

Should the Economic and Monetary Union Be Democratic After All? Some Reflections on the Current Crisis

By Päivi Leino* and Janne Salminen**

A. The Debt crisis is a Challenge – and An Opportunity

During the past months the European Council agenda has been dominated by Europe's economic crisis, which combines elements of banking crisis in the euro area and individual Member States' debt crisis – and has turned into something of an existential crisis for the Union as a whole.¹ Many questions concerning the Union's legitimacy have been raised in the context of the current debates pointing out how the role of democratic institutions has turned blurry while market pressure has been tackled in quickly developing institutional structures by taking fast decisions on major economic commitments involving a tightened belt both for those receiving the aid, and for those giving the necessary guarantees required by the creditors. As the crisis has evolved, these questions have become more or less fundamental in nature since they have increasingly encompassed the trust in the possibilities of the Union to manage the crisis through its own decision-making. But at the same time, crises also bring about potential for change.

In June 2012 the European Council adopted a report setting out “four essential building blocks” for the future Economic and Monetary Union (EMU): an integrated financial framework, an integrated budgetary framework, an integrated economic policy framework and, finally, strengthened democratic legitimacy and accountability. The Report prepared in June by Mr Herman van Rompuy, President of the European Council, underlined that

[T]o ensure stability and growth in the euro area, Member States have to act and coordinate according to common rules. There have to be ways on ensuring compliance when there are negative effects on other EMU

* Adjunct Professor of EU Law, University of Helsinki, Finland. The authors gratefully acknowledge the financial support granted by the Ella and Georg Ehrnrooth Foundation. Email: paivi.leino@helsinki.fi.

** Licentiate of Laws, Faculty of Law, University of Turku, Finland, member of the research project “How to Rule the Economy”, financed by the Academy of Finland. A first draft of this paper was presented at the Constituting Control Workshop organized at the Turku Law Faculty on 13–14 December 2012. The authors thank the participants in that Workshop, in particular Professor Günter Frankenberg, for a good discussion around the core themes of this submission. Email: janne.salminen@utu.fi.

Note: This manuscript was completed on 17 December 2012.

¹ See JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION. A RESPONSE (Ciaran Cronin (tr.), 2012).

members. This is necessary to guarantee the minimum level of convergence required for the EMU to function effectively.

Overall, closer EMU integration will require a stronger democratic basis and broad support from citizens. For this reason, it is essential that already the process towards realising this vision is based on wide consultation and participation. Integration and legitimacy have to advance in parallel.²

The European Council invited its President to develop — together with three wise men including the President of the Commission, the President of the Eurogroup and the President of the ECB — a “specific and time-bound road map for the achievement of a genuine Economic and Monetary Union”. An interim report was presented in October 2012 and a Final Report, published on 5 December 2012, has recently been discussed by the European Council in December 2012.³ The December 2012 European Council stressed that

Throughout the process, the general objective remains to ensure democratic legitimacy and accountability at the level at which decisions are taken and implemented. Any new steps towards strengthening economic governance will need to be accompanied by further steps towards stronger legitimacy and accountability. At national level, moves towards further integration of the fiscal and economic policy frameworks would require that Member States ensure the appropriate involvement of their parliaments.⁴

While increasingly difficult questions relating to Europe’s economic survival are being tackled, wider and equally fundamental questions relating to the role of democracy and the need of ‘legitimate’ decision-making — whatever meaning is given to the term — have come to surface. This is particularly interesting against the background that in the 1990’s, around the time when the EMU was designed and launched, there was no particular expectation that it should be democratic.⁵ Instead, it was believed that the system would

² Herman Van Rompuy, José Manuel Barroso *et. al*, *Towards a Genuine Economic and Monetary Union*, EUROPEAN COUNCIL (2012), available at:

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf (last accessed: 27 June 2013).

³ See Herman Van Rompuy, *Towards a Genuine Economic and Monetary Union*, *supra* note 2, conclusions at para. 4; see also *European Council Presidency Conclusions: Brussels 14 December 2012*, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134353.pdf (last accessed: 2 July 2013).

⁴ See *European Council Presidency Conclusions*, *supra* note 3, at para. 14; *European Council conclusions on completing EMU*, adopted on 18 October 2012, para 15, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/132986.pdf (last accessed: 2 July 2013).

⁵ For a discussion, see Päivi Leino, *The European Central Bank and Legitimacy — Is the ECB a Modification of or an Exception to the Principle of Democracy?*, THE JEAN MONNET WORKING PAPERS 11/2000, HARVARD LAW SCHOOL (2000).

legitimate itself through its results (Section 2). The EMU construction is unique in being intentionally asymmetric: while the monetary union is built on a high level of integration and largely driven by an exceptionally independent European Central Bank (ECB), the economic union has been loose and built on the idea of coordination, even though the Treaty certainly acknowledges a connection between price stability and the way in which the Member States run their economies. The hindsight developed during the last years is that the system was not sturdy enough to tackle crises of the dimension Europe is facing today (Section 3). The current contribution will discuss weaknesses of the current arrangements from the perspective of democratic legitimacy and conclude with reflections on the attempts to find an end to the crisis (Section 4).

The recent debate has circled largely around the concept of legitimacy, necessitated, in particular, by the discussions on the challenges caused by supranational control over some Member States' economic choices. But one problem with the attempt to measure legitimacy is that it has no well-established meaning, and is used to refer to at least three values: it may mean that the institution is actually accepted (as a fact) by the relevant community (empirical or social legitimacy); that it does 'good' (moral legitimacy); or that it functions in accordance with law (formal or normative legitimacy, i.e. legal validity).⁶ Due to these various meanings, as Koskenniemi has shown, 'legitimacy' is ideally suited to justify whatever we want to justify because it has no clear reference; as a notion it defies definition and forms an intermediate concept between 'the formal (but too abstract) idea of legal validity and the substantive (but too controversial) notion of justness'.⁷ As neither 'law' nor 'justice' is fixed, each relies on the other, while legitimacy falls short of both validity and justness.⁸ In the current debates, it seems that the concept is used rather loosely and interchangeably for many of these purposes. We use it in the same way, but not entirely without a certain degree of criticism.

Other core values in the debate include credibility and accountability. Credibility is based on the expectation that an institution can fulfill the functions it has been delegated and will properly carry out the functions it is entrusted with.⁹ In the case of the ECB it has been crucial for the success of the Bank (and the EMU as the whole) that the Bank has been able to establish sufficient credibility, or as Snyder sees it, the 'legitimacy' of the whole of the

⁶ See e.g., Kaarlo Tuori, *Legitimacy*, in THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 493-495 (1999); Lars Eriksson, *Legitimitteetti* (Legitimacy), in ENCYCLOPAEDIA IURIDICA FENNICA 438-444 (1999); Thomas Franck, *Legitimacy in the International System*, 82 AMER. J. OF INT'L L. 706 (1988); THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990); Martti Koskenniemi, *Book Review of the Power of Legitimacy Among Nations by Thomas N. Franck*, 86 AMER. J. OF INT'L L. 175-178 (1992). For a discussion about this in the EU context, see Päivi Leino, *All Dressed Up and Nowhere to Go – The Debate on the EU Charter of Fundamental Rights*, XI FINN. YBK. INT'L L. 37-81 (2000).

⁷ Koskenniemi, *supra* note 6, at 175.

⁸ *Id.* at 178.

⁹ Francis Snyder, *EMU Revisited: Are We Making a Constitution? What Constitution Are We Making?*, in THE EVOLUTION OF EU LAW 463 (Paul Craig and Gráinne de Búrca (eds), 1999).

EMU has been closely linked to the nature and function of its institutions, the ECB and the European System of Central Banks (ESCB, consisting of the ECB and the national central banks). Accountability again refers to the fact that the institution is more or less responsive, directly or indirectly, to the people who are affected by its decisions.¹⁰ Therefore, accountability and legitimacy are closely connected. The wider question of course is whether democracy, citizen participation and open decision-making should have some independent value, or whether they are merely tools in the making of something greater: legitimacy for the Union actions.¹¹

B. On the Role of Democracy in the Economic and Monetary Union; the Treaty Framework

This is not the first time that questions relating to the Economic and Monetary Union figure high on Europe's constitutional agenda. The formal entry into force of the Treaty of Maastricht introducing the EMU in November 1993 was surrounded by a certain air of uncertainty, along with one of relief.¹² It had been preceded by a discussion concerning the democratic legitimacy of the EMU, in particular as regards the monetary union; a creation that had been deliberately distanced from the conventional politically organized and democratically legitimated system of decision-making¹³ in order to make it immune to political pressure. An autonomous central bank, the ECB, was seen as a prerequisite for price stability,¹⁴ and the general opinion appeared to be that monetary sovereignty cannot be divided.¹⁵

The main objective of the Monetary Union is to defend the Euro through the maintenance of price stability, which in its turn is guaranteed by the independence of the ECB. The core principle governing the Bank's inter-institutional relations is that neither the European

¹⁰ *Id.*

¹¹ Or alternatively, if human rights were valid and useful only so as to buttress legitimacy, they would be instrumental and no longer 'trumps', as Dworkin argues in his well-known thesis. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977).

¹² Geoffrey Edwards, *Legitimacy and Flexibility in Post-Amsterdam Europe*, in *COPING WITH FLEXIBILITY AND LEGITIMACY AFTER AMSTERDAM* 121 (Monica den Boer, Alain Guggenbühl and Sophie Vanhoonaeker (eds.), 1998).

¹³ Christiaan Timmermans and Jan Winters, *Executive Agencies within the EC: The European Central Bank – a model?* *Editorial Comments*, 33 (4) *CML REV.* 629 (1996).

¹⁴ *E.g.* JEAN-VICTOR LOUIS *ET AL.*, *COMMENTAIRE MEGRET, LE DROIT DE LA CEE 6: UNION ECONOMIQUE ET MONETAIRE, COHESION ECONOMIQUE ET SOCIALE, POLITIQUE INDUSTRIELLE ET TECHNOLOGIQUE EUROPEENNE* 62 (Comment on Megret: the law of the EEC 6: European economic and monetary union, economic and social cohesion, industrial and technology policy), 1995); René Smits, *The European Central Bank: Institutional Aspects*, 45 *ICLQ* 327 (1996).

¹⁵ *E.g.* Hugo Hahn, *The European Central Bank: Key to European Monetary Union or Target?*, 28 *CML REV.* 799 (1991).

System of Central Banks, the ECB, or a national central bank nor any member of their decision-making bodies shall seek or take instructions from Union institutions, governments or any other bodies.¹⁶ The ECB is independent in relation to political decision-making both at the European and at national levels, which is meant to guarantee that it has a wide margin of appreciation when it comes to judging between different monetary policy measure alternatives.¹⁷ This discretion is not significantly limited by the jurisdiction of the Court of Justice (CJEU) to review the legality of its acts.¹⁸ In practice, it seemed almost impossible for outsiders to demonstrate that the ESBC has been mistaken in its judgments, reflecting that the System was carefully protected against any criticism by its independence.¹⁹

The independent status of the ECB was also justified with the need to lead the market in an unprecedented way, and to convince the financial markets of the fact that neither the ECB nor any Union organ would implicitly guarantee the obligations of Member States.²⁰ For these reasons, it was believed that the democratic legitimacy of the monetary policy within the EMU framework could not be realized on the basis of traditional, democratic methods but instead, through a combination of different supervisory and accountability arrangements, ranging from certain reporting obligations to other EU institutions and the appointment procedures of the Bank's leadership to the fact that the Bank's objective is based on the Treaty,²¹ which jointly contribute to creating legitimacy for the arrangement. This is because the accountability of the ECB stems less from the (limited) extent to which it is directly answerable to the Union's political institutions or national governments than from the fact that the Bank is locked into a relatively complex institutional structure and

¹⁶ See Article 130 TFEU. For discussions of ex-Article 108 TEC, see RENÉ SMITS, *THE EUROPEAN CENTRAL BANK, INSTITUTIONAL ASPECTS* 172 (1997); Bernd Martenczuk, *Der Europäische Rat und die Wirtschafts- und Währungsunion* (The European Council and the economic and monetary union), 33(2) *EUROPARECHT* 174 (1998); Hubertus Arndt, *Zur Frage der Legitimität der Europäischen Zentralbankautonomie*, in *LEGITIMATIONSPROBLEME UND DEMOKRATISIERUNG DER EUROPÄISCHEN UNION* 212 (On the question of the legitimacy of the European Central Bank autonomy, legitimacy problems and democratization in the European Union, Andreas Maurer and Burkard Thiele (eds.), 1996) ; Robert Elgie, *Democratic Accountability and Central Bank Independence: Historical and Contemporary, National and European Perspectives*, 21 (3) *WEST EUROPEAN POLITICS* 54-56 (July 1998).

¹⁷ Jean-Victor Louis, *supra* note 14, at 75.

¹⁸ According to Article 263 TFEU the legality of all acts adopted by the ECB can be reviewed by the CJEU.

¹⁹ Charles Goodhart, *The European System of Central Banks after Maastricht*, in *POLICY ISSUES IN THE OPERATION OF CURRENCY UNIONS* 237 (Charles Goodhart (ed.), 1993); JÜRGEN VON HAGEN, *PENNINGPOLITIK OCH INSTITUTIONER I EMU* (Monetary policy and institutions in the EMU) 18-19 (1997).

²⁰ TOMMASO PADOA-SCHIOPPA, *THE ROAD TO MONETARY UNION IN EUROPE - THE EMPEROR, THE KINGS AND THE GENIES* 183 (1994).

²¹ MARTIN SCHEININ, *EMU JA SUOMEN VALTIOSÄÄNTÖ: YHTEISEEN RAHAAN SIIRTYMINEN JA SUOMEN PANKIN ASEMA* (EMU and the Finnish Constitution: Transition to the single currency and the position of the Bank of Finland) 173 (1997).

set of inter-institutional relations.²² Transparency, which usually would have a central position in such arrangements, was given a rather modest role: All documents connected with monetary policy could remain confidential unless the Bank decided otherwise.²³ In practice, voting records and the reasoning behind the decisions taken have remained confidential,²⁴ even though some openings in this respect have been made more recently.²⁵ In addition to its great independence, a noteworthy aspect of the ECB is that it has powers that do not automatically belong to every central bank, including its limited law-making competence and competence to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions²⁶. ECB decisions may also require an undertaking to submit to an infringement procedure.²⁷

The Economic Union was built around entirely different – but still rather unorthodox in the EU context – principles: while the Member States were to conduct their economic policies with a view of contributing to broadly defined Community objectives, and to regard their economic policies ‘as a matter of common concern’, their obligations were largely limited to a duty to coordinate such policies, based on broad guidelines adopted through

²² Francis Snyder, *EMU - Metaphor for European Union? Institutions, Rules and Types of Regulation*, in *EUROPE AFTER MAASTRICHT - AN EVER CLOSER UNION?* 80 (Renaud Dehousse (ed.), 1994).

²³ This limitation is maintained by Article 15(3) TFEU, even if the ECB is bound by the general obligation to conduct its work ‘as openly as possible’ in Article 15(1) TFEU. See also the European Central Bank, *Annual Report 1996 86* (1997), available at: <http://www.ecb.europa.eu/pub/annual/html/index.en.html> (last accessed: 27 June 2013).

²⁴ According to Article 10 of the Rules of Procedure of the General Council of the European Central Bank (ECB/2004/12) O.J. L 230/63, 30 June 2004) the ‘proceedings of the General Council, and of any committee or group dealing with matters falling within its competence, shall be confidential unless the General Council authorizes the President to make the outcome of their deliberations public’.

²⁵ von Helmut Steuer, *Finnischer Zentralbankchef verteidigt EZB* (16 Sept. 2011) *HANDELSBLATT*, where Erkki Liikanen, Director of the Bank of Finland and a Member of the ECB Board argues that the current practice of non-disclosure of meeting protocols for 30 years is far too excessive, available at: <http://www.handelsblatt.com/politik/international/umstrittene-anleihenkaeufo-finnischer-zentralbankchef-verteidigt-ezb/7140166.html> (27 June 2013). Even the CJEU has had the opportunity of addressing the public access regime of the ECB – see Case T-436/09, *Julien Dufour v the European Central Bank*, Judgment of 26 October 2011, in which the General Court rejected the ECB’s argument that ex- Article 255 EC and Regulation No 1049/2001 do not apply to its actions: the ECB itself referred, in recital 2 in the preamble to the decision Decision 2004/258, to the joint declaration relating to Regulation No 1049/2001, concluding that ‘[t]he regime on public access to ECB documents ... should be revised accordingly’ (at para. 166). The Court confirmed that the databases held by the ECB indeed constituted a ‘document’ that the applicant had the right of access to and in particular ‘obtain the right to use them in the sense that he may ask the ECB to use them in order to carry out searches in its databases, in accordance with search criteria that he himself would define, and communicate the results thereof to him’ (at para. 183).

²⁶ Council Regulation (EC) No 2532/98, concerning the powers of the ECB to impose sanctions; ECB Regulation (EC) No 2157/1999 on the powers of the ECB to impose sanctions (ECB/1999/4). ECB’s powers also include e.g. supervision of credit institutes, payment systems and minimum reserves.

²⁷ Art. 3(2) of the Council Regulation.

recommendations by the Council. In addition, the Member States were placed under an obligation to avoid 'excessive government deficits', something that the Commission was to monitor, report on, and if need be, address an opinion on the matter to the Council for the purpose of making recommendations, and ultimately impose fines, to the concerned Member State.²⁸ The Treaty provisions regulating the Economic Union contain few references to the European Parliament; in brief, its role is limited to being informed of some of the decisions taken by the Council.

The discussion preceding the approval of the EMU arrangements in the early 1990s indicated that a number of different elements that had seemed important in the past in legitimating the integration process now seemed deficient and inadequate.²⁹ Monetary Union was not *per se* seen to require the establishment of a political union, but it was assumed that monetary integration would have the spillover effect of tighter cooperation in the economic matters, or that markets would do the job and exerts strong pressure on euro area fiscal policies.³⁰ At the same time, the consequent moves towards the establishment of a political union in Europe had resulted not simply in the problems related to ratifying the Treaty but also in a more general skepticism towards the single currency which would symbolize the Union.³¹ Among the consequences were the results of the French and Danish referenda.³² In Germany the discussion was dominated by a number of Court cases where the legitimacy of the Treaty, especially that of the envisaged Economic and Monetary Union and European Central Bank (ECB), was questioned.³³ Denmark ultimately decided to stay out of the euro entirely, as did the United Kingdom, albeit for a different reason.³⁴ For those concerned with the legitimacy of the ECB the

²⁸ Ian Harden, *The Fiscal Constitution of EMU*, in LEGAL FRAMEWORK OF THE SINGLE EUROPEAN CURRENCY 72-93 (Paul Beaumont and Neil Walker (eds), 1999).

²⁹ Geoffrey Edwards, *supra* note 12, at 125.

³⁰ Also Jean-Victor Louis, *Guest editorial: The No-Bailout clause and rescue packages*, 47 COMM. MKT. L. REV. 979-981 (2010). Of course, even doubts about the sufficiency of the arrangements existed, see Christian Joerges, *European Economic Law, the Nation-State and the Maastricht Treaty*, in EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION? (Renaud Dehousse 54 (ed.), 1994).

³¹ Edwards, *supra* note 12, at 131.

³² In the first referendum on the Maastricht Treaty in Denmark on 2 June 1992 the Treaty was rejected by 50.7% of voters. For the discussions in Denmark, see Karsten Skjalm, *On the Outside: Denmark and the Euro*, in THE EURO IN THE NATIONAL CONTEXT 53-85 (Jean-Victor Louis (ed.), 2002). In France the Treaty was narrowly approved in a referendum on 20 September 1992 by 51% of the voters.

³³ The best-known case is Manfred Brunner and Others v. the European Union Treaty, Bundesverfassungsgericht (2. Senat) 12 October 1993, Cases 2 BvR 2134/92 and 2159/92 [hereinafter "Brunner and Others v the European Union Treaty"]. The case has also been published in 69(2) CML REPORTS 57-108 (1994).

³⁴ In addition to Denmark, the UK enjoys a permanent derogation from the EMU based on the Treaty. For a more detailed discussion of the legal status of these two states and the other States not participating in the third stage, see e.g. Francis Snyder, *supra* note 22, at 93-95 and 98.

fundamental problem with the Bank's independence was the discrepancy between its independent status, on the one hand, and greater legitimacy and stricter arrangements to guarantee the Bank's accountability, on the other. Many found that there is a fundamental trade-off between central bank independence and accountability, in that pure independence rules out accountability and substantial accountability rules out independence.³⁵

In Germany, the Constitutional Court relied in its ruling of October 1993 on the express provision in the German Constitution that the functions and powers of the *Bundesbank* can be transferred to the ECB in order to remedy the fact that monetary policy in the EMU becomes isolated from parliamentary, democratic legitimacy. The Court acknowledged that placing most of the management of monetary policy on an autonomous basis in the hands of an independent central bank restricts democratic legitimacy, stemming from the voters in the Member States, and therefore affects the principle of democracy. This modification of the democratic principle was, however, acceptable as it took account of the particular mention that an independent central bank is a better guarantee of the value of currency.³⁶ Consequently, the placing of monetary policy within the independent jurisdiction of the ECB in accordance with the strict criteria of the Treaty and the Statute satisfied the requirements of the German constitution under which a 'modification' could be made to the principle of democracy.³⁷

In 1997 the EU Member States complemented the formal EMU structures by concluding the Stability and Growth Pact,³⁸ an agreement aiming at maintaining the stability of the EMU and consisting of fiscal monitoring by the Commission and the Council, and the issuing of a yearly recommendation for policy actions to ensure a full compliance with the Pact also in the medium-term. The idea was to make sure that Member States adopting the euro not only met the Maastricht convergence criteria when joining the euro,³⁹ but continued to comply with the fiscal requirements. An Excessive Deficit Procedure could be launched against a Member State breaching against the maximum limit for government deficit and debt, and if unsuccessful, the Member State could ultimately be placed under economic sanctions.⁴⁰

³⁵ E.g. Philip Brentford, *Constitutional Aspects of the Independence of the European Central Bank*, 47 ICLQ 108 (1998).

³⁶ *Brunner and Others v the European Union Treaty*, supra note 33, at 104.

³⁷ *Id.*

³⁸ Resolution of the European Council on the Stability and Growth Pact Amsterdam, 17 June 1997, O.J. C 236, 02/08/1997, at 1.

³⁹ See Article 140 TFEU.

⁴⁰ Paul Beaumont and Neil Walker, *The Euro and European Legal Order*, in LEGAL FRAMEWORK OF THE SINGLE EUROPEAN CURRENCY (Paul Beaumont and Neil Walker (eds), 1999) 190. See also Ian Harden, *The Fiscal Constitution of EMU*, in LEGAL FRAMEWORK OF THE SINGLE EUROPEAN CURRENCY 72-93 (Paul Beaumont and Neil Walker (eds.), 1999).

The Stability and Growth Pact, however, proved impossible to enforce, especially against larger Member States, such as Germany and France,⁴¹ at a time when excessive budget deficits became more the rule than the exception. Action was also taken against Portugal and Greece under the Stability and Growth Pact, but no fines were ever applied. Mr Romano Prodi, then the President of the European Commission, in 2002 argued that the idea of a system regulating EU Member States' budgets from Brussels was 'stupid': 'The stability pact is imperfect, it's true, because there is a need for a more intelligent tool and more flexibility', Mr Prodi argued. In his view: 'The idea of having divergent economic policies is totally crazy'.⁴² In 2005, the Pact was reformed, increasing flexibility in the application of the criteria.⁴³ While the Stability and Growth Pact included clear obligations on the Member States, the lack of efficient mechanisms of enforcement and supervision at EU level in practice turned such obligations into mere recommendations, the observance of which was at everyone's own discretion. From the point-of-view of legitimacy, again with hindsight, it is of course somewhat problematic that while provisions to enforce budgetary discipline have in fact existed, they have not been enforced.

Since the creation of the EMU, the Treaty framework has changed – very little concerning the EMU itself, but more generally, in order to tackle the legitimacy deficit of the Union more generally. A new Title in the Treaty on the European Union (TEU) includes a number of core provisions on democratic principles, applicable in all areas of Union action, which underline the principle of representative democracy through the European Parliament, representing the citizens directly at Union level, on the one hand, and the governments forming the European Council and the Council and that are democratically accountable either to their national Parliaments, or to their citizens, on the other.⁴⁴ Even participatory democracy enjoys a pivotal role in the new Treaty framework; in order to guarantee the right of 'every citizen' to 'participate in the democratic life of the Union', the Treaty establishes that '[d]ecisions shall be taken as openly and as closely as possible to the citizen' and that both citizens and representatives should be given opportunities to 'make known and publicly exchange their views in all areas of Union action'.⁴⁵ These provisions

⁴¹ In 2003 the Commission brought proceedings against the Council before the CJEU, arguing that the Council had failed to adopt in respect of France and Germany the relevant formal instruments and instead adopted conclusions. The Court confirmed that the Council could not have recourse to an alternative procedure. See Case C-27/04 Commission of the European Communities v. Council of the European Union, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004CJ0027:EN:HTML> (last accessed: 27 June 2013).

⁴² BBC Business News, *Row over 'stupid' EU budget rules*, (17 Oct. 2002) BBC WORLD EDITION, available at: <http://news.bbc.co.uk/2/hi/business/2336823.stm> (last accessed: 27 June 2013).

⁴³ *European Council Presidency Conclusions: Brussels 22 and 23 March 2005*, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/84335.pdf (last accessed: 27 June 2013).

⁴⁴ Article 10(1) and (2) TEU.

⁴⁵ Article 10(3) TEU, Article 11 TEU.

have a natural linkage with Article 15 TFEU, which establishes that the legislature is to act publicly, and that citizens have the right to access documents held by all Union institutions, bodies and agencies; a right that in the case of the Court, the ECB and the European Investment Bank only applies to documents relating to their administrative tasks. The Treaty strengthens the direct involvement of national parliaments in Union decision-making, particular through specific procedures for direct submission of a number of key documents and their role in the supervision of the principle of subsidiarity.⁴⁶ Finally, the Protocols provide a framework for interparliamentary cooperation between the European Parliament and national parliaments.

While the constitutional rearrangement that took its final form in the Treaty of Lisbon provided for opportunities for the rewriting of various Treaty provisions, no amendments were made to the fundamental asymmetry that is characteristic of the EMU. The role of the Commission was strengthened somewhat⁴⁷ and the Article 126 TFEU procedure on excessive deficits was slightly polished⁴⁸. Also the differentiation between the euro-Member States and the others became more visible through the express acknowledgement of the existence of the Euro group.⁴⁹ However,

Notwithstanding the mandate given by the Laeken Declaration (adopted by the European Council in December 2001) in order to strengthen economic policy coordination, the Convention and the IGC 2003/2004 seemed to have wasted too much time in expressing a minimalist view of the role of the Union in this matter[...].⁵⁰

The intergovernmental conference was most vocal on economic policy in Declaration on Article 126 TFEU,⁵¹ where it reaffirmed 'its commitment to the provisions concerning the Stability and Growth Pact as the framework for the coordination of budgetary policies in the Member States' and the principle that 'a rule-based system is the best guarantee for commitments to be enforced and for all Member States to be treated equally'. In

⁴⁶ Article 12 TEU; Protocol No 1 on the role of National Parliaments and Protocol Nr 2 on the application of the principles of subsidiarity and proportionality.

⁴⁷ See Article 121(4) TFEU (ex-Article 99(4) TEC), 126(5) TFEU (ex-Article 104(5) EC) and Article 126(6) TFEU (ex-Article 104(6) TEC).

⁴⁸ See Article 126(13) TFEU (ex-Article 104(13) TEC).

⁴⁹ See Article 137 TFEU: "Arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro Group." See also, e.g. Ulrich Häde, *The Treaty of Lisbon and the Economic and Monetary Union*, in *THE EUROPEAN UNION AFTER LISBON. CONSTITUTIONAL BASIS, ECONOMIC ORDER AND EXTERNAL ACTION* 412-439 (Hermann-Josef Blanke and Stelio Mangiameli (eds.), 2012) .

⁵⁰ Jean-Victor Louis, *Economic Policy under the Lisbon Treaty*, in *THE LISBON TREATY. EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY?* 291-292 (Stefan Griller and Jacques Ziller (eds.), 2008).

⁵¹ Declaration No. 30 on Article 126 of the Treaty on the Functioning of the European Union.

particular, the Conference underlined balanced economic growth and price stability, which requires economic and budgetary policies to set the 'right priorities', something that ought to 'be reflected in the orientations of budgetary decisions at the national and Union level'. Finally, the Conference welcomed proposals from the Commission to strengthen and clarify the implementation of the Stability and Growth Pact: 'The Member States will take all necessary measures to raise the growth potential of their economies. Improved economic policy coordination could support this objective'.

While the intergovernmental conference thus underlined the need of budgetary discipline and the role of the Growth and Stability Pact, it did nothing to change the abnormal character of economic policy among EU policies. This is particularly visible in the first Articles of Treaty on the Functioning of the EU (TFEU), which aim at clarifying the categories of EU competence (exclusive, shared and competence to 'support, coordinate or supplement the actions of the Member States') and the nature of competence in different areas of EU action⁵². The *sui generis* character of economic policy is visible in the fact that economic policy is not covered by any of these provisions, but has received its own paragraph in Article 5 TFEU,⁵³ which leaves the nature of this competence undefined. While the Treaties provide for a number of possibilities to coordinate and supervise Member States' economic policies and to adopt relevant secondary legislation, would such be deemed necessary, even if the Treaty provisions affect the primary responsibility of Member States for their economic policies, they ultimately leave the responsibility for such policies with the Member States.

C. When Things Don't Go Quite as They Were Intended

Almost twenty years after the entry into force of the Treaty of Maastricht, it is evident that many of the EMU solutions have proved unsustainable. While the Monetary Union initially provided a number of fat years in the form of stability and a strong currency, the Economic Union did not encourage to a satisfactory level of convergence that would have been needed for the prosperous years to continue.⁵⁴ There are many reasons for this outcome: Member States and their financiers operated for a long time in an unexpected way, and more recently the markets have reacted likewise. Some blame the crisis on an 'asymmetric

⁵² Article 3 TFEU includes a list of areas in which the Union has exclusive competence; Article 4 TFEU includes a list of the "principal areas" in which the Union and the Member States have shared competence; and Article 6 TFEU defines the areas where the Union has competence to carry out actions to support, coordinate or supplement the actions of the Member States.

⁵³ Article 5(1) TFEU: "The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies. Specific provisions shall apply to those Member States whose currency is the euro."

⁵⁴ For a summary of reasons behind the crisis, see also Jean-Victor Louis, *Guest editorial: The No-Bailout clause and rescue packages*, 47 COMM. MKT. L. REV. 978-980 (2010).

symbiosis between states and banks'.⁵⁵ The situation of Greece has been considered partially self-inflicted as regards fraud and corruption, but was made much worse by the global financial crisis.⁵⁶ The other Member States were slow in coming to the rescue, and soon after they did, the Greek government debt turned out to be of a size practically untenable for the country,⁵⁷ followed by concerns relating to some of the larger Member States. The fundamental problem has been this: the EU has had no appropriate tools that would solve the current crisis, and there is disagreement on what measures would be needed, and whether these should be adopted. Therefore, the crisis itself is caused by the justified suspicion that the EU is not capable of solving the crisis that it is trying to tackle.

To avoid this outcome, a number of quick fixes have been made to save certain Member States and, ultimately, Europe's common currency, from sinking. In handling the sovereign debt crisis various instruments have been used, by the Union and the Member States along the Union in an intergovernmental setting. This has resulted in a web of various mechanisms and parallel processes. There are measures aiming at assisting individual Member States and, subsequently, at stabilizing the whole euro area, on the one hand, and measures aiming at improved economic governance, on the other.⁵⁸

As regards the first group of measures, first, in 2010 Member States agreed on direct loans for Greece in cooperation with the International Monetary Fund.⁵⁹ Secondly, European Financial Stabilisation Mechanism (EFSM) was launched based on Council Regulation (EU) No. 407/2010⁶⁰ as an emergency funding instrument, relying on Article 122(2) TFEU, which enables the Council to grant Union financial assistance to a Member State that is 'in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control'. The EFSM is administered by the European Commission, and in financing the function the Union budget is used as collateral. The power of granting the financial assistance is conferred on the Council.

⁵⁵ For a recent contribution arguing this, see Mattias Kumm, *Democratic Challenges Arising from the Eurocrisis: What kind of a constitutional crisis is Europe in and what should be done about it?*, EUROPEAN PARLIAMENT (2010), a discussion paper ordered by the European Parliament Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs.

⁵⁶ See René Smits, *Correspondence*, 49 COMM. MKT. L. REV. 827-832 (2012).

⁵⁷ For a discussion, see Editorial Comment, *The Greek sovereign debt tragedy: Approaching the final act?*, 48 COMM. MKT. L. REV. 1769-1776 (2011).

⁵⁸ A third group consists of the measures intended to further the development of the bank union through shared supervision, deposit insurance and resolution competences. These measures fall outside the scope of the current contribution.

⁵⁹ This is of course not the first time Member States had borrowed to each other bilaterally; see Jean-Victor Louis, *Guest editorial: The No-Bailout clause and rescue packages*, 47 COMM. MKT. L. REV. 985 (2010).

⁶⁰ Council Regulation (EU) No 407/2010 of 11 May 2010, establishing a European financial stabilization mechanism, O.J. L 118, 12 May 2010.

In 2010 alongside the EFSM, the EU Member States participating in the euro agreed on the European Financial Stability Facility (EFSF),⁶¹ a temporal instrument aimed at safeguarding financial stability in Europe. This instrument sets up a Luxemburg based company owned by the Member States, which issues bonds and other financial instruments on the markets in order to provide financial assistance. The instruments are backed by guarantees provided by the euro area Member States. The arrangement provoked constitutional discussion, not least in Germany, where the Euro Rescue Package was addressed and finally approved with certain critical remarks by the Constitutional Court.⁶²

Later in 2010, it was decided that a permanent mechanism, the European Stability Mechanism (ESM), would replace both the previous Stabilisation Mechanism and the Stability Facility – not least due to the continuing discussion concerning their compatibility with the Treaty framework. The new European Stability Mechanism is a public international financing institution which is based on an intergovernmental treaty between the ESM member states.⁶³ The function of the ESM is to provide financial assistance to the euro area Member States, which is done by issuing debt instruments in order to finance loans. Contrary to Stability Facility in which the Member States act as guarantors, the Member States have invested capital in the Mechanism. Even if based on an intergovernmental treaty, the institution has certain linkages with the Union through the amendment of Article 136(3) TFEU: simultaneously with the adoption of the ESM the European Council concluded that Article 136 TFEU should be amended in order to clarify that the Treaties indeed did provide for competence to establish a permanent stability mechanism that can be activated if needed to safeguard the stability of the euro area⁶⁴.

The European Council agreed on amending Article 136(3) TFEU in a simplified revision procedure provided for in Article 48(6) TEU.⁶⁵ The European Council's decision to amend

⁶¹ European Financial Stability Framework Agreement, 9 May 2010, available at: http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf (last accessed: 27 June 2013).

⁶² See the ruling of the Bundesverfassungsgericht of 7 September 2011, BVerfG, 2 BvR 987/10 (note 103). For a discussion of the ruling, see Antje von Ungern-Sternberg, *Parliaments – Fig Leaf or Heartbeat of Democracy? German Federal Constitutional Court Judgment of 7 September 2011 – Euro Rescue Package*, 8 EUR. CONST. L. REV. 304-322 (2012).

⁶³ Treaty establishing the European Stability Mechanism, 11 July 2011, available at: <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf> (27 June 2013).

⁶⁴ European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) O.J. L 91/1, 6 April 2011. The European Council decided that the following paragraph shall be added to Article 136 TFEU: "3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."

⁶⁵ European Council decision 2011/199/EU. Article 48(6) TEU provides for a simplified revision procedure that enables the European Council to revise all or part of the provisions of Part Three TFEU relating to the internal

Article 136 TFEU was again challenged, partly because the use of the simplified revision procedure is limited to questions where Union competence is not increased, and partly because the decision to clarify Article 136 TFEU to enable the establishment of a stability mechanism of course indicated that perhaps the matter indeed did require clarifying, suggesting there might have been doubts about this fact earlier. The *Pringle* case,⁶⁶ a preliminary ruling from Ireland ruled upon by the CJEU on 27 November 2012, concerned specifically the applicability of the simplified revision procedure and, in particular, whether the proposed amendment to Article 136 TFEU in fact involved an increase in the competences conferred on the Union in the Treaties. The applicant also wished to clarify 'whether the content of the proposed amendment involves any violation of the Treaties or of the general principles of law of the Union and whether a Member State of the European Union whose currency is the euro entitled to enter into and ratify an international agreement such as the ESM Treaty'. The Court clearly did not have too much flexibility in pronouncing the outcome if it wished to keep the markets from yet another deep crash - keeping in mind that all relevant Member States had already ratified the amendment and the ESM Treaty, which had also entered into force on 27 September 2012. It gave its authoritative blessing to the arrangements: first, it found that the amendment did not confer any new competence on the Union since it does not enable the Union to undertake any action which it could not have taken before the amendment (para. 73). The Court then confirmed that the ESM Treaty was compatible with the relevant provisions of the TFEU (para. 114). Finally, the CJEU confirmed the right of Member States to ratify the ESM Treaty before the entry into force of the European Council decision amending Article 136 TFEU (para. 185).

As regards the measures concerning economic governance, the development of the Stability and Growth Pact was initiated in 2010, when the Commission proposed amendments to both its preventive and corrective parts. The so-called six-pack consisting of five regulations and one directive⁶⁷ entered into force towards the end of 2011, and might contribute to a significant strengthening of the Stability and Growth Pact by means of reversed qualified majority voting and sanctions approved more or less automatically.⁶⁸

policies and action of the Union. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements and cannot be used to increase the competences conferred on the Union in the Treaties.

⁶⁶Case C-370/12; Reference for a preliminary ruling from Supreme Court (Ireland) made on 3 August 2012, *Thomas Pringle v Government of Ireland, Ireland and the Attorney General*.

⁶⁷ See Communication from the Commission. Reinforcing economic policy coordination, COM (2010) 250 final, Brussels, 12 May 2010; Communication from the Commission, *Enhancing economic policy coordination for stability, growth and jobs – Tools for stronger EU economic governance*, COM (2010) 367 final, 30 June 2010.

⁶⁸ November 2011 six-pack, adopted by the Council to improve budgetary discipline, on the one hand, and economic surveillance, on the other, including Regulation amending Regulation 1466/97 on the surveillance of member states budgetary and economic policies; Regulation amending regulation 1467/97 on the EU's excessive deficit procedure; Regulation on the enforcement of budgetary surveillance in the euro area; Regulation on the prevention and correction of macroeconomic imbalances; regulation on enforcement measures to correct

In addition, the Commission has in November 2011 proposed the amendment of two of the regulations that were already amended as a part of the six-pack in order to tailor them to address the euro-area more specifically. In addition, some other decisions have been taken, including the European Semester, a yearly cycle of economic policy coordination,⁶⁹ and the Euro Plus Pact,⁷⁰ which establishes a “stronger economic policy coordination for competitiveness and convergence”.

Towards the end of 2011 a decision was made to strengthen the structures of the Economic and Monetary Union. This was, again, done through an international agreement known as the Treaty on Stability, Coordination and Governance in the EMU⁷¹ (Fiscal Compact) concluded in March 2012 by the majority of Union Member States. The aim of the agreement, as expressed in its Article 1, is

[T]o strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion.

The Member States thus aim at regulating the actions taking place within the framework of the EU Treaties through an international agreement – yet another very interesting legal construction. The Treaty has been signed by 25 EU Member States and is currently in the process of being ratified.

The problem is that, while few of these measures have helped to cure the problems of credibility in any more permanent manner, they have also done little to contribute to the legitimacy of the existing arrangements – on the contrary, many of the recent arrangements have only helped to emphasize the earlier deficits. Many of the recent measures have provoked a number of legal questions both relating to Member States’

excessive macroeconomic imbalances in the euro area; and a Directive on requirements for the member states' budgetary frameworks. These measures were concluded in two parts; first, a preventive part that was based on Art. 121 TFEU and including Council Regulation (EC) 1466/97, amended by Council Regulation 1055/2005 and Regulation 1175/2011 of EP and Council and second, a corrective part based on art. 126 TFEU and protocol 12 on excessive deficit procedure including Council Regulation (EC) 1467/97, amended by 1056/2005 and 1177/2011 and Council Regulation (EC) 479/2009, amended by 679/2010 and 679/2010.

⁶⁹ For details, see EU Economic and Financial Affairs, *Surveillance of Economic and Financial Policies*, EUROPEAN COMMISSION, available at: http://ec.europa.eu/economy_finance/economic_governance/index_en.htm (last accessed: 27 June 2013).

⁷⁰ See the European Parliament, *Conclusions of the Heads of State or Government of the Euro Area of 11 March 2011*, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/119810.pdf (last accessed: 27 June 2013).

⁷¹ See the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, available at: http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf (last accessed: 27 June 2013).

constitutional requirements and the limits of the EU Treaties, in addition to the political challenges that they have faced in a number of Member States. The current problems of accountability are different in the Monetary Union and in the Economic Union. The recent discussion has addressed both as a whole, and thus failed to see the nuances and legal differences in the two regimes that, in fact, are rather fundamentally different in character.

As regards the Monetary Union, the problems relating to its legitimacy remain largely the same as in the 1990s: as long as the ECB and the ESCB remain within the margins of their own clearly limited competence and preserve and maintain their Treaty-based independence, the solutions and problems concerning their democratic legitimacy remain unchanged. However, if it can be shown that the ECB has taken a distance from its tasks of maintaining price stability, or compromised the independence it should enjoy in relation to both democratic institutions and market forces – an independence that was, after all, granted because it was believed that such independence was indeed crucial for the successful management of its tasks – then some of these solutions might require re-evaluation. In other words, the Bank's current role and status might be different from the one envisaged earlier,⁷² and thus, consequently, there might be a reason to revisit some of the justifications for its position.

As regards the Economic Union, the Member States have from the beginning opted for an alternative route, which builds on coordination instead of harmonization or the traditional 'Community method' based on a strong Commission and a legislative and budgetary power shared more or less equally by the European Parliament and the Council. This method of in practice more or less voluntary coordination has not led to a satisfactory level of convergence – thus the means chosen have not necessarily been justified by the results. Since an 'alternative route' has been chosen, also the democratic legitimacy enjoyed by these arrangements at the EU level has been modest; for example, the European Parliament has little influence over the decisions taken since its role is limited to being heard and informed about significant events.

Some Member States have, of course, more generous democratic arrangements in place through their national constitutional structures. The parliamentary dimension has been discussed in several Member States, and constitutes an element that the German Constitutional Court addressed in the context of the ESM Treaty when evaluating the secrecy provisions of the ESM Treaty, analyzing their interpretation in relation to information given to national parliaments by the ESM.

⁷² Serious doubts in this respect have been caused by some of the ECB's recent actions, which have – or so can certainly be argued – created risks for tax payers and compromised the Bank's independence. While the crisis has persisted, the ECB's role has changed to a factual financier of States that also places conditions on them. Such a role is problematic in light of the provisions of the Treaty concerning the prohibition to finance States and the independence of the ECB. From this perspective, also the recent Commission proposal establishing a European Supervisory Authority (European Banking Authority) conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions is also of a particular interest, *See* COM/2012/0512 final.

Admittedly, a good argument can be made that these provisions are above all intended to prevent a flow of information to unauthorized third parties, for instance to actors on the capital market, but not to the parliaments of the Member States, which must bear political responsibility for the commitments based on the ESM Treaty vis-à-vis their citizens also during further treaty implementation. However, the provisions do not explicitly address the information of the national parliaments by the ESM; with a view to the fact that the situation under constitutional law as regards the parliament's rights of participation and its rights to be informed is different in the Member States, an interpretation is there fore conceivable which would stand in the way of sufficient parliamentary monitoring of the ESM by the German Bundestag. A ratification of the ESM Treaty is therefore only permissible if the Federal Republic of Germany ensures an interpretation of the Treaty which guarantees that with regard to their decisions, Bundestag and Bundesrat will receive the comprehensive information which they need to be able to develop an informed opinion.⁷³

National parliament's right to information and participation in decision making both in the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM) have been under serious constitutional evaluation in other Member States, as well.⁷⁴

At the EU level, however, the legitimacy and accountability problems are currently solved in structures that are underdeveloped for these purposes, and not specifically designed for the Economic Union - in particular since the tendency has been to introduce instruments falling outside the EU's constitutional structures altogether. There are various factors that contribute to such a finding.

First, long-term functioning in more less permanent situations of crisis by relying on flexible – and perhaps even selective - interpretation of core Treaty provisions risks to undermine the Union's legitimacy and the basic understanding of the Union as a 'Union based on law'. Many of the recent operations – the European Financial Stability Facility (EFSF), the European Stability Mechanism (ESM), the reform of Article 136 TFEU – have relied for their success on flexible interpretations and remained fundamentally challenged. While innovative interpretations have never been foreign to the EU's constitutional

⁷³ Decision by the Bundesverfassungsgericht of 12 September 2012, 2 BvR 1390/12; 2 BvR 1421/12; 2 BvR 1438/12; 2 BvR 1439/12; 2 BvR 1440/12; 2 BvE 6/12; available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012.html (last accessed: 27 June 2013).

⁷⁴ In Finland, for example, the Constitutional Committee of the Parliament has in several occasions emphasized the right to get information and possibilities to influence the decision-making in the instruments. For a discussion of some of the findings of the Finnish Constitutional Committee, see Päivi Leino-Sandberg and Janne Salminen, *Eurokriisin demokraatialottuvuusia* (The democratic dimensions of the euro crisis), in 3 LAKIMIES 390-413 (2013); Päivi Leino and Janne Salminen, *The Euro Crisis and Its Constitutional Consequences for Finland*, submitted to *European Constitutional Law Review*; Kaarlo Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, EUI WORKING PAPERS LAW 2012/28 (2012).

development, they constitute challenges to the legitimacy of the Union, and are not easily explained away by the reluctance to use the 'Community method' in the area of matters that are seen to constitute core sovereign powers, in this case economic policy coordination⁷⁵. The same argument applies to the intergovernmental Fiscal Compact, based on an intergovernmental agreement between the Member States but aiming at doing away of some of the intergovernmental character of the EMU – again, hardly a sustainable long-term solution. In brief, it would seem that a clear majority of Member States now believes that many of the intergovernmental characters of the Economic Union as they can today be found in the Treaties are outdated. But instead of modifying the Treaties, measures are adopted through international agreements with some Member States staying outside. An additional problem – one highlighted by Habermas in his recent essay on the 'Crisis of the European Union' - is the dilemma of legally non-binding international agreements: if governments indeed coordinate their measures on the basis of such 'agreements', this creates problems of legitimation at home. But if the recommendations of economic governance remain ineffective, then the problems they were supposed to tackle remain unsolved.⁷⁶

Second, while many of the reforms of the Treaty of Lisbon aiming at addressing the Union's more general legitimacy-related hick-ups have a lovely sound, the crux from the EMU perspective is that for major parts of economic cooperation they are of no particular relevance. This is because Member States have been 'forced' to have recourse to instruments of international law but used for the purposes of regulating the acts and constructions of the EU. Decision-making within the EU structures has not been deemed possible for various legal or political reasons, or because of possible risks attached to the success of such measures. These solutions have obvious consequences for their transparency, democratic nature, and accountability: structures outside the EU offer even weaker guarantees for decision-making than the EU legal framework would have been able to provide. As the CJEU specifically pointed out in its *Pringle* ruling in relation to the ESM Treaty and the applicability of the requirement of effective judicial protection under the EU Charter of Fundamental Rights

[U]nder Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing Union law. [...] It must be observed that the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism. It follows from the foregoing that the general principle of effective judicial protection does not preclude either the conclusion by the Member States

⁷⁵ See Smits *supra* note 56, at 830.

⁷⁶ HABERMAS, *supra* note 1, at 130.

whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.⁷⁷

Also the European Parliament is largely bypassed in the EMU structures, and the involvement of national parliaments is dependent on the relevant national constitutional arrangements. As regards the ESM, for example, the widest possible degree of accountability would be necessary, since the matter has direct connections to the economic control of Member States participating in the euro and the vast economic interest in the arrangements. Moreover, the chosen method has clear weaknesses in relation to the national parliaments, the European Parliament and civil society, as well, and any appropriate standards of good administration and openness are also lacking in the arrangement. Even if citizen participation has never been the strongest part of the EU, these instruments offer even weaker guarantees of participation, openness and supervision than those usually applying for EU activities. Alternatively, it is to be understood that the EMU constitutes a *sui generis* creature to which open decision-making and citizen participation should remain foreign.

Third, the Member States have relied in their mutual relations on the EFSF, which – even if temporary in nature – is an odd arrangement to be used for its purpose for the reason of being a financing institution governed by private law. Transparency – which should always be one of the core principles of any democratic society – seldom enjoys a similar position in a financing institution – something that is also visible in the EFSF agreement. Accountability is also more difficult to administer in this construction, and has provoked discussion for example on the role and obligations of the representatives of participating Member States in the governing bodies and the status of external audition. In brief, both the EFSF and the ESM have been considered to create challenges from the point of view of open and accountable decision-making.

Finally, the new structures have had serious consequences for the clarity of the applicable structures and processes, which also is a legitimacy problem *per se*. The fundamental structures for dealing with these questions are currently seriously blurred, and little of the arrangements can be grasped by the ‘common man’. This can be easily demonstrated by an occasional visit to the EFSF or ESM websites,⁷⁸ which indeed provide an immense amount of information of basic facts and the relevant operations, but still remain distant for civil society simply because of the language used. Moreover, the attempts to create legitimacy and credibility do not automatically always draw in the same direction: the audience of the rescue operations is not citizens, but financial markets. Irrespective of the

⁷⁷ Case C-370/12; Reference for a preliminary ruling from Supreme Court (Ireland), made on 3 August 2012, *Thomas Pringle v Government of Ireland, Ireland and the Attorney General*, at paras. 179-181.

⁷⁸ See European Financial Stability Facility, *About EFSF*, available at: <http://www.efsf.europa.eu> (last accessed: 27 June 2013), and European Stability Mechanism, *About the ESM*, available at: <http://www.esm.europa.eu/> (last accessed: 27 June 2013).

level at which the arrangements are realized – Member State, the EU or international – the distance to citizens is growing.

D. Democracy, Transparency and Legitimacy in Tomorrow's Economic and Monetary Union

It is with a mixed feeling that one reads the conclusions of the December 2012 European Council; a feeling of relief and a feeling of despair at the Heads of State and Government obviously having so very little to say about something of such a fundamental importance. The Conclusions on the EMU conclude with twelve lines around the theme of democratic legitimacy and democratic accountability, which state nothing but the obvious. It is clear that the general objective of a group of democratic governments must always be 'to ensure democratic legitimacy and accountability at the level at which decisions are taken and implemented'.⁷⁹ This must be the starting point for any existing arrangement or plan to reform it. But in practice even this objective might be more difficult to maintain in a world of governance, where the limits of competence between different levels remain fundamentally blurred.

Also the means proposed by the European Council seem to be more or identical with the reforms already brought about by the Treaty of Lisbon for more than three years ago:

Further integration of policy making and greater pooling of competences must be accompanied by a commensurate involvement of the European Parliament. New mechanisms increasing the level of cooperation between national parliaments and the European Parliament, in line with Article 13 of the TSCG and Protocol No 1 to the Treaties, can contribute to this process. The European Parliament and national parliaments will determine together the organization and promotion of a conference of their representatives to discuss EMU related issues.⁸⁰

It is striking that this seems to be the only actual proposal that the European Council has come up with, after months of hectic preparation. No fundamentally new solutions can be born out of working with old tools, which have never been taken too seriously by the European decision-makers nor demonstrated any particular democratic brilliance. While periodic and general discussions in the European Parliament or national parliaments of course form nice gestures that do little harm, they are unlikely to bring any qualitative changes to the main framework of decision-making, and the same applies to forms of cooperation between the parliaments. It would be difficult to see such proposals breaking

⁷⁹ See European Council conclusions on completing EMU adopted on 14 December 2012, *supra* note 3, at para. 14; European Council conclusions on completing EMU, adopted on 18 October 2012, *supra* note 4, at para. 15.

⁸⁰ See European Council conclusions on completing EMU adopted on 14 December 2012, *supra* note 3, at para. 14. See also, Rompuy, *supra* note 3, at 17. See also Rompuy, *supra* note 2.

any fundamentally new ground. When questioning the contribution of the tools provided by the Treaty of Lisbon in the context of the economic crisis, one wonders whether the same conclusion in fact applies to these reforms as a whole, or whether they are in fact more window-dressing than concrete improvements.

While the Treaty of Lisbon did some modifications to the provisions concerning the European Council – and indeed turned it into an institution – the global and European needs in the form of Europe’s economic crisis and climate change have required leadership and decision-making at the political highest level, which has contributed to a further strengthening of the position of the European Council – and a relative weakening of the other institutions, thus affecting the more or less Treaty-based dynamics between the Union institutions. This shift has in particular affected the Commission, which has previously been able to set the European agenda more single-handedly, and has now had its right of initiative encroached upon. In the EMU context the role of the Commission has traditionally been rather narrow, but the intergovernmental method used during the past years has actually strengthened the role of the Commission, too,⁸¹ since it has been allocated a number of tasks outside the Treaty framework. In fact, the only institution whose role has not gained any particular lift is the institution whose role the Treaty of Lisbon aimed at strengthening the most, i.e. the European Parliament, which continues to be involved in the EMU only to a minimum extent.⁸² The European Council – whose role the Treaties foresee as one providing ‘the Union with the necessary impetus for its development’ and defining ‘the general political directions and priorities thereof’ but without exercising ‘legislative functions’,⁸³ has also been stamping on the toes of the legislature in largely predicating the outcomes that the legislative process should result in.

The discussion on the democratic credentials of the European Council of course has many sides to it. It would be difficult to claim that the members of the European Council, Prime Ministers (or in some cases, the President) lack democratic backing. An institution is not fundamentally undemocratic simply because it lacks accountability at the EU level through the magical and legitimating touch of the European Parliament. In fact, the control of governments through their national parliaments still constitutes the most efficient mechanism of ensuring democratic accountability, even if it is not a mechanism regulated in the EU Treaties. But such a finding requires the basic understanding that the primary avenue of guaranteeing the democratic legitimacy of the European Council – and for the various intergovernmental solutions used to save the EMU - is through the Member States’ own constitutional arrangements.

⁸¹ See Smits *supra* note 56, at 830.

⁸² For a discussion, see Matthias Ruffert, *The European Debt Crisis and European Union Law*, 48 COMM. MKT. L. REV. 1801- 1802 (2011).

⁸³ See Article 15(1) TEU.

But if legitimacy at EU level is discussed as a separate question, the lack of mechanisms of control for the last years' arrangements at the EU level has of course been striking. The *de facto* legislative role of the European Council combined with the non-transparent preparation of its meetings is a problem, and might be inappropriate in relation to the other EU institutions, for which arrangements of accountability exist at EU level. The two Reports prepared for the European Council include various references to national parliaments and the European Parliament

As a general principle, democratic control and accountability should occur at the level at which the decisions are taken. This implies relying on the European Parliament as regards accountability for decisions at European level but also maintaining and securing the pivotal role of national parliaments, as appropriate.⁸⁴

'As appropriate' of course refers to the traditional hesitation and lack of competence of the Union decision-makers to regulate EU-related processes in national parliaments. The matter has been on the EU agenda for years, and some openings were made in this respect by the Treaty of Lisbon. On the whole, however, the Treaty is silent on the way in which EU matters are to be dealt with by national parliaments, a question left for national constitutions to settle. At the same time, there is little wish to let the European Parliament take over the role of national parliaments as a source of democratic legitimacy.

There are of course various ways in which the position of national parliaments and the European Parliament could be strengthened, starting from their role in decision-making procedures. This is something that the Final Report of Mr Van Rompuy enlarges upon, especially in relation to the European Parliament:

[T]he provisions for democratic legitimacy and accountability should ensure that the common interest of the union is duly taken into account; yet national parliaments are not in the best position to take it into account fully. This implies that further integration of policy making and a greater pooling of competences at the European level should first and foremost be accompanied with a commensurate involvement of the European Parliament in the integrated frameworks for a genuine EMU.⁸⁵

But the proposals of engaging the European Parliament, which after all represents the EU citizenry as a whole, more in economic governance focus on the euro area, and are by no means unproblematic because of the differentiated integration that the euro represents. As Tuori has recently argued, this should raise worries about the congruence of influence on decision-making. After all, "[d]emocracy requires that all those concerned be given a

⁸⁴ The quote is from the van Rompuy interim report of October 2012; the idea is repeated in the Final Report at 16; see Rompuy, *supra* notes 2 and 3.

⁸⁵ Rompuy, *supra* note 3, at 16.

chance to participate. But arguably, it also requires that those not concerned be left without a voice".⁸⁶

For the three years that the Treaty of Lisbon has been in force, the Union has operated more or less in a permanent state of crisis – a crisis that the Treaty-makers were ill-prepared for. But instead of a thorough revision of the constitutional framework, a number of quick crisis arrangements have been put in place – quick fixes that might prove to be more permanent than temporary, since the end of the crisis is still nowhere in sight. The permanent nature of temporary measures bear witness to how temporary ‘crisis’ arrangements often tend to become more permanent than intended: absolute necessity and temporariness contradict the fact that the state of exception has become the rule.⁸⁷ In crises competences tend to be stretched, and while perhaps legitimately so to tackle the immediate, then such competences ought to be given up once the crisis is over. In this regard, one wonders whether the European Council and its President are willing to surrender their newly acquired powers as the core institution in settling questions relating to the EMU once the dust begins to settle.

Against this background the Commission Blueprint issued in November 2012 is much more courageous in visualizing the future EMU, and as such is a welcome step.⁸⁸ It proposes measures for three different time frames and argues for a departure from the past years legally blurry ‘exceptional and transitional basis’; instead the deepening of the EMU should build on the Treaty institutional and legal framework, which should be complemented by carefully prepared changes ensuring political and democratic ownership.⁸⁹ The Blueprint calls for a strengthened role for revising national budgets in line with European commitments, the adoption of a substantial central budget derived in part from an autonomous power of taxation and the possibility to issue the EU’s own sovereign debt. The new and genuine EMU would naturally be run by a strengthened Commission and co-legislated by the European Parliament, with the CJEU enjoying strengthened competences. In other words, economic policy should, the Commission argues, become ‘business as usual’. This is certainly one possible way forward, even if the same alternatives have been on the table and rejected many times before with reference to a wish to preserve Member State sovereignty in this sensitive area. It is obvious that further moves in the direction proposed by the Commission would create a further challenge to the EU’s already shaky

⁸⁶ See *Tuori, supra* note 74, at 46. This element is observed in the European Parliament’s Reflection Note. Democratic Scrutiny for the Euro, Brussels, 6 December 2012, D (2012) 64130 (on file with authors.) While the European Parliament claims to be ‘the Parliament of the Euro’, the membership of the proposed Committee on Economic and Monetary Union focusing on democratic scrutiny ‘could be focused by political decision on parliamentarians from Euro-zone countries and a legal obligation to join’.

⁸⁷ GIORGIO AGAMBEN, *STATE OF EXCEPTION* 9 (Kevin Attell (tr.) 2005).

⁸⁸ See Communication from the Commission, European Commission, *A blueprint for a deep and genuine economic and monetary union. Launching a European Debate* COM (2012) 777 final (2012).

⁸⁹ *Id.* at 13-14.

legitimacy. It is unlikely that the Commission vision survives a debate in Member States intact. In this regard, the December 2012 European Council decided on a time-out

To this end, the President of the European Council, in close cooperation with the President of the Commission, after a process of consultations with the Member States, will present to the June 2013 European Council possible measures and a time-bound roadmap [...]

Many of these reforms, including the strengthening of the role of parliaments and the Commission, in economic governance would, of course, also require an amendment of the Treaties. The paradox there seems to be is that the Treaty-amendment procedure,⁹⁰ which initially was believed to mark a glorious celebration of democracy in requiring a broad debate of the intended amendments in a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission, and finally culminating in a round of ratifications by all Member States, in some following a referendum, is now turning into democratic nightmare: there are serious doubts as to the possibilities of getting any amendment decided by the European elite, or suggested by the chosen 'four wise men', approved by the European people that the elite is believed to represent. As a minimum, these requirements are too overwhelming to convince the markets – who seldom give any points for democratic style and elegance – that the required changes are to enter into force at the pace dictated by the market forces themselves.

A much more topical issue would be to develop the current arrangements further by addressing their most obvious deficits, for example by incorporating the Fiscal Compact into the Union legal and institutional framework.⁹¹ Before embarking on an extensive Treaty reform, perhaps there would be reason to first test the Treaty of Lisbon together the surrounding framework for economic governance, in 'normal conditions', and to examine the proper division of economic and fiscal competence with all its nuances between the Union and its Member States based on such experiences. It is evident at the outset that democratic processes will need to be strengthened both at the Union and in the Member States – but this is a part of a wider legitimacy deficit in the Union.

In such an examination, it is important to keep in mind that the current Treaty framework allocates a clearly democratic role to the Council and the European Council as well. Against this background, many aspects of decision-making especially in the European Council could be improved, in particular when taking into its role as a quasi-legislative body that in practice dictates many of the outcomes more or less single-handedly without any prior

⁹⁰ See Article 48 TEU.

⁹¹ This objective is also emphasized in the Preamble of the agreement itself: "Bearing in mind that the objective of the Heads of State or Government of the euro area Member States and of other Member States of the European Union is to incorporate the provisions of this Treaty as soon as possible into the Treaties on which the European Union is founded [...]"

public discussion. These questions remain completely unaddressed by the recent Report.⁹² The preparations of the European Council are characterized by a lack of transparency where proposals are made too late; this sets clear limitations on national discussions, as well, which is conditioned by the fear that the EU would – in particular in case national debates prove substantial and require amendments – not be capable of taking the necessary decisions in a timely manner. Many of the points on the agenda are in fact extremely heavy and would benefit from much more thorough preparation. Thinking how many of Europe's current problems are connected with a lack of transparency when making past decisions,⁹³ one would think that European decision-makers would now hurry to do what they can to improve openness- but even the more minor steps are still to be taken.⁹⁴ This is to be regretted – never before has the role of European Council been as important for EU-decision-making as it has been during the past three years, and consequently, never before has the importance of securing openness in its work been greater. This is a question that has – hardly surprisingly – received extremely limited attention in the Reports written for the European Council so far – and that in fact one would believe that would be easiest to address since it concerns the methods of working of the European Council itself.

But even the opening-up of the formal Treaty-revision process would in itself serve the Union's democratic legitimacy in providing a forum for debate. And as long as this is not done, the assumption seems to be that these questions cannot be left to the people to decide, since the people do not know what they should want.

⁹² This does not mean that the words "transparency" or "openness" would not have been mentioned during the process: In October 2012 the European Council took the opportunity to stress that "[t]he process towards deeper economic and monetary union should build on the EU's institutional and legal framework and be characterized by openness and transparency towards Member States which do not use the single currency and by respect for the integrity of the Single Market."⁹² Openness and transparency are thus, it needs to be pointed out, not directed at decision-making in relation to citizens, but to countries that are currently not in the euro. European Council conclusions of 18 October 2012, *supra* note 4, at para. 3. A similar reference can be found in the recent European Council Conclusions of 14 December 2012, *supra* note 3, at para. 4..

⁹³ For an example of such discussion, see Case T-590/10 *Gabi Thesing and Bloomberg Finance LP v the European Central Bank*, which concerned access to information concerning the Greek government deficit and debt.

⁹⁴ *E.g.* Treaty of Lisbon extended the legal basis regulating the right of public access to cover documents held by the European Council, but three years later, the extension is still to be made. Current Regulation No 1049/2001 only applies to the European Parliament, Council and the Commission. See however, European Commission, *Proposal for a Regulation amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents*, COM (2011) 137 final (2011).