

# Viðauki V: Continuity or Change? Democracy in the Institutional Architecture of the European Union after the Lisbon Treaty

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## **1. Introduction: Democracy and the EU – a problematic relationship**

A substantial body of academic literature over the past two to three decades has been devoted to exploring the democratic character of the European Union's decision-making processes and procedures. The advent of debates about a "democratic deficit" broadly coincided with the emergence of a growing sentiment of Euroskepticism. At the same time, calls for a more democratic way of decision making, mostly pertaining to increasing the accountability of the EU's institutional architecture, have been made for an even longer time. The decision to directly elect Members of the European Parliament (EP) in the (then) Community's member states and the subsequent gradual process of strengthening the EP in various rounds of treaty reform – from the Single European Act in 1987 until the Lisbon Treaty in 2009 – are testimony to this. But while the political-science literature on the democratic deficit could fill libraries on its own, the democratic shortcomings of the union are also one of the most important issues that have sparked the interest of the wider public, no less so in Iceland than in most of the union's member states. Very often, arguments about a democratic deficit are made in public debate with a clearly discernible ambition to discredit the union. At the same time, such arguments are sometimes also made with the ambition of placing institutional reform onto the political agenda, aiming at improving the democratic character of the union and its processes and procedures of decision making. This debate has increased significantly in the wake of the Eurozone debt crisis, at least since discussions ensued about a first Greek rescue package in the spring of 2010. It should however also be said that the technocratic character of decision making about the austerity measures demanded by the "troika" (consisting of the International Monetary Fund, the European Central Bank and the European Commission) constitute a democratic problem that is profoundly different from what is usually referred to as the democratic deficit of the EU's institutional architecture.

It is no exaggeration that the relationship between democracy and the EU can be described as problematic. To arrive at a deeper understanding of the reasons for why this relationship is so problematic, it is however crucial not only to explore the fundamental meaning of democratic rule, and to assess the institutional reality of the European Union in relation to whatever normative ideal of democracy arises from such considerations. More importantly, one also has to take into account the character of the European Union as an organization, or, better said, as a polity. A second body of literature – in addition to the one on the democratic deficit – discusses the nature of the EU as a polity. Much of this research – whether in political philosophy, international relations, comparative politics, or other subdisciplines of political science – arrives at the oft-quoted conclusion that the EU is a "polity sui generis", that is: a polity of its own kind, without any precedent. The former President of the European Commission, Jacques Delors, is also frequently quoted as describing the EU as an "unidentified political object". As we will see in this report, defining the EU as a polity – or as an organization – has profound implications for the expectations that we can have on its democratic performance. To summarize the argument that will be made in more detail below: the EU is not a state, but in popular debate on the democratic performance of the EU, there is a clear tendency to apply the normative yardstick of the nation state. In other words, although the EU is not a state, there is an implicit and often explicit assumption that it needs to function as a democracy along the lines staked out by the nation state. This is however an overly simplistic analysis that misses core aspects of the dilemma of attempting to

democratize a supranational non-state polity. Both historical and theoretical aspects of the integration process, as well as theoretical insights from theories of democracy, allow for a much more nuanced analysis. As we will see in this report, the EU is stuck between on the one hand claims for *more democracy*, understood mostly in terms of representative democracy and stronger accountability mechanisms, providing for a greater sense of democratic legitimacy, and on the other hand the continued adherence to strongly *intergovernmental* principles in organizing political power at the European level. This is indeed a paradoxical situation that can even be described as a genuine dilemma, where a dilemma is understood as the juxtaposition of two fundamental values that are equally (or at least similarly) important and cannot be reconciled with one another. Democracy is one of those values, which is usually taken to be the normatively most appropriate way of legitimizing political power. The other principle is the intergovernmentalism of international cooperation, in this case in the highly advanced and sophisticated form of international cooperation that is known as European integration. As we will see in this report, intergovernmentalism has always been a key feature of European integration, embodied already in the contrast between the institutional reality of the European Coal and Steel Community (ECSC) and the initial proposals made in the “Schuman Plan” in May 1950: in the Paris Treaty of 1951, the supranational common authority that had been proposed by Schuman and Monnet for French and German coal and steel production was already complemented by an intergovernmental council of ministers. Many of the democratic shortcomings of the EU – the usual suspects in debates about what is democratically wrong with the EU – could be fixed with relative ease, as is discussed in detail in chapter 5 of this report. Democratic accountability could be strengthened through more powers to the European Parliament, not merely in relation to its legislative role, but also in relation to the European Commission. The Lisbon Treaty introduced a clause that states that the Commission President has to be chosen *taking into account the results of elections to the EP*. This clause will be put to use for the first time when Jose Manuel Barroso’s successor as Commission President is chosen in the autumn of 2014. But the formal power to choose the president-designate, i.e. the candidate that is then formally elected by the European Parliament, still rests with the European Council: the heads of state or government of the member states. These are a few examples to illustrate the difficulty of reconciling democracy and intergovernmentalism: many of the EU’s democratic shortcomings can be traced directly to the organizational principle of intergovernmentalism, which – as we will see – has historically been a significant force in European integration.

The bottom line under these considerations is that already a very preliminary look at the EU’s institutional architecture, with its unique combination of intergovernmental and supranational elements, combined with a look at the union’s historical development, suggests that the EU’s relationship with democracy is problematic not so much because the union as such is undemocratic, but because the union as such is not a state and will not develop into anything like a state in any foreseeable future. In this sense, the relationship between the EU and notions of democratic rule can best be described as paradoxical: while there are strong claims for the EU to become more democratic, most importantly as regards enhancing the democratic accountability of its institutions, there is simultaneously a lack of political will (or consensus) to achieve this latter goal.

This is however not to say that the union will forever have to remain as intergovernmental/undemocratic as it is at this point. Democratic theory has a significant contribution to make in this debate, as it allows us not only to analyze the various elements of different kinds of democracy in the EU (such as most notably representative, participatory and deliberative democracy) and their historical development. In addition, democratic theory also offers us fundamental insights into why democracy – understood as popular sovereignty in the context of the Westphalian nation state – *may appear unachievable* in international organizations such as the European Union, *unless* they take a qualitative leap in the direction of developing *something like* a federal nation state. At the same time, democratic theory also gives us guidance in the question of how democratic principles can be achieved in international organizations such as the EU, but this kind of *transnational* democracy – as we will see – would be a form of democracy very different from the kind of popular sovereignty that has come to be viewed as tantamount to democracy as such.

This report therefore takes its starting point in a discussion on what democracy is to begin with. “Rule of the people” has been interpreted very differently throughout the history of the idea of democracy. Even contemporary democratic theory is far from achieving a consensus on how popular sovereignty can even be achieved in the nation state, as indicated by ongoing debates between representative, participatory and deliberative scholars. This report therefore asks the question of whether we are currently observing a fundamental transformation of democracy, based on the observation that decision making is increasingly moving to arenas beyond the nation state, and consequently what meaning can be given to the notion of the “rule of the people” when decisions are taken decreasingly *by* “the people” in the singular, and increasingly *between* peoples (in the plural). These considerations will highlight some of the tensions inherent in any attempt to create democracy at the European level by implying the existence of some kind of European people. Can the democratic ideal of popular sovereignty be achieved in the EU even in the absence of a European people? What sources of legitimacy are there other than peoplehood and/or collective identity? And lastly: what alternatives are there to the ideal of popular sovereignty, if we find that popular sovereignty does indeed necessitate the existence of a single European people? Against this backdrop, this report then introduces three basic ideas about democracy, all of which are relevant to the discussion on the future of democracy in the EU, namely representative, participatory and deliberative democracy. As we will see in the analysis, debates on the democratic deficit tend to emphasize only elements of representative democracy, even though also the latter two have been strengthened in recent treaty reform processes, most notably with the introduction of EU citizenship in the Maastricht Treaty on European Union (1993) and the introduction of the European Citizens’ Initiative in the Lisbon Treaty (2009).

Arguably even more crucial to this analysis, the report looks at the development of the EU as a polity. This analysis is crucial for the reasons argued above: *what kind of democracy* is possible in a given polity depends to the largest extent on *what kind of polity* it is. The EU democratic deficit debate has highlighted a paradox in this respect, since there is a greater public demand for democracy – specifically for more democratic accountability – than the nature of the EU as a “polity sui generis” will allow. To substantiate these claims, it is therefore necessary to have a closer look at what makes the EU a “polity sui generis”, i.e.

what the unique mix of supranational and intergovernmental elements looks like. As we will see, the EU is much more than a usual international organization, at the same time as it is – and will also remain, in the foreseeable future – much less than a (federal) state. In this context, the report also emphasizes the historical development of these institutional features, most importantly with a view to changes that have occurred since Iceland decided to apply for EU membership in the summer of 2009, that is: the changes brought about by the Lisbon Treaty that has been in force since December 2009. One of the core arguments throughout this report is that the Lisbon Treaty does not constitute a revolutionary change as such, but is much more accurately described as the culmination of much longer and much more gradual process of institutional reform that has spanned at least the last three decades.

Next, the report analyzes elements of different kinds of democracy in the EU. The EU has certain elements of representative democracy, but the Lisbon Treaty has also significantly strengthened participatory elements. But also elements of deliberative democracy can be considered important, most of all in the context of so-called stakeholder consultations that the European Commission organizes prior to the formal submission of a legislative proposal to the European Parliament and the Council of Ministers. However, as the report also shows, the absence of a lively European public sphere still hinders the further development of deliberative democracy vis-à-vis the European institutions.

The report ends with a discussion on the prospects of democracy in the European Union. By the end of the report, it should be clear that democracy in an organization that is not – will not be, in any foreseeable future – a nation state, democracy may have to take a different form than it has taken in the context of the nation state. That does not in and of itself have to mean that it has to be less democratic than the nation state, but it will by necessity need to be *differently* democratic than the nation state. Therefore, the normative yardstick for assessing the democratic performance of this intergovernmental organization cannot be the same as for the nation state. The role of the three main legislative institutions needs to be addressed in this light: not only how much, but also what kind of representative democracy is possible in the EU? The discussions on participatory and deliberative democracy can arguably be seen as somewhat more speculative, but what can be said already now is that the success of these two elements of democracy depends crucially on the emergence of a European public sphere and the success of the new European Citizens' Initiative.

## **2. Setting the tone: A few remarks from the field of democratic theory**

### **2.1. The basics: democracy as rule of the people**

Democracy is a deceptively simple concept, stemming as it does from the Ancient Greek words “demos” and “kratos” and thus referring simply to “rule of the people”. Rule of the people can however be – and certainly has been – interpreted in very many different ways, both with regard to the question of who belongs to and owns full citizenship rights in the group of people that constitutes a “demos” (or people), and with regard to how their rule should be exercised – whether directly by the citizens, whether through elements of citizen participation, or exclusively through some system of representative government. This ambiguity has led not only to very different accounts of what constitutes democracy, under which conditions the ideal of democratic self-rule can be said to have been achieved, or whether real democracy can be achieved in the first place. John Dewey’s famous quote that there can always be more democracy is certainly relevant in this context (Dewey 1927). The same discussion also applies to the European Union and the European integration process, which has been accompanied by heated debates about a presumed democratic deficit at least since the early 1980s. One of the most fundamental questions in this debate is the question of whether democracy can actually be achieved at any level beyond the nation state, and what kind of ideal-typical expectations we can have towards an organization that is profoundly more than an international organization, but significantly less than a federal state in the making. As we will see, the conceptual foundations regarding what constitutes democracy tend to be rather shaky in these debates, making it necessary in this report to take one step back to discuss the concept of democracy before applying it to the unique mix of intergovernmental and supranational elements that characterizes the institutional architecture of the European Union even after the Lisbon Treaty.

The contested nature of the concept of democracy has to be addressed both from a historical and from a contemporary perspective. While democracy is interpreted in very different ways by different democratic theorists today (who nonetheless all claim the same historical roots), differences are arguably even wider between the kind of mass democracy that is institutionalized in representative government in the nation state and the ideas that we connect to direct-democratic decision making in the ancient Athenian polis. As a matter of fact, despite what we would perceive from a contemporary perspective as the many shortcomings of ancient Athenian democracy – most of which are connected to the question of who is actually to be considered a citizen allowed to participate in “democratic” decision making in the Athenian market square –, the form of representative mass democracy that we are accustomed to would seem profoundly undemocratic from an Athenian direct-democratic perspective. Consequently, similar concerns were for instance expressed in debates on the transformation to mass democracy in the first half of the 20<sup>th</sup> century, maybe most prominently in the debate between the pragmatist philosopher John Dewey and Walter Lippmann (Kantner 2004; cf. Conrad 2009).

Two conclusions can be drawn from this: the first is that as an institutional procedure for determining the collective will, democracy has historically taken different forms. The second is that as a consequence, democracy beyond the nation state may be expected to take a form

different from the one we are familiar with in the nation state. Both points are connected to the view that representative mass democracy is only one institutional expression of the idea of democracy. However, representative mass democracy as it has developed in the context of the nation state is *historically contingent*: it fits the contemporary environment of coexisting nation states and as such, it is different both from democracy both in ancient Greece and – most likely – different from the kind of democracy that will develop in relation to the simple fact that the increasing amount of decisions made in arenas beyond the nation state is already creating a fundamental demand for democratic forms of governance beyond the nation state, most importantly in the European Union.

From this arises the question what democracy could look like beyond the nation state, if it is indeed necessary for politics in international arenas to be democratic in the first place, and if it is indeed possible to have a meaningful conception of democracy beyond the familiar frame of the nation state. This debate has been going on for quite a few years, both within the academia – whether in political science, philosophy or other disciplines – and in broader public debate. It is far from obvious what conclusions these debates will yield, and whether debates taking place in the ivory tower of political philosophy can ever hope to have any impact on shaping democracy beyond the nation state. Currently, we appear to be left with a genuine dilemma of being fond of a notion of democracy that, although it is historically contingent, is inherently and inextricably linked to the Westphalian nation state. The Westphalian nation state is arguably the strongest source of collective identification. For many, this makes it a kind of natural home – and ultimate limit – of democracy, making it difficult to imagine a group of people larger than the nation state that would still be able to claim peoplehood and thus rule itself democratically.

On the other hand, few would dispute that decision making is increasingly moving to arenas beyond the nation state, the most obvious – but not the only – example of which is the European Union. But also other forms of international cooperation are relevant to mention in this context. Iceland clearly has an interest in participating in European integration via the internal market, as the continued commitment to EFTA and the EEA Agreement underlines despite a certain amount of contestation about if and when EU legislation should be considered “EEA-relevant” (Jónsdóttir 2013). This phenomenon of decision making beyond the nation state does not have to be a problem, as long as national governments making decisions on behalf of their nation states in such international or supranational arenas are sufficiently legitimated to do so at the national level. But it is also undeniable that this act of delegation – giving national governments the authority to negotiate binding decisions on behalf of the nation state as such – has created problems of democratic accountability in the context of European integration. If this act of delegation was *unproblematic* and people were happy with what their governments negotiate for them in the EU Council of Ministers (or in the process of reforming the treaties), one would assume that there should be no debate about any “democratic deficit”. In fact, the American political scientist Andrew Moravcsik, one of the most influential theorists of European integration, argues that the democratic deficit is a myth because the Commission is by and large controlled by the European Council in its drafting of legislative proposals. Maybe more importantly, legislative decisions are ultimately made by a directly elected institution (i.e. the European Parliament) and by

national governments (in the Council of Ministers) that are democratically accountable to their electorates at the national level (Moravcsik 2008). But evidently, this form of indirect legitimation via the nation state is insufficient at least in the case of the EU; hence the debate about a democratic deficit and a call for democratically more accountable European institutions. As we will see below in chapters 3 and 5, such reforms are however problematic because they would also entail a strengthening of the supranational institutions, which in turn is perceived as democratically problematic. In other words, we are faced with a genuine dilemma.

Transformationalist democratic theory gives us primarily two answers to questions about how democracy could be institutionalized beyond the nation state: one argues that democracy can still be “rule of the people” (or better: “popular sovereignty”), but this would require a reconstitution of democracy beyond the nation state through the constitution of a European people on the basis of the existing nation states – a people of peoples, so to speak. The second perspective argues that democracy has to take a much more profoundly different shape: it has to be a sort of transnational democracy of “demoi” in the plural, which would come at the expense of giving up on the concept of popular sovereignty; if there is no European people, then there can also be no self-rule of the European people (in the singular).

## **2.2. Democracy beyond the nation state: rule of a newly constituted European people?**

Some would argue that the normative ideal of democracy – popular sovereignty – has reached its limits in the nation state; political community of the quality that will allow citizens to claim peoplehood is inconceivable beyond the nation state. In this regard, there is somewhat controversial debate among theorists of democracy, with some claiming that democracy – understood as rule of the people in the republican sense of “popular sovereignty” – can by all means be reconstituted at the level of the European Union. This fundamental assertion has however led to very different conclusions.

An important aspect in this debate is the so-called collective identity or “community deficit”, meaning that Europeans lack a sense of community/collective identity, resulting in a problematic mismatch between the scope of European integration and the level of community that would be required to legitimate this scope of integration. This view is connected to the German-American sociologist Amitai Etzioni, who has further argued that the EU can overcome this community deficit by establishing its communal moral values in “transnational moral dialogues” and thereby contribute to the emergence of a European sense of community (Etzioni 2007). Attempts on the part of the European institutions to create a stronger sense of European identity can also be understood in this light, for instance through the use of symbols of European unity such as the flag or anthem, but maybe more importantly through exchange programs for students and workers alike. Erik Oddvar Eriksen and John Erik Fossum (Eriksen & Fossum 2004, 2007) have identified this form of fostering a European collective identity as one of three possible strategies for legitimation in the EU. However, they are also highly critical of this approach since they believe that a reconstitution of democracy at the European level can also take place purely at the level of a political understanding of citizenship: basically, there is nothing that prevents the emergence of a *politically* conceived notion of European citizenship *alongside* – and thus not (!) as a

replacement of – the *cultural* identification of citizens with their respective nation states. This view could be summarized as the sort of “postnational” understanding of democracy that is largely connected to the name of the German philosopher and social theorist Jürgen Habermas. Habermas has long been one of the advocates of democratizing the European integration project by making its institutions more democratically accountable and also drafting a European constitution as a basic law of an ever more federal EU (Habermas 2011). Consequently, he is also one of the authors who do not shy away from pointing out the democratic benefits of federalization (e.g. Habermas 1998), and who is consequently one of the most pronounced critics of the form of “executive federalism” as which he has identified the democratically unaccountable style of decision making by national executives in the wake of the Eurozone debt crisis (Habermas 2011).

### **2.3. Democracy beyond the nation state: rule without a people?**

Contrary to both the postnational and communitarian understandings of democracy, there are also democratic theorists who claim that the fact that political decision making is increasingly moving beyond the nation state calls for a much more profound reconsideration of what constitutes democracy and how democracy can be achieved beyond the nation state. The American philosopher James Bohman, for instance, is skeptical of the benefit of postnational democracy as developed by Habermas and Eriksen/Fossum (Bohman 2005, 2007a, 2007b). He is primarily skeptical of the idea that European peoplehood (i.e. a European demos) could be constituted without at the same time implying that the interests of Europeans as a whole have to be seen as more important than the interests of the people of each and every one of the member states. As an alternative, he proposes a different kind of transnational democracy of multiple demoi (in the plural). This view however implies that since there would not be any unified European people/demos, the understanding of democracy as rule of the people would also have to be replaced by something else. In his account, this “something else” is the democratic minimum that he describes as “non-domination”: we can speak of democracy not if any particular decision represents the will of the people, but if and when the decisions made by the institutions of the political system are justifiable to all without any particular group of people perceiving them as unjust. The only way to realize this is to institutionalize communicative freedom in a way that allows individuals to initiate deliberation on what they perceive as unjust, and to include this deliberation in institutional decision-making processes. This is obviously a very different understanding of democracy, but it pays tribute to the deeply rooted understanding that democracy has to take into account the existence of democratically constituted demoi at the level of the nation state (and below).

### **2.4. Representative, participatory and deliberative democracy: rule of the ballot box, rule of the active citizen, or rule of reason?**

The question of whether and how democracy can be reconstituted beyond the nation state – whether as “popular sovereignty” of a newly constituted European people or as a transnational democracy of European demoi – is however not the only question that has to be taken into account in discussing the highly contested nature of democracy. While the institutional form of democracy has changed fundamentally in the course of history, even our contemporary understanding of how to achieve popular sovereignty is highly contentious.

This is so despite the fact that we can claim that there is at least some sort of broad and overarching consensus that mass democracy has to be representative democracy, that is: the will of the people has to be established through the democratic election of representatives of the citizens. What is however less clear is how and to what extent representative government should also be complemented by elements that would help to approximate the ideal of popular self-rule and thus bridge gaps between citizens and their representatives.

Even from a contemporary perspective focusing on the nation state, it is by no means clear whether representative government in and of itself is sufficient to ensure the achievement of popular sovereignty. To some extent, this ambiguity is connected to the scale of modern mass democracy: democratic governance in larger polities necessitates an element of representation, but government by representation by necessity implies a gap between citizens and their representatives. In representative democracy, this necessary gap is certainly legitimated in elections that take place on a regular basis, generating a direct chain of accountability that therefore gives citizens the oft-quoted option of “throwing the rascals out” at the next elections. Representative democratic theory is also often connected to a somewhat elitist understanding of democracy, implying that informed decision making on a variety of issues overburdens average citizens and should therefore be left to people elected for that purpose and who have the time and resources to make educated decisions on behalf of the citizens that they represent (cf. Marx-Ferree et al. 2004). As we will see in chapter 3, representative democracy at the level of the European Union does not work this way because the European Parliament has relatively limited powers primarily in relation to the European Commission, bringing about a need for alternative sources of democratic accountability and legitimation.

Even at the level of the nation state, many democratic theorists argue that representative democracy generates too wide a gap between citizens and the institutions of the political system. This is based not only on the very real concerns that many citizens have about the decisions that the institutions of the political system produce in their name. It also has to do with the elitism of representative democratic theory. Consequently, participatory democratic theory argues that democracy cannot be achieved through representative mechanisms alone, but that those elements need to be complemented by channels that allow active citizens to participate in institutional decision making. Such channels can include instruments such as petitions, citizens’ initiatives, agenda initiatives, and so on. As we will see below, the at best indirectly representative character of EU democracy generates an additional need for participatory mechanisms.

Deliberative democratic theory, most closely connected to the name of Jürgen Habermas (Habermas 1992), shares many of the concerns expressed by participatory theorists. Most of all, it is committed to the notion that citizens can play a much more active role in democratic processes than representative theory assumes. But deliberative democratic theory emphasizes the role of the public sphere quite differently. For Habermas and his followers, the public sphere – and the communicative processes taking place therein – is a sphere of democratic politics that necessarily has to be distinct from the institutions of the political system. The public sphere serves as an inclusive forum for the formulation of public opinion and will; its

functional task consists of the generation of communicative power that can be used as a counterweight to the administrative power of the political system: decisions made by the institutions of the political system can claim to be democratically legitimate *not primarily* because they are supported by a majority of the people, but because they are supported by good arguments that can be accepted by all on the same grounds (Habermas 1992). This becomes particularly relevant in multinational settings such as the European Union, but no less in pluralistic nation-state societies (Conrad 2009). As such, deliberative democratic theory also plays a key role in the transformationalist democratic theory of James Bohman that was discussed above.

The analytical purpose of this excursus into the field of democratic theory was to provide a solid conceptual background that is often missing – and sorely missed – in debates about the EU democratic deficit. While it is easy to point out a lack of democratic accountability in the EU's institutions, it is quite clearly much more difficult to point to possible solutions to these shortcomings. This is because solutions to these problems first require a basic understanding of what democracy can be beyond the nation state – whether it should be popular sovereignty at this level as well, whether it should be popular sovereignty of a newly constituted people, or whether it should be popular sovereignty without a people – and to what extent and in what ways representative government beyond the nation state should be complemented by instruments and mechanisms of participatory and/or deliberative democracy. As we can see already at this early point, the democratic development of the European Union thus presents us with a conceptual paradox that quite possibly cannot be solved. The institutional architecture of the EU is, if anything, testimony to the broader conviction that the nation state is the main and possibly sole source of legitimacy in the EU. However, the democratic deficit also strongly suggests that it is a highly insufficient source of legitimacy considering the problem of the apparent lack of legitimacy that institutions such as the European Commission suffer from.

### **3. A polity sui generis: what kind of polity is the European Union?**

The European Union is not a state. Consequently, it has been argued, it is highly problematic to assess the democratic performance of the EU institutions *as if* the EU were a state. This chapter looks in more detail at the unique mix of intergovernmental and supranational elements that have resulted in a view of the EU as a *polity sui generis*. Again, the nature of the EU as a polity has profound implications for how democratic it can become in relation to how democracy functions in the nation state. In this discussion, certain references to the history of European integration are necessary in order to highlight why the institutions look and function as they do. However, the primary focus is on developments in the institutional architecture that have taken place since the entry into force of the Lisbon Treaty in December 2009, which also roughly coincides with the Icelandic Parliament's decision to apply for EU membership in July 2009.

#### **3.1. Intergovernmental elements**

##### **3.1.1. The Council of Ministers**

Although the legacy of intergovernmentalism in European integration has already been emphasized, it is nonetheless necessary to have a closer look not only at those institutions in the EU's institutional architecture in which these elements are the most prominent, but also why they have been so important historically and what impact they have on the democratic character of EU decision making. There are two more or less obvious places to begin this discussion: the two most intergovernmental of the EU's institutions are the European Council and the Council of Ministers. It is important to note that although both bear the name "Council", they are in fact very different institutions that serve very different purposes and have emerged at different times in the integration process.<sup>1</sup>

The emergence of the Council of Ministers is particularly interesting in relation to the intergovernmental character of European integration. European integration is usually considered to begin with the creation of the European Coal and Steel Community, which in turn is based on the initiative and ideas of the French foreign minister Robert Schuman. In the Schuman Plan in 1950, Schuman proposed the creation of a supranational authority to be in charge of French and German production of coal and steel. The idea that Schuman and Jean Monnet shared was that coal and steel production were so central to a country's ability to wage war that pooling their sovereignty in these regards in a common supranational authority would make wars between them virtually impossible (e.g. Bache et al. 2011: chap. 6). More importantly, however, they also believed that integration in these areas would lead to further integration in other areas. This method – also known as the "Monnet method" of incremental integration – was subsequently theorized by political scientists such as most famously Ernst Haas as "neofunctionalism" (Niemann & Schmitter 2009). The Schuman Plan only proposed a supranational authority for coal and steel production. However, the six participating ECSC states – West Germany, France, Italy and the three Benelux states – ended up creating an intergovernmental Council to counter the role of an otherwise

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<sup>1</sup> It is however certainly valid to argue that the European Council, which is by now a formal institution, the composition of which was codified in the Lisbon Treaty, emerged out of the Council of Ministers and grew into an independent institution.

unchecked supranational authority. In other words, already the founding of the ECSC illustrates the reluctance of the member states to transfer authority to a supranational institution *unless* this institution also had a sufficiently strong intergovernmental counterpart. The Paris Treaty thus established not only the *High Authority* – the precursor of the European Commission –, but also the Council as an intergovernmental counterweight that we still see reflected in the EU’s current institutional architecture.

From an historical point of view, it is also worth pointing out that the Council of Ministers has been the most important of the Community’s – and later the EU’s – *legislative* institutions.<sup>2</sup> Until the entry into force of the Single European Act in 1987, the Council of Ministers was basically the only decision *maker* in the Communities, as there was only one legislative decision-making procedure. Under this “consultation procedure”, the Council of Ministers had to consult the European Parliament on the Commission’s legislative proposals, but the European Parliament had no say in whether or not the proposal was accepted by the Council. The Council’s role in this regard has not precisely weakened over time, as all EU legislation still has to be accepted by the Council of Ministers, that is to say: by the relevant ministers from the member states.<sup>3</sup> Therefore, it has to be emphasized that legislation proposed by the supranational Commission *still* cannot be adopted against the will of the member states. However, this statement needs to be qualified in relation to two aspects: (1) the increased use of qualified majority voting in the Council, and (2) the gradual strengthening of the role of the European Parliament in the legislative process.

As the European Communities grew in size, first from six to nine member states in 1973, then to twelve in 1981 and 1986, respectively,<sup>4</sup> decision making by consensus in the Council became increasingly problematic. As a consequence, the Single European Act (entry into force: 1987) introduced qualified majority voting (QMV) in the Council, which means that in the limited number of policy areas to which this applied at this point, member states could be outvoted by others on proposals from the Commission. Nonetheless, there is still a strong consensus culture in the Council, meaning that consensus between member states is sought and usually found, although this is also due to the fact that member states are more willing to make compromises if they know that they could also be outvoted by the other states. The Single European Act is an important stepping stone in this regard, as the number of policy areas in which QMV applies was extended in successive treaty reform processes. By now, four years after the entry into force of the Lisbon Treaty, QMV is the norm in the EU’s legislative process, being part of the “ordinary legislative procedure” and applying to over 80 policy areas. In a union of by now 28 member states, it is also self-evident that qualified

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<sup>2</sup> In this context, it should be made clear that the European Union (EU) was founded as late as 1993 with the entry into force of the Maastricht Treaty on European Union. Prior to this, the communities consisted of the European Coal and Steel Community (ECSC, founded in 1952) as well as the European Economic Community (EEC) and the European Atomic Energy Community (Euratom; the latter two are both founded in 1958).

<sup>3</sup> The Council of Ministers is not *one* body composed of the same representatives of the member states, but rather a set of ten different Council formations depending on the policy area within which a legislative proposal lies. For instance, Commission proposals on environmental legislation are formally decided by the Ministers of the Environment of the member states in the Environmental Council.

<sup>4</sup> Denmark, Ireland and the UK joined in 1973; Greece in 1981; and Spain and Portugal in 1986.

majority voting is a functional necessity without which decision making on contentious issues would be difficult to imagine.

The Lisbon Treaty is relevant in this regard, as it replaces the previous system of the “voting weights” with a simpler “double majority”. Under the Nice Treaty (in force between 2003 and 2009), member states held a certain number of votes in the Council, ranging from 29 for the biggest states (Germany, France, UK and Italy) to 3 for the smallest state, i.e. Malta. Due to a *transition rule* included in the Lisbon Treaty, this system is still in place, but will be replaced by the double majority system in November 2014. This double majority means that legislative proposals from the European Commission (and supported by the European Parliament) can enter into force if they are supported by 55% of the member states’ governments who simultaneously represent 65% of the union’s population (art. 238(3a) TFEU). As an additional safeguard for small states in the EU, the Lisbon Treaty further introduced a clause into the Treaty on the Functioning of the European Union (TFEU) according to which the number of states forming a blocking minority is four; in other words: no fewer than four states can block proposals that enjoy the support of the other member states (art. 238(3a) TFEU).<sup>5</sup>

Mention should also be made of the role of the Committee of Permanent Representatives (COREPER) in the Council. While the formal decisions in the Council are made by the respective sectorial ministers of the member states, many decisions are already made at the diplomatic level by the member states’ permanent representatives/ambassadors. One of the functions of COREPER is to sort out items of a more contentious nature which are then negotiated and, if necessary, voted on at the ministerial level, using qualified majority voting.

The second aspect mentioned above in relation to the continuously strong role of the Council of Ministers relates to the gradual strengthening of the European Parliament. This process was set in motion by the first direct elections to the European Parliament in 1979. The fact that since then, the EP has been able to claim a direct chain of accountability between itself and the citizens in the member states (as the only directly elected of the EU’s institutions), also led to calls for a stronger role of the EP in the legislative process. Proponents of a stronger EP even demanded that the parliament should have the authority to co-decide on equal ground with the Council of Ministers. After the introduction of the “cooperation procedure” in the Single European Act, the “co-decision procedure” was introduced in the Treaty on European Union in 1993 and then revised, simplified and extended in successive rounds of treaty reform. The Lisbon Treaty has now made the co-decision procedure the norm in EU decision making. As part of the “ordinary legislative procedure”, it now applies to over 80 policy areas. It can be debated to what extent this strengthening of the European Parliament also constitutes a weakening of the Council of Ministers. Obviously, it gives the Parliament greater influence over the Council, as the latter cannot accept Commission proposals that would be unacceptable to the Parliament. But of course, also the Commission knows that proposing legislation unacceptable to either of the other two legislative

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<sup>5</sup> The precise wording in this article is that “[a] blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained.”

institutions would be futile. In addition, no power has been taken away from the Council: legislation cannot pass unless the Council agrees, underlining the continued role of the Council as an intergovernmental balance against the supranational Commission and Parliament.

### **3.1.2. The European Council**

The European Council needs to be distinguished clearly from the Council of Ministers.<sup>6</sup> The former has no formal legislative role at all, but serves merely as a discussion forum on an intergovernmental level. In everyday language, the European Council is often referred to as the EU summit, bringing together heads of state or – more commonly – heads of *government*, who are also joined by the Commission President, the European Council President (see below), and the High Representative for Foreign and Security Policy. The tasks and composition of the European Council are now finally also codified in art. 15 TEU. European Council meetings were first introduced as a means of fostering more dialogue at the intergovernmental level, mostly in relation to the so-called “empty chair crisis” that paralyzed the Council of Ministers in the mid-1960s.<sup>7</sup>

While the European Council has no formal *legislative* authority, it is still considered by many to be the most important and possibly also the most powerful institution in the EU. This is partly due to its role as the union’s main agenda setter (art. 15(1) TEU), but arguably even more so due to its role in the selection of candidates for some of the most important positions in the union (such as the Commission President or its own President) – and most importantly for its role in the process of treaty reform. Whichever of these may be considered the most important of the European Council’s functions, it is clear that both the very existence and the powers enjoyed by the European Council need to be fully understood in order to assess the intergovernmental character and legacy of European integration, and the lasting implications that this legacy has on the democratic character of EU decision making. Many of the justified criticisms regarding a lack of democracy in the EU stem from the member states having so far wanted to retain relevant powers that could otherwise be subject to (more) direct democratic accountability. Therefore, the following paragraphs address the role of the European Council in (a) treaty reform, (b) the selection of the Commission President, (c) the selection of the European Council President and the High Representative for Foreign and Security Policy, and (d) setting the agenda for the European Union. Specific attention is paid to the codification of the European Council’s role in the Lisbon Treaty, and of course to the democratic implications of the special role played by the European Council today.

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<sup>6</sup> The different composition and functions of the two institutions are covered in articles 15 (European Council) and 16 (Council of Ministers) of the consolidated Treaty on European Union (TEU).

<sup>7</sup> During the empty-chair crisis, France – under the Presidency of Charles de Gaulle – boycotted all meetings of the Council of Ministers, partly in protest against the planned introduction of qualified majority voting on agricultural issues in the Council of Ministers. The crisis ended with the so-called Luxembourg compromise, according to which a national veto was retained if a member state could argue that proposed legislation touched upon vital national interests.

The treaty reform process – which has by and large been an ongoing process at least since the “relaunch” of the European integration process in the early 1980s<sup>8</sup> – is often criticized for its allegedly undemocratic character. This observation would be correct if the EU was no intergovernmental organization, leaving aspects of ratification and democratic legitimation to the member states: nothing illustrates this better than the process of treaty reform. Treaty reform is a process in which the governments – often bound by fairly strict negotiating mandates – strike often highly complex compromises that are subsequently subjected to the ratification procedures that exist within national contexts. These procedures vary, often entailing parliamentary ratification, but in some cases and under certain conditions also referenda in which member state citizens decide directly whether or not to ratify a given treaty. In any event, ratification is subject to the provisions in each and every one of the member states, and treaty changes cannot enter into force unless they are ratified in all the member states.<sup>9</sup>

This process is not undemocratic per se if the intergovernmental character of European integration is taken into account: treaty reform is a right that member state governments have preserved precisely to remain in control of the institutional development of the European Union. Consequently, the supranational institutions (e.g. the Commission and the European Parliament) play no role in shaping the content of the treaties. Instead, treaty reform is to a large extent about how much authority these supranational institutions are allowed to have, which in turn indicates the intergovernmentalist point that supranational institutions are designed as facilitating devices, intended to facilitate cooperation between sovereign member states at the European level (e.g. Moravcsik & Schimmelfennig 2009). The intergovernmental character of treaty reform – in which the European Council plays the key role – can thus even be looked at as more “democratic” than a process in which the supranational institutions would play a stronger role. This argument is based on what has been described as “delegated democracy” (e.g. Eriksen & Fossum 2007; Moravcsik 2008): national governments are directly legitimated at the national level and thus have a mandate to negotiate treaty reform on behalf of their state. In addition, all states have the same weight when it comes to reforming the treaties: whereas qualified majority voting (QMV) is now in legislative decisions in the Council of Ministers, treaty changes have to be agreed by all member states unanimously, which is why treaty reform are usually highly complex compromises between widely diverging interests.

This system looks democratically questionable only from a supranational perspective, considering that the kind of direct legitimation and the mandate for negotiating treaty reform that national governments derive from democratic accountability institutionalized at the national level is insufficient. As a matter of fact, there have been numerous calls for making the treaty reform process more open, transparent and inclusive, for instance by also involving

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<sup>8</sup> Since the entry into force of the Single European Act (SEA) in 1987, the member states signed and ratified no less than five treaties (the SEA included), namely the Treaty on European Union (1993), the Amsterdam Treaty (1999), the Nice Treaty (2003) and the Lisbon Treaty (2009).

<sup>9</sup> Germany is an example of a member state that has no constitutional provision for nationwide referenda, which is why new EU treaties are ratified in both chambers of parliament. In the cases of the Maastricht and Lisbon Treaties, compatibility with the German constitution was furthermore confirmed in much-noted cases before the Federal Constitutional Court (Bundesverfassungsgericht).

members of national parliaments or even citizens more directly. Some proponents of a treaty reform process that is more democratic along these lines – such as the German philosopher Jürgen Habermas – have even gone so far to call for a new and democratically elected constitutional convention to draft a new basic law for the EU. This would arguably provide for more democratic legitimacy, but it would also undermine the fundamental principle of intergovernmentalism on which European integration is founded, and which some still see as an important check against the development of excessively supranational and/or federal structures. But, as we have seen, it comes at the expense of democratic accountability.

It could be noted that one experiment of taking the treaty reform process out of the hands of the European Council has already been undertaken – and failed. The *Convention on the Future of Europe* that worked out the *Treaty establishing a Constitution for Europe* (referred to in the following as the *Constitutional Treaty*) in 2003 did not go as far as Habermas’s proposal of a *directly elected* convention, but was at least composed not only of representatives of heads of state or government, but also representatives of the national parliaments, the European Commission and the European Parliament. In addition, the Convention’s deliberations took place in public. The result was therefore the product of the most inclusive and democratic attempt at treaty reform in the history of European integration so far. However, as is well known, the Constitutional Treaty was nonetheless rejected in two referenda in France and the Netherlands in the spring of 2005.

The intergovernmental character of European integration further manifests itself in the European Council’s role in the selection of the President of the European Commission. Despite claims that the European Commission is a democratically unaccountable bureaucracy (see below), member states have so far retained the right to appoint their respective Commissioners independently. The same applies to the Commission President, and it does so for the same intergovernmentalist reasons. Although the Commission President certainly plays a significant role in a variety of contexts, the position is at best indirectly – and quite insufficiently – legitimated via the European Council. The Commission President is formally elected by the directly elected European Parliament – and therefore by the democratically elected representatives of the European people (art. 17(7) TEU). At the same time, those representatives have no choice in selecting the candidate for this office (i.e. the “President-designate”), as this choice is the formal responsibility of the European Council: it is a right that the member states have chosen to keep for themselves. This obviously has democratic implications: it guarantees that member state governments play the decisive role in choosing the Commission President, but it also means that this choice can be questioned by reference to the highly indirect democratic legitimation that this highly important position enjoys via the governments of the member states.

The same further applies to the two new positions that were created in the Lisbon Treaty, namely the President of the *European Council* (art. 15(5) TEU) and the *High Representative for Foreign and Security Policy* (art. 18(1) TEU). Both positions were already included in the failed Constitutional Treaty. Prior to the Lisbon Treaty, the European Council had the same principle of a rotating presidency as the Council of Ministers still does today: one member state holds the presidency for a six-month period before the latter moves on to the next

member state. This was however replaced by the office of the “permanent” President of the European Council, both to give the institution a face and, more importantly, to provide continuity in its work. The President of the European Council is elected for a renewable term of two and a half years. Similarly, the office of the *High Representative for Foreign and Security Policy* was created both as a way of spanning the Commission’s and the Council’s work in these regards, and also to provide continuity in this work. Regarding the former point, it could be added that the High Representative is both the chair of meetings in the *Political and Security Committee* of the Council of Ministers *and* one Vice-President of the European Commission. Similar to the discussion above about the Commission President, these two institutional innovations of the Lisbon Treaty underline the continued role of intergovernmental elements in European integration: while there have been arguments that the former position constitutes a European President and the latter a European foreign minister, both offices are in fact controlled by the governments of the member states. One might also add that although the High Representative is one of the Vice-Presidents of the Commission, the Commission President explicitly does not have the authority to put another Commissioner in this position (art. 17(6c) TEU). In addition, although the offices of European Council President and High Representative were designed as fairly high-profile positions, the way that the roles of these positions have been exercised by Herman van Rompuy and Lady Catherine Ashton is best described as low-key.

Finally, some attention should be paid to the agenda-setting role of the European Council. Although the European Council has no formal role in the legislative process, it does have quite considerable influence over the European Commission not just in selecting a candidate for the office of Commission President, but also over the policy proposals that the European Commission formulates and submits to the European Parliament and to the Council of Ministers. Some estimates claim that some 70 to 80% of the legislative proposals coming from the European Commission can be traced directly to the goals and ambitions formulated by the European Council. The role of the European Commission as an appointed instead of elected body therefore has to be seen in this light: it is highly responsive to the wishes expressed by the member states in the European Council, in addition to the key role that the latter plays in selecting the Commission President. In light of the criticism that the European Commission receives as an unelected and therefore unaccountable, but in addition excessively supranational legislator that is beyond the control of the member states, the strong influence of the European Council cannot but be seen as a strong intergovernmental check against the supranational character of the European Commission.

### **3.1.3. The European Commission from an intergovernmentalist perspective**

These considerations pave the way for an analysis of the role and democratic impact of the European Commission from an intergovernmentalist perspective. This kind of analysis might seem somewhat surprising, considering that the European Commission is largely perceived as a supranational institution with a clear preference for further and deeper integration. In addition, some of the key theories of European integration – most importantly neofunctionalism, but also more recent additions such as historical institutionalism or social constructivism – view the European Commission as an important engine of European integration that is far less controlled (and controllable) by the member states, partly because

of its own self-understanding that has developed over time, partly because of the socializing effect of institutional norms on newcomers entering this institutional environment.

While these are certainly good reasons for analyzing the Commission as a supranational institution, the remarks made in the previous section indicate that the European Commission's role also has to be addressed from an intergovernmentalist perspective. The selection of the Commission President and of the individual Commissioners are of particular relevance on this context. The selection of the Commission President can by all means be seen both as an illustration of the continued legacy of intergovernmentalism in the EU and – maybe more importantly – as an illustration of the democratic paradox of European integration: intergovernmentalism in the selection of the Commission President and the College of Commissioners is difficult – if not outright impossible – to reconcile with demands on democratic accountability derived from the nation-state template of democratic governance. Both the College and the Commission President are frequently criticized for a lack of democratic accountability. This is often taken up in the context of the Commission's central legislative (as the institution that has the *exclusive (!)* right of legislative initiative), but maybe even more importantly in the context of its executive role. This strong role of the Commission is connected to demands for more democratic accountability. But this would necessarily imply a step away from the principle of intergovernmentalism, and consequently a step towards further supranationalism.

The selection of the Commission President remains a broadly intergovernmental process despite the increased role of the European Parliament in the process of “electing” the candidate chosen by the European Council. The Lisbon Treaty strengthens the role of the EP in this regard, but the effect that this will have in practice looks doubtful. The European Council (i.e. the member states) still has the right to select a candidate for the position of Commission President. Even though it is in principle possible to choose this candidate by qualified majority vote (and thus against the will of a certain number of member states), the norm is to do so by consensus. The Commission President is then formally elected by the European Parliament. While the European Parliament has the chance to reject the candidate chosen by the European Council (which is certainly a supranational element in the process), it does not have the authority to choose and elect a candidate of its own. The Lisbon Treaty is interesting in this context because it introduces into the Treaty on European Union (art. 7) a vaguely phrased clause according to which

“*[t]aking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure*” (author's italics).

The next EP elections are held in the spring of 2014, whereas the next Commission President – succeeding Jose Manuel Barroso – will be chosen in the autumn of 2014. This new article 7

TEU has prompted some of the party groups of the EP to choose their own candidates for the office of Commission President. For instance, the candidate of the Progressive Alliance of Socialists and Democrats (S&D) will be the current EP president Martin Schulz, while the most likely candidate of the Christian-democratic European People's Party (EPP) will be the former EuroGroup president Jean-Claude Juncker. However, as seen above, article 7 TEU does not formally hand over the authority to choose and elect the Commission President to the European Parliament. It is therefore unlikely that a conservative majority in the European Council would elect a social democratic candidate even if there should be a left-wing majority in the EP after the upcoming elections.<sup>10</sup> At the same time, it is still certainly too soon to speculate about this at this point. To sum this up, one can however claim that although the Lisbon Treaty further strengthened the role of the EP in the selection of the Commission President and thus somewhat weakened the role of the European Council, the process is still dominantly intergovernmental.

Similarly, the appointment of members of the College of Commissioners is still the right of member state governments, although the Commission as a whole has to be approved by the European Parliament. The right of the EP to approve the Commission as a whole has in the past at least to some extent undermined the right of member state government to select their own Commissioner. The most-noted example of this so far was probably the refusal of the EP to accept the Italian government's nomination of Rocco Buttiglione in 2004, even though the EP also refused the approval of other states' selected Commissioners at the same time. This resulted in a number of member states being forced to rethink their selection, and thus certainly makes the process of assembling the College of Commissioners less intergovernmental than it may appear. However, this system is still far from creating a sense of democratic accountability, as the citizens of Europe – represented by the European Parliament – still have only very limited and indirect influence over the European Commission as a whole. This could for instance be improved by connecting the selection of the College of Commissioners more directly to the EP elections (as discussed in chapter 5), even if the 28 Commissioners (including the Commission President) would still come from the different member states. This would turn the Commission into a democratically accountable quasi-government of the EU, but it would clearly come at the expense of intergovernmentalism – and thus at the expense of member state governments' control over the Commission. Again, the shortcomings of the present system, most of all in relation to democratic accountability, are a direct consequence of the continued commitment to the principle of intergovernmentalism in the EU, and thus of the democratic paradox that has already been identified in this report.

More as a footnote to this discussion, one could also mention that the Lisbon Treaty foresees limiting the number of Commissioners to two thirds of the member states, “according to a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States” (art. 17(5) TEU). However, the Treaty also

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<sup>10</sup> The British Prime Minister David Cameron has for instance already announced that he would launch a campaign to prevent Schulz from becoming Commission President. In addition, the German Chancellor Angela Merkel has rejected claims that the candidate of the most popular party would also automatically become Commission President.

allows the European Council to alter this number unanimously (art. 17(5) TEU). This option has already been used as a consequence of the Irish “no” in the first referendum on the Lisbon Treaty.

#### **3.1.4. The European Court of Justice from an intergovernmentalist perspective**

The European Court of Justice (ECJ) is certainly also best described as a supranational institution in the sense that it is an independent institution that has the final say in legal disputes between for instance member states and the union institutions, individuals and their member states (in matters relating to EU primary or secondary legislation), between member states, and so on. Nevertheless, it is similarly relevant as in the case of the supranational European Commission to also look at its role and the tensions that have arisen from this role from an intergovernmentalist perspective.

In recent years, substantial attention has been devoted to the question of whether there needs to be more political control over the role of the ECJ. This is not a matter connected to the Lisbon Treaty, considering that the phenomenon known as “judicial activism” has a much longer history. By this is meant the active role that the Court has played in promoting further integration, both in its interpretation of the treaties and in its case law. Hot topics in this regard include some of the legal doctrines that the Court has developed quite early on in the integration process, such as most importantly the doctrines of “direct effect” and the “supremacy” of Community/Union law over national law. Both are however perfectly logical consequences of the existence of first an internal market and, subsequently, an ever more integrated union of nation states. Community/Union law necessarily *must* have direct effect in all the member states; otherwise, it would be possible for individual member states to choose to opt out and thereby undermine the integration project as a whole.<sup>11</sup> By the same logic, union law *must* enjoy supremacy over national law because the fundamental idea of having union law would be undermined if it did not enjoy that status.

The role of the ECJ in this context has been discussed controversially, mainly due to the observation that its rulings have tended to deepen European integration. This is so not primarily because the Court can be accused of having any clearly discernible bias towards deepened supranational integration, but because many of the cases that have been brought before it have highlighted a lack of integration, or better said: obstacles to the smooth functioning of e.g. the internal market due to the absence of integration or harmonization in related areas.

Against this backdrop, it is hardly surprising that the role of the ECJ in the “relaunch” of European integration since the early 1980s has been a popular topic for neofunctionalist analyses. As a theory of European integration, neofunctionalism looks at the way the integration process “spills over” into an increasing number of policy areas in which non-integration constitutes an obstacle to the smooth functioning of those policy areas in which decision-making has already been moved to the European level. Early neofunctionalism

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<sup>11</sup> This was established in the famous ruling on *Van Gend en Loos*: here, the Dutch government had imposed an import tariff on a German product that a Dutch company was importing, thereby undermining the free movement of goods and thus one of the “four freedoms” of the common market. In other words, there cannot be a common market unless all members are bound by the same rules that therefore have to have “direct effect”.

looked at the role of the European Commission in driving integration forward, but some recent neofunctionalists have also redirected their attention towards the Court.

From an intergovernmentalist perspective, the role of the Court is somewhat puzzling. Intergovernmentalism has no difficulty explaining the creation of a supranational court that has the final say in settling legal disputes. As a matter of fact, intergovernmentalism arguably has the most pertinent explanation for the creation of this institution, since delegation of authority to supranational institutions also creates a need for an institution that can independently have a final say regarding matters of non-compliance on the part of other participating member states. If one member state does not fulfill its obligations – whether in relation to the treaties or secondary legislation –, there obviously needs to be a judicial institution that has the authority to sanction that state. This arguably also explains why the member states have been reluctant to introduce any sort of political balance to counter the independence of the Court, which was actually proposed by the United Kingdom in the Intergovernmental Conference that led to the Amsterdam Treaty in 1997 (entry into force: 1999).

### **3.2. Supranational elements**

So far, we have seen that the European Union constitutes a political system with very strong intergovernmental elements that are most obvious in those institutions that are designed as intergovernmental, such as the European Council and the Council of Ministers. However, and this is probably somewhat more surprising, we have also seen that at least one of the union's key supranational institutions – the European Commission – is still subject to some highly significant intergovernmental checks, both with regard to its composition and its role in the legislative process.

The discussion will now turn to supranational elements in the union's institutional architecture, focusing especially on institutional developments in the wake of the Lisbon Treaty. In this part, we will look at the European Commission and the European Parliament, before concluding this institutional discussion by addressing the discussion to which extent the EU can be described as a polity *sui generis*.

#### **3.2.1. The European Commission: A Federal Quasi-Government**

The European Commission is often perceived as a sort of government for the EU, although the EU is certainly better described as a system of governance without a government. To some extent, the former perception is understandable, considering that the tasks of the Commissioners are quite similar to those exercised by members of the cabinets of national governments in the member states. Each Commissioner has a “portfolio”, i.e. the responsibility for a specific policy area. The Commission furthermore plays a key role not only in the legislative process, but also has a number of executive tasks due to which the comparison to a European government seems plausible at first sight. However, this comparison becomes much more problematic when taking into account not only the complex sharing of legislative and executive tasks between the EU institutions, but also some simple organizational facts. Regarding the latter, it should be mentioned that unlike members of national governments, European Commissioners are not Members of the European Parliament and thus have no impact on the decision to be taken on its own legislative

proposals. Similarly, there is no formal connection between the Commission or individual Commissioners and the party groups of the European Parliament. As a matter of fact, the Treaty on European Union makes it absolutely clear that the Commission (and the Commissioners) have to be entirely independent. According to art. 17(3) TEU, “the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity.” In these regards, the two institutions are strictly separated. Furthermore, as we will see below, the unique system of sharing legislative and executive tasks between the Commission, the Parliament and the Council highlights the complex character of the EU as a political system and lends support to the observation that the EU is best described as a polity *sui generis*, that is: a polity of its own kind.

The Commission’s role in the legislative process is at the same time powerful and limited. Although the Council and the Parliament both have the right to *request* legislative proposals from the Commission, the formal right of legislative initiative resides exclusively with the Commission. This is already a notable difference from the legislative role of (members of) governments in the nation state. Legislative proposals in the nation state can usually be made by any member of parliament, but since the Commission – and thus the members of the College – is separate from the EP, this does not apply to the EU political system. This of course also brings about problems of democratic accountability, which are part of the above-described legacy of intergovernmentalism. At the level of the nation state, no institution has a comparable exclusive right of legislative initiative as the European Commission enjoys at the EU level. This has to be seen in relation to the lack of a similar right of the European Parliament (as discussed above), but most of all, it has to be seen in relation to the lack of a say that the Commission (or the Commissioners) has in making a formal decision on its own legislative proposals. In the legislative process, the Commission’s only role is to draft proposals, and as we have seen above, it does so to a large extent on the basis of the preferences and priorities expressed by the European Council, i.e. the summit meetings of the member states’ heads of state and/or government. In this regard, the Commission is thus an institution that is difficult to place with the tools of comparative politics and that therefore indicates the unique character of the EU as a political system.

But the Commission also has important executive functions. It is often referred to as the “guardian of the treaties”, by which is meant that the Commission is the institution that is responsible for monitoring member states’ compliance with EU legislation and the fundamental requirements of EU membership. In cases of conflict, it is consequently the Commission’s role to initiate a formal process that can ultimately lead to a case between the Commission and the member state in question before the European Court of Justice.

Overall, this analysis of the Commission’s tasks underlines the unique place that it has not only in the EU’s institutional architecture, but also in comparison to tasks performed by national governments in the member states. While the Commission thus performs some of the roles that are traditionally associated with those performed by governments in nation states, it is clearly far less than a European government. To some extent, it could of course be argued that the role of the Commission has changed in the wake of the Lisbon Treaty, due foremost to the strengthened role of the European Parliament in relation to the Commission.

Art. 17(8) TEU states that “the Commission, as a body, shall be responsible to the European Parliament” and that “the European Parliament may vote on a motion of censure of the Commission”. This clearly makes the European Commission accountable to the directly elected Parliament (and thus the representatives of the European citizens), but this is still qualitatively very different from giving the Parliament any say in the composition of the Commission and in the appointment of the Commission President.

### **3.2.2. The European Parliament: Voice of the European People(s)?**

Similar to the European Commission, the European Parliament is widely considered to be one of the most clearly supranational institutions. This is so despite the fact that technically, Members of the European Parliament (MEPs) are representatives of the citizens of the different member states. MEPs are elected at the level of the nation state, following the election laws of the state in question. Nonetheless, they are organized in transnational party groups following cleavages similar to those familiar from the context of the nation state. In addition to the familiar left-right and authoritarian-libertarian cleavages, however, party politics in the EP is also characterized by a pro-/anti-integration cleavage, which is illustrated for instance by the fact that the difference between the two most important conservative groups – the *European People’s Party* (EPP) on the one hand and the group of *European Conservatives and Reformists* (ECR) on the other – is primarily that the former is considerably more pro-integration and supranationally oriented than the latter, more intergovernmentally oriented. As a matter of fact, this difference is what prompted the British conservative party under the leadership of David Cameron to leave the EPP group and join the ECR group instead.

In terms of organization, what is arguably most relevant to note in the context of the democratic character of the EU is that seats in the EP are allocated on the basis of a principle of “digressive proportionality”, meaning that population size of a state is taken into account, but only to a certain extent. Smaller states are thus quite heavily overrepresented. According to the Lisbon Treaty, the final minimum number of seats in the EP following the upcoming elections in the spring of 2014 will be six, and the final maximum number of seats will be 96. This overrepresentation of smaller states in the EP translates into one German MEP representing over 850,000 citizens, whereas one Maltese MEP represents only 75,000 citizens. It has been questioned whether this principle of digressive proportionality is justifiable, considering this overrepresentation of smaller states, but is at the same time considered to be the only politically sustainable solution at this point, considering that EP decision making would otherwise be completely dominated by the larger states. It is nonetheless important to emphasize the way in which the distribution of seats in the EP reflects the intergovernmental nature of the EU: the system would arguably be unjustifiable if the EU were a federal state with a bicameral parliament. In this case, it would have to be a system in which the first chamber would have to at least *approximate* a system of one man, one vote – to complement a second chamber of states which would at the very least *approximate* a system of equal representation of states. But considering the relevance of intergovernmental elements in this system, the EU is far away from anything close to a federal system with a bicameral parliament. Consequently, the distribution of seats in the EU

– as a compromise struck between the member state governments that negotiate the treaties – is driven by state interests and thus organized along the lines of digressive proportionality.

The historical development of the European Parliament is illustrative of the tensions between the legacy of intergovernmentalism and the claims for more democratic accountability in the wake of the ongoing deepening of European integration. Although the EP's predecessor – the Common Assembly – was founded already in the Paris Treaty in 1952 (later to be renamed as the “European Parliamentary Assembly” and finally as the European Parliament), it only played a minor role for the first three decades of the integration process. Due to the intergovernmental character of European integration, MEPs were not directly elected before 1979; instead, they were appointed representatives of national parliaments. Until then (or more precisely, until the Single European Act in 1987), the European Parliament could also be largely disregarded by the Council of Ministers in the legislative process. In the period between the Treaties of Rome and the Single European Act, the only legislative decision-making procedure was the so-called consultation procedure. This procedure entailed one reading of the Commission's proposals in the Parliament, serving only “consultative” purposes (hence the name) and implying that the final decision made by the Council – and thus the member states – could not be directly influenced by the more or less powerless parliament.

Since then, however, the EP has gained in influence and power quite rapidly. The Single European Act introduced the cooperation procedure, which gave the EP the means to force the Council to take decisions by unanimity if there was disagreement between the two institutions. More importantly, however, it also paved the way for the introduction of the co-decision procedure in the Maastricht Treaty. Although it was limited to only very few policy areas at that time, the procedure made the EP a co-equal legislator with the Council. The procedure has since then been simplified and extended in successive rounds of treaty reform. In the wake of the Lisbon Treaty, the co-decision procedure is by now part of the “ordinary legislative procedure” and thus the norm in EU decision making. This means that after the Lisbon Treaty, the directly elected Parliament is now on par with the Council of Ministers. The Lisbon Treaty can thus be seen foremost as a continuation – and quite possibly the culmination – of a process of strengthening the European Parliament that has been going on at least since the mid-1970s. It is a small step from the provisions of the Nice Treaty that were in force between 2003 and 2009, but a major leap from the Treaties of Rome and the unelected EP in the period until 1979.

But while the EP's role is now stronger than ever before (and not just in the field of legislative politics), its role still sparks some controversy, with some (primarily advocates of deeper integration and possibly federal reorganization) demanding an even stronger parliament and others claiming that more power should be given to national parliaments. These claims are addressed below as part of a discussion on potential solutions to the lack of democratic accountability in the EU's institutional architecture. For now, it may suffice to say that such debates highlight not only the contested nature of the European Parliament, but also the somewhat awkward position that it has due to the unresolved question of what kind

of polity the EU actually is, and what kind of parliamentary representation would be best-suited to provide for democratic accountability in this kind of polity.

The Lisbon Treaty has however also introduced a stronger role for national parliaments. This role is now defined in art. 12 TEU, stating that “National Parliaments contribute actively to the good functioning of the Union”, most importantly through monitoring that the principle of subsidiarity is respected through the use of the so-called “yellow-“ and “orange-card” procedures to halt legislative proposals from the European Commission.<sup>12</sup> The yellow-card procedure obliges the Commission to review its position in the event of one third of member state national parliaments challenging the proposed legislation on the grounds of a breach of the subsidiarity principle. Since the Commission is not forced to change its proposal, this procedure is referred to as the “yellow-card” procedure. By comparison, the Commission *if forced* to change its proposal if 50% of member state parliaments have subsidiarity concerns; in this case, they can request 55% of member state governments to block the Commission’s proposal. While this is obviously a strengthening of national parliaments, it could also be noted that the Lisbon Treaty does not include any form of “red-card” procedure.

### **3.2.3. Democratic Accountability: A Second Best Solution?**

The changes brought about by the Lisbon Treaty can be interpreted both as a certain deepening of the integration process, but also as a continuation of a much longer and much more gradual process that has been going on at least since the early 1980s. In addition, any assessment of the state of democratic accountability also has to take into account the character of the EU as a polity and as a political system. It is certainly true that the EU is undergoing a more or less constant – and gradual – process of transformation, possibly even in the direction of increasingly state-like elements, often strengthening the supranational dimension of the integration process. It is nonetheless also clear that the intergovernmental legacy is still the dominant force in the integration process. The most important conclusion to draw from this is that the EU as a polity is still a unique mix of intergovernmental and supranational elements. Any interpretation of the state of democratic accountability has to take this fundamental assertion into account.

One could certainly hope for a more democratically accountable Commission. However, democratic accountability of the Commission is a value that from the perspective of the member states has to be balanced with the value of member state influence over the Commission, most obviously regarding the selection of the Commission President(-designate) and the selection of the individual members of the College of Commissioners. Recent developments can be interpreted as attempts to find a balance between these two – seemingly contradictory – values: in light of increased criticism regarding the unelected and thus barely accountable Commission and in light of increasing demands for greater democratic accountability of this important institutions *without compromising member state influence*, the strengthened role of the European Parliament in relation to the Commission can be seen as an effort to find a second-best solution for democratic accountability. Evidence to this effect can be found in the fact that

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<sup>12</sup> The role of national parliaments in monitoring the principles of subsidiarity and proportionality is further laid down in art. 69 of the Treaty on the Functioning of the European Union (TFEU).

- a) while still formally enjoying the right to select a candidate for the office of Commission President, the European Council now (after the Lisbon Treaty) has to take the outcome of the EP elections into account;
- b) the European Parliament formally gets to elect the Commission President, however without having the formal right to propose one or several candidates on its own;
- c) the member states still get to choose their Commissioners on their own, but their candidates have to be approved by the EP after a public cross-examination.

The same applies to the role of the European Parliament and the lack of a right of legislative initiative. Even after the Lisbon Treaty, legislative initiative is the exclusive right of the European Commission, although the Maastricht Treaty gave the Parliament the right to request proposals from the Commission. Also this can be seen as a second-best solution that increases the rights of the supranational parliament, but without substantially weakening the role of a supranational institution whose role is to take into account the preferences and priorities of the union's most intergovernmental institution, namely the European Council.

### **3.3. A Polity Sui Generis?**

In sum, this analysis of institutional developments in the EU – in which the Lisbon Treaty has been viewed as the latest step in a much longer and much more gradual process of institutional reform – clearly supports the view of the European Union as a polity sui generis. Certain developments in the direction of enhancing democratic accountability mechanisms that are familiar from the context of the nation state can certainly be identified. However, they are also significantly impaired by the fundamental principle of intergovernmentalism, which still rejects qualitative leaps in the direction of more than mere second-best solutions in terms of democratic accountability.

#### **4. What kind of democracy exists in the European Union?**

So far, the discussion has highlighted the unique institutional architecture of the European Union: it is still an international organization with strong intergovernmental elements that are even reflected in a variety of aspects pertaining to its supranational institutions. While this certainly impairs the union's ability to become "democratic" along the lines of nation-state democracy, it is still relevant to highlight existing elements of democracy. In this discussion, we distinguish between different normative/theoretical understandings of democracy, that is: different ideas as to how the ideal of popular self-rule can best be achieved. As was stated already in the introduction, the idea of democracy as rule of the people has been interpreted very differently, and continues to be a bone of contention among different camps of democratic theorists. The following discussion highlights existing elements of different understandings of the democracy, but also points out some shortcomings.

##### **4.1. Representative democracy and the lack of strong accountability relationships**

Most discussions on the democratic deficit tend to emphasize problems in the institutional design of European-level representative democracy. As is clear by now, representative democracy at the level of the European Union necessarily takes a very different form from the kind of representative democracy that is institutionalized at the level of the nation state. This is so primarily due to the fact that European-level representative democracy has to take into account that while there has to be an element of direct citizen participation in European-level legislative decision making, European citizens are first and foremost citizens of their respective member states. This consequently means that there has to be both an institutional representation of European citizens, and an institutional representation of the member states.

Unsurprisingly, these two elements are therefore also the cornerstones of representative democracy as spelled out in art. 10 TEU, stating that "[t]he functioning of the Union shall be founded on representative democracy"; that "[c]itizens are directly represented at Union level in the European Parliament"; and that "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". In addition, art. 10 notes the subsidiarity principle – that decisions shall be taken as closely to the citizens as possible – as well as the role of political parties at the European level in shaping the collective will of the union's citizens.

These two aspects of European-level representative democracy – representation of all EU citizens via the European Parliament, in addition to representation of member states via their governments and/or heads of state in the European Council and the Council of Ministers – could be perceived as problematic. Representative democracy as it is shaped in article 10 TEU takes for granted that in one way or another, a European people already exists – even if only the form of a thinly conceived political community of citizens. This form of representative democracy – which is not however an innovation brought about by the Lisbon Treaty – also bears certain quasi-federal characteristics in the sense that the goal of all federal systems – to preserve as much diversity as possible while creating central institutions as strong as necessary – is usually achieved through a bicameral parliament in which one chamber represents the citizens as such, whereas the other represents the governments of the

member states. Of course, the EU is still far away from becoming a genuine federal system not merely because of the ultimately very limited role of the EP (as seen above), but most of all because of the simple fact that differently sized member states are represented so unequally in the EP (on the basis of the principle of “digressive proportionality”). Despite the central role of representative democracy in the consolidated version of the TEU, the continued strong role of intergovernmentalism in both “chambers” (needless to say, the Council of Ministers is **not** a chamber of parliament) still shows that a more genuine form of representative democracy at the European level has not been achieved yet. It is very possible that such a form of representative democracy can only be brought about by a more decisive move away from intergovernmentalism and in the direction of federalism (Conrad & Steingrímnsdóttir 2012).

Disputes over the role of the European Parliament are a salient illustration of these problems. In the past, debates on the democratic deficit have tended to focus on the limited role of the EP in the legislative process. Yet the gradual strengthening of the EP – both in its legislative role and in its role vis-à-vis the Commission – has been questioned by reference to the claim that there is no *one* European people which can be represented in the European Parliament. Then again, the principle of digressive proportionality and the overrepresentation of smaller states can be seen both as testimony to this fact, and as a compromise that allows for the representation of all European citizens in one parliamentary chamber. The Maastricht Treaty’s introduction of EU citizenship as a set of rights enjoyed by all citizens of the member states further underlines that the EU constitutes not only a political community bound by the same supranational legislation, but also by rights that its citizens share vis-à-vis these supranational institutions. In other words, even though there may be a lack of citizen identification with the institutions of the EU, citizenship of the union certainly constitutes political and legal community nonetheless.

Despite the Lisbon Treaty’s strengthening of representative democracy through the increased use of the co-decision procedure (art. 14(1) TEU) and the increased role of national parliaments (art. 12 TEU), representative democracy still falls short of the standards of nation-state democracy that are often (mistakenly) applied to the EU. Proposals on how this could be improved are discussed in chapter 5 of this report.

#### **4.2. Participatory democracy in the EU**

Article 11 TEU spells out the role of participatory-democratic elements in EU democracy. However, it is also worth pointing out elements of participatory elements that had existed in the EU prior to the Lisbon Treaty. The introduction of EU citizenship in the Maastricht Treaty included also certain participatory rights. These rights are now laid down in art. 20 of the Treaty on the Functioning of the European Union (TFEU) and include “the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.” Art. 11 TEU nonetheless goes quite a bit further, stating that “[t]he 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” (art. 11(1) TEU), that “[t]he institutions shall maintain an open, transparent and

regular dialogue with representative associations and civil society” (art. 11(2) TEU) and that “[t]he European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent” (art. 11(3) TEU). These points – in particular the last one – have to be seen in the context of the Commission’s practice of inviting interested parties to participate in “stakeholder consultations” on planned legislative proposals. This is however not a new element in the EU’s legislative process, but one that illustrates the relevance of participatory elements in European governance.

Arguably the most interesting innovation in relation to participatory democracy is the introduction of a European Citizens’ Initiative (ECI) in the Lisbon Treaty, allowing one million EU citizens to request legislative proposals from the European Commission. Art. 11(4) TEU now states that

“[n]ot 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 introduction of the citizens’ initiative is interesting in particular because it can be traced directly to the efforts of pro-democracy movements such as most importantly the German “Mehr Demokratie e.V.” at the time of the *Convention on the Future of Europe* that drafted the original Constitutional Treaty. Keeping in mind the Convention’s inclusive composition as well as the fact that its deliberations took place in public (as discussed above), it was possible to include this most advanced element of transnational participatory democracy into the treaty. Although the Constitutional Treaty was later voted down in the two famous referenda in France and the Netherlands in the spring of 2005, the ECI was nonetheless – and similar to most of the institutional reforms agreed during the Convention – transferred into the Lisbon Treaty in 2007, allowing the ECI to be seen as an institutional reform driven more or less directly by civil society organization demanding more influence for citizens in the EU’s legislative process. The ECI does not go as far as its proponents had hoped; most importantly, it neither allows citizens to propose legislation directly (without going through the Commission), nor does it involve any form of *direct-democratic* decision making in the form of e.g. European-wide referenda. Nonetheless, it has been seen as an important step in the direction of further increasing the opportunities available to citizens to participate the EU’s legislative process. This can also be seen as an interesting innovation against the backdrop of similar attempts in Iceland to introduce increased elements of participatory democracy at the national and municipal levels.

Against the backdrop of debates on the EU’s development as a polity, the ECI is interesting also because it is the first *transnational* citizens’ initiative in the world. To understand the implications of the ECI’s transnational character, it is necessary to highlight some of the organizational requirements placed on ECI organizers. Following the ECI regulation that entered into force in April 2011, ECI organizers have to come from at least one quarter of the union’s member states, which means that the ECI as an instrument is highly likely to foster (and has already done so) the emergence and/or further development of European civil

society and quite possibly also the emergence of a European public sphere (Conrad 2011). This requirement clearly makes the organization of a European citizens' initiative quite challenging, as it requires potential organizers to find like-minded co-organizers in at least six other member states. However, the high number of initiatives that were submitted to the European Commission in the first year and a half since the ECI became legislative reality (in April 2012) strongly suggests two things: first, European civil society is already so well-networked transnationally that the burden of finding organizers from seven different states can be overcome with relative ease. Second, an analysis of the organizers of the first round of initiatives has further indicated that "average citizens" without any strong prior links to civil society organizations can be successful in launching citizens' initiatives (Conrad 2013a).<sup>13</sup> After the ECI has been in use for over a year and a half, there have already been three cases of initiatives that managed to collect the required one million signatures in the required minimum number of states and within the required time frame of one year.

Finally, the ECI can also be seen as an important instrument that can enhance the role of small-state citizens in EU policy making. Recently published research has shown that citizens from at least *some* of the union's smaller states are actively involved in many of the initiatives that currently open for signature collection. However, this analysis also suggests that the citizens of those states that are frequently represented among ECI organizers also broadly see themselves as EU citizens that are aware of the EU citizenship rights *and* feel that their voice matters in the EU. Ironically, this feeling of having a voice in the EU was stronger among many small-state citizens than among their counterparts in some of the EU's biggest states (Conrad 2013b). These findings are clearly relevant not only from a broader small-states perspective, but also in relation to debates about the potential for Icelandic citizens to influence the EU's legislative process in the event of EU membership – not only via their government or their respective MEP's, but also more directly via the European Commission.

#### **4.3. Deliberative democracy and the public sphere deficit**

While very little can be done in institutional terms to remedy one specific aspect of the democratic deficit, it should nonetheless be addressed in this report. The EU democratic deficit, as is abundantly clear by this point of the report, has been discussed primarily in institutional terms, with a broad focus on representative democracy. However, the democratic deficit – as the author of this report has argued in a number of publications (e.g. Conrad 2009, 2010) – also has an important communicative aspect. This communicative deficit is manifested in the presumed absence of a European public sphere, which, as we have seen above in the discussion on the basics of what constitutes democracy, is one of the most central elements of the deliberative understanding of democratic politics. To bridge the gap that emerges by necessity from representative systems of government, it is important to have an inclusive public forum for political debate that can generate communicative power

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<sup>13</sup> A complete and updated list of all initiatives that have been submitted is available on the European Commission's ECI website at <http://ec.europa.eu/citizens-initiative/public/welcome>. The webpage contains information not only about open initiatives, but also about those whose signature-collection period has already expired, and about those that were rejected on formal grounds, i.e. because they proposed legislation that would either amount to a treaty change or that falls outside the scope of the Commission's competences.

and channel it into the institutions of the political system (Habermas 1992). Whether such a public sphere exists even at the national level and how well it performs this deliberative-democratic function can be debated, many have disputed the existence of such a more or less uniform public sphere at the European level. This is to some extent an institutional problem, as deliberation could be connected directly to the European institutions. The Commission's stakeholder consultations are sometimes named as an example of institutionalized deliberation between citizens and the institutions. However, from a strict deliberative-democratic perspective, the public sphere and the political system have to remain apart from one another.

Solutions to the public sphere deficit could arguably be found via an increasing politicization of EU politics, which could for instance be achieved through a stronger role of the European Parliament not merely in the legislative process, but also in the appointment of the Commission President and the composition of the Commission. This would however require a qualitative leap in the direction of supranationalism – and hence away from intergovernmentalism – and can therefore be considered highly unlikely in the near future.

The European Citizens' Initiative could possibly be more promising in this regard: successful initiatives usually address topics that arouse the emotions of EU citizens and therefore have the potential to generate significant communicative power. The three initiatives that have succeeded in their signature collection fall into such areas, dealing with issues connected to privatization of water services, animal testing and abortion, respectively. The case of the *Right2Water* initiative is arguably the clearest illustration not only of the effect of communicative power on the institutions of the political system, but also of the potential impact of the ECI in facilitating transnational discursive sphere, that is: communicative spaces in which public opinion and will can form in relation to concrete policy proposals launched by the European Commission (Conrad 2013a). Although the initiative cannot be seen as a “citizens” initiative in any strict sense, considering that it is organized by the European Federation of Public Service Unions (EPSU), it certainly touched a nerve with an overwhelming number of EU citizens who signed the initiative. The initiative targeted the supposed privatization of water and sanitation services in the Commission's so-called “concessions directive” and received tremendous media attention especially in Germany, where the initiative subsequently also received most of its signatures. Faced with over 1.6 million signatures from around the union, the Commission announced in the summer of 2012 to explicitly exclude water and sanitation from the concessions directive.

While the other two initiatives named here – *One of us* and *Stop Vivisection!* – have not managed to create the same kind of media attention, they have nonetheless found other ways of achieving the necessary one million signatures. In the case of *One of us*, the public support of the Pope (!) certainly helped, whereas *Stop Vivisection* could count on a strong street-level support from the participating animal-rights organizations in the member states and an active social media campaign. These initiatives should be seen as illustrations of the impact that the ECI can have not merely in terms of creating a new channel for citizen participation, but also in terms of creating transnational communicative spheres in which communicative power can be generated as a balance to the administrative power of the EU institutions. After the

success of the first three initiatives, it is certainly likely that more initiatives will be launched with similar effect in the future. At the same time, only time will show what kind of EU legislation the first three initiatives will amount to.

## **5. Concluding Discussion: What kind of democracy is possible in the European Union?**

What conclusions does this report allow regarding the kind of democracy that is possible in the European Union and the kind of democracy that has been established over the course of the integration process, culminating in the Lisbon Treaty and the changes that it has brought for the Treaty on European Union and the Treaty on the Functioning of the European Union? Maybe the most important realization that readers of this report can arrive at is that even towards the end of the year 2013, after over sixty years of European integration, the main source of democratic legitimacy in the European Union continues to be the nation state. This is meant much less as a normative than as an empirical statement: European integration is in its nature and institutional design so profoundly intergovernmentalist that it remains difficult to develop an institutional balance that more closely resembles representative democracy as it is familiar from the nation state. Of course, this also means that the nation state has a special burden to bear in relation to the democratic (il-)legitimacy of the decisions made at the European level: since democratic accountability rests with institutions at the level of the member states, those also have to make sure that the decisions made in the European institutions are perceived as democratic in the member states. The discourse on the democratic deficit, however, overwhelmingly suggests that democratic accountability institutionalized at the national level is insufficient: considering the scope of policy areas on which the EU legislates, considering also the independent role and self-understanding of some of its key institutions, more supranational democratic accountability would clearly be normatively appropriate. Of course, this would also require recognizing and addressing the democratic paradox of European integration: democratic accountability at the national level is insufficient, but there is also a clear reluctance to allow for more democratic accountability at the supranational level. To conclude this report, it could therefore be useful to revisit some of the problems posed by this democratic paradox and discuss possible solutions, along with an assessment of how feasible those solutions may be. In this discussion, it is furthermore useful to distinguish between different understandings of democracy, namely representative, participatory and deliberative.

### **5.1. Prospects for representative democracy: what role for the European Parliament and the European Commission?**

The report has shown that the Lisbon Treaty confirms the union's commitment to representative democracy, institutionalized both in the role of the European Parliament as a representation of the European citizens as a whole, and in the respective roles of the European Council and the Council of Ministers as a representation of member states and their governments. However, the report has also shown that the European Union remains far from fully realizing representative democracy in a way that resembles what its citizens are familiar with and to some extent also expect to see realized in a representative democracy. The most important reason for this is the continued weight of intergovernmentalism in designing the union's institutional architecture. To some extent, there are also good reasons for this, as intergovernmentalism stems from a desire on the part of the participating member states to retain as much control over the integration process and over the supranational institutions as possible. Against this backdrop, it is certainly still justified to speak of supranational institutions that are designed as facilitating devices, even though both

neofunctionalist and historical-institutionalist analyses correctly point to the fact that institutions such as the Commission and the Court of Justice are significantly less controllable than a narrow understanding of intergovernmentalism would imply. There is however no indication that the Lisbon Treaty – and the changes that it has brought in the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) mark a significant turning point in the development of the EU as a polity and political system: it is still a system of intergovernmental cooperation, aided by strikingly independent, yet nonetheless intergovernmentally balanced supranational institutions.

The Lisbon Treaty has brought some advances in representative democracy, but those can be seen as a continuation of the institutional reform project that has gone on at least since the first direct elections to the European Parliament in 1979. The European Parliament has finally become a co-equal legislator on par with the Council of Ministers, marking the last step and possibly the culmination of a process that began with the introduction of direct elections and proceeded with the successive introduction, revision and extension of the cooperation and co-decision procedures throughout the 1980s and 1990s. Still, the development of representative democracy in the EU lags behind, most of all in relation to the ultimately very weak powers that the Parliament holds over the Commission and the Commission President. Complaints about the lack of democratic accountability of the Commission and the Commission President should therefore be directed towards the member state governments who – in the European Council – resist institutional reform that would make representative democracy a viable alternative to the current second-best solution.

There are certainly prospects for increased representative democracy in the EU. If the channels of democratic legitimation that are available at the national level are insufficient to legitimize the powers of the European Commission, then democratic accountability of this institution can be bought at the price of at least some of the power that the European Council holds over the process of selecting the candidate for the Presidency of the Commission. Instead of giving the EP more or less virtual powers in the sense of requiring the European Council to “take into account” the results of the EP elections in its choice of Commission President, the EP (or rather: the party groups therein) could be given the power to propose their own candidates in the context of EP elections campaigns. Representative democracy could be strengthened even further by connecting the composition of the Commission to the outcome of the EP elections. A European Commission composed of representatives of the majority groups of the EP would clearly have direct democratic legitimacy, but would of course also (and rightfully so) look at itself as a democratically legitimate European government. It goes without saying that we are nowhere near seeing a development of this kind, which would in fact constitute a qualitative leap in the development of European-level representative democracy.

## **5.2. Prospects for increased participatory democracy: what role for the European Citizens’ Initiative?**

The development of elements of participatory (and to a lesser extent deliberative) democracy in the context of the ongoing institutional reform project is intriguing because of the striking underdevelopment of representative democracy in the EU. It was argued in this report that

representation – no matter how intimately it is connected to our contemporary understanding of democracy as popular sovereignty – automatically generates a gap between citizens and the institutions of the political system, based on the fundamental fact that those who govern are not the same as those who are governed. This gap can be bridged or at least narrowed e.g. by binding referenda (as in direct democracy), petitions, citizens’ or agenda initiatives (as in participatory democracy), or through deliberation in a lively public sphere (as in deliberative democracy). The problem of a gap between citizens and the institutions of the political system is arguably wider in the European Union than in the nation state due to the problematic state of representative democracy and the lack of direct-democratic elements at the European level (which, intergovernmentalists would argue, are missing for a reason). This makes the need for complementary forms of participatory-democratic instruments all the more pressing. The creation of a European ombudsman as well as the introduction of the right to petition the European Parliament have arguably done very little to change the image of the union institutions as distant from the needs of the European citizens. Stakeholder consultations organized by the European Commission can be regarded somewhat more positively, as they have allowed interested parties to influence the Commission’s proposals already in the agenda-setting phase, before the formal submission of a legislative proposal to the Parliament and the Council.

The most promising instrument in this regard is however the newly introduced European Citizens’ Initiative (ECI). This tool, as was argued here, provides strong and relatively user-friendly incentives for transnational civil society networking in the organization of initiatives. In this context, the ECI could be an important stepping stone in the development of a political conception of European identity in the sense that at least those who use and/or support this instrument may increasingly come to perceive themselves as bearers of European citizenship rights and thus as members of a political community of Europeans. This also underlines the potential of the ECI in democratizing the EU without the prior need of creating a cultural community of Europeans. However, also the design of the ECI reflects the intergovernmental nature of EU. As a citizens’ initiative, the instrument is quite weak and disappointing because it only allows citizens to request legislative proposals from the Commission, while the latter retains the exclusive right of legislative initiative.

### **5.3. Prospects for deliberative democracy: can a European public sphere come to life?**

The prospects for the emergence of a European public sphere as a communicative counterweight to the administrative power of the EU institutions has been debated – for the most part in the academia – for the better part of the last two decades. Some contributors to this debate have pointed out the fundamental “problem” of language diversity in this respect: a European political will, based on inclusive deliberation in the public sphere – is unlikely to emerge because Europeans lack a shared language in which this deliberation could take place (Kraus 2002, Kraus 2004). The emergence of a European public sphere is further impaired by the lack of European-wide mass media in which transnational deliberation (or even just debate) could take place. However, it has also been pointed out that the European public sphere may take a form very different from the national public sphere. Particularly relevant in this context is the distinction between the form and function of public spheres in democratic systems: the kind of communicative power which a democratically functional

public sphere has to generate can also emergence in a sphere of “Europeanized” publics in different languages and in different countries.

The European Citizens’ Initiative has been mentioned also in this context as an institutional innovation of the Lisbon Treaty that has a potentially transformative effect on EU democracy from a deliberative perspective: the issues addressed in European citizens’ initiatives may not generate a uniform European public sphere, but they may very well contribute to the emergence of issue-specific “transnational discursive spheres” in which knowledge and opinion about issues of relevance to all European citizens is generated.

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