²³ Besson, “Sovereignty”, paras 70-71

Today, internationally recognised states have legal equality within the global order. This sometimes extends to equal voting rights in multilateral bodies – for example, at the United Nations General Assembly. In practice, some states have much greater weight in world affairs than others and this is sometimes reflected by unequal voting powers in such bodies – for example, the World Bank.

There has long been debate about the extent to which international cooperation between sovereign states violates the concept of popular sovereignty. There does not appear to be an inherent incompatibility. However, matters inevitably become less clear-cut if and when international cooperation between sovereign states begins to produce international institutions which aspire to a direct popular mandate of their own. The relationship of democratic states to such international institutions is unlikely to be simple or straightforward, given the dual loyalties this creates. It raises questions of whether – and if so, how far – sovereignty can be limited or divided. The EU is a pioneer in this regard.

Since the end of World War II, there have been important, if sometimes controversial, developments in international law that have made it increasingly difficult for sovereign states simply to ignore democratic principles. According to Besson, these originated in the desire of Western democracies to strengthen their own domestic legitimacy:

Post-1945, international law was seen by modern democracies as a new way to secure their democratic development. Given the lack of consensus on minimal democratic requirements and in view of the intricate relationship between human rights and democracy, entrenching human rights protection from the outside through minimal international standards became the way to guarantee their new democratic regimes. International sovereignty objectively limited in this way became, in other words, a direct way to secure domestic sovereignty in a legitimate fashion. As a result, modern democratic sovereignty now finds its source both in constitutional and international law. Seen differently, the sovereigns behind international law are peoples within States, and no longer States only. And these peoples organize and constrain their sovereignty through both the international and domestic legal orders.²⁴

Following the end of the Cold War in 1989, there has been a growing impulse within significant parts of the international community to consider that serious humanitarian abuses trump state sovereignty and legitimise external interference in a country's internal affairs. In this context, democratic inadequacies tend to be translated into the language of democracy's close cousin, human rights.²⁵

Finally, there have also been occasional attempts in recent decades to create 'communities of democratic states' that will act in concert to promote their values amongst non-democracies or countries in transition to democracy. Predictably, non-democracies have resisted such initiatives - but some non-Western democracies (for example, India) that continue to place a high premium on state sovereignty have also been reluctant to become involved.²⁶

²⁴ Besson, "Sovereignty", para 131

²⁵ Products of this trend include the International Criminal Court and the international legal norm known as 'The Responsibility to Protect'.

²⁶ L. Whitehead, "State sovereignty and democracy: an awkward coupling", in P. Burnell and R. Youngs, *New Challenges to Democratization* (Abingdon and New York, 2010), pp30-32

National sovereignty

This term is often used today virtually interchangeably with state sovereignty, although historically not all self-declared nations have necessarily had their ‘own’ internationally recognised state, or accepted the legitimacy of the one that contained them. Nevertheless, much of the discussion above about state sovereignty can also be taken to apply to national sovereignty.

1.5 Contemporary debates about democracy

Before launching into the main body of this paper, we first briefly explore two of the most important wider debates about democracy taking place today. Both of them have significant ramifications for an assessment of the EU’s democratic credentials.

Is representative democracy broken at the national level?

Despite the fact that it remains the dominant type of democracy today, critics of representative democracy at the national level have been on the increase in recent times.

Critiques of national-level representative democracy today include:

- A professional ‘political class’ has emerged, often having little in common with those they represent;²⁷
- As power has shifted elsewhere, including to supranational bodies, national representatives have become increasingly ineffective in holding governments to account;²⁸
- Powerful lobbies in society have established undue influence over national representatives – to the point where some have been captured by those interests. Trades unions and large corporations have been cited as cases in point;²⁹
- There has been a collapse of party loyalties amongst voters and the dominant response to national politicians has become ‘a plague on all their houses’; as a result voter turn-out in elections is often in decline.³⁰

This is not the place to assess the validity of such critiques, which are often interlinked. However, their growing currency has encouraged supporters of greater direct democracy – who can be found across the political divide – to hope that it might experience a revival.

The defenders of representative democracy counter that deficiencies can be overcome through appropriate reforms – for example, by opening up opportunities to people from a wider range of backgrounds to become an MP, returning powers to parliament and improving

²⁷ See, for example, P. Osborne, *The Triumph of the Political Class* (London, 2007) and G. Allen, *Reinventing Democracy* (London, 1995)

²⁸ For a discussion of these issues and more, see “[The state of accountability in 2013](#)”, Centre for Public Scrutiny, 2013

²⁹ Many analysts would argue that today it is large corporations – not least those which specialise in providing public services through contracts with the state – which embody this problem. See, for example: D. Beetham, “[Unelected Oligarchy: Corporate and Financial Dominance in Britain’s Democracy](#)”, Democratic Audit UK, 2011

³⁰ See Library Standard Note 5125, “[Membership of UK political parties](#)” (last updated 3 December 2012); “[Voter turnout in Western Europe since 1945](#)”, International IDEA, 2004

scrutiny, more regular resort to referendums; better use of social media; and by giving constituents the power to recall parliamentarians.³¹

However, a radical minority – sometimes with links to the anti-capitalist Left – is sceptical about whether reform of this kind will be enough and is open to dramatically different ways of organising political and economic life, including by experimenting with highly participatory techniques of direct democracy. However, tensions have arisen over how to sustain such initiatives. Given its apparently strong propensity to produce hierarchies, a high degree of institutionalisation is viewed with considerable ambivalence by radical activists and thinkers.³²

Can democracy reinvigorate itself at the international level?

Contemporary debates about representative democracy at the national level also have international implications.

Over the last 30 years or so, many democrats have come to the view that politicians are increasingly unable to exercise power effectively within and through states. Those who take this view contend that economic globalisation, which has been accompanied by the rise of influential non-state actors such as multinational companies and international NGOs, means that politics must operate beyond the national level. In their view, many policy challenges today require growing international cooperation. They accept that this co-operation inevitably involves some transfer (or loan) of state sovereignty but believe that this is more than compensated for by the power that flows back from being part of a group of countries that operates in concert. This means that sovereignty need not necessarily be considered 'lost'.³³

There is widespread acceptance today that international cooperation may in some circumstances take permanent institutional form and be imbued with certain degrees of power, but there remain major disagreements about how much power can or should reside at the international level and what the basis of its legitimacy should be.

For some, international institutions receive their mandate mainly from governments that are elected by the people at the level of the state. As such, democracy remains fundamentally rooted in the state and international cooperation should therefore be primarily intergovernmental in nature.³⁴

But others argue that some international institutions may embody a more ambitious vision and require deeper political transformations. In these circumstances, while it is accepted that long-standing interests and identities remain important, new ones are created by these institutions which in due course justify higher levels of integration. Where this is so, such integration means that the issue of democratic representation must be addressed. State-level representatives will be unable effectively to hold such institutions to account. The solution, then, could be the establishment of international assemblies of representatives specifically elected for this purpose and other forms of direct accountability to citizens.³⁵ Those who

³¹ The power to recall MPs has been on the political agenda in the UK. "Recall of MPs", www.gov.uk (last updated 29 November 2013)

³² Occupy is perhaps the most prominent example of recent years. See, for example: D. Graeber, *The Democracy Project: a History, a Crisis, a Movement* (London, 2013)

³³ For one discussion of these issues, see V. Sperling, *Altered States. The Globalization of Accountability* (Cambridge, 2009)

³⁴ For a discussion of some of these issues, see: T. Zweifel, *International Organizations and Democracy: Accountability, Politics, and Power* (Boulder, 2005)

³⁵ For example, A. Stutzer and B. Frey, "Making international organisations more democratic", *Review of Law & Economics*, January 2013.

make arguments for this kind of ‘international liberal democracy’ often describe themselves as “cosmopolitans”.³⁶

Such debates are highly germane in the case of the European Parliament, which shifted in 1979 from being an assembly of national parliamentarians to one in which representatives were directly elected in elections held in each member-state. At the same time, it is important to bear in mind that the EU is a unique case; to our knowledge, no other existing international institution has yet introduced direct elections to its own assembly. Those who believe democracy remains fundamentally rooted in the state are highly sceptical about the arguments made for direct elections to the European Parliament at the international level. This particular debate is dealt with in much more depth in the main body of this paper, so we will not expand on it here.

As we have seen, liberal cosmopolitans naturally favour international cooperation, including degrees of democratic integration where possible and appropriate. This can include elements of direct democracy. However, there are more radical currents of cosmopolitanism that go further, seeing a deeper, more fully democratised international cooperation as essential to changing unfair power relations within the global order.³⁷

Those who take this view complain that international cooperation has hitherto often been characterised by elite control and manipulation, with ordinary people at best largely passive beneficiaries. Views of this kind are, of course, also sometimes held by defenders of state sovereignty on the right of the political spectrum. But more radical cosmopolitans often go further, claiming that there is a ‘elite project’ specifically driven by corporations and the financial markets, and that many international institutions, as currently configured, have become the vehicles through which harsh measures are enforced that disproportionately affect the poor and vulnerable in society. Their solution is not to return to the state as the primary location of democracy but to strengthen international cooperation on a democratic basis through the deeper empowerment and participation of ordinary people.³⁸ While not dismissive of representative democracy, more radical cosmopolitans today tend to be attracted to direct democracy.

This viewpoint is in some ways a reiteration at the international level of the critiques by the anti-capitalist Left of representative democracy at the national level described above, although some reformist social democrats might also support aspects of this critique. The critique is nearly always internationalist in nature because its supporters strongly believe that no single country can succeed in promoting popular empowerment and participation on its own. Although its resonance increased following the 2007/08 global financial crisis, it remains a very much a minority perspective for now.

2 What kind of union is the European Union?

One of the problems in evaluating the democratic legitimacy of the EU is doing so against a valid benchmark when there is not one single template for what a democracy is (see section 1 above) and because “the meaning of democracy has also changed and evolved over time”.³⁹ Another is that the EU is not a state, although it has many of the features of a state,

³⁶ L. Martell, “Cosmopolitanism and global politics”, *Political Quarterly*, Autumn 2011

³⁷ J. Ingram, *Radical Cosmopolitics: The Ethics and Politics of Democratic Universalism* (New York, 2013). Sceptics might replace the word ‘radical’ with ‘populist’.

³⁸ See, for example, E.Olin Wright, *Envisioning Real Utopias* (London, 2010)

³⁹ Dr Gavin Barrett, University College Dublin, Written evidence to House of Lords EU Committee, [The Role of National Parliaments in the European Union](#), 6 February 2014.

and its members are not sub-state regions but sovereign states themselves. It is a supranational union of sovereign states. The 2009 German Federal Constitutional Court ruling on the compatibility of the *Treaty of Lisbon* with the German Constitution confirmed this status, providing a useful context for the discussion of the EU's democratic credentials:

With the present status of integration, the European Union does, even upon the entry into force of the Treaty of Lisbon, not yet attain a shape that corresponds to the level of legitimisation of a democracy constituted as a state. It is not a federal state but remains an association of sovereign states to which the principle of conferral applies.⁴⁰

According to the literature, the EU falls short of being democratically legitimate in many areas, but, as Sonia Piedrafita (Centre for European Policy Studies) points out, “Political legitimacy is a very contentious concept when referring to non-state entities such as the EU”.⁴¹ Micossi notes that, as the EU is not a state, “comparisons with state-type models of

“A system may benefit from a reasonably high level of legitimacy while not conforming to key features of democracy and vice versa. However, in the western tradition of liberal democracy, legitimacy and democracy are closely related”.

Brigid Laffan, “Democracy and the European Union”, 1999

democratic legitimisation may well prove misleading”. Brigid Laffan has written that “political theorists have tended to focus on democracy and legitimacy in the traditional nation-state, rather than non-state forms of political order” and “The EU is a challenge to how we conceptualize democracy, authority and legitimacy in contemporary politics”.⁴²

In terms of its structure and operation, the EU is not a straightforward inter-governmental organisation like the UN and it is not a federal entity like the United States. Sergio Fabrini⁴³ does not think either the intergovernmental or the fully federal model would work for the EU and that an EU integration strategy should focus on “amore satisfactory balance between the interests of states and those of citizens”. To achieve this, Fabrini thinks:

Europe needs political leaders who are able to look beyond these two strategies, who are aware that an intergovernmental union can never be a political union, and, at the same time, have also grasped that a federal union is not a federal state.⁴⁴

The EU has dimensions of both a confederation and a federation. According to Michael Burgess's⁴⁵ analysis, the EU is “neither a federation nor a confederation in the classical sense”, but “the European political and economic elites have shaped and moulded the EC/EU into a new form of international organization, namely, a species of ‘new’ confederation”.⁴⁶ Joseph Weiler⁴⁷ thinks the EU has “charted its own brand of constitutional federalism”.⁴⁸ Helen Wallace describes the EU system as a “contest ... between a loosely

⁴⁰ Federal Constitutional Court Press office, [Press release no. 72/2009 of 30 June 2009 \(re. Judgment of 30 June 2009 on Act Approving the Treaty of Lisbon compatible with the Basic Law\)](#).

⁴¹ [EU Democratic Legitimacy and National Parliaments](#), CEPS essay No. 7, 25 November 2013

⁴² “Democracy and the European Union”, in *Developments in the European Union* edited by Laura Cram, Desmond Dinan and Neill Nugent, 1999

⁴³ Director of the Luiss School of Government and Professor of Political Science and International Relations at LUISS Guido Carli

⁴⁴ [Presseurop, 4 September 2013](#), “A third way forward for Europe”

⁴⁵ Michael Burgess is Professor of Federal Studies and Director of the Centre for Federal Studies (CFS)

⁴⁶ Michael Burgess, *Federalism and European Union: The building of Europe, 1950–2000*, 2000, p. 49.

⁴⁷ Hague Academy and New York University.

⁴⁸ Chapter 2, *Federalism without Constitutionalism: Europe's Sonderweg: the federal vision: legitimacy and levels of governance in the United States and the European Union*, “Europe has charted its own brand of constitutional federalism. It works. Why fix it?” 2003.

intergovernmental system, enabling member states to cooperate as a consortium, and tight supranationalism, based on autonomous European institutions” where “different institutional arrangements operate for different policy domains at different points across this spectrum”.⁴⁹ In other words it is a kind of compromise of competing and complementary systems and arrangements. As the EU has expanded from six to 28 Members, the institutional structure has evolved but has remained constrained by opposing forces that have resulted in compromises and a degree of stability. Laurent Pech comments:

... institutional change in the EU continues to be largely shaped by antagonistic interests and philosophies (e.g., supranationalism v. intergovernmentalism, enhanced democratisation v. preservation of national sovereignty, interests of small countries v. those of large countries), and compromises must be constantly sought to guarantee the unanimous ratification of any new treaty by the Member States. The co-existence of these contrasting interests and philosophies largely explains why the Union’s institutional framework has shown a high degree of stability over the years.⁵⁰

Some governments, headed by the current UK one, would like an altogether different kind of EU and a different relationship between the EU and its Member State governments and parliaments. The following sections look at the democratic dimensions of the EU system, the so-called ‘democratic deficit’ and suggestions as to how this could be remedied. UK views are discussed in Section 6 of this paper.

2.1 The EU aspires to be democratic

The Laeken Declaration

“The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses.

However, the European project also derives its legitimacy from democratic, transparent and efficient institutions. The national parliaments also contribute towards the legitimacy of the European project (emphasis added). The declaration on the future of the Union, annexed to the Treaty of Nice, stressed the need to examine their role in European integration.”

The EU does not conform fully to any of the definitions of democracy in Section 1 of this paper, although it has elements of representative, direct and associational democracy. Just as there are a number of competing models of democracy, so there are within the EU system a number of competing models, systems, roles and principles. The EU has evolved as a hybrid system straddling the national and the transnational.⁵¹ It is unique - *sui generis* - not homogeneous socially or culturally; politically only in so far as all Member States are deemed to be themselves democratic.

After the negative Danish referendum on the Maastricht Treaty in 1992, the subsequent Treaty amendment negotiations leading to the Amsterdam Treaty (1997) focused on institutional reforms and citizenship rights, in an attempt to make the EU more

relevant and accessible to its citizens. The Commission’s White Paper on Governance⁵² in July 2001 referred to the EU’s “double democratic mandate through a Parliament representing EU citizens and a Council representing the elected governments of the Member States”. The EU, it stated, had achieved “by democratic means” fifty years of stability, peace and economic prosperity, high standards of living, an internal market and a strengthened

⁴⁹ Wallace, *ibid.*

⁵⁰ Laurent Pech, “[The Institutional Development of the EU Post-Lisbon: A case of plus ça change...?](#)” UCD Dublin European Institute Working Paper 11-5, December 2011.

⁵¹ Helen Wallace, “Designing Institutions for an Enlarging European Union”, *Ten Reflections on the Constitutional Treaty for Europe* edited by Bruno de Witte, European University Institute, 2003

⁵² [COM \(2001\) 428 final](#), 25 July 2001.

Union voice in the world.⁵³ However, the White Paper and the [Laeken Declaration on the Future of the European Union](#) of the same year emphasised the democratic challenge facing the EU. At Laeken in December 2001 Member State governments concluded that there was an urgent need to increase the democratic legitimacy and transparency of the EU's institutions, to improve their efficiency in an enlarged Union, and to better associate the national parliaments with the EU's decision-making process.

The first question is thus how we can increase the democratic legitimacy and transparency of the present institutions, a question which is valid for the three institutions.

How can the authority and efficiency of the European Commission be enhanced? How should the President of the Commission be appointed: by the European Council, by the European Parliament or should he be directly elected by the citizens? Should the role of the European Parliament be strengthened? Should we extend the right of co-decision or not? Should the way in which we elect the members of the European Parliament be reviewed? Should a European electoral constituency be created, or should constituencies continue to be determined nationally? Can the two systems be combined? Should the role of the Council be strengthened? Should the Council act in the same manner in its legislative and its executive capacities? With a view to greater transparency, should the meetings of the Council, at least in its legislative capacity, be public? Should citizens have more access to Council documents? How, finally, should the balance and reciprocal control between the institutions be ensured?

A second question, which also relates to democratic legitimacy, involves the role of national parliaments. Should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European Parliament has no competence? Should they focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?

The third question was about how the EU could “improve the efficiency of decision-making and the workings of the institutions in a Union of some thirty Member States”. What Laeken did not identify as a problem, let alone seek to tackle, was how the answers to the first two questions could be reconciled with the answer to the third.

The Lisbon Treaty which came into force in December 2009 (and before Lisbon the failed EU Constitutional Treaty) sought amongst other things to improve both the efficiency and the democratic legitimacy of the EU. While many argue that Lisbon has significantly strengthened democracy and legitimacy in the EU, others think Lisbon increased efficiency at the expense of democracy.⁵⁴

⁵³ Kenneth Armstrong, School and Department of Law, Queen Mary, University of London, called the claim a “half truth”, noting that the EU had only recently acquired “the bells and whistles of democratic constitutionalism”. He thought they had been the “product of transnational technocratic decision-making among elite political actors”.

⁵⁴ See, for example, *Financial Times*, 16 June 2008, Gideon Rachman, [Ireland's bold blow for democracy](#).

2.2 EU Treaty guarantees

The European Union Treaties as amended by Lisbon comprise the *Treaty on European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU), which together form the constitutional basis of the EU. Like many state constitutions they set out *inter alia* an institutional framework for the way the EU operates, a set of principles by which it will act, provisions on where powers and competences lie, and rules on how these things can be changed.

Article 4(1)TEU states that “competences not conferred upon the Union in the Treaties remain with the Member States”, confirming the presumption in the ‘subsidiarity principle’ set out in Article 5(2)TEU that:

... the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to obtain the objectives set out therein. Competences not conferred upon the Union in the Treaties shall remain with the Member States.

The EU has no competences by right and no “competence-competence” (i.e. it cannot decide its own competences). The Court of Justice of the EU (CJEU) supervises this principle and acts on alleged breaches of it.⁵⁵ But the Court has been accused of judicial activism in its willingness to promote the interests of the EU and EU integration, sometimes to the detriment of the interests of the Member States, and in the 1960s and 1970s established doctrines such as ‘direct effect’ and the primacy of EU law (see below) that are now the basis for the legal relationship between the EU and the Member States.

The EU Treaties aspire to create a democratic foundation for the Union. Article 10 TEU requires that EU action is founded on “representative democracy” (for definition see section 1 above).

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament.

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

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

This Article formalises the concept that the heads of state and government in the European Council and government ministers in the Council are themselves democratically accountable to their national parliaments or to their citizens. The Treaties thereby link democratic legitimacy at EU level to accountability and legitimacy at national level: democratic legitimacy is not just a matter of EU governance but also of domestic governance.

Article 11 TEU contains various provisions which complement the representative system:

⁵⁵ See, for example, [Case C-376/98](#), *Germany v Parliament and Council (tobacco advertising)*, [2000] ECR I-8419.

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

Article 12 sets out how national parliaments contribute to the “good functioning of the Union”:

- (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
- (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;
- (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;
- (d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;
- (e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;
- (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.⁵⁶

Furthermore, the preamble to the EU's Charter of Fundamental Rights states that the EU is “founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law”. These are core principles and the individual, rights and duties, are at the centre of the EU's activities.⁵⁷

⁵⁶ The word ‘democracy’ or ‘democratic’ is used 16 times in total in the EU Treaties, Protocols and Declarations, which number over 400 pages: 10 times in the TEU, twice in the TFEU, once in the Protocols, once in the Declarations and twice in the European Charter of Fundamental Rights.

⁵⁷ EU membership criteria require that the candidate countries must have achieved, amongst other things, stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.

The EU Treaties provide mechanisms for national parliaments to contribute to the decision-making process. Under two legally binding protocols attached to the EU Treaties, national parliaments not only scrutinise EU documentation, but may object to Commission proposals. The *Protocol on the Application of the Principles of Subsidiarity and Proportionality* (the subsidiarity Protocol) sets out procedures for challenging draft legislation on the grounds of subsidiarity.⁵⁸ The *Protocol on the Role of National Parliaments* places obligations on EU institutions to send all documents to national parliaments and to wait up to eight weeks before adopting legislation so that they can effectively scrutinise the documentation and hold their governments to account with regard to them.⁵⁹ Article 9 of this Protocol also states that the EP and national parliaments “shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union”.

Under Article 5(3) TEU national parliaments “ensure compliance with the principle of subsidiarity in accordance with the procedure provides for in the Protocol” and in Article 12(b) TEU they “contribute actively to the good functioning of the Union” by seeing to it “that the principle of subsidiarity is respected”. The second recital of the *Protocol on the Role of National Parliaments* recalls that Member States wish: “to encourage greater involvement of national Parliaments in the activities of the European Union and to enhance their ability to express their views on draft legislative acts as well as on other matters which may be of particular interest to them”.

But did the Lisbon Treaty really fully involve national parliaments in European decision-making,⁶⁰ or did Lisbon merely give “the appearance of greater democratic legitimacy” to EU affairs?⁶¹

2.3 The ‘democratic deficit’

A democratic deficit is said to exist where institutions fall short of general principles of democracy (e.g. participation, competition for power, election of political leadership by universal suffrage, transparency and accountability).

EU definition (*Europa*) of democratic deficit:

“The democratic deficit is a concept invoked principally in the argument that the European Union and its various bodies suffer from a lack of democracy and seem inaccessible to the ordinary citizen because their method of operating is so complex”.

The guarantees of a representative democratic system have been formalised in the EU Treaties and have been confirmed by the Court of Justice of the EU (CJEU) on various occasions. The Treaties appear to provide a clear and equitable legal and constitutional basis for power, accountability and legitimacy, one that was negotiated and agreed by the leaders of all EU Member States and endorsed by their parliaments and/or electorates.

So why do so many accuse the EU of not being democratic, of having a ‘democratic deficit’? The accompanying reading list to this paper contains a fraction of the literature on the subject of the EU’s democratic deficit,⁶² which has been a criticism of the EU from its very early days.

The term ‘democratic deficit’ in relation to the EU has been attributed to various originators. The German newspaper editor and intellectual Theo Sommer referred to it in 1973.⁶³ The

⁵⁸ The principle set out in Article 5(3) TEU, whereby the EU should act only if action at EU level would be more effective than at national level.

⁵⁹ For more information on the protocols, see SN/IA/6297, 12 April 2012

⁶⁰ See, for example, Carlo Casini, Chair of the EP’s Constitutional Affairs Committee, uncorrected evidence, Lords Select Committee on the European Union Inquiry on the Role of National Parliaments 9 January 2014.

⁶¹ Lord Boswell of Aynho, Chair of Lords EU Committee, uncorrected evidence, 9 January 2014.

⁶² See Standard Note 6871, [Democratic Legitimacy and the EU: reading list](#), 29 April 2014.

⁶³ *Foreign Affairs*, Vol. 51 No. 4 July 1973, “[The Community is Working](#)”

term was also used by the Young European Federalists in their [1977 manifesto](#) and by the academic and former Labour MP David Marquand in 1979.⁶⁴ Although it emerged in the early 1970s, the democratic deficit has been attributed largely to successive EU Treaty amendments since 1986 (the *Single European Act*) which have incrementally reduced the powers of individual Member States and challenged the traditional concept of national sovereignty. The main characteristics are:

- The increased use of qualified majority voting (QMV – about 74%) for the adoption of legislation in the Council;
- Limiting Member States' powers by removing their veto in the Council of Ministers;
- Expanding the policy areas in which the EU has a role, sometimes excluding any action by Member States (EU 'exclusive competence');
- An increase in executive power and a decrease in national parliamentary control with deeper EU integration.

The following observations refer to other aspects of the perceived democratic deficit:⁶⁵

- The EU's executive, the Commission, is unelected;
- The EP is too weak compared with the Council and Commission;
- EP elections are not really 'European' elections and turnouts are low;
- The EU is too distant from voters;
- The EU adopts policies that are not supported by a majority of EU citizens;
- The Court of Justice makes law rather than interpreting it;
- There is a lack of transparency in the Council's adoption of legislation and in certain appointments (e.g. EU Commissioners);
- EU law has primacy over national law and constitutions.

The EU and the Member States agree that the EU needs to tackle legitimacy issues, but they diverge over where the source of EU democratic legitimacy should lie. Several EU governments believe they should have more power, that the EU should be more inter-governmental. Some governments maintain that only their own national parliaments can make the EU more accountable and legitimate. They argue that the EU adopts decisions in which national parliaments have had only limited input and influence, that subsidiarity has been an ambiguous and elusive concept. Not until the Lisbon Treaty has there been a mechanism for involving national parliaments in alerting the Commission to subsidiarity issues through an 'Early Warning Mechanism' ('yellow card'), but this mechanism has been criticised for not compelling the Commission to rethink a proposal to which national parliaments object on subsidiarity grounds.⁶⁶ In [evidence](#) to the Lords EU Committee Inquiry into the Role of National Parliaments in the EU, Professor Dr Hermann-Josef Blanke,

⁶⁴ He was referring to the EEC in *Parliament for Europe*.

⁶⁵ See also, for example, *Journal of Common Market Studies*, 2006 Volume 44. Number 3. pp. 533–62, "[Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik](#)", Andreas Follesdal (University of Oslo) and Simon Hix (London School of Economics).

⁶⁶ Under the early warning mechanism set out in the subsidiarity protocol, national parliaments have the right to challenge a Commission proposal on subsidiarity grounds, forcing the Commission to rethink but not necessarily revise or withdraw the proposal.

University of Erfurt, referred to this situation as a “paradox ... in relation to the democratic principle, which the role of national Parliaments has been structured to foster”. Furthermore, as MEP Andrew Duff has pointed out, while national parliaments thought that triggering a yellow card was a triumph for them and for democracy, the EP saw this as a failure of the democratic process.⁶⁷ Another development, the increased use of trilogues⁶⁸ and first reading agreements,⁶⁹ present legitimacy challenges to parliamentary scrutiny committees across the EU.

Some argue that a fundamental lack of understanding of the EP and the consequent lack of engagement between the EP and national parliaments contributes to the lack of democratic legitimacy of the EU as a whole and the EP in particular.

2.4 National sovereignty and the primacy of EU law

As noted in section 1, sovereignty is about where and with whom power resides. Power is often expressed as ‘competence’ in the EU. The effects of the EU Treaties and EU law on national legislatures, the ‘Europeanisation’ of national law-making and the concept of ‘pooled sovereignty’ have all been problematic from time to time and have produced a body of case law at the CJEU – though not always in the national courts - that confirms the supremacy of EU law in the legal order of the Member States. Many international treaties require the pooling, and thus a limitation, of national sovereignty. This limitation arises, for example, from collective decision-making, majority voting, adherence to a particular set of rules or the obligation to bring national laws into line with a ratified treaty. Some have their own courts and monitoring mechanisms.⁷⁰

Under customary international law, international treaties take precedence over domestic law where there is a conflict. The EU is no exception to this principle, but the EU is unique in having created its own legal system in which European laws are enacted as domestic laws. EU Regulations are directly applicable in all Member States, while directives and decisions are implemented as domestic laws. All are binding instruments. From the birth of the European Coal and Steel Community (ECSC) in 1951 and the European Economic Community (EEC) in 1957, Member States have been required to pool sovereignty in areas covered by the relevant Treaties, and the presumption has always been that EU membership is conditional upon a limitation of sovereignty. During the Second Reading of the *European Communities Bill* in 1972 the then Chancellor of the Duchy of Lancaster, Geoffrey Rippon, said of the provision which became section 2(2) of the [European Communities Act 1972](#) (the ECA):

As for the future, our obligations will result in a continuing need to change the law to comply with non-direct provisions, and to supplement directly applicable

⁶⁷ EP Constitutional Affairs Committee (AFCO) debate on COSAC and the Inter-parliamentary Conference on Economic and Financial Governance, 16 December 2013.

⁶⁸ Trilogues are composed of 2-3 MEPs, a Deputy Permanent Representative, normally from the State holding the EU Presidency, and a senior Commission official. The trilogue is a forum where each side in an OLP procedure can explain its position to the other and if possible say where agreement can be reached. The increase in trilogues may have implications for the balance of power between the institutions.

⁶⁹ Attempts to agree on common texts after a single reading, instead of going through second and even third readings. The Data Protection Package, Tobacco Products Directive, Clinical Trials Regulation and Medical Devices Regulations were all, controversially, agreed in this way. According to Lukas Obholzer and Christine Reh, first-reading agreements increased “from 28% in the 5th EP to 77% in the present legislative term”. CEPS policy brief, [How to Negotiate under Co-decision in the EU Reforming Trilogues and First-Reading Agreements](#), May 2012.

⁷⁰ The UN and Council of Europe, for example, have legal machinery which ensures compliance with convention obligations and which may impose sanctions for non-compliance.

provisions, and it is not possible in advance to specify the subjects which will have to be covered.⁷¹

As Paul Craig⁷² points out, if a democratic Parliament agrees to EU membership, it also agrees to “some loss of autonomy”, which is “characteristic of any collective action”.⁷³ Not to do so could lead to a situation where EU membership would be untenable. Sir Konran Schiemann, former UK judge at the CJEU thinks it is “obvious that agreements from which anyone can escape at any time are pretty well useless”.⁷⁴ On the other hand, as Roger Liddle points out in *The Europe Dilemma: Britain and the Drama of EU Integration* (2014), the concept of sovereignty pooling, which “succeeded brilliantly in bringing about reconciliation and an end to war on the European continent”, has a quite different rationale today. The “simple test to which supranational sovereignty pooling should be subject” today, he argues, is whether “a case [can] convincingly be made that the national states of the EU will achieve significantly more through any new measure of sovereignty pooling than they could achieve on their own – in other words by the test of whether it delivers results”.

Member States’ constitutions provide for the transfer of sovereign powers to the EU or the pooling of sovereignty within the EU.⁷⁵ In the UK this has been achieved by means of the ECA. The UK Government was aware of the consequences of membership for national and parliamentary sovereignty long before the UK joined the EEC. They were drawn to the attention of the then Lord Privy Seal, Edward Heath, by the Lord Chancellor, Lord Kilmuir, who had no doubt that in signing the Treaty of Rome “we shall suffer some loss of sovereignty”, but that “At the end of the day, the issue whether or not to join must be decided on broad political grounds ...”.⁷⁶ The ECA allowed the Government to confer competence on the EC/EU, and subsequent conferrals or extensions of competence have been authorised by amendments to this Act. Under Section 2(1) ECA all directly effective EU law is enforceable in the UK domestic courts. If the UK were to enact legislation which it knew contradicted EU law, the UK courts would be faced with a contradiction. In the UK one of the main exponents of the primacy issue was the so-called ‘Metric Martyrs’ case, *Thoburn v Sunderland City Council*.⁷⁷ In the appeal judgment, Lord Justice Laws confirmed the sovereignty of Parliament and Parliament’s legislative supremacy vis-à-vis the EC, but thought the traditional doctrine had been modified, by the common law and “wholly consistently with constitutional principle”.⁷⁸ He described how the Courts had found their way through the “*impasse* seemingly created by two supremacies, the supremacy of European law and the supremacy of Parliament”, comparing the ECA to the “family” of “constitutional statutes” such as the *Magna Carta*, the *Bill of Rights*, the *Human Rights Act* and others.⁷⁹

The doctrine of direct effect⁸⁰ and the primacy of EC/EU law⁸¹ have been established by the CJEU. Lisbon Treaty Declaration 17 recalls ECJ case law in this respect and cites the *Opinion of the Council Legal Service* that “primacy of EC law is a cornerstone principle of

⁷¹ HC Deb Vol 831, 15.2.72, c282

⁷² Professor of English Law, University of Oxford.

⁷³ *The European Constitution in the Making*, “The ECJ, National Courts and the Supremacy of Community Law”,

⁷⁴ Regent’s University London, *The UK & Europe: Costs, Benefits, Options. The Regent’s Report 2013*, “The debate about Sovereignty” p.232.

⁷⁵ E.g. New article 23 on the European Union was introduced into the German Basic Law. A constitutional revision of 25 June 1992 gave the French Constitution Title XV to take account of Maastricht.

⁷⁶ Letter 14 December 1960

⁷⁷ [2003] QB 151

⁷⁸ Supreme Court, Queen’s Bench Division, Divisional Court, 18 February 2002, Lord Justice Laws and Mr Justice Crane, at <http://www.metricmartyrs.sageweb.co.uk/appealjudgment.htm>

⁷⁹ http://www.hmcourts-service.gov.uk/judgmentsfiles/j1008/THOBURN_v_SUNDERLAND.htm

⁸⁰ Individuals can immediately invoke EU law before courts, independent of whether it has been enacted in national law. See Case 26/62, *Van Gend en Loos v Netherlands administratie der belastingen*.

⁸¹ Case 6/64, *Costa v ENEL*; Case 41/74, *Van Duyn v Home Office*.

Community law". EU law also has priority over other international law.⁸² However, the primacy assumption continues to raise questions about sovereignty and whether, or to what extent, sovereignty can be limited or divided. Not all Member States have accepted the precedence of international law, claiming ultimate authority over potential infringements of their constitution by acts of international or EU law.⁸³ Legal opinion is increasingly questioning the unconditional supremacy of international and EU law over domestic constitutional law, particularly where there is a conflict with core domestic values. According to Armin von Bogdandy,⁸⁴ "given the state of development of international law, there should be the possibility, at least in liberal democracies, of placing legal limits on the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles".⁸⁵ In the view of Professor Anne Peters,⁸⁶ competing international and national laws need some kind of compromise mechanism based on respect for the democratic credentials of states:

The task ahead then is to devise novel procedural mechanisms for the adjustment of competing claims of authority in order to realize what Mireille Delmas-Marty has called a 'pluralisme ordonné'.¹⁴² For instance, it must be acknowledged that national courts are under a *bona fide* obligation to take into account international law, must interpret domestic constitutional law as far as possible consistently with international prescriptions, and must give reasons for non-compliance. Moreover, any refusal to apply international law based on domestic constitutional arguments must be strictly limited to constitutional core values, and may be permissible only 'as long as' the constitutional *desiderata* have not been even in a rudimentary fashion incorporated into international law itself.¹⁴³ On the other hand, the international bodies should grant a margin of appreciation to national decision-makers with a strong democratic legitimation.¹⁴⁴ Of course these suggestions bear the real risk of reinforcing the perception that international law is only soft law or even no law at all, with little potential to place robust constraints on the exercise of political powers. They may therefore seem minimalist or even subversive for international law and global governance. However, it is my hope that procedural principles for ordered pluralism might work constructively, and provide, together with further democratization of international law, a flexible and sustainable response to

⁸² See, for example, cases C-420/05P and C-415/05P, *Kadi and Al Barakaat*, Grand Chamber judgment, 3 September 2008, paras. 285 and 306-09.

⁸³ For example, in the *Arcelor* decision of 8 February 2007, the French *Conseil d'Etat* confirmed the supremacy of French constitutional law over international and EU law, while emphasising that the higher authority of the domestic constitution and the control of the constitutionality of EU acts by French judges must be reconciled with France's EU membership under Article 88-1 of the Constitution. The German Constitutional Court affirmed in *Görgülü* in 2004 that the Constitution (Basic Law) "does not waive the sovereignty contained in the last instance in the German constitution". See also German Constitutional Court Maastricht decision of 1993, BVerfGE 89, 155 (1992); in judgment 64/91, 22 March 1991, *Asepesco*, Spanish Constitutional Court implies that national authorities are bound by Spanish Constitution when implementing EU law; Danish High Court Maastricht Judgment of 6 April 1998, para. 9.6; Irish Supreme Court, judgement of 19 December 1989, *Society for the Protection of Unborn Children Ireland v. Grogan*, [1990] ILRM 350, 361 (separate opinion Walsh J); Section 18 of the UK's *European Union Act 2011* confirms the sovereignty of the UK Parliament: "Status of EU law dependent on continuing statutory basis. "Directly applicable or directly effective EU law (i.e. the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act".

⁸⁴ Professor of public law and international law, University of Heidelberg School of Law; Director of Heidelberg Max Planck Institute for Comparative Public Law and International Law.

⁸⁵ Armin von Bogdandy, "Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law" (2008) 6 *Journal of International Constitutional Law*, pp 397-413.

⁸⁶ Department of Public International Law, State and Constitutional Law, University of Basel

counter nationalist tendencies and non-compliance with international law.⁸⁷

Footnotes

¹⁴² Mireille Delmas-Marty, *Le pluralisme ordonné* (Seuil Paris 2006).

¹⁴³ Cf German Constitutional Court, BVerfGE 37, 271 (1974) – Solange I.

¹⁴⁴ ECHR, *Hatton v. UK*, appl. No 36022/97, judgment of 8 July 2003, para. 97: 'The national authorities have a direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.'

Is “ordered pluralism” the answer to the sovereignty question for EU Member States? Can EU States be relied upon to devise, implement and sustain, even in the face of international turmoil, a democratic, legitimate and accountable system by which to be collectively governed? All 28 EU Member States are considered to be “free”;⁸⁸ all are representative parliamentary democracies of one form or another and most have elected unicameral or bicameral legislatures.⁸⁹ This does not mean the EU system is automatically democratic, because the EU does not function as the sum of its component parts, but it probably means that the EU system stands a greater chance of being democratic than it would if its membership were largely dictatorships.

Fundamental contradictions remain as to how international treaty obligations sit with national sovereignty. Professor Mattias Kumm⁹⁰ has proposed that international law is inherently undemocratic, but that this might be mitigated if there is a strong link between international law and state consent:

But even then there is a residual problem, because many international obligations can't be unilaterally revoked by the state as a matter of international law, even when the majority of citizens using democratic procedures wants to do so. Problems of democratic legitimacy become even more serious, when Treaties authorize international institutions to make important social and political choices. Even if ultimately problem-solving or cooperation-enhancing benefits associated with international law may legitimate international law, there remains an aura of a legitimacy deficit that hangs over international law.⁹¹

The following section looks at the extent to which state (including parliamentary) consent contributes to the EU decision-making and institutional systems.

3 Institutional issues

The democratic deficit is said to lie mainly in the structure, composition, powers, procedures and interaction of the main EU institutions, the Commission, Council, European Parliament (EP) and Court of Justice. In the institutional triangle that forms the EU's decision-making mechanism, the Commission proposes legislation while the EP and the Council debate and adopt it. This structure, which underpins the so-called ‘Community method’, was set up by the *Treaty of Rome* and has not changed fundamentally, although the EP has gained powers incrementally with each EU Treaty change. The European Council of Heads of State and

⁸⁷ www.icl-journal.com Vol 3 3/2009, 170, [Supremacy Lost: International Law Meets Domestic Constitutional Law](#)

⁸⁸ According to Freedom House criteria, all EU States are rated 1/1 except for Croatia and Hungary with 1/2, Italy with 2/1, and Bulgaria, Greece, Latvia and Romania with 2/2. A [paper by DEMOS in 2013](#) argued that some States are “backsliding” in this respect (e.g. censorship under Hungary's media law).

⁸⁹ Some bicameral EU legislatures have an upper house that is not directly elected: the National Council of Slovenia, for example, is represented by certain interest groups; the UK House of Lords is represented by non-elected and appointed members.

⁹⁰ Head of the Rule of Law Centre, Wissenschaftszentrum Berlin für Sozialforschung.

⁹¹ Prof Dr Mattias Kumm, *Constitutionalism and the Moral Point of Constitutional Pluralism: Institutional Civil Disobedience and Conscientious Objection*, in Dickson/Eleftheriadis, *Philosophical Foundations of EU Law*, OUP, 2012

government, although not a legislator, has, with the introduction of the post of president in 2009, gained considerable weight as the main provider of political leadership at EU level. The Commission's role and powers are largely unchanged since 1957. Its right to initiate legislation has survived Treaty amendments, although Paolo Ponzano *et al* have argued that "its exercise in practice has been progressively eroded by the expansion and normalization of the codecision procedure",⁹² which involves the Council and EP in a complicated and lengthy process of debate and amendment (see below).

It was originally envisaged in the post-World War II context that the EEC's institutional structure would protect the interests of 'small' countries (then the three Benelux countries) and avoid the common weaknesses of intergovernmental institutions, such as the 'unanimity trap', which can delay or prevent decisions being adopted.⁹³ This concept has generally prevailed and the Commission's Governance White Paper in 2001 outlined the benefits of the 'Community method':

The Community method guarantees both the diversity and effectiveness of the Union. It ensures the fair treatment of all Member States from the largest to the smallest. It provides a means to arbitrate between different interests by passing them through two successive filters: the general interest at the level of the Commission; and democratic representation, European and national, at the level of the Council and European Parliament, together the Union's legislature.

- The European Commission alone makes legislative and policy proposals. Its independence strengthens its ability to execute policy, act as the guardian of the Treaty and represent the Community in international negotiations.
- Legislative and budgetary acts are adopted by the Council of Ministers (representing Member States) and the European Parliament (representing citizens). The use of qualified majority voting in the Council is an essential element in ensuring the effectiveness of this method. Execution of policy is entrusted to the Commission and national authorities.
- The European Court of Justice guarantees respect for the rule of law.⁹⁴

But critics have found the structure undemocratic. Professor Ian Ward commented that it did "not fit neatly" into the early definitions of democracy because it did not "respect the essential principle which lies at the heart of this constitutional tradition, the separation, and the balance, of powers."⁹⁵ Sonia Piedrafita commented on the singular nature of the EU's political system:

... the EU's political system largely differs from the system of separation of powers in place in modern democracies. The executive, legislative and judicial powers are not wielded exclusively by any single EU institution, and the checks and balances are understood in a different fashion. The principle of institutional balance – rather than Montesquieu's principle of separation of powers, which is overseen by the Court of Justice – ensures that EU institutions act within the limits of the powers conferred to them by the treaties. As for the principle of representation, the current distribution of seats of the European Parliament

⁹² *Notre Europe* study 89, [The Power of Initiative of the European Commission: A Progressive Erosion?](#) Paolo Ponzano, Costanza Hermanin and Daniela Corona, February 2012.

⁹³ See, for example, the United Nations Security Council, where from 1945 to the end of 2009, 215 resolutions on substantive issues were vetoed. A recent example is China and Russia, two of the permanent five SC members, vetoing a UNSC resolution threatening sanctions against Syria in July 2012.

⁹⁴ *European governance - A white paper*, [COM/2001/0428 final, 12 October 2001](#)

⁹⁵ Professor of Law, Newcastle Law School, *A Critical Introduction to European Law*, 3rd ed., 2009, p19

among member states represents a substantial deviation from equality, with the larger member states being underrepresented and the smaller states being largely overrepresented.² Moreover, the legislative powers of the European Parliament are more limited than those of the national parliaments, and the EU executive branch does not depend on a majority in the European Parliament. Therefore, unlike in liberal democracies, EU decisions do not necessarily reflect the ‘will of the majority’.⁹⁶

The EU does not have a government or president that citizens can vote out, and the political scientist, Peter Mair, has commented on the weaknesses of the EU system in not providing an effective opposition:

... it is clear that the EU misses the third great milestone that has marked the path to democratic institutions in the nation-states. That is, we are afforded a right to participate at the European level, even if we may now choose to avail ourselves of that right less frequently; and we are afforded the right to be represented in Europe, even if it is sometimes difficult to work out when and how this representative link functions; but we are not afforded the right to organize opposition within the European polity. There is no government–opposition nexus at this level. Second, and again following Dahl, as well as Kirchheimer and Schapiro, we know that a failure to allow for opposition within the polity is likely to lead either (a) to the elimination of opposition, and to more or less total submission; or (b) to the mobilization of an opposition of principle against the polity – to anti-European opposition and to Euroscepticism. Third, this development is also beginning to reach down into the domestic sphere, in that the growing weight of the EU, and its indirect impact on national politics, also helps to foster domestic democratic deficits, and hence also limits the scope for classical opposition at the national level. Here too, then, we might expect to see either the elimination of opposition or the mobilization of a new – perhaps populist – opposition of principle”.⁹⁷

3.1 European Commission

The Commission, the EU’s ‘executive’, is a collegiate body composed of one Commissioner per Member State, “chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt” (Article 17(3) TEU).

The Commission proposes and initiates legislation and monitors Member States’ compliance with EU law and the Treaties. It represents the EU externally, promotes the general interests of the EU and mediates in its internal affairs. It also plays a major role in the allocation of large amounts of funding from the EU budget, such as agricultural subsidies and structural funds.

Commissioners are nominated by Member States and are usually former politicians of high standing (e.g. former government ministers, even prime ministers). They are appointed by the Council by a qualified majority vote and with the consent of the EP. The Commission President is proposed by the European Council by QMV and elected by the EP by a majority of its members.

⁹⁶ [EU Democratic Legitimacy and National Parliaments](#), CEPS essay No. 7, 25 November 2013

⁹⁷ [Political Opposition and the European Union](#), *Government and Opposition* 10 January 2007

The Commission is widely seen as the most undemocratic of the EU's institutions. Its members cannot be put in place or removed directly by the ballot box. Its main source of legitimacy is said to lie with the vote of approval from the EP, together with the EP's power to dismiss the whole body, but this in turn raises questions about the legitimacy of the EP (see below). The Commission's executive powers of initiative and implementation also raise concerns. Since 1986 single market legislation has broadened the Commission's powers to propose legislation and to develop implementing rules, usually in the form of EU regulations.

The Commission is not a 'party government' like a national government, and as no party holds power in the EU, no party is responsible for its policies. Analysts have also found that in EP elections people vote largely to express an opinion on what their national governments are doing, rather than what the Commission is doing. When during the Convention on the Future of Europe in 2001 several Member States suggested allowing the majority in the EP, instead of the European Council, to nominate the Commission President, there were objections from a minority of governments, including the UK and France, which feared this would be too 'federalist'. However, under the Lisbon Treaty reforms, the EP "elects", rather than approves the Council's proposed candidate for President (Article 7(7) TEU). The European Council must now also take into account the results of the most recent EP elections when proposing a candidate for the Commission presidency. The changes represent a degree of politicisation which many argue gives the EU as a whole more legitimacy.

Moves to democratise the Commission

In 2013 the Commission President, José Manuel Barroso, in the [Blueprint for a deep and genuine economic and monetary union: Launching a European Debate](#),⁹⁸ maintained that democratic accountability can only be ensured at the level at which the executive decision is taken, while taking due account of the level at which the decision has an impact. The *Blueprint* called for greater involvement by national parliaments and the EP where there is further deepening of economic and monetary union, better EP and national scrutiny and greater inter-parliamentary cooperation between national parliaments and the EP (see also Section 4.3 on the euro crisis and Section 5 on dealing with the democratic deficit). The Commission has also initiated an EU-wide [debate on the future of Europe](#) by means of events, 'citizens' dialogues', internet polls and contributions to discussions.⁹⁹

In an analysis of the Commission, Andreas Fischer-Hotzel¹⁰⁰ summarises recent innovations that aim to improve citizens' participation in Commission initiatives, citing the deliberative poll on 'Tomorrow's Europe', Citizens' Consultations,¹⁰¹ multi-media websites (e.g. [Twitter](#)) and online forums such as 'Debate Europe': "These, and other projects, resonate with the European Union's strategy to strengthen democratic participation, demonstrated for example by the introduction of the principle of participatory democracy in the Treaty of Lisbon".¹⁰² But Fischer-Hotzel concludes that the Commission's attempts at participatory democracy fall short at a practical level because the EU does not have decision-making structures into which such contributions can be fed or acted upon:

⁹⁸ [COM/2012/777 final](#), 28 November 2012.

⁹⁹ See Barroso's [2013 State of the Union address](#).

¹⁰⁰ Technische Universität Darmstadt, Institute for Political Science.

¹⁰¹ For example, a citizens' dialogue was held in London on 10 February 2014 to discuss what the EU should be doing to tackle the euro crisis, what rights should citizens of the EU have and what the EU of the future should look like. http://ec.europa.eu/debate-future-europe/citizens-dialogues/unitedkingdom/london/index_en.htm

¹⁰² Democratic Participation? The Involvement of Citizens in Policy-making at the European Commission', *Journal of Contemporary European Research*. Volume 6, Issue 3, pp. 335-352. A recent example of citizen participation in an EU-wide debate is the [Assises de la Justice 2013](#), a forum on EU justice policies, to which the Commission asked for contributions from anyone with an interest in the conference issues and more broadly on the future justice policy of the EU.

The application of participatory procedures in the EU representative democratic political system is faced with certain practical problems stemming from legal restrictions and the multi-level and multi-lingual nature of the Union. The Commission's approach to participation has been to run or sponsor selected projects which encourage citizens to engage in discussion and consultation, especially in the period from 2005 to 2007. These projects, however, fell short of the normative ideal of participation because they were not connected to a specific decision-making process and because the citizens' input was often mediated by civil society organisations. In addition, there is no evidence that decision-makers felt normatively bound by the results.

Even the practical objective of discussion and (very general, unspecific) consultation could not be met satisfactorily for three reasons. First, face-to-face projects, which can necessarily involve only a limited number of people, were very few given the overall EU population of 500 million inhabitants, and online based projects could not attract great numbers of participants either, despite their technical potential. Second, not all instruments had a truly European dimension and some were confined to the local or regional level only. Third, all projects were faced with the problem of language. Only some projects provided adequate translation, but only at the price of a limited number of participants. Translation is costly, but no translation is exclusive. All these problems seem to be structural rather than accidental.

The author is doubtful as to whether future Treaty revision would be more receptive to participatory democracy, given the size and diversity of the EU and the range of interested parties that could potentially feed into policy- and decision-making. The use of the internet for participating in EU consultations, while valuable, is also criticised for not allowing participation in formal negotiations.

In the balance between participation by citizens/civil society and efficiency, the latter has been the priority, arguably in the interest of furthering EU integration. Some accuse the Commission of focusing on narrow economic interests over general public interest and a diverse range of civil society input. As Dr Femke van Esche¹⁰³ observes, this is a classic governance problem:

... the crux of politics at every level, local, national and European alike. The matter of achieving that delicate balance of fundamental, though not necessarily compatible values, such as democracy and efficiency, equality and autonomy. The classic problem of public administration: What degree of centralisation of power is required in order to act effectively, and how many checks and balances to vouch for sufficient public support?¹⁰⁴

3.2 European Parliament

The European Parliament, directly elected since 1979, has for many years been the focus of arguments about the EU's democratic legitimacy. The premise was that if the EP were given more substantive legislative power to carry out the tasks of a real legislative assembly, the EU as a whole would become more accountable and the democratic deficit would be reduced. The EP has gained substantial power since the 1970s, with reform of the rules for adopting the EU's annual budget, which gave it a power of veto over "non-compulsory

¹⁰³ Assistant Professor of European Integration, Utrecht School of Governance.

¹⁰⁴ *Presseurop*, [Caught in a democratic tangle](#), 3 April 2013

expenditure” (economic and social spending) and with direct elections and co-decision (now the Ordinary Legislative Procedure - OLP).¹⁰⁵

From assembly of national politicians to directly elected parliament

“The nature of European elections as second-order national elections is an indication not only of the dominance of national parties over European parties, but also of the attachment of national electorates to domestic politics”.

Stephen George and Ian Bache, *Politics in the European Union*, 2001

The European Assembly which pre-dated the EP was composed of national parliamentarians from the then nine Member States. It was largely deliberative but from the start was regarded as a precursor to a future, directly elected assembly. Yet, as early as 1955 there were doubts about a directly elected assembly: the Belgian Socialist MP, Pierre Wigny, said in a debate in the Coal and Steel Community Common Assembly on 24 June 1955 that a directly elected European assembly would “not create a shared sense of

belonging among voters and would cut the valuable ties between the Assembly and national parliaments”.¹⁰⁶ He elaborated:

If there are no longer personal ties between national parliaments and ourselves; if there is a different mode of suffrage and different results of representation, such that we argue over the representative value, within the nations themselves, of such-and-such an Assembly; if, this unity having been achieved, the Chambers are not re-elected at the same time and the vote of one side can be considered by the other side as involving a necessary change in government, then I fear that, through these highly premature reforms, which try to do too much too soon by endeavouring to guarantee a democratic nature which, I repeat, is indispensable, but already largely accomplished, we will arouse the fears of those who worry about the colossal shadow of a hypothetical Europe which would efface the various differences which exist and which must continue to exist between historic states and ancient nations.¹⁰⁷

The 1972 [Vedel Report](#), ‘Growth of Competency in the European Parliament’, argued for the EEC’s “Community element” to be reinforced. The report was optimistic that the Parliament could move towards a single electoral law once it had gained legitimacy on the strength of its first direct election. From 1979 directly elected MEPs sat in pan-European political groups (Socialist, Conservative, Liberal, Green etc) and not in national delegations. The Spanish MEP, Miguel Angel Martínez, giving evidence to the Lords EU Committee inquiry into the Role of National Parliaments in the EU, described a situation in the EP which reflected what he described as a “deficiency” both at national and EU level: that political majorities in the Council and EP make decision-making predictable and inevitable:

What I feel to be a deficiency in the process, in terms of the democratic functioning of all of our societies as well as these institutions, is that the same political majority that exists in the Council is the same political majority that exists in the European Parliament. What that means—and this is a larger scale of what happens in many member states, and it happened for a long time in my country—is that the European Parliament, despite having this role of exercising democratic scrutiny over the executive body, is dominated by the same political majority. That is what is happening here now. Very often, even though the Parliament has co-decision powers, because we have the same political majority in Parliament as we do in Council, the proposals that Council comes

¹⁰⁵ See Simon Hix and Bjørn Høyland, [Empowerment of the European Parliament](#), 2013

¹⁰⁶ Quoted in [Europarl Towards a Single Parliament: the influence of the ECSC Common Assembly on the Treaties of Rome 1957 – 2007](#), 50th anniversary of the Treaties of Rome.

¹⁰⁷ Quoted in [Europarl, Towards Direct Elections to the European Parliament](#), Paper written to mark the 30th anniversary of direct elections (June 1979), 2009.

out with end up being imposed. That limits the ability of the European Parliament to amend the proposals and the effect is lessened. I do not think that is satisfactory and that is something that could be improved in terms of the way the Parliament works.¹⁰⁸

The belief was that the directly elected assembly would be more democratic and therefore more legitimate in the eyes of the EU electorate. But could the former Assembly of elected national politicians have been a more democratic institution? In an article in 2010 Anand Menon¹⁰⁹ and John Peet¹¹⁰ thought the 1979 EP elections had indeed broken the direct link between national parliaments and the EP, and that direct elections had “come at a cost in lost legitimacy at home”:

The model of the European Assembly [...] solved this problem by choosing delegates from national parliaments as MEPs. But after direct elections were introduced in 1979, this organic link with national parliaments was weakened and, when dual mandates (allowing MEPs simultaneously to serve as MPs in their own country) were scrapped, later broken altogether.¹¹¹

Could the EP return to its former composition of national parliamentarians? The increased use of co-decision, which involves the EP at all stages of the decision-making process, and the expansion of policy areas in which the EU acts, mean that an MEP’s workload is much heavier today than it was in the 1950s, 60s and 70s, when the Assembly had virtually no legislative powers.¹¹² As Menon and Peet point out, this would probably make such an assembly untenable today; they argue instead for finding a better way of involving national parliaments in EU decision-making, and suggestions as to how this could be done are discussed in Section 5.3).

EP gains in legislative powers

Since 1986 the Member States have agreed through Treaty changes to give the EP more legislative power:

- The *Single European Act* of 1986 helped redress the institutional balance by giving the EP a second reading. Under the ‘cooperation procedure’, the Council could only approve a previously rejected proposal by a unanimous vote rather than by a qualified majority. Also, the EP received the right to veto the accession of new Member States and assent with the Council to international agreements.
- The Maastricht Treaty introduced co-decision and gave the EP an ultimate right to veto a legislative proposal by an absolute majority after two readings of the Council and EP.
- The Amsterdam and Nice Treaties extended the use of co-decision, giving the EP a say in a wider range of matters. The Nice Treaty gave the EP the right to institute proceedings before the ECJ seeking to review acts of the institutions
- The Lisbon Treaty made co-decision (renamed the Ordinary Legislative Procedure - OLP) the EU’s default decision-making procedure and extended it to justice and

¹⁰⁸ [Uncorrected evidence, 8 January 2014](#)

¹⁰⁹ Professor of European Politics and Foreign Affairs, Kings College, London.

¹¹⁰ Europe editor, *The Economist*.

¹¹¹ *Centre for European Reform*, [Beyond the European Parliament: Rethinking the EU’s democratic legitimacy](#), December 2010

¹¹² Another issue is the need for MEPs to travel between three different locations (Strasbourg, Brussels and Luxembourg). A single seat in Brussels would cut travel expenses and enable MEPs to spend more time dealing with policy and legislation.

home affairs areas such as immigration, offences and penalties, police cooperation and aspects of trade and agriculture policy. The EP gained almost equal rights with the Council in the adoption of legislation.

- Lisbon abolished the distinction between ‘compulsory’ and ‘non-compulsory’ expenditure, so that now the EP and Council determine all EU expenditure together.

The EP has also ‘democratised’ through soft powers, such as its right, by a two-thirds majority, to pass a motion of censure against the Commission, to question the Commission and Council at a regular question time and establish committees of inquiry to investigate cases of poor administration by the EU institutions. In spite of these gains, the EP’s relative weakness compared with the Council and Commission, and the repeatedly low turnout for EP elections, tend to support assertions that the directly elected and more powerful EP does not remedy the EU’s democratic deficit. As Dr Julie Smith, Cambridge University, [told the Lords EU Committee inquiry](#):

Granting the EP more powers only responded to one element of the democratic deficit, however. It ensured that there was a parliamentary dimension to legislative and budgetary decisions within the EU but it did not tackle the problems associated with holding national ministers to account for their actions within the Council of the EU. This was, and remains, primarily a task for national parliaments. How well national parliaments are able to fulfil this role depends in part on the formal powers of NPs under the Treaties but also on political will and resources within the various national chambers

For some, the EP is part of the legitimacy problem. Professor Adam Cygan, University of Leicester, in written evidence to the Lords Inquiry on the [Role of National Parliaments in the EU](#), thought that “unlike national parliaments which are expressions of popular democracy in each Member State, the European Parliament does not share many of the democratic credentials of national parliaments, remains distant from citizens and within the process of EU decision-making may be viewed as part of the legitimacy problem”. Roger Godino and Fabien Verdier thought that although the EP is “the sole democratic element in the whole fabric, [it] is seen as a hotbed of lobbying rather than as a shrine of democracy, and its members are elected on lists organised by political parties and consisting primarily of those politicians who fail to win the support of their own countries’ electorates” (to which their answer is the creation of a European democratic federation).¹¹³ Some are even more sceptical: Charles Grant of the Centre for European Reform (CER) suggests that “Much of the time, the parliament’s priority appears to be more power for itself ... The parliament always wants ‘more Europe’ - a bigger budget and a larger role for the EU”.¹¹⁴

Many commentators and would-be reformers emphasise the importance of the forthcoming EP elections as a chance for EU citizens to shape the EU for the next five years: Commissioner Viviane Reding said on 7 January 2014 that the elections were “Europe’s democratic moment. We must make sure citizens seize it” She appealed to voters to participate and not shun the ballot box or vote in protest for eurosceptic parties. In his [speech at the opening ceremony of the Greek Presidency](#) on 8 January 2014, President Barroso also called on EU citizens to contribute to the shaping of Europe by voting in the EP elections:

The buck stops, and rightly so, at the political leaders’ desk. But governments and institutions alone cannot tackle the complex challenges we face. That

¹¹³ *Notre Europe*, Policy Paper 105, 11 February 2014, [Heading towards a European Federation: Europe’s last chance](#).

¹¹⁴ *Centre for European Reform*, [Can national parliaments make the EU more legitimate?](#) Charles Grant, 10 June 2013

requires engaged European citizens. That is why we all should care about the upcoming European elections. It truly does cut to the heart of our European future and the unity of Europe.

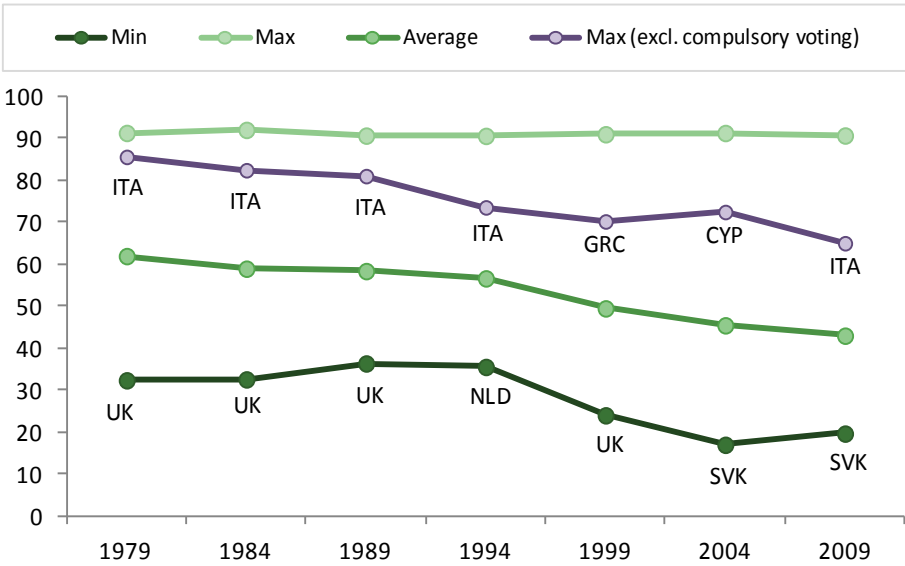
But this kind of rhetoric has not worked in the past: EP elections have been too remote and ‘foreign’ for the vast majority of EU citizens; EU reform too intangible and the EU too incomprehensible.

The turnout problem¹¹⁵

In modern democracies election turnout is seen as a key measure of political engagement, with low or decreasing turnout often seen as an indicator of political disengagement or disenchantment. The OECD states: “High voter turnout is desirable in a democracy because it increases the chance that the political system reflects the will of a large number of individuals, and that the government enjoys a high degree of legitimacy”.¹¹⁶

Fig 1 below shows that there has been a general decline in turnout since the first EP parliamentary election in 1979. This is true for the countries with the maximum (when excluding compulsory voting) and minimum voter turnouts, as well as average voter turnout across the years. The average turnout has fallen from 62% in 1979 to 43% in 2009. Even countries that have traditionally seen high turnout such as Italy have seen a decline (a fall of 20.6% in the same time period).¹¹⁷ With the exception of the 1999 EP elections, UK-wide turnout in the EP elections has remained relatively steady since 1979, but is consistently among the lower turnouts in the EU.¹¹⁸ In States with compulsory voting, such as Belgium and Luxembourg, turnout has been consistent and high.¹¹⁹

Fig 1. Maximum, minimum and average voter turnout at European Elections (1979-2009)



Source: European Parliament

¹¹⁵ This section was written by Steven Ayres. See also Standard Note 6865, [European Parliament Elections: Turnout trends, 1979-2009](#), 14 April 2014.

¹¹⁶ [OECD Better Life Index: civic engagement](#).

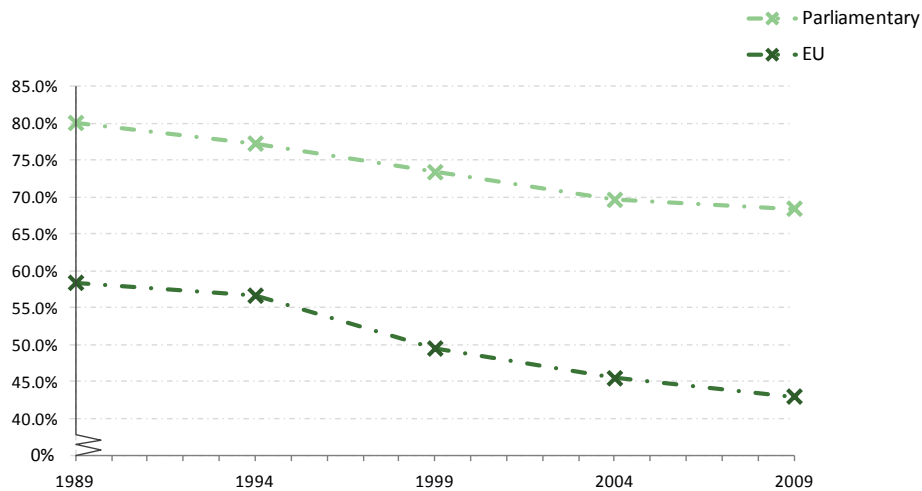
¹¹⁷ Sources: European Parliament, Turnout at the European elections (1979-2009) at [http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-\(1979-2009\).html](http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-(1979-2009).html) and International Institute for Democracy and Electoral Assistance (International IDEA) at <http://www.idea.int/vt/>.

¹¹⁸ See Standard note 5442, [UK Public Opinion on the European Union](#) 16 April 2012.

¹¹⁹ See IDEA, [“Compulsory Voting”](#), 21 March 2012.

Is this trend also true of national elections? Using data from the Institute for Democracy and Electoral Assistance’s (IDEA) Unified Database,¹²⁰ Figure 2 shows the average turnout at EU and national parliamentary elections in each of the 28 member states from 1989 to 2013. While there has been a progressive decline in turnout for both EP and national elections, the decline in EU turnout has been more pronounced. Between 1989 and 2009 turnout for EU elections fell by 15.4% compared with 11.6% in the case of national elections.

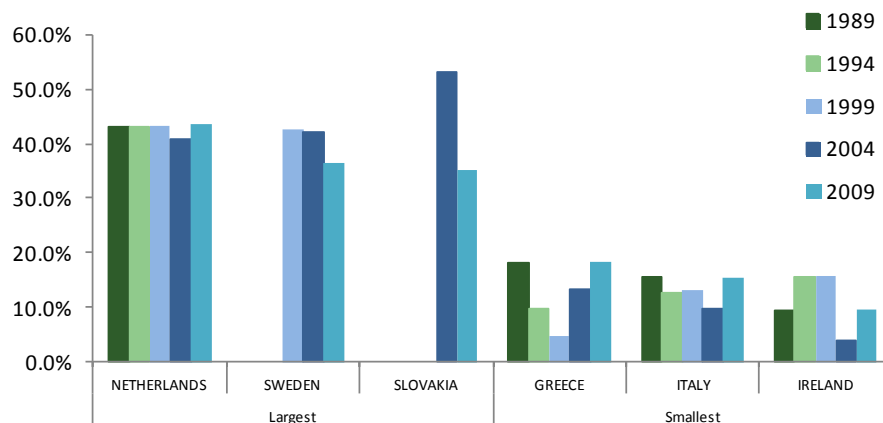
Fig 2. Average voter turnout at national parliamentary and EU elections, 1989-2009¹²¹



Note: Where EU and parliamentary elections did not occur in the same year, the most recent parliamentary election was used.

Turnout gaps (defined as the difference in voter turnouts between EU elections and the most recent national elections) show any differences within and between countries in terms of their preference to vote in national over EU elections. The average voter turnout gap for the 2009 EP election was 22.8% i.e. in the 2009 election, the average EU member state was likely to see a 22.8% lower turnout than in its most recent national election. The three countries with the largest and smallest turnout gaps are represented in figure 3, showing that while in almost all EU countries more people are likely to vote in national elections than EU ones, the scale of this difference varies significantly across the EU.

Fig 3. Largest and smallest voter turnout gaps between national and EU elections, 1989-2009¹²²



Note: Where EU and parliamentary elections did not occur in the same year, the most recent parliamentary election was used.

¹²⁰ <http://www.idea.int/uid/index.cfm>

¹²¹ Source: Institute for Democracy and Electoral Assistance

¹²² Source: Institute for Democracy and Electoral Assistance Unified Database

While the average difference in turnout between national and EU elections has increased from 17.5% in 1989 to 22.8% in 2009 (+5.3%), the gap has fallen slightly since peaking in 1999 (24.1%).

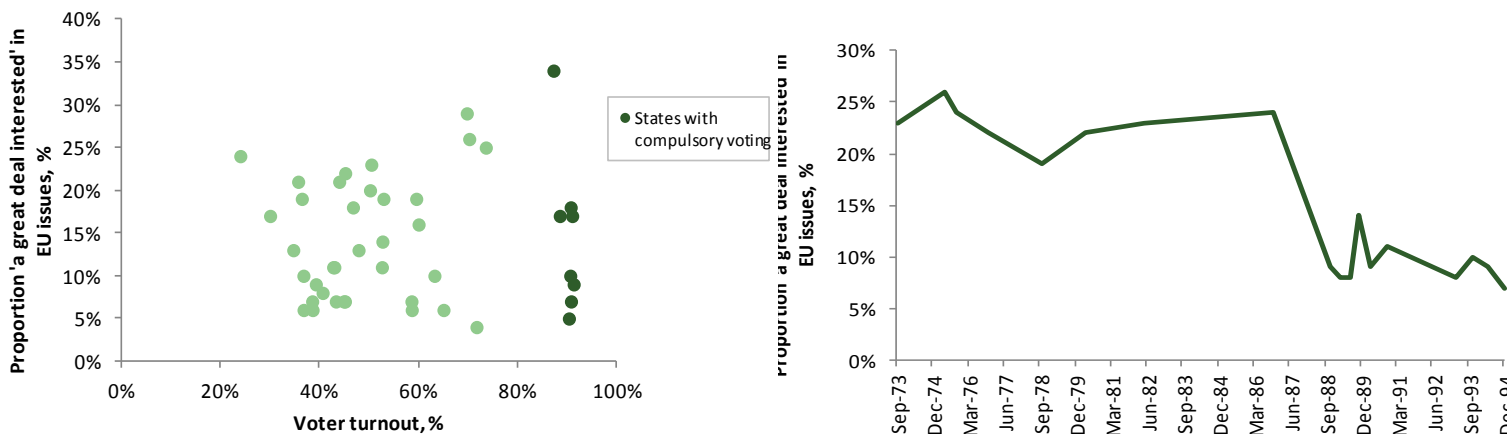
Why do EU citizens not vote in EP elections?

Eurobarometer polls give an insight into reasons behind the fall in EU election turnout¹²³ in relation to satisfaction with EU democracy and attitudes towards EU membership.

Interest in EU issues

Is there any link between the citizens of EU Member States' interest in EU issues and voter turnout? In figure 4, the left panel shows the proportion of those who responded to a poll about interest in EU issues by stating that they are "a great deal interested" (with each point on the graph representing high interest for a given country in a given year).¹²⁴ There appears to be a somewhat positive trend between being "a great deal interested" and voter turnout. The right panel represents the trend in the average proportion of those reporting to be "a great deal interested", showing a clear decline in interest in EU issues over time.

Fig 4. Interest in EU issues and voter turnout¹²⁵



Satisfaction with EU democracy

Another question was about satisfaction with EU democracy. Satisfaction here is defined as a response of either 'very satisfied' or 'fairly satisfied' in response to the poll.¹²⁶ In the left panel of figure 5 the scatter graph links the percentage of those who report being satisfied with EU democracy and the relationship of this percentage with voter turnout. Again, there appears to be a positive relationship, intuitively indicating that the more satisfied the population of a country is, the higher the turnout. However, the right-hand panel indicates that the average satisfaction with EU democracy across the EU has actually been going up in recent years. Given the left-hand panel, this would imply that voter turnouts should actually be *increasing*, suggesting that satisfaction with EU democracy is unlikely to be the underlying cause for low turnout.

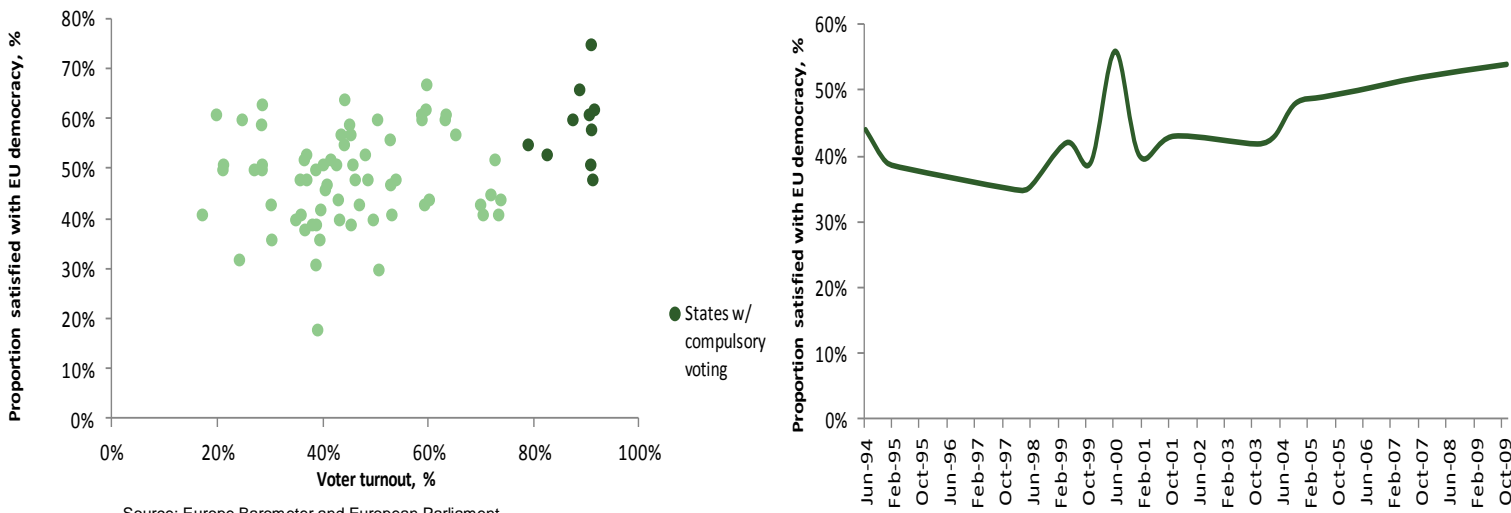
¹²³ http://ec.europa.eu/public_opinion/cf/step1.cfm

¹²⁴ The question was: "As far as European politics are concerned, that is matters related to the European Community, to what extent would you say that you are interested in them?"

¹²⁵ Source: Europe Barometer and European Parliament

¹²⁶ The question was: "On the whole, are you very satisfied, fairly satisfied, not very satisfied or not at all satisfied with the way democracy works in the EU?"

Fig 5. Satisfaction with EU democracy and voter turnout

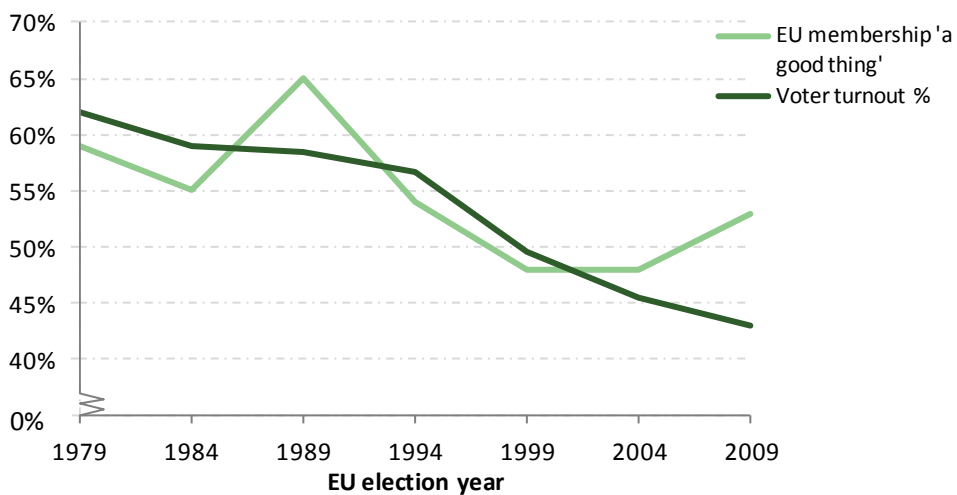


Source: Europe Barometer and European Parliament

Attitudes towards EU membership

What about the attitudes of citizens of EU countries towards their country’s membership of the EU and how this relates to voter turnout?¹²⁷ Figure 6 shows that the decline in EU voter turnout since 1979 has coincided with the average proportion of people stating that EU membership is ‘a good thing’. This may contribute towards an explanation for declining voter turnout. However, it should be noted that in recent years there appears to be an uptick in the average proportion of positive attitudes towards EU membership.

Fig 6. Average proportion of those with a positive attitude towards EU membership and voter turnout

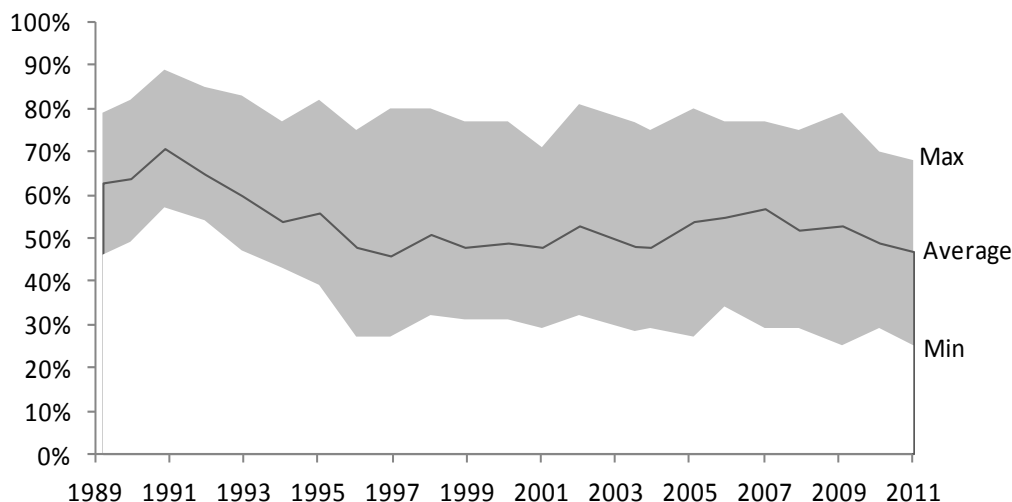


Source: Europe Barometer and European Parliament

Figure 7 below also represents the average proportion of those rating EU membership ‘a good thing’, showing substantial differences among the different members of the EU, a gap that has been growing over time and may account for the widening gaps in voter turnout.

¹²⁷ The question was: “Generally speaking, do you think that your country's membership of the European Community is: a good thing; a bad thing; neither good or bad; don't know?”

Fig 7. Average proportion of those with a positive attitude towards EU membership and voter turnout



Source: Europe Barometer and European Parliament

Trust in EU institutions

In 2011, a year marked by the global financial crisis, [Standard Eurobarometer 76](#) reported a sharp decline in trust in the EU institutions and in national institutions. [Standard Eurobarometer 78](#) found in autumn 2012 that more European citizens considered the EU to be undemocratic than democratic. [Standard Eurobarometer reported in July 2013](#):

More than two-thirds of Europeans say that their voice does not count in the EU (67%), a 3-point increase taking this score to its highest level since autumn 2004 (EB62) when the question was first asked. This proportion has increased almost continuously since spring 2009 (EB71), from 53% up to 67%. Slightly more than a quarter of respondents (28%, - 3) agree that their voice counts in the EU.[...]

In 24 EU Member States, absolute majorities of respondents disagree that their voice counts in the EU. This opinion is most widespread in Greece (89%) and Cyprus (89%), but is also very common in Portugal (81%), in Italy (78%) and in Spain (77%). These five countries in the south of the EU are joined by the Czech Republic (81%) and Estonia (77%).

In evidence to the Lords EU Committee inquiry, Dr Eleni Panagiotarea commented on the “political limits” in citizens’ trust in national institutions when linked to support for the EU:

Citizens may no longer be content with the performance of their respective parliamentary democracies in the EU framework and casting a vote may no longer suffice to give ‘citizenship’ a substantive meaning. Interestingly, the declining trend in citizens’ trust in both the EU and national governments and parliaments, evident in successive Eurobarometer surveys and other surveys has not set the alarm bells ringing.

Analysing the turnout issues

Is the EU undemocratic because people do not vote? Do people not vote because the EU is undemocratic? A *Flash Eurobarometer* in March 2013 asked voters whether voting in EP elections was an effective way of influencing political decisions:

54% think voting in EU elections is an effective means of influencing political decision-making. At least 50% of people in 19 Member States agree that voting in European elections is an effective way to influence political decisions. Romania (71%) has the highest number of people who take this view, followed by Malta (69%) and Italy (65%).

In four EU countries a majority of respondents think that voting in European elections is not an effective way to influence political decisions: Latvia (61%), the Czech Republic (54%), the UK (54%) and Slovenia (53%). Opinion is equally divided in the Netherlands, with 49% of respondents agreeing and 49% disagreeing that it is effective.¹²⁸

Would an increase in votes for eurosceptic parties such as UKIP, Italy's *Five Star Movement* or Denmark's *People's Movement against the EU* indicate that the EU is democratic or undemocratic? The process is democratic but such an outcome would bolster the argument that the electorate does not believe in the EU as a democratic institution.

Analysts have found that voting in EP elections, as well as being low across the EU, tends to be based on domestic issues. These, Anand Menon argued in 2009, are rehearsed in a "confused" and "apathetic" way in EP elections:

... beyond the "operational" flaws in the way elections to the European parliament work, the indifference of many citizens has deeper roots. Most fundamentally, member-states retain control over all those areas of public policy that polls routinely show to be the primary concern of their electorates: health, welfare spending, education and direct taxation among them. It is little wonder, then, that "real" political debate occurs at national level; or that European elections are regarded as (in political-science jargon) as "second-order elections" in which electorates feel free to experiment. The European Union, in other words, is structurally condemned to elicit electoral apathy.¹²⁹

Before the last EP elections in 2009, Julia De Clerck-Sachsse and Piotr Maciejkaczynski thought that politicising the debate in the EP might help halt the trend of low turnout:

If growing powers are matched with continually falling turnout, the logic of strengthening the European Parliament's powers as a means of democratising EU governance is undermined. In order to halt this trend, the next European Parliament should therefore carefully balance the need for efficiency with its role as a public forum for political debate. Therefore, more efforts should be made to politicise the debate in the EP, and debate in plenary should be structured around the most politically salient questions. Indeed, the experience of the Services Directive has shown that, while difficult, it is possible for the Parliament to shape controversial policy.

Moreover, in addition to making EU policy more relevant to the public, the EP elections should be personalised, presenting 'faces' that the public can recognise and relate to. In this regard the role of national parties is also crucial in presenting candidates to the EP that are able to make an impact and in giving some space to European themes in the European election campaign.¹³⁰

However, turnout in the 2009 EP elections reached a record average low of 43%.

¹²⁸ [Europeans' Engagement in Participatory Democracy](#), March 2013.

¹²⁹ *Open Democracy, The European parliament: problem, and solution*, 5 June 2009.

¹³⁰ *The European Parliament – more powerful, less legitimate? An outlook for the 7th term*, CEPS Working Document No. 314, Julia De Clerck-Sachsse and Piotr Maciejkaczynski, May 2009.

According to a report by the US-based Pew Research Centre on a poll in March 2013 in eight EU Member States,¹³¹ support for the EU is declining sharply, particularly in France, “suggesting that an economic crisis has become an existential crisis for the EU”.¹³² Positive views of the EU were only 41%, support for more integration had fallen to (below a third); young people were much less likely to view the EU positively than the population as a whole, except in Greece and Germany. There were some positive views in the Eurozone, where around two-thirds of respondents supported the continued use of the euro, and only the Greek and Polish voters wanted greater government spending rather than cuts. Germany was positive in most responses on economic, political and EU matters.

Current public opinion polls generally show an increase in euroscepticism, with low levels of trust in the EU institutions and little support for further EU integration or enlargement. Tony Barber wrote in January 2014 that “Underlying everything is the frustration of Europeans that they exert less influence than ever over the decisions of elites, both in their own countries and in Brussels”.¹³³ Attempts to bring the EU closer to its citizens, including through participatory opportunities, appear to be having little effect on the majority view that the EU, with its institutions, politicians and technocrats, lacks democratic legitimacy.

EP elections have been described as ‘second-order elections’ because of the lack of engagement of MEPs and the electorate with what could be described as a genuine political process. Ben Crum¹³⁴ wrote in 2003 that this “second-order character” of the EP elections also reflected upon its internal workings. “Although the Parliament is organised in cross-national ideological party groups, in day-to-day practice MEPs operate first of all from within their national political faction. Also most of their public engagement is oriented to their own national sphere”.¹³⁵

Peter Grand and Guido Tiemann¹³⁶ assessed data from a 2009 EP election survey, concluding that many EU citizens found EP elections insufficiently rewarding and that the perceived benefits of voting were often outweighed by the costs. “[T]here is ‘less at stake’ because no government emerges from the electoral process, the EP remains the weaker partner compared to the Council of Ministers in the legislative decision-making process and citizens do not feel “adequately represented by political parties in EP elections”.¹³⁷ This conclusion supports the view that the EP is not the root of the legitimacy problem: it is not that the EP does not act democratically, but that it does not adequately represent the people in the EU. Christian Wohlfahrt¹³⁸ emphasised the German Constitutional Court’s view (see Appendix) that EU citizens’ right to vote is a “complementary possibility of participation in the system of European institutions”,¹³⁹ and represents “complementary democratic legitimisation”. It confirms the earlier German ruling on the Maastricht Treaty in this respect.¹⁴⁰

The EP has many democratic credentials, as Menon has noted:

¹³¹ Germany, France, UK, Italy, Spain, Poland, Greece and Czech Republic.

¹³² [European Voice, 16 May 2013](#)

¹³³ [Financial Times 2 January 2014](#)

¹³⁴ Associate Professor, Department of Political Science, Vrije Universiteit Amsterdam

¹³⁵ EPIN Working Paper 10, December 2003, [Staging European Union democracy: discussion paper prepared for round table on a sustainable project for Europe](#).

¹³⁶ Vienna Institute for Advanced Studies.

¹³⁷ LSE blog, [Low turnout in European Parliament elections is driven by the perception that the process is not rewarding enough for voters](#), 9 August 2012.

¹³⁸ Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

¹³⁹ [German Law Journal](#) Vol. 10 No. 8, 2010, [The Lisbon Case: A Critical Summary](#), Christian Wohlfahrt.

¹⁴⁰ Similarly, Lisbon Treaty innovations such as providing citizens with the possibility to communicate their views directly and the citizens’ initiative “can only have a complementary and not a central function when it comes to legitimising European public authority”: Wohlfahrt *ibid*.

To be clear: the European parliament is in many ways an admirable institution, populated by a number of hard-working, dedicated and highly able members (MEPs). Indeed, in those areas where it enjoys [coequal status](#) with the council of ministers in the legislative process, it is far more effective than virtually any parliament in any domestic setting. Its committees produce enlightening and thoughtful reports; it has frequently shown itself [able](#) to amend and even veto legislation proposed by the commission and endorsed by the member-states in the [European council](#).¹⁴¹

David Schleicher¹⁴² has commented on the gap between the EP's democratic credentials and its actual effect:

... the EP looks and sounds like a democratically elected legislature, with parties organizing votes, predictable ideological splits, lobbyists loitering in the hallways, and members making preening speeches. Yet, there is one missing element: any semblance of democratic control. Voters have no idea who the MEPs are, do not care about what they do, and certainly do nothing to punish their bad behavior. Voter disengagement from the EP has ensured that the decision to give it more power failed to confer much democratic legitimacy on the EU as a whole. In fact, polls reveal a collapse in popular support for the EU since granting the EP real power.

He is puzzled by the lack of interest in the EP:

With the ability to pass legislation that affects hundreds of millions of people in an increasing number of ways, the EP is now undoubtedly an important body—in last the last few years, they have passed legislation governing everything from carbon emissions to mobile telephony—and it is therefore both surprising and problematic that voters cannot be bothered to form independent judgments about its policies. It is equally surprising that despite the flaws of its elections, European states continue to grant the EP more power in an effort to resolve the democratic deficit, like a nervous gambler doubling his bets after a series of losses.¹⁴³

But, in Menon's view, it lacks credibility as a democratic institution because EP elections "*do not work*"—they fail to provide a parliament with a genuine mandate for action at European level". Menon confessed that it was "hard to imagine a sensible way in which to make them do so". Hix and Follesdal comment on the lack of opportunity for popular opinion to influence EU policy through a process of party political debate:

A key difference between standard democratic and non-democratic regimes ... is that citizens form their views about which policy options they prefer through the processes of deliberation and party contestation that are essential elements of all democracies. Because voters' preferences are shaped by the democratic process, a democracy would almost definitely produce outcomes that are different to those produced by 'enlightened' technocrats. Hence, one problem for the EU is that its policy outcomes may not be those policies that would be preferred by a political majority after a debate.¹⁴⁴

¹⁴¹ *Open Democracy*, [The European parliament: problem, and solution](#), Anand Menon, 5 June 2009.

¹⁴² Irving S. Ribicoff Visiting Associate Professor of Law at Yale Law School.

¹⁴³ *Harvard International Law Journal* Vol. 52, Number 1, Winter 2011, "[What if Europe Held an Election and No One Cared?](#)".

¹⁴⁴ *Journal of Common Market Studies*, 2006 Vol 44 Number 3. pp. 533–62, Andreas Follesdal (University of Oslo) and Simon Hix (London School of Economics) "[Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik](#)".

The Lisbon Treaty introduced new EP election procedures which will be used for the first time at the EP elections in May 2014. Electorates will not only elect MEPs, but also indirectly choose candidates for Commission President to replace José Manuel Barroso, whose term ends in 2014. The conduct of the EP elections was the subject of a Commission Communication and a Recommendation on enhancing the democratic and efficient conduct of the 2014 EP elections:¹⁴⁵ the European political parties would name their preferred candidates for the presidency and the chosen politician would then seek support in his/her own State. These recommendations, which are not legally binding, aim to make clearer the link between national and EP parties. The UK Government did not support them. David Lidington, Minister for Europe, said in an [Explanatory Memorandum](#) in April 2013 that “if national political parties wish to make their connection to European political parties known ... they are welcome to do so, but they should not be under any obligation in this regard”. Overall, the Government was dismissive of the proposals, stating that they: “... appear to seek to assign more weight to the European Parliament’s role than is provided for in the Treaties. Moreover, they argue that the basis for making such a change is to encourage an increase in electoral turnout. The documents provide no rationale for this assumption, other than a comparison with US electoral turnout ...” .

3.3 The Council of the EU

The intergovernmental Council of the EU comprises government ministers from all EU Member States and meets in sectoral formations to discuss and adopt legislation. The Council is the link between Member States and the EU.

A 1992 Maastricht Treaty Declaration stated that “transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration”, and there were subsequent pledges from the Institutions in support of more openness and transparency in the Council.

Critics believe that since Council decision-making by Qualified Majority Voting (QMV) was extended by the 1986 [Single European Act](#) in order to quickly adopt a large amount of internal market legislation, the EU has ‘accumulated’ a democratic deficit.

The default voting procedure is now ‘co-decision’ with a qualified majority (around 74%) of the total number of votes required to adopt legislation. Analyses of voting behaviour in the Council tend to conclude that even where QMV is required, the Council prefers to reach a consensus. It does not vote formally in many cases where QMV is required, and much of the decision-making is believed to be done before proposals even reach the Council in the Committee of Permanent Representatives (COREPER) and Council working groups. Other factors may influence the outcome of a QMV decision, such as the preference of the Presidency, coalition forming, the ‘shadow of the vote’, informal bilateral contacts and ‘horse-trading’.

Council secrecy and moves towards openness

In the view of its critics the Council has always been secretive and its procedures opaque. Before the adoption in 2001 of a [Regulation on transparency and access to documents](#), most Council documents were not publicly available and the Council’s rules on confidentiality were incompatible with democratic standards. In 1995 Deidre Curtin summarised fears at that time about opening up Council meetings: “either progress would be blocked, because delegations would be forced to take up immovable positions or the public proceedings would result in

¹⁴⁵ European Union Document No. 7648/13 and EU document No. 7650/13

theatre, with the real business being done by officials behind closed doors".¹⁴⁶ Some of these fears have transpired, particularly with the increase in co-decision, which has meant more behind-the-scenes bargaining both by officials and government ministers.

In October 1993 the Council started to publish press releases detailing topics discussed and measures and common positions adopted, indicating which Member States voted against or had reservations. Later came the publication of [timetables and agendas](#), a monthly [summary of Council Acts, Council Minutes](#) and the outcome of voting on legislative acts at [Public Votes](#).¹⁴⁷ There has been a Public Register of Council documents since January 1999. Article 15 TFEU provides for public access to the documents of the EU institutions and openness in the decision-making process for draft legislative acts. The Council sits in public when it is discussing and voting on a proposal for a legislative act or when there is a general debate. Council minutes concerning the adoption of legal acts are published on the Council's [Consilium website](#); access to other Council minutes can be requested. There are also live webcasts of public meetings on [Consilium](#).

Critics maintain that although new rules of procedure have increased the Council's transparency, its processes are still opaque, which in turn affects the ability of national parliaments to effectively scrutinise its work.¹⁴⁸ EU and national civil servants do much of the negotiating before government ministers formally adopt a measure. Government ministers may eventually accept a compromise agreement which might not be popular with their parliament or the public. In such cases, ministers might exploit the lack of transparency to avoid taking responsibility for unpopular EU decisions. The EU Council does not often vote formally on matters where QMV is required. It prefers to continue negotiating until there is consensus in the Council. The QMV rules are still important because they help States to determine the likely outcome if a vote were held, but the lack of a formal vote makes it difficult to evaluate outcomes or to ascertain which States lined up where in the decision-making procedure. A lack of accountability is thus inherent in the Council's working procedures.

Sara Hagemann, co-author of a report by *Votewatch Europe*, believes the Council is now more transparent than many national legislatures, but Simon Hix, in evidence to the European Scrutiny Committee (ESC), argued that the Council was still too secretive and ought to make *everything* available to the public (Q431):

... when the Council is operating as a legislature, let us recognise it as a legislature. Let us have everything out in the open; let us have all the documents and all the position papers of all the Governments. Let us see up front what coalitions are formed between what Governments. They have to share speaking time, for example. They have to cosponsor amendments. Has this Government ever admitted to you who they cosponsor amendments with? I doubt it. Why not? They have to do it. With 27 member states and limited time, this is how they now organise the Council agenda, but we do not see any of that as citizens, and I think that is appalling.

He thought it was important that all Council negotiations – presumably including those in the Committee of Permanent Representatives (COREPER) and working groups - should be opened up (Q447):

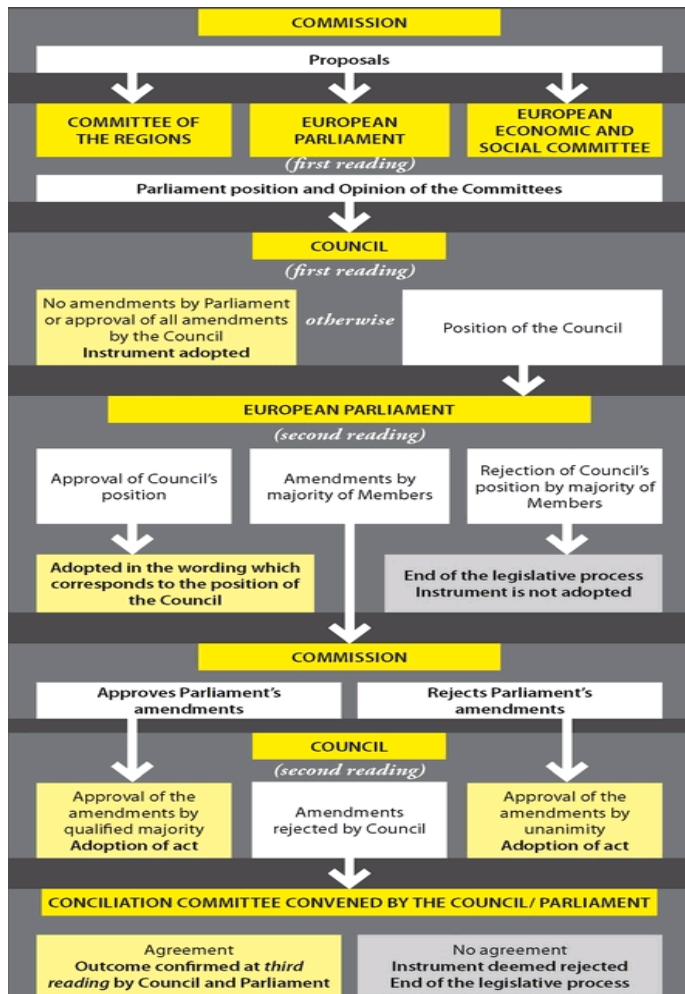
¹⁴⁶ Reforming the Treaty on European Union – the legal debate, "Betwixt and between: democracy and transparency in the governance of the European Union", T.M.C. Asser Institut, 1995.

¹⁴⁷ However, there is no public record of how governments voted in the 1970s, 1980s and early 1990s.

¹⁴⁸ See [Standard Note 6646](#), *Voting Behaviour in the EU Council*, 23 May 2013.

... it would be more helpful for the legitimacy of the EU if this was transparent and we learnt that you win some and you lose some and this is part of the process. We could stick all this up online, we could look at it, we could analyse it and we could see whether it is true that we lose more than other member states. We do not know that. Nobody knows that.

The Ordinary Legislative Procedure



The Lisbon Treaty made the OLP (co-decision) with QMV the general rule for EU decision-making.

The OLP involves up to three readings of a Commission proposal and co-legislative powers for the EP and Council. The OLP is lengthy, often with much to-ing and fro-ing between institutions,¹⁴⁹ but the Commission describes it as “the most legitimate from a democratic point of view”.¹⁵⁰

The scope of co-decision almost doubled under Lisbon, applying to 85 legal bases from 44 previously.¹⁵¹ Unanimity is still required in 72 cases in the TFEU,¹⁵² the main areas being taxation, social security and the accession of new States to the EU; and it remains the main decision-making procedure for foreign, security and defence policy in the TEU.

But as the EP has gained powers via co-decision, the national legislatures have lost them, and, as Anne Elisabeth Stie says, it cannot be taken for granted that making the EP a co-legislator with the Council will automatically make EU decision-

making more democratic:

Including the EP is not a guarantee in itself that the MEPs will behave democratically. We can also not simply assume that the ministers meeting in the Council can be conceived as channels where the views of affected parties (i.e. their respective national constituencies) are voiced. Moreover, the evaluative framework provides the conditions for showing when co-decision acts are satisfactorily subjected to democratic scrutiny and when unelected participants become too dominant and autonomous to be compatible with

¹⁴⁹ Diagram from Eur-Lex, [The legal order of the EU](#); see also useful [Step-by-step flow diagram of the OLP](#), USEU/FAS Hilde Brans

¹⁵⁰ *Europa*, [Legislative procedures](#).

¹⁵¹ [Codecision and Conciliation: A Guide to how the Parliament co-legislates under the Treaty of Lisbon](#), January 2012

¹⁵² This figure varies, depending on whether sub-sections of Articles are counted separately.

democratic decision-making.¹⁵³

Steve Peers finds the OLP lacking in openness and transparency:

The ordinary legislative procedure can be compared to the legislative process in any State with a bicameral legislature; its closest comparators are perhaps the legislative procedures in Germany (within the EU) and the United States (outside it). However, the legislative process in any democratic State compares favourably to that of the EU as far as openness and transparency is concerned.¹⁵⁴

Its complexity and capacity to provide more opportunities for informal, behind-the-scenes agreement have hindered national parliamentary scrutiny - with implications for transparency and accountability both at EU and national levels. Bill Cash, Chair of the Commons European Scrutiny Committee, finds it undemocratic:

Through the ordinary legislative procedure, the United Kingdom has been assisting in the proliferation of informal meetings and early agreements. The ordinary legislative procedure with the inclusion of the trialogue meetings and the early agreements could not have been more undemocratic. It has consistently undermined the Westminster Parliament. Under this procedure it is increasingly difficult for Westminster to manage the way in which European Union affairs are conducted and how legislation is passed. The negotiations are informal so it is very difficult for national parliamentary committees to assemble information, and to decide speedily enough in order to have any impact on the final outcome of an early agreement dossier.¹⁵⁵

Stie thinks that co-decision, in practice, is undemocratic:

... the democratic legitimacy of the co-decision procedure suffers from two main deficits: Firstly, the relationship between elected politicians and unelected experts is biased towards the latter in the sense that co-decision acts are to a large extent made by experts and bureaucrats. Secondly, the trialogues move the policy-making process behind closed doors where only a limited number of participants are present and of which only a half is elected politicians. In sum, the established practices of co-decision-making lead to a situation where politically and publicly salient issues are canalised into closed settings. A privatisation of politics has never been compatible with democratic decision-making.¹⁵⁶

Peers suggests an Inter-institutional Agreement to remedy the lack of accountability in the OLP, which he outlines as follows:

It provides for the prior adoption of a negotiating position by the EP and the Council – which must be publicly available – before first-reading negotiations start (points 1 to 3). This would confirm the developments in the EP, to the extent that committee mandates are becoming the norm, and would add a requirement of making the relevant documents available.

¹⁵³ Anne Elizabeth Stie, [Co-decision – the panacea for EU democracy?](#) ARENA report February 2010. Stie's thesis is an excellent analysis of co-decision in a deliberative democratic process.

¹⁵⁴ *Statewatch Analysis*, [The democratic accountability of the EU's legislative approach](#), December 2011.

¹⁵⁵ "It's the EU, Stupid", 5 September 2011

¹⁵⁶ *ARENA report*, [Co-decision – the panacea for EU democracy?](#) February 2010. Stie's thesis is an excellent analysis of co-decision in a deliberative democratic process.

Detailed information on all aspects of the negotiations must be available to the public (point 4). The final provisional text of any deal must in particular be public (point 5), and be widely publicised (in practice by means of press releases and updates on the dedicated website), in particular to national parliaments. There must then be at least eight weeks for national parliaments and civil society to scrutinise the final deal before any vote (based on the national parliaments' scrutiny period at the start of the legislative process) – although national parliaments could ask for an extension of this period (point 6).

For all this information to be accessible, there would be a single specialised website (point 7). At the moment, the separate 'co-decision' sites of the Commission, EP and Council are hard to find, contain much less information, and are infrequently updated. This site should be a broader forum for discussion of the proposals – including comments by civil society and interventions by national parliaments. There should be provision for interactivity, if, for instance, national ministers or MEPs want to respond to comments or to explain the latest developments.

Finally, since proposals to codify EU legislation do not make any substantive amendments to that legislation, there is no need to apply the rules to those proposals (point 9).

Qualified Majority Voting

Qualified Majority Voting

Since the accession of Croatia to the EU on 1 July 2013, when all 28 Member States are voting, a qualified majority (QM) is at least at least 260 Council votes (about 74%) out of a total of 352 by at least 15 Member States. Where the Council does not act on the basis of a Commission proposal, the QM threshold is the same, except that the votes in favour must be cast by at least two-thirds of the 28 Member States (i.e. 19). In addition, a Member State may request verification that the QM represents at least 62% of the population of the EU.

A blocking minority must include at least four Member States, failing which the QM will be deemed attained. Any Member State can abstain at any time and abstentions count as no-votes (in unanimous voting, they do not prevent unanimity being reached, so they count as yes-votes).

The voting powers of the Member State governments in the Council are now based more on population than on the system of voting points negotiated with each EU enlargement. From 1 November 2014 a QM will be reached if a draft decision is supported by at least 55% of Member States (i.e. 16 member states), representing at least 65% of the EU population. Where the Council does not act on the basis of a Commission proposal, the QM threshold is 72% of Member States (i.e. 21), representing at least 65% of the EU population.

Between 2014 and 2017 there will be a transitional phase where the new QMV rules apply, but where the old voting weights can be applied when a Member State requests it.

Successive Treaty amendments have reduced the number of policy areas subject to unanimous voting in the Council, and the default voting procedure is now by a qualified majority (QM). Various informal arrangements have sought to mitigate any possible negative effects for individual Member States. In 1965 the so-called 'Luxembourg Compromise' (LC) added another dimension, outside the Treaty framework, in the form of an unofficial national veto. It was an agreement that where "very important interests of one or more partners" were at stake, ministers in the Council would try to reach unanimous solutions, even if the Treaty required only a majority. The UK Government was enthusiastic about the compromise, which seemed to be an instrument of democracy even though it stood outside the Treaties. It has

been a somewhat fragile guarantee of national interests, however, and a pretty blunt instrument of democracy. The LC has rarely been invoked formally at ministerial level since the 1980s and increasingly the threat of majority voting has given way to a protracted search for consensus in the Council, although according to accounts of Council processes, it has been invoked informally on several occasions at sub-ministerial level (e.g. at the Committee of Permanent Representatives –COREPER).

The LC was never popular with the EU institutions because it had the potential to delay agreement on legislative proposals, just as the EU was trying to move away from national vetoes in the interests of completing the single market. Its use has undergone some refinement since its invention by de Gaulle as a totally unilateral national stance. It was to some extent supplanted by the ‘Ioannina Compromise’ of 1994, another ‘gentlemen’s agreement’ that if a Member State government believed its vital interests were threatened by a proposal, but could not muster a blocking minority, the decision would be delayed while attempts to find a satisfactory solution were made. The Treaties now contain so-called “emergency brakes” in a number of areas which have the effect of stalling negotiations if important national interests are at stake. In addition, under the Protocol on subsidiarity and proportionality national parliaments are able to submit to the Commission a reasoned opinion on a proposal which they do not believe conforms with the principle of subsidiarity (this is discussed in more detail in Sections 2.2, 5.4 and 6.3). Not all would agree that the LC no longer exists, although it is true to say that its relevance has diminished over the last decade.

The increase in QMV has gone hand-in-hand with the extension of co-decision. The 1986 *Single European Act* (SEA) provisions on co-decision with QMV added a new dimension to the ‘democratic deficit’.¹⁵⁷ The large increase in QMV allowed single market legislation to be adopted more easily in the Council, and so was regarded as efficient, but many opportunities for Member State governments to veto proposals were lost.¹⁵⁸

When the current transitional voting arrangements end, the post-2014 changes to weighted Council votes and what constitutes a QM will make mustering a blocking minority more difficult for non-Eurozone States. An *Open Europe* report in December 2011¹⁵⁹ noted that if the Eurozone votes as a caucus, non-euro States will never be able to form a blocking minority. Under the current voting rules, the Eurozone cannot form a QM on its own. After the voting rules change in 2014/17, if the Eurozone votes as a caucus, it will represent 66% of the EU population and will therefore achieve the threshold of 65% of the EU population needed to adopt a proposal. The Eurozone will have, as *Open Europe* put it, “a permanent

“Democracy requires political institutions that ‘provide citizens with opportunities for political participation, influence and control’”.

Robert Dahl, ‘On Democracy’, Connecticut: Yale University Press. 1999

in-built majority” in the Council, which “could leave the UK consistently outvoted on measures with a profound impact on its economy and the City of London, simply because it is outside this new inner core”.

4 Participation by EU citizens and civil society

4.1 EU citizenship

A concept of EU citizenship has long been an EU aim. In 1985 the *Adonnino Committee* (chaired by Pietro Adonnino, Italian Christian Democrat MEP) [proposed](#) a “People’s Europe”

¹⁵⁷ Brigid Laffan, “The Treaty of Maastricht: Political Authority and Legitimacy”, *The State of the European Community: The Maastricht Debates and Beyond* 1993

¹⁵⁸ See Research Paper 04/54, “[The Extension of Qualified Majority Voting from the Treaty of Rome to the European Constitution](#)”, 7 July 2004 and Standard Note 4639, “[Lisbon Treaty: decision-making by Qualified Majority Voting or Unanimity](#)”, 28 February 2008.

¹⁵⁹ [Continental Shift: Safeguarding the UK’s financial trade in a changing Europe](#),

that would give citizens special rights and encourage them to develop a “European consciousness”. Among its proposals were the notion of European citizenship, the European flag and anthem, the creation of a European Ombudsman and the right to vote and stand in local and EP elections. Many of these were later incorporated into the Maastricht Treaty, and have been enhanced by further reforms encouraging and providing for more citizen participation in EU affairs

EU citizenship was formally introduced in Article 2 of the Maastricht Treaty, which stated that the Union aims to “strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union”. In addition to the established right to move, work and reside freely in any Member State, Maastricht introduced voting and election rights in EP and local elections, and extra consular protection for EU citizens. The *Treaty of Amsterdam* extended citizens’ rights with a new anti-discrimination clause, while stipulating that Union citizenship “shall complement and not replace national citizenship”.

The EU Treaty as amended by Lisbon states in Article 10(3) TEU that citizens have “the right to participate in the democratic life of the Union”, and stipulates that “decisions shall be taken as openly and as closely as possible to the citizen”. Yet, as noted in section 3(1) above, participatory democracy at EU level does not work well because the EU does not have decision-making structures into which citizens’ contributions can be fed or acted upon.

EU citizenship is different from national citizenship. An EU Reflection Group [report to the European Council on 5 December 1995](#) noted that although citizenship of the EU was “intended as a response to the need to involve citizens more closely in the process of European construction”, there were differences of opinion on the concept in the Member States. In some, the concept of a complementary citizenship “was not readily understood”; while for supporters of a federal Europe, a common EU citizenship with clearly defined rights and obligations was essential.

The Lisbon Treaty asserted that EU citizenship does not replace national citizenship, but adds an extra layer of rights which are limited and defined by the EU Treaties and EU law. The terms of EU citizenship are set out in Articles 20-24 TFEU. Union citizenship does not generally entail any direct duties for citizens of the Union, “which constitutes a major difference between it and citizenship of the Member States”.¹⁶⁰ Dr Annette Schrauwen maintains that: “In general, duties linked to Union citizenship are lacking”: where national citizenship imposes duties, such as paying taxes or perhaps to vote, EU citizenship does not.¹⁶¹ In a footnote Schrauwen clarifies: “The duty to obey European law is mostly indirect, via the national level. Citizens are only directly bound by European law in those instances where provisions have horizontal direct effect”.¹⁶² She concludes that “as long as there are no direct duties related to the status of Union citizenship, but only a bundle of rights, it will never have the same form as national citizenship and therefore will never completely replace national citizenship”.¹⁶³

Citizens of the EU cannot vote on matters of EU governance and the EU decision-making bodies do not respond directly to the concerns or views of citizens. However, the [European Ombudsman](#) investigates complaints from citizens about maladministration in the EU

¹⁶⁰ EP factsheet at http://www.europarl.europa.eu/factsheets/2_2_0_en.htm

¹⁶¹ Dr. Annette Schrauwen, Europa Instituut, Amsterdam Centre for International Law, Law Faculty, Universiteit van Amsterdam. Paper presented at conference “After the first 50 years: the future of European law and policy, “The Future of EU Citizenship: corrosion of national citizenship”, Birmingham, 2-4 July 2008, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375413.

¹⁶² Schrauwen, *ibid*

¹⁶³ *Ibid*

institutions, and the Commission's [European Citizens' Initiative](#) is an attempt to give citizens collectively an opportunity to influence EU policy-making. One of Damian Chalmers' suggestions was to empower EU citizens to "disapply" EU law via their national courts and parliaments:

To protect certain domestic democratic values and traditions, citizens should have the right to petition a national Constitutional Court to disapply an EU law if the law violates those values or traditions. If an EU law is disapplied by a national parliament or Constitutional Council a majority of other parliaments, on the basis of an independent report, may petition the European Council to mediate, if the costs on other citizens are excessive or there is no violation of domestic democratic values or traditions.¹⁶⁴

Some have suggested holding EU-wide referendums giving citizens the chance to overturn an existing EU law or to put a new legislative issue on the EU agenda. The Citizens' Initiative goes a small way towards this, but from a practical point of view, with an EU population of over 500 million and an electorate of around 375 million, the process would be highly complicated and would undoubtedly create unequal opportunities for 'disapplication'.

4.2 Civil society

The *Treaty of Rome* provided a role for civil society in EU affairs through the European Economic and Social Committee (EESC). This EESC involves economic and social groups (but primarily economic groups) in establishing the common market, and it is the only way for interest groups (e.g. trade unionists, employers, farmers) to have a formal and institutionalised say on draft EU legislation. The EESC channels the views of interest groups to the larger EU institutions. The Commission's 2001 Governance White Paper thought the EESC could help tackle the democratic deficit and committed the EU to consulting and incorporating civil society in EU policy and decision-making. The Lisbon Treaty called on the EU institutions to have "open, transparent, and regular dialogue with representative associations and civil society" and the Commission is required to hold broad consultation with all concerned parties. The EESC's role has been enhanced by Treaty changes over the years, but it remains only a consultative body, and there have even been calls in recent years for the EESC and the other consultative body, the Committee of the Regions, to be abolished.¹⁶⁵ In March 2011 the EESC held a seminar on the prospects for participatory democracy in Europe,¹⁶⁶ at the end of which the EESC concluded that it should work on the practical implementation of civil dialogue.

The findings of the March 2013 *Flash Eurobarometer* report on [Europeans' Engagement in Participatory Democracy](#) suggest that around half those surveyed thought civil society could have some influence in the EU:

Over half of the respondents in 19 Member States think that NGOs can influence EU decision-making -- At least 50% of people agree that NGOs can influence EU decision-making in 19 Member States, with a relatively high number of respondents saying this in Romania (71%), Portugal (68%) and Luxembourg and Denmark (both 66%).

¹⁶⁴ [Democratic Self-Government in Europe: Domestic Solutions to the EU Legitimacy Crisis](#), 15 May 2013

¹⁶⁵ In January 2011 the EP's ALDE group suggested scrapping advisory bodies to save taxpayers' money, and on the grounds that it does not "contribute significantly to the democratic decision-making process and the transparent, smooth and efficient running of the Union" (ALDE [Position Paper on EU budget post-2013](#)).

¹⁶⁶ See EESC website at <http://www.eesc.europa.eu/?i=portal.en.events-and-activities-participatory-democracy-prospects>

However, in six Member States a relative majority of people say that these organisations cannot influence EU-level decision-making: the Czech Republic (59% disagree vs. 37% who agree), Austria (54% vs. 42%), Slovenia (52% vs. 44%), Latvia (52% vs. 44%), Germany (48% vs. 46%) and the Netherlands (48% vs. 47%). Opinion is equally divided in Greece (49% agree and disagree).

4.3 Tackling the euro crisis

“... the crisis has transformed the EU from the “fantastic object” that inspired enthusiasm into something radically different. What was meant to be a voluntary association of equal states has now been transformed by the euro crisis into a relationship between creditor and debtor countries that is neither voluntary nor equal. Indeed, the euro could destroy the EU altogether”.

George Soros, *The World Economy's Shifting Challenges*, Project Syndicate, 2 January 2014

The euro crisis has brought the subject of democratic legitimacy to the forefront of the debate on the future of Europe. It has had a major impact on the EU and its Member States, including non-Eurozone States, particularly with regard to the democratic legitimisation by national parliaments of Commission, Council and European Central Bank measures to tackle the crisis. One expert commented that in the context of the ECB's Outright Monetary Transactions – OMT - programme), “In the EU, the rule of law, the separation of powers and democratic self-government have effectively been suspended”, and he suggested that in the event of challenge, the Court of Justice would uphold any EU action that purported to end the euro crisis.¹⁶⁷

In the 2012 [Blueprint for a deep and genuine economic and monetary union](#), the Commission insisted on a “a robust democratic framework” for the deepening of Economic and Monetary Union (EMU) and on ensuring “optimal democratic accountability and governance”. It set out two basic principles for the EU's democratic legitimacy in moves to deepen EMU in order to help solve the euro crisis:

First, in multilevel governance systems, accountability should be ensured at that level where the respective executive decision is taken, whilst taking due account of the level where the decision has an impact. Second, in developing EMU as in European integration generally, the level of democratic legitimacy always needs to remain commensurate with the degree of transfer of sovereignty from Member States to the European level. This holds true for new powers on budgetary surveillance and economic policy as much as for new EU rules on solidarity between Member States. Briefly put: Further financial mutualisation requires commensurate political integration.

But the crisis seems to have reinforced the two-tier economic integration structure of Eurozone and non-Eurozone States, with many of the new rules and structures that deal with the euro crisis becoming Eurozone-specific. Many observers believe the role and weight of the new Eurogroup will increase rather than decrease. Margarida Vasconcelos¹⁶⁸ http://www.europeanfoundation.org/my_weblog/2013/03/margarida-vasconcelos-brussels-must-start-listening-to-people-democratic-wishes.html thought the EU's response to the financial crisis through austerity measures, and its moves to control Eurozone States'

¹⁶⁷ Dr Gunnar Beck, Ifo Institute Munich Seminar, 28 January 2013, [Law as the Continuation of Politics by Other Means - the Unconstitutional ESM and the ECB's Unlawful Bond Buying Programme oder der Rechtsstaat als Schönwetterveranstaltung](#). While in March 2014 the German Constitutional Court rejected the bulk of complaints against the European Stability Mechanism (ESM), the Court recently asked the EU Court to clarify the interpretation of the ECB statute that would allow for an application of OMT. Based on the ECJ's advice, the German Court will rule on whether the German government or German institutions such as the Bundesbank are allowed to participate in enabling decisions made by the ECB.

¹⁶⁸ Head of research, European Foundation.

economic and fiscal policies, had led to a further democratic deficit and lack of legitimacy at both European and national levels. The sovereignty of Eurozone States, she thought, would be further reduced with full fiscal and political union, “with an economic policy imposed by Germany”, and no possibility of rejecting it.¹⁶⁹ In an article in the *Financial Times* Tony Barber thought some Eurozone members were facing a new and difficult reality:

In debtor countries such as Greece and Spain, but also in states such as France and Italy that drag their heels on reform, the perception is taking hold that society is at the mercy of pitiless external forces – Germany or globalisation, bankers or Brussels – and is being punished for the misguided prescriptions of outsiders.¹⁷⁰

The Eurocrisis has raised questions about whether the EU, representing 28 Member States, can legitimately make fiscal and banking decisions for the 17-Member Eurozone, “given that the issues at stake go to the heart of national sovereignty on taxation, spending and borrowing”?¹⁷¹ The measures the EU has taken to mitigate the crisis have given rise to criticism that traditional budgetary sovereignty has been undermined, that elected politicians in the States worst affected have been sidelined by Commission, ECB and IMF technocrats, and that Germany not only called all the shots but profited from the crisis.¹⁷²

Even László Andor, the Commissioner for Employment, Social Affairs and Inclusion, thought the situation might become so bad for some southern European states that “Eurozone membership and democracy are no longer compatible”.¹⁷³ Ben Crum told the Lords inquiry into the Role of National Parliaments in the EU that during the crisis, “the operating conditions of debtor state parliaments have been severely constrained, to the point of compromising the very idea of representative democracy”. He called for Treaty provisions “that guarantee the continued respect for, and effective functioning of, national parliaments in countries that are bailed out and find “Memorandums of Understanding” imposed upon them”.¹⁷⁴

The Lords EU Committee report, [Genuine Economic and Monetary Union’ and the implications for the UK](#),¹⁷⁵ concluded (para. 143) that “There is a risk that top-down control removes the power from citizens to determine at the ballot box how taxes are raised and public money is spent in their country. Ensuring democratic legitimacy for the evolving system of economic governance is crucial”, but the Committee left detailed discussion of this to the Lords report on the role of national parliaments in the EU.

5 Dealing with the democratic deficit

5.1 Introduction

Few dispute the existence of a democratic deficit in the EU’s institutional and decision-making systems, although there is disagreement over the degree of the deficit. Simon Hix described the EU as a “semi or non-democratic institution”;¹⁷⁶ Bill Cash believes there exists not a democratic deficit but a “democratic crisis”¹⁷⁷ Andrew Moravcsik, on the other hand, thinks the EU is as democratic as it can be. There is also a vast array of opinion both from

¹⁶⁹ [European Journal](#), 5 March 2013

¹⁷⁰ [Financial Times](#), 2 January 2014

¹⁷¹ Roger Liddle, *The Europe Dilemma: Britain and the Drama of EU integration*, 2014, p.224.

¹⁷² For information on Germany and the euro crisis, see Library Research Paper 13/73, [Germany’s 2013 election: shaping the future?](#) 17 December 2013

¹⁷³ [Voxeu Can we move beyond the Maastricht orthodoxy?](#) László Andor, 16 December 2013

¹⁷⁴ [Written evidence](#), 24 September 2013.

¹⁷⁵ 8th Report, 2013–14.

¹⁷⁶ [Evidence to European Scrutiny Committee](#), 12 June 2013

¹⁷⁷ [HC Deb](#) 16 July 2013, c 180WH

eurosceptics and EU supporters on how to tackle the deficit, ranging from abolishing the EU altogether, turning it into a 'United States of Europe' with a fully federal system, giving national governments and/or parliaments more powers. Some of these suggestions are considered below.

The [EU charts Treaty amendments](#) that have already sought to tackle the democratic deficit, by reinforcing the EP's powers, improving transparency and encouraging citizen participation in EU projects and consultations. The Lisbon Treaty opened up Council sessions to the public, strengthened the powers of the EP in legislative and budgetary matters, involved it in the appointment of the Commission President, improved citizen participation through the citizens' initiative and Treaty recognition of the importance of dialogue between the EU institutions and civil society.

Andrew Moravcsik¹⁷⁸ maintained in 2006 – before the Lisbon reforms - that further channels of democratic legitimisation were not required; the EU, he said, was the product of an intergovernmental agreement embodied in the EU Treaties that is “pragmatically efficient, normatively attractive and politically stable”.¹⁷⁹ Moravcsik thought the EU was a satisfactory negotiated equilibrium, periodically modified when the need arose, and otherwise reconfirmed, and that it therefore reflected the requirements of participating states. He also believed that increasing the opportunities to participate and decide would not necessarily generate more participation and that increased participation would not necessarily generate more legitimisation. In his view, declining voter participation in EP elections appeared to confirm that the greater scope for democratic participation provided for by the Treaties had largely been unused; and that where and when it had been used, this had been to express dissatisfaction with the domestic policies of national governments.¹⁸⁰ Moravcsik attributed this situation to the nature of the tasks undertaken by the EU, such as international trade, development assistance, agriculture and safety standards for goods and services, which had modest general political salience for most citizens.

Stefano Micossi¹⁸¹ has argued that the EU is generally no better or worse than its component states when it comes to being democratic, “even if multiple, and potentially conflicting legitimisation channels and principles may confuse observers”.¹⁸² Micossi refutes the argument that the EU cannot have democratic legitimacy because it has no *demos*, no common identity or “sufficiently shared values to guide institutional and political action”:

True, a weak common identity makes it difficult to refer back to a single popular support base; but it does not preclude the development of partial mechanisms legitimising individual decisions or decision-making processes, through national parliaments, the European Parliament, and various other channels participating in the process. Nor does it preclude forms of legitimisation linked to the output of common action, insofar as the said action does meet voters' needs that individual national states are no longer in a position to satisfy.

Hix and Follesdal believe the increased politicisation of the Council and EP signals a change that could give the EU more democratic legitimacy:

Democratic contestation, in terms of trans-national alignments and coalitions along left–right lines have started to emerge in both the EU Council and the European Parliament. What is still missing, though, is the connection between

¹⁷⁸ Professor of Politics and International Affairs and Director, European Union Program, Princeton University.

¹⁷⁹ Cited in *CEPS Working Document No. 286*, February 2008, [Democracy in the European Union](#)

¹⁸⁰ A point also made by Bogdanor (2007), Hix (1999) and Schmitter (2000).

¹⁸¹ Director General of *Assonime*, Professor at the College of Europe and Board Member of Centre for European Policy Studies (CEPS).

¹⁸² [Democracy in the European Union](#), CEPS Working Document No. 286/February 2008.

these developments and the divisions in the EU's society at large, in terms of the potential winners and losers of potential policy agendas. This may not even require fundamental reform of the EU treaties. All that may be needed is for the political elites to make a commitment to open the door to more politicization of the EU agenda, for example via a battle for the Commission President, with governments and national and European parties backing different candidates and policy platforms. European Parliament elections would continue to be primarily 'second-order' for some time. But, if there are new incentives for national party leaders to compete in these contests on European-level issues rather than purely national concerns, over time EU-wide coalitions and alignments between national and European actors would begin to solidify.¹⁸³

However, other analysts think concrete reforms are in order, some requiring Treaty change, others not. Charles Grant, of the *Centre for European Reform*, suggests the EU could improve its "outputs" to restore its legitimacy in the eyes of citizens, but also that EU governance is "in bad need of an overhaul".¹⁸⁴ He thinks national legislatures need to be more involved in Eurozone governance, but also that they will have to "think European" in the way that heads of government have learnt to do in the European Council. His suggestions for improving democratic legitimacy include strengthening the 'yellow card' system to allow national parliaments to force the Commission to withdraw a proposal and establishing a forum for national parliamentarians in Brussels.

In September 2012 the final report of the *Future of Europe Group* (the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain) included a proposal for "a directly elected Commission President who personally appoints the members of his 'European Government', a European Parliament with the powers to initiate legislation and a second chamber for the Member States".¹⁸⁵ In evidence to the Lords EU Committee inquiry, Professor Stelio Mangiameli, University of Teramo, thought national parliaments should have an EU-based role: "if there is a political will ... it is not exaggerated to state that there is scope for giving rise to a general overhaul of the European constitutional architecture, that may lead to an actual representation of national parliaments within the form of government of the European Union ...".

Damian Chalmers (LSE) proposes democracy tests which he thinks would not require Treaty change:

1. There should be a new test of relative democratic authority where the EU can only act if it enlarges choices or protects certain values in a way that cannot be done by domestic parliaments and where the benefits of this action exceed collective domestic democratic costs.
2. This test of relative democratic authority would be policed by national parliaments. An EU proposal would be abandoned unless two thirds of the national parliaments indicate their support.
3. A new test of democratic responsiveness would require that if one third of the national parliaments propose either that legislation be reviewed or that new legislation should be proposed, the Commission is obliged to make a proposal to this effect.

¹⁸³ Simon Hix and Andreas Follesdal, "Why there is a Democratic Deficit in the EU: a Response to Majone and Moravcsik", 2006, http://is.muni.cz/el/1423/podzim2013/EVS447/um/Presentation_6__Follesdal_Hix.txt.

¹⁸⁴ CER, *Can national parliaments make the EU more legitimate?* 10 June 2013.

¹⁸⁵ *Final Report of the Future of Europe Group*, 17 September 2012.

4. Individual national parliaments should also be able to pass laws disapplying EU law where an independent study shows that EU law imposes higher costs than benefits for that member state.¹⁸⁶

Some of these suggestions, and others, are discussed in more detail in the following sections.

5.2 More ‘differentiation’ in the EU?

Would a more democratic EU be one in which there were more options for individual Member States to go their own way in areas of particular importance to them – i.e. more differentiation? There is already a mix of alternative arrangements, some temporary, some indefinite, that have been agreed during accession or Treaty amendment negotiations:

- Temporary transitional provisions governing the accession of new Member States (covering varying elements of the *acquis communautaire*);
- Opt-outs established in Treaty revisions and protocols to EU Treaties (likely to be long-term or permanent, e.g. UK from EMU, Schengen and elements of Justice and Home Affairs (JHA) + earlier from social policy; Denmark from EMU, Common Security and Defence Policy (CSDP) and JHA);¹⁸⁷
- EMU obligation: new Member States must adopt the euro providing they meet the Maastricht Treaty criteria;¹⁸⁸
- Other protocol-based arrangements on Treaty application: UK, Poland, Czech Republic and Charter of Fundamental Rights (not strictly speaking an opt-out);
- Opt-in protocol: UK and Ireland re. JHA;
- Enhanced cooperation (with at least nine Member States and only within shared competences, e.g. trans-European divorce law, EU patent; financial transaction tax);
- Permanent structured cooperation (PESCO - only within CSDP: authorised by Council by QMV at request of participating States; no Member State threshold for establishing PESCO);
- Cooperation on the basis of international law: e.g. Schengen, Prüm Convention, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (fiscal compact treaty);
- Open Method of Coordination: the voluntary cooperation of Member States, based on soft law mechanisms such as guidelines, indicators, benchmarking and sharing of best practice (e.g. Euro Plus Pact of March 2011).

¹⁸⁶ [Democratic Self-Government in Europe: Domestic Solutions to the EU Legitimacy Crisis](#), 15 May 2013. There is a response to Chalmers’ suggestions in [Killing the EU rather than quitting it](#), Olivier Rozenberg, Policy Network, 10 October 2013.

¹⁸⁷ See Standard Note 4462, [EU Treaty Opt-ins and Opt-outs](#), 8 October 2007

¹⁸⁸ Under the 1994 *Treaty of Accession* Sweden must join the eurozone once it meets the criteria. Sweden maintains that joining the ERM II (a requirement for euro adoption) is voluntary, giving Sweden a de facto opt-out. All political parties have pledged not to join the eurozone without a referendum in favour of doing so. The European Commission appears to have accepted this (see [Summary of hearing of Olli Rehn](#), Economic and Monetary Affairs, 12 January 2010).

The table below shows how EU Member State currently participate in differentiated integration, i.e. where certain EU rules do not apply in some Member States?¹⁸⁹

Overview

Participation of EU Member States in projects of differentiated integration

Projects	AT	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	Total
Eurozone	1	1	0	1	0	1	0	1	1	1	1	0	1	0	1	1	0	1	0	1	1	0	1	0	0	1	1	17
Euro Plus Pact	1	1	1	1	0	1	1	1	1	1	1	0	1	0	1	1	1	1	1	1	1	1	1	1	0	1	1	23
Fiscal Pact	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	25
CSDP	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	26
Schengen Agreement ^a	1	1	1	1	1	1	1	1	1	1	1	0	1	1	0	1	1	1	1	1	1	1	1	1	1	1	1	25
Charter of Fundamental Rights	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	1	0	1	1	1	1	1	24
AFSJ ^b	1	1	1	1	1	1	0	1	1	1	1	0	1	1	0	1	1	1	1	1	1	1	1	1	1	1	1	24
EU Patent	1	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	1	1	1	1	25
Trans European Divorce Law	1	1	1	0	0	1	0	0	1	0	1	0	0	1	0	1	0	1	1	1	0	0	1	1	0	1	0	14
Total	9	9	8	8	4	9	6	8	8	8	9	2	8	7	6	9	8	9	9	9	8	6	9	8	6	9	8	

a Bulgaria, Romania, and Cyprus ratified the Schengen Agreement, but it has not entered fully into force.

b Opt-outs with an opt-in possibility are treated in this table as non-participation.

Source: author's compilation.

Perhaps the way forward for a more democratic EU is more flexibility; an EU of 'concentric circles', with groups of Member States doing more of what they want to do and less of what they don't want to do in many variations of enhanced cooperation. But this too may present risks and a potential threat to legitimacy, as David Lidington acknowledged before the December 2011 European Council.¹⁹⁰ There was, he thought, a small risk that an intergovernmental solution to the Eurozone crisis involving the 17 Eurozone States and some others could have the effect of "caucusing on single market measures", presenting the UK with a "take it or leave it" option.¹⁹¹

At the end of May 2013, a joint Franco-German letter,¹⁹² floated ideas such as a eurozone budget, a bank resolution regime, contracts for economic reform and a permanent president for the Eurogroup. The two governments proposed "contractual arrangements", agreements in which Member States would commit to structural reform in exchange for financial support from a new "fiscal capacity" (i.e. a Eurozone budget): "Member States and the European level will enter into contractual arrangements. Both sides will be committed to implement the undertakings under these contractual arrangements". This could be the basis for future Eurozone economic governance, but it could also affect the functioning of the whole EU.

¹⁸⁹ Nicolai von Ondarza, [Strengthening the Core or Splitting Europe? Prospects and Pitfalls of a Strategy of Differentiated Integration](#), 2013, *German Institute for International and Security Affairs*.

¹⁹⁰ At which the Government vetoed the proposed EU fiscal compact as a Treaty amendment, resulting in the majority of other Member States proceeding with an intergovernmental treaty without the UK.

¹⁹¹ [HC Deb 8 December 2011 c 197WH](#)

¹⁹² "France and Germany – Together for a stronger Europe of Stability and Growth".

The Commission published a Communication in March 2013¹⁹³ outlining its idea of contractual arrangements “combined with a solidarity mechanism for national structural reforms for competitiveness and growth whose lack of implementation would have a spillover effect on other Member States but whose implementation would need to be done by the Member State concerned under particular stress”. The Commission would have the central role (which the Franco-German paper had not given it): negotiating the details of the plan, monitoring implementation of the arrangement annually as part the European Semester, and assessing progress. The Commission would give national parliaments and social partners a role in the process:

In all circumstances, national parliaments should be involved before the endorsement of the contractual arrangements by the Council. Where appropriate, and depending on the specific nature of the envisaged reforms, other national stakeholders such as social partners should also be involved. Where relevant and appropriate, representatives of the Commission would be available to participate in dialogue with national parliaments on the application of the instrument.

But this kind of intergovernmentalism and differentiation raises other questions about democratic legitimacy, as Piotr Buras¹⁹⁴ points out in [The EU’s Silent Revolution](#):

For example, if member states are required to commit through contractual arrangements to undertake structural reforms in exchange for financial support, who decides on the reforms? The imposition of reforms by Brussels would strengthen “technocratic federalism”. If, on the other hand, they were designed by national governments but a new government would be bound by them, it would limit the space for political discretion and thus violate democratic rules even more than in the current system. The deeper integration of the eurozone also raises questions about how to secure democratic accountability and public scrutiny of policies there by using institutions designed for the whole EU. Should the whole European Parliament perform tasks also in the areas which do not affect all EU member states? Building new parliamentary structures for the eurozone may be the only solution – with far-reaching consequences for the whole institutional structure of the EU.¹⁹⁵

The Lords EU Committee wanted national parliaments to have “more effective purchase on the steps towards enhanced economic surveillance”:

Means must be found to ensure that EU institutions are accountable not only to the European Parliament but also to national parliaments, in particular when such significant decisions about their future are being taken. Further steps towards greater eurozone integration are likely to follow in the years to come. Unless steps are taken to strengthen national parliaments’ role in oversight of such developments, the democratic foundations of the EU could be undermined.¹⁹⁶

This situation also presents the EU with a ‘West Lothian question’. Dr Joanne Hunt of Cardiff University pointed out in [evidence](#) to the Lords EU Committee inquiry:

¹⁹³ [Towards a Deep and Genuine Economic and Monetary Union. The introduction of a Convergence and Competitiveness Instrument](#), 20 March 2013, COM(2013) 165 final.

¹⁹⁴ Head of European Council on Foreign Relations, Warsaw office.

¹⁹⁵ *European Council on Foreign Relations*, September 2013.

¹⁹⁶ [The Role of National Parliaments in the European Union](#), 24 March 2014.

If MEPs elected by States outside the eurozone (or other area of flexible/differentiated integration) are not to be permitted to participate in democratic control of activities, what additional or better claims do national parliaments from non participating states have to be included? Should national parliaments be excluded from exercising the right to participate and ‘vote’ through the EWS on measures that are not going to apply to their state? How should the EU answer this particular version of the West Lothian question?

Open Europe is also sceptical, commenting that the Eurozone crisis “is forcing its 17 members closer together, with a risk that these countries start to act and vote as a ‘caucus’ in areas which do not directly relate to eurozone governance”.¹⁹⁷

The German finance minister, Wolfgang Schäuble, wrote in a joint article with George Osborne in the *Financial Times* on 27 March 2014 that any EU Treaty change must “guarantee fairness” for countries outside the eurozone. While Mats Persson, director of Open Europe, thought this marked “a substantial win for Osborne and Cameron”, how reliable would German support for a democratic form of differentiation turn out to be?

5.3 A bigger role for national parliaments?

“There is widespread agreement that national parliaments – individually the cornerstone of any constitutional democracy - may be able to provide an effective and convincing way of shoring up the democratic legitimacy gaps which are perceived to exist within the EU order. With the EU’s political and legal framework having privileged the position of central governments, national parliaments may be considered to have been sidelined and marginalized, and their democratic legitimating function not adequately fulfilled by the European Parliament. Despite imaginative scholarly attempts to present the Union as demanding and deserving models of legitimation which break with traditional ideas of representative democracy, the latter’s appeal has continued to survive”.

Dr Joanne Hunt, [Written evidence](#), 2 October 2013

Is the solution to the democratic deficit to be found in giving national MPs, rather than MEPs, more power? This is the UK Government’s view, which is considered in more detail in Section 6 below.

The Lisbon Treaty gave new powers to national parliaments in an Early Warning Mechanism (EWM) to alert the Commission to possible subsidiarity breaches, but some analysts are critical of the actual effect of this.

In evidence to the Lords Inquiry into the [Role of National Parliaments in the EU](#), the Finnish *Eduskunta* thought nothing much had changed with Lisbon:

While it is good that more national parliaments have taken an active role in EU affairs since the Lisbon treaty, we see no evidence that the inputs of national parliaments have actually affected outcomes at the EU level. We fear that the post-Lisbon arrangements have created the appearance but not the reality of increased parliamentary participation.

But its view was that Member States needed to provide democratic legitimacy by tackling relations between governments and parliaments. This did not require Treaty change; it was a matter for national parliaments to resolve: “democratic legitimacy in the EU requires that each national parliament controls its country’s EU policy to the full extent of that parliament’s

¹⁹⁷ *Open Europe, Repatriating EU social policy: The best choice for jobs and growth?* November 2011, Stephen Booth, Mats Persson and Vincenzo Scarpetta.

powers under the national constitution. This can only be achieved within each member state”.

Not all EU national parliaments are equally engaged with the EU. They scrutinise their governments in different ways (see also below) and, as Professor Adam Cygan told the Lords Inquiry on the [Role of National Parliaments in the EU](#) they do not exist “as a collective bloc which acts as some form of ‘revising chamber within the EU legislative process... and the Article 12 TEU requirement of ‘actively contributing to the good functioning of the Union’ is undoubtedly interpreted differently within the national parliaments.¹⁹⁸ It is difficult to see how allowing national parliaments more powers to block ‘unwanted’ legislation work in practice. What is unwanted for one parliament is not necessarily so for another; EU agreement is almost always based on a compromise.

The EU has gradually reduced national vetoes in the Council in order to prevent endless wrangling among Member States and to facilitate the adoption of legislation. Giving national parliaments such powers could lead to legislative gridlock. Professor Hix is not averse to gridlock, as he told the Lords EU Committee: “Gridlock is not a bad thing if it means broader consensus and deliberation. I think history has shown the longer it takes to make decisions often they can be better decisions”.¹⁹⁹

On 17 October 2013 the Netherlands *Tweede Kamer* (Lower House) published a report on the [Democratic Legitimacy in the EU and the role of national parliaments](#), with proposals to enhance the yellow card procedure, and introducing ‘green card’ and ‘late card’ mechanisms. The report proposed three ways to boost the yellow card:

- Extend the period during which parliaments can object beyond the current eight weeks;
- Broaden the grounds on which parliaments can object to EU laws to proportionality and the legal base of the proposal;
- Lower the threshold for the number of parliaments required to activate the yellow card

Open Europe summarised the Dutch mechanisms as follows:

'Green card': This new mechanism would allow national parliaments to *propose* new policies to the European Commission, including the amendment or repeal of existing EU laws. This would make national parliaments 'agenda-setters' in the EU decision-making process, as opposed to the current situation in which they can only react to proposals originating in Brussels. At present, only the Commission can make proposals to scrap EU laws.

'Late card': This would give national parliaments the right to object to proposals *at the end* of negotiations between the European Commission, the Council of Ministers and MEPs. At the moment, national parliaments can only examine a proposal when the Commission has tabled it. However, the final product can often look completely different. For example, the bankers' bonus cap was introduced by MEPs and wasn't in the version of the proposal on capital requirements national parliaments received from the European Commission.²⁰⁰

¹⁹⁸ Written evidence, 14 October 2013.

¹⁹⁹ [Uncorrected evidence, 22 October 2013.](#)

²⁰⁰ [Open Europe blog, 1 November 2013](#)

The report also considered ways of getting national MPs to work more closely together “and so act as a counterweight to the Commission's and the European Parliament's centralising tendencies”.

The Lords EU Committee broadly supported the ‘green card’ idea, with a proviso: it “would need to include an undertaking by the Commission that it would consider such suggestions carefully, and either bring forward appropriate legislative or other proposals (or consult on them), or explain why it had decided not to take the requested action”.²⁰¹

Not all analysts believe that national parliaments have a legitimate role in EU decision-making. In [evidence](#) to the Lords EU Committee, Oskar Josef Gstrein and Darren Harvey²⁰² maintained EU law was for EU institutions to make, but that the levels of decision-making should be clarified:

... it has to be clearly acknowledged that legislative procedures on the EU level will never be “as close” to the European citizen as their national equivalents. More importantly, however, it is questionable if understanding the issue of “democratic legitimacy” in this way is appropriate, since it is not the purpose of European institutions to replace those already existing at the national level. Clearly, it is the task of European legislation to solve European problems. Nothing more and nothing less. Therefore, it is wrong to include national parliaments in the process of European legislation as such. However, what is necessary is an improved procedure in order to clarify the sphere for national and European legislation. It is time to transform the principle of subsidiarity from a political token gesture into a legally feasible concept.

5.4 Better parliamentary scrutiny of the EU

Scrutiny of the EU by national parliaments is potentially a useful and influential tool, but its effectiveness depends both on the powers of national parliaments in relation to their governments and in relation to the EU decision-making processes. Do national parliaments scrutinise or exert control over the EU or their governments sufficiently or effectively? Is better scrutiny the key to transparency and legitimacy in the EU? Should all national parliaments seek to adopt the strong mandating model of EU scrutiny of the Danish *Folketing* (national parliaments in the new Member States have all copied this model)?

In 1995 the [Reflection Group Report](#) on Treaty change recommended more transparency in decision-making processes, so that national parliaments could more effectively scrutinise what the EU was doing. This led in 1997 to the *Protocol on the role of national parliaments* in the Amsterdam Treaty, which has been strengthened in subsequent Treaty changes. The Lisbon Treaty provided for ‘yellow card’ and ‘orange card’ warning processes when national parliaments object to a proposal on subsidiarity grounds. Lisbon also called on national parliaments to “contribute actively to the good functioning of the Union” by:

- being informed by the EU institutions and having draft EU legislative acts forwarded to them;
- making sure the principle of subsidiarity is respected;
- taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of EU policies in this area;

²⁰¹ Lords European Union Committee, *The Role of the National Parliaments in the European Union*, 24 March 2014, chapter 3: [Dialogue with the European Commission](#).

²⁰² Both of Europa-Institut, Saarland University.

- being involved in the political monitoring of Europol and the evaluation of Eurojust's activities;
- taking part in the revision procedures of the Treaties;
- being notified of applications for accession to the Union;
- monitoring EU proposals on family law, with the power for any national parliament to veto them;
- taking part in inter-parliamentary cooperation between national parliaments and with the EP.²⁰³

The Protocol also provides that a national parliament may bring a case before the EU Court of Justice, arguing that an adopted legislative act does not comply with the principle of subsidiarity. This has been called a 'red card' procedure, but it is different from the 'red card' national veto the Government has proposed (see Section 6.3 below).

Follesdal and Hix concede that EU integration "has meant an increase in executive power and a decrease in national parliamentary control", but maintain that the deficit is the result of governments acting in the Council without recourse to their national parliaments or parliamentary scrutiny:

At the domestic level in Europe, the central structure of representative government in all EU Member States is that the government is accountable to the voters via the parliament. European parliaments may have few formal powers of legislative amendment (unlike the US Congress). But, the executive is held to account by the parliament that can hire and fire the cabinet, and by parliament scrutiny of the behaviour of government ministers. The design of the EU means that policy-making at the European is dominated by executive actors: national ministers in the Council, and government appointees in the Commission. This, by itself, is not a problem.

However, the actions of these executive agents at the European level are beyond the control of national parliaments. Even with the establishment of European Affairs Committees in all national parliaments, ministers when speaking and voting in the Council, national bureaucrats when making policies in Coreper or Council working groups, and officials in the Commission when drafting or implementing legislation, are much more isolated from national parliamentary scrutiny and control than are national cabinet ministers or bureaucrats in the domestic policy-making process. As a result, governments can effectively ignore their parliaments when making decisions in Brussels. Hence, European integration has meant a decrease in the power of national parliaments and an increase in the power of executives.²⁰⁴

Their view is that the democratic deficit lies as much with national governance as with EU governance, and it is the responsibility of national parliaments to scrutinise their governments better. But national parliaments have different ideas about their role in the democratic process. In [evidence](#) to the Lords EU Committee inquiry, Claudia Heffler, Valentin Kreiling, Olivier Rozenberg and Wolfgang Wessels identified seven models of parliamentary control: the "limited control model", the "Europe as usual" model, the "expert model", the "public forum", the "government accountability" model, the "policy maker", and "full Europeanisation". The differences between Member States are rooted in their visions of what the role of a

²⁰³ [IPEX note](#)

²⁰⁴ *Journal of Common Market Studies* 2006 Vol 44 Number 3, pp. 533–62, Andreas Follesdal and Simon Hix, "[Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik](#)".

parliament in a democracy should be. The authors emphasised that it was essential “to combine room for manoeuvre of the head of state or government with deeply informed oversight by national parliaments”, and this was for national governments and parliaments to work out between them.

But good national scrutiny will not by itself resolve the democratic deficit, as Simon Hix acknowledged in [evidence to the ESC](#) on 12 June 2013. Referring to the “weaknesses of the aspiration” that strengthening the scrutiny powers of national parliaments over their national governments is a way to close the democratic deficit, he emphasised how difficult it was to get early information about what is going on in the EU institutions. He thought the Council was still too secretive and operated “primarily very much as a diplomatic body, rather than seeing itself as a legislative body”.²⁰⁵

Richard Yung, a member of the European Affairs Committee in the French Senate, told the Lords EU Committee²⁰⁶ that there should be more exchanges of information between national parliaments and the Commission, especially before budgetary decisions are made, a greater flow of information between national parliaments and the Commission, and more exchanges between national parliaments. But should national parliaments necessarily have a role in the EU legislative process? Heleen Jalvingh, UCL School for Public Policy, did not think so. She told the Lords EU Committee that most national parliament tasks “are focused on scrutinising legislation rather than having a legislative role. For that reason, therefore, their task at EU level should be limited to scrutinising EU policies rather than shaping actual EU decisions”.²⁰⁷ She believed the Lisbon provisions suffice, given the limited resources of national parliaments, and that the EP was better equipped than national parliaments to deal with EU dossiers. She concluded: “Rather than increasing NPs’ powers in EU decision-making, which would eventually paralyze EU decision-making, the most important and necessary change to the Treaty is to increase transparency within the Council”.

Should national parliaments coordinate their scrutiny of governments before important intergovernmental summits in order to jointly hold the executive to account before intergovernmental decisions are taken? Could there be a joint scrutiny committee of national parliaments from all EU Member States, where views could be garnered more quickly during the eight weeks parliaments have to scrutinise proposals and submit yellow cards under the early warning mechanism? Lord Harrison asked how national parliaments could “combine in an effective way, in terms of resources and time [...] and in terms of consulting 28 member states, as well as those states consulting the Commission or, in some cases, the European Central Bank” in order to remedy the democratic deficit.²⁰⁸

In [evidence](#) to the Lords EU Committee on 22 October 2013, Professor Adam Cygan thought national EU scrutiny committees were not thorough enough, that they needed to “start going further upstream, looking at impact assessment and going directly to the Commission at source to consider what the Commission is using as justification for legislation”. He also pointed to the challenge of scrutinising EU ‘soft law’: policy co-ordination and the use of complementary competencies. He cited Europe 2020 as an example, noting that “These have regulatory, financial, political impacts across the member states and they are not open to systematic review.

²⁰⁵ This charge was explored in a [judgment on 18 July 2005](#) by the Second Senate of the German Constitutional Court. The Court declared void the German *European Arrest Warrant Act* (*Europäisches Haftbefehlsgesetz*). The complainant argued that the Act and the Framework Decision lacked democratic legitimisation by an act of the German Parliament. Judge Lübke Wolff [underlined the need for better Bundestag control](#) over government behaviour in the Council, especially where unanimity was required.

²⁰⁶ [Uncorrected evidence, 9 January 2014](#)

²⁰⁷ [Written evidence, 27 September 2013](#)

²⁰⁸ [Uncorrected evidence, 9 January 2014](#)

Professor Hix thought the Committee's role "should be one of scrutinising the whole legislative process from the Commission's initiation through what happens inside the Parliament through to the Council".²⁰⁹

Something else to bear in mind is that not all national parliaments have the same scrutiny powers, and in some Member States strengthening national parliaments means strengthening governments, which is not the same.

In its report on [Reforming the European Scrutiny System in the House of Commons](#) in November 2013, the European Scrutiny Committee recommended among other things for the requirement for a European Reporter to be appointed on each Departmental Select Committee to be written into Standing Orders, and a more systematic approach to scrutinising the Commission Work Programme:

209. We recommend that the House, through the European Scrutiny Committee and Departmental Select Committees, produces a document along the lines of the Netherlands model. All Departmental Select Committees would be expected to set out which of the proposals in the Programme they will aim to scrutinise, forming the basis for a debate which takes place in the House at the beginning of the Work Programme period. Should a Departmental Select Committee indicate to us that it saw a document as particularly worthy of debate, we would take account of that. We as a Committee would also continue to review the Work Programme. The Government would then use this information as a basis for making commitments to hold debates on particular documents, following discussions with this Committee (and without prejudice to our right to refer documents for debate). The Work Programme for the coming year is usually published in the autumn and comes into effect in January, so the timeframe for doing this would typically be November and December. We would publish a Report for debate on the floor of the House setting out our priorities and those of the Departmental Select Committees.

In evidence to the Lords EU Committee, the Europe Minister said the Government wanted to focus on "the most important issues" and apply "lighter touch" scrutiny for less significant EU documents. He also reiterated calls for further mainstreaming of EU business and greater engagement of departmental select committees, as in Germany.²¹⁰

5.5 More interparliamentary cooperation?

The Lisbon Treaty provided for a strengthening of interparliamentary cooperation mechanisms, connected in particular with the Conference of Speakers of EU Parliaments, which meets once a year and which produces guidelines for interparliamentary cooperation (IPC). Is IPC the best way for the EP and national parliaments to help legitimise EU policy-making, through participation in discussion and debate, at, for example, the Conference of Speakers of the EU parliaments and COSAC, or through sectoral joint committees, exchange of best practice, the EU Interparliamentary Exchange (IPEX), and the European Centre for Parliamentary Research and Documentation (ECPRD)? The aim of IPC is:

a) To promote the exchange of information and best practices between the national parliaments of the European Parliament with a view to reinforcing parliamentary control, influence and scrutiny at all levels.

²⁰⁹ [Uncorrected evidence](#), 22 October 2013.

²¹⁰ [Written evidence](#) to Lords EU Committee report, Role of National Parliaments in the European Union, September 2013

b) To ensure effective exercise of parliamentary competences in EU matters in particular in the area of monitoring the principles of subsidiarity and proportionality.

c) To promote cooperation with parliaments from third countries.²¹¹

IPC cannot make or amend EU legislation, but delegates can exert pressure on the Commission to initiate legislation or reform. The [Guidelines for Inter-parliamentary Cooperation in the European Union](#) of June 2008 sets out a framework for IPC, and some of its components are considered below.

A stronger COSAC?

In 1989 the *Conférence des Organes Spécialisés dans les Affaires Communautaires*, or COSAC, was established. The Speakers of the Member State parliaments agreed to strengthen the role of national parliaments in relation to Community matters by bringing together their Committees on European Affairs. COSAC was formally recognised in the Amsterdam Treaty *Protocol on the Role of National Parliaments in the European Union* which came into force 1 May 1999. The Lisbon Treaty gave it more powers: under Article 10 of the Protocol on the Role of National Parliaments, COSAC:

... may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. The Conference shall in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. Contributions from the Conference shall not bind national Parliaments and shall not prejudice their positions.

COSAC and EP representatives meet twice a year, usually in the capital of the country holding the rotating EU Presidency. The Commission has acknowledged the important role of COSAC in the political dialogue between it and national parliaments. COSAC is a platform for national parliaments to share views and exchange information, but its role is limited, its contributions non-binding, and, as Steve Pryce has noted, it “scarcely contributes to closing the EU’s “parliamentary deficit”, and there has been little appetite to give it “a more robust mandate”.²¹² In [evidence](#) to the Lords EU Committee inquiry, the Finnish *Eduskunta* was doubtful about ‘dialogue’ delivering results for national parliaments, but called for better provision of information between the Commission and national parliaments:

The concept of “dialogue” among institutions needs to be examined more closely. It seems doubtful whether there can really exist a “dialogue” in the sense of an on-going exchange of views between a large bureaucracy like the Commission and the 39 chambers, each comprising scores or hundreds of vocal and opinionated individuals, that we call parliaments. Any “dialogue” would probably involve either a formalised exchange of generally phrased letters or be controlled by a small group of individuals acting in the name of their respective institution. The first is ineffective, the latter risks being opaque and undemocratic.

We believe that it would be helpful to replace the concept of “dialogue” with that of information flows, inputs and outcomes: Parliaments need better access to the Commission’s reasoning. The Commission should inform itself of reactions

²¹¹ [EP relations with national parliaments website](#)

²¹² [From Talking Shop to Working Forum: the evolution of COSAC](#), 2006.

to its proposals. Parliaments' inputs need to be channelled to the places where the decisions are taken.

COSAC and several Member State parliaments including the UK's would like a greater role for national parliaments in the EU decision-making process in order to legitimise it. At the COSAC meeting in Vilnius on 27–29 October 2013, the UK delegation tabled an amendment calling for “a full debate on the strengthening of democratic legitimacy of the Union and the fundamental role of national Parliaments for the good functioning of the Union as well as on how this role could be further enhanced”. The Vilnius [Conclusions](#) expressed the need to fundamentally re-examine democratic legitimacy in Europe, and hoped for a “full debate on the strengthening of democratic legitimacy of the Union and the fundamental role of national Parliaments for the good functioning of the Union as well as on how this role could be further enhanced”.

Interparliamentary conferences?

The Parliament of the Member State that holds the six-monthly EU Presidency can organise conferences with the chairs of specialised EP committees, such as the committees on budget and finance, agriculture etc and delegations from national parliaments. At the Conference of Speakers of EU Parliaments in April 2012, an Inter-Parliamentary Conference for the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) was established. It provides a framework for the exchange of information and best practice in the areas of CFSP and CSDP, to enable national Parliaments and the European Parliament to be fully informed in this policy area. Delegates may by consensus adopt non-binding conclusions.

The Interparliamentary Conference is composed of delegations from national parliaments and the EP (national parliaments are represented by six Members each; the EP by sixteen Members. EU candidate countries and European NATO members can be represented by a delegation of 4 observers). However, the membership question has already given rise to disputes between the EP and national parliaments over which has the most competence and which should have a larger representation. The *Inter-parliamentary Conference on Economic and Financial Governance* (EFG) met in October 2013 in Vilnius. The Conference conclusions confirmed that:

... democratic control and accountability should take place at the level where decisions are taken and implemented; this implies a pivotal role for national Parliaments in controlling the implementation of the relevant policies at the national level, in ensuring the legitimacy of Member State actions in the European Council and the Council, and in the conduct of national fiscal, economic and social policies, while the European Parliament is a co-legislator and ensures scrutiny and democratic accountability for the decisions taken at the Union level;²¹³

The Conference launched the “[Vilnius Process](#)”, by which a working group open to national parliaments and the EP would by consensus draw up practical arrangements and rules of procedure. The conference would not be an extension of COSAC; it would focus on information exchange and coordination, not adopting conclusions and common positions. However, as the Austrian MEP, Othmar Karas, observed in the case of the EFG interparliamentary conference, it seemed that the more competence the EP had, the more “annoying” national parliaments found the EP. At the second EFG inter-parliamentary conference in January 2014, Bill Cash emphasised the relative roles of national parliaments and the EP in providing democratic legitimacy, and called for the balance of power to be returned to the national parliaments. The EP President, Martin Schulz, agreed that reform

²¹³ [Presidency Conclusions, 16-17 October 2013.](#)

would be necessary, but in his view the purpose would be to ensure a true transnational democracy; the role of the EP could not and should not be called into question.

Competing parliaments?

How willing are the EP and national parliaments to cooperate in what should be the common objective of scrutinising the Commission? Simon Hix told the Lords EU Committee he did not accept the idea that there is the EP “on the one side and national parliaments on the other side, and there is some sort of battle between the two about who gets to scrutinise what. Both are parliamentary institutions”. Dr Julie Smith described how national parliaments and the EP were all busy writing reports on EU policies, talking to the same people, “re-inventing the wheel very often”, but none of them were exchanging information or collaborating.

Relations between the EP and national parliaments

Two recent events show how far the EP and national parliaments are from agreeing an arrangement that could contribute to improving the EU’s democratic credentials. On 11 February 2014 the EP Constitutional Affairs Committee (AFCO) discussed a draft report by the Italian EPP MEP, Carlo Casini, on relations between the EP and national parliaments. The report focused on national parliament cooperation in, rather than control of, EU decision-making. The primary task of national parliaments was, it emphasised, to monitor, control and provide democratic legitimacy to the Council. The report put the onus on national parliaments to improve their scrutiny of national governments and to provide the latter with prior guidance on their work in the Council. The report recommended a legal framework and more formal procedures for the emerging EU inter-parliamentary system and suggested upgrading the role of the annual Conference of Speakers. In the ensuing debate, there was clear disagreement among MEPs over what UK Liberal Democrat MEP Andrew Duff thought was the blurring of the separation of powers between the EU and national levels. Some MEPs pointed to the rivalry between the EP and national parliaments, and the unlikelihood of 28 national parliaments and the EP ever concluding an inter-institutional agreement on anything other than exchange of information.

AFCO adopted the report on 18 March. Whereas Casini had called for a more formal framework of rules and procedures for the ‘interparliamentary system’ to be established, MEPs backed the compromise wording which stated that any attempt to devise a common framework for interparliamentary cooperation at this stage would be premature. The report recommended that COSAC should remain a forum for regular exchange of views, information and best practice, but that it could focus its discussions in particular on the general state of the integration process. MEPs rejected by one vote amendments which would have called on the Commission to provide more detailed subsidiarity justifications and to recognise that the current eight-week deadline for Reasoned Opinions was insufficient. They also rejected Casini’s proposal for an inter-parliamentary agreement to be concluded between the EP and national parliaments which would form the basis for organised cooperation under Article 9 of the Protocol on the Role of National Parliaments. It recommended *inter alia* that the role of the EU Speakers’ Conference in inter-parliamentary relations should be more clearly defined and placed on a more formal institutional footing, and that inter-parliamentary cooperation was welcome and should be open and inclusive. It concluded that the lack of transparency of Council deliberations makes it difficult for governments to be genuinely accountable to national parliaments. The report was debated in plenary on 14-17 April 2014.

The EP is perceived as reluctant to see any diminution of its powers or any form of cooperation with national parliaments that might impinge on its legislative role, yet it has called for more cooperation with national parliaments, in order to enhance its work and the work of multi-lateral assemblies such as the Inter-Parliamentary Union (IPU). EP Vice-President Miguel Angel Martinez told the Lords EU Committee: “We cannot simply increase

the role of national parliaments if their role is seen as a way of attacking the European Parliament or trying to undermine the way that European institutions work".²¹⁴

Is there an inherent and fundamental conflict between the EP and national parliaments that will prevent them from forming a democratic partnership at the European and national levels? Raffaello Matarazzo²¹⁵ commented that since 1979 the two parliamentary levels have competed with, rather than complemented, each other:

.... the NPs [national parliaments] and the EP continue to incorporate two opposing approaches to EU integration: the NPs tend to defend the inter-governmental dimension of the EU, considering the EP as an antagonist and possible threat, while the EP conceives its function as that of the main promoter of integration. Political dialogue between these actors will continue to be undermined by this differing view: the entry into force of the new Treaty has, in fact, increased inter-institutional dialogue, but it has also enlarged the scope for competition, in particular the scrutiny of sensitive issues like CFSP and CSDP.²¹⁶

5.6 A separate chamber for national parliaments?

Menon's proposed solution to the EP legitimacy problem is simple but radical ("surgical", as he puts it): shut it down and let national parliaments perform its functions, thereby ensuring "adequate democratic scrutiny of all EU legislation" (assuming national parliaments do adequately scrutinise EU business – see above). Voting on EU matters could be done in national parliaments using electronic voting systems; it would save money (no need for the three EP seats in Brussels, Strasbourg and Luxembourg); and it would, in his view, "advance democratic legitimation. For entrusting national parliaments with legislative tasks at the European level would - at a stroke - serve to strengthen the union itself". Menon is pessimistic about the future of democratic reform in the EU without such a change:

Europeans will have no option but to watch in dismay as, every five years, the EU itself is brought into disrepute by elections in which abstentions rise and nationally-inspired protest-votes send representatives to Brussels and Strasbourg with no real democratic mandate.²¹⁷

In their 2010 report, Menon and Peet note the progress made by national parliaments in acquiring a role in EU politics and suggest four ways in which the EP and national parliaments could move forward.

- Set up a new body, like the United States Senate, that would represent national parliaments (like the German *Bundesrat*); floated in the 2001 *Laeken declaration*, but it is unlikely that the establishment of another EU institution would be supported with EU voters, and "a European senate could quickly find itself uselessly duplicating the work of the European Parliament" unless the latter were abolished - highly unlikely.
- Getting national parliaments more explicitly engaged in holding to account national governments in the Council. This proposal emphasises the importance of EU scrutiny committees in national parliaments, of summoning ministers to appear before EU committees ahead of meetings, and of national EU committees working more closely together through COSAC to co-ordinate their positions. OR: national parliamentary committees appoint an EU rapporteur to look into European matters that fall within

²¹⁴ [Uncorrected evidence, 9 January 2014](#)

²¹⁵ Research Fellow, Istituto Affari Internazionali

²¹⁶ [National Parliaments after the Lisbon Treaty: A New Power Player or Mr. No in the EU Decision Making?](#) Istituto Affari Internazionali (IAI), *Democracy in the EU after the Lisbon Treaty*, Edited by Raffaello Matarazzo, Istituto Affari Internazionali (Rome), *Centro Studi sul Federalismo* (Turin), *Notre Europe* (Paris).

²¹⁷ *Open Democracy*, [The European parliament: problem, and solution](#), Anand Menon, 5 June 2009.

their competence. This would involve UK departmental select committees in looking at how national policy feeds into EU policy.

- National parliaments could insist on being consulted more explicitly over the choice of Commissioners. Although Commissioners are supposed to act collegially, “the notion that commissioners also in some way represent their countries has become widespread”. National parliaments should therefore be able to debate and approve national governments’ choices before the EP hearings.
- National parliaments and the EP should work more closely together, co-operating closely with their MEPs in joint investigations and big reports. “The cultures of Brussels, Strasbourg and national capitals might need to change to make this possible”, but the main challenge would be for national MPs and MEPs to hold the Commission and national governments to account.²¹⁸

In a Commons [debate on 16 July 2013](#) on national parliaments and the EU, the European Scrutiny Committee Chair, Bill Cash, was critical of institutional duplication, which he called “completely unworkable”.²¹⁹

6 UK Government and parliamentary views

6.1 Introduction

For the current Conservative-led UK Government, democracy remains fundamentally rooted in the state, and international cooperation should therefore be primarily intergovernmental in nature. The [Conservative Party election manifesto](#) in 2010 stated: “We believe Britain’s interests are best served by membership of a European Union that is an association of its Member States. We will never allow Britain to slide into a federal Europe”. It promised to seek negotiations to “return powers that we believe should reside with the UK, not the EU” (repatriation of EU powers).

The Foreign Secretary William Hague outlined why, in his view, giving the EP more powers had not remedied the democratic deficit, and how national parliaments could do so:

The European Parliament has an important role that is set out in the treaties and many MEPs do excellent work. However, over the past 20 years, member states have granted the European Parliament a dramatic increase in its powers through successive treaties, in the hope that it would address the growing sense of distance and disengagement among European voters. That manifestly has not worked. The question of democratic disconnection and accountability has not gone away. That suggests that we need a different answer. That answer will include a bigger and more significant role for national Parliaments, which are and will remain the true the source of democratic legitimacy in the European Union. By according a greater role to national Parliaments, we will give practical effect and real force to the principle of subsidiarity.²²⁰

Several UK initiatives to tackle democracy and legitimacy issues are underway or have recently been completed:

²¹⁸ Summarised from “Beyond the European Parliament: Rethinking the EU’s democratic legitimacy”, 2010.

²¹⁹ Ibid, [HC Deb 16 July 2013 c181WH](#); He reiterated these points in the [second reading debate](#) on the *European Union (Referendum) Bill* on 5 July 2013.

²²⁰ [HC Deb, 30 Jan 2013 c 921](#).

- **European Union Act 2011** allows the UK Parliament to mandate the Government not to agree to the adoption of certain measures in the Council unless they have been approved by an Act of Parliament and in some cases a referendum.²²¹
- **Review of the Balance of Competences**
The Government's *Review of the Balance of Competences* is due to conclude in autumn 2014. The Review aims to deepen understanding of the UK's EU membership and provide a constructive contribution to the wider European debate about modernising, reforming and improving the EU. The Review will help inform the Government for its proposed renegotiation of the EU Treaties.²²²
- **European Scrutiny Committee report on scrutiny of the EU**
On 28 November 2013 the Commons European Scrutiny Committee published [Reforming the European Scrutiny System in the House of Commons](#).²²³ See below for conclusions.
- **House of Lords report on the role of national parliaments**
The House of Lords European Union Committee published its [report on the Role of National Parliaments in the European Union](#) on 24 March 2014.
- **Fresh Start Project**
The [Fresh Start Project](#) involving MPs across party lines, think tanks, interest groups, Peers, MEPs and constitutional experts, is looking at options for a new UK-EU relationship.

6.2 Bloomberg speech

In his [Bloomberg speech](#) on 23 January 2013, the Prime Minister pledged that the Conservative election manifesto in 2015 would “ask for a mandate from the British people for a Conservative government to negotiate a new settlement with our European partners in the next Parliament..”. This would be followed by a referendum in the first half of the next Parliament (i.e. by the end of 2017) on whether to stay in the EU on the new terms, or leave altogether.

David Cameron explained that as an “island nation”, Britain had a distinctive character and view of Europe, but was not “un-European”. The five principles for his “vision for a new European Union, fit for the 21st Century” were:

“My fourth principle is democratic account-ability: we need to have a bigger and more significant role for national parliaments. ... It is national parliaments, which are, and will remain, the true source of real democratic legitimacy and accountability in the EU”.

David Cameron, ‘[Bloomberg speech](#)’, 23 January 2013

- **Competitiveness:** “creating a leaner, less bureaucratic Union, relentlessly focused on helping its member countries to compete”;
- **Flexibility:** “We need a structure that can accommodate the diversity of its members—North, South, East, West, large, small, old and new. Some of whom are contemplating much closer economic and political integration. And many others, including Britain, who would never embrace that goal”;
- **Power back to Members:** “power must be able to flow back to Member States, not just away from them”;

²²¹ For further information on the 2011 legislation, see Research Paper 10/79, [The European Union Bill HC Bill 106 of 2010-11](#), 2 December 2010.

²²² Reports to date are available at <https://www.gov.uk/review-of-the-balance-of-competences>.

²²³ ESC 24th Report, [Reforming the European Scrutiny System in the House of Commons](#), 28 November 2013.

- Democratic accountability: “we need to have a bigger and more significant role for national parliaments. There is not, in my view, a single European demos. It is national parliaments, which are, and will remain, the true source of real democratic legitimacy and accountability in the EU”;
- Fairness: “whatever new arrangements are enacted for the Eurozone, they must work fairly for those inside it and out”.

In [written evidence](#) to the Lords EU Committee inquiry in September 2013, David Lidington outlined two ways in which to tackle the EU’s democracy challenge: by increasing the role of national democracies through the Council and European Council, “and for national parliaments to play a greater and more effective role in the EU’s functioning”. As to why national parliaments should have a role in the EU framework, he said that “people in Europe identify with their national parliaments more than with EU institutions. They understand how to make their voice heard through national parliaments. National parliaments are closer to, and understand better, the concerns of citizens”. The Government, he said, was discussing the following matters with EU partners:

- Increased coordination between national parliaments, possibly by strengthening existing cooperation channels, particularly COSAC, and establishing new channels (joint committee meetings, or regular evidence sessions from Commissioners or MEPs).
- Earlier and more direct engagement by national parliaments with EU institutions. The Government would encourage Parliament to consider increasing its level of representation in Brussels (other States’ chambers have 10-20 staff; the UK has three).
- Changes to the processes in Brussels: more effective use of yellow and orange cards; identify earlier Commission proposals which raise subsidiarity concerns, including through better analysis of subsidiarity implications in Commission legislative proposals. Making it easier for national parliaments to challenge EU legislation: e.g. strengthening existing yellow card process (giving parliaments more time, lowering the threshold of the number of parliaments required to trigger a yellow card, extending scope of the card e.g. to cover proportionality); perhaps allowing national parliaments working together the power to force the Commission to withdraw a proposal (‘red card’ procedure).
- We should explore whether such cards might be issued at any point during the legislative process and indeed whether they could be exercised in relation to existing legislation. The Government would also support a number of COSAC’s recommendations, including that the Commission should make a political commitment that it will respond to opinions or requests issued by more than a third of chambers. And the Government is interested in Parliament’s views on whether national parliaments working through COSAC might issue “own initiative” reports, emulating in part the European Parliament’s practice, in order to enhance the political dialogue process. Such changes could be achieved through political agreement between Member States and the EU institutions in the short term, and/or through any future Treaty change.

6.3 A national veto mechanism: proposals for a ‘red card’ mechanism

The Lisbon Treaty innovations on the role of national parliaments, although welcomed by the UK Government, did not go far enough to satisfy David Cameron’s conviction that national

parliaments are the true source of real democratic legitimacy and accountability in the EU.²²⁴ David Lidington told the [Lords EU Committee inquiry in September 2013](#):

We want to make more effective use of the existing yellow and orange cards and identify earlier Commission proposals which raise subsidiarity concerns. In addition, we want to make it easier for national parliaments to challenge EU legislation. For example, we should consider strengthening the existing yellow card process (giving parliaments more time, lowering the threshold of the number of parliaments required to trigger a yellow card, and extending the scope of the card e.g. to cover proportionality), and consider proposals to give national parliaments working together the power to force the Commission to withdraw a proposal (a 'red card' procedure). We should explore whether such cards might be issued at any point during the legislative process and indeed whether they could be exercised in relation to existing legislation. The Government would also support a number of COSAC's recommendations, including that the Commission should make a political commitment that it will respond to opinions or requests issued by more than a third of chambers.

The current subsidiarity mechanism is a means of engaging in political dialogue with the EU institutions, rather than a means of blocking unwanted EU legislation. UK views include both strengthening the current subsidiarity early warning (yellow card) system and introducing a 'red card' veto. When, during the negotiations on the *Treaty Establishing a Constitution for Europe*, the UK Labour MP Gisela Stuart suggested a red card mechanism that would be triggered by a two-thirds threshold, it was rejected by the IGC (and later by the Lisbon Treaty IGC) on the grounds that it might undermine the Commission's right of initiative and slow down the legislative process with national vetoes. On the other hand, as the Lords EU Committee noted in its [11th Report](#) of 2002-3: "This can be countered by the argument that a two-thirds threshold is going to be quite hard to achieve, meaning that the 'red card' will always remain a weapon of last resort". The Lords Committee concluded that the yellow card procedure would "in most circumstances, strike the right balance, providing an individual right to be heard, rather than a collective right to block". However, it recommended keeping the red card proposal:

The successful marshalling of the necessary majority to activate the "red card" will, in our view, be a very rare event. The fact that so many national parliaments were concerned about a proposal might well reveal a serious concern that would need addressing. Any effective early warning system would of course require an effective mechanism to allow national parliaments to exchange information.

The Lisbon Treaty did not provide a blocking 'red card' mechanism, but since 2009 calls for a national veto power have increased – and not just from the UK Government. At the [Königswinter Conference](#) on 31 May 2013 William Hague spoke about a "crisis of legitimacy" that was undermining EU institutions, and called for national parliaments to be able to overrule Commission legislative proposals by means of a 'red card' system. This would "give national parliaments the right to block legislation that need not be agreed at the European level". As with the current 'yellow card' system, a minimum number of national parliaments would have to agree that the proposal should not be made by the EU. Hague also hailed 'enhanced cooperation' (whereby some Member States proceed with integration measures ahead of others) as evidence of a more flexible form of integration involving only States that wanted to integrate, and said that "ultimately the EU remains an inclusive club based on the four freedoms and the Single Market". He told the conference the UK wanted to help "make the EU more democratically responsive", solve the problem of the EU's lack of "mechanisms

²²⁴ See [HC Deb 12 December 2012 c 291](#) and [HC Deb 17 December 2012 c 569](#).

to decentralise – to push powers down as well as up”, without which the EU would not be “democratically sustainable”.

In [evidence to the ESC on 4 July 2013](#), David Lidington outlined Government thinking on how to improve the EU’s democratic legitimacy, starting with a repudiation of the view that giving the EP more powers would improve the situation, and going on to discuss a possible ‘red card’:

Even before we get to the red card, there is a question about whether the yellow card procedure could be strengthened by looking again at the threshold and the scope of the yellow card process, which at the moment is limited to subsidiarity grounds but could be made wider to cover proportionality, disproportionate cost, the time given to national parliaments to put forward a reasoned opinion, or other grounds. But we thought it was right to bring forward the idea that we should go beyond the yellow card and propose an outright power of veto. If a given number of national parliaments around the EU said that a certain Commission proposal should be blocked, the Commission simply would not be able to review it and decide to resubmit but would have to take it off the table. It is not something the British Government have yet formally adopted as a policy, but it is an idea we have put out that we think needs serious consideration.

In November 2013 the [Fresh Start Project](#) outlined proposals for a red card procedure to be introduced via Treaty change, which would mean national parliaments could “combine to permanently block Commission proposals” and, more controversially, could seek to apply the red card to existing EU legislation. The group also suggested strengthening the existing yellow card system “by lowering the threshold for issuance and giving Parliaments more time to scrutinise proposals”. In their view, the trigger for a subsidiarity notification to the Commission should be three national parliaments submitting reasoned opinions, rather than the current one third of national parliament votes, and “a significantly extended period for scrutiny” rather than the present eight weeks.²²⁵

David Lidington proposed that the red card might take the form of a “political commitment”, (reminiscent of the earlier Luxembourg and Ioannina Compromises):

...we could make an advance ahead of reopening the treaties if the Commission were to say, “We agree that, once a given number of national Parliaments deploy a reasoned opinion against a proposal, we will treat that as an effective veto. We promise, as a matter of political commitment, that we will withdraw such a proposal.” We could get a change of working practice at political level ahead of codifying it through treaty change.²²⁶

The European Scrutiny Committee Report on reforming EU scrutiny proposed more effective Government accountability, and more engagement on the Floor of the House, including specific EU questions, more engagement in EU matters in departmental select committees and a permanent membership of the ESC, rather than the current ad hoc, subject-based membership. There were also some radical proposals: the Committee emphasised the supremacy of the Westminster Parliament and proposed a national veto and the unilateral repeal of EU legislation. It recommended that “there should be a mechanism whereby the House of Commons can decide that a particular legislative proposal should not apply to the UK”; further, that “parallel provision should be made to enable a decision of the House of

²²⁵ Fresh Start Project Mandate for Reform “[Securing the Right Deal for the UK: Equipping the EU for a Globalised World](#)”, November 2013

²²⁶ European Committee B, [Relations Between the European Commission and National Parliaments](#), 30 January 2014.

Commons to disapply parts of the existing *acquis*". This would require "an Act of Parliament to disapply the European Communities Act (1972) in relation to specific EU legislation".²²⁷

A letter from around a hundred Conservative MPs (about 17% of the Commons)²²⁸ called on David Cameron to introduce a national veto of existing unwanted EU legislation, but, as William Hague pointed out in an interview on [Sky News on 12 January 2014](#):

... if national parliaments all around the European Union were regularly and unilaterally able to choose which bits of EU they would apply and which bits they wouldn't, well then the European single market wouldn't work and indeed even a Swiss style arrangement, free trade arrangement with the European Union wouldn't work. So we have to be realistic about these things but we are working for more national accountability and we are finding common cause with other people in Europe such as in the Netherlands for instance, on some of these ideas.

The Justice Secretary Chris Grayling [told the BBC Sunday Politics show](#) on 12 January 2014 that there could not be a situation "where one parliament could prevent laws happening across the whole of the European Union".

There are some obvious problems with a national veto of existing EU laws. EU law has primacy over national law, as confirmed by the Court of Justice and stated in the Treaty Declaration (see Section 2.4). Furthermore, the TFEU states in Article 288 that its legislative instruments are all binding and regulations "directly applicable in all Member States". As the Court of Justice concluded in [Flaminio Costa v E.N.E.L.](#) in 1964, this would become meaningless if a Member State could unilaterally nullify their effects by means of a contrary domestic legislative measure. The Court ruled that "The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail".

Support for a 'red card' in the EU?

According to [Open Europe's ComRes poll, 22-24 May 2013](#), one of the top four priorities for a renegotiation of the UK's EU membership was "giving the UK parliament more powers to block unwanted EU laws". A red card is also supported by [Business for Britain](#). It is hard to assess the level of support among other EU governments for a red card procedure. In 2007, when the Lisbon Treaty was being negotiated, Poland, the Czech Republic and the Netherlands supported such a procedure.²²⁹ According to an [Open Europe](#) report in September 2011, "European localism" would be supported by Scandinavia, the Netherlands, most of Eastern Europe and the German Länder.²³⁰

The Dutch Government appears to be a firm supporter of strengthened subsidiarity. In a review of subsidiarity and proportionality in June 2013, it called for "a more sober but more effective EU, starting from the principle: 'at European level only when necessary, at national level whenever possible'".²³¹ The Dutch Government argued that power and responsibility should be at local, national, European, or global level, depending on the issue. It stated that the "time of an ever-closer union in every possible policy area is behind us", preferring the principle of "Europe where necessary, national where possible". In a speech on 30 October 2013 the Dutch Prime Minister, Mark Rutte, echoed much of what the Fresh Start Group and

²²⁷ ESC [Reforming the European Scrutiny System in the House of Commons](#), 28 November 2013

²²⁸ See [Telegraph](#), 11 January 2014

²²⁹ [European Voice](#), 16 May 2007.

²³⁰ Anthony Browne and Mats Persson, [The case for European localism](#), September 2011.

²³¹ [Testing European legislation for subsidiarity and proportionality – Dutch list of points for action](#), 21 June 2013

the Government have been saying about looking at which tasks are better performed by Member States, and which by Europe. The Dutch Foreign Minister, Frans Timmermans, wrote in a *Financial Times* article, [Monnet's Europe needs reform to fit the 21st century](#), on 14 November 2013:

... we would encourage national parliaments to bring Europe back home where it belongs and strengthen their co-operation with each other and the European parliament. They should have the right to summon commissioners to capitals. And if one-third of national parliaments raise subsidiarity objections to a legislative proposal (the yellow card procedure), the commission should not just reconsider, it should use its discretion to take the disputed proposal off the table, turning the yellow card into a red.

According to a report by Rem Korteweg of the *Centre for European Reform*, the Dutch subsidiarity review has received support from Germany, Sweden, Finland and Austria, and even the EP President, Martin Schulz.²³² However, the author did not think the Dutch Government would support David Cameron in his quest for “radical changes to the EU”, and the 2013 *Tweede Kamer* report on national parliaments in the EU did not call for a red card system.

Before the 2013 German election Chancellor Merkel was reported as wanting more direct agreements between EU Member States - an intergovernmental rather than an EU approach - and during her election campaign, she was widely reported as saying she saw “no need to give more authority to Brussels”. Open Europe [reported on 31 May 2013](#) on a guest piece in the *Frankfurter Allgemeine Zeitung*, 31 May 2013, by Professor Dr. Hans Hugo Klein, a former CDU MP and judge at the German Constitutional Court. He argued that “the principle of subsidiarity needs to be defined in more detail” followed by a “thorough check of existing EU law”, and that, in order not to alienate the people in Europe, “a repatriation of EU competences and a thinning-out of European rules and regulations is required”.

Opinion polls show a fall in public support for the EU and more support for domestic decision-making, Jose Ignacio Torreblanca (European Council on Foreign Relations) [reported on 1 October 2013](#). He noted a poll in May 2007 in which 57% of Germans tended to trust the EU, compared with only 29% in the *Eurobarometer spring 2013 poll*. Data collected in August 2013 for a *YouGov Deutschland poll* for Open Europe and Open Europe Berlin seem to confirm this trend: 60% of voters thought national parliaments should be given more powers to block unwanted EU laws (25% disagreed).

7 Conclusions

There is talk of another EU Treaty reform - not just by UK Government, but by the EU institutions and other Member States. Commission President Barroso has called for a “deep and genuine economic union, based on political union”, while Council President Van Rompuy has tried to strengthen Eurozone governance within the existing Treaty framework.

But what is actually on the reform agenda? Will it stand a chance of being adopted and if so, will it make the EU more democratic? The last reform process lasted eight years from the Laeken Declaration to the Lisbon Treaty, yet for many the democratic deficit, particularly since the euro crisis, appears to have deepened. In a [speech on 7 January 2014](#), Commission Vice President Viviane Reding spoke of making the EU more democratic and transparent by creating a “United States of Europe with the Commission as government and two chambers – the European Parliament and a ‘Senate’ of Member States”. She called for a broad debate on the future of Europe before the “required” changes are made.

²³² CER bulletin 91, August-September 2013.

For some, including the UK Government, the way forward is to allow Member States to loosen the EU framework in more policy areas and thereby to preserve national sovereignty.²³³ National parliaments have democratic legitimacy at the national level; this needs to be transferred onto the EU stage so that they can become actors there. The European Scrutiny Committee suggestions²³⁴ and the letter from [Conservative MPs to David Cameron](#) in January 2014 take this further: the re-establishment of a national veto of EU proposals, which would not only “transform the UK’s negotiating position in the EU”, but transform the negotiating position of the other 27 Member States.

What can be done about the falling support for the EU as an institution among the electorates of Europe? If the EU has a *demos* (the UK Government and the German Constitutional Court argue that it does not), it still fails to attract trust or even interest among its citizens. Its institutions lack transparency, and all too often their deliberations and decisions are subject to the ‘black market’ scrutiny of the tabloid press, sometimes long before national parliaments have scrutinised them.

What are the chances of a radical Treaty amendment that would suit the current UK Government? Roger Liddle comment in *The Europe Dilemma: Britain and the Drama of EU Integration* that “Views on the likelihood of a process of full-blown treaty change have waxed and waned”.²³⁵ The assumed timetable of a Treaty amendment process being launched after the EP elections, a convention in 2015-16 and an IGC in 2016-17, would, as Liddle points out, be compatible with the David Cameron’s timetable, but would it achieve the ambitious reforms the UK Government seeks before putting UK membership of the EU to a referendum?

The Foreign Office Minister, Lord Howell, in a debate on 9 January 2014, thought the UK Government was gathering support for wide-scale EU reform – even if their ideas of reform were different from the UK’s – and he listed a number of other reform-minded Member States (Poland, the Netherlands, Sweden, the Czech Republic, Slovakia, Hungary, the Baltic and Mediterranean States). But he made clear that “It must be European reform, not just reform of the narrow issue of Britain’s relations with the rest of the European Union”. In Germany, says Liddle, “In principle, the Christian Democratic Union ... supports a radical leap forward in political integration, creating a federal European finance ministry, and a directly elected EU president”, but Chancellor Merkel is cautious, and therefore he thinks, “if there is German backing for treaty change, it will be limited in scope”.²³⁶

Some observers think the EU has reached a critical point in its evolution, a point at which a radical change could, or should, be made. John Wyles, writing in *European Voice* in January 2014 about the dwindling public support for the EU and its institutions, thought this offered “nothing but encouragement for those who dream of strict curbs on ‘Brussels’ or even of taking their countries out of the Union”.²³⁷ Governments were, he wrote, “gradually and almost imperceptibly ... adopting a crablike shuffle away from the model of political and economic integration that has ruled for most of the last 60 years”. Predicting successes for eurosceptics in the EP elections, Wyles thinks governments “will have to take a fresh look at the balance of competences between the Union and its member countries. And a revision through subsequent treaty changes could be equally unavoidable”.

Not all institutional reform requires Treaty amendment. The Lords EU Committee concluded that there was ample scope for institutional reform without Treaty amendment:

²³³ See Foreign Affairs Committee [Written evidence from Frank Vibert](#), LSE, June 2013.

²³⁴ Reforming the European Scrutiny System in the House of Commons, 4 December 2013

²³⁵ Liddle, p 222

²³⁶ Liddle, p 223

²³⁷ *European Voice*, 16 January 2014.

Treaty change is not necessary to enhance the role of national parliaments in the EU: substantial improvements can, and should, be achieved without treaty change. To a significant degree it is a matter for the will of parliamentarians to insist on securing substantial and lasting changes, and of their governments to give effect to that will. Important improvements could be achieved through the autonomous action of national parliaments, and through actions collectively agreed between the national parliaments, the Commission, the Council and the European Parliament where relevant. This report sets out options for reforms which could be pursued in such agreements.

Robert Howse and Kalypso Nicolaidis have written of the “largely impossible nature of the task of squaring the federalist idea with the modern statist conception of sovereignty”.²³⁸ If democracy is fundamentally rooted in the state, Reding’s proposal for more democracy along with more integration, has an inescapable - if for the UK Government unpalatable - logic: should not the EU, to make it more democratic, legitimate and accountable, be given the structures and institutions of a democratic, legitimate and accountable state? On the other hand, while the hybrid model encompassing intergovernmental, EU and differentiated arrangements, is creaky, it has nevertheless survived for over 50 years. Treaty changes have allowed the EU to expand and change, patching up weaknesses, but also making it more flexible and adaptable to the demands of its growing and diverse membership. The Lisbon Treaty reforms did not radically change the EU’s institutional structure. Laurent Pech commented that EU governments were “motivated by two somewhat contradictory impulses when devising the [Lisbon Treaty]: They wanted to make the EU more democratic and efficient whilst avoiding any process of state-building”.²³⁹ With any future changes, can the dynamic of EU political and economic integration, efficiency and democratic legitimacy be reconciled with the preservation of Member State sovereignty, national vetoes and opt-outs?

The debate continues.

²³⁸ Introduction to [The Federal vision, Levels of Governance, and Legitimacy](#) and Levels of Governance in the United States and the European Union, September 2001.

²³⁹ Laurent Pech, *The Institutional Development of the EU Post-Lisbon: A case of plus ça change...?* UCD Dublin European Institute Working Paper 11-5, December 2011. The idea of “double impulse” is borrowed from J. Peterson and M. Shackleton (eds.), *The Institutions of the European Union*, 2006.

Appendix German Constitutional Court ruling on Lisbon Treaty

German Constitutional Court ruling on the Lisbon Treaty – is the EP an institution of EU democracy?

In pre-Maastricht debates in the early 1990s, the German *Bundestag* called for the EU's democratic deficit to be eliminated, in particular by strengthening the EP's legislative powers. The [German Constitutional Court ruling on the Maastricht Treaty](#) on 12 October 1993 argued that, having no demos, European democracy had to be based on "... the existence of specific privileged conditions, such as ongoing free interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified, and as a result of which public opinion moulds political policy". The Court also ruled that national legislative bodies were the relevant organs to convey democratic legitimacy in the context of Germany's participation in the process of European integration.

During the Amsterdam Intergovernmental Conference which gave rise to the *Amsterdam Treaty* the *Bundestag* supported the EP in becoming a co-legislator with the Council, rather than supporting a stronger role for national parliaments in the legislative process. Subsequently, the German Parliament insisted on, and received from the Government, its own right to approve EU matters.

In a [ruling](#) in June 2009 on the compatibility of the Lisbon Treaty with the German Constitution (Lisbon Case, [BVerfG, 2 BvE 2/08, 30 June 2009](#)), the Constitutional Court refused to endorse the EP as a primary institution of EU democracy. In ruling on the constitutionality of various Treaty reforms, the Court formulated a "democracy *solange*" (as long as), establishing the extent to which the EU can develop as a constitutional and legal entity. In the ruling the Court raised interesting arguments about the nature of the EU and its lack of a 'demos', concluding that the EP does not represent the EU people because the EU does not have a 'people'. It placed the national parliaments of the Member States ahead of the EP, as long as ("solange") the Union continues to be founded on the principle of conferral – i.e. the Member States confer power on the EU to act and the EU itself has no general power to decide its own powers (*Kompetenz-Kompetenz*). The Court used this argument to support German approval of the Treaty. The principle of 'conferral', the Court argued, secures democratic legitimacy in the EU. Without this principle the EU could exercise both the powers conferred on it by the Member States and also those created by the EU; the EU would be able to decide its own powers and would therefore exhibit the characteristics of a state. The Court emphasised that the EU is not a state, but an association of States (*Staatenverbund*); and the EP is not "a body of representation of a sovereign European people", but "a supranational body of representation of the peoples of the Member States, so that the principle of electoral equality, which is common to all European states, is not applicable with regard to the European Parliament". The ruling continued:

Other provisions of the Treaty of Lisbon, such as the double qualified majority in the Council (Article 16.4 TEU Lisbon, Article 238.2 of the Treaty on the Functioning of the European Union), the elements of participative, associative and direct democracy (Art. 11 TEU Lisbon) as well as the institutional recognition of the national Parliaments (Article 12 TEU Lisbon) cannot compensate the deficit of European public authority that exists when measured against requirements on democracy in states, but can nevertheless increase the level of legitimisation of the *Staatenverbund*.

In the Lisbon judgment the Court turned the legitimacy argument on its head: it assumed that parliamentary democracy exists *only* in the Member States, and that, as the EU is not a state with a sovereign people, but an association of states, the EU cannot and need not fulfil the national criteria for a democracy. The election of Members of the German *Bundestag* by the people fulfils its central role in the system of the federal and supranational intertwining of power "only if the *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 responsibilities and competences of substantial political importance or if the Federal Government, which is answerable to it politically, is in a position to exert a decisive influence on European decision-making procedures".

Professor Davor Jancic noted that Germany's Lisbon judgement represented the climax of the "emphasis on the democratic legitimization of the European Union by national parliaments" and "In the "democracy *solange*," the [Constitutional Court] denied the possibility for the European Parliament ever to surpass its supplementary character".

Source: *Columbia Journal of European Law*, Vol. 16 (3), 2010; [LSE Research online, August 2013](#). For further information on the *solange* judgments, see Davor Jancic, "[Caveats from Karlsruhe and Berlin: whither democracy after Lisbon?](#)" 2010; [LSE Research online, August 2013](#).