

# **The Institutional Accountability in the European Union and its crisis**

**--The Loss of Democratic Control and Institutional Balance during  
the Euro Crisis**

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# Introduction

The European integration process is an unprecedented experiment in human history, transferring sovereignty and powers ranging from market regulation to borders' control and even the adoption of single currency to a supranational body. Besides, the European Union will continue to deepen the integration to be a political union with the European Parliament as the first transnational/international representative institution whose members are directly elected by pan-European voters rather than appointed or indirectly elected. With the Lisbon Treaty, the skeleton of structures and institutions with regard to transnational governance comes to be roughly framed when the conventional institutional powers in the European level including the legislative, the government and the judicial ones have been assigned to or shared by different institutions according to the provisions of this Treaty.<sup>1</sup>

After the transformation to one political union by the Maastricht Treaty in 1992, when the European Union ceased to be merely about economic integration and regulation but a Union of economic and political cooperation and beyond (the introduction of European Citizenship for example), challenges circumfusing its legitimacy have been put forward. The European debt crisis and refugee crisis strengthen the revolt against the monetary union and the economic integration and sweep up the Member States in seemingly endless recrimination. Doubt arises that whether the haste with the integration process and the introduction of common currency is more of a political decision while regardless of economic conditions. Then the negotiations and agreement between Greece and the creditor states also give rises to criticism on the European Union (and its dominant Germany as accused by many people) and those terms in the agreement undermining the sovereignty of Greece in the field of economic and financial policies. It thus constitutes another proof proposed by the Euro-Skepticalists to question that the European Union has been intruding and eroding the Member States sovereignty in opacity.

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<sup>1</sup> See Title III (Provisions on the Institutions) of Lisbon Treaty (Consolidated Version).

Euro-Skeptical forces have welcomed their unprecedented achievement in the 2014 European Parliament election. In that election, Euro-Skeptical Parties ranked the first in both France and the UK who were influential in the Union and reached 7% in Germany (AfD). Their political rise was open to interpretations. Some observers held that it was economic crisis and high unemployment rate that motivated voters to shout out their dissatisfaction instead of an explicit declaration of denial to the integration process. Some others viewed it as the peoples' disillusion and their resistance against Brussels' notorious technocrats. Regardless of these interpretations, the fact that EU has been confronted with serious challenges to their legitimacy and further integration received few objections.

The unprecedented project has always attracted attentions and interests of scholars from all fields, inevitably followed and haunted by questions as well as criticism from time to time. Discussions have focused on several central issues which could be briefly named. This work is in no way ambitious about researching those grand propositions with regard to the essence of the European integration or the destination of the integration process. In the view of the author, those propositions are more of political decisions or spontaneous institutional evolution than top-level design or academic conceptions, and the division of tasks between the academia and the politicians might achieve higher efficiency when the academia devote their enthusiasm to the exploration of the institutional issues while leaving politicians fretting about the appropriate solutions.

Accordingly, I shall not hesitate to reveal the thesis of this work, or the question this work endeavors to reply, **Is There an Accountability Crisis in the European Union especially during the Euro Crisis Ages?** For answering this question, explore the current institutional structure and constitutional distribution of authority based on the written texts and political practices. Afterwards this work would explore the accountability problems within the EU institutions and how those problems have been exaggerated by the Euro crisis and the counter-crisis measures. The legislative and government power performance would be primarily analyzed for the exploration of possible distortion in the legislative-government powers and how further have the EU institutions been from political accountability and responsible government.

This work is about two fundamental themes: **the first is the *de facto* power assignment.** To be more specific, does the fall/gap regarding the power distribution between the legal texts and the practices exist in the EU? In other words, which institutions actually exercise the government power and the legislative power at the European level? Considering that the government power primarily points to the policy adoption and political direction settings, the question could be switched to be the real determiner in establishing the political directions and policy-making in the European Union. It is the same case with the legislative one.

This would then invite **the second theme of this work: whether these powers have been appropriately supervised and controlled?** This theme also related to the issue of the democratic deficit. Does the democratic deficit exist at the European level? Currently, most interpretations of democracy stem from theories and institutional practices under the context of nation states. Questions arise when it comes to the supranational institutions or the future European government, if any. What is the difference of democracy between the national state and the supranational “state”? Which elements of democracy apply not to the supranational organization when the whole content and extension of democracy have been concluded under the context of national states?

Democracy is regarded as one of the fundamental values of the EU and one of the crucial elements of common European constitutional traditions. The value of democracy is explicitly enshrined in the Treaties.<sup>2</sup> However, since European integration is an ongoing process, and there is so far no concluding agreement on the ultimate pattern of the European government. Some scholars view the European Union as a comprehensive regulatory mechanism and thus advocate a less democracy model. Some have feared the birth of the new supranational Leviathan with arbitrary powers to suppress human rights and liberty as the result of supranational governance and advocate more supervision and checks. There are also scholars viewing the European Union as the fruit of the development of transnational capitalism and hold that the European Union should be more social democratic as well as play the role of redistribution in larger geographical scale and the impose regulatory restriction on transnational companies or groups. Further, the EU is also taken by some as the model

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<sup>2</sup> See the Preamble and Article 2 of Lisbon Treaty.



of multi-level governance and with proposals of strengthening democratic supervision and control from both the domestic and the supranational level. These discussions lead to rethinking about what democracy is all about although that this work will not exert itself in defining the democracy or outlining the development of democracy and its institutions from the time of ancient Greeks when democracy has been practiced in rather a direct way to the age of representative democracy. During that long history innumerable forms of democracy has been or once been adopted and established, like popular democracy, pluralist democracy, representative democracy, deliberative democracy. Some would define briefly democracy as the power/sovereignty should be held by the people or the government should be “of the people, by the people and for the people”. However, democracy not only refers to the issues that who should hold the power but also how those political powers should be performed and controlled. New forms of democracy, like deliberative democracy, constitute the complementarities of electorate democracy, indicating that electorate democracy which deals with the issue of the source and ownership of political powers may be inadequate in providing politics with legitimacy. Supervision and control mechanisms with regard to political decision-making also carry significant weight.

This would be an entry point to this work. European Union has been advocated to have presented democracy with dual consent from the national governments of Member States (the European Council and the Council of European Union) and from the European representative institution (the European Parliament), and based on that architecture the legitimacy has been constructed.<sup>3</sup> However, as has been argued, legitimacy has been generally divided into three parts, the input democracy, the throughput legitimacy, the output democracy.<sup>4</sup> The input one stresses upon the electorate process and the output one upon the efficiency of policies being adopted. As mentioned above, the input part of the Union democracy has been advocated with the “dual democratic legitimacy”. As for the output part, the establishment of an internal market and the regulatory roles played by European Union institutions signals the response to efficiencies achieved by the Union in performing its regulatory tasks

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<sup>3</sup> Von Bogdandy, A. (2012). The European lesson for international democracy: the significance of Articles 9 to 12 EU Treaty for International Organizations. *European Journal of International Law*, 23(2), 315-334.

<sup>4</sup> Bekkers, V. J. (Ed.). (2007). *Governance and the democratic deficit: assessing the democratic legitimacy of governance practices*. Ashgate Publishing, Ltd. 43-45.

under the context of economic development and companies spilling over the borders between nation states. However, for the aspect of throughput legitimacy, the supervision on powers, checks and balances and decision-making process is not seemingly attracting equivalent attentions and discussions.

The work mainly focuses on the performance of government power in the European Union, particularly concentrating on how policies are made –how they are initiated, drafted, amended and passed. The games, negotiations and balances between different European institutions in the process of decision/policy-making will be specially explored. The roles of various European institutions will also be analyzed. Besides, this work also explores the current supervision and controls over the policy-making powers from the representative institutions at both national and supranational level, namely the Member States parliaments and the European Parliament, and whether these supervisions and controls turn out to be adequate to hold the government branch accountable or to refrain certain institutions from exceeding their powers or intruding into others' scope of powers/competences.

In other words, this study would focus little on searching for who should be dominant about European integration process since this is not an issue more of politics rather than academic. What the future European integration will be turn out to be essentially a political decision rather than an academic one. Besides, specific models may vary from one state to another according to their differences in emphasis of institutional spirit and balance of interests while certain principles may run through all sorts of democratic government forms. Among them includes the respect of basic rights especially the minorities, elections should be open, secret and competitive and that the decision-making process and its output should be under appropriate supervision by the public and their representatives. Considering that supervisions from the *ex-post* perspective fail to provide sufficient pressures to the decision-making process and possibilities to correct feedbacks and remedies to the parties suffering undue losses, supervisions and controls through the decision-making process deserve to be of special concern.

Now it is the crucial historical node for the continental cause of European integration. Since the foundation, it has achieved innumerable accomplishments. It helps to secure the long-term peace in a continent where used to be the source and

main battlefield of two world wars and promote prosperity to be one of the most developed areas in the world. It brings about the union of decades of nation states to remove border controls for the service of free movement of goods, services, persons and capital by way of negotiations and judicial decisions, and thus set an example for regional integrations in other part of the world typically represented by the Association of Southeast Asia Nations (ASEAN) and numerous areas alike. Nothing could be sure except that this integration process has already and will continue to be faced with constant and endless challenges. Its legitimacy has been challenged with the democratic deficit problems. Its monetary union has been swayed precariously by the debt crisis, and the internal market without borders (the Schengen System) drifts to be on the brink of collapses during the European Refugee Crisis when Chancellor Merkel declared her policy of accepting refugees while several other Member States decided to reintroduce their border control measures. Integration in a deeper level and wider areas inevitably violates the interests of vested groups and integration measures could in themselves also become sources of new problems. That is the reason why supervisions and controls of powers and decision-making in the European level by the representative institutions are regarded increasingly more important: it not only furnishes further integration measures and competent institutions with strong public and democratic endorsement to stand and responds to those criticisms but also that with appropriate supervisions and controls the decisions made and policies adopted are more likely to be consensual and more efficient, especially when policies made by the EU are to be implemented by corresponding bodies of the Member States' governments.

In retrospect, I could still remember that back in the Europe Day in 2012, I participated in one activity held in the Beijing Campus of China Europe International Business School. I proposed one question to the European Commissioner from Cyprus (she happened to be the First Lady of Cyprus) that considering the difficulties EU was suffering, whether it was possible for Europe to head back. She replied a clear "no". The collapse of the EU is an idea that appears to be so extreme that would not be welcomed or accepted even by those who voted for the Euro-Skepticalists. Some protesters are critical about problems (like bureaucracy in Brussels) while some are worrying the process could be over-speed that the integration may call an end to the nation states. However, even those Euro-Skeptical parties have difficulties in

finding common grounds about to what extent shall the Member States be integrated. Every crisis embodies the chance for next great leap. Crisis now mystifies the European Union could also be interpreted as the chance for both the peoples and the leaders to review the road already walked down and concentrate on problems which have been left behind or haven't been properly solved during the process of transferring sovereignties to the Union and harmonization as well as unifying policies of all areas.

Particularly I would stress that the roles and influences of national parliaments shall be strengthened and institutionalized avenues of participation in decision-making and policy adoption shall be further refined. First of all, national parliaments are still viewed as the most typical representative institutions compared with the European Parliament. In most Member States parliamentary elections stand for the top issue in their national politics, whether from the perspective of turnouts, voters' attention rate or the discussions on political and social issues. They are also the places where party politics have been comparatively maturely developed, and thus could be able to yield up mechanisms for public opinions' communication and organized, experienced supervisions on governmental policies. Compared with national parliaments, the European Parliament is still beset with comparatively weak status not only from its entrusted powers in the Treaties but also from other political symbols like the turnouts of its elections, the concentration that has been paid by the public on its operation and related issues. Its electoral system also contributes to this problem since it is mostly elected through the system of Party List (proportional representative) under which the MEPs are elected not by voters in each single constituency but by the votes received of the party they belong to. That also facilitates to the public' existing perception that the European Union is quite far from common people's daily lives although Brussels does not necessarily locate geographically further than their comparative capital cities like Berlin or Paris. Besides, with the rather limited power listed in the Treaties, comparing with its national counterpart the European Parliament in current situations does not seemingly be qualified in performing the function of legislative control all by itself.

This work will also adopt analysis tools and theories ranging from cost-benefit analysis, principal-agent theories to the alienation theory on institutions. These would

be helpful in analyzing, interpreting and criticizing the behaviors, measure, and roles taken by institutions involved. We would see whether the actions and measures of the institutions have deviated from their institutional roles and what factors or the defects in the institutional project have prompted these deviations. Also, this work is to assess whether there are alienations happening during the operation of institutions that the institutions work just the opposite with its origin under certain institutional structures. They would provide with entry perspectives to assess the performance of institutions not from the words in the Treaties but the living law that performs actual regulation roles.

This work, according to the differences in contents, could be roughly divided into two parts. The first part would make a general review on interpretive theories with regard to the European integration and democratic deficit. Then it will pivot to the current division of powers and search for the real government actors where political decisions and major policies are decided. Also, it will be explored how the legislative powers have been distributed among several institutions, including the European Commission solely with the power to initiate and the equal status of the European Parliament and the Council of European Union in the common legislative procedure. The second part would focus on the counter-crisis measures taken by the Member States and the Union during the Euro Crisis. This part includes the critical study on the independence of the European Central Bank and their bail-out actions represented by the Outright Monetary Transaction Program (the OMT Program) as an example. The series of judgments made by the *Bundesverfassungsgericht* and the European Court of Justice on the constitutionality of this program will be of contribution in assessing the institutional checks and balances in the European Union. Besides the European Central Bank, the Council of ministers for economic and financial affairs, under the instruction of the European Council, also plays a central role in initiating counter-crisis measures and outlining the European financial and capital market Union; therefore their decision-making mechanisms would be taken into full account of consideration.

The European integration goes beyond the Europe countries and peoples. It has a global dimension. The European Union is the pioneer in the world to unite neighboring states with mutual trust, reciprocal respect and solidarity to advance

peace as well as prosperity through reconciliation, compromises and cooperation among which used to be enemies for centuries. Besides, the European Union has shouldered another mission, that is, to test whether democracy could further be extended to the transnational level. Fragmentation and restructuring of political authorities appear to be a process that has started after the Second World War, with powers transferred to the regional and the supranational level from the classical nation states government. Then the question arises whether the democracy originating from city states and then fundamentally characterized by the nation states could be suitable for organizing the supranational polity. This may trigger the trend of a new wave of democratization, not from already democratic states to others but to the regional and international organizations which used to be dominated by the nation states and implying a new era where international politics and closed-door negotiations between leaders are to be taken over by a international democratic process. The significance of EU experiment on the democratizing international organizations and further global democratic governance deserves our serious attention and shall in no way be underestimated.

This work will be composed of five chapters.

The first chapter will review three general issues with regard to the EU political structure: transnational democracy, democratic deficit and the institutional balance principle. This chapter will look back on existing theories and approaches about and some comments will be made.

The second chapter will be dedicated to government power in the European Union. This chapter will adopt a limitative scope of government power, defining as the power to decide general political directions and major policy in serve for the European governance. This chapter would address the issue that which institution would hold the last say during the EU decision-making process. Written laws, especially the primary EU law, will not be the only guideline for this research and the institutional practices during the decision-making process will take large weights for that analysis.

The third chapter will turn to the legislative institutions in the Europe Union. It will be assessing the distribution of legislative-related powers within the EU,

including the European Parliament and the Council of the European Union. National Parliaments will be paid special attention to considering their new roles in the subsidiarity review procedure and the weights they carry in accommodating democratic legitimacy in political process. This chapter will respond to the problem with the approach of system theory that why the European Union is still beset by the democratic deficit when a basket of institutions with direct or indirect democratic input has been established.

The fourth chapter will take a specific scope on the decision-making process during the Euro zone crisis. It will first come to the independence issue of the European Central Bank, testing whether their bail-out measures have posed a challenge on the institutional balance in the EU and marginalized the representative actors. Apart from this, this chapter will take the decision-making process in the inter-governmental institutions into consideration and explore the new problems arising from these counter-crisis measures which may break the balances what the European Union is supposed to endeavor to sustain.

The fifth chapter will be the concluding part which would summarize the main ideas and the conclusion based on previous analysis on whether there is an alienation of the EU institutions from the perspective of institutional and inter-state balance.

# **Chapter1. A General Review on the European Democracy**

## **1.1 Introduction**

This chapter aims to generally review issues related to the European Democracy, including the issues of transnational democracy, democratic deficit and the principle of institutional balance. The European integration is a process that transfers part of sovereignty and powers from the Member States to the supranational institutions, and the democracy at the European level becomes the common concern of the public and the politicians. The superordinate concept of European Democracy is the concept of transnational democracy which deals with the question on the extension of democracy within the national boundaries to transnational. The second issue is the democratic deficit which actually has received constant discussions since the 1990s with problems on whether there is the democratic deficit in the European Union and what reforms may be taken to repair it included. This issue also relates to what shall the European Union be all about, a regulating state (polity) or a (future) federal state. Third, the principle of institutional balance is one of the basic principles established in the European Union. It largely overlaps with the classical constitutional principle—checks and balance of powers but differentiates itself in many cases as well. The European Court of Justice (hereafter “the ECJ”), through case laws, has portrayed its outline and enriched its comments.

The shared central part of these issues is that is it possible to extend the democracy originating from city states and nation states to the supranational states and if a positive answer is to be given, what is the fundamental difference between the democracy under the supranational context and its counterpart under the nation state context. It is also one of the crucial obstacles in realizing the democratization at the European level when specific institutional reforms need to be initiated as a response to the public’s claims for the European democracy.



## 1.2 Transnational Democracy

Democracy, in its very sense, refers to the facts that the people, as the holder of sovereignty, transfer the public power in a political community to the government who has been elected to represent them to govern. The “demos”, which forms the basis of a democratic polity, has been long regarded as inseparable from the nation states since the emergence of Westphalia System.<sup>5</sup> As mentioned above, the concept of democracy covers not only the input dimension, that is, the democratic way to authorize the government powers to certain people or person, but also the throughput and output dimension. In other words, avoiding an elaborate exploration about the concept of democracy which seems to be an everlasting question, this article would base its research on that, which has been mentioned in the introduction part, the basic elements of democracy concerns beyond the election process but also, maybe more important, the process to achieve democratic control over the exercise of political powers—the accountability. Citizens shall be not only entitled to elect their political leaders to adopt political decisions but also have access to hold them accountable, through political and legal ways, for the decisions they made. However, in a constitutional polity, it shall also be pointed out certain issues within this political community has been constitutionalized; that is, those issues have been accepted as fundamental elements of this political community and are thus deprived from the political decision-making process. It may be briefly described as “the more constitutionalization, the less democracy”.<sup>6</sup> The globalization and its consequent problems which are in the need of transnational solutions have largely fueled the emergence and upspring of transnational decision-making mechanisms where the transnational/international organizations play an outstanding role. Correspondingly this trend of transnationalization /internationalization in decision-makings raises concerns about the democratization of these international entities in a certain age when democratic legitimacy and accountability have been taken as the core political

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<sup>5</sup> Caporaso, J. (2005). The Emergence of the EU Supranational Polity and its implications for democracy. *Democracy and Federalism in the European Union and the United States—Exploring Post-National Governance*, 57-75.

<sup>6</sup> Grimm, D. (2015). The democratic costs of constitutionalisation: The European case. *European Law Journal*, 21(4), 460-465.

themes.<sup>7</sup> Among these discussions the structure and performance of the European Union, as the mostly integrated political entity in the world, becomes the best example ever in the demonstrations of various theories.

### **1.2.1 Questions and difficulties faced by the transnational democracy**

Robert Dahl has proposed three propositions in assessing the possibility of transnational democracy and two of them, that international decisions do make significant influence and that “many of the consequence of the decision...are highly desirable”, have been widely accepted while the third one which related to the democratic nature of these international decisions remains being challenged.<sup>8</sup> Generally reviewing, the concept of transnational democracy has been challenged from various aspects, from its component elements, the nature of transnational organizations to the appropriate system structure and its actual necessity.

First, Euro-Skepticalists argue that democracy is unlikely to go beyond, at least so far, the level of nation states. One of the crucial arguments which have received special focus is about the existence of transnational “*demos*”. According to the existing theories and practices of democracy, the “*demos*” and its public sphere appear to be part of the preconditions essential to a democratic polity. Lacking the *demos* renders a fundamental defect to the foundation of the transnational democracy. This is even true for the European Union according to the constitutional judgment on the Maastricht Treaty made by the German Federal Constitutional Court (“*Bundesverfassungsgericht*”).<sup>9</sup> The “*demos*” in a political community embodies the collection of common culture, faith and fate; and it is of vital importance since at the

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<sup>7</sup> Karlsson, J. (2008). *Democrats Without Borders. A Critique of Transnational Democracy*. Department of Political Science; Statsvetenskapliga institutionen.9-10.

<sup>8</sup> Dahl, R. A. (2005). Is international democracy possible? A critical view. Sergio Fabbrini (Hg.): *Democracy and federalism in the European Union and the United States. Exploring post-national governance*. London/New York: Routledge, 194-204.

<sup>9</sup> Caporaso, J. (2005). The Emergence of the EU Supranational Polity and its implications for democracy. *Democracy and Federalism in the European Union and the United States—Exploring Post-National Governance*, 59.

end of the day these would be the last resort to motivate and unite the people to defend the democratic system when the latter is in crisis and in danger.

Second, the necessity of transnational democracy also relates to the very nature of transnational organizations. One theory claims that institutions for the transnational governance is established as the agents of nation states to handle with transborder issues especially economic regulation and market integration; therefore, their source of legitimacy should be defined as from the democratically elected nation state government and the transnational democratic elements hardly offer any help.<sup>10</sup> Besides, if transnational organizations function primarily as regulating authorities, then what such organizations seek is the institutional guarantee for their independence and technocracy prevails over politics.<sup>11</sup> Democratic approach does not always properly apply to issues which are technical in nature.<sup>12</sup> However, for scholars who are more critical towards the globalization and neo-liberalism, they usually champion to strengthen the redistributive function of the transnational organizations and the regulating role in the intern market and to advance the common social and labor policies.<sup>13</sup> Different from the pattern of a regulating state, transnational organizations who shoulder the responsibility of redistribution and the common improvement in social welfare are supposed to construct its own democratic legitimacy through a democratic and federal European Union, embodying the great leap to the new stage of the supranational democracy.<sup>14</sup>

Third, if we assume transnational democracy is ought to be recognized and promoted, then the immediately emerging question would come that which pattern of democracy shall be constructed at the transnational level? Robert Dahl has explored

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<sup>10</sup> Moravcsik, A. (2008). "The Myth of Europe's Democratic Deficit," *Intereconomics: Journal of European Public Policy* (November-December 2008), pp. 331-340.

<sup>11</sup> Majone, G. (1999). The regulatory state and its legitimacy problems. *West European Politics*, 22(1), 1-24; Moravcsik, Andrew. (2002): In Defense of the Democratic Deficit: Reassessing Legitimacy in the European Union, *Journal of Common Market Studies* 40(4), 603-624.

<sup>12</sup> Sbragia, A. M. (2005). Post-national democracy as post-national democratization. *Democracy and Federalism in the European Union and the United States: Exploring Post-National Governance*, 178-179.

<sup>13</sup> McCormick, J. P. (2007). *Weber, Habermas and Transformations of the European State: Constitutional, Social, and Supranational Democracy*. Cambridge University Press. 176-230.

<sup>14</sup> Majone, G. (1998). Europe's 'Democratic Deficit': The Question of Standards. *European law journal*, 4(1), 28.

this question from several aspects. He seems to hold a rather negative attitude to this question that to project a supranational democracy demands special discreteness. Even the mostly integrated European Union would still be confronted with numerous obstacles and questions. First, you need to make a fundamental decision between the parliamentary and the American system or even to propose a brand new one. Second, the boundaries of competences and the division of powers need to be drawn between the “federal” government and its composing states.<sup>15</sup> Furthermore, he also mentions his concerns that the larger the scale of a polity is, the fewer opportunities and channels for direct participation. Also, diversity in social groups (like different histories, races or religions) may lead to consequences that the losers and winners of political decisions are likely to be related to certain social groups which could unleash the break of national consensus on integration and even slip into civil wars.<sup>16</sup> In addition, any proposals for other forms of democracy except the classical representative one would only cause more disputes. Deliberative democracy has been advocated as the most feasible way for the transnational democracy in that it opens the door of decision-making process to the public participation without posing fundamental challenges to existing institutional performance where the representative institutions play a dominant role.<sup>17</sup> Although the deliberative democracy model works currently more as a supplement to the electorate democracy rather than as an acceptable alternative to the latter and that for an institution deciding the political directions and making major policies a new model of primary source of democratic legitimacy goes beyond reality for the moment, the model of deliberative democracy at least suggests the existence of a possible path towards an transnational political decision-making.

Fourth, it is also argued that there is a practical necessity to advance the democratization at the transnational level as above mentioned. Initially this idea has been backed by the famous political science theory “Democratic Peace Theory” that

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<sup>15</sup> Dahl, R. A. (2005). Is international democracy possible? A critical view. Sergio Fabbrini (Hg.): *Democracy and federalism in the European Union and the United States. Exploring post-national governance*. London/New York: Routledge, 198-199.

<sup>16</sup> Dahl, R. A. (2005). Is international democracy possible? A critical view. Sergio Fabbrini (Hg.): *Democracy and federalism in the European Union and the United States. Exploring post-national governance*. London/New York: Routledge, 199-200.

<sup>17</sup> Karlsson, J. (2008). *Democrats without Borders. A Critique of Transnational Democracy*. Department of Political Science; Statsvetenskapliga institutionen. 14-19.

between democratic countries there would be fewer wars or armed conflict than in other cases. Hence, transnational democracy could be further contributive to the peace and stability between countries when more disputes are to be solved by democratic procedures.<sup>18</sup> Secondly, it is also stressed that transnational democracy can aid in the promotion of justice since it further advances equality from that among citizens within one country towards the equality among different countries.<sup>19</sup> Furthermore, the imbalance of globalization process between the economic dimension and the political dimension also drives the transnational democracy construction to be put into agenda.<sup>20</sup> In the context of globalization and economic integration, both the economic development and related policy-making within one country have been more and more profoundly influenced by policies taken by other countries and sectors and thus have actually undermined the efficiency of policies made by the democratically elected government in certain field, and the domestic accountability would be less and less workable since the policies of the national politicians whom the citizens within one country is able to hold to be responsible are actually less and less influential in economic development and market regulation and the foreign policies and multi-national sectors who are gaining increasingly more influence can hardly be held accountable.<sup>21</sup> In other words, the transnational democracy shall be introduced and constructed as a response to the emerging problem of “the erosion of democracy through delegation (of powers and sovereignty from the national level to the transnational organizations)”.<sup>22</sup>

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<sup>18</sup> Bohman, J. (2006). Beyond the democratic peace: an instrumental justification of transnational democracy. *Journal of social philosophy*, 37(1), 127-138.

<sup>19</sup> Bohman, J. (2006). Beyond the democratic peace: an instrumental justification of transnational democracy. *Journal of social philosophy*, 37(1), 127-138.

<sup>20</sup> Anderson, J. (2002). Questions of democracy, territoriality and globalization. *Transnational democracy: Political spaces and border crossings*, 6-7.

<sup>21</sup> Anderson, J. (2002). Questions of democracy, territoriality and globalization. *Transnational democracy: Political spaces and border crossings*, 6-38.

<sup>22</sup> Kochler, H. (2005). European Constitution and the Imperatives of Transnational Democracy, *The. SYBIL*, 9, 87.

## 1.2.2 Patterns of transnational democracy

The ways to achieve the democratization of transnational organizations currently discussed by scholars and politicians could be roughly divided into three types. Among them, two belong to the representative pattern and the third points to the direct participation in the decision-making procedures. The first way is the construction of single identity among several states on the basis of homogeneous cultural traditions. This idea has received strong endorsement from Jürgen Habermas who advocates the constitutional patriotism, holding that one shared constitution could play an instrumental role in the integration process without necessarily being common in language and history.<sup>23</sup> However, this idea has been doubted that what Habermas has been trying to promote is merely converting the conventional democracy from national to the transnational; and his critics, taking Bohman as an example, argues that the reconstruction of democracy is of vital importance at the transnational level since that double-decker demos or citizenship would inevitably bring about competition in between and the inevitable tie-breaking between them. Based on that, the solutions to the aforementioned problem would be the non-domination democracy rather than popular sovereignty.<sup>24</sup> He also mentions that the European Citizens' Initiative (ECI)<sup>25</sup>, which has been introduced by the Lisbon Treaty to promote the public participation in the EU policy-making process (direct democracy) and thus strengthen the democratic legitimacy of the EU, should be seen as an illustration of this idea on the grounds that it not only avoids the stepping into quarrels between supranationalism and intergovernmentalism but also not to be necessarily preconditioned by the existence of European Demos.<sup>26</sup>

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<sup>23</sup> Turner, C. (2004). Jürgen Habermas European or German? *European Journal of Political Theory*, 3(3), 293-314.

<sup>24</sup> Conrad, M. (2011). The European Citizens' Initiative. Transnational Democracy in the EU at last? *Stjórnmal og stjórnsýsla*, 2011, 7(1): 5-22.

<sup>25</sup> See Article 11, Paragraph 4 of the Treaty on European Union (TEU) and Article 24, Paragraph 1 of the Treaty on the Functioning of the European Union (TFEU).

<sup>26</sup> Conrad, M. (2011). The European Citizens' Initiative. Transnational Democracy in the EU at last? *Stjórnmal og stjórnsýsla*, 2011, 7(1): 5-22.

## 1.3 Democratic deficit in the EU

The idea of European integration originates from the ancient age of Roman Empire, along with Charlemagne, Napoleon and Hitler through conquering wars to Jean Monnet through establishing supranational institutions to promote common interests peacefully.<sup>27</sup> Although the idea of democracy has been cultivated in Europe and been incorporated into one of its core constitutional traditions, democracy does not seem to be one of the major concerns for the founders at the starting period of European integration. That can also be deduced from the division of powers among the Community institutions that the Common Assembly, the predecessor of the European Parliament, has only very limited power with the role of consultation and hardly counter-measures against the Commission.<sup>28</sup> However, with more national powers being transferred and delegated to the European institutions, the accountability within the Member States has been undermined and the weakening of democratic supervision and control became a more and more practical concern. Measures with regard to double tracks have been proposed to restore the accountability of government and ease the concerns for the increasingly uncontrolled political power. At the national level, parliaments took more constructive actions in supervising respective national governments on their participation in the European policy-making through the newly established European Affair Committees.<sup>29</sup> At the European level, the European Parliament started to be empowered as the representative institutions as their counterpart in the Member States. The European Parliament has been not only entrusted with more powers and roles through the amendments of Treaties, but also its way of election has been transformed to be direct suffrage since the year of 1979 for the purpose of enhancing its democratic foundation.

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<sup>27</sup> Campbell, H. M. (Ed.). (2011). *A History of Western Civilization: Advances in Democracy: From the French Revolution to the Present-Day European Union*. Britannica Educational Publishing. 208-217.

<sup>28</sup> Mancini, F. (2000). *Democracy and constitutionalism in the European Union: collected essays*. Hart Publishing. 31.

<sup>29</sup> Martin, L. L. (2000). *Democratic Commitments: Legislatures and International Cooperation*. Princeton, NJ: Princeton University Press. 160.

Even so, the European Union has long been beset by the problem of legitimacy deficit. Three narratives have been pointed out to be related to the legitimacy deficit. That is, the still-inefficiency of multi-level mechanisms, the “absence of a symbolically unifying European identity or ‘Europeanness’ among EU citizens” and the democratic deficit,<sup>30</sup> and the third one receives the most discussions. According to Max Weber, the sources of legitimacy could be generally categorized into three types, the “traditional rule”, the “legal rule” and the “charismatic rule”.<sup>31</sup> In modern societies, the most pervasive source of governmental legitimacy is democracy, including the democratic election of political leaders and the democratic way of decision-making; in other words, the legitimacy comes from the majoritarian. In the representative institutions the political majority adopts their policies with the respect for fundamental rights of the minority and thus constitutes the legitimate basis to carry out persuasion and even forces for the purpose of the citizens’ obedience of those policies.

### 1.3.1 Criticisms on EU’s democratic deficit

All forms of criticisms on EU’s democratic deficit have poured to Brussels since decades. It has been argued that the democratic deficit in the European Union could be embodied by the public (the people)’s lack of significant input and influence in both the decision-making process and the institutional arrangement.<sup>32</sup> The little input in the decision-makings with regard to major issues and the rare channel for their direct participation give rise to the publics’ perception of being detached from the Brussels’ “Black Box”. Besides, the delegation of powers from the Member States to the EU institutions also invites the voters’ concern that the national parliaments would be weakened in performing their supervision roles and the loss of sovereignty beyond what has been written in the Treaties.

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<sup>30</sup> Giorgi L and Crowley J. (2006). The political sociology of the European public sphere||, in: Giorgi Liana, Von Homeyer Ingmar and Parsons Wayne (eds.), *Democracy in the European Union: Towards the emergence of a public sphere* (London/New York: Routledge). 1-23.

<sup>31</sup> Wolfgang J. Mommsen. (1992). *The Political and Social Theory of Max Weber: Collected Essays*, University of Chicago Press. 46.

<sup>32</sup> Pogge, T. W. (1997). Creating Supra-National Institutions Democratically: Reflections on the European Union’s “Democratic Deficit”. *Journal of Political Philosophy*, 5(2), 163-182.



As for the first part, the institutions of the EU have been challenged with the criticism of technocrats' monopoly, lack of public participation and "excessive use of administrative discretion" etc.<sup>33</sup> However, this is exactly what its founders have intended to achieve: the Commission-dominated technocratic approach of Europe integration with limited democratic input.<sup>34</sup> In other words, the way to secure the legitimacy of the European integration goes neither through democracy nor the due procedure but through the output of decision-makings. With this functionalist path, Monnet tried to establish the European Community on the basis of consensus on common interests (economic cooperation and peace maintaining initially).<sup>35</sup> This effort finds its base on the political theory of legitimacy that legitimacy could be further divided into input legitimacy, throughput legitimacy, and output legitimacy and the third one stresses that the effectiveness, efficiency and responsiveness of governmental decisions shall also be assessed as one constituent part of government legitimacy.<sup>36</sup> However, with the deepening of European integration and more powers transferred to the European institutions, more and more citizens tend to be warm to the idea that the democratic supervision shall be extended to those transferred powers which used to be democratically controlled at the domestic level since policies from Brussels plays more and more significant role in the lives of common people. In other words, the democratic representation and accountability fail to follow up with the speed of European integration that leads to the crisis of legitimacy.<sup>37</sup> This lag in process propels more institutional transparency to the public and an enhanced role of representative institutions in the European decision-making procedures.

The second aspect goes relates to the European institutional structures. Initially, the European citizens exert no or little influence in the design of institutions and division of powers between them while the institutional project is frequently

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<sup>33</sup> Majone, G. (1998). Europe's Democratic Deficit': The Question of Standards. *European law journal*, 4(1), 14-15.

<sup>34</sup> Featherstone, K. (1994). Jean Monnet and the 'democratic deficit' in the European Union. *JCMS: Journal of Common Market Studies*, 32(2), 149-170.

<sup>35</sup> Boyce, B. (1993). The democratic deficit of the European Community. *Parliamentary Affairs*, 46(4), 467.

<sup>36</sup> Bekkers, V. J. (Ed.). (2007). *Governance and the democratic deficit: assessing the democratic legitimacy of governance practices*. Ashgate Publishing, Ltd.45-46.

<sup>37</sup> Andersen, S. S., & Eliassen, K. A. (Eds.). (1996). *The European Union: how democratic is it?* London: Sage.

monopolized by politicians and senior technocrats.<sup>38</sup> Hence, channel/institutions for citizens to express their ideas about European issues are usually quite limited and usually those representative institutions only have comparatively weak status. Theoretically, voters may express their ideas about European issues indirectly through the national elections, appointing and removing their respective ministers in the Council as well as their President/Prime Minister in the European Council; they may also have their voices heard through the direct election of European Parliament.<sup>39</sup> However, such two channels are very problematic in practice. As for the national election, national voters focus primarily on domestic issues when they decide to whom their ballots will be cast. Even if the voters would like to grade the performance of their governments in the European institutions, it is hard for them to know how those decisions at the European level have been made in the closed-door meetings in Brussels as a result of the lack of transparency and the restricted right to information concerned.<sup>40</sup> As for the direct way of European Parliament, there stand also lots of obstacles ahead. The European Parliament has no power to initiate which according to the Lisbon Treaty belongs exclusively to the European Commission and consequently its role in the legislative procedure turns out to be quite weak.<sup>41</sup> Besides, lacking the initiative power means that the European Parliament alone has no formal channel within its competence to transform the will of European citizens into the legislative agenda. Besides, the European Parliament's power in the appointment and removal of the President of the European Commission and its commissioners is paralyzed since the majority leader in the Parliament is not guaranteed to be nominated as the candidate for Commission President and the Parliament is not authorized to remove or impeach a single commissioner. That captures the European Parliament's complain that the democratic deficit is actually the parliamentary

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<sup>38</sup> Pogge, T. W. (1997). Creating Supra-National Institutions Democratically: Reflections on the European Union's "Democratic Deficit". *Journal of Political Philosophy*. 5(2). 163.

<sup>39</sup> Norris, P. (1997). Representation and the democratic deficit. *European Journal of Political Research*, 32(2), 273-282.

<sup>40</sup> <sup>40</sup> Norris, P. (1997). Representation and the democratic deficit. *European Journal of Political Research*, 32(2), 275.

<sup>41</sup> Article 17, paragraph 2 of Lisbon Treaty (Consolidated Version).

deficit.<sup>42</sup> Furthermore, the accountability of regulating institutions, the European Central Bank (ECB) for example, has also received certain discussions. This issue concerns the balance between the independence of regulating institutions and how should these institutions be supervised and accountable to majoritarian institution.<sup>43</sup> The supervision mechanism on the regulating institutions, whether with regard to their establishment through the legislation of representative institutions or that their decisions shall be open to democratic review, distinguishes them from political majoritarian institutions that were directly or indirectly elected by the people.<sup>44</sup> Then the question arises whether the independent institutions in the EU, such as the ECB as the most independent central bank in the world, have been under suitable democratic supervision within current institutional structure. This issue will be elaborately addressed in Chapter 4.

The third one concerns about the absence of supervision in the delegation of powers from the national level to the European level. The delegation of powers has received many justification theories to support its rationality. It is said that the delegation of powers to specialized agencies is helpful to “reduce(s) legislative decision-making costs” or to transfer the risks of policies to others; besides, there are also explanations that it “is one method of achieving credible policy commitments” and that under the context of transnationalization of economy and market, the delegation of powers also witnesses its rationality from the inefficiency of national policies in regulating the economy and the market.<sup>45</sup> However, these justifications never succeed in squashing doubts and concerns regarding the accountability issue. Scharpf has criticized that the delegation of powers to the European level would inevitably undermine the accountability and democratic control at the national level since the European Parliament is not as democratic and competent in participation and supervision as their counterpart in the national level while the decisions made in the

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<sup>42</sup> Neunreither, K. (1994). The democratic deficit of the European Union: towards closer cooperation between the European Parliament and the national parliaments. *Government and Opposition*, 29(03), 299.

<sup>43</sup> Abels, G. (2009). Citizens 'deliberations and the EU democratic deficit: Is there a model for participatory democracy? *Tübinger Arbeitspapiere zur Integrationsforschung (TAIF)* No, 1.

<sup>44</sup> Majone, G. (1998). Europe's 'Democratic Deficit': The Question of Standards. *European law journal*, 4(1), 5-28.

<sup>45</sup> Majone, G. (1998). Europe's 'Democratic Deficit': The Question of Standards. *European law journal*, 4(1), 16-18.

national level is less and less effective<sup>46</sup>. Besides, the inadequacy of information about legislative proposals at the early stage also places the national parliaments in an inferior situation.<sup>47</sup> Another problem concerned is whether it is possible for the Member States to withdraw the powers which have been transferred to the EU institutions through amendments to the EU Treaties or the exit from the EU as the last resort. This problem is also part of the concerns revealed in the constitutional judgment by the German Federal Constitutional Court (“*Bundesverfassungsgericht*”) on the Maastricht Treaty. One of the preconditions for the compatibility of Maastricht Treaty with the German Basic Law is that Germany should always hold the power at hand to secede from the Union or to refuse further integration.<sup>48</sup> The Court finds under the Maastricht Treaty the power to secession still falls within the domain of the German *Bundestag*. However, the rule written in legal documents (Article 50 of the TEU) is not adequate to put an end to the question that the *Bundestag*, in fact, does not seem to be likely (or is very difficult) to exercise the power to exit from the European Union.<sup>49</sup> In a sense, the Brexit, although mostly interpreted as a tragic event to the European integration, could also from another scope perfectly demonstrate the narrative that the Member States still retain the power to retreat from the integration process; and the process of Brexit, composed of a series of negotiations and approval procedure, could also be taken as an irreplaceable example for the EU to assure to the peoples of the Member States that they are and will always be the masters of the European integration process and so to ease their anxiety and fear about the emergence of the “Supranational Leviathan”.

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<sup>46</sup> Scharpf, F. W. (1997). Economic integration, democracy and the welfare state. *Journal of European public policy*, 4(1). 19-20,28.

<sup>47</sup> Neunreither, K. (1994). The democratic deficit of the European Union: towards closer cooperation between the European Parliament and the national parliaments. *Government and Opposition*, 29(03), 310.

<sup>48</sup> Pogge, T. W. (1997). Creating Supra-National Institutions Democratically: Reflections on the European Union's “Democratic Deficit” . *Journal of Political Philosophy*, 5(2), 166.

<sup>49</sup> Pogge, T. W. (1997). Creating Supra-National Institutions Democratically: Reflections on the European Union's “Democratic Deficit” . *Journal of Political Philosophy*, 5(2), 166.

### 1.3.2 Defenses for the EU on democratic deficit

The defenses for the European Union concerning democratic deficit resemble what has been invoked for the defenses of transnational democracy. It mainly includes, first, the emphasis on the regulatory function of European institutions; second, the existing democratic structure of the European institutions has basically provided a framework for the legitimizing of the Union.

Majone is a strenuous supporter of the regulatory state theory. He lays the legitimacy of EU on the efficiency of the regulating functions, and advocates that it is the increasing inefficiency of regulations implemented in the national states level that encourages the transfer of certain power to the European level.<sup>50</sup> Therefore, the performance evaluation of EU institutions should be, like the antitrust institutions and the central banks as their counterparts in the domestic level, based on their efficiency rather than how democratic they are.<sup>51</sup> Accordingly, he points out that the real problem the EU faces is not the democratic deficit but the credibility crisis caused by “*the mismatch between the Communities’ highly complex and differentiated regulatory tasks and the available administrative instruments; and the problem of credible commitment caused by the increasing level of politicization and parliamentarization of the Commission*”.<sup>52</sup> Hence, he concludes that the solution to deal with the integration crisis is not to develop the politicization of EU institutions but to enhance their independence and professionalism of these institutions which are now profoundly influenced or even dominated by related interested groups so to achieve greater credibility.<sup>53</sup>

Moravcsik argues that the democratic deficit is far from posing one significant challenge on the EU. He defends with three entry points ranging from accountability, representative institutions, and the decision-making procedures. He stresses that, first,

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<sup>50</sup> Majone, G. (1994). The Rise of the Regulatory State in Europe. *West European Politics*, 17(3), 78–102.

<sup>51</sup> Majone, G. (1993). The European Community: An “Independent Fourth Branch of Government”? *EUI Working Paper SPS No. 94/17*.

<sup>52</sup> Majone, G. (2000). The credibility crisis of community regulation. *JCMS: Journal of Common Market Studies*, 38(2), 273.

<sup>53</sup> Majone, G. (2000). The credibility crisis of community regulation. *JCMS: Journal of Common Market Studies*, 38(2), 298–299.

the Member States governments are accountable to their national parliaments; second, the power of European Parliament has been steadily increasing and finally, the decision-making procedure is actually becoming more transparent than their national counterparts and decisions will be made only when the high-level consensus has been reached.<sup>54</sup> Furthermore, he also conveys his worry that proposals from Habermas and Hix, who hold a critical attitude to the democratic deficit issue in the EU, are “*seeking to cure the faults of populist democracy by importing even more populist democracy*” “*would almost likely undermine public legitimacy, popularity and trust without generating greater public accountability*”.<sup>55</sup>

Besides those functionalistic defenses, it is also argued that current democratic structure in the European Union represents the new democratic model for transnational/international organizations in seeking their legitimacies. It explains that the legitimacy of the EU has been established on the basis of dual democracy, namely, from the European Parliament who is directly elected by European voters and from the European Council and the Council of European Union consisting government leaders and ministers from Member States governments who are chosen by the respective national elections; besides, direct participation in the decision-making procedures has also been advanced marked by the European Citizens’ Initiative Program.<sup>56</sup> Therefore, the democratic framework for the European Union has been basically accomplished and what shall be highlighted would only be to implement and improve these democratic mechanisms.

### 1.3.3 Assessment on the democracy in the European Union

As an unprecedented project, the European integration and the European Union have been confronted with countless criticisms and doubt from the public, including the “complexity of the EU system”, “lack of accountability”, “lack of transparency”,

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<sup>54</sup> Moravcsik, A. (2002) .In Defence of the “Democratic Deficit”: Reassessing the Legitimacy of the European Union. *Journal of Common Market Studies*, 40(4), 603–34; (2003) The EU Ain’t Broke. *Prospect*, March, 38–45; (2004) ‘Is there a “Democratic Deficit” in World Politics? A Framework for Analysis’. *Government and Opposition*, 39(2), 336–63.

<sup>55</sup> Moravcsik, A. (2008). "The Myth of Europe's Democratic. Deficit," *Intereconomics: Journal of European Public Policy* (November-December 2008), 340.

<sup>56</sup> Von Bogdandy, A. (2012). The European lesson for international democracy: the significance of Articles 9 to 12 EU Treaty for International Organizations. *European Journal of International Law*, 23(2), 315–334.

“lack of social legitimacy” and “lack of a European *demos*”.<sup>57</sup> Some of those criticisms are actually contradicted with each other. If European Union democracy is the democracy in the transnational/international dimension, is it then suitable to measure the transnational version of democracy with standards of democracy under the national context? In order to come up with appropriate standards compatible with the transnational character to assess the democracy of the European Union, to take a look back on the essence and function of democracy could be helpful to liberate us from the boundaries of existing terms and forms of the democracy and pave the way for gaining fruitful knowledge of operation of the European Union democratic process and the conditions of democratic input in the EU decision-makings.

Thus, this paper would not endeavor involving into the abstract discussions on the colorful theories of democracy from the perspective of political theory but pay its primary focus on the specific institutional design of the European democracy. According to Sir Karl Popper, the question “*who is to be the sovereign*” is, in fact, dedicating the “*unchecked sovereignty*” and hence he advocates that we shall replace it with a more specific question, “*How can we so organize political institutions that bad or incompetent rulers can be prevented from doing too much damage?*”<sup>58</sup> He also distinguishes where the political systems can be peacefully changed and where cannot, he calls the political system where government leaders can be peacefully changed democracy; autocracy conversely.<sup>59</sup>

This paper will also neither discuss how to find an ultimate definition for democracy nor to tell which political system would be the best choice for the European Union. Rather, this paper would be assessing the EU democracy according to the actual performance of political powers. This work suggests that how democratic a polity is could be reflected and evaluated through the political processes. First, democracy primarily addresses the question that who is to be authorized to perform the political power for a period. This includes the peaceful election of government and

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<sup>57</sup> S.C. Sieberson.(2008).The Treaty of Lisbon and Its Impact on the European Union’s Democratic Deficit, *Columbia Journal of European Law* .14(3), 446-455.

<sup>58</sup> Popper, K. R. (1966). *The Open Society and Its Enemies Volume 1 Plato*. Routledge Paperbacks. Chapter 7.

<sup>59</sup> Popper, K. R. (1966). *The Open Society and Its Enemies Volume 1 Plato*. Routledge Paperbacks. Chapter 19.Marx’s Prophecy: the Revolution, Section V.

also represents the ultimate way for the citizens to achieve political accountability since to be removed from power through elections is the primary way to hold the government accountable for their performance of political powers and governance. Second, apart from elections, democracy also demonstrates that the policies and decisions executed by the administrative branch shall be supervised by the representative body. That is to say, even the governing party receives the authorization and legitimacy out of the most recent election to form the government and carry out its political agenda, should also be strictly supervised by the representative institutions when it execute the laws in an age when the political gravity is located in the executive rather than the legislative.<sup>60</sup>

As for the EU case, we may also evaluate the democracy within the EU institutional framework with that approach, including the institutional arrangement and the possibility about how the decisions and policies made at the European level be supervised by representative institutions (the European Parliament, and the Council and national parliaments newly included). Considering that the first aspect of this issue has been widely discussed, this paper will be focusing more on the second aspect of this issue.<sup>61</sup> In Chapter 4, the supervision from representative institutions on the European decision-making will be under exhaustive exploration particularly with the counter-crisis measures taken by the European leaders during the Euro Crisis. Besides, it shall be particularly pointed out that, for the Union case, the rule of “**the more constitutionalization, the less democracy**” also applies since the Treaties has lifted exceeding issues to be part of constitutional arrangement, including the monetary union, the intern market. Since they have been promulgated as the indispensable part of the EU constitution, they exempt themselves from the majoritarian process; as a result, the judicial review plays a significant role in the

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<sup>60</sup> Crum, B. (2005). Tailoring representative democracy to the European Union: does the European constitution reduce the democratic deficit? *European Law Journal*, 11(4), 453.

<sup>61</sup> Some scholars have pointed out that the democratic deficit in the Europe mainly comes from the facts that it is rather difficult for voters to remove those political leaders. Featherstone, K. (1994). Jean Monnet and the 'democratic deficit' in the European Union. *JCMS: Journal of Common Market Studies*, 32(2), 151. Also, the European Parliament is too weak to supervise the government power and the national parliaments would also face enormous difficulty in controlling the Council ministers. Katz, R. S. (2001). Models of Democracy Elite Attitudes and the Democratic Deficit in the European Union. *European Union Politics*, 2(1), 55.



control over powers.<sup>62</sup> However, this situation does not preclude the discussion, which will be made in Chapter 4, about the appropriateness on the constitutionalization of monetary union and the exclusive entrustment of monetary policy to the European Central Bank and its high level institutional independence and the issue that whether certain democratic control shall be imposed in the future, not to mention the de facto new function the European Central Bank is suspected to be playing, even if the judiciary body of the Union has so far denied by holding that certain programs fall still within the scope of monetary policy.

## 1.4 The Principle of Institutional Balance

The principle of institutional law is a concept that has been firstly proposed by the ECJ through its case laws and afterwards written into the founding Treaties. According to the ECJ case law,

*“the Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with the due regard for the power of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur”*<sup>63</sup>.

This principle was then written into the founding Treaties that *“Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.”*<sup>64</sup> This concept has both political and legal dimensions which are not totally overlapped and they have also been applied to different situations. The political dimension of this concept is a very fundamental principle in constructing the European institutional structures, the

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<sup>62</sup> Grimm, D. (2015). The democratic costs of constitutionalisation: The European case. *European Law Journal*, 21(4), 460-473.

<sup>63</sup> Case C-70/88 Parliament v Council

<sup>64</sup> Art. 13(2) TEU.

competence and power division between different institutions, especially the legislative and the government. However, the legal application of this principle in existing cases determined by the ECJ is, on the contrary, so narrow that it mostly concentrates on the procedural disputes in the secondary legislation of the European Union.<sup>65</sup>

### **1.4.1 The political dimension of the institutional balance principle**

Compared with the legal dimension of this principle, the political counterpart is obsessed with much less challenges. The political view of this principle refers to the balance of interests which are represented by different Community institutions in order to come up with proposals on European integration accepted, at least not opposed, by different parties<sup>66</sup>. In this sense, this principle is usually interpreted as the EU version of the Power Separation Principle developed by John Locke and Montesquieu. In the European Union case, this principle of institutional balance has been seen as a textual expression of the balance between two approaches of the European integration and their respective institutional reflections.<sup>67</sup> In detail, the institutional balance aims at the balance between the supranational institutions that are designated to represent the general interests of the whole European Union, the European Commission As well as the European Parliament, and the intergovernmental institutions who are taken to put the interests of the Member States at a prior position, the Council and the European Council.

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<sup>65</sup> Moskalenko, O. (2016). The Institutional Balance: a Janus-faced concept of EU constitutional law. *Politeja-Pismo Wydziału Studiów Międzynarodowych i Politycznych Uniwersytetu Jagiellońskiego*, 13(45), 136.

<sup>66</sup> Lenaerts, K., & Verhoeven, A.(2002). "Institutional balance as a guarantee for democracy in EU governance" in Joerges & Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, 41-45

<sup>67</sup> Sbragia, A. M. (2002). Conclusion to Special Issue on the Institutional Balance and the Future of EU Governance: The Treaty of Nice, Institutional Balance, and Uncertainty. *Governance*, 15(3), 393-412.

## 1.4.2 The legal dimension of the institutional balance principle

The legal dimension of this principle receives many challenges, partly concerning the nature of this principle: is the provision in the Treaties a legal rule or merely a declaratory term? If this principle falls within the category of legal terms, what would the legal consequence be if this principle is breached? To answer these questions, we should look back on the case laws made by the ECJ and the reasons within those cases.

In the *Meroni* case, the Court invoked the principle of institutional balance to hold it invalidated when the discretionary powers were delegated to bodies which are not expressly allowed by the Treaties. According to the Court, any delegation of powers including political discretion to bodies not provided for by the Treaties inevitably results in the transfer of responsibility which would breach the institutional balance for that the transfer of decision-making bodies.<sup>68</sup> Then in the *Chernobyl* Case, this principle was advanced that it is the ECJ that is responsible and guarantee for the application of this principle.<sup>69</sup> This judgment entrusted the ECJ the role as the defender of this principle more than merely an institution under this principle.<sup>70</sup> The idea that majority of application of this principle goes to the cases where there arise the disputes concerning legislative procedure has been reiterated with the MFA case. While deciding that the Commission has due power to withdraw its proposal even when this proposal has been passed to the Council and the Parliament since the power to withdraw still falls within the scope of the right to initiate which has been entrusted solely to the Commission, the Court rejects the situation where this power to withdraw is to be exercised as a genuine veto.<sup>71</sup> In these cases, this principle has been

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<sup>68</sup> Case 9/56 , *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*.

<sup>69</sup> Case C-70/88. *European Parliament v. Council of the European Communities*.

<sup>70</sup> Moskalenko, O. (2016). The Institutional Balance: a Janus-faced concept of EU constitutional law. *Politeja-Pismo Wydziału Studiów Międzynarodowych i Politycznych Uniwersytetu Jagiellońskiego*, 13(45), 135.

<sup>71</sup> Case C-409/13, *Council v Commission*, para. 75-76.

mainly invoked as a channel and rationale to fill the gap between the closest rules concerned and the specific facts of the dispute at hand.<sup>72</sup> Its role in the legal reasoning is more of a supplement to the delimitation of competence boundaries in cooperation with specific rules which fail solely to draw a clear division of powers between institutions than as an independent claim.<sup>73</sup> In fact, the gaps filled by the ECJ in specific cases concerning secondary legislative procedures with the principle of institutional balance usually come out to be favorable to the European Parliament, partly out of the concerns about the democratic deficit problem in the EU.<sup>74</sup>

In conclusion, the principle of institutional balance has been invested with both political and legal significance. So far, there is a gap between the roles of the political dimension and the legal one. For the political dimension, this principle aims at the achievement of different interests represented by corresponding EU institutions, especially the balance between the general interest of the Union and the respective interests of the Member States. However, the legal application of this principle currently has been comparatively restraint. As mentioned, this principle has so far been mostly applied to cases with regard to the clarification of secondary legislative procedural disputes between Union institutions. In short, this principle functions more of a guideline in the interpretation and application of Union laws rather than “a self-standing principle”.<sup>75</sup> The Court only exploits the microcosmic aspect of institutional balance (the legislative procedural rules) in the very specific and detailed cases thus far without imposing judicial review on the more general perspective of inter-institutional interactions or the balance between institutions as a whole in a system or certain mechanisms, nor a judicial assessment on the institutional balance affected by certain measures or acts. This may perhaps be, a purely guess, a demonstration of judicial restraint (although a little weird to label the ECJ with this phrase), it does, however, result in the undermining of the ECJ’s role as the guardian

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<sup>72</sup> Yuratich, D. (2017). Article 13 (2) TEU: Institutional Balance, Sincere Co-Operation, and Non-Domination during Lawmaking. *German LJ*, 18, 124.

<sup>73</sup> Yuratich, D. (2017). Article 13 (2) TEU: Institutional Balance, Sincere Co-Operation, and Non-Domination during Lawmaking. *German LJ*, 18, 115.

<sup>74</sup> Fabbrini, F. (2016). A Principle in Need of Renewal? The Euro-Crisis and the Principle of Institutional Balance. *Cahiers De Droit Europeen*. 8.

<sup>75</sup> Senden, L. A. (2005). Soft law and its implications for institutional balance in the EC. *Utrecht L. Rev.*, 1, 85.

of the Treaties when certain measures or acts (like the economic governmental acts brought during the Euro crisis) bring challenges to the institutional balance of Union structure, refusing to invoke this principle so as to make judgments concerning the general institutional relations.<sup>76</sup>

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<sup>76</sup> Chamon, M. The Institutional Balance, and Ill-Fated Principle of EU Law?"(2015). *European Public Law*, 21, 391.

# **Chapter 2. The governmental**

## **function among EU institutions: a**

### **revision**

The first step to explore the situation of legislative control over government is supposed to be, which institution is the true holder of the government power responsible for the adoption of political decisions since the separation of name and reality (or form and substance) is frequently witnessed, or an eternal issue, in human history with regard to institutional project and evolution. Also, since the European integration is an on-going process, this fact invites the rather fuzzy and non-ultimate institutional mechanisms and eminent role of international politics in the performance of institutional functions. It must, at the same time, be observed, however, that the principle of the rule of law and principle of democracy are explicitly enshrined as two of the fundamental values and constitutional traditions common to all Member States<sup>77</sup> and it is both a legal and political obligation to obey such principles.<sup>78</sup> Hence, the deficiency in the rule of law and the democratic deficit caused by the lack of accountability among EU institutions are likely to form certain breaches to them. This part will discuss in brief what the government power points to within the European Union structure. The analysis would explore the wielding of powers among the European Union institutions, including European Commission who is thought to be the government of EU, at least in form, and the European Council with whom many arguments have been made to be the real decision-maker for major EU affairs. Then this part would try to trace out the government power distribution in reality at the EU level.

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<sup>77</sup> Dickson, J., & Eleftheriadis, P. *Philosophical foundations of European Union law*. Oxford University Press. (Oxford. 2012). 4-16

<sup>78</sup> Article 2, TEU.

## 2.1 A review exploration on the “government”

Currently, numerous countries in the world have political structures of separate governmental institutions, although some of them are separating political powers merely in form. Among all the government institutions usually the most eminent one would be the institution who exercises government/administrative powers and sometimes it is referred to by citizens as the “Government” in the narrow sense. This concept has been proposed no later than those well-known political philosophers who come up with ideas on the separation of powers, of whom the eminent figures are John Locke and Montesquieu.

In the *Second Treatise of Government*, John Locke explains that in the state of nature, everyone is entitled to the power to punish the invaders.<sup>79</sup> Then it appears better to transfer their private-owned power of imposing punishment to a government with laws to protect their lives and properties, and there emerges the government.<sup>80</sup> As for the specific division of powers, Locke defines the government power as “a power always in being, which should see to the execution of laws that are made and remain in force”<sup>81</sup> and “comprehending the execution of the municipal laws of the society within its self”<sup>82</sup>. Also, he emphasizes in the final chapter that if the government power holders are no longer executing the law that will be the doomsday for the existing government and a new government is expected to be established to take the place to execute the laws<sup>83</sup>. It must be pointed out; however, there is no independent role for the judicial institutions in Locke’s theory of separation of powers but that he divides the governmental power into legislative, government/executive and federative powers.<sup>84</sup> The government power mentioned by John Locke actually covers both the government power (without the power for foreign affairs) under the

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<sup>79</sup> John Locke. *Second Treatise of Government*, Hackett Publishing Company, Inc. (Indianapolis . Cambridge, 1980), 66.

<sup>80</sup> John Locke, 67.

<sup>81</sup> John Locke, 76

<sup>82</sup> John Locke, 77

<sup>83</sup> John Locke, 110

<sup>84</sup> John Locke, 75. The federate power according to his description is equivalent to the power for foreign affairs.

context of modern political science and the judicial power which has becoming gradually independent in the following hundreds of years.<sup>85</sup> In spite of criticisms, Locke's argument has enlightened the theoretical basis for the liberal constitutionalism, including the distinguished significance and function of constitution and law, and the idea of certain prerogatives and discretions of the government.<sup>86</sup>

Different from Locke, Montesquieu has proposed the judicial power with an independent role. He divides the governmental power into what we are more familiar with nowadays as the legislative, government and judiciary. He describes the government power as the power to "*makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions*" while the judiciary power as "*punishes criminals, or determines the disputes that arise between individuals*"<sup>87</sup>. He holds the idea that government power which should belong to the Monarch shall be independent from other powers and reaches checks and balances with them.<sup>88</sup>

Institutional evolutions in the second half of 19<sup>th</sup> century and the first half of 20<sup>th</sup> century jointly instigate the new development within the government systems and also to some extent redefine the government power as well as the principle of separation of powers.<sup>89</sup> Confronted With the explosively increasing public affairs to handle, the role of civil servants has been at large strengthened since they are chosen and trained professionally and have gathered abundant experience through their daily business while the political officials are much more involved in political activities rather than

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<sup>85</sup> Ratnapala, Suri (1993) "John Locke's Doctrine of the Separation of Powers: A Re-Evaluation," *American Journal of Jurisprudence*: Vol. 38: Issue. 1, 189.

<sup>86</sup> Ward, L. (2005). Locke on government power and liberal constitutionalism. *Canadian Journal of Political Science*, 38(03), 719-744.

<sup>87</sup> Montesquieu. *The spirit of laws* / de Secondat, Baron de Montesquieu. Translated from the French by Nugent. - London : Nourse and Vaillant- 2. ed. corr. and considerably improved. - 1752. - XL, 451 S. 1. 215-216.

<sup>88</sup> Montesquieu. 215, 222, 227-228.

<sup>89</sup> M.J.C.Vile. *The Constitutionalism and the Separation of Powers*, 2ed edition, Liberty Fund, Inc. (Indianapolis.1998) 5-6. In the 1980s a satirical British series named "Yes, Minister" (and its sequel "Yes, Prime Minister") has won millions of audiences in the UK and some other areas overseas. The stories in this series are actually reflections of an emerging sociological phenomenon, the compartment between the politically-neutral bureaucrats and the partisan politicians.



daily administration of public sectors. The gap on expertise between them thus leads to the civil servants' advantages against the politicians in the decision-making process; some arguments even advocate that civil servants are actually dominant in most governmental policies' formulation.<sup>90</sup> However, such dichotomy has been undergoing constant discussions and in the 1990s finally the distinction is generally accepted, one century later from the year of 1887 when it was firstly introduced by Woodrow Wilson and then Max Weber.<sup>91</sup>

Politicians have been endeavoring to keep the civil servants under their control, and the image of classical government where civil servants would follow the instructions made by the democratically-elected political leaders has been far from the truth.<sup>92</sup> Some have already suggested one new trend of separation of powers, that is, the conventional government power which is generally accepted as to execute the law has evolved into dual independent powers: the political government power and the administrative power.<sup>93</sup> The politicians are responsible for making policies while the civil servants to implement them.<sup>94</sup> The institutions that make the policies are further referred to as the "Policy Branch".<sup>95</sup> Certain powers for deciding major policies are left or ought to be reserved to the political government. In Britain, the cabinet (or the Prime Minister) chiefly performs three functions: "*the final determination of policy...the supreme control of the national government...the continuous co-ordination and delimitation of the interests of the several departments of state*".<sup>96</sup> In France, there is also such "*important but not clear-cut distinction*" between executive ("the Government") and administrative; similarly it is also the political government that is responsible for decision-making with co-ordination of opinions,

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<sup>90</sup> Putnam, R. D. (1973). The political attitudes of senior civil servants in Western Europe: A preliminary report. *British Journal of Political Science*, 3(03), 257-290.

<sup>91</sup> Wille, A. *The normalization of the European Commission: politics and bureaucracy in the EU government*. Oxford University Press. (2013). 11

<sup>92</sup> Campbell, C., & Peters, B. (1988). The politics/administration dichotomy: Death or merely change? *Governance*, 1(1), 79-99.

<sup>93</sup> M.J.C.Vile. 399

<sup>94</sup> Putnam, R. D. 257-290

<sup>95</sup> M.J.C.Vile. 405-414.

<sup>96</sup> Alex Carroll, *Constitutional and Administrative law*. Fifth edition, (Pearson Education Limited, 2009) 240.

interests from different parties while the professional bureaucrats are assigned to be responsible for “*the execution of decisions*”.<sup>97</sup> In German practices, even those who believe that the classic Weberian way of distinction between political government and administration is not perfect in portraying current governmental decision-making process and civil servants are, contrary to some imaginations, inserting much influence in the decision-making also admit that politicians and civil servants together formulate and assess policies with different background context, different consideration factors, different priorities of “aesthetic standards” and perspectives, but diverging in weight they respectively carry.<sup>98</sup> Regarding administrative power as the independent “Fourth Power” or not, it is widely accepted that there is the distinction between policy execution and the professional administration in many western democratic states<sup>99</sup> although this dichotomy alone may be not sufficient to explain the policy process.<sup>100</sup> Civil servants are thought to be seizing more and more powers even in the decision-makings nonetheless, as named by the phrase “administrative state”, politicians are still able to insert influence up to decisive in the policy-formulation in certain fields.<sup>101</sup>

It seems to be neither possible nor necessary to indulge ourselves in exactly defining the specific contents of the government power according to the previous discussions. The approximate boundary of government power is influenced, if not determined, by the institutional practices of a given period of age. In the age of Locke, “government” is widely regarded as the same as “judiciary” and the King of England was thought to be also the “Top Judge” of the state.<sup>102</sup> While in the age of Montesquieu, governmental practices differ from those in the times of Locke. He adopts the same words but with distinct connotations, with which the judiciary is no longer part of the government while the power for foreign relations is integrated into

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<sup>97</sup> Malcolm Anderson, *Government in France: An Introduction to the Government Power*, Pergamon Press. 1970, 8.

<sup>98</sup> Joel Aberbach, Robert Putnam, Bert Rockman. *Bureaucrats and Politicians in Western Democracies*. Harvard University Press. (Cambridge, Massachusetts and London, England, 1981).111

<sup>99</sup> Wille. A. 10.

<sup>100</sup> M.J.C.Vile. 410

<sup>101</sup> M.J.C.Vile.413-414

<sup>102</sup> M.J.C.Vile. 33

the scope of the executive powers.<sup>103</sup> Then after nearly two centuries, the administrative power has been witnessed more and more independent from its original matrix, even in some sense to become a more dominant actor in the adoption of government policies.

To analyze the specific EU case on government power exercises, it is worth outlining the general idea about what the government power is all about in the present ages. As discussed above, it seems still widely acceptable for most public lawyers to connect or to define the government power with the policy formulation (and political decisions) on domestic and foreign affairs ranging from economic, social, and diplomatic to defensive policies.<sup>104</sup> The function of the political government is to make determination on policies of domestic issues (including economic development, market regulation, and social welfare) and foreign affairs and to propose initiatives to the parliament if they are required to obtain the consent or budgetary support from the democratic representative institutions.<sup>105106</sup> Therefore, this paper will not focus on the interrelationship or distinction in the decision-making process between the political government and the bureaucrats. Rather, it will be concentrating on which institution will be the one that holds the power of political government, including the power to decide the direction, the general strategy or the framework of major policies in their formulation. Furthermore, according to the Lisbon Treaty and the conferral principle on EU competence division<sup>107</sup>, EU institutions, even those which are responsible for government affairs, are not entitled to equal powers as their counterpart of the Member States governments. Hence, this analysis would mostly focus on those powers with government nature which are entrusted to the EU institutions by the Lisbon Treaty.

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<sup>103</sup> M.J.C.Vile. 95

<sup>104</sup> Duignan, B. *The executive Branch of the Federal Government: Purpose, Process, and People*. The Rosen Publishing Group. (2009). 22-23. In this book, political executives are defined as "Government officials who participate in the formulation and direction of government policy", including head of government, ministers and agency heads.

<sup>105</sup> M.J.C.Vile. 418

<sup>106</sup> Craig, P., European governance: Executive and administrative powers under the new constitutional settlement. *International Journal of Constitutional Law*. 3(2005), 410.

<sup>107</sup> Craig, P., & De Búrca, G. *EU law: text, cases, and materials*. Oxford University Press (2011), 75.

## 2.2 The European Commission as the government branch of European Union?

On 15 July 2014, the European Parliament elected Juncker, who had been nominated by the European Council as the Presidential candidate, to be the new President of European Commission. The whole Commission was then approved by the European Parliament, too. This was interpreted as a big moment for the politicalization of the European Commission since Juncker was campaigning in the 2014 election as the “Leading Candidate” (*Spitzenkandidat*) of the European People’s Party which maintained to be the biggest party in the European Parliament. His nomination by the European Council was also interpreted in large part as the European Council’s respect to the resolution passed by the Parliament before this election which appealed the European Council to nominate the leader of the biggest party as the presidential candidate.<sup>108</sup> Although some Member States leaders were not satisfied with this nomination, Juncker won the election in the Parliament with the support of 422 seats, 250 seats’ opposition and remaining 57seats abstentions or invalid votes among total 729 according to the rules of Lisbon Treaty.<sup>109</sup>

The European Commission was a *sui generis* government in the human history of governmental system considering its characteristics as “a multi-purpose supranational government with its own political leadership that is able to act relatively independently from national governments and councils of ministers”.<sup>110</sup> It has experienced fundamental evolutions ranging from structures, entrusted powers, and institutional roles to perform since the establishment of its predecessors, the High Authority. According to the Lisbon Treaty (Consolidated Version 2012), the Commission is supposed to be independent from the influence of the Member States but responsible to the European Parliament; the Commission has been allocated with

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<sup>108</sup> European Parliament resolution of 4 July 2013 on improving the practical arrangements for the holding of the European elections in 2014.

<sup>109</sup>European Parliament News: “Parliament elects Jean-Claude Juncker as Commission President”, see: <http://www.europarl.europa.eu/news/en/news-room/content/20140714IPR52341/html/Parliament-elects-Jean-Claude-Juncker-as-Commission-President> , Retrieved 2015-7-14

<sup>110</sup> Morten Egeberg, European Government(s): Executive Politics in Transition? *West European Politics*, 31(1-2).235

the tasks specifically to “*Promote the general interest of the Union...ensure the application of the Treaties...of Union law...exercise coordinating, government and management functions*”.<sup>111</sup> The Commission, as summarized by Paul Craig, enjoys the power of legislative, administrative, government and some judicial power, among them the power to budget and to foreign affairs forms the core part of the political government.<sup>112</sup> As in human history the first “*multi-purpose supranational government with its own political leadership that is able to act relatively independently from national governments and councils of ministers*”<sup>113</sup>, discussions on its nature, role, the source of its powers and its institutional restrictions have always been lingering around the Commission.

### 2.2.1 The rationale of the Commission’s government role

The Commission is entrusted with the government role by the Treaties. According to the latest amendment of founding Treaties, the Lisbon Treaty, the Commission is supposed to “*execute the budget and manage programs*” and “*exercise coordinating, executive and management functions, as laid down in the Treaties*”.<sup>114</sup> These provisions constitute the legal basis for the Commission to perform its government functions. As a core element of the government role, the Commission is expressly entrusted with the competence to “*implement the budget in cooperation with the Member States*”.<sup>115</sup> To be more specific, the Commission’s role and function vary from the rules of the Treaties. Article 17 defines basically four functions of the Commission: initiative, implementation of the Treaties, administration of the budget and the controlling/supervision the application of the Union Law.<sup>116</sup> Among these roles, the initiative power is in nature part of the legislative process, and the

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<sup>111</sup> Article 17 of TEU(Consolidated version 2012)

<sup>112</sup> Craig, P., & De Búrca, G. 36-39. See also, Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur(Eds.) *European Union Treaties: A Commentary: Treaty on European Union-Treaty on the Functioning of the European Union-Charter of Fundamental Rights of the European Union*, Beck/Hart (2015), 102.

<sup>113</sup> Egeberg, M. European government (s): Government politics in transition? *West European Politics*, 31(1-2), 2008, 235.

<sup>114</sup> Article 17, TEU.

<sup>115</sup> Article 317, TFEU.

<sup>116</sup> Geiger, R., Khan, D. E., & Kotzur, M. (Eds.). (2015). *European Union Treaties; a Commentary: Treaty on European Union: Treaty on the Functioning of the European Union*. Hart. 102-103.

competence to supervise the implementation of EU laws mainly concerns the relationship and correlations between the Union and the Member States in the multi-level governance structure. Therefore, in a narrow sense, the government function of the Commission mainly points to the implementation of EU laws and the administration of the budget.

One approach to understand the role and function of the Commission is the principal-agent analysis where the Member States delegate certain powers to the supranational institutions.<sup>117</sup> When problems confronted go beyond borders and thus it would be a rational choice to make to pool powers from national level to the supranational together.<sup>118</sup> Along with this assumption, the government system of dual level has been established in the EU between the Member States and the Union. In brief, the European Commission is responsible for government decision-makings relating to issues falling within its competences while the national governments or the national agencies are responsible for implementing and administrating such supranational decisions.<sup>119</sup> However, such pattern of “direct partnerships” between the Commission and national government and agencies also raises problems including the responsibility distribution and dual loyalty affairs.<sup>120</sup> This is a typical example that demonstrates a fundamental problem which extends through the integration process of Europe, the dilemma of institutional compatibility between the EU and national existing institutions. If the European Union institutions are to take the place of its national existing counterpart, it might be seen as too institutionally radical actions to advance the European integration. Those actions are possible to drive national partners to the edge of extinction and touch the sensitive nerve of the intergovernmentalists, the national sovereignty advocates and the parties or groups who have vested interest at stake under existing structures. Consequently it will surely draw drastic resistances. However, the more modest way to cooperate with current

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<sup>117</sup> Majone, G. (1996). The European Commission as Regulator. *Regulating Europe*, 69-71; Pollack, M. A. (1997). Delegation, agency, and agenda setting in the European Community. *International organization*, 51(01), 99-134.

<sup>118</sup> Tallberg, Jonas. "Executive politics." *The Handbook of European Union Politics*, New York, Sage (2007): 195-212. Other approaches, like Sociological institutionalism and Normative Democratic Theory, was also discussed in this essay.

<sup>119</sup> Egeberg, M. 252

<sup>120</sup> Deirader Curtin and Morten Egerberg, Tradition and Innovation: Europe's Accumulated Executive Order, *West European Politics*, Vol.31, No.4, (2008), 639-661.

institutions would also lead to questions including but not limited to the followings. First, there will be question about the division of responsibilities and accountability. Second, the civil servants will face dilemma when there are confrontations occurring between the Union and the national authorities.

## **2.2.2 The government division inside the European**

### **Commission**

Like many western democracies, the institution to implement laws of the EU could also be divided into two subfields, the political government and the neutral bureaucrats.<sup>121</sup> As introduced by Anchrit Wille as “a delicate triangle”, the policy-making process works briefly as follows: the head of cabinets comes up with policy proposals to their appointers—the commissioners with political background and role—then the commissioners would make decisions on such proposals and afterwards to be implemented and administrated by the civil servants (Directors General).<sup>122</sup> The political “hat” (the commissioners) constitutes one of the biggest differences between the Commissioners and other supranational bureaucrats and shelters the latter from outsiders’ criticisms on their elitism.<sup>123</sup> Simultaneously, the Kinnock Reform has drawn relatively clear-cut boundaries between politicians and the civil servants through the “horizontal and vertical coordination and steering mechanism”.<sup>124</sup> This reform has, on the one hand, reduced the political elements of the Commission bureaucrats while remained their high autonomy, and on the other hand, enhanced the political nature of the commissioners.<sup>125</sup> This result has actually transformed the Commission in a way more and more similar to the governmental cabinet of the Member States. An independent political leadership is at the same time increasingly visible for the Commission. It also causes the ripple effect to the

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<sup>121</sup> Wille, A. *The normalization of the European Commission: politics and bureaucracy in the EU government*. Oxford University Press. (2013) 4.

<sup>122</sup> Wille, A. 4.

<sup>123</sup> Trondal, Jarle. *An emergent European government order*. OUP Oxford, (2010). 34.

<sup>124</sup> Bauer, M. W., & Ege, J. Politicization within the European Commission’s bureaucracy. *International Review of Administrative Sciences*, 78(3), (2012), 407.

<sup>125</sup> Bauer, M. W., & Ege, J. 403-424.

legislative-government relationship in the EU and thus arise the problem of accountability. These following issues are then responded by Treaty amendments afterward. It will be discussed in the following part.

### **2.2.3 The evolution of the European Commission: from technocratic to political**

The European Commission was supposed to be an international bureaucracy composed of technocrats at the very early days and is thus named as “the civil service of the EU” and more of an agenda-setter.<sup>126</sup> Then its political nature has been gradually strengthened and plays a mixed role as a combination of policy proposal provider and also “a *political broker helping to bring about reliable compromises*”<sup>127</sup>. Or in a combinative way, the Commission is becoming an international bureaucracy with the task of coordinating interests of different parties.<sup>128</sup> Thus it is argued that the European Commission has been gradually transformed close to a “normal government” especially with a role in making political decisions and therefore the Commission should be in some way accountable to the public representative institutions.<sup>129130</sup> In chapter 3 of his book “*The Normalization of the European Commission: Politics and Bureaucracy in the EU government*”, Anchrit Wille analyzes the evolving role of commissioners from technocrats to politicians with various aspects including the presidentialization on relationship of commissioners in the European Commission, the politicization of the selection of commissioners, the commissioners’ government leadership and increasingly emerging dependence of the Commission on the Parliament.<sup>131</sup> At the same time, it is worth bearing in mind that different logics of

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<sup>126</sup> Crum, B. Legislative—Executive Relations in the EU. *JCMS: Journal of Common Market Studies*, 41(3), (2003), 377.

<sup>127</sup> Bauer, M. W., & Ege, J. 406

<sup>128</sup> Trondal, Jarle. 252.

<sup>129</sup> Wille. A. 2.

<sup>130</sup> Or to be specifically, this transformation happens at the year of 2005. After the year 2005, the clear division of tasks between the Commission and Member States is related to the increasingly political role of the Commission. See: Borrás, Susana. "The politics of the Lisbon Strategy: the changing role of the Commission." *West European Politics* 32.1 (2009): 97-118.

<sup>131</sup> Wille. A. 58-94



institutions apply to the administrative and the political government. For the administrative who is more of independence from party politics, the stability of institutional performance (to secure the administrative coherence) are particularly emphasized while for the political government, the principle of political accountability prevails. Because of this distinction, the politicians are expected to be accountable and controlled by the Parliament for their policy-decisions, and their performance needs to be reviewed periodically and the accountability usually lay to the specific political leader of the government group/college such as the President of the U.S. or the Prime Minister of the United Kingdom. The trend of the Commission's institutional evolution goes closer towards such distinctions in the national states. The President of the Commission is exercising significantly more power with his roles' both inside and outside the institution,<sup>132</sup> rendering that the President gains more outstanding authorities compared with his colleges.<sup>133</sup> Besides, the politicalization of commissioners' career background and experiences is also promoted. The prior political experience has been thought to be a requirement for qualification to become the commissioner while the professional background as technocrats is at the same time becoming less and less relevant.<sup>134</sup> This trend has been advanced to an unprecedented level in the newly-elected European Commission since the new president Juncker runs as the Leading Candidate (*Spitzenkandidat*) of the central-right European People's Party, resembling the candidate of Prime Minister/Chancellor under a parliamentary system. It drives the European Union politics in large scale to the era of personalization.

In a democratic polity, the power of a political nature is always supposed to be followed by the supervision and control of the representative institutions. The political government institution also welcomes to obtain the endorsement from the legislative branch to strengthen the democratic legitimacy of both itself and its policies. It is also the case with the relationship between the European Commission and the European Parliament. The commissioners are appointed with the approval from the Parliament, and they are also obliged to be present in the Parliament or certain committees to

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<sup>132</sup> Wille. A.61

<sup>133</sup> Bauer, M. W., & Ege, J. 406.

<sup>134</sup> Wille, A. The politicization of the EU Commission: democratic control and the dynamics of government selection. *International Review of Administrative Sciences*, 78(3), (2012)399-400.

explain and defend their policies.<sup>135</sup> According to the Lisbon Treaty, the European Parliament has the power to elect, to supervise and even censure the Commission. First, the Commission President shall be elected by majority of EP's component members; it is the same case with other commissioners.<sup>136</sup> Besides, the Commission shall also be responsible to the European Parliament and the latter could even cast the non-confidence vote to the Commission which would legally end up with the resign of the whole Commission.<sup>137</sup> Studies on the Commission-Parliament relationship also find that both institutions are very dependent on each other in the process of legislation because of the technical requirements, and their officials are sharing "sectoral, ideological and supranational" behavioral patterns.<sup>138</sup>

After all, the increase in powers and a more politicalized commission still fall within the scope of the rationale of the European integration in the field of public authority, namely, the delegation and control of powers from the Member States. As mentioned by Fabio Franchino, "*the essence of this game is the delegation of policy-making functions to supranational institutions and the establishment of control mechanisms*".<sup>139</sup> It is also connected to the goal set in Maastricht and also as an on-going process that the European Union should and will be a political union. After all, it would be incredible to think about a politically integrated Europe without the Commission of political nature considering the Commission's role and function stipulated by the Treaties that the Commission is supposed to "initiate the Union's annual and multiannual program" and in specific legislative procedure that it is the Commission that solely has the power to propose initiatives.<sup>140</sup> The political Union starts with political programs and agendas whose setter is inevitably political in nature.

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<sup>135</sup> Wille. A. 85-86.

<sup>136</sup> Art 17(7) TEU.

<sup>137</sup> Art. 17(8) TEU.

<sup>138</sup> Egeberg, Morten, Ase Gornitzka, and Jarle Trondal. A not so technocratic government? Everyday interaction between the European Parliament and the Commission. *West European Politics* 37.1 (2014): 1-18.

<sup>139</sup> Franchino, Fabio. Control of the Commission's Government Functions: Uncertainty, Conflict and Decision Rules. *European Union Politics* 1.1 (2000): 64.

<sup>140</sup> Magnette, P. (2003). European Governance and Civic Participation: Beyond Elitist Citizenship? *Political Studies*, 51(1), 154-160. ; Art 17(1), (2) TEU.

As a supranational institution that is expected to be independent from the Member States, the motor of integration and the guardian of the Treaties, European Commission has received more and more autonomy from the Member States, and it even to a great extent overcomes the shackles of territorialism<sup>141</sup> and develops a closer relationship with the Parliament in cooperation as well as policy endorsement.<sup>142</sup> However, the question remains that whether the fundamental power to decide political directions of a community, which is seen as “*the focal point of any political government, particularly when it comes to policy-making*”, belongs to the Commission.<sup>143</sup> That question is the starting point in the exploration of the political government in the European Union and only the answer to that question could pave the way for the review of accountability issue in this Union.

## 2.3 The European Council as the EU government?

### 2.3.1 The law and practice of the European Council

The European Council is recognized as one of the formal institutions in the EU only after the conclusion of Lisbon Treaty and powers entrusted have thus become explicitly created.<sup>144</sup> According to the Lisbon Treaty, the European Council is portrayed as the institution to “*provide the Union with the necessary impetus for its development and shall define the general political directions and priorities*”<sup>145</sup>. From

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<sup>141</sup> Egeberg, M. (2008). European government (s): Executive politics in transition? *West European Politics*, 31(1-2), 242-243.

<sup>142</sup> An empirical analysis finds that the behaviors of commissioners cannot be simply imaged relating to their own countries' interest or the general interests of the Union but mostly the “portfolio role”, supplemented with interest of Commission and Member States even the Party political role. See: Egeberg, M. (2006). Executive politics as usual: role behavior and conflict dimensions in the College of European Commissioners. *Journal of European Public Policy*, 13(1), 1-15.

<sup>143</sup> Wille. A. 91

<sup>144</sup> Monar, J. (2011). *The European Union's institutional balance of power after the Treaty of Lisbon*. In: Irusta, Enrique Banús (ed.) *The European Union after the Treaty of Lisbon: visions of leading policy-makers, academics and journalists*. Publications Office of the European Union, Luxembourg: Publications Office of the European Union, pp. 60-89. Theoretically at least, the legal consequence of European Council's becoming formal institutions of EU is that its measures will be possible to be faced with judicial reviews from the European Court of Justice since the latter, according to the Lisbon Treaty, is responsible “*on the interpretation of Union law or the validity of acts adopted by the institutions*”(Article 19, TEU). See also: Goebel, Roger J. "European Council after the Treaty of Lisbon, *Fordham Int'l LJ* 34 (2010): 1258.

<sup>145</sup> Article 15, TEU.

the perspective of legal interpretation, it is worth looking back on the evolution of terms and context of the legal texts in order to comprehensively grasp the afflux of meaning and intentions by the drafter. In the Maastricht Treaty, the tasks of European Council were established as “*necessary impetus for its development and shall define the general political guidelines*”.<sup>146</sup> The verbal transformation from “*general political guidelines*” to “*general political directions and priorities*” explicitly suggests the strengthening of European Council powers in more detailed decision-making and agenda-setting especially with regard to major political issues in EU.<sup>147</sup>

The European Council makes fundamental decisions on political issues in the EU. Although most ministerial issues might have been solved in the Council of the European Union consisting of respective ministers from the Member States, there are also issues which are interdepartmental in nature or issues which ministers have no sufficient authority to decide or conclude.<sup>148</sup> That would be the moment for the European Council and the heads of states or governments to come onto the stage, especially in the field of Common Foreign and Security Policy.<sup>149</sup> Besides this, Paul Craig further points out that the European Council plays also a central role in the revolutionary changes related to institutional structure, amendment to the treaties and certain policy strategies. It is the same with the EU external relations.<sup>150</sup> The European Council also decides on the application of joining the EU for membership. All these powers join to highlight its role as the top political actor in the EU.

The process of European Council’s power strengthening is rarely the consequence of Treaty amendments. On the contrary, the provisional evolution of Treaty should be better viewed as the result and textualization of institutional practices which happen to be finally accepted by all parties through the “run-in”

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<sup>146</sup> Article D, Maastricht Treaty.

<sup>147</sup> Goebel, Roger J. "European Council after the Treaty of Lisbon, *Fordham Int'l LJ* 34 (2010): 1256.

<sup>148</sup> Craig, P., & De Búrca, G. *EU law: text, cases, and materials*. Oxford University Press (2011), 48.

<sup>149</sup> Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur (Eds.) *European Union Treaties: A Commentary: Treaty on European Union-Treaty on the Functioning of the European Union-Charter of Fundamental Rights of the European Union*, Beck/Hart (2015), 88. See also: Tallberg, Jonas. Bargaining Power in the European Council. *JCMS: Journal of Common Market Studies* 46.3 (2008): 685-708.

<sup>150</sup> Craig, P., & De Búrca, G. *EU law: text, cases, and materials*. Oxford University Press (2011), 48-49.

period.<sup>151</sup> It might be interpreted as the result of reasonable institutional choice by institutions and the Member States of EU. First, as argued by certain constitutional law scholars, the democratic elements of the Union is based on the dual structure that gains its democratic legitimacy from the directly-elected European Parliament (and the European Commission to be elected by the European Parliament) and indirectly from the democratically elected heads of states or national governments by respective national voters (as the member of the European Council).<sup>152</sup> Before the Junker Commission, no Commission and its president have been elected relevantly with the result of European Parliament election and thus the democratic legitimacy of the European Council, whose members are those democratically-elected national leaders, appears to be relatively superior to that of the Commission. That explains the institutional practice to leave the highly-controversial and fundamentally political issues to the European Council. Besides, although the Commission President is also a member of the European Council, he has not his specific state and people to represent who at the same time works as backup forces of the Commission President. Therefore even if it is assigned to perform coordinating functions<sup>153</sup> and balance different interests, the Commission is not fully competent to achieve this goal considering its roles, influences and authority. Some explain the reason why the European Council became a necessity in the mid-1970s, and some of those reasons are still in process nowadays. It is argued that it is the lack of political leadership in the Union, the sensibility of certain political problems, and the stagnation of integration process that lead to the emergence and rising of the European Council.<sup>154</sup> His explanations, in fact, have indicated a deeper issue, that is, one institution should be entrusted with the powers it is competent to exercise; or in other words, the practical division of powers in most cases differentiates from what have been written on papers but, to large extent, depends on the institutional politics. In modern democratic societies, the strongest

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<sup>151</sup> Curtin, Deirdre. Challenging executive dominance in European democracy. *The Modern Law Review* 77.1 (2014): 7. See also: Johansson, Karl Magnus, and Jonas Tallberg. Explaining chief executive empowerment: EU summitry and domestic institutional change. *West European Politics* 33.2 (2010): 215.

<sup>152</sup> Von Bogdandy, Armin. "The European lesson for international democracy: the significance of Articles 9 to 12 EU Treaty for International Organizations." *European Journal of International Law* 23.2 (2012): 315-334.

<sup>153</sup> Article 17, Para 1, TEU.

<sup>154</sup> Werts, Jan, and TMC Asser Instituut. *The European Council*. London: John Harper Publishing, (2008), 19-20.

democratic basis usually helps the institution who enjoys that basis to have an edge in the institutional political games. Therefore when one institution is entrusted with powers beyond its capacity, inevitably other actors capable of winning out will take away /seizing that part of its power.

Other examples would occasionally provide confirmation from exactly the opposite perspective. First, in line with the Lisbon Treaty, the European Council is restricted “*shall not exercise legislative function*”.<sup>155</sup> However, the European Council may adopt legally binding decisions in the intergovernmental-approach areas as well as in the form of international agreements, inside or outside the EU framework. The decisions made by the European Council are well-known to be with strong political binding effect. It wouldn’t make big differences when those political decisions are to be implemented through legislation. In some cases decisions made by the European Council actually play a decisive role in the legislative procedures.<sup>156</sup> In one way, the conclusions of the European Council have actually been incorporated to be part of “*soft law*”, and thus constitute the *de facto* binding forces on other institutions;<sup>157</sup> some of them may further become directive in policy initiatives or agenda settings.<sup>158</sup> Most essential issues, in fact, are reaching to an agreement or compromise only with the involvement of the European Council.<sup>159</sup> Besides, since one of the European Council’s tasks is to provide the EU with political directions and priorities, they also formulate the framework and directive principles when other institutions are making decisions on policies of specific issues.<sup>160</sup> In other European Union areas, the European Council is exerting even more profound influence. In the area of Common Foreign and Security Policy, the Treaties stipulate that the European Council “*shall*

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<sup>155</sup> Art. 15 TEU.

<sup>156</sup> Werts, Jan, and TMC Asser Instituut. *The European Council*. London: John Harper Publishing, (2008), 28-29.

<sup>157</sup> Peterson, John, and Michael Shackleton. *The institutions of the European Union*. Oxford University Press, (2012) 45-46.

<sup>158</sup> Curtin, Deirdre, Herwig Hofmann, and Joana Mendes. Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda. *European Law Journal* 19.1 (2013): 2.

<sup>159</sup> Johansson, Karl Magnus, and Jonas Tallberg. Explaining chief executive empowerment: EU summitry and domestic institutional change. *West European Politics* 33.2 (2010): 209.

<sup>160</sup> Craig, P., & De Búrca, G. *EU law: text, cases, and materials*. Oxford University Press (2011), 49. See also: Peterson, John, and Elizabeth Bomberg. *Decision-making in the European Union*. Basingstoke: Macmillan, (1999). 33-34.

*identify the strategic interests and objectives of the Union*”<sup>161</sup>. There are also other fields where the European Council should act its respective roles from deciding the guiding principles of economic policies<sup>162</sup> to setting the guidelines for a common defense.<sup>163</sup> It is also the same with the decision of foreign policies. Compared with the community area, the Area of Common Foreign and Security Policy and the Area of Freedom, Security and Justice is more of an intergovernmental method rather than the supranational one; therefore in those areas the European Council still holds a dominant role even in the respective legal provisions.

### **2.3.2 The role and function of the European Council**

The European Council actually works as the “Black Box”, the political decision-making process, of the EU. Inputs from all sorts of stakeholders, like territorial interests, industry interest, the contradicted interest of the small Member States and the big Member States, are expected to be processed in it. With its spring-up in powers and decision-making process, many problems regarding the inequality between small and big Member States and its consistency in policies and performances emerge. Institutionalization of the European Council indicates outcomes from both sides. On the one hand, institutionalization helps to secure the consistency of institutional operation since permanent staff, normalized process of decision-making will be equipped with; on the other hand, institutionalization might lead to the synchronized institutionalization of inequalities between members, and also it might be confronted with questioning of its legitimacy and criticisms to its performance since citizens are very likely to hold different expectations between the periodical summit and the institution with explicitly listed objectives and tasks. The newly adopted reform to have a permanent and full-time president (some scholars name it as “semi-permanent”) of the European Council is part of the efforts in making institutional responses to such problems.

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<sup>161</sup> Article 22, TEU.

<sup>162</sup> Article 121, Para. 2 TFEU

<sup>163</sup> Article 42, Para.2 TEU

As described by Paul Craig, it has been long discussed whether there should be a single presidency (possibly the President of European Commission) or a “separate hat” structure with presidents from both the European Council and the European Commission.<sup>164</sup> According to the Lisbon Treaty, the President should chair the European Council, prepare the work agenda and try to achieve cohesion within the European Council. Outside the European Council, he should report to the European Parliament and also be on behalf of the European Council in certain occasions.<sup>165</sup> However, as for the external relations, it should be deduced that, considering the role of High Representative for Foreign Affairs and the Security Policy, the role of president of the European Council should be “*essentially of a representative character*” and shall step back from foreign affairs in the European Council.<sup>166</sup> However, the path to a permanent, full-time president is not a smooth one. The European Council has been criticized to have been controlled by big powers like Germany and France and thus voices from the small Member States have been ignored in spite of the principle of equality enshrined in the Lisbon Treaty.<sup>167</sup> That’s also why the proposal of a permanent, full-time presidency has been suggested by France and Germany with support from larger Member States while opposed by their small and medium partners.<sup>168</sup> The whole story of the battle has been stated in detail by Jan Werts.<sup>169</sup> Finally, the larger players win out and the structure resembling the Fifth Republic of France is adopted with the presidents of European Council and European Commission similar to the president and the premier in France.<sup>170</sup> Even so,

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<sup>164</sup> Craig, P., & De Búrca, G. *EU law: text, cases, and materials*. Oxford University Press (2011), 47-48.

<sup>165</sup> Article 15, Para. 6, TEU.

<sup>166</sup> Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur (Eds.) *European Union Treaties: A Commentary: Treaty on European Union-Treaty on the Functioning of the European Union-Charter of Fundamental Rights of the European Union*, Beck/Hart (2015), 89.

<sup>167</sup> Tallberg, Jonas. Bargaining Power in the European Council. *Journal of Common Market Studies* 46.3 (2008): 703.

<sup>168</sup> Werts, Jan, and TMC Asser Instituut. *The European Council*. London: John Harper Publishing, (2008), 148-149.

<sup>169</sup> Jan Werts listed the arguments supporting the proposal in his book “*The European Council*”, most of which is about the unsatisfying performance of rotating presidency, the enlargement and the efficiency of the European Council. See also: Dashwood, Alan, and Angus Johnston (2004). The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty. *Common Market Law Review* 41(6).1491.

<sup>170</sup> Werts, Jan, and TMC Asser Instituut. *The European Council*. London: John Harper Publishing, (2008), 154-155.



the existence of huge disagreement among the Member States could still be easily deduced through the vagueness in definition of the post.<sup>171</sup> With the (semi-) permanent president, the consistency of institutional operation and policy formulation process are expected to have been further strengthened. Another outcome would be that with the insurance of organizational process and personnel resulting from the institutionalization, the European Council could be more efficient in making arrangement for its policy plans and projects with the material and staff support and to advance their progress in carrying out its functions. Thereupon then, the European Council is likely to be approaching to specific issues and preparing more detailed proposals. Contrary to the Commission, The European Council appears to be increasingly more technocratic.

Among all the powers entrusted to the European Council, the power to form political guidelines and priorities is a crucial one. The composition of the European Council and the definition of roles indicate the position of European Council as the top-level institution, indispensable to the operation of such a supranational organization.<sup>172</sup> However, the descriptive terms used in the Treaties raise questions about their legal interpretation. What does the term “general political directions and priorities” refers to? What content may be covered in the scope of this term? How would the boundary (even not necessarily to be clear and definite) be drawn between this term used for the European Council and the power to initiative proposals which is one of the tasks assigned to the European Commission?

### **2.3.3 Essential questions about the European Council to be replied**

To distinguish legal terms is never merely a matter of linguistics or lexicology. The boundary between different legal terms is more of the outcome of interpretation and application in individual cases or in the long-term dynamical inter-institutional

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<sup>171</sup> De Waele, H., & Broeksteeg, H. (2012). Semi-Permanent European Council Presidency: Some Reflections on the Law and Early Practice, *The. Common Market L. Rev.*, 49, 1039-1074.

<sup>172</sup> Peterson, John, and Michael Shackleton. (2012). *The institutions of the European Union*. Oxford University Press. 57-58

interactions. In modern democracies where the separation of powers has been established, the right to initiate is usually performed by the government branch, even though the members of parliament, when reaching certain threshold, are also entitled to initiate, since the government branch (or the cabinet) is equipped with efficient resources, staff, tools and mechanisms to be the “generator of policies”. In one way, the power to initiate can be viewed as a procedural power with which the government branch proposes its legislative drafts or other policy proposals to the representative branch when they are obliged to get the approval from the latter. Usually the political parties list their ideas about the national political direction and major issues into the campaign manifesto and when majority voters favors the policies of certain parties and vote for that party/ union to be the governing party/union, they would propose those policies to the parliament for approval and then implementation. The European Union has exhibited another model of wielding initiating powers currently in practice. It must be clarified that it is the description of current institutional interactions (under the Lisbon Treaty) of the EU since in different period of time the dominants method of European integration (demonstrated by different treaties and practices) could be varying.<sup>173</sup> The pattern for the policy initiative in the EU, different from the national institutional design where it is the cabinet/government makes the political decisions and then proposes it to the parliament or congress, is that the body to make decisions and the body to propose is not the same one but separate. Let’s just assume that it is in line with the reality; then questions may arise with regard to this outline. **How specifically do the European Commission and the European Council interact with each other under such pattern and what is the possible rationale for this pattern? Is this pattern consonant with the trend of politicalization (or “Normalization”<sup>174</sup>) of the Commission and its presidency?**

**The first question is related to the government structure in EU.** Arguments have been richly given on who is the (central) government actor in the EU. Many assessments have been put forward. Some prefer the Commission since it is becoming more and more political and it gains more and more autonomy from national

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<sup>173</sup> Craig, Paul (eds). (2011). *The evolution of EU law*. Oxford University Press, 13-40.

<sup>174</sup> Wille, A. *The normalization of the European Commission: politics and bureaucracy in the EU government*. Oxford University Press. (2013).

governments.<sup>175</sup> Some address that the European Council is the core government branch in the EU since it is the real boss being sheltered by the complex institutional structures.<sup>176</sup> Considering that it appears not to be on the political schedule or not an urgent issue for the political leaders of EU Member States to integrate several government institutions to establish a single government institution instead,<sup>177</sup> it would be worth observing how the government power has been shared between institutions in practice and how the pattern, as it has been mentioned above, works with the separation of the power to initiate and the power to decide fundamentally political problems.

Jan Werts has laid out a rather comprehensive portrayal in relation to the interaction between the European Council and the European Commission in the policy-making process with impressively explanatory part to doubts surrounding the EU. He points out that as early as the old days of Luxemburg Compromise, the European Council has grasped “*the power to shape an initiative of the Commission at the earliest stage*”. Afterwards, although it has been written in Treaties that the Commission shall never take orders from any Member States, the European Council still delivers a large number of requests, ordering the Commission to provide its proposals on policies, some of them could be rather detailed.<sup>178</sup> In a way the European Council may have constituted a violation of the provisions of Treaties in a strict scope and belittled the importance of the European Commission, but that is not the whole story and there is a reason for the situation. The European Commission is fully aware of the situation that the nearest path to the realization of its own objectives

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<sup>175</sup> Including but not restricted to: Wille, A. (2013). *The normalization of the European Commission: Politics and bureaucracy in the EU executive*. OUP Oxford; Egeberg, M. (2008). European government (s): Executive politics in transition?. *West European Politics*, 31(1-2), 235-257; Wille, A. (2012). The politicization of the EU Commission: democratic control and the dynamics of executive selection. *International Review of Administrative Sciences*, 78(3), 383-402.

<sup>176</sup> For this idea, including but not restricted to: Craig, P., & De Búrca, G. (2011). *EU law: text, cases, and materials*. Oxford University Press. Werts, Jan, and TMC Asser Instituut. (2008). *The European Council*. London: John Harper Publishing; Curtin, D. (2014). Challenging executive dominance in European democracy. *The Modern Law Review*, 77(1), 1-32.; Goebel, R. J. (2010). The European Council after the Treaty of Lisbon. *Fordham Int'l LJ*, 34, 1251.

<sup>177</sup> Berman, G. A. (2005). Executive power in the new European constitution. *Int'l J. Const. L.*, 3, 440-447.

<sup>178</sup> Werts, Jan, and TMC Asser Instituut. (2008) *The European Council*. London: John Harper Publishing, 46-47. See also: Curtin, D. (2009). *Executive power of the European Union: law, practices, and the living constitution* (Vol. 12). Collected Courses of the Acad. Oxford University Press, 4.

is the one that goes through the European Council since no policies, especially those sensitive and major ones, would be adopted without European Council's smiling on them.<sup>179</sup> If proposals have been endorsed by the European Council, it is very likely to pass<sup>180</sup> in the following legislative procedures since members of the Council of European Union and the Parliament usually have rather close relations with their national governments. For instance, the President of European Parliament Martin Schulz is a senior member of the German Social Democratic Party that is a governing partner of German Chancellor Angela Merkel in the Grand Coalition government. The measures or policies of the Commission, once received the support from the European Council, would be very likely to be better and positively implemented rather than being laid aside or blocked by national institutions since the member of European Council is at the same time wearing another hat as the top political leader of national state government.

The European Commission is strangely pleased to accept the erosion of its procedural power to initiate since it has been paid off with the actual reinforcement of its political position; they may be even delightful to find the other way round to realize its own political agenda through the European Council.<sup>181</sup> This tactic is named as "Fan Ke Wei Zhu (successfully reverse the positions of the host and the guest)" in the traditional Chinese wisdom the Thirty-Six Stratagems. Werts mentioned the "manipulation" of the Commission over the European Council could be to the extent that they successfully "smuggle" their priority issues into the final conclusion of the European Council.<sup>182</sup> Besides, in areas where it is the Member States and intergovernmentalism that should be dominant, the Commission also finds its entry into these areas by taking the advantages of the proposals requested by the European Council.<sup>183</sup> It is interesting that the reality comes the other way compared with what

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<sup>179</sup> Craig, P. (2005). European governance: Executive and administrative powers under the new constitutional settlement. *Int'l J. Const. L.*, 3, 427-431.

<sup>180</sup> Werts, Jan, and TMC Asser Instituut.(2008). *The European Council*. London: John Harper Publishing, 52.

<sup>181</sup> Werts, Jan, and TMC Asser Instituut.(2008). *The European Council*. London: John Harper Publishing, 53.

<sup>182</sup> Werts, Jan, and TMC Asser Instituut.(2008). *The European Council*. London: John Harper Publishing, 53.

<sup>183</sup> Werts, Jan, and TMC Asser Instituut.(2008). *The European Council*. London: John Harper Publishing, 47.

is written in the Treaties. The power to initiate, which has been intended to be reserved only to the Commission, is now shared by the European Council and the Commission, and the European Council has actually played important roles in the legislative process notwithstanding the preclusion of its legislative function in the Lisbon Treaty, not to mention the entry into other fields of the supranational institution, the Commission. Besides, certain justification from the perspective of rational choice could be made to the approach adopted by the Commission in advancing its cause. Theories to interpret the European Integration usually relate to the institutionalism and liberal intergovernmentalism and their respective improved versions. Both resort to the rational choice of group or institutions, whether the rational choice of the bureaucrats, multinational companies or the rational choice of member states.<sup>184</sup> The Rational Choice Theory (mostly the cost-benefit mathematics) may also be applicable to the analysis of the contradictions between the written law (the Treaties) and the practice with regard to the function of the Commission. According to the Treaties, the European Commission is positioned as the “Motor of integration”, the “Guardian of the Treaties” and the “executive body of the EU”.<sup>185</sup> Although the European Commission is such a *sui generis* institution that merely exists in the European Union as one “*separate government body*” to be on the watch for the general European interests,<sup>186</sup> its actual authority and influence are still confronted with doubts and challenges. First and the most, the European Commission has a relatively weaker democratic basis. Compared with heads of states or governments who are widely and in a long-term history accepted as the democratic representative of the people of that nation, the European Parliament, to whom and the by whom the European Commission is elected and responsible, is still brought by a secondary-order election and not treated by the EU citizens in the same rank as their national elections.<sup>187</sup> The inferior standing of the European Parliament to the national political leaders results in the inferiority of the European Commission to the European Council. Besides, the institutionalization of the European Council and the adoption of

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<sup>184</sup> Craig, P., & De Búrca, G. (Eds.). (2011). *The evolution of EU law*. OUP Oxford, 13-40.

<sup>185</sup> Sabathil, G., Joos, K., & Kessler, B. (2008). *The European Commission: An Essential Guide to the Institution, the Procedures and the Policies*. Kogan Page Publishers. 6-8.

<sup>186</sup> Egeberg, M. (Ed.). (2006). *Multilevel union administration: the transformation of executive politics in Europe*. Springer. 31.

<sup>187</sup> Craig, P., & De Búrca, G. (Eds.). (2011). *The evolution of EU law*. OUP Oxford, 13-40.

European Council (semi-) Presidency also give rise to pressures on the European Commission, like the case of the foundation of the European Financial Stability Facility (EFSF) mentioned by scholars as a proof where the Commission and the European Council play significantly different roles.<sup>188</sup> Furthermore, some vital regulatory powers have also been detached from the European Commission to be independently entrusted to Union agencies. The typical case is that the power to make monetary policies has been transferred to the independent European Central Bank, free of orders from the Commission.<sup>189</sup>

The overwhelming unbalance of power between the Commission and the European Council makes it appear be a reasonable option for the Commission to quit the way of confrontation against the European Council (at least publicly). *If you cannot lick him, join him*. The Commission is in some sense a loyal follower of this famous idiom. Now the Commission President is also a formal member of the European Council<sup>190</sup> and the European Council becomes the forum for the Commission when the latter may seek endorsement on its proposals from the Member States.<sup>191</sup> For the Commission, it may be seen as a profitable strategy to choose to cooperate with the European Council to share the power to initiative. The power to initiative solely belonging to the Commission according to the Treaties can be nothing the same with the power to initiative that the Commission shares with the European Council. For the former, it is merely a procedural power with high risks of its proposals being refused or amended in the legislative procedure by the Council or the Parliament.<sup>192</sup> However, the power to initiatives shared by the European Council and the Commission is the “2.0 version” of it or the “initiating power +”. It is not an

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<sup>188</sup> Bauer, M. W., & Ege, J. (2012). Politicization within the European Commission's bureaucracy. *International Review of Administrative Sciences*, 78(3), 405.

<sup>189</sup> Tallberg, J. (2007). *Executive politics. The handbook of European Union politics*, 195-212.

<sup>190</sup> Article 15, Para. 2, TEU.

<sup>191</sup> Craig, P., & De Búrca, G. (2011). *EU law: text, cases, and materials*. Oxford University Press, 49.

<sup>192</sup> Doreen Allerkamp mentioned that in the European Council, only 10% recommendations from the Commission become the final initiatives. It may be deduced if the Commission exercises the initiatives alone without consultation from other institutions especially the European Council, more deliberately may it acts, there might be still some initiatives being refused or amended. See: Allerkamp, D. (2010). Who sets the agenda. How the European Council and the team presidencies are undermining the commission's prerogative'. *Standing Group on European Union Politics of the European Consortium for Political Research in Porto, Portugal*, June 24-26. Porto (2010). 10.

exaggeration to say that such initiatives are the initiatives with much lower risks being overruled or substantially amended. Furthermore, the European Council is not the only “vulture” to tussle with the Commission for this power, the Parliament and the Council are also the potential “predators”. The Parliament may come to an agreement with the Council with regard to legislation contents they favor and then request the Commission to propose initiatives to them in order to be formally in accordance with the procedural provisions of the Treaties.<sup>193</sup> The benefits the Commission obtains at the expense of solely initiating power, except the extra endorsement from the European Council, also include the power to initiate in other areas shared by the European Council.<sup>194</sup> For both the Commission and the European Council, the current pattern of *de facto* sharing of initiating power brings benefits to both of them. It may even be defended as the flexible and necessary amendments in implementing the Treaties since certain designs on papers are not likely to be directly applied to the reality. However, in spite of those actual successes, the approach of the Commission to realize its political agendas would meanwhile lead to the cost for the Commission to pay. As mentioned above, the small Member States are frequently in disadvantageous situations in the decision-makings in the European Council; therefore, when the important initiatives is in fact receiving a prior review in the European Council before the Commission officially propose them to the Council and the European Parliament, that character of decision-makings in the European Council will be inevitably inserted to those initiatives. Therefore the official initiatives proposed by the Commission in many cases would be shaped by the element of “the-big-prevails-the-small” from the *de facto* prior review made by the European Council. The cost for the Commission to pay is what they proposed deviates from the institutional objectives that they are assigned to guard and achieve. That raises the risk of the Commission’s failure in performing its institutional role in balancing different interests within the EU and promoting the general interests of the Europe within the EU structure. In that case, balance of interests in the EU decision-making process is to

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<sup>193</sup> Jacqué, J. P. (2004). The principle of institutional balance, *Common Market Law Review*, 41(2), 388-391.

<sup>194</sup> Börzel, T. (2010). European governance: negotiation and competition in the shadow of hierarchy. *JCMS: Journal of Common Market Studies*, 48(2), 206. It is similar case in the Home and Justice Area, see: Curtin, D. (2014). Challenging executive dominance in European democracy. *The Modern Law Review*, 77(1), 7.

be in great crisis when even the Commission chooses to step back from that responsibility.

**Second, is such pattern compatible with the current trend of the Commission's politicalization?** The idea of a politicalized Commission, which primarily relates to the democratic election of the Commission and its President, is not popular among the national leaders. The European Council has worked as the forum deciding constitutional directions and defining constitutional frameworks for the European integration since 1975<sup>195</sup> and the European Council finally accept the idea of a Commission with (direct) democratic basis for the purpose of strengthening the democratic legitimacy of the European Union.<sup>196</sup> It is further enhanced during the 2014 European Commission's election. Many scholars see, or try to interpret, this Commission election as a symbolic progress in the path towards politicalization which have started earlier and also as the prophecy of an era when the Commission becomes the core government being responsible to the European Parliament in EU.<sup>197</sup> However, this trend so far has not fundamentally shaken the existing power structure in EU: the European Council is still the dominant player and plays a central role in the EU multi-level governance; the European Council, especially the Euro Zone Summit, has been tremendously reinforced with the financial crisis at stake since 2008 and operates as the "economic government" of the European Union.<sup>198</sup> The pattern of shared initiating power also faces no significant alternations. The Commission may find itself in great embarrassment: while being more and more politicalized and receiving stronger parliamentary control in accordance with the amendments to the Treaties,<sup>199</sup> the Commission acts growingly like the "Staff Group"

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<sup>195</sup> Bulmer, S. J. (1996). The European Council and the Council of the European Union: shapers of a European confederation. *Publius: The Journal of Federalism*, 26(4), 17-42.

<sup>196</sup> Craig, P., & De Búrca, G. (Eds.). (2011). *The evolution of EU law*. OUP Oxford. 79-80.

<sup>197</sup> See: Wille, A. (2012). The politicization of the EU Commission: democratic control and the dynamics of executive selection. *International Review of Administrative Sciences*, 78(3), 383-402; Wille, A. (2013). *The normalization of the European Commission: Politics and bureaucracy in the EU executive*. OUP Oxford; Egeberg, M. (2008). European government (s): Executive politics in transition? *West European Politics*, 31(1-2), 235-257.

<sup>198</sup> Heffler, C., Kreilinger, V., Rozenberg, O., & Wessels, W. (2013). National parliaments: Their emerging control over the European council. *Notre Europe Policy Paper*, 89. 3.

<sup>199</sup> Wille, A. (2013). *The normalization of the European Commission: Politics and bureaucracy in the EU executive*. OUP Oxford 91.



of the European Council to takes orders from the European Council and provides the latter with policy recommendations or as the machine of policy draft. The public is also divided and self-contradicted with this issue. In a survey, both ideas are supported by a majority that the Commission should be the one who decides the policy while it shall not seek the supreme power nor become a European Government.<sup>200</sup> It is worth noticing that there is a distinctive break between the nature of politicalization and the role of deciding political directions. However, many people have mistakenly regarded the idea “a politicalized institution” and “the institution capable of deciding political directions” as the same. They welcome the enhanced role of the Parliament in the appointment of the Commission,<sup>201</sup> keen on more and more politicians to be selected to the Commission College<sup>202</sup>, and they think the Commission would be the new European Government making fundamental political decisions naturally. However, if we look cautiously into the so-called politicalization, we would be likely to notice that the politicalization only happens to the institutional personnel, structure and the appointment procedure, not the politicalization of functions and powers. The politicalization of appointment and composition of the Commission does not necessarily produce a Commission responsible for deciding the political directions. A similar case would be that in China the national President and the Premier (the State Council) are also elected by the People’s National Congress which is defined as the body with the Supreme Power according to the Constitution.<sup>203</sup> However, it is common sense in China that the Political Bureau actually enjoys the Supreme Power to decide the political directions and fundamental issues of China. For the European Union, the politicalization of the European Council in the appointment procedure and composition might be superficially conducive to its establishment and consolidation of democratic legitimacy to a certain extent. However, some possible risks may also be assumed.

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<sup>200</sup> Kassim, H., Peterson, J., Bauer, M. W., Connolly, S., Dehousse, R., Hooghe, L., & Thompson, A. (2013). *The European Commission of the twenty-first century*. OUP Oxford. 133-135.

<sup>201</sup> Wille, A. (2013). *The normalization of the European Commission: Politics and bureaucracy in the EU executive*. OUP Oxford. 91.

<sup>202</sup> Egeberg, M. (2008). European government (s): Executive politics in transition? *West European Politics*, 31(1-2). 245.

<sup>203</sup> Article 57 of the Constitution of The People’s Republic of China: “The National People’s Congress of the People’s Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People’s Congress”.

First, the current pattern of initiating power shared between the European Council and the European Commission is based on the mutual will of cooperation as a rational choice. However this constitutes significant violation of the Treaties as the constitutional law of the European Union and is thus also incompatible with the Rule of Law principle not only in the Treaties but also as a common constitutional tradition to all the Member States because the Treaties expressly declare the sole control of the initiative by the Commission. Legal consequence would emerge when this violation of the Treaty rules is put forward to the Court. It is still questionable about the stability and sustainability of this structure since the conflicts may arise between them and then impose challenges to that cooperation<sup>204</sup>, the distribution of political and legal responsibilities between the Commission and the European Council with regard to power to initiative would also draw disputes. Second, to make political decisions and negotiations on the highest-level also have disadvantages, including the “*irretrievable character of mistakes; limits to the nature and quantity of decisions to be taken...miscalculations or tactical errors occur and cannot, in most cases, be corrected*”.<sup>205</sup> Third, the dissatisfactions even angers with the European Union among the EU citizens might be far worse when the voters find or feel someday that they are to some extent cheated by the European politicians in that, on one hand, the European politicians appeal to voters to vote in the Parliament elections while on the other hand, the European Council may choose someone else (not the majority/biggest party leader in the European Parliament) to nominate as the president candidate as well as that the Commission and its President turn out to be playing rather subordinate roles. That could cause damages to the political credibility of the European integration and endanger popular support for future integration, especially under the circumstances of the springing up of Euro-skeptical forces.

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<sup>204</sup> The possible conflicts have been assessed between the both President and the institutions they represent under the “double-hat” structure. See: Werts, Jan, and TMC Asser Instituut. (2008). *The European Council*. London: John Harper Publishing.172-175.

<sup>205</sup> Peterson, John, and Michael Shackleton. (2012) *The institutions of the European Union*. Oxford University Press. 54-55.

## 2.4 Conclusion

The intension and extension of legal and political terms vary with the times and political practices. After the establishment of modern public governance model, the government mainly represents the political policy making and political directions<sup>206</sup> with the administrative part allocated to the civil servant and regulatory functions to the (semi-)independent agencies. Under the nation states context, it points to the cabinet ministers and prime ministers (or the president in the presidential polity). In the European Union, a new model of the divided government has been established<sup>207</sup> and no fundamental changes so far have happened to such structure: the national governments hold the “high-level” government power regarding political and legislative agenda through the European Council; while the supranational institution, the European Commission exercises government powers relating to the day-to-day social-economic policies and inter market regulation.<sup>208</sup> The European integration is a process without clear and definite destination or blueprint but with subtle or visible alterations; the consequence of that vagueness and uncertainty might be that its institutions are possible to evolve and be modified with regard to different considerations under various ideas dominating different stage of the European integration. As for the Commission, it has been an institution with bureaucrats and politicians, as the supranational political actors as well as regulatory roles.<sup>209</sup> The Treaties have empowered the Commission with rather superior tasks while beyond its capacity to achieve. Then the question arises about why, as the “master of the Treaties”, would the Member States agree to entrust such tasks and roles to the Commission while then make those authorization turn out to be merely nominal? Fundamentally it is a question that requires answers with the review of the international *Realpolitik* which goes beyond the content of this article. The European Council takes over those functions which is failed to be accomplished by the

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<sup>206</sup> Wille, A. (2013). *The normalization of the European Commission: Politics and bureaucracy in the EU executive*. OUP Oxford. 91.

<sup>207</sup> Craig, P., & De Búrca, G. (2011). *EU law: text, cases, and materials*. Oxford University Press. 50.

<sup>208</sup> Hix, S. (1997). Executive Selection in the European Union: Does the Commission President Investiture Procedure Reduce the Democratic Deficit?. *European Integration online Papers (EIoP)*, 1. 2.

<sup>209</sup> Trondal, J. (2010). *An emergent European executive order*. Oxford University Press. 17-24.

Commission. The European Council frequently comes to the rescue when the EU is faced with major problems that cannot be solved by the Commission or even the Council, like the disastrous situation faced by the EU after the vetoed referendum in 2005 in France and Netherlands where people said no to the Treaty establishing a Constitution for Europe; it is also the case with the rescue action with the Euro-zone Summit after the crisis in Greece and the several Member States.<sup>210</sup> However, while the European Council becomes more and more active in the assurance of the stability and continuity of the European integration, it also commits encroachment to the power of other institutions and debases their authorities, especially the Commission.<sup>211</sup> The operational pattern between the Commission and the European Council may be justified for its mutual-interests to them. However, it could also cause new problems when actions are taken to respond to existing problems. Once the Commission becomes the “Staff Group”, it would possibly lose its independence as the supranational institutions guarding the general interests of European Union but becomes the implementing body of the European Council which is the forum for Member States’ political games<sup>212</sup> rather for their national interests than the common Community interests with a long-term perspective.<sup>213</sup> This evolution also brings about repercussions to the domestic politics. A case study on the institutional changes in Sweden and several EU Member States reveals that the enhanced decisive role of European Council in the EU decision-making consequences the empowerment in a domestic regime with more discretionary power and less parliamentary control to the national government branches.<sup>214</sup>

After the Lisbon Treaty, the European Council finally receives the official recognition as an institution of the EU and its own (semi-) permanent President. Many

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<sup>210</sup> Curtin, D. (2014). Challenging executive dominance in European democracy. *The Modern Law Review*, 77(1). 7.

<sup>211</sup> Dawson, M., & Witte, F. (2013). Constitutional Balance in the EU after the Euro - Crisis. *The Modern Law Review*, 76(5). 830.

<sup>212</sup> Tallberg, J. (2008). Bargaining power in the European Council. *Journal of Common Market Studies*, 46(3), 685-708.

<sup>213</sup> Dawson, M., & Witte, F. (2013). Constitutional Balance in the EU after the Euro - Crisis. *The Modern Law Review*, 76(5). 830..

<sup>214</sup> Johansson, K. M., & Tallberg, J. (2010). Explaining chief executive empowerment: EU summitry and domestic institutional change. *West European Politics*, 33(2), 208-236.

factors may jointly contribute to an emerging dominant European Council as the “Shadow Warriors”. It emerges because of the conditions which call for an institution to be created to perform those functions. In an age of nation-states, even it has been more and more fragmentized and under erosion by the political authorities’ reorganization in the supranational and local (the “Land” in Germany as an example) level, sovereign states is still the master of international politics and regional integrations, particularly when considering the basic fact that even the EU is based on the sovereign transferred by the national states. The supranational bodies are still in lack of full-fledged legitimacy and authority to decide controversial and sensitive issues. The institutionalization of Member States Summit is merely the result of that embarrassing situation the Commission is plunged. A great crisis faced by the EU forms the catalyst to accelerate this evolution.

Through decades of years’ evolution and Treaties’ amendments, the European Council appears to be emerging as the super-power institutions within the European Union. It takes the power to initiative from the Commission and turns the latter to be his “servitor”.<sup>215</sup> It is entitled to the role deciding the supreme constitutional directions and enjoying the reserved powers in the CFSP areas.<sup>216</sup> It is also argued to have “*shifted from ‘economic governance’ in the sense of a rules-based normative system to ‘economic government’ entailing discretionary government decisions*”,<sup>217</sup> not to mention the fundamental issues it addresses which can be handled by neither the Council nor the Commission. To put all these into consideration, the conclusion may be reached that it is the European Council that plays the role of the supreme political government at the EU level, if one counterpart of the cabinet in the domestic politics could be found in the EU. However, different from the domestic governance, the EU is composed of 28 (soon 27) sovereign states even if significant part of their sovereignty has been transferred to the supranational institutions. Therefore the majoritarian rule is not supposed to apply to every institution in the decision-making

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<sup>215</sup> Allerkamp, D. (2010). Who sets the agenda? How the European Council and the team presidencies are undermining the commission’s prerogative’. *Standing Group on European Union Politics of the European Consortium for Political Research in Porto, Portugal*, June 24-26. 10-12.

<sup>216</sup> Monar, Jörg. (2010). The European Union’s institutional balance of power after the Treaty of Lisbon. *The European Union after the Treaty of Lisbon: visions of leading policy-makers, academics and journalists*: 60-89.

<sup>217</sup> Curtin, D. (2014). Challenging executive dominance in European democracy. *The Modern Law Review*, 77(1). 6.

process and there should be certain institutions playing the role of balancing the interests of different member states especially the special attend to the interest of small member states since they are vulnerable to lose out in the international political games. However, the European Commission which is responsible for that mission has deviated from its institutional role even though it tactically finds a path to advance its political agenda through the substantial sharing of its power to initiative with the European Council. The cost it pays, that it fails to impartially balance different interests in the Union, is likely to have raised challenges and instability to the EU architecture by exposing the interests of small member states to be neglected or even encroached by the big member states.

# Chapter 3. The distribution of

## legislative powers among EU

### institutions

In states conceived in constitutionalism, parliaments perform both as the representative and the legislative body, providing the political establishment with democratic legitimacy. Whether in the states of presidential or parliamentary system/dominance, it is the parliament that exercises democratic control over the government.<sup>218</sup> Currently under the Lisbon Treaty, take the ordinary legislative procedure which has been the most frequent decision-making mechanism as an example, the major actors in the legislative process include the European Commission who has been granted solely with power to initiate, the Council and the European Parliament with powers to review and pass/veto the legislative acts.<sup>219</sup> In this sense, the European Parliament and the Council have thus been generally titled with the role of legislative bodies in the European Union just as two chambers in the nation states since they have been entrusted in the Treaties with legislative and budgetary functions.<sup>220</sup> Furthermore, the wording “Jointly” in the Treaties describing the relationship between the European Parliament and the Council in legislative process also indicates that the legislative power is supposed to be shared rather than monopolized by one party and both institutions work in cooperative way rather than confrontation. Besides, in the Lisbon Treaty, national parliaments have also been

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<sup>218</sup> Robert Grzeszczak: *Progress in European integration process and its consequences for parliamentary democracy*, in Bodnar, A., Kowalski, M., Raible, K., & Schorkopf, F. (Eds.). (2003). *The emerging constitutional law of the European Union: German and Polish perspectives* (Vol. 163). Springer Science & Business Media. 118-119.

<sup>219</sup> Art. 293-299, TFEU.

<sup>220</sup> Art. 14 and Art. 16 of the TEU. Craig, P. (2010). *The Lisbon Treaty: law, politics, and treaty reform*. OUP Oxford. 36-39.

granted with unprecedented role and influence. They have been endorsed with a legal basis in participating Union decision-making procedures in mainly six areas of issues<sup>221</sup>, especially in the legislative procedures and with regard to the observance of the principle of subsidiarity.<sup>222</sup> It is predictable and have somewhat been verified by the agreement between the Union and the UK that the role of national parliaments will be further strengthened<sup>223</sup> whether through the amendment to the Treaties or through institutional practices. Therefore for the purpose of cautious observation on the legislative power in the Union, the role of national parliaments is better to be assessed even if their participation in the EU decision-making is currently restricted to be rather preliminary.

### **3. 1 the European Parliament**

#### **3.1.1 The institutional framework of the European Parliament**

According to the Lisbon Treaty, the European Parliament should be composed of directly elected members whose numbers shall be degressively proportional and even the smallest Member State should have no less than 6 MEPs.<sup>224</sup> More detailed explanation of this distribution mechanism was defined by the parliament resolution that *“the principle of degressive proportionality means that the ratio between the population and the number of seats of each Member States must vary in relation to their respective populations in such a way that each Member from a more populous Member State represents more citizens than each Member from a less populous Member State and conversely, but also that no less populous Member State has more*

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<sup>221</sup> According to Article 12 TEU, the national parliaments will participate in the legislative process, the respect of principle of subsidiarity, in the area of freedom, security and justice, in the revision of Treaties, accession process of the Union and the inter-parliamentary cooperation.

<sup>222</sup> See Protocol 1 and Protocol 2 of the Lisbon Treaty.

<sup>223</sup> See: *Letter by President Donald Tusk to the Member of the European Council on his proposal for a new settlement for the United Kingdom within the European Union*, <http://www.consilium.europa.eu/en/press/press-releases/2016/02/02-letter-tusk-proposal-new-settlement-uk/?from=groupmessage&isappinstalled=0>, time for last visit: February 26, 2016.

<sup>224</sup> Art. 14 TEU.



*seats than a more populous Member State*".<sup>225</sup> For the term 2014-2019, the Parliament has Germany with the most MEPs (96 seats) while Estonia, Cyprus, Luxembourg and Malta with the least (6 seats). This mechanism provides special protection to the smallest Member States with the threshold compared with the purely proportional representation solely based on the respective populations of the Member States and also takes the balance between big Member States into consideration.

### 3.1.2 The institutional evolution of the European Parliament

In the very beginning, the European Parliament was merely a rather marginalized institution named "Common Assembly" with 78 members from 6 founding states of European Coal and Steel Community in 1952. It had the power to advise, to scrutiny and even to dismiss the High Authority in theory, but it had no significant say in the adoption of decisions and policies.<sup>226</sup> Afterwards, the Budgetary Treaty entrusted the Parliament with the power to veto the budgetary as well as control over the budgetary implementation. The members have been directly elected since 1979 after twenty more years' appointment from the national parliaments.<sup>227</sup> As for the legislative procedure, the SEA in 1987 introduced the second reading procedure but the Council and the Commission held the last say in the adoption of legislation<sup>228</sup>. With this procedure, although the Parliament only had the power to publish their opinions, nonetheless it was able to delay the legislation in accordance with the interpretation from the court by refusing to release one opinion.<sup>229</sup> The Parliament also took strategies to maximize its power and influence. Being conscious of the embarrassing situation that its opinions may be ignored by other institutions, the Parliament focused on the content of the opinions and played as a constructive

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<sup>225</sup> Motion for a European Parliament Resolution, see: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2007-0351+0+DOC+XML+V0//EN>, access time: March 10<sup>th</sup>, 2017.

<sup>226</sup> Cini, M. & Borragán, N. P. S. (2007). *European Union Politics* (2<sup>nd</sup> Edition), Oxford University Press.175-176

<sup>227</sup> Chalmers, D., Davies, G., & Monti, G. (2010). *European Union law: cases and materials*. Cambridge University Press.81

<sup>228</sup> Article 149 of SEA

<sup>229</sup> Scully, R. M. (1997). The European parliament and the co-decision procedure: A reassessment. *The Journal of legislative studies*, 3(3), 60.

partner in order to gain the support from the member of the Council<sup>230</sup>. Scholars also argued that under the co-operation procedure if the European Parliament stood beside the Commission on a proposal it would be more likely to be accepted by the Council rather than being amended since only Qualified Majority Voting was needed to accept but unanimity to amend, such decision-making procedure design made the Parliament the role as a “conditional agenda setter”.<sup>231</sup>

The Maastricht Treaty brought a great leap to the power and influence of the European Parliament and some balances were thus achieved between the Parliament and the Council although the latter was still “more balanced”. The third legislative procedure, the co-decision procedure was established that if the differences still existed after the second reading, a conciliation committee should be established with members from the Parliament and the Council. Under this procedure the Council was a little more equal to the Parliament because the Council still held the right to the final decision<sup>232</sup>. What was more interesting in the Maastricht Treaty was that the candidate of Commission president shall be nominated by the Member States after consultation with the Parliament and to be subject as a body to the approval voting from the Parliament. The Parliament had no power to decide on the solo candidate of the president but merely to vote of an entire package. As for the president candidate solely, the Parliament only had the power to be consulted<sup>233</sup>. Besides, the Parliament had no power to remove certain individual Commissioners<sup>234</sup>. However, the Parliament strategically gained the de facto power to decide the candidate for the President of Commission through its own interpretation of the “consulting of Parliament” regulated in the Treaty with investiture procedure to request the candidate to make a report to the Parliament and asked the President of the Parliament (the Speaker) to negotiate with the Member States if the Parliament would not like to

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<sup>230</sup> Selck, T. J., & Steunenberg, B. (2004). Between Power and Luck The European Parliament in the EU Legislative Process. *European Union Politics*, 5(1), 25-46

<sup>231</sup> Tsebelis, G. (1994). The power of the European Parliament as a conditional agenda setter. *American Political Science Review*, 88(01), 128-142

<sup>232</sup> Article 189(b) of the Maastricht Treaty.[http://europa.eu/eu-law/decision-making/treaties/pdf/treaty\\_on\\_european\\_union/treaty\\_on\\_european\\_union\\_en.pdf](http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf)

<sup>233</sup> Article 158 of the Maastricht Treaty

<sup>234</sup> Lenaerts, K., & Verhoeven, A.(2002) “Institutional balance as a guarantee for democracy in EU governance” in Joerges and Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, 63

accept the candidate. This procedure had created the momentum in front of the public eyes and thus to “force” the candidate and other institutions to respect and accept the will of the Parliament even if it was not legally binding. So it was the case in the practice with the appointment of Jacques Delors<sup>235</sup>. With regard to the non-confidence of individual Commissioner, the Parliament would pressure the President Commissioner to dismiss particular Commissioner opposed by the Parliament under certain conditions.<sup>236</sup> However, this design was still far from the parliamentary system as the power of the EP was still unbalanced that even when the EP successfully forced President Santer to resign because just in this victory the EP showed that it had only the “negative power”(the power to dismissal) and had no “positive power”(the power to appoint)<sup>237</sup> as the power and influence of the EP in the nominating process was not legally binding and thus the EP had no strength to perform toughly but more or less in an modest way.

Then in the Treaty of Amsterdam, this rule was replaced by the following, “The governments of the Member States shall nominate by common accord the person they intend to appoint as President of the Commission; the nomination shall be approved by the European Parliament.” This new amendment was more of a confirmation of the practices in the form of written law than a significant system design. Another power extension of the EP in the Treaty of Amsterdam was the new co-decision procedure took the place of the old co-decision procedure and finally empowered the EP equal position to the Council in this new co-decision procedure<sup>238</sup>. Differentiating from the former co-decision procedure, if the proposal was not agreed in the conciliation committee, the Council would not be able to adopt it even if the members of the Council came to unanimity. The European Parliament has in real sense become

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<sup>235</sup> Hix, S. (2002). Constitutional agenda-setting through discretion in rule interpretation: why the European Parliament won at Amsterdam. *British Journal of Political Science*, 32(02), 259-280

<sup>236</sup> Lenaerts, K., & Verhoeven, A. (2002). “Institutional balance as a guarantee for democracy in EU governance” in Joerges and Dehousse (Eds.), *Good Governance in Europe’s Integrated Market*, 63-64

<sup>237</sup> Judge, D., & Earnshaw, D. (2002). The European Parliament and the Commission crisis: A new assertiveness? *Governance*, 15(3), 345-374

<sup>238</sup> Article 189 (b) of Treaty of Amsterdam

obtained the status as the co-legislator, considering its substantial influence in the legislative procedures.<sup>239</sup>

### 3.1.3 The power game for the European Parliament

Looking back on the evolution of the EP during the past half century, the basic trend of the EP would be its powers have increased both on the weight and on the breadth. It has developed from an advisory role with the only power mostly focusing on supervision to its current position more or less like the Common House in a bicameral parliamentary system with powers ranging from budget, legislation to supervision and appointment. The extension of EP powers can be seen as the responses to the criticism of democratic deficit<sup>240</sup>. At the beginning this parliamentary supervision may be the supervision spread from the national legislatures to the Community level. Democratic accountability requests the administrative acts to be supervised by the legislature and thus when certain parts of the sovereignty and powers on previous domestic issues were transferred to the intergovernmental organizational structure, the supervision of representative institution shall then follow. With more powers transferred to the Community institutions, the supervision from the representative institution should be correspondingly strengthened and formalized due to the democratic legitimacy demand of the policies and regulations when they are increasingly affecting the daily life of citizens for the emerging question of legitimacy.<sup>241</sup> This trend is significantly improved after the Maastricht Treaty's coming into effect in the early 1990s because in this Treaty the Community is transformed into a political union and, what is more important, is the introduction of the concept: EU Citizenship. This idea is clearly expressed by the former German Foreign Minister Fischer that

*“Today, the EU is no longer a mere union of states, but more and more a union of citizens. Nevertheless, European decisions are still taken almost exclusively by the*

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<sup>239</sup> Ringe, N. (2010). *Who Decides, and how?*. Oxford University Press. 13.

<sup>240</sup> Smismans, S. (2002). “Institutional balance as interest representation. Some reflections on Lenaerts & Verhoeven” in Joerges and Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, 90-91

<sup>241</sup> Laursen, F. (Ed.). (2012). *The EU's Lisbon Treaty: institutional choices and implementation*. Ashgate Publishing, Ltd. 287.

*states. The role of the elected European Parliament as a source of direct legitimization is underdeveloped. This role has to be further strengthened if we are to overcome the democratic deficit of the Union...*”<sup>242</sup>

Other studies also reveal the motivation of the politicians to extend the power of the EP in the Treaties that there is a positive correlation between the amount of powers transferred to tackle with international matters and the strength of political elites’ perception of democratic deficit, and it is the latter that constitute the motivation to “democratize” the institutions<sup>243</sup>.

EP plays a dramatic role in the battle for powers among Community institutions. Like any players in the Triangular relationship, EP have to be confronted with two-route battle condition that it struggles for legislative power with the Council and for restraining the administrative power of the Commission. It seems that EP has been a great success since it has grabbed numerous powers beyond the imagination of its predecessors. It successfully exercises its own powers to exert influences in the procedure through the two basic tools relating to power in a society, persuasion and punishment. When the powers it owns are very limited at the very beginning it would turn to persuasion more than punishment. EP would act as a constructive actor to get its voice heard and thus to form some informal convenances. Once the EP receives certain powers which it may use to perform some challenges it would develop its own internal procedures and interpretations of the ambiguity of the Treaties to indiscipline other institutions to accept its opinions. Informal pressures are also kept up on other institutions to maximize its influence in the legislative process<sup>244</sup>. At this stage EP would adopt more uses of punishment or threat of punishment, coordinating with its

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<sup>242</sup> Noury, A. G., & Roland, G. (2002). More power to the European Parliament? *Economic Policy*, 17(35), 279-319

<sup>243</sup> Rittberger, B. (2003). *Removing conceptual blinders: Under what conditions does the ‘democratic deficit’ affect institutional design decisions?* (No. p0023). University of Bath, Department of European Studies and Modern Languages

<sup>244</sup> Earnshaw, D., & Judge, D. (1995). Early days: The European Parliament, co-decision and the European Union legislative process post-Maastricht. *Journal of European Public Policy*, 2(4), 624-649

discretion in interpretation of EU rules EP gradually tends to the power of agenda setting.<sup>245</sup> It is in this way EP transforms its luck into power through its tactics<sup>246</sup>.

### 3.1.4 Problems remained: decision making and the political representation

Democratic decision-making and political representativeness are not only the outdated problems but also the future challenges faced by the European Parliament.<sup>247</sup> The European Parliament has been established and elevated as a response to democratic imbalance as a result of the sovereignty transfer for supranational governance.<sup>248</sup> However, it should be pointed out that one institution with the appearance like the representative institution or named as “Parliament” “Assembly” or “Congress” does not necessarily operate so in practical politics. The European Parliament also faces challenges on its inadequacy in representativeness. First, it is the democratic input perspective. The European Parliament has nagged by the notably low turnout of its elections.<sup>249</sup> More than this, the elections of European Parliament play the role of political thermometer, testing the popularity and performance of established parties in national level while the European issues at best turns out to be

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<sup>245</sup> Hix, S. (2002). Constitutional agenda-setting through discretion in rule interpretation: why the European Parliament won at Amsterdam. *British Journal of Political Science*, 32(02), 259-280. Simon Hix outlines the story on how the European Parliament successfully maximize its power through the discretion on interpreting rules of the Treaties and by that to stretch out their clouts into constitutional agenda-setting, channeled through “Constitutional Design” “Constitutional operation” and “Constitutional reform”.

<sup>246</sup> Selck, T. J., & Steunenberg, B. (2004). Between Power and Luck The European Parliament in the EU Legislative Process. *European Union Politics*, 5(1), 25-46

<sup>247</sup> Weßels, B. (1999). institutional Change and the Future Political order. *Richard S. Katz; Bernhard Weßels (Hg.), The European Parliament, the National Parliaments, and European Integration, Oxford: Oxford University Press 1999a*, 213-228.

<sup>248</sup> Rittberger, B. (2003). The Creation and Empowerment of the European Parliament. *Journal of Common Market Studies*, 41(2), 206-208. Besides responding to the democratic deficit, this paper also argues that the establishment of the European Parliament is also the result of “legitimizing belief” on governing.

<sup>249</sup> The facts have been mentioned and analyzed by many scholars. Despite differences in explanations and interpretations, basically agreement has been reached on that the turnouts of European Parliament elections are comparatively low. See: Franklin, M. N. (2001). How structural factors cause turnout variations at European Parliament elections. *European Union Politics*, 2(3), 309-328; Franklin, M. N., & Hobolt, S. B. (2011). The legacy of lethargy: how elections to the European Parliament depress turnout. *Electoral Studies*, 30(1), 67-76; Mattila, M. (2003). Why bother? Determinants of turnout in the European elections. *Electoral studies*, 22(3), 449-468.

the second-order concerns.<sup>250</sup> Furthermore, the European Parliament also faces criticisms on the “extremely weak connection” between the voters and the European Parliament. Most European voters have no significant understanding about the EP and its performance; besides, the characteristics of EP election (low turnout genuinely focusing on domestic issues) also contribute to the fact that MEPs emphasize on the EU policy making process rather than strengthen the electoral connections externally.<sup>251</sup> Besides, the nominating power is always held by the national parties which could cause unscrupulous damage to their independency to make judgment beyond narrow national interests on Pan-European issues as a widely-known saying tells, if you have got them by the balls, their hearts and mind will follow.<sup>252</sup>

The European Parliament is said to be the possible winner in the negotiation of Lisbon Treaty with substantial power expansion both in width and in weight.<sup>253</sup> However, considering the legislative power in the Union is designed to be divided and distributed to the Commission, the Council and the Parliament and the European Council in practical sense,<sup>254</sup> efforts to move the Union to the parliamentary model currently leave the Parliament still much more vulnerable compared with the Common House/Lower House in the parliamentary country where the parliaments

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<sup>250</sup> Reif, K., & Schmitt, H. (1980). Nine second-order national elections—A conceptual framework for the analysis of European election results. *European journal of political research*, 8(1), 3-44; Schmitt, H. (2005). The European parliament elections of June 2004: still second-order? *West European Politics*, 28(3), 650-679; Hix, S., & Marsh, M. (2007). Punishment or protest? Understanding European parliament elections. *Journal of Politics*, 69(2), 495-510; Hobolt, S. B., & Wittrock, J. (2011). The second-order election model revisited: An experimental test of vote choices in European Parliament elections. *Electoral Studies*, 30(1), 29-40; De Vreese, C. H., Banducci, S. A., Semetko, H. A., & Boomgaarden, H. G. (2006). The news coverage of the 2004 European Parliamentary election campaign in 25 countries. *European Union Politics*, 7(4), 477-504.

<sup>251</sup> Hix, S., Noury, A. G., & Roland, G. (2007). *Democratic politics in the European Parliament*. Cambridge University Press. 26-29.

<sup>252</sup> Kreppel, A. (2002). *The European Parliament and Supranational Party System: a study in institutional development*. Cambridge University Press. 210; Katz, R. S., & Wessels, B. (1999). *The European Parliament, the national parliaments, and European integration*. Oxford University Press, 217; Hix, S. (2002). Parliamentary behavior with two principals: preferences, parties, and voting in the European Parliament. *American Journal of Political Science*, 688-698.

<sup>253</sup> Craig, P. (2010). *The Lisbon Treaty: law, politics, and treaty reform*. Oxford University Press. 36-37. Jean-Claude Piris listed clearly and orderly the extension of European Parliament's power, including the extension 'in the scope of co-decision', 'on the appointment of the Commission', 'on the budget', 'on the conclusion of international agreement', 'on the European external action service', 'on delegated and implementing acts', 'on the FSJ area', 'on the flexibility clause', 'on the revision of the Treaties' and 'on the possible withdrawal of a member states from the Union'. See: Piris, J. C. (2010). *The Lisbon Treaty: a legal and political analysis*. Cambridge University Press. 118-121.

<sup>254</sup> Craig, P. (2010). *The Lisbon Treaty: law, politics, and treaty reform*. Oxford University Press. 72.

and the government organized by the majority dominate the politics. Besides, despite the much more powers the Parliament has been granted<sup>255</sup>, the increased influence in choosing and deciding the President of European Commission and other members and the direct way of electing the MEPs, political elites do not seem to be embracing the victory of solving the problem of democratic deficit. Actually, it has already been prophetically pointed out that besides those above, democracy also has another dimension of representative-voter connection.<sup>256</sup> Besides, the Parliaments' lower election turnout, less knowledge on the Parliament among EU citizens and sense of distance indicates that national parliaments still take the priority. Therefore, for some, especially some politicians, the most convenient way to tackle with democratic deficit and enhance the democratic legitimacy of the European Union, the empowerment and participation of national parliaments in the Union decision-making process shall be indispensable part of that mechanism. In other words, the national parliaments are supposed to be institutionalized to be an integrated part of the EU political establishment. The European Parliament itself alone fails to contribute to the sufficient democratic legitimacy for the Union. However, this approach, to involve national parliaments into the EU decision-making process, is still questionable.

### 3. 2 the Council of European Union

The Council of European Union, consisting of ministers in respective policy areas from the Member States, has long-term been regarded as the central actor in the legislative process in the EU where the Member States meet, fight and defend their national interests.<sup>257</sup> As the representative institution of intergovernmentalism, the *de facto* power and influence has been strongly strengthened in the Luxemburg Accord with which the formal voting rules in the Council has been replaced by the informal compromise from qualified majority to unanimity with Member States highly

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<sup>255</sup> Hix, S., Raunio, T., & Scully, R. (2003). Fifty Years on: Research on the European Parliament. *Journal of Common Market Studies*, 41(2), 191-202.

<sup>256</sup> Katz, R. S., & Wessels, B. (1999). *The European Parliament, the national parliaments, and European integration*. Oxford University Press, 13, 21-22.

<sup>257</sup> Sherrington, P. (2000). *Council of Ministers: Political Authority in the European Union*. A&C Black. 32; Naurin, D., & Wallace, H. (2008). *Unveiling the Council of the European Union. Games Governments*. 1; Craig, P. (2010). *The Lisbon Treaty: law, politics, and treaty reform*. Oxford University Press. 33; Bindseil, U., & Hantke, C. (1997). The power distribution in decision making among EU member states. *European Journal of Political Economy*, 13(1), 183.



concerned obtaining the veto power as the result of the Empty Chair Crisis invoked by former French President De Gaulle.<sup>258</sup> The institutional settings and power distribution among EU institutions has advanced the Council to be the Senate of EU from in terms of bicameralism, with the Council and the European Parliament sharing the legislative and budgetary powers.<sup>259</sup>

### 3.2.1 The Council: The Guardian of National Interests?

In the bicameral federal countries, the Senate or Houses at the equivalent position represents, generally speaking, the interests of its constituent entities in the federal government, the Senate of the U.S. composed of senators standing for 50 states or the *Bundesrat* to the *Land* in Germany, for example. Similarly, the Lisbon Treaty stipulates that the Council “joint with the European Parliament, exercise legislative and budgetary functions”<sup>260</sup>. Therefore, when the Council of European Union is to be assessed under the bicameralism model<sup>261</sup>, it naturally steps into the shoes of Senate. It also appears to be a reasonable idea when the further detailed reviews on the composition of the Council (ministers sent by Member States government)<sup>262</sup> and its role in the legislative procedures, and this has already received affirmation by many academic literatures.<sup>263</sup> From the perspective of inter-institutional interactions, the Council is also the institution that confronts with or “circumvents” the supranational institutions in defending the core national interests.<sup>264</sup> Besides, certain political policies which have difficulties in being passed in the national level

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<sup>258</sup> Judt, T. (2005). *Postwar: A history of Europe since 1945*. New York: The Penguin Press, 308

<sup>259</sup> Article 14, Article 16 of TEU.

<sup>260</sup> Art. 16(1) TEU.

<sup>261</sup> See more about the “Theoretical models of EU bicameralism”: Hix, S. (2005). *The political system of the European Union*. Palgrave Macmillan. 103-106; Crombez, C. (2000). Codecision: towards a bicameral European Union. *European Union Politics*, 1(3), 363-381.

<sup>262</sup> Section 2, Article 16 TEU.

<sup>263</sup> Thomson, R., & Hosli, M. (2006). Who Has Power in the EU? The Commission, Council and Parliament in Legislative Decision - making. *Journal of Common Market Studies*, 44(2), 413-414; Craig, P. (2010). *The Lisbon Treaty: law, politics, and treaty reform*. Oxford University Press. 45; Bulmer, S. J. (1996). The European Council and the Council of the European Union: shapers of a European confederation. *Publius: the journal of federalism*, 26(4), 17-42.

<sup>264</sup> Sherrington, P. (2000). *Council of Ministers: Political Authority in the European Union*. A&C Black. 32-33.

sometimes would be taken by the ministers to Brussels and then adopted as EU legislation and then to be implemented to the Member States.<sup>265</sup> However, as one of the Union institutions, the Council also takes the general interests of the Union into significant consideration and thus performs not merely intergovernmental but also out of Supranationality.<sup>266</sup> More precise distinctions are even made with regard to the nature of issues that “*in matters concerning the Community it acts as a supranational institution but in matters which have not been completely transferred to the Community it acts de facto as an inter-governmental conference.*”<sup>267</sup> Certain explanation on the centric role of the Council more like the origin of government: necessary evil. It is necessary since there are inter-state problems that can be hardly tackled by the single state itself and thus the demand of intergovernmental mechanisms or even institutions arises for collective actions to be taken; It is “evil” since Member States government are under reluctance to transfer existing powers to the Union and as an alternative method Member States establish the Council as controller to the Union policy-making and integrating process.<sup>268</sup>

### **3.2.2 Decision-making mechanism: consensus or Qualified Majority Voting?**

The formal rule of decision-making in the Council stipulated in the Lisbon Treaty after 1 November 2014 would the Qualified Majority Voting (QMV) that requires 55% of the members of the Council, at least fifteen states and 65% of the population of the Union while the blocking minority consists of four or more members.<sup>269</sup> However, this formal rule has been in practice employed in quite rare

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<sup>265</sup> Wallace, H., Pollack, M. A., & Young, A. R. (Eds.). (2015). *Policy-making in the European Union*. Oxford University Press, USA. 83.

<sup>266</sup> Peterson, J., & Shackleton, M. (2012). *The institutions of the European Union*. Oxford University Press. 92 ; Hix, S. (2005). *The political system of the European Union*. Palgrave Macmillan.83.

<sup>267</sup> Lasok, D., & Lasok, K. P. E. (2001). *Law and institutions of the European Union*, 7<sup>th</sup> edn, ch. 5. Markham, Ontario: LexisNexis Butterworth. 246.

<sup>268</sup> Bulmer, S. J. (1996). The European Council and the Council of the European Union: shapers of a European confederation. *Publius: the journal of federalism*, 26(4), 18.

<sup>269</sup> Section 4, Article 16 TEU.

cases and consensual voting turns out to be the most popular.<sup>270</sup> The consensual culture might have been cultivated by several comprehensive factors. First, there are no regular and long-term coalitions among the Council members but varying with the policy areas.<sup>271</sup> Therefore, members may tend to behave in a more compromise and cooperative way to foster the atmosphere of negotiations and delicate balancing act.<sup>272</sup> Second, the reason why most decisions have been adopted through consensus could also be explored from the position of the minorities based on reasonable understandings. It has been demonstrated with DEU data that the veto player model has resulted substantial error rate in predicting the fate of Commission proposals in the Council, suggesting “*further incentives*” to “*provide an answer for the gap between the observed consensus in the Council and a few but decisive errors*”.<sup>273</sup> Jonathan Aus then indicates the importance of informal rules in the procedures with the example of the Dublin II Regulation’s adoption that the reach of consensus could be achieved in use of members’ intention to avoid being the public enemy.<sup>274</sup> The avoidance of being public enemy could also be reasoned with the vital significance of trust and reputation of Member States in virtue of “*the iterated nature of the negotiations*”.<sup>275</sup> In other words, it is the logic of appropriateness that motivates the members in the Council to follow the rules rather than stand up as a non-cooperator,

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<sup>270</sup> Craig, P. (2010). *The Lisbon Treaty: law, politics, and treaty reform*. OUP Oxford. 44. It is recorded that 81%, the overwhelming majority, of all decisions in the Council were made through consensus rather than explicit voting from 1994 to 2002. See: Heisenberg, D. (2005). The institution of ‘consensus’ in the European Union: Formal versus informal decision - making in the Council. *European Journal of Political Research*, 44(1), 66. See also: Novak, S. (2013). The silence of ministers: Consensus and blame avoidance in the Council of the European Union. *JCMS: Journal of Common Market Studies*, 51(6), 1091-1107; Nugent, N. (1999). *The government and politics of the European Union*, 4th edn. Durham, NC: Duke University Press. 168-169; Hix, S. (2005). *The political system of the European Union*. Palgrave Macmillan. 87;

<sup>271</sup> Naurin, D., & Wallace, H. (2008). *Unveiling the Council of the European Union. Games Governments play in Brussels*. 8; Peterson, J., & Shackleton, M. (2012). *The institutions of the European Union*. Oxford University Press. 86.

<sup>272</sup> Sherrington, P. (2000). *Council of Ministers: Political Authority in the European Union*. A&C Black. 83; Lewis, J. (2000). The methods of community in EU decision-making and administrative rivalry in the Council's infrastructure. *Journal of European public policy*, 7(2), 261.

<sup>273</sup> König, T., & Junge, D. (2008). Veto player theory and consensus behavior. In Daniel Naurin and Helen Wallace (Eds.). *Unveiling the Council of the European Union* (pp. 81-98). Palgrave Macmillan UK.

<sup>274</sup> Aus, J. P. (2008). The mechanisms of consensus: coming to agreement on Community asylum policy. In *Unveiling the Council of the European Union* (pp. 99-118). Palgrave Macmillan UK.

<sup>275</sup> Heisenberg, D. (2005). The institution of ‘consensus’ in the European Union: Formal versus informal decision - making in the Council. *European Journal of Political Research*, 44(1), 68.

casting negatives votes.<sup>276</sup> Besides, the high percentage of consensus in the decision-making of the Council results also from the strategy of avoiding blame. If ministers vote against the majority but fail to constitute the blocking minority, they are very likely to be forsaken and punished by national voters for not successfully defending national interests.<sup>277</sup> In other words, the formal voting rule, the QMV, works more of the context, the shadow or the bargaining counter than explicitly walk forward to the front of the stage, constituting as pressure or threat for worse by the majority to put into practice for the purpose of the consensus-reach.<sup>278</sup> With the conventional consensus culture and path dependence of institutional operation, where formal voting rules rarely plays a part, evolutions on the standard of qualified majority and the correspondingly blocking minority influences mostly the comparative negotiating position rather than the capacity to make decisions, as it has been demonstrated with regard to the Nice Treaty.<sup>279</sup>

### 3.2.3 The role of the Presidency and divergence among the Council

After the Lisbon Treaty, the previously combined presidency of the Council and the European Council has been separated with a permanent president for the European Council<sup>280</sup> and a “group presidency” including three Member States for every 18 months in the rotating way.<sup>281</sup> However, scholars seem to be hugely divergent on the role, the power and the influence of presidency in the decision-making process. With

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<sup>276</sup> March, J. G., & Olsen, J. P. (1998). The institutional dynamics of international political orders. *International organization*, 52(4), 951-952.

<sup>277</sup> Novak, S. (2013). The silence of ministers: Consensus and blame avoidance in the Council of the European Union. *Journal of Common Market Studies*, 51(6), 1092. Novak also specifically analyzes different reasons for different blocs of Member States not to cast negative votes. For big Member States like Germany and France, they do not do so in case of humiliation. For small states, casting negative votes could be useless. For the new Member States they do not do so out of the humbleness as the freshmen. (1102-1103).

<sup>278</sup> Craig, P. (2010). *The Lisbon Treaty: law, politics, and treaty reform*. OUP Oxford. 44.

<sup>279</sup> Moberg, A. (2002). The Nice Treaty and voting rules in the Council. *JCMS: Journal of Common Market Studies*, 40(2), 281.

<sup>280</sup> Section 5, 6 of Article 15, TEU.

<sup>281</sup> Declaration on Article 16 (9) of the Treaty on European Union concerning the European Council decision on the exercise of the Presidency of the Council.

Germany's and France's chairing cases as demonstrations, Jonas Tallberg stresses the significant function of the presidency "*in unlocking incompatible negotiating process and securing agreement*" in use of the information asymmetry favorable to the presidency.<sup>282</sup> Andreas Warntjen, as the confutation, suggesting that the role of presidency has been overestimated in terms of the influence in agenda setting since the presidency does not hold exclusive privilege in delivering proposals but merely "one of all" who might be slightly ascendant.<sup>283</sup> Divergences between them appear to be more about the extent of priority of the presidency rather than the existence of that priority. In other words, the presiding Member States enjoys widely-accepted obviously advantageous status compared with his fellows. The presiding Member State is in favorable conditions advancing policies on his schedule and rendering practical blocks on those they loathe.<sup>284</sup> Besides, the presiding effectiveness is also partly determined on the size of the presiding states and it is advocated that middle-scale states turn out to be the possibly best candidate in holding the presidency.<sup>285</sup> As for the divergence on policies, voting patterns of states could be shaped in accordance with various dimensions and factors of both national and European level. Empirical analysis on the voting records indicates that compared with the right wings, the left tends to vote dissident less and shows to be more coordinative with the majority considering most Euro-skeptical parties usually falls within the national political spectrum of the conservative part. In addition, big countries vote against the majority more while the presidency less.<sup>286</sup> With regard to the coalition formation, drawing on the voting records published, new political division between the east and the west have become obvious with the accession of eastern European states.<sup>287</sup> The following divisions between east European countries (the so-called

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<sup>282</sup> Tallberg, J. (2004). The Power of the Presidency: Brokerage, Efficiency and Distribution in EU Negotiations. *Journal of Common Market Studies*, 42(5), 999-1022.

<sup>283</sup> Warntjen, A. (2008). Steering, but not Dominating: the Impact of the Council Presidency on EU Legislation. In *Unveiling the Council of the European Union* (pp. 203-218). Palgrave Macmillan UK. 203-218.

<sup>284</sup> Hix, S. (2005). *The political system of the European Union*. Palgrave Macmillan. 80-81.

<sup>285</sup> Hayes - Renshaw, F., & Wallace, H. (1995). Executive power in the European Union: the functions and limits of the Council of Ministers. *Journal of European Public Policy*, 2(4), 571.

<sup>286</sup> Mattila, M. (2004). Contested decisions: Empirical analysis of voting in the European Union Council of Ministers. *European Journal of Political Research*, 43(1), 46-47.

<sup>287</sup> Hagemann, S. (2008). *Voting, Statements and Coalition-Building in the Council from 1999 to 2006*. Palgrave Macmillan UK. 36-63; Naurin, D., & Lindahl, R. (2008). East-North-South: Coalition-building in

“New Europe”) and the western European countries (the so-called “Old Europe”) as to the Attitudes to Iraqi War and the Refuge Crisis have constantly echoed this thesis.<sup>288</sup>

### 3.2.4 The Council: Best representing the democratic deficit?

Conveying democratic accountability is one of the three main challenges with regard to the legislative-government relations in the EU,<sup>289</sup> and this is especially so with the Council when the European Parliament has been directly elected for decades of years and the Commission has run its course increasingly similar to a parliamentary cabinet. Multiple problems ranging from the de facto decision-making bodies, the transparency of decision-making to the wide adoption of informal rules have contributed to the haunting democratic deficit grabbing the Council.

#### 3.2.4.1 The Genuine Decision-Maker

According to the organizational structure of the Council, the members of the ministerial level shall be assisted by the Committee of Permanent Representatives (Coreper) and the General Secretariat, with the former body preparing works for the Council, making procedural decisions and carrying out the tasks assigned to it<sup>290</sup> while the latter supporting administratively.<sup>291</sup> The Coreper has developed to be the “*veritable decision-making factory*” pivoting on its institutional characteristics<sup>292</sup>, indicating the transfer of decision-making center of gravity from the ministers with political accountability to the permanent representatives in lower ranks, promoting the

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the Council before and after enlargement. In *Unveiling the Council of the European Union*. Palgrave Macmillan UK. 64-78.

<sup>288</sup> Further detailed discussions on the divergence between east Europe and west Europe on the Iraqi War, see: Levy, D., Pensky, M., & Torpey, J. C. (2005). *Old Europe, new Europe, core Europe: transatlantic relations after the Iraq war*. Verso.

<sup>289</sup> Crum, B. (2003). Legislative—Executive Relations in the EU. *JCMS: Journal of Common Market Studies*, 41(3), 375-395.

<sup>290</sup> Art. 240 (1) TFEU.

<sup>291</sup> Art. 240 (2). TFEU.

<sup>292</sup> Peterson, J., & Shackleton, M. (2012). *The institutions of the European Union*. Oxford University Press. 325.

decision-making out of the focus of the public. The analysis on the decisions made in the Council signals explicitly the severity of genuine power transfer from ministers to committees or bureaucrats, demonstrating 35%~48% of Community legislations made by ministers, 22% by the Coreper and Special Committee on Agriculture, leaving 31%~43% to working parties. That is, more than half decisions are not taken by the ministers but other lower ranks officials.<sup>293</sup> That raises the question on how shall those decisions be legitimate considering it faces abundant obstacles for the voters to hold the makers accountable when there is negative correlation between the frequencies of ministers' participation in the negotiating process and the accountability gap.<sup>294</sup>

### 3.2.4.2 Transparency

The decision-making process in the Council used to be covered back-doors from the public and the speed tending transparent happens to be quite slow.<sup>295</sup> The lack of transparency inevitably gives rise to the deficit in the voters' control on their representatives (the ministers) in the Council, notwithstanding their democratic rights to change the ministers through national elections since there would be no such thing as accountability when the voters are not able to get access to and identify the deciders.<sup>296</sup> The Lisbon Treaty divided the meeting in the Council into two parts and the legislative part shall be public.<sup>297</sup> However, such step to transparency falls merely upon the ministerial level and comes to halt before the Coreper and lower bodies. As a result, this "half set" transparency, as has been criticized, reaches simply the effect to

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<sup>293</sup> Häge, F. M. (2008). Who Decides in the Council of the European Union? *Journal of Common Market Studies*, 46(3), 554.

<sup>294</sup> Häge, F. M. (2008). Who Decides in the Council of the European Union?. *Journal of Common Market Studies*, 46(3), 556.

<sup>295</sup> Heisenberg, D. (2005). The institution of 'consensus' in the European Union: Formal versus informal decision - making in the Council. *European Journal of Political Research*, 44(1), 67-68.

<sup>296</sup> Héritier, A. (2003). Composite democracy in Europe: the role of transparency and access to information. *Journal of European public policy*, 10(5), 830; Follesdal, A., & Hix, S. (2006). Why there is a democratic deficit in the EU: A response to Majone and Moravcsik. *JCMS: Journal of Common Market Studies*, 44(3), 553.

<sup>297</sup> Craig, P., & De Búrca, G. (2015). *EU law: text, cases, and materials*. Oxford University Press. 40-41.

push genuine negotiations downwards to the more covert committees.<sup>298</sup> Besides the decision-procedure, the transparency of voting records also in certain extent brings about unexpected negative effect on accountability. Once the members of the Council realized that under the obligation to make the voting records in public, they would take reactive actions as response to the rule for their own sake; in other words, they would join the majority beyond the threshold even if they actually hold the opposite positions while unable to form a blocking minority in case of being shown as a failure before their national voters. This “blame avoidance” strategy, combined with the transparency appeals, has precisely contributed to the problem of accountability this it increases the difficulties to identify the authentic positions of Council members.<sup>299</sup> It is also the case with the consensual culture on decision-making in the Council, it weakens the accountability through hurdling the public’s knowledge of decision-makers’ position.<sup>300</sup>

### 3.2.4.3 Popularity of informal rules

The informal rules have become increasingly popular among the members of the Council in making decisions and other affairs since the remarkable Luxemburg Accord, with the consensual decision-making as its classical example, playing the roles not only supplementing formal rules, but taking the place of and even systematically deviating from the formal rules.<sup>301</sup> The adoption of informal rules could be helpful in portraying the scene of sincere cooperation without showing disputes on stage and avoiding the danger of firing patriotism among peoples in the state of controversial issues and advancing the integration process to what it is

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<sup>298</sup> Peterson, J., & Shackleton, M. (2012). *The institutions of the European Union*. Oxford University Press. 90.

<sup>299</sup> Novak, S. (2013). The silence of ministers: Consensus and blame avoidance in the Council of the European Union. *Journal of Common Market Studies*, 51(6), 1104.

<sup>300</sup> Novak, S. (2013). The silence of ministers: Consensus and blame avoidance in the Council of the European Union. *JCMS: Journal of Common Market Studies*, 51(6), 1092; Heisenberg, D. (2005). The institution of ‘consensus’ in the European Union: Formal versus informal decision - making in the Council. *European Journal of Political Research*, 44(1), 67.

<sup>301</sup> Kleine, M. (2014). Informal Governance in the European Union. *Journal of European Public Policy*, 21(2), 303-314.



today.<sup>302</sup> However, it could also be accused, from the opposite perspective, that informal rules cover the decision-making process under the table or behind doors, leaving the public with no efficient channels to get the knowledge, criticize and further challenge those decisions, rendering the current democratic control unfeasible.<sup>303</sup> Interesting enough, what the method that has been drawn as the successful experience, also conceived by the founding fathers like Monnet (the elitism with civil servants mostly involved) in service of integration just turns out to be one of the main accusations the Union needs to wrestle with.

In all, the legitimacy problems with the council could be generally classified into two categories. The first points to the lack of democratic basis, that is to say, among the important institutions in the EU, the European Parliament and the Commission could be alternated wholly by the European elections while the Council and the European Council could only change one of their members at a time by national elections<sup>304</sup>, and most, their performance in the European institutions rarely be deliberately examined by the voters. The second refers to that secrecy in the decision-making proceedings where the public have no adequate and efficient knowledge about that and thus hardly could they get access to and supervise through various channels.

### 3. 3 National Parliaments

The national parliaments used to possess their seat in the European institutions through sending representatives to make up the Common Assembly (the predecessor of the salient “European Parliament” before the year of 1979 when the latter was transformed to be a representative body with members directly elected by Member States nationals, independent both in organization and legitimacy from the national parliaments. However, decades of years later, the “Return of the King” has been witnessed after the “Long Time No See”, interpreted to be coming to the rescue of the criticized tenuous democratic legitimacy of the European Union with more

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<sup>302</sup> Heisenberg, D. (2005). The institution of ‘consensus’ in the European Union: Formal versus informal decision - making in the Council. *European Journal of Political Research*, 44(1), 81-82.

<sup>303</sup> See the last chapter.

<sup>304</sup> Craig, P. (2010). *The Lisbon Treaty: law, politics, and treaty reform*. OUP Oxford. 72.

empowered privilege to information and the Early Warning Mechanism (hereafter “EWM”) for subsidiarity insight, indicating its formal role in the European Union decision-making procedures.<sup>305</sup>

### 3.3.1 De-parliamentarism or Re-parliamentarism?

#### 3.3.1.1 De-parliamentalism

The integration process which transfers increasingly more sovereign and policy-making powers to the supranational level could in other way from the perspective of national parliaments be interpreted as the history of being marginalization, helplessly watching powers flowing away from their own hands (de-parliamentarism).<sup>306</sup> The European integration has brought impact on national parliaments ranging from legislative powers, deliberation of policy-makings, the democratic control over governments and the realization of accountability, consistently rendering alterations to the legislative-government relationship domestically.

For the legislative function, the policy center has been moved to Brussels on account of rampant legislative tasks transferred to the European level especially those falling within the scope of areas where the EU enjoys exclusive competence while in the shared competence areas the EU would be always eager to claim their priority.<sup>307</sup> The *Passerelles* clause, although aiming to improve to efficiency and deeper

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<sup>305</sup> The task of EWM with regard to the enhancement of EU democratic legitimacy has been concluded by countless literatures, such as: Cooper, I. (2012). A 'virtual third chamber' for the European Union? National parliaments after the Treaty of Lisbon. *West European Politics*, 35(3), 446; Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing.21; Benz, A. (2004). Path-dependent institutions and strategic veto players: national parliaments in the European Union. *West European Politics*, 27(5), 875-876; Kiiver, P. (2006). *The national parliaments in the European Union: A critical view on EU constitution-building* (Vol. 50). Kluwer law international. 184-185; Bellamy, R., & Kröger, S. (2014). Domesticating the democratic deficit? The role of national parliaments and parties in the EU's system of governance. *Parliamentary Affairs*, 67(2), 437-457.

<sup>306</sup> O'Brenan John and Tapio Raunio.(2007) 'Deparliamentarisation and European Integration', in (eds.) J. O'Brennan, T. Raunio, *National Parliaments within the Enlarged European Union: From Victims of Integration to Competitive Actors*.(London: Routledge), 2007. pp.2-8; Raunio, T., and S. Hix (2000). 'Backbenchers Learn to Fight Back: European Integration and Parliamentary Government', *West European Politics*, 23, 142-168;

<sup>307</sup> Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing.53.

integration in Union legislations, inevitably goes even further in debilitating the legislative function exercised by national parliaments.<sup>308</sup> Other aspect of the legislative function of national parliaments is to implement the EU laws or to transform the EU directives into the domestic legal system according to the nature of EU law.<sup>309</sup> However, it has been pointed out that, firstly the implementation of EU laws does not necessarily falls on the shoulder of national parliaments, certain other national public institutions could also turn out to be the responsible one; secondly, the EU directives usually leave rather narrow space for national parliaments to exercise their discretion in transformation of them into domestic laws considering that most legal framework in the directives has been drawn quite elaborate so as to hardly left space for national parliaments to perform their characteristics.<sup>310</sup> In conclusion, the general tendency, in spite of possible reversals, would be the legislative power has been shifted from national parliaments to EU legislatures (the European Parliament and the Council) while leaving the national parliament functions more of the implementation body or the subordinate legislature to the EU.

As for the domestic legislative-executive relationship, the European integration has been criticized to crystallize or worsen the current unbalances between them to the benefits of the government powers and thus endangers the accountability.<sup>311</sup> First, the government nature of international/transnational negotiations hinders the representative institutions to participate the decision process, and this is also the common practice nowadays that the legislature mostly focuses on the deliberation and ratification process after the government takes back the decided version of international agreements. Second, the ministerial accountability has also been impaired by the Qualified Majority Voting in the Council decision-making process since it makes rather difficult for national government to make any assured promise

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<sup>308</sup> Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing. 79-80.

<sup>309</sup> Raunio, T. (1999). Always one step behind? National legislatures and the European Union. *Government and Opposition*, 34(2), 180.

<sup>310</sup> Kiiver, P. (2006). *The national parliaments in the European Union: A critical view on EU constitution-building* (Vol. 50). Kluwer law international. 11-12.

<sup>311</sup> Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing. 25.

before the Council meetings<sup>312</sup> and the minister could be voted out and thus leads to the member state he represents to be bound by the decisions he opposes and as a result of this it would be in a dilemma to decide whether to hold the minister responsible or not.<sup>313</sup> Besides, lack of expertise on the policies and the information asymmetry also contribute to this run-off accountability which will be further discussed in the following.

### 3.3.1.2 Re-parliamentarism

However, the idea that national parliaments are the vital victims to the integration process has been confronted with challenges. It is argued that parliaments as institutions would also consciously make adaption to the changing world through both intern reformation and rewrite their relations with other actors.<sup>314</sup> Various efforts have been done to fight against the marginalization by national parliaments, including more access to the information on EU decision-making process, more scrutiny over the EU decisions and documents and nearly all Member States have established special European Affair Committee attached to the parliament to wrestle with pouring documentary works from the EU, strengthening their capacity to analyze those information.<sup>315</sup> Empirical analysis on the institutional changes of parliaments in several Member States also indicates the existence of such reactions, although incremental, “slow, small and marginal based on existing institutional repertoires” on account of path dependence.<sup>316</sup> These institutional changes have also been incorporated into the “Europeanisation of national parliaments”, on which substantial literatures were presented covering the various adaption and responses in line with

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<sup>312</sup> Raunio, T. (2009). National parliaments and European integration: What we know and agenda for future research. *The Journal of Legislative Studies*, 15(4), 327.

<sup>313</sup> Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing. 106-107.

<sup>314</sup> O'Brennan, J., & Raunio, T. (Eds.). (2007). *National parliaments within the enlarged European Union: from 'victims' of integration to competitive actors?*. Routledge. 8.

<sup>315</sup> Auel, K. (2007). Democratic accountability and national parliaments: Redefining the impact of parliamentary scrutiny in EU affairs. *European Law Journal*, 13(4), 488-450.

<sup>316</sup> Dimitrakopoulos, D. G. (2001). Incrementalism and path dependence: European integration and institutional change in national parliaments. *JCMS: Journal of Common Market Studies*, 39(3), 405-422.

different Member States<sup>317</sup>, also the behavioral and attitudinal aspects of this process.<sup>318</sup>

Arguments, whether in favor of the de-parliamentarism assertion or the re-parliamentarism one, have presumed the existence of “Standard Parliament Model”. Unfortunately this is never the case. Both the roles, powers in actual sense and the power game/balance between the legislative-government relations happen to be essentially dynamic rather than stereotypical. It shall be emphasized that shift of power center from the legislature to the cabinet, even in parliamentary states has become “normalized” after the Second World War when the contents of legislations and policies turns of expertise and the leadership also discipline have been notably reinforced as well as the internationalization of governance, the political agenda has devolved from the legislature to the government.<sup>319</sup> In addition, the length of scrutiny varies from different forms of government. Analysis on different forms of government demonstrates the actual power and influence of opposition party in scrutiny on European policies has been maximized under the minority government, seconded by the one under the coalition government while under the majority government the opposition party stays the least blocking, if we take the capacity of opposition party in deliberation and blocking the government policy as the one index to review the space of parliamentary control.<sup>320</sup> The essential issues implied by the discussions surrounding de-parliamentarism or re-parliamentarism direct to what the role and position should national parliaments be and how to navigate ways to make the accountability be achieved which has been immensely under challenge since the integration process.

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<sup>317</sup> For further information, see: Kiiver, P. (2006). *National and regional parliaments in the European constitutional order*. Europa law publishing; Maurer, Andreas, Wessels, Wolfgang (Eds.), (2001), *National Parliaments on their Ways to Europe: Losers or Latecomers?* Nomos, Baden-Baden; Saalfeld, Thomas, (2005), “Deliberate Delegation or Abdication? Government Backbenchers, Ministers and European Union Legislation”, *Journal of Legislative Studies*, 11(3/4): 343–371.

<sup>318</sup> For further information, see: Holzhaacker, R. (2002). National Parliamentary Scrutiny Over EU Issues Comparing the Goals and Methods of Governing and Opposition Parties. *European Union Politics*, 3(4), 459-479; Auel, K. (2005). The Europeanisation of Parliamentary Democracy: Introduction. *The Journal of legislative studies*, 11(3), 303-318; Benz, A. (2004). Path-dependent institutions and strategic veto players: national parliaments in the European Union. *West European Politics*, 27(5), 875-900.

<sup>319</sup> Raunio, T. (2009). National parliaments and European integration: What we know and agenda for future research. *The Journal of Legislative Studies*, 15(4), 328.

<sup>320</sup> Holzhaacker, R. (2005). The power of opposition parliamentary party groups in European scrutiny. *The Journal of Legislative Studies*, 11(3-4), 428-445.

## 3.3.2 Europeanisation of national parliaments

### 3.3.2.1 Roles of the national parliament in the EU governance

Primarily, there are several models for national parliaments' participation in the Union governance. The conventional model insists on the domestic oversight of parliamentary control that is to indirectly involve in the international affairs through the scrutiny of government foreign policies; in contrary, the Parliamentary Assembly model steps a mile forward to directly review the supranational cooperation through the Parliamentary Assembly (the Common Assembly of EEC before 1979 for example) whose members are sent by national parliaments among their members, concentrating on deliberation rather than legislation.<sup>321</sup> From the 1990s, national parliaments have been empowered with more involvement in the EU decision-making process and oversight. First, the EU treaties have been modified steadily to allow national parliaments to get access to more EU information both the national governments and from the Union institutions, including draft or proposals to the legislation and documents.<sup>322</sup> Second, the Conference of Community and European Affairs Committees of Parliaments of the European Union (the "COSAC") was established since 1989 and then becomes an important forum for national parliaments to share and communicate respective information about EU policies and contributes to developing their capacity in scrutiny and accountability.<sup>323</sup> Third, the Early Warning System established in the European Constitutional Treaty and its successor the Lisbon Treaty for the first time provides national parliaments with formal roles to play in the European decision-making process, with the power for subsidiarity scrutiny of Union actions with regard to its competences as the "gatekeeper" of the European integration

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<sup>321</sup> Cooper, I. (2012). A 'virtual third chamber' for the European Union? National parliaments after the Treaty of Lisbon. *West European Politics*, 35(3), 445. This paper also mentioned the supranational parliament (the federal parliament) as the third conventional model; however, since this model has never been the case in the history of EU so far, therefore it would not be mentioned here.

<sup>322</sup> Fraga, A. (2005). After the Convention: The future role of National Parliaments in the European Union (and the day after... nothing will happen). *The Journal of Legislative Studies*, 11(3-4), 493 ; Auel, K. (2007). Democratic accountability and national parliaments: Redefining the impact of parliamentary scrutiny in EU affairs. *European Law Journal*, 13(4), 488. See also, Declaration NO.13 of Maastricht Treaty, Article 2 of the Amsterdam Protocol on the role of national parliaments in the European Union, etc.

<sup>323</sup> Barrett, G. (2008). *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other member states legislatures*. Clarus Press. 456.

and watchdog of the principle of subsidiarity.<sup>324</sup> Besides all the above, European Affairs Committee in the national parliaments have been created especially to handling with European affairs and coordinating the scrutiny work within the national parliaments equipped with specialized staff and resources.<sup>325</sup> With deeply involved into the European decision-making and scrutiny and the corresponding self-reformation to this tendency, national parliaments themselves become even more Europeanized. Although so much progress have been realized thus far and the possibly positive feedbacks to benefit national parliaments with regard to precedent setting and policy transfer as has been identified<sup>326</sup>, national parliaments may nevertheless raise the question to themselves, “who are we”? The answer to this question, even not totally clearly delimited or negatively listed, could be conducive in defining or identifying what powers may be authorized to national parliaments and whether these powers could be properly exercised. In other words, national parliaments might be plagued with identity crisis. Before uncovering the veil of this problem, participatory ways of national parliaments in the EU currently may need to be primarily reviewed.

### 3.3.3 Current participatory ways of national parliaments

#### 3.3.3.1 Early Warning Mechanism

In the European Constitutional Treaty, as a response to the critics about democratic deficit and appeals for the formal role of national parliaments in the EU, the Early Warning Mechanism/System was introduced although essentially advisory with only the “yellow card”.<sup>327</sup> This mechanism then was reinforced, adding the

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<sup>324</sup> Raunio, T. (2011). The gatekeepers of European integration? The functions of national parliaments in the EU political system. *Journal of European Integration*, 33(3), 303-321; Cooper, I. (2006). The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU\*. *JCMS: Journal of Common Market Studies*, 44(2), 281-304.

<sup>325</sup> Auel, K. (2007). Democratic accountability and national parliaments: Redefining the impact of parliamentary scrutiny in EU affairs. *European Law Journal*, 13(4), 488; Benz, A. (2005) ‘Conclusion: Linking Research on Europeanisation and National Parliaments’, *The Journal of Legislative Studies*, 11, 515.

<sup>326</sup> Duina, F., & Oliver, M. J. (2005). National parliaments in the European Union: are there any benefits to integration?. *European Law Journal*, 11(2), 173-195.

<sup>327</sup> Cooper, I. (2012). A ‘virtual third chamber’ for the European Union? National parliaments after the Treaty of Lisbon. *West European Politics*, 35(3), 447.

“Orange Card” in the Lisbon Treaty possibly as a gesture to respond the voters’ dissatisfaction through the refusing of European Constitutional Treaty. According to Protocol NO.2 on the Application of the Principles of Subsidiarity and Proportionality, national parliaments significantly gain the power to collectively interfere with the legislative process in European level. When the “Yellow Card” has been played, the draft legislative proposal must be reviewed. Then the proposing institutions should deliver reasons whatever actions they may take.<sup>328</sup> If the “Orange Card” comes into effect, then 55% of Council members or a simple majority of votes cast in the European Parliament would be adequate to block this proposal and thus abandoned.<sup>329</sup> At the same time, reasons for this hindering shall be the violation of subsidiarity or proportionality principle.<sup>330</sup> This concept of subsidiarity, basically nothing innovative notwithstanding, does indicate the new development for member states to review the same documents within common period of time collectively.<sup>331</sup>

This Early Warning Mechanism has been expected to fulfill the duty of providing European legislations with additional output legitimacy besides those on account of problem-solving legitimacy<sup>332</sup>. In addition, this mechanism also contributes to the communication between citizens and the European Union through the bridge role played by national parliaments.<sup>333</sup> What a much more far-reaching impact might be that this mechanism introduces the new culture of respecting subsidiarity and member states autonomy into European legislation and gives impetus

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<sup>328</sup> That means at least one third of NPs raise questions or opinions with regard to the draft legislative acts. Article 7, Section 2 of Protocol NO.2, Lisbon Treaty.

<sup>329</sup> Article 7, Section 3 of Protocol NO.2, Lisbon Treaty.

<sup>330</sup> The principle of subsidiarity applies only to the areas of shared competence or where the Union is authorized to provide with supporting, coordinating and supplementing measures. While the areas where the proportionality principle applies is comparatively larger, extending even to the areas of exclusive competences. See: Geiger, R., Khan, D. E., & Kotzur, M. (Eds.). (2015). *European Union treaties: Treaty on European Union, treaty on the functioning of the European Union*. Beck. 36-40.

<sup>331</sup> Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing. 119-120.

<sup>332</sup> Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing. 220-221; Cooper, I. (2006). The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU\*. *JCMS: Journal of Common Market Studies*, 44(2), 282;

<sup>333</sup> Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing. 67.



to the latter to be quality-oriented rather than quantity-oriented.<sup>334</sup> However, as an important endeavor to reducing the democratic deficit, and even when this mechanism has so far never been triggered once, opinions and remarks on this mechanism from academia could in no way be conveyed as positive but at least cautiously doubtful in various sorts.

Some questions points to purely the institutional defects, namely there is no “Red Card” for national parliaments to solely block legislative proposals but consultative in substance.<sup>335</sup> At the same time, no standardized or harmonized procedures have been introduced in the Protocol NO.2 except some basic minimum review standards which could consequent in obstacles for collective actions.<sup>336</sup> Moreover, from the perspectives of problems this mechanism is expected to respond and the subjects it tries to scrutiny, certain studies challenges this model with advocating that the intrusion of European institutions has been far from the current situations in that most legislative initiatives from the Commission constitute no severe infringement of the subsidiarity principle.<sup>337</sup> Practical politics also worsen the performance of this mechanism since the European issues have not attract much attention and thus big, mainstream parties are hardly with incentives to raise them to the plenary debates and deliberations.<sup>338</sup>

To make the judgment or remarks on the system even before this system has been applied into specific cases or firstly triggered might possibly be on the very

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<sup>334</sup> The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU. *Journal of Common Market Studies*, 44(2), 282-283.

<sup>335</sup> Cooper, I. (2006). The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU\*. *JCMS: Journal of Common Market Studies*, 44(2), 283; Cooper, I. (2012). A 'virtual third chamber' for the European Union? National parliaments after the Treaty of Lisbon. *West European Politics*, 35(3), 441.

<sup>336</sup> Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing. 60.

<sup>337</sup> Fraga, A. (2005). After the Convention: The future role of National Parliaments in the European Union (and the day after... nothing will happen). *The Journal of Legislative Studies*, 11(3-4), 497; Bellamy, R., & Kröger, S. (2014). Domesticating the democratic deficit? The role of national parliaments and parties in the EU's system of governance. *Parliamentary Affairs*, 67(2), 447.

<sup>338</sup> Raunio, T. (2011). The gatekeepers of European integration? The functions of national parliaments in the EU political system. *Journal of European Integration*, 33(3), 315. Considering this, certain conventional idea has once again been put forward that the legislative proposals from the Commission shall better be politicalized so as to motivate representatives and voters from both left and right blocs to invest more time and focus on the EU issues. See: Miklin, E. (2014). EU Politicisation and National Parliaments: Visibility of Choices and Better Aligned Ministers?. *The Journal of Legislative Studies*, 20(1), 78-92.

slippery slope since it is often conspicuously uncovered that practices of rules rewrite the textual rules in specific cases from time to time. If we deviating the focus from the win-lose power games, this mechanism, another impact of this mechanism may falls in our vision, that is this mechanism will significantly bridges the communication between national parliaments (and the peoples they represent) and European institutions. This mechanism could be a forum for European institutions and national representative institutions to discourse their respective interpretations on the subsidiarity principle (whether it has been respected) in every specific cases. The power distribution and institutional projects in this mechanism has been subtly balanced and provocative to motivate both parties towards close but different positions.<sup>339</sup> It is in this sense that the defined role of national parliaments in the Early Warning Mechanism should rather be told as the public forum for the purpose of debating and communicating on EU policies and also “the ‘hard core’ of a broader and less formal deliberative exchanges among NPs and EU institutions”.<sup>340</sup> Precisely it is on this deliberation and communication on EU policies between them shall the supplementary legitimacy be established rather than conventional interpretations on the participation of national parliaments in the EU decision-makings.

### 3.3.3.2 European Affairs Committee and COSAC

Special bodies in the national parliaments for dealing with EU-related issues have been gradually established along with the European integration. This committee represents in fact the parliament with regard to EU issues, if not necessarily the formal case in accordance with the laws. The European Affairs Committees in certain countries, if not most, acts as the essential body regarding the deliberation over EU documents and accountability.<sup>341</sup> This is so as a result of major parties’ reluctance to

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<sup>339</sup> Cooper, I. (2006). The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU\*. *JCMS: Journal of Common Market Studies*, 44(2), 295. This article analyses merely incentives for national parliaments to adopt a friendly interpretation on the respect of subsidiarity principle. While this idea could be further developed since the European institutions may similarly be under the pressure as respecting the national parliaments (and the peoples backed them) considering the legitimate challenges they face and the rising Euro-skepticism. Thus, to cooperate sincerely (even if pretending to be) and adopting cooperative-like positions and interpretations could be the “win-win strategy”.

<sup>340</sup> Cooper, I. (2012). A ‘virtual third chamber’ for the European Union? National parliaments after the Treaty of Lisbon. *West European Politics*, 35(3), 444.

<sup>341</sup> Benz, A. (2004). Path-dependent institutions and strategic veto players: national parliaments in the European Union. *West European Politics*, 27(5), 883-885.

raise those questions when the plenary meeting is in process. In the past and still the nowadays situation, mainstream parties (center left or center right) see rather tiny divergences on their respective European policy; both the socialists and the conservatives belong to the pro-integration bloc and the Euro-skeptical parties have gained rather low voices and influences in spite of their unprecedented insurgence in 2014 European Parliament election.<sup>342</sup> Besides, considering the multi-sectoral nature of European issues, the establishment of specialized European Affairs Committee would administer to the coordinating parliamentary scrutiny on EU issues which could be multiply dimensional, overlapping various ministries' competence.<sup>343</sup>

Another way of collective scrutiny over EU policies by national parliament is the cooperative organization, COSAC<sup>344</sup>, composed of European Affairs Committees within national parliaments.<sup>345</sup> Currently most EU-related issues have virtually deliberated in the special European Affairs Committees established within national parliaments. Protocol NO. 1 of the Lisbon Treaty defines the tasks of this conference to be “submit any (no binding) contribution it deems appropriate for the attention of the European Parliament”, promoting information flows among EU institutions and national parliaments, and special conferences could also be organized for specific issues.<sup>346</sup> At the same time when the involvement of COSAC into the EU decision-makings in the service of mitigating the democratic deficit and enhancing the accountability, the springing up of sectoral committees' role in the scrutiny poses challenges on the dominant status.<sup>347</sup> What's worse, studies on the documents reveal the problem that when delineating the role of national parliaments in the European political system it is the governance oversight function rather than the connection

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<sup>342</sup> Raunio, T. (2011). The gatekeepers of European integration? The functions of national parliaments in the EU political system. *Journal of European Integration*, 33(3), 315.

<sup>343</sup> Bellamy, R., & Kröger, S. (2014). Domesticating the democratic deficit? The role of national parliaments and parties in the EU's system of governance. *Parliamentary Affairs*, 67(2), 448.

<sup>344</sup> Conférence des organes spécialisés dans les affaires communautaires et européennes, see: [www.cosac.eu](http://www.cosac.eu).

<sup>345</sup> Karlas, J. (2012). National parliamentary control of EU affairs: Institutional design after enlargement. *West European Politics*, 35(5), 1095.

<sup>346</sup> Article 10, Protocol NO.1, Lisbon Treaty.

<sup>347</sup> Barrett, G. (2008). *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other member states legislatures*. Clarus Press. 456.

function (between government and voters) that takes the priority.<sup>348</sup> If we agree with the opinion that democratic deficit in the EU might be more of lacking public forum and (EU) government-voters' connection and thus less salient to the public<sup>349</sup>, it seems the legitimacy arising from the COSAC could have been overestimated.

### ***Ministerial accountability***

The ministerial accountability forms the fundamental part of the democratic polity. As for the integration process when sovereign and policy-making powers have been consistently transferred to the supranational level, losing control over ministers, which is the political task of parliaments, come out not only as a theoretical scenario a brute fact, and this is also one defect that fails the Lisbon Treaty to consolidate its democratic legitimacy when the Qualified Majority Voting in the Council inevitably dampens down personal responsibility.<sup>350</sup> As for this issue, national parliaments face the difficulties to adopt or navigate the subtle balance between holding ministers accountable and restraining the ministers to be snagging their tights in participating the EU negotiations.<sup>351</sup>

The national parliaments' supervision over ministers mainly relates to the decision-making in the Council.<sup>352</sup> The relationship between national parliaments and ministers demonstrates the conventional agent theory where challenges on the agent risks are also very likely to happen between national parliaments and ministers based on the ministers' orientation of sectoral interests versus parliamentary consideration of comprehensive interests balance as well as the information asymmetry between

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<sup>348</sup> Raunio, T. (2011). The gatekeepers of European integration? The functions of national parliaments in the EU political system. *Journal of European Integration*, 33(3), 303-321.

<sup>349</sup> Auel, K., & Raunio, T. (Eds.). (2012). *National parliaments, electorates and EU affairs*. Institut für Höhere Studien (IHS). 9-11.

<sup>350</sup> Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing. 211-215.

<sup>351</sup> Benz, A. (2004). Path-dependent institutions and strategic veto players: national parliaments in the European Union. *West European Politics*, 27(5), 897.

<sup>352</sup> Raunio, T. (1999). Always one step behind? National legislatures and the European Union. *Government and Opposition*, 34(2), 191; Kiiver, P. (2010). The Lisbon Judgment of the German Constitutional Court: A Court - Ordered Strengthening of the National Legislature in the EU. *European Law Journal*, 16(5), 581; Kiiver, P. (2006). *The national parliaments in the European Union: A critical view on EU constitution-building* (Vol. 50). Kluwer law international. 68-69.

them due to the dual-level decision-making.<sup>353</sup> To achieve the accountability of government power, some intern scrutiny mechanisms have been developed including procedures to communicate documents concerned to the parliaments and scrutiny reserve to impose possibly stricter supervision over ministers' behavior in the Council for the compensation of their lost powers.<sup>354</sup> However, as have mentioned before, due to the integration and the establishment of multi-level decision-making, ministers of national governments have been endowed with double hats. They are both the members of cabinet accountable to their respective parliaments and the members of the Council where they need to communicate, negotiate and compromise on issues that go beyond the scope and interests of single member states. Then naturally comes the questions that what about when the two hats conflicts with each other, that is to say, would the minister be held accountable when what he has done as a member of the Council does not fit the best interests of the states? What about when the minister consent in the Council before they gain the approval from national parliaments or even in theory go against the will of national parliaments? Fortunately these problems has not become into reality since the ministers are usually backed by majority parties/coalitions in the parliament and also fundamentally their second hats (the member of the Council) derives from their first hats (minister of cabinet), and the parliaments actually could always hold ministers accountability one way or another.<sup>355</sup>

Even so, the problem arises that parliamentary control over ministers in the Council has been far from adequacy. The parliament has been confronted with resource shortage and incentives for parties to propose EU issues into salient discussions.<sup>356</sup> On account of this, the suggestion of politicization has been raised; holding that politicization of EU issues could motivate voters from both blocs to concentration on these issues and members of parliaments would also invest more

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<sup>353</sup> Miklin, E. (2014). EU Politicisation and National Parliaments: Visibility of Choices and Better Aligned Ministers? *The Journal of Legislative Studies*, 20(1), 82.

<sup>354</sup> Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing. 53-55.

<sup>355</sup> Benz, A. (2004). Path-dependent institutions and strategic veto players: national parliaments in the European Union. *West European Politics*, 27(5), 897.

<sup>356</sup> Miklin, E. (2014). EU Politicisation and National Parliaments: Visibility of Choices and Better Aligned Ministers?. *The Journal of Legislative Studies*, 20(1), 82.

resources and attentions in scrutinizing EU policies and the ministers.<sup>357</sup> For a long time, politicization has seems to be the “cure-alls” for democratic deficit in the EU, proposed both to the Commission and to the Council. However, this proposal, at least for the Council, could be rather skeptical. As has been analyzed in the former part, the decision-making method in the Council is consensual which has been part of institutional culture. Consensual decisions, although possibly inclined to weaken the accountability through smoothing down divergences and thus showing harmonious unanimity to the public, do not only correspond to the political reality that the member states are still the masters of the Union but also plays indispensable roles in advance the integration process in finding the common position accepted by all member states at best rather than resorting to the win-lose showdown to split the member states. Besides, according to political practices in other polities, politicization needs to be supplemented with voting methods of simple majority or absolute majority (half of the all members) in the chamber representing the component units, say, the Senate of United States or the *Bundesrat* of Germany since the politicization generally refers to the division of lefts and the rights (50% vs. 50%) and high threshold would only be blocking in adopting decisions. Actually we just need to look back on the history of voting methods in the Council we would realize how difficult and tortuous it is for the transformation from unanimity to the Qualified Majority Voting, not to mention the could-be-imagined tremendous barriers ahead to adopt the majority voting method(over 50%).

### **3.3.4 Review on the national parliaments’ role in the European integration**

Although the role of national parliaments under the supranational legal context has not been concluded and the argument on models of national parliaments continues, the power of national parliaments has been, at least textually, been broadened. Information to the decision-making activities and access to the EU documents has been elevated as necessary prerequisites for advancement of national parliaments’

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<sup>357</sup> Miklin, E. (2014). EU Politicisation and National Parliaments: Visibility of Choices and Better Aligned Ministers?. *The Journal of Legislative Studies*, 20(1), 78-92.

involvement in European decisions.<sup>358</sup> Concentration leads to resentment while separation satisfies everybody. Concentrating powers from member states to Brussels has resulted in the national parliaments being increasingly marginalized from decision-making, legislation introduction to ministerial accountability, and has been accused as the triumph of bureaucrats in garnering unscrupulous expansion of powers while free from supervision and balance from elected politicians.<sup>359</sup> Besides, as Moravcsik observes, the integration process has multiplied the problem of information asymmetry and both agenda setting as well as decision-making process overwhelmingly swings to the government branch.<sup>360</sup> Dragging the national parliaments into the decision-making symbols the democratic legitimacy endorsement from the former, who are still be regarded as the principle institution for democracy whether domestically or supranational and thus to ease up critics and challenges on the European integration.<sup>361</sup> Or in other words, it is based on the assumption that decisions from Brussels could be democratic when the national parliaments have smiled on them.<sup>362</sup> Involving the European decision-makings prompts the Europeanization of national parliament.<sup>363</sup> The Europeanization of national parliaments has reinvigorated national parliaments in danger of marginalization in both levels of governance, say, to reinforce parliamentary control over government

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<sup>358</sup> Fraga, A. (2005). After the Convention: The future role of National Parliaments in the European Union (and the day after... nothing will happen). *The Journal of Legislative Studies*, 11(3-4), 494.

<sup>359</sup> Raunio, T. (2009). National parliaments and European integration: What we know and agenda for future research. *The Journal of Legislative Studies*, 15(4), 327.

<sup>360</sup> Moravcsik, A. (1994). *Why the European Community strengthens the state: domestic politics and international cooperation*. Center for European Studies Working Paper Series #52. See: [https://ces.fas.harvard.edu/files/working\\_papers/CES\\_WP52.pdf](https://ces.fas.harvard.edu/files/working_papers/CES_WP52.pdf), time for last access: 26<sup>th</sup>, April 26, 2016.

<sup>361</sup> Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing. 40.

<sup>362</sup> Fraga, A. (2005). After the Convention: The future role of National Parliaments in the European Union (and the day after... nothing will happen). *The Journal of Legislative Studies*, 11(3-4), 504.

<sup>363</sup> Literatures have set certain standard for assessment of the Europeanization of national parliaments , that is, reduction in information asymmetry, national parliaments' being consulted by governments with regard to community issues and the binding force(de jure or de facto) of parliamentary opinions on the governments. National parliaments' role has been phenomenally enhanced. See: Neunreither, K. (1994). The Democratic Deficit of the European Union: Towards Closer Cooperation between the European Parliament and the National Parliaments\*. *Government and Opposition*, 29(3), 304.

regarding EU issues and to hold national parliaments closer in collective actions in scrutinizing over EU decision-makings.<sup>364</sup>

Before any chances testing the positive effects of national parliaments' involvement in the European Union, concerns and problems have already emerged. For a long time the European integration has been mainly described as an project constructed by politicians, civil servants and scholars if any. Uniform procedures and systems hardly satisfy practical conditions from state to state, and the specific practices of standardized rules could vary unthinkableably. National parliaments functions quite diversely from member to member and even within (in state with two chambers, the two chambers in no way performs the same), and abundant examples could be those illustrations. Those parliaments/chambers which may actively take part in the EWM mechanism are more likely to be those with minority or coalition government.<sup>365</sup> Besides the form of government, the institutional culture on party relationship could also be an influential factor; the goal of coalition government in Germany tends to protect this coalition and promote stability while its counterpart in Netherlands prefers the strict scrutiny on government acts for bargains and compromised made within the cabinet for parties' interests.<sup>366</sup> Other than that, different parliaments may emphasize differently in exercising various functions of governing and representing. For those parliaments who takes the representing function as the priority they would invest more efforts in strengthening the connection between national and supranational while for those who hold the governance function as their top task they probably tends to lift the position of European Parliament.<sup>367</sup>

Second, the elevation of national parliaments in the EU, which partly aims to reducing the bureaucrats in the supranational institutions, could precisely on the contrary aggravate the bureaucracy. Bureaucratic risks follows every time when there

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<sup>364</sup> Raunio, T. (2008). Ensuring democratic control over national governments in European affairs. *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures*, 12.

<sup>365</sup> Holzhaacker, R. (2005). The power of opposition parliamentary party groups in European scrutiny. *The Journal of Legislative Studies*, 11(3-4), 428-445.

<sup>366</sup> Holzhaacker, R. (2002). National Parliamentary Scrutiny Over EU Issues Comparing the Goals and Methods of Governing and Opposition Parties. *European Union Politics*, 3(4), 476.

<sup>367</sup> Wessels, B. (2005). Roles and orientations of members of parliament in the EU context: Congruence or difference? Europeanisation or not?. *The Journal of Legislative Studies*, 11(3-4), 453.



has been new institutions being established; it is also applicable to the Europeanization of national parliaments that bureaucrats always steam ahead in the intern management of cooperation networks between parliaments and helps the administrators rather than the representatives.<sup>368</sup> The situation is even worse considering the concentration attributed to EU issues among national parliaments' members reasonably constitutes only very small part of the whole work for them since they would often left most tasks, also the dominance of operations to the administrators.

Third, what is of vital importance is that national parliaments' stepping into the EU decision-makings breaches certain basic political formula. The power to represent the states and to handle with foreign affairs belongs widely-accepted to the government power rather than the legislative power. One state should have only one official voice externally, and any deviating from that could appear to be weird and only to erode the credibility of that state. If the parliament holds the similar position as the government, then the significance of national parliaments' involvement could be rather limited. The idea that opposition from domestic parliament could constitute bargaining counters during the international negotiations<sup>369</sup> appears to be rather illusive. The tricks known to and can be used by all players usually performs ineffectively. In fact, when we connect the Early Warning Mechanism and the voting method in the Council, the real function of this mechanism might come into appearance. If certain member states fail to form the blocking minority and thus are voted out in the Council but reach the threshold of playing the "Yellow Card" or "Orange Card" according to the requirements of Early Warning Mechanism, they could motive or appeal their parliaments to act collectively as thus exercise the de facto delay power regarding the decision-makings.

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<sup>368</sup> Christiansen, T., Högenauer, A. L., & Neuhold, C. (2014). National Parliaments in the post-Lisbon European Union: Bureaucratization rather than Democratization&quest. *Comparative European Politics*, 12(2), 135-136.

<sup>369</sup> Besselink, L. F. (2006). National Parliaments in the EU's composite Constitution; a plea for a shift in paradigm. In *National and regional parliaments in the European constitutional order* (pp. 117-132). Europa Law Publishing.

### 3.4: Conclusion

The role of legislative institutions in the supranational governance was not taken into notable consideration at the time when the community structure was portrayed. As mentioned above, the supranational institutions, according to its founders, should be more of the bureaucratic rationality's governance than the comprehensive government structure, precluding the popular input. However, since constant transfer of sovereign powers to the supranational networks with legislative institutions trails behind, the democratic legitimacy emerges due to the constitutionalism traditions in Europe and propels the substantial involvement of representative bodies. Consequently, the democratic baseline of supranational institutions evolves from the rudimentarily indirect democracy (the democratically-elected ministers according to provisions in respective member states) to the exemplarily dual democracy (the direct elected of European Parliament and the indirect European Council as well as the Council). After the abortive Constitutional Treaty and its successor the Lisbon Treaty, it has been supplemented into the age of "Dual democracy +" with national parliaments come onto the stage and also introduction of diverse direct participations like the European Citizens' Initiatives.

Those sophisticated combination, however, does not effectively responds to the critics with regard to the democratic deficit. European citizens seem not to take politicians' chattering away their highlights and efforts on democracy construction. The overlap of Euro Crisis and the immigration crisis in Europe gives rise to the insurgence sweeping most important member states including the *AfD* in Germany, the *Front National* in France, the *Independent Party* in the UK, the *Freiheitliche Partei Österreichs* in Austria and the *Law and Justice Party* in Poland, exposing the fragility of democratizing contributions made in the past decades. Without any intentions to belittle the importance of reasons originating from economic, social and cultural respects, institutional defects could also be traced out as one source in illustrating the failures to consolidate EU's democratic legitimacy.

We may classify the functions exercised by representative institutions into three categories, the function to elect and dismissal, the function to deliberate on policies and the function to connect the government and voters. As for the elect and dismissal,

voters could have the chance to elect the Commission President through the directly elected European Parliament if the Juncker Model could be continued as becomes one constitutional convention. However, there is no way for the whole European Council (as well as the Council) and all the national parliaments to be alternated with single election. Second, as for the deliberation of policies it is still the Council (with the assistance of Coreper) that are superior to others, if not dominant. However, the Council happens to be part of the democratic legitimacy problem on account of his secrecy and distinctive way of decision-making, both formally and informally. As for the other two institutions, their respective dilemma would be more accurately revealed when we combine both the function of connection and the function of deliberation. The European Parliament has progressed both in power and resources to perform better deliberation on supranational policies while it is at the same time being persecuted by the “extremely weak connection” with voters. National parliaments, however, just appear to be bottom-up version of European Parliament in performing these functions, strong in connecting with voters while extremely weak in deliberation on EU policies considering their current role, powers, resources and political impulse. Consequently, two of the three legislative institutions or legislatively related are paralyzed in exercising comparatively integrative legislative power and the other one constitutes salient part of the democratic deficit problem. The physical combination of these fragmentized and paralyzed “chambers” are more likely to cause more problems rather than to complement each other in solving the democratic legitimacy problem. The subdivision of one actors in one conventionally balanced system used to hampering the normal performance and interactions of this actor with others and in worst results in the collapse of the whole system rather than more transparent or democratic. A system is not only the combination of all component parts but what’s possibly more important, also the collection of all connections between those component parts. The subdivision, if not taking these connections into considerations, would be very likely to cut off those connections and results in the paralyzing operation of that system. The institution with legislative power constitute an relatively independent system, the function to deliberation on policies and the function to connecting voters are in every way dependant on each other, jointly achieving voters’ will into the policy and then the feedbacks to the voters. That is the very process we name “democracy” except the elections every several years. However, the current

allocation of legislative powers among the European Parliament, the Council and national parliaments precisely in practice subdivides different functions of the organic legislative body. Democratic deficit does not necessarily refer to the democratic power lacks in quantity, but could also be a description of the ill-operated legislative powers/institutions. Unfortunately, subdivision of powers is precisely what the integration process is actually working; at least it is so demonstrated by the architecture of EU's legislative power.

### **3.5 Approach revision: Right way to strengthen national parliaments?**

Based on the functionalistic analysis on the problems of the legislative institutions in the EU, we may move towards the explorations on the solutions advanced by the EU to enhance the democratic legitimacy of the EU with the involvement of national parliaments since they are regarded to be more democratic and closer to the voters. The question could be proposed in another way, is it the solutions to invite the national parliaments into the EU decision-making process genuinely instrumental in fulfilling the function of the legislative institutions, the functions of democratic participation in the decision-making process (the democratic input, the policy deliberation and feedbacks to the voters by the representatives/MPs) which has been paralyzed under current system. In other words, are national parliaments promising to be the representative institutions that are available in both policy deliberation and connecting the voters with regard to the EU issues? This work is not that bold and prophetic enough to provide a clear answer to that question. However, when we turn our eyes to another institution, the European Parliament, we may find a more constructive but a never-earthshaking way to achieve that cause. For the European Parliament, who is more convenient in EU policy deliberation in structure and various resources and facilitates, the only major step it is in need of deployment is to promote closer connections with the voters and make the MEPs the representative of EU at local areas. Actually, the transformation of electoral system could be of lots contribution to that cause. Usually, when compared with the Party List (Proportionate Representation) system, members (of the parliament) under single constituency system have more member-voter linkage and the interactive contact and

voters' knowledge of candidates similarly.<sup>370</sup> That's part of the advantages of the district/constituency electoral system, whether single or mixed constituency, that to promote accountability and enhance the member-voters connection as well as the democratic legitimacy.<sup>371</sup> Therefore, the electoral system reform could be contributive in remedying the defect of the European Parliament in lacking of member-voters' connection since most of them have been elected through the Parties' lists and thus peoples' feeling that they are distant from the grassroots although Brussels or Strasburg is not necessarily further to the common people than Berlin or Paris geographically. Surely the mere electoral system reform is neither the whole story nor the only remedy in demand to the defect of the European Parliament in lack of member-voters' linkage and the peoples' perception of detachment, but it could be rendering an aid to that cause of strengthening the democratic legitimacy in reality and also in perception and the European Parliament could thus become the institutions that is capable of accomplishing the crucial function as a representative institution and in best case be incorporated to be part of the solution to the problem of democratic deficit in the EU. However, that electoral system reform concerns not only the member-voters' linkage and the democratic legitimacy of the EU but also the control of the party leaders over their party members especially those members in the representative institutions. Therefore it goes beyond an academic issue but becomes a political issue in even larger sense. On that account, the proposal on electoral system reform is restraint to be merely academic vision and seeks no intention to be an institutional reform proposal. However, it remains worth rethinking whether the recent institutional reform which prompts the involvement of national parliaments in the EU decision-making is really beneficial to the enhancement of democratic legitimacy of the EU or this reform is merely an "institutional make-up" as a response to the criticisms on the democratic deficit of the EU. That would a question for future EU studies to offer an answer.

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<sup>370</sup> Carey, J. M., & Shugart, M. S. (1995). Incentives to cultivate a personal vote: A rank ordering of electoral formulas. *Electoral studies*, 14(4), 417-439.

<sup>371</sup> Norris, P. (2001). The twilight of Westminster? Electoral reform and its consequences. *Political Studies*, 49(5), 877-900.

# **Chapter 4. The Euro Crisis and the challenges to the accountability in the EU**

As discussed in the above chapters, the accountability mechanism in the pre-crisis age has witnessed its defects and the corresponding consequences. From the legal perspective, the legislative and the government branch has been confronted with accountability problems. For the legislative bodies, the institutional arrangement of the legislative branch in the Treaties has subdivided the legislative power as well as supervision power to different institutions and thus fails for every one of them or the whole of them to exercise effective institutional control over the government decision-making powers. For the government branch, the European Council has steadily disregarded the rules in the Treaties about the power division and substantially acquired the actual exercise of the power to initiatives and a increasing role in the decisions about the political directions and major policies of the Union while there are currently no formal mechanism available for the voters and the representative institutions to impose effective control over the genuine government body who holds the last say. All these accountability problems have emerged even before the crisis ages. What's even worse, the accountability problem becomes even more severe during the crisis ages as we have seen countless times in the history. Crisis in the history, whether it is an economic/financial or a military one, frequently ends up in the out-of-balance of public power to the advantage of the government branch and weakens the supervision mechanisms and institutions concerned, the Roman Republic's transforming to be an empire system for example. It is always the case that when confronted with crisis, the government always requests for stronger authority as well as powers and simplified procedure to adopt major policies to

respond to the crisis and possible emergencies. Correspondingly, the effectiveness of the supervision mechanism is often undermined and the institutions marginalized, temporarily or permanently institutionalized. It is a similar case with the European Union institutions' experience during the Euro Crisis. In short, the economic decision-making mechanism and the counter-crisis actions, the ESM Programs as well the OMT programs and programs of the same kind, have aggravated the already accountability problems to be an accountability crisis. This part will show and explain how this has happened.

## **4.1 The Economic and legal background of the crisis: the Union's competence on the general economic policy**

### **4.1.1 The economic and financial crisis**

The introduction of common currency represents the beginning of new era in the integration process of Europe with competence of monetary policies being transferred to the supranational level and an independent technocratic body, free from receiving orders and interference of politicians, conducting for the service of EU long-term interests in terms of price stability in the Maastricht Treaty. Common currency symbols the end of monetary nationalism and flexible exchange rates in Eurozone states.<sup>372</sup>

However, its impact differs from states to states. For south European states that have also faced with the heavy burden of public debts, Euro turns out to be the chance of a lifetime to reduce such deficit and reinvigorate their competitiveness while at the same time also a temptation to borrow more money out of political (short-term) concerns, taking advantages of lower rates. Tragically but seemingly unable to refuse, they swallow the Eden's Apple and end with even greater numbers of public debts.<sup>373</sup> While for north European states especially Germany the introduction of Euro drags

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<sup>372</sup> Huerta de Soto, J. (2014). In defense of the euro: an Austrian perspective (with a critique of the errors of the ECB and the interventionism of Brussels). *Journal de Economistes et des Etudes Humaines*, 19(1), 6.

<sup>373</sup> Sinn, H. W. (2014). *The Euro trap: on bursting bubbles, budgets, and beliefs*. OUP Oxford. Chapter 2 (Bubbles in the Periphery).

them into years' stagnation and painful reforms have to be taken in order to restore competitiveness caused by flowing away of capitals and labor market in lack of vitality.<sup>374</sup>

The Great Recession in the United States spreads to the Europe and triggers its underlying structure deficit crises there, then sequentially fall the periphery member states, Greece, Spain, Ireland and others. As a response, member states of Eurozone and subsequently the European Central Bank (ECB) deployed a cluster of countermeasures to rescue states in crises and bail out them with providing monetary liquidity, namely the European Financial Stability Facility (EFSF), European Financial Stabilization Mechanism (EFSM) and their successor, the European Stability Mechanism (ESM) which was finally approved by the German Federal Constitutional Court (FCC) in 2012. Besides, the ECB also delivered their actions in tussling with the crises in 2012, the Outright Monetary Transactions (OMT) whose constitutionality is expected to be decided by FCC at the end of June 2016. These measures have faced with criticisms, questions and legal challenges since the first day when they are proposed, ranging from their legality with regard to the non-bail out clause and non-state financing clause in the Treaties, their constitutionality with national constitutions to their inadequacy in democratic control and accountable transparency of decision-makings. This crisis reveals not only the vulnerability of integration and solidarity but also the structural flaws within the EU construct.

#### **4.1.2 The Union's competence on the economic governance**

In the Lisbon Treaty, the competence has been defined between the Union and the Member States to various categories. Different decision-making procedures and division of powers apply respectively to the corresponding areas. According to the rules concerned, the monetary policy falls within the scope of exclusive competence of the Union.<sup>375</sup> Or to be more accurate, only the monetary policy of the Eurozone Member States applies the exclusive competence approach. However, the monetary policy of the none-Eurozone Member States then shall be categorized to be of the

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<sup>374</sup> Sinn, H. W. (2014). *The Euro trap: on bursting bubbles, budgets, and beliefs*. OUP Oxford. Chapter 3 (The other side of the coin).

<sup>375</sup> Art.3(1) TFEU.



economic policy field since otherwise it will find no more appropriate position.<sup>376</sup> In the nature of the exclusive competence, the monetary policy of the Eurozone Member States shall be exercised by solely the Union and the Member States have been prohibited to promulgate any new legislative acts unless under three exceptional cases.<sup>377</sup> However, the classification of the economic policy does cause questions. From the textual codification order of the Treaties and the widely-accepted logic behind the codification (from general terms to the specific ones), the competence of economic policy shall be taken as part of the shared competence since its location in the Treaties, between the provisions on shared competence and the coordination competence. However, from the content of the rules on the Union's acts available with regard to economic policies and the Member States' reluctance to the transfer of economic policy competence to the Union level, it shall be better categorized to be the competence of supporting, coordinating or supplementing actions of the Member States.<sup>378</sup> In that case, the Treaties read that "*Legally binding acts of the Union...shall not entail harmonization of Member States' Law or regulation*".<sup>379</sup> This article indicates that it is the Member States that reserve the competence to introduce economic policies and the Member State' "self-coordination" shall take precedence while the coordination adopted by the Union supplements. In some sense, the competence to economic policy could also be referred to as the "exclusive competence" of the Member States.<sup>380</sup> A further reading of the provisions respectively governing the monetary policy<sup>381</sup> and the economic policy show more detailed elaboration on the actions the Union and the Member State are entitled to take. The provisions of the monetary policy chapter has entrusted the task of formulating monetary policies for the sake of guaranteeing the price stability to the ECB and the

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<sup>376</sup> Geiger, R., Khan, D. E., & Kotzur, M. (Eds.). (2015). *European Union Treaties; a Commentary: Treaty on European Union: Treaty on the Functioning of the European Union*. Hart. 211.

<sup>377</sup> Geiger, R., Khan, D. E., & Kotzur, M. (Eds.). (2015). *European Union Treaties; a Commentary: Treaty on European Union: Treaty on the Functioning of the European Union*. Hart. 204.

<sup>378</sup> Geiger, R., Khan, D. E., & Kotzur, M. (Eds.). (2015). *European Union Treaties; a Commentary: Treaty on European Union: Treaty on the Functioning of the European Union*. Hart. 211.

<sup>379</sup> Art.2 (5) TFEU.

<sup>380</sup> Geiger, R., Khan, D. E., & Kotzur, M. (Eds.). (2015). *European Union Treaties; a Commentary: Treaty on European Union: Treaty on the Functioning of the European Union*. Hart. 205.

<sup>381</sup> Without particular demonstration, the "monetary policy" in this paper refers to the monetary policy of the Eurozone Member States which belongs to the exclusive competence category of the Union.

ESCB which is solely responsible for the achievement of that objectives free from any political influence from other institutions and governments. As for the economic policy, the Treaties have conferred no legislative competence to the Union from the mere reading of the legal texts while the Member States that are under obligation to coordinate their economic policy which constitute part of the common concern of the Union, not only to the Eurozone Member States but also for the non-Eurozone Members.<sup>382</sup> As for the economic policy chapter, the essential character of the coordination competence, the Member States dominance, comes much clearer. The Union institutions may formulate broad guidelines to achieve that coordination. However, the guidelines, although based on the recommendations proposed by the Commission, shall be reviewed by the Council and the European Council which represent the interests of the Member States among various Union institutions. Another supranational institution, the European Parliament, however, has been excluded from the decision-making process. Other than the decision-making process, the content of the guidelines has also been installed restrictions that they may draw general objective but the details especially the specific content of legislative acts to be formulated is supposed to be reserved to the Member State.<sup>383</sup> Therefore, from both the perspective of the decision-making process and the substantive content of the guidelines for the purpose of achievement of economic policy coordination, the characteristic of Member States dominance has shaped the crucial part of the Union's competence on the supporting, coordinating and supplementing the economic policies adopted by the Member States, precisely opposite to the monetary policy which has been exclusively entrusted to the Union (the ECB). This separation of monetary policy and economic policy equipped with different competence approach, namely the Union's competence in the general economic governance, constitute the legal ground to assess the validity and the accountability problem of the actions taken by the Union and the Member States in coping with the financial crisis.

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<sup>382</sup> Geiger, R., Khan, D. E., & Kotzur, M. (Eds.). (2015). *European Union Treaties; a Commentary: Treaty on European Union: Treaty on the Functioning of the European Union*. Hart. 581.

<sup>383</sup> Geiger, R., Khan, D. E., & Kotzur, M. (Eds.). (2015). *European Union Treaties; a Commentary: Treaty on European Union: Treaty on the Functioning of the European Union*. Hart. 582-583.

## 4.1 The European Central Bank's independence and its challenges

The European Central Bank (ECB) plays an eminent role in the European Monetary Union (EMU) which has been established by the Maastricht Treaty and forms the European System of Central Banks (ESCB) with national central banks.<sup>384</sup> The top priority of ECB is to preserve the price stability and supplement other EU institutions in the implementation of economic policies.<sup>385</sup> Its Governing Council consists of the Government board members of the ECB and all Governors of national central bank belonging to the Eurozone.<sup>386</sup> The ECB is the undertaker of European common monetary policy which used to be scattered among individual Member States but now have been centralized to the single supranational institution after decades of evolution since the establishment of its predecessors, the Committee of Central Bank Governors (CCBG) in 1974 and the European Monetary Institute (EMI) in 1994.<sup>387</sup> The most distinctive characteristic of this supranational central bank is the high-level independence, possibly the most independent central bank in the world. It is even so when it is compared with the German *Bundesbank* who has already been known for its independence.<sup>388</sup>

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<sup>384</sup> Article 282(1) TFEU.

<sup>385</sup> Article 282(2) TFEU.

<sup>386</sup> Article 283(1) TFEU.

<sup>387</sup> Andrews, D. (2003). The Committee of Central Bank Governors as a source of rules. *Journal of European Public Policy*, 10(6), 956-973.

<sup>388</sup> Elgie, R., & Thompson, H. (1998). *The Politics of Central Banks*. Routledge.154-155; De Haan, J. (1997). The European Central Bank: independence, accountability and strategy: a review. *Public Choice*, 93(3-4), 421-422.

## 4.1.1 The independence of the ECB

### 4.1.1.1 Theories on the independence of central banks

Independence of central banks has been seen as one of the core elements of neo-liberalism.<sup>389</sup> The independence of central banks primarily refers to the independence from any political pressures in deciding its monetary policies, especially the interest rate of banking sectors, which is usually explicitly enshrined into the statutes even constitution. The political independence of ECB has been highlighted in the Maastricht in the form of constitution-guaranteed independence, or, the legal independence. Article 107 of this Treaty declared that

*“When exercising the powers and carrying out tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or the national central banks in the performance of their tasks”.*

This article shall be interpreted to have imposed legal obligations both on the ECB (and national central banks) and on the persons and bodies that are with chances to exert influences on the Central Banks: for the ECB and other central banks, they are not only entitled the right to say no to these instructions but also that they are supposed to refuse; for interested parties who are likely to exert undue influence, the obligation they need to shoulder is negative, that is, they are prohibited to cast instructions or orders with the equivalent influence except certain pressure-free dialogues.<sup>390</sup> The political independence could be assessed from two perspectives, the relationship between the head of the central banks and the political leader also the role

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<sup>389</sup> Berman, S., & McNamara, K. R. (1999). Bank on democracy: why central banks need public oversight. *Foreign Affairs*, 2.

<sup>390</sup> Geiger, R., Khan, D. E., & Kotzur, M. (Eds.). (2015). *European Union Treaties; a Commentary: Treaty on European Union: Treaty on the Functioning of the European Union*. Hart. 604-605.

of government in the decision-making of central banks.<sup>391</sup> The benefits of the central bank independence have both theoretical and empirical basis although constant questions have been raised. Advocates of independent central banks actually could be concluded, in a brief way, that politicians are neither professional in deciding the most appropriate monetary policies for the stability and prosperity of the economy nor always willing to adopt the appropriate policies when they have been recommended by economics experts. Firstly, it is argued that monetary decision-makings should be differentiated from (other) political issues in that it is technical in nature and thus shall at best be left to the experts to make the professional judgment.<sup>392</sup> Secondly, the monetary policies have been largely abused by politicians in seeking short-term political benefits while such policies could be traumatic to the long-term monetary stability and economic development. It could be even worse when monetary policies are made by politicians to curry favor with certain political groups and lobbies.<sup>393</sup> Both are temptations government and politicians are very unlikely to refuse, and the independence of central bank with powers of monetary decision-makings could be the solution to avoid those risks. Besides, there is also empirical evidence supporting the independent status of central banks. Many studies based on empirical analysis have come up with the conclusion that those central banks independent from political influences turn out to have better economic performances especially comparatively low inflation.<sup>394</sup> Besides, the independence of the ECB to a large extent originates from the experience of the German *Bundesbank* model which the monetary stability could be prompted with an independent central bank.<sup>395</sup>

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<sup>391</sup> Elgie, R. (1998). Democratic accountability and central bank independence: Historical and contemporary, national and European perspectives. *West European Politics*, 21(3), 55.

<sup>392</sup> Berman, S., & McNamara, K. R. (1999). Bank on democracy: why central banks need public oversight. *Foreign Affairs*, 3.

<sup>393</sup> Hasse, R., Weidenfeld, W., & Biskup, R. (1990). *The European Central Bank: perspectives for a further development of the European Monetary System* (Vol. 2). Bertelsmann Foundation. 122-125.

<sup>394</sup> Alesina, A., & Summers, L. H. (1993). Central bank independence and macroeconomic performance: some comparative evidence. *Journal of Money, Credit and Banking*, 25(2), 151-162; Bernhard, W. (1998). A political explanation of variations in central bank independence. *American Political Science Review*, 92(02), 311-327; Blinder, A. S. (1999). *Central banking in theory and practice* (2<sup>nd</sup> MIT Press paperback edition). Mitpress. 56.

<sup>395</sup> Jabko, N. (2003). Democracy in the age of the euro. *Journal of European Public Policy*, 10(5), 714.

The independence of central bank from political influences is not a universal principle applying to all cases and even in countries who has accepted this principle there are distinctive models with different levels of independence. To liberate the monetary policies from politicians does represent a distrust of politicians so much as pursuing policies for the service of the achievement of long-term benefits to economy and market and characterizes those monetary policies with high degree credibility since the independence of central banks could provide it with capacities to resist and even to slam the brakes to the disastrous government monetary and economic policies.<sup>396</sup> The relation between independence of central bank and monetary policy credibility constitutes another proof on the positive correlation between constitutional checks/balances and the economic effects.<sup>397</sup>

#### **4.1.1.2 Structure of the ECB independence and the logic**

The independence of the ECB could be classified into fourth categories. First, it is the independence of its governing council members. According to the Treaties, the term of members in the ECB is a rather long period of time (eight years) and this term cannot be renewable.<sup>398</sup> This rule could be contributive in preventing members of the ECB taking instructions from politicians in order to get the credit from the latter and thus be nominated for a second or more terms in office. The second is the decision-making independence. The Treaties declare that only the ECB may address the issues of the euro and other institutions shall respect its independence.<sup>399</sup> Although President of the Council may submit a motion for deliberation to the Governing Council and the president, together with a member of the Commission may attend the ECB meetings, the ECB does not have to consider that motion, not to mention accepting the position of the Council and the outside participants have no

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<sup>396</sup> Issing, O. (1999). The Eurosystem: Transparent and Accountable or 'Willem in Euroland'. *JCMS: Journal of Common Market Studies*, 37(3), 516-517.

<sup>397</sup> In "city, constitution and sovereign borrowing in Europe, 1274-1785", the author, David Stasavage demonstrates the empirical evidences show that European states with constitutional structures are closely related to their credibility as debtors. These states are more likely to receive loans, usually in lower interest rates and thus be beneficial to their business booming. See: Stasavage, D. (2007). Cities, constitutions, and sovereign borrowing in Europe, 1274-1785. *International Organization*, 61(03), 489-525.

<sup>398</sup> Article 283(2) TFEU.

<sup>399</sup> Article 282(3) TFEU.

right to vote.<sup>400</sup> Third, the rules governing the ECB are rather difficult, if not impossible, to amend or abolish and are much stricter than most or all national central banks. The whole process is time-consuming and requires the consent of all member states to amend the Treaties and statutes concerned<sup>401</sup>. To be more specific, the amendment with regard to the rules in the Treaties (articles of the TEU and TFEU) shall be approved by all the Member States according to the Treaties' amendment procedures.<sup>402</sup> Besides, according to the *Protocol (No.4) on the Statute of the European System of Central Banks and of the European Central Bank*, Art.10 (2) of this Statute may only be amended with the consents from all the Member States while certain other rules of this Statute (Art. 5.1, Art. 5.2, etc.) could be changed with the requirements of ordinary legislative procedure.<sup>403</sup> Fourth, in a sense, the ECB has no institutions to be accountable to (only accountable, in the general way, to the Eurozone People rather than the European Parliament or any representative institutions) while even the most independent national central bank, the *Bundesbank*, is projected to be still accountable to the Bundestag. Even though the ECB may make reports to the European Parliament, the Council and the Commission as well as the European Council, those institutions, except the European Court of Justice, have no power to dismiss the Governing Council of the ECB nor to amend or repeal its decisions.<sup>404</sup>

Current discussions on the legitimacy of the ECB laid much weight on the terms of output legitimacy, following the logic of legitimacy through technical expertise.<sup>405</sup> In other words, the primary legitimacy lies in the ECB's performance in

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<sup>400</sup> Article 284(1) TFEU.

<sup>401</sup> Leino, P. (2000). The European Central Bank and Legitimacy Is the ECB a Modification of or an Exception to the Principle of Democracy?. *Jean Monnet Working Papers*.24; Jabko, N. (2003). Democracy in the age of the euro. *Journal of European Public Policy*, 10(5), 710; Verdun, A. (1998). The institutional design of EMU: a democratic deficit?. *Journal of Public Policy*, 18(02), 112-113.

<sup>402</sup> Art.48 TEU.

<sup>403</sup> Art. 40 of the Protocol No.4 on the Statute of the European System of Central Banks and of the European Central Bank.

<sup>404</sup> Apel, E. (2003). *Central banking systems compared: The ECB, the pre-euro Bundesbank and the Federal Reserve System* (Vol. 20). Routledge.62-63; Taylor, C. (2000). The role and status of the European Central Bank: Some proposals for accountability and cooperation. *After the Euro: Shaping Institutions for Governance in the Wake of European Monetary Union*, 179-202.

<sup>405</sup> Weber, M. (1978). *Economy and society: An outline of interpretive sociology*. University of California Press. Volume II, Chapter XI, *Bureaucracy*, 956-1003.

securing the price stability; besides, the ECB also is also supposed to endeavor to guard the European Monetary Union.<sup>406</sup> The ECB, which has centralized monetary policies of Member States for the purpose of uniting the monetary stability across the continent as a whole, avoiding inevitable conflictions with each other when they fall within the competence of the Member States, embodies the most coordinated way of monetary policies. Actually, the ECB also has the similar basis of legitimacy as the judiciary branch. Firstly, both monetary policies and judicial judgments are usually taken as a professional expertise which shall be decided by experts of certain field. Second, from the output legitimacy perspective, both the independent central bank and the independent courts are supposed to perform respective functions in service of long-term interests rather than temporary political credits. Thirdly, as the non-elected institutions in the age of democracy, both of them are adopting a self-restraining strategy in trade for the tolerance from Majoritarian branches. For the judiciary branch, the courts, when deciding sensitive cases brought to them, usually choose to peel detach the legal dimension from the political entirety and seek a self-limited style of exercising its own power within the legal issues discreetly. The famous case *Marbury v. Madison* is a classical example in demonstrating how courts seek self-preservation through the way of voluntary restraint. The legitimacy of the ECB could also be annotated with that approach. The non-bail out clause and the non-financing state clause in the Maastricht Treaty have largely limited the power of the ECB within the scope of monetary policies and precluded the ECB, which has been created as an instrument to promote the goals and interests of European states, from becoming a superpower to put member states under its control. The prohibition of public financing and the non-bail out clause are not only the contributing to the ECB's capacity in securing price stability but also aim at avoiding the risks that the ECB becomes the final creditor of member states and the runoff of budgetary powers from member states governments to the ECB.<sup>407</sup> Besides, once the public financing has implemented, it inevitably leads to the risk transfer from states of economic

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<sup>406</sup> Torres, F. (2013). The EMU's legitimacy and the ECB as a strategic political player in the crisis context. *Journal of European Integration*, 35(3), 294-295.

<sup>407</sup> Tuori, K. From expert to politician and stakeholder? Constitutional drift in the role of the ECB. *The European Union in Crises or the European Union as Crises?* 494.



hardships to the taxpayers of creditor states<sup>408</sup>, and this action with the possibly redistributive roles in nature could be making incursions into the fields which fundamentally should be decided by majoritarian mechanism. However, in the Euro Crisis, the ECB has launched a string of actions in countering with crisis sweeping the south European countries, raising anxiety about the ECB's rampant expansion of powers<sup>409</sup> and the conventional panic rooted in the European political culture with regard to the totalitarian Leviathan's dominance of citizens' freedom and self-determination, which are then transformed to be the resentment against the European Union and challenges towards legitimacy of the ECB, resulting in the insurgence of populists movement and a bitterly divisive Europe, complicating the economic crisis to be an full-fledged crisis. This will be further discussed in the following chapter.

However, it shall also be fair to make clear that even before the crisis, the ECB has tried to taking steps towards the democratic accountability direction through both improving the transparency and openness of its decision-making process and the closer relationship with representative institutions especially the European Parliament, seeking to enhance its own legitimacy. For the former, The ECB publishes annual forecasts after the year 2000 and also the *Monthly Bulletin* revealing the progress of its policies and also press conferences are usually held after the Governing Council meetings.<sup>410</sup> As for the democratic legitimacy basis, the ECB has been equipped with preliminary and fundamental democratic legitimacy by the facts that the establishment of the ECB originates from the EU Treaties which were approved by member states in their respective constitutional procedures.<sup>411</sup> The input legitimacy has been further strengthened when the members of the Council of the ECB are appointed by the democratically elected national governments.<sup>412</sup> The ECB also recourses to

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<sup>408</sup> Murswiek, D. (2014). ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014. *German LJ*, 15, 150.

<sup>409</sup> Cotta, M. (2014, March). Technocracy and Democracy in Times of Financial Crisis. In *International workshop organized by Hubert Heinelt and Jens Steffek* (Vol. 6, p. 7).

<sup>410</sup> David Howarth; Peter Loedel(2005), *The European Central Bank: the New European Leviathan*(Revised 2nd Edition), Palgrave Macmillan, 125.

<sup>411</sup> Torres, F. (2013). The EMU's legitimacy and the ECB as a strategic political player in the crisis context. *Journal of European Integration*, 35(3), 288.

<sup>412</sup> Quaglia, L. (2007). *Central banking governance in the European Union: a comparative analysis*. Routledge. 116.

narrowing its distance to the representative body, the European Parliament, to negative ways to characterize its legitimacy. According to the Treaties, the ECB are obliged to address an annual report on its activities and policies. The president of the ECB is supposed to report to the Council and the Parliament and participate following discussions; The Parliament may also ask the president and the members of Government Board to be heard by committees concerned.<sup>413</sup> The ECB also accepts the European Parliament's extensive interpretation of the Maastricht Treaty which holds that the ECB should be democratically accountable.<sup>414</sup> However, in the plural relationship of cooperation and competition with the Parliament, the ECB tends to accept the notion of accountability, especially in relations with the Parliament, in general terms while refuses to make substantial concessions in placing its powers and activities under control and supervisions of any other institutions.<sup>415</sup> The vulnerable basis for legitimacy on the output benefits, the self-restraints and the dubious, half-committed progress to become accountable to the democratic institutions, turns out to be unsustainable when the ECB is taking unprecedented-in-scale actions to struggle against the crisis for the survival of the Euro and the avoidance of bankruptcy of periphery states, along with the erosion of these legitimate elements.

#### **4.1.2 Actions of the ECB and its accountability problem: The OMT Program as an example**

After the transmission of the financial crisis to the European continent, periphery European states with high debts have encountered prices of government bonds plummeting and interests rate rising rapidly, and the fate of the Eurozone was at stake. In order to stabilize the financial markets and restore the confidence of marketing actors, the European Stability Mechanism was thus introduced in interfering with the secondary market operation. However, this scale-limited program brought no significant effectiveness in achieving those objectives. Then the ECB come up with the Outright Monetary Transmission (OMT) as the enhanced version of the ESM,

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<sup>413</sup> Article 284(3) TFEU.

<sup>414</sup> Jabko, N. (2003). Democracy in the age of the euro. *Journal of European Public Policy*, 10(5), 711.

<sup>415</sup> Jabko, N. (2003). Democracy in the age of the euro. *Journal of European Public Policy*, 10(5), 716.

authorizing the European Central Bank to buy the governmental bonds of the specific Member States concerned through the secondary market, conditional upon the acceptance and implementation of the macroeconomic adjustment program and no volume limits have been set according to this program.<sup>416</sup> Besides these differences, the OMT was also proclaimed by the ECB as a purely monetary policy decision which the ECB has exclusive competences vis-à-vis the Member States and consequently this program is not necessary to be endorsed by national parliaments in exercising their budgetary powers. Similar to the ESM program, the OMT program was afterward taken into the *Organstreit* proceedings of the German Federal Constitutional Court (*Bundesverfassungsgericht*) for testing its constitutionality with the constitutional principles of the German Basic Law (*Grundgesetz*) by constitutional complaints from both the political lefts and rights. In particular, the constitutional complaints assert that the federal government and the federal parliament (*Bundestag*) fail to fulfill their obligations of guarding the sovereignty and constitution identity when they have been encroached on by the *ultra vires* acts of the ECB. Besides, they also proclaimed that the prohibition of monetary financing of the budget clause in the Lisbon Treaty, which is part of the primary EU law, has also been violated. The Federal Constitutional Court referred a preliminary ruling to the Court of Justice of the European Union (CJEU) for the interpretation of EU law in question and also the validity of the OMT program on February 7<sup>th</sup>, 2014.<sup>417</sup> Finally on June 20<sup>th</sup>, 2016, the Federal Constitutional Court released the final decision based on the interpretations, rulings and the conditions supplemented by the CJEU on June 16<sup>th</sup>, 2015, holding the OMT program as constitutional insofar as it is to be implemented in accordance with the conditions formulated by the CJEU as well as within the scope interpreted by the latter.<sup>418</sup>

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<sup>416</sup> Murswiek, D. (2014). ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014. *German LJ*, 15, 147-148.

<sup>417</sup> "Principal proceedings ESM/ECB: Pronouncement of the Judgment and referral for a preliminary rulings to the Court of Justice of the European Union", see: <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-009.html>, access time: July 4, 2016.

<sup>418</sup> "Constitutional Complaints and Organstreit Proceedings against the OMT Programme of the European Central Bank unsuccessful", see: <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html>, access date: July 4, 2016.

#### 4.1.2.1 A series of decisions on the OMT program

The Federal Constitutional Court of Germany decides vigilantly when the case has been brought forward. While the Federal Constitutional Court (FCC) referred the case to the CJEU for further interpretations and opinions with regard to the OMT program, it has in large extent maintained the *ultra vires* nature of this program.<sup>419</sup> The FCC entails its concerns with several approaches. First, the OMT Program is very likely to be categorized into the field of economic policies rather than a purely monetary policy. Not only the “immediate objective” of this program, “to neutralize spreads on government bonds of selected Member States of the euro currency area” but also the selective nature in purchasing and selling bonds from several Member States that contribute to the definition of the OMT Program as economic policy. The OMT Program enjoys equivalent status as the ESM Program except the fact that no parliamentary approvals are needed while the latter has been established by the Member States as a manifestly economic policy. Considering the allocation of competences between the EU and the Member States, when one policy falls within the competence of the Member States as an economic policy, it is in no way allowed to take another hat as a monetary policy monopolized by the ECB according to the provisions of the Treaties.<sup>420</sup> Second, the OMT Program represents the circumvention of the prohibition of monetary financing of the budget in the Article 123 TFEU by measures with equivalent function which could be accessed through the selective purchase, the neutralization of interest rate spreads, the option to keep the purchased government bonds to maturity, the interference with the price formation on the market and other elements concerned. The objective with which the ECB claims to justify the ECB Program, which is to correct the disruption to the monetary policy transmission mechanism, would inevitably authorize the ECB in practice to repeat the OMT-like programs when the transmission mechanism disrupts and consequently shall not bring about any significant and critical impact on the above-mentioned deduction. However, the FCC takes an abrupt bend in the concluding part of the judgment and tends to

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<sup>419</sup> Sinn, H. W. (2014). *The Euro trap: on bursting bubbles, budgets, and beliefs*. OUP Oxford. 290-293.

<sup>420</sup> “Constitutional Complaints and Organstreit Proceedings against the OMT Programme of the European Central Bank unsuccessful”, see: <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html>, access date: July 5, 2016.

leave the door open to accepting the constitutionality of the OMT Program. The FCC indicates that the OMT Program could be constitutional when and if the CJEU would adopt interpretations in restrictive nature and additional conditions to be established as well as certain exclusions when it is to be implemented. It follows that the final decision will be released only after those conditions are entailed by the CJEU in issuing its opinions concerned. Along with the decision, Justice Luebbe Wolf and Justice Gerhardt have written their separate opinions. Justice Luebbe Wolf holds that actions of the federal government and the *Bundestag* in wrestling with acts of EU institutions shall be based on their political discretion rather than pre-suppositional positive action rules while Justice Gerhardt claims that this decision has extended individuals' rights to challenge acts of EU institutions through an *ultra vires* review with Article 38 sec. 1 GG which falls outside the provision of the Basic Law.

The 2014 decision to refer for a preliminary ruling to the CJEU, different from typical preliminary references which usually presume the final say is dominated by the CJEU, actually brings also pressures even threats to the CJEU that the OMT program shall be interpreted restrictively; otherwise the OMT decision would be unconstitutional in the light of the large part of paragraphs stated in the 2014 FCC decision.<sup>421</sup> Besides, this 2014 decision once again establishes the power for federal government to resist EU acts when they exceed their competence and authorities after the Lisbon Treaty judgment in compliance with the fundamental principles, namely the principle of democracy, social state and sovereignty of the people, that rule sovereignty shall be inalienable, including the whole budgetary powers reserved to the Bundestag and it is also the Bundestag that represents the people and provides the democratic legitimacy rather than other representative institutions in the European level.<sup>422</sup> Furthermore, this 2014 decision also demonstrates the competition on jurisdiction in reviewing the implementation of EU acts. The FCC has in fact exercised the review power through indirect way, say to review the implementation of EU acts by the Member States governments and thus forbid the governments from participating the implementation, and substantially block the EU acts concerned.

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<sup>421</sup> Schiek, D. (2014). German Federal Constitutional Court's Ruling on Outright Monetary Transactions (OMT)-Another Step towards National Closure, *The. German LJ*, 15, 337.

<sup>422</sup> Schiek, D. (2014). German Federal Constitutional Court's Ruling on Outright Monetary Transactions (OMT)-Another Step towards National Closure, *The. German LJ*, 15, 338-340.

Beyond that, the FCC has already made it quite clear in the *Honeywell* Case that the FCC would not make the final decisions with regard to the *ultra vires* review of EU acts and thus denying their application in Germany before the CJEU makes its preliminary rulings on the EU law contained, meaning that the FCC would be the one who has the last word.<sup>423</sup> This is also the case in the Lisbon Treaty Judgment that the FCC rather than the CJEU is the guard of the bridge--the parliamentary statutes of approval--that connects the national law and the EU law.<sup>424</sup> The links between the *ultra vires* acts and the violation of democracy principle have also been indicated in this case that *ultra vires* acts would inevitably constitute violation of democracy principle in the Basic Law in that when the EU institutions act beyond their authorities entrusted by the Treaties, they are exercising public powers which have not been approved by the people to transfer to the European institutions. Therefore those *ultra vires* act inevitably face the embarrassment lacking the democratic legitimacy. While for those acts falling within the competence of EU institutions, the risk of breaching the principle of democracy come into existence when they pose challenges to the parliamentary power in deciding the budgets of the states as a part of the constitutional identity.<sup>425</sup> In other words, in the view of the FCC, the FCC and the CJEU are respectively responsible for the protection of constitution identity at the national level (with the Basic Law as the legal basis) and its counterpart in the European level (with the Treaties as the legal basis).<sup>426</sup>

In short, although the FCC once again releases judgment in the approach of “yes but” mode<sup>427</sup>, its wording and analysis in the judgment still reveal deep concerns about the risks the implementation of the OMT Program without restrictions would bring about to democracy and self-determination as well as the parliamentary sovereignty with the budgetary power as its core element when the program is

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<sup>423</sup> Murswiek, D. (2014). ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014. *German LJ*, 15, 160.

<sup>424</sup> Wendel, M. (2014). Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference. *European Constitutional Law Review*, 10(02), 273.

<sup>425</sup> Murswiek, D. (2014). ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014. *German LJ*, 15, 159.

<sup>426</sup> Wendel, M. (2014). Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference. *European Constitutional Law Review*, 10(02), 285-286.

<sup>427</sup> Murswiek, D. (2014). ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014. *German LJ*, 15, 161.

fundamentally an economic policy in its nature. These concerns have been assisted with facts that the Euro crisis has caused more impairment to the democratic accountability and major measures taken to wrestle with the crisis have been imposed upon national parliaments and citizens without adequate deliberation from the perspective of the decision-making process.<sup>428</sup> Besides, from the perspective of consequences, the risks vary from the core European countries to the crisis-ridden countries. For the core European countries, the program ECB adopted has led to the mutualization of debts and transferred the risks from the investors to the taxpayer.<sup>429</sup> While for the crisis-ridden states, they would have to accept the adjustment project proposed by the ECB and adjust their economic policies in order to receive the finance aid from the ECB, and the parliaments could hardly do anything but to approve it, and also the ECB becomes the final and total creditors of those Member States, signaling an age of “creditors’ right superior to the sovereignty”, resulting in the risks caused by the transfer of legitimacy control from citizens and parliaments to the international financial actors.<sup>430</sup> Possibly based on these considerations, the FCC proposed conditions to be established along with the OMT program and for that the FCC makes the preliminary references to the CJEU, seeking for restrictions ranging from volumes, period, and conditions for purchase as well as negative lists of actions the ECB shall avoid in implementing the OMT Program. What’s of significance in this case is that the FCC not only restates its standpoint in guarding the sovereignty non-transferable but also furthers its view about the final say in deciding the cases of EU-Member States relationship, even superior to the CJEU. Through deciding the OMT program, the FCC further entails its view in balancing the two constitutional principles, the principle of democracy and the principle of participating in the

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<sup>428</sup> Pianta, M. (2013). Democracy lost: The financial crisis in Europe and the role of civil society. *Journal of Civil Society*, 9(2), 148-161.

<sup>429</sup> Sinn, H. W. (2014). *The Euro trap: on bursting bubbles, budgets, and beliefs*. OUP Oxford. 310-318; Michailidou, A. (2014). Crisis and change in Greece What price democracy?. *The European Union in crises or the European Union as crises?* 512.

<sup>430</sup> Garcia - Arias, J., Fernandez - Huerga, E., & Salvador, A. (2013). European periphery crises, international financial markets, and democracy. *American Journal of Economics and Sociology*, 72(4), 826-850; Armingeon, K., Guthmann, K., & Weisstanner, D. (2016). How the Euro divides the union: the effect of economic adjustment on support for democracy in Europe. *Socio-Economic Review*, 14(1), 1-26.

European integration and draws clearer borderlines about the extent of German's integration into the European Union after the Lisbon Treaty judgment.<sup>431</sup>

### **The Preliminary Rulings from the CJEU<sup>432</sup>**

The European Court of Justice released its preliminary ruling in the year of 2015. In this ruling, the ECJ first of all holds the admissibility of this preliminary request where the OMT program has not been implemented in that the preventive legal protections could be granted even before further legislations have been adopted which shall not be classified as purely hypothetical problem, one of the cases the ECJ shall refuse to answer. Afterwards, the ECJ emphasizes that the preliminary rulings, which fall within the scope of EU law interpretation and the validity of the EU institutions' acts, given by the ECJ are supposed to be binding and the national courts are bound to apply into their final judgments as a response to the FCC's indication of final say in their own hands. With large scale of paragraphs the ECJ structurally defends the validity of the OMT Program, while exploring the objectives, the means of acts, the satisfaction with the proportionality, the non-decisive and ineluctable nature of the consequences brought by the program, when and if the program is to be implemented restrictively. In the view of the ECJ, the objective of the OMT program is to ensure the monetary policy transmission and to guard the singleness of the monetary policy, which reflects the monetary policy nature of this program. Second, the Protocol on the Statute of the European System of Central Banks and the European Central Bank authorizes the ESCB to participate the performance of financial market through purchase of government bonds and its selective nature of purchase is necessary to "rectify the disruption to the monetary policy transmission" and at the same time has not been forbidden by the Treaties. As for the proportionality test, the ECJ emphasized that the implementation of this program, considering its technical nature and requirements with regard to professional assessment, the ECB shall enjoy broad discretion on substantive issues while the review would thus primarily focuses on procedures obligations which could only be specified and established by assessing the context and the rules concerned. For impact by this program on the economic policy

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<sup>431</sup> Miller, R. A. (2013). Germany v. Europe: The Principle of Democracy in German Constitutional Law and the Troubled Future of European Integration. *Va. J. Int'l L.*, 54, 587.

<sup>432</sup> Case C-62/14, Peter Gauweiler and Others v Deutscher Bundestag



autonomy and the possible distortion on the market operations, the ECJ finds that, this impact could be justified since it is the inherent consequence when the Treaties allows the ESCB to purchase and sell financial instruments in the secondary market and does not necessarily to enjoy the status as privileged creditor. For the concerns regarding the consequences when the prohibition of monetary finance of budget clause was substantially abandoned, namely the Member State would be less motivated to carry out sound budgetary policies as a result of the assumption that the ECB will nevertheless comes to their rescue when the day comes, the ECJ argues that according to the Treaties (Article 119 TFEU, 127 TFEU and 282 TFEU) the ESCB has to carry out policies to support the general economic policies in the Union and these policies cannot be invalidated by Article 123 TFEU simply because of the side effect they may lead to in less impetus to the Member States to implement sound economic policies during one fixed period of time and under specific conditions; after all, monetary policies would always influence the interest rate and refinance conditions of the banks as well as the financial conditions for the public debts.

### **The final judgment by the FCC<sup>433</sup>**

Although questions remain, the FCC chooses to accept the rulings from the ECJ and based on that the FCC makes its final judgment on the validity of the OMT Program. The FCC agrees with the ECJ in that the OMT Programs remains valid and falls within the scope of monetary policy under the restrictive framework conditions established by the ECJ. On the one hand, the FCC claims that the Basic Law accepts the priority of application of EU law through authorizing the federal to transfer part of sovereignty to the Union; on the other hand, the FCC conserves that as the core elements of the constitution identity of the Basic Law, the principle of democracy is doubtlessly superior to the constitutional amendments, the respect for the European integration. The federal government and the Bundestag could participate in the implementation of this program only when the restrictive framework conditions have been met and they should also take close observation during the implementation.

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<sup>433</sup> See the main points of this judgment:  
<http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html>,  
access time: July 7, 2016.

#### **4.1.2.2 Other factors exacerbating the accountability problem of the ECB during the crisis**

The legitimacy of the ECB, as an independent technocratic body, has been established on three bases, that is their expertise, the logic of outcome/output legitimacy, and their self-restraint strategy in carry out their tasks. However, during the crisis doubts have been raised about their legitimacy when they chose to actively participate in the bail-out actions and financial market operation, suspiciously intruding into the areas which have been reserved to be part of the sovereignty of the Member States so far and carrying out highly controversial programs towards crisis-ridden states, causing revolts from both core and periphery states. With the European Monetary Union taking away increasingly more powers on the macroeconomic governance from the democratically elected national governments to the European institutions, policy instruments still left in the hands of the latter are hardly able for them to form effective countermeasures and also fail to satisfy the expectations from the peoples and with that the economic crisis is thus evolved to be a crisis of democratic legitimacy.<sup>434</sup> The institutional balance has been altered by the EU decisions during the crisis, along with more intergovernmentalism, non-majoritarian governance and the technocrats.<sup>435</sup> Besides those constitutional challenges, the ECB also faces distrust towards their performance in the monetary governance and the fights against the crisis, and these may weaken the legitimacy of the ECB from the perspective of output. Is it the appropriate time for the European states to adopt the single currency and transfers their power in monetary policies to the centralized EU institution to implement the single monetary policy that would uniformly apply to all the Eurozone states in the circumstances of heterogeneous economic conditions across states? With the singleness of monetary policy, the specifically economic situation can hardly be reflected through the general monetary policies but either above or below the average economic conditions on which the

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<sup>434</sup> Scharpf, F. W. (2011). Monetary union, fiscal crisis and the pre-emption of democracy. *Zeitschrift für Staats-und Europawissenschaften (ZSE)/Journal for Comparative Government and European Policy*, 163-198.

<sup>435</sup> Schmidt, V. A. (2012). The Eurozone Crisis and the Challenges for Democracy. *The State of the Union (s): The Eurozone Crisis, Comparative Regional Integration and the EU Model*, 103-116.

monetary policies are adopted.<sup>436</sup> Besides, the efficiency of the ECB measure still remains doubtful. After all, what the ECB can do is to put off the deadline for the shutdown between the creditors and the debtors and leave more time for the national government to rectify the problems in their economic structure and recover from the ashes through the bail-out actions rather than takes the place of the national government to tackle directly with the growth problem and restore the debt sustainability.<sup>437</sup> Beyond these, actions taken by the ECB in tacking with the Euro crisis are very likely to have opened the Pandora's Box which the TFEU has struggled to lock with the prohibition of monetary finance of budget clause. Even though in the judgment in 2015 the ECJ ruled that the impact OMT program brought could be justified by the competence entrusted to the ESCB that they were entitled to support the economic policies in the EU, they also, maybe reluctant, admit the existence of impetus reduction for the Member States to follow sound budgetary policies. In worst case, the OMT program and others of the same kind might have triggered the source of next financial crisis.

### 4.1.3 Conclusion

Before the Euro crisis, although the unprecedentedly independent nature of the ECB has raised accountability concerns, the latter has not come to be a problem so urgent and manifest. The ECB has, which could be seen successfully, established multiple bases for their institutional legitimacy, combining the output legitimacy, namely their performance in price stability, their expertise legitimacy and especially their strategy of self-restraint in exchange of being tolerated by other institutions and the people concerned. In addition, the ECB also makes efforts or pretend to be making efforts, to advance transparency and explanations for their policies.<sup>438</sup>

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<sup>436</sup> Scharpf, Fritz W. (2011): Monetary union, fiscal crisis and the preemption of democracy, MPIfG discussion paper, No. 11/11, 12, 33.

<sup>437</sup> Bini Smaghi, L. (2014). Austerity, A Threat to Democracy?. *The International Spectator*, 49(1), 7-16.

<sup>438</sup> Issing, O. (2001). *Monetary policy in the euro area: strategy and decision-making at the European Central Bank*. Cambridge University Press. 128-143.

During the Euro Crisis, the ECB has transformed itself to be “a stronger and more strategically positioned actor of the Eurozone”,<sup>439</sup> extending its influence into the area of economic governance and elevating its authority in the regulation of banking system.<sup>440</sup> As has been discussed above, with the OMT program the ECB has not only become the final creditor and the genuine economic policies maker for the peripheries states, limiting the economic policy options left to the democratically elected government and resulting in large extent the consequence of “you can vote but you cannot choose”, but also the one who steadily transferring money from the core EU Member States who provide the fund for this program, acting resembles the redistributive role in the range of the EU, limiting the influence of people’s votes in the European wealth distribution.<sup>441</sup> Democracy in both the core and periphery states has thus been under undermined, and it is also this moment the ECB becomes the common enemy and the one to be blamed, to some extent as a scapegoat, by the people from nearly all Member States for the crisis and the sufferings because of the crisis and the austerity policy, and the worrying for sovereignty lost spreads whether as a fact or merely an illusion. In a word, the pouring critics on the legitimacy problem of the ECB could be concluded as such an assertion: the ECB, with the OMT program, has been making economic policies and implement them directly into the Member States which is not only violation of EU law regarding the allocation of competences in means of *ultra vires* actions but also breaching the principle of democracy according to which, economic policies containing the redistributive nature and especially the budget-related could only be legitimized by the approval of the people represented by the national parliaments.<sup>442</sup>

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<sup>439</sup> Maurizio Cotta. (2014). Changing Equilibria between democratic and technocratic principles in the European Elite System after the Crisis, *conference paper for "Technocracy and democracy in Times of Financial Crisis"* (Technische Universitaet Darmstadt), 6-7 March 2014. See: [http://www.academia.edu/6636700/Changing\\_Equilibria\\_between\\_Democratic\\_and\\_Technocratic\\_Principles\\_in\\_the\\_European\\_Elite\\_System\\_after\\_the\\_Crisis](http://www.academia.edu/6636700/Changing_Equilibria_between_Democratic_and_Technocratic_Principles_in_the_European_Elite_System_after_the_Crisis). Access time: July 8, 2016.

<sup>440</sup> Fontan, C. (2015), ‘the ECB: A Democratic Problem for Europe?’ See: [http://www.booksandideas.net/IMG/pdf/20150430\\_bce\\_en.pdf](http://www.booksandideas.net/IMG/pdf/20150430_bce_en.pdf), access time: July 8, 2016.

<sup>441</sup> Murswiek, D. (2014). ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court’s Referral Order from 14 January 2014. *German LJ*, 15, 152; Fontan, C. (2015), ‘the ECB: A Democratic Problem for Europe?’ Alonso, S. (2014). ‘You can vote but you cannot choose’: Democracy and the Sovereign Debt Crisis in the Eurozone. See: <http://e-archivo.uc3m.es/bitstream/handle/10016/18315/IC3JM-2014-282.pdf?sequence=3>, access time: July 8, 2016.

<sup>442</sup> Schmidt, V. A. (2013). Democracy and legitimacy in the European Union revisited: input, output and ‘throughput’. *Political Studies*, 61(1), 2-22.

As for the judgments made by the FCC and especially the ECJ, justices have endeavored to argue the OMT program, under certain conditions and interpreted in a restrictive scope, to be falling within the range of monetary policy and consequently to be validated in accordance with the Treaties and the Basic Law. The judgment, although avoiding admitting they are making political decisions, has actually made decisions beyond the rules of not only the texts but also the meaning and understandings common people would infer. To be more concise, the logic of the judgment made by the FCC and the ECJ could be summarized, in the terms of Judge Richard Posner, as that the Treaties governing the European Monetary Union are “Not a Suicide Pact”.<sup>443</sup> To be more specific, the application of the prohibition of monetary finance of budget shall not be as strict and absolute as to deny the only possible way to save the common currency and the Eurozone. That is to say, the EU law norms shall not be interpreted as to lead to the “suicide” of the Euro and EMU, and that would surely breach the objective and other constitutional principles of the EU law of the Treaties (the teleology legal interpretation).<sup>444</sup> However, after examining the necessity requirement, the OMT Program shall also be reviewed with the proportionality principle, deciding whether this program, even though necessary and shall be accepted generally, has been beyond the density in contents adequate to achieve the objectives and thus constitutes unnecessary violation of other rules and principles of the EU law. Therefore, certain restrictions and conditions are requested by the ECJ in deciding this case, including that purchasing government bonds in the secondary market should be necessary for the achievement of objectives and stop purchasing when the latter has once been achieved<sup>445</sup>; when the ECB purchases government bonds from secondary market, adequate safeguard measures shall be

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<sup>443</sup> Posner, R. A. (2006). *Not a suicide pact: The Constitution in a time of national emergency*. Oxford University Press.

<sup>444</sup> Geiger, R., Khan, D. E., & Kotzur, M. (Eds.). (2015). *European Union Treaties; a Commentary: Treaty on European Union: Treaty on the Functioning of the European Union*. Hart. 590-593. The logic and reasoning of the commentary on the Article 125 TFEU apply identically to the interpretation of Article 123 TFEU.

<sup>445</sup> Para. 82 of the Preliminary Ruling of the Case C-62/14, *Peter Gauweiler and others v. Deutscher Bundestag*.

established to make sure the interference of the ECB will be prohibited by Article 123 TFEU<sup>446</sup>.

The crisis in the EU is not merely the crisis of monetary integration or economic governance, but also reflects the democratic failure and the crisis of EU legitimacy.<sup>447</sup> The austerity programs, which have been claimed as “no alternative”, have triggered the rising of the populist movements across the Europe.<sup>448</sup> The EU is supposed to be more than an economic and commercial union but also a political union and a social union in its sight.<sup>449</sup> However, the financial crisis and the countermeasures have in large scale witnessed the EU institutions in the service for the financial actors and markets while marginalizing the voice of peoples, leading to more imbalance and legitimate deficit.<sup>450</sup> For the part of the ECB, their technical instrument, the monopoly of the liquidity, has contributed to the expanding of influence in Euro economic governance and has developed the political dimension when it imposes forcible economic adjustment program upon the Member States who have been stuck in the financial crisis and in great demand of financial aid.<sup>451</sup> It unleashes consternations from the aided states and has been convoluted with the conventional German Question in the Europe (“Half-Hegemony”).<sup>452</sup> Besides the conventional critics about the transparency problem and its newly-gained role of redistribution of European wealth, the independence of the ECB also faces challenges with regard to its identity

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<sup>446</sup> Para.102 of the Preliminary Ruling of the Case C-62/14, Peter Gauweiler and others v. Deutscher Bundestag.

<sup>447</sup> Maduro, M. P. (2013). A new governance for the European Union and the Euro: democracy and justice. *Yearbook of Polish European Studies*, (16), 111-140.

<sup>448</sup> Bini Smaghi, L. (2014). Austerity, A Threat to Democracy?. *The International Spectator*, 49(1), 7-17.

<sup>449</sup> Pochet, P., & Degryse, C. (2013). Monetary union and the stakes for democracy and social policy. *Transfer: European Review of Labour and Research*, 19(1), 103-116.

<sup>450</sup> Garcia - Arias, J., Fernandez - Huerga, E., & Salvador, A. (2013). European periphery crises, international financial markets, and democracy. *American Journal of Economics and Sociology*, 72(4), 826-850; Pianta, M. (2013). Democracy lost: The financial crisis in Europe and the role of civil society. *Journal of Civil Society*, 9(2), 148-161.

<sup>451</sup> Fontan, C. (2015), ‘the ECB: A Democratic Problem for Europe?’ See: [http://www.booksandideas.net/IMG/pdf/20150430\\_bce\\_en.pdf](http://www.booksandideas.net/IMG/pdf/20150430_bce_en.pdf), access time: July 11, 2016.

<sup>452</sup> Montani, G. (2015). *The German Question and the European Question. Monetary Union and European Democracy after the Greek crisis* (No. 0105). University of Pavia, Department of Economics and Management.

as a stakeholder.<sup>453</sup> Although the ECJ has approved the OMT program under certain conditions and within the restrictive interpretation, the problem of legitimacy deficit still lingers on the ECB and the reestablishment of the legitimate basis of the ECB is supposed to be taken into serious consideration with certain institutional arrangements that provide the ECB with further input legitimacy,<sup>454</sup> and input legitimacy model of the Federal Reserve System of the U.S. could be used for reference.

## 4.2 Intergovernmental mechanism in response to the Crisis

To assess the accountability crisis of the European Union during the financial and national debt crisis, a full coverage of the whole European Union structure is of necessity. The reason for this is that so far the EU is still a composite structure composed of areas where different approaches, the Supranationalism and the Intergovernmentalism, apply. Therefore, without the assessment of those intergovernmental branches, the whole picture of the accountability problem in the EU would be in no way complete. What is more important is that, in the areas of intergovernmentalism, it is the coordination way of operation between the Member States that is usually adopted. It is usually regarded less transparent compared with the supranational branch and what is more special is that in the Treaties there are no provisions that explicitly directing to any supervision and accountability mechanisms in the Union level other than those already established in the Member States level by respective constitutional laws. Besides, according to the Lisbon Treaty, the competence of economic governance has been reserved to the Member States and the Union shall helps to achieve the coordination between them.<sup>455</sup> The EU economic policy decision-making adopts the way of high-level governmental coordination and

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<sup>453</sup> Tuori, K. From expert to politician and stakeholder? Constitutional drift in the role of the ECB in the *John Erik Fossum and Agustín José Menéndez (eds). (2014) The European Union in Crises or the European Union as Crises? ARENA Report No 2/14. 511.*

<sup>454</sup> Tuori, K. From expert to politician and stakeholder? Constitutional drift in the role of the ECB in the *John Erik Fossum and Agustín José Menéndez (eds). (2014) The European Union in Crises or the European Union as Crises? ARENA Report No 2/14. 520.*

<sup>455</sup> Art.2(3) TFEU.

is even strengthened after the Lisbon Treaty.<sup>456</sup> However, the solutions to the financial crisis are always a package of at least economic and monetary policies. Many counter-crisis decisions are made through those economic coordination mechanisms. Anywhere the power is exercised without supervision, the accountability problem would inevitably arise. Therefore, the counter-crisis measures adopted through intergovernmental mechanism shall also be given special assessment.

The Euro Crisis not only calls the integrated monetary policy into question but also the existing economic governance based on co-ordination between the Member States. A series of counter-crisis legislative measures have been taken within the legal framework of the Union as well as intergovernmental mechanisms by international treaties outside the Union when the issues to be confronted with fall outside the competence of the Union, including the European Stability Mechanism, the Treaty on Stability, Coordination and Governance (the Fiscal Compact), the Euro-Plus Pact under the EU's Open Method of Coordination (the OMC). These intergovernmental measures, their effectiveness still in controversial though, have brought about not only reshaping of the European the governance structure<sup>457</sup> but also rewrite the constitutional order characterized by the Lisbon Treaty which just comes into effect in the year of 2009.<sup>458</sup>

Early in the year of 2010, the ECOFIN Council has set up the EFSF bypassing the EU institutions for the purpose of crisis management. Soon in the year of 2011, the European Council adopted the Six Pack<sup>459</sup> as an advanced substitute to the Stability and Growth Pact for further economic coordination and surveillance. The

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<sup>456</sup> Puetter, U. (2012). Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance. *Journal of European Public Policy*, 19(2), 161-178.

<sup>457</sup> Along with these Treaties, many corresponding new organs were also established, including the *European Banking Authority*, the *Single Resolution Board*, the *Board of Governors* and the *Board of Directors* of the ESM funds.

<sup>458</sup> Fabbrini, S. (2014). After the euro crisis: a new paradigm on the integration of Europe. *Available at SSRN 2441201*.

<sup>459</sup> The Six Pack includes the Regulation 1175/2011 amending Regulation 1466/97(On the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies), Regulation 1177/2011 amending Regulation 1467/97(On speeding up and clarifying the implementation of the excessive deficit procedure), Regulation 1173/2011(On the effective enforcement of budgetary surveillance in the euro area), Directive 2011/85/EU(On requirements for budgetary frameworks of the Member States), Regulation 1176/2011(On the prevention and correction of macroeconomic imbalances) and Regulation 1174/2011(On enforcement action to correct excessive macroeconomic imbalances in the euro area).



EFSF was also replaced by the ESM Treaty in 2012 with amendment to the Article 136 TFEU by adding that

*“The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality”.*

Afterwards the Two—Pack was adopted including the Regulation 473/2013 (*On common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area*) and the Regulation 472/2013 (*On the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability*). In accordance with these two regulations, the European Semester was adopted to tackle the problems of excessive deficit and imbalance, authorizing the involvement of the Commission in the review of the national budget for “enhanced surveillance”. Besides, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union was also approved for more stringent fiscal integration. With these Treaties and mechanisms newly established, further economic policy coordination has been achieved; the autonomy of budgetary powers has received involvement and control from those supranational and intergovernmental mechanisms, the European economic government instead of economic governance has been in sight.

In the course of the counter-crisis efforts, the ESM Treaty was challenged in the Federal Constitutional Court of Germany. The Federal Constitutional Court held that the ESM was constitutional unless certain exceptions come into reality. In the view of the Court, the Bundestag has been empowered by the Basic Law with “broad discretion when determining the volume of guarantees for foreign states and when assessing the probability whether these guarantees could actually result in payments”, and the power to make such assessments do not fall within the competence of judiciary authorities.<sup>460</sup> Even though the Federal Constitutional Court smiled on this

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<sup>460</sup> Becker, F., & Merschmann, A. (2014, April). National Constitutional Reservations with Respect to Budget Policy. In *The EU Between an Ever Closer Union and Inalienable Policy Domains of Member States* (pp. 187-200). Nomos Verlagsgesellschaft mbH & Co. KG. 192-197.

mechanism, even the most radical supporters of European integration would not deny that this series of counter-crisis measures have led to profound, possibly permanent, influence on the constitutional order and competence structure of both supranational and national levels. Does the intergovernmentalism finally welcome its triumph over supranationalism or the Community Method successfully spill over to what it is excluded previously? Is the European Union which is proclaimed to be established on the basis of the value of democracy evolving towards a polity which refrain the will of the people? The following analysis would be about the economic governance structure in the European Union during the Euro crisis and problems within its constitutional order.

#### **4.2.1 The role of intergovernmental institutions in the counter-crisis actions**

As for the counter-crisis actions, some of those plans have been through the legislative procedure of the Union and become binding laws and an integral part of the Union legal system, the Six-Package regulations as an example. However, there are also measures which are concluded in the form of intergovernmental treaties which are international treaties in nature and thus shall be regulated by the international treaties' law, including some of those reached under the Open Method of Coordination (OMC). There are two kinds of OMC procedures being established in the Treaties, the Multilateral Surveillance Procedure and the Excessive Deficit Procedure.<sup>461</sup> The legal basis for these procedures and mechanism are Article 121 and Article 126 of the TFEU. There are abundant of measures which are adopted and applied with the means of "Conclusion" of the European Council which are not legally binding within the Union legal framework.<sup>462</sup> Justifications for the adoption of these coordination working methods may be advocated<sup>463</sup>, they are nonetheless more frequently adopted to carry out policies established by the economic governance

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<sup>461</sup> Paul, C. (2012). EU Administrative Law. 186-187.

<sup>462</sup> Puetter, U. (2012). Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance. *Journal of European Public Policy*, 19(2), 169.

<sup>463</sup> Collignon, S. (2004). Is Europe going far enough? Reflections on the EU's economic governance. *Journal of European Public Policy*, 11(5), 911.

bodies. Besides, regardless of the forms they are adopted with, soft law or hard law, they are actually all binding to the parties concerned; and sometimes the soft laws are more binding because all in all, one of the ultimate sources of the binding force of laws comes from the political authority which the soft laws adopted by the European Council also or even more enjoy. *All animals are equal, but some animals are more equal than others.*

The Euro crisis is a heaven-sent chance for the intergovernmental institutions to bolster their roles in the supranational decision-making process, and it is consistent with the reality that the intergovernmental institutions (including the European Council, the Euro Summit, the Council, the ECOFIN Council and the Euro Group) successfully gain the centrality of adoption of counter-crisis actions, leading the intergovernmentalism method to recapture the precedence and strengthened the trends of the European Council rather than the Commission as the “supreme political institution” both in form and in actual decision-makings.<sup>464</sup> Justifications for the elevation of the European Council’s role were made through the gap between the urgency of taking actions to tackle the Euro Crisis and the absence of EU’s competences and inadequacy of authority in deciding essential issues. With the Euro Crisis ceasing to be urgent and serious, the European Council continues to play the role as the key actor in the European economic governance and fiscal union.<sup>465</sup> According to Wessels, the European Council<sup>466</sup> has functioned in generally six ways in the process of tackling the Euro crisis: “creating and adapting the Economic and Monetary Union”, “setting and reviewing guidelines for hard and soft coordination”, “managing the economic and financial crisis and a reinforced leadership role in a turbulent Eurozone”, “shaping Community policies”, “making and using the financial provisions” and “the institutional centre of the multi-pillar architecture”.<sup>467</sup> In other words, the European Council has not only performed with the last say in the intergovernmental issues according to the structural design by the Lisbon Treaty but

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<sup>464</sup> Wessels, W. (2016). *The European Council*. Palgrave Macmillan.85.

<sup>465</sup> Puetter, U. (2012). Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance. *Journal of European Public Policy*, 19(2), 161.

<sup>466</sup> In this chapter, the European Council also covers the activities of its Eurozone version, the Euro Summit, unless manifest emphasized on the contrary.

<sup>467</sup> Wessels, W. (2016). *The European Council*. Palgrave Macmillan.187-210.

also extends its authority to the internal market, ranging from the economic issues to social, employment policy areas, acting as the top institution of the European economic government of collective decision-making (or “deliberative intergovernmentalism”), taking over the power to economic governance which used to be reserved to the Member States’ governments.<sup>468</sup> It is also the case with the Euro Summit, initiated by former French President Nicolas Sarkozy who advocates that the leaders of Member States (especially those from the Eurozone Member States) are the only actors qualified with democratic legitimacy to make decisions on economic governance.<sup>469</sup> This transformation satisfies neither the concept of internationalism nor the concept of supranational in conventional sense, and the interpretations of this evolution as the enhancement of Community method or the intergovernmental method fail to reflect its essence, and this issue will be elaborately discussed in the analysis and conclusion part. Besides the European Council, the Council (the ECOFIN Council and the Euro group) also advanced its role in the EU architecture and the European economic governance as a whole. Corresponding to the European Council’s role as the political decision-maker, the Council and the Euro Group formulate the forum for policy debate especially for the ministerial negotiations.<sup>470</sup> Compared with the Council or the ECOFIN Council, the Euro Group is characterized by informality, secrecy of discussions and the lack of decision-making powers and those characters make it a preliminary forum for sensitive and controversial issues in a flexible manner.<sup>471</sup> The leaders of the EU have actually acknowledged the status of the Euro Group as the “central steer”, “a central role to play in discussing, promoting and representing the interest of the Euro area” and also project to advance its role as “a reinforcement of its presidency” in the short term and “an even greater role in representing the interest of the single currency, within the euro area and

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<sup>468</sup> De Schoutheete, P., & Micossi, S. (2013). On Political Union in Europe: The changing landscape of decision-making and political accountability. *CEPS Essays*. 5.

<sup>469</sup> Wessels, W. (2016). *The European Council*. Palgrave Macmillan. 205.

<sup>470</sup> Puetter, U. (2012). Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance. *Journal of European Public Policy*, 19(2), 171.

<sup>471</sup> Paczynski, W. (2003). ECB Decision-making and the Status of the Eurogroup in an Enlarged EMU. *CASE Research Paper*, (262). 21.

beyond”,<sup>472</sup> which could, however, jeopardize the role of the Commission in representing the general European interest externally.

During the Euro crisis, most major counter-crisis measures have been adopted in these intergovernmental institutions or organs, and the method of collective negotiation seems to have been welcomed in overcoming the problems of collective action. The popularity of intergovernmentalism among the national leaders is the result of both their reluctance to empower the EU with new competences and the actual performance of this method that it has been so far proved to be effective in organizing negotiations and adopting contemporaneous actions.<sup>473</sup> However, the problems of collective actions exist not only in the decision-making stage but also in the executing those decisions and the supervision of those implementations. In that regard, the supranational institutions, especially the European Commission, still play crucial roles in routine implementations and technical details in overcoming the dilemma of collective actions, and that is also the new role for the Commission during the urgent counter-crisis efforts and afterwards.

#### **4.2.1.1 The role of the European Commission in the counter-crisis actions**

As have mentioned in the second chapter, the Commission has gradually lost its substantial role as the agenda-setter in the European governance characterized by the Lisbon Treaty and evolved to be the secretariat and administrative organ to the European Council.<sup>474</sup> The European Council and the Council have both in provisions and in fact the power to input to the EU agenda even if the European Parliament chooses to stand together with the European Commission.<sup>475</sup> The European Council not only releases strategic documents and comes up with specific legislative proposal, but goes much further: the European Council also usurps the Commission’s

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<sup>472</sup> Juncker, J. C., Tusk, D., Dijsselbloem, J., Draghi, M., & Schulz, M. (2015). Completing Europe’s economic and monetary union. *Brussels: European Commission*. 18.

<sup>473</sup> Chiti, E., & Teixeira, P. G. (2013). The constitutional implications of the European responses to the financial and public debt crisis. *Common Market Law Review*, 50(3), 689.

<sup>474</sup> Schmidt, V. (2012). Democratizing the Eurozone. *Social Europe Journal*, 15 May.

<sup>475</sup> Craig, P. (2015). The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility. *Indiana Journal of Global Legal Studies*, 22(2), 249.

Treaty-authorized power to supervise the compliance of EU measures with a great deal of coordination measures newly established.<sup>476</sup> That part of responsibility has even been illustrated as one of the crucial functions of the European Council and extending the sphere of its power from the Eurozone to the areas, the intern market for example, where it is the community method that is generally known to apply.<sup>477</sup> However, it shall also be pointed out that the losses of the Commission's power receive compensation through the Commission's implementation of counter-crisis decisions and economic governance policies. In accordance with the European Semester, the budget plan of the Member States are required to sent to the Commission for a detailed review and the Commission would then propose recommendations based on specific state conditions.<sup>478</sup> The “reverse qualified majority voting” method also contributes to that boost.<sup>479</sup>

Along with the undermining of its power, the Commission is also confronted with the risk of role confusion during the Crisis. According to the Treaties, the European Commission has been assigned to represent the general interests of the Europe Union as a whole rather than the interests of one or some Member States.<sup>480</sup> However, during the counter-crisis decision-making especially when the Commission participates in the negotiations with the debtor Member States, together with the IMF and the ECB in forming the so-called “Troika”, it has been the representative of the creditors which conflicts with its original role as an independent body guarding and promoting the general interests of the Union. Further, the Commission has chosen to step into the international political games between the strong and the weak Member States in line with the core ones, and that also risks its impartial position and authority in balancing and conciliating the interests between the Member States.<sup>481</sup> For an

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<sup>476</sup> Dawson, M., & Witte, F. (2013). Constitutional Balance in the EU after the Euro - Crisis. *The Modern Law Review*, 76(5), 831.

<sup>477</sup> Dawson, M., & Witte, F. (2013). Constitutional Balance in the EU after the Euro - Crisis. *The Modern Law Review*, 76(5), 832.

<sup>478</sup> Scharpf, F. W. (2015). After the crash: A perspective on multilevel European democracy. *European Law Journal*, 21(3), 391;

<sup>479</sup> Curtin, D. (2014). Challenging government dominance in European democracy. *The Modern Law Review*, 77(1), 9.

<sup>480</sup> Art.17 TEU.

<sup>481</sup> Soares, A. G. (2015). EU Commission participation in the Troika mission: is there a European Union price to pay? *Revista Brasileira de Política Internacional*, 58(1), 111-112.

independent institution whose democratic legitimacy has always been challenged, the loss of impartiality and independence endanger its remaining basis of legitimacy. Different from the hot topic of the Commission's politicalization through more party political input into the election of the Commission President as well as other commissioners in strengthening its political visibility and democratic legitimacy, this trend represents another form of politicalization of the European Commission, that is, to be involved in the international political games between the Member States and chooses to be inclined to certain bloc when facing the internal conflicts in the European Union, namely, the east-west European tensions and the north-south European tensions. During the Euro crisis and the bail-out stage, the Commission has explicitly joined the creditors' bloc. As a consequence, the European Commission tends to adopt economic policies in line with the ideology of creditor Member States rather than the solutions which could best serve the general interests of the Union; besides, the interests and voices are more and more likely to be ignored and the conflicts within the EU are even exacerbated.<sup>482</sup> The alienation of the European Commission, which refers to the deviation and even opposition of the Commission from its original roles and objectives, has been draining its legitimacy basis originating from its independence and its irreplaceable role for promoting the general interests of the Union, posing challenges on the integration project.

#### **4.2.1.2 The role of the legislatures in the counter-crisis actions**

Legislatures, so far, seem to be the greatest loser in this round of power games triggered by the Euro crisis. Measures taken to secure the Euro zone stability and to rescue the Member State in debt have transferred the dominant position on national budget, which belongs to one of the crucial responsibilities of the legislatures, from the parliaments to the government, frequently with the same platitude, "no alternative".<sup>483</sup> To bail out other Member States with national budgets produces direct impact on the interests of taxpayers while the parliaments have only rather limited

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<sup>482</sup> Soares, A. G. (2015). EU Commission participation in the Troika mission: is there a European Union price to pay? *Revista Brasileira de Política Internacional*, 58(1), 111-112.

<sup>483</sup> Becker, F., & Merschmann, A. (2014, April). National Constitutional Reservations with Respect to Budget Policy. In *The EU Between 'an Ever Closer Union' and Inalienable Policy Domains of Member States* (pp. 187-200). Nomos Verlagsgesellschaft mbH & Co. KG. 187-188.

roles in the macroeconomic governance and the ESM program despite the establishment of the “Economic Dialogue”.<sup>484</sup> Besides, the participation of national parliaments in the intergovernmental mechanisms including the EFSF, the ESM and the Fiscal Compact is not restricted since the national governments define them as the international rather than Union policy.<sup>485</sup> The European Semester is also substantially drawing the border regarding the exercise of budgetary power of the parliaments. Under the European Semester, as has been mentioned above, it is the European Commission rather than the national parliaments that enjoys the priority to have an operation on the budgetary plans.<sup>486</sup> The European Semester has placed the national budgetary competence into the “birdcage”, that is, the national parliaments have every right and autonomy to the budget as long as they fall within the scope defined by the Commission backed by the ECOFIN Council and the European Council. Besides, the transparency problem becomes even more serious during the Euro Crisis since most of the major decisions have been adopted in the intergovernmental forum whose negotiation and decision-making process is extremely inaccessible to the European Parliament and the national parliaments. The legislatures in most cases are excluded from that process or at most playing the role of *ex post* endorsement, not to mention the right to information of the public.<sup>487</sup> Without direct transparency (open to the public) and the indirect transparency (through the legislatures), the rescuing actions increase the intergovernmental institutions’ “unilateral control over information and decision-making” feature and promote the “black box” decision-making, further weakening the parliamentary control over the government in the European and national level.<sup>488</sup> The Euro crisis and the rescuing action push the EU to the direction of government dominance with the institutional balance turning to

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<sup>484</sup> van den Brink, T. (2016). National Parliaments and EU Economic Governance. In *Search of New Ways to Enhance Democratic Legitimacy*. In *Democracy and Rule of Law in the European Union*. TMC Asser Press. 21.

<sup>485</sup> Auel, K., & Höing, O. (2014). Parliaments in the euro crisis: can the losers of integration still fight back?. *JCMS: Journal of Common Market Studies*, 52(6), 1186.

<sup>486</sup> Majone, G. (2014). From regulatory state to a democratic default. *JCMS: Journal of Common Market Studies*, 52(6), 1221.

<sup>487</sup> Curtin, D. (2014). Challenging government dominance in European democracy. *The Modern Law Review*, 77(1), 2.

<sup>488</sup> Curtin, D. (2014). Challenging government dominance in European democracy. *The Modern Law Review*, 77(1), 1-32.



the superiority of the government leaders and the intergovernmental institutions,<sup>489</sup> or “transnational government machinery outside both the realm of democratic politics and the form of accountability formerly guaranteed by the rule-of-law”.<sup>490</sup> The transformation to the government dominance and the triumph of the intergovernmental institutions over their supranational counterpart consequence not only the default of national parliaments in controlling the government and hold them accountable but also leveraging the legitimacy of the European Parliament’s existence as the legislative and representative institution since the democratic legitimacy could be provided by the national parliaments in an intergovernmentalism European Union and the European Parliament turns out to be superfluous when the supranational institution(here the Commission) is reduced to be the secretariat and the administrator to the intergovernmental institutions.

The impact of the Euro crisis and the rescuing actions on national parliaments, however, varies with states. Generally, the national parliaments’ involvement in the Union-Member States relationship primarily depends on their domestic constitutional arrangement.<sup>491</sup> In Germany, the Act on Cooperation between the Government and the *Bundestag* on the EU requires that the government shall seek the approval from the *Bundestag* on the negotiation of accession or Treaty amendments then the government is entitled to reach final decisions in the Council or the European Council. Besides, the government is also obliged to inform both houses of the parliament (the *Bundestag* and the *Bundesrat*) on Union matters in time.<sup>492</sup> Besides, in the Germany practice, the Chancellor usually makes *ex-ante* reports to the parliament about the European Council meetings and her Minister of State would also make *ex-post* reports to the parliament.<sup>493</sup> The Euro crisis has widened the imbalance between the national

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<sup>489</sup> Dawson, M., & Witte, F. (2013). Constitutional Balance in the EU after the Euro - Crisis. *The Modern Law Review*, 76(5), 832.

<sup>490</sup> Joerges, C. (2014). Brother, can you paradigm? *International Journal of Constitutional Law*, 12(3), 778.

<sup>491</sup> Leino, P., & Salminen, J. (2013). Should the Economic and Monetary Union Be Democratic after All; Some Reflections on the Current Crisis. *German LJ*, 14, 862.

<sup>492</sup> Fromage, D. (2015). National parliaments and governmental accountability in the crisis: theory and practice. *The Never-Ending Reform of the EU: Another Chain in the Semi Permanent Treaty Revision Process?* 155.

<sup>493</sup> Fromage, D. (2015). National parliaments and governmental accountability in the crisis: theory and practice. *The Never-Ending Reform of the EU: Another Chain in the Semi Permanent Treaty Revision Process?* 160.

parliaments with stronger influence and the weak ones, resulting in certain national parliaments inferior to their colleges of equivalent position.<sup>494</sup> The German Bundestag has successfully seized the “golden opportunity” to expand their power and control regarding the Union issues especially the rescue actions with the assistance of the Federal Constitutional Court.<sup>495</sup> In the ESM Case, the Court holds that any payments without the approval from the Bundestag would be unconstitutional; only with the consent from the Bundestag will the federal government be permitted to provide significant financial guarantee, and the Bundestag will always be the holder of the budgetary sovereign no matter whether the parliament has smiled on the bail-out programs or not.<sup>496</sup> However, for the parliaments of weaker influence, especially those of the debtor Member States, the crisis happens to be their battle of Waterloo. They have to accept and follow the instructions and reform programs without alternative, being the meat on the Troika’s chopping block, and to some extent they have been thrown into the ranks of Second Order Parliaments.<sup>497</sup> The fantasy drift of the Irish budget during the bail-out period illustrates that embarrassment. The Irish budget is supposed to be sent to the Troika and then to the ECONFIN Council with the implementation situation of austerity policies stipulated in the memorandum of understandings; afterward the Irish budget is to be sent to the German Bundestag for review and finally returns to the Irish parliament. The procedural requirement for the purpose of securing the *Bundestag*’s budgetary sovereignty constitutes the violation of other parliaments.<sup>498</sup> Considering the role of parliaments as the representative of the peoples, the inferior status of some parliaments indicates the substantial emergence of second-class will of the peoples and breaks the spatial balance within the Union.

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<sup>494</sup> Auel, K., & Höing, O. (2014). Scrutiny in Challenging Times-National Parliaments in the Eurozone Crisis. *Swedish Institute for European Policy Studies (SIEPS), European Policy Analysis*, (2013), 1-16.

<sup>495</sup> Fromage, D. (2015). National parliaments and governmental accountability in the crisis: theory and practice. *The Never-Ending Reform of the EU: Another Chain in the Semi Permanent Treaty Revision Process?* 151.

<sup>496</sup> Becker, F., & Merschmann, A. (2014, April). National Constitutional Reservations with Respect to Budget Policy. In *The EU between 'an Ever Closer Union' and Inalienable Policy Domains of Member States* (pp. 187-200). Nomos Verlagsgesellschaft mbH & Co. KG.194-195.

<sup>497</sup> Auel, K., & Höing, O. (2014). Scrutiny in Challenging Times-National Parliaments in the Eurozone Crisis. *Swedish Institute for European Policy Studies (SIEPS), European Policy Analysis*, (2013), 1-16.

<sup>498</sup> Majone, G. (2014). From regulatory state to a democratic default. *JCMS: Journal of Common Market Studies*, 52(6), 1221.

## 4.2.2 Impact on the balances within the Union

The principle of institutional balance is viewed as one of the constitutional principles in the European Community legal system<sup>499</sup>, and in the political dimension, this principle embodies the rationale of institutional assignment to achieve the balance of interests represented by different Union institutions and to formulate integration policies which are acceptable to all parties.<sup>500</sup> The Council, the Parliament and the Commission represent respectively the interests of the states, the EU citizens and the general European Union.<sup>501</sup> With the crisis, the European Parliament (so it is with most national parliaments) has been marginalized to a large extent and the Commission has been yielded to the orders from the intergovernmental institutions, the institutional balance severely influenced. However, it is hard thus far to tell which direction has the European institutional balance swung to, intergovernmentalism or supranationalism for sure. If, let us assume, the institutional balance tends to the intergovernmentalism, then it would conflict with the fact that the supranational institutions have obtained a large scale of powers for further integration in many areas being transferred from the national level, especially in the economic policy and the budgetary area. However, the assumption that the supranationalism takes precedence during the Euro crisis does not fit well with the fact that it is the intergovernmental institutions and mechanisms now are playing a dominant role in the European economic governance, even a little bit earlier than the crisis—the Lisbon Treaty has already demonstrated the intergovernmentalism-oriented model of economic governance in the European Union.<sup>502</sup> To review those institutional changes from the perspective of political power's classification, the institutional balance in the European Union could be summarized to be tending to the advantage even dominance of the government system, covering the governments at both the supranational and the

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<sup>499</sup> Lenaerts, K., & Verhoeven, A, "Institutional balance as a guarantee for democracy in EU governance" in Joerges & Dehousse (Eds.), *Good Governance in Europe's Integrated Market*.35

<sup>500</sup> Lenaerts, K., & Verhoeven, A, "Institutional balance as a guarantee for democracy in EU governance" in Joerges & Dehousse (Eds.), *Good Governance in Europe's Integrated Market*. 41-45.

<sup>501</sup> Majone, G. (2002). Delegation of regulatory powers in a mixed polity. *European Law Journal*, 8(3), 320-326.

<sup>502</sup> Puetter, U. (2012). Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance. *Journal of European Public Policy*, 19(2), 161-178.

national level.<sup>503</sup> That government-dominated imbalance undermines the periphery states' interests and the powers of the representative institutions, and the power's centralization to the intergovernmental institutions and the collective decision-making practices formulate serious threats to the balance between the Member States and erode the equality principle between the Member States which will in the long term destabilize the integration process and the legitimacy of the European project.<sup>504</sup> Besides, from the legal aspects, it has been mentioned above case laws so far related to the institutional balances suggest the indication to the protection of prerogative of the Parliament, out of the concerns to promote and guarantee democratic contribution to the legislative process.<sup>505</sup> However, in the collective actions taken by the Member States outside the EU legal framework, the ESM program for example, the only direct representative institution, namely the Parliament, has been excluded from the decision-making process, free from the accountability and transparency systems of the Union. However, the current legal application of this principle has refrains the Court from advancing its role as the judicial guardian of the EU institutional structure. The article in the TEU about the institutional balance principle (Article 13) refers basically to the regulation of powers and competences already expressly entrusted to certain institutions, not about the division of new powers or existing institutional powers in need of expansion.<sup>506</sup> This problem is to be deteriorated when confronting with an economic crisis since in the age of crisis it is usually the case that the governmental institutions need frequently seek to exercise new powers (or "implied power", in another term) in order to take extraordinary measures against the crisis while the principle of institutional balance is of very limited use there. Second, as mentioned above in Chapter 1, the Court has been long refusing to invoke this principle as the legal basis to make judicial assessment on the institutional balance situation under the influence of new acts adopted by parties concerned (the Member States, for example) in the sense of institutional structure

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<sup>503</sup> Dawson, M., & Witte, F. (2013). Constitutional Balance in the EU after the Euro - Crisis. *The Modern Law Review*, 76(5), 830.

<sup>504</sup> Dawson, M., & Witte, F. (2013). Constitutional Balance in the EU after the Euro - Crisis. *The Modern Law Review*, 76(5), 817-818.

<sup>505</sup> Yuratich, D. (2017). Article 13 (2) TEU: Institutional Balance, Sincere Co-Operation, and Non-Denomination during Lawmaking. *German LJ*, 18, 102.

<sup>506</sup> Yuratich, D. (2017). Article 13 (2) TEU: Institutional Balance, Sincere Co-Operation, and Non-Denomination during Lawmaking. *German LJ*, 18, 109.

rather than specific institutional procedure. In the case where the EU institutions have been employed to act under mechanism established outside the EU legal framework, the Court imposes judicial review merely on the powers exercise by the Commission and the ECB, abstaining to demonstrate whether and how these arrangements newly established have constituted to an impact on the institutional powers and the balance in accordance with the Treaties.<sup>507</sup> There leave a sizable blank for the Court to exercise judicial control in the Union and to provide judicial remedy to the parties whose interests are to be influenced by the erosion of institutional balance.

### **4.2.3 Analysis**

#### **4.2.3.1 More Supranationalism or More Intergovernmentalism?**

In the conventional sense, the supranationalism refers to the integration arrangement that independent, supranational institutions hold the centralized sovereignty transferred from the Member States and play the dominant role in the governance and integration whose institutional foundation points to the Commission and the Parliament. On the contrary, the intergovernmentalism emphasizes the position of the Member States in the integration especially their role as the “Masters of the Treaties” who have the decisive power (the veto specifically) with regard to the integration and the European Council along with the Council make up its institutional foundation.<sup>508</sup> However, such new trend has difficulties in basically being consistent with both integration routines. The crisis triggers a new process which transfers the sovereignty from the Member States to the European level, not to the supranational institutions but to the intergovernmental institutions and some independent institutions like the ECB; what differentiates from the intergovernmentalism is that many crucial sovereignty powers, the budgetary and economic power as examples, has already been transferred to the European level rather than reserved to the Member

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<sup>507</sup> Chamon, M. The Institutional Balance and Ill-Fated Principle of EU Law?“(2015). *European Public Law*, 21, 389.

<sup>508</sup> Tsebelis, G., & Garrett, G. (2001). The institutional foundations of intergovernmentalism and supranationalism in the European Union. *International Organization*, 55(02), 357-390.

States.<sup>509</sup> In other words, the counter-crisis actions have transferred the sovereignty powers to the European intergovernmental institutions what operate in the way of collective decision-making. However, what could seem to be a little strange is that the rescue actions indicate this collective decision-making method turns out to be comparatively effective in reaching agreements and measures' adoption considering the collective actions dilemma haunting other collective decision-making institutions composed of equal members.<sup>510</sup> That working method has been described as the "deliberative intergovernmentalism" which is highly consensus-dependent.<sup>511</sup> Consensus reached through the process of policy deliberation enables the European Council and the Council with the capacity to deal with more and more issues pouring into it for decision-making. Then the question arises, what makes this deliberation and decision-making process inside the European Council and the Council effective and timely to cope with those challenges during the Euro crisis among which emergencies happened from time to time? One answer to that proposed question could be that although the member states are equal in form and before law, the deliberation and decision-making in the European Council and the Council has been under the leadership or instruction of several strong Member States (Germany and France).<sup>512</sup> The dominating role of some Member States in the decision-making process contributes to the consensus reaching and the solution adoption. With the German leadership, the counter-crisis actions manifestly reflect the policy preference and economic ideology of what has applied in Germany during the past decades.<sup>513</sup> That refers to the idea of Ordo-liberalism and the culture of stability.<sup>514</sup> That paradigm is what now is happening in the European Union: "an approach that circumscribes

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<sup>509</sup> Scicluna, N. (2013). *Politicization without democratization: The impact of the Eurozone crisis on EU constitutionalism* (No. 341). Collegio Carlo Alberto. 18-19.

<sup>510</sup> Chiti, E., & Teixeira, P. G. (2013). The constitutional implications of the European responses to the financial and public debt crisis. *Common Market Law Review*, 50(3), 687-688.

<sup>511</sup> Puetter, U. (2012). Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance. *Journal of European Public Policy*, 19(2), 161-178.

<sup>512</sup> Fabbrini, S. (2014, March). The Euro crisis and the constitutional disorder of the European Union. In *21st International Conference of the Council for European Studies, Panel on "The Political and Economic Dynamics of the Eurozone Crisis"*, Washington DC (Vol. 15).

<sup>513</sup> Vilpišauskas, R. (2013). Eurozone crisis and European integration: functional spillover, political spillback? *Journal of European Integration*, 35(3), 368.

<sup>514</sup> Meiers, F. J. (2015). Introduction: Europe's Powerhouse. In *Germany's Role in the Euro Crisis*. Springer International Publishing. 5.

political discretion with a long list of detailed rules” adopted by the European Council and the Council.<sup>515</sup> Besides, the approach that tends to govern the multi-tier EU also performs as an extended version of the German model “Joint-decision federalism” under which the federal units get involved in the federal legislation and also be responsible for the implementation of those legislations.<sup>516</sup> Not to mention the German model of a highly independent central bank with the exclusive competence with regard to the monetary policy and solely for the service of price stability mentioned previously.<sup>517</sup> To “make them us” goes beyond the mere universalism seek but also one of the essential path to enhance self-narrative and self-identification: when the ideas and systems of one society are to be transplanted to another, it is not only the influence of the exporting society would be thus strengthened but also the exporting society receives the reverse effect at home that the exporting society proves to be more confident in the justification and beliefs in their own ideals. However, the importing society would have to bear the cost and consequences of that integration process even with the possibly best case that that transplant finally keeps its foothold in the importing society. In many cases, that process leads to internal unrest in the importing society and even revolts against the exporting society. The situation could be aggravated by the complex and entangling “Paradox of German Power” (or the “German Question”), the semi-hegemony with the geographically central place of Europe, in the European history.<sup>518</sup> German’s exporting of rules, Ordoliberalism and the stability culture precisely consequences in instability.<sup>519</sup>

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<sup>515</sup> Fabbrini, S. (2014, March). The Euro crisis and the constitutional disorder of the European Union. In *21st International Conference of the Council for European Studies, Panel on "The Political and Economic Dynamics of the Eurozone Crisis", Washington DC* (Vol. 15).15.

<sup>516</sup> Scharpf, F. W. (2015). After the crash: A perspective on multilevel European democracy. *European Law Journal*, 21(3), 399.

<sup>517</sup> In a conversation between Stalin and Djilas, Stalin commented that “This war (the Second World War) is not as in the past; whoever occupies a territory also imposes on it his own social system. Everyone imposes his own system as far as his army can reach. It cannot be otherwise”. Djilas, M. (1962). *Conversations with Stalin* (Vol. 63). Houghton Mifflin Harcourt. Part 5 of the Chapter “Doubts”.

<sup>518</sup> Kundnani, H. (2015). *The paradox of German power*. Oxford University Press, USA.8.

<sup>519</sup> Kundnani, H. (2015). *The paradox of German power*. Oxford University Press, USA.107-110.

#### 4.2.3.2 Impact of the adoption of international treaties on the EU legal framework

During the crisis, most of the major decisions and mechanisms dealing with the crisis have been established through the international treaties outside the EU legal framework.<sup>520</sup> The adoption of this approach mainly relates to the considerations these measures basically fall outside the EU legal framework.<sup>521</sup> The Lisbon Treaties at the same time cover no effective tools in coping with the crisis.<sup>522</sup> Necessary under emergencies be that as it may, this model of double-track legal governance inevitably raises legal questions both in terms and in appliance with regard to the EU legal unity in the overlapping areas, directly or indirectly. Legal questions concerned will be discussed in the following part, which mainly covers the conflicts between the newly-introduced rules in the international treaties and the existing Union rules, the substantial replacement/amendment to the Treaties through no formal amendment procedures and the legal spillover of the EU objectives.

First, the rules in those international treaties could raise conflicts with the existing EU laws. Newly established mechanisms, the ESM for example, have been challenged before the ECJ for their violation of certain EU legal clauses.<sup>523</sup> In the *Pringle Case*, Pringle advocates that permanent mechanism established by some Member States to carry out tasks which have been prohibited under the EU legal framework is unlikely to be consistent with the Union law and undermined the Union's fundamental value, the rule of law.<sup>524</sup> Some of his arguments invoke the Supremacy principle and Loyalty principle of the EU law. Under these principles, the Member States are forbidden concluding new international treaties whose clauses may

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<sup>520</sup> Fabbrini, S. (2014). After the euro crisis: a new paradigm on the integration of Europe. *Available at SSRN 2441201*.

<sup>521</sup> Soares, A. G. (2015). EU Commission participation in the Troika mission: is there a European Union price to pay?. *Revista Brasileira de Política Internacional*, 58(1), 109-110.

<sup>522</sup> Van Rompuy, H. (2010). Lessons from a crisis: reflections on economic governance for Europe. *European View*, 9(2), 134.

<sup>523</sup> ECJ Case C-370/12, the *Pringle*.

<sup>524</sup> Tomkin, J. (2013). Contradiction, circumvention and conceptual gymnastics: the impact of the adoption of the ESM Treaty on the State of European Democracy. *German LJ*, 14, 174-175.



conflict with the obligations imposed by the Union Treaties.<sup>525</sup> Nor is it allowed to join the international organization of such kind.<sup>526</sup> The Court paves the way for the ESM through its teleological interpretation of Art.125 TFEU that this article provides no prohibition to the financial rescue under the ESM.<sup>527</sup> However, even scholars who favored the validity of the ESM express their concern that the implementation of these Treaties could consequence in actions violating the EU law and are supposed to be sanctioned according to the EU law.<sup>528</sup> Besides, Bruno de Witte makes further efforts softening the concerns and doubts with regard to the possible conflicts between the ESM and the EU legal framework by identifying that those Treaties should cease to perform once the EU introduces legislations regarding those issues and that the Fiscal Compact urges the signatory states that “*the necessary steps shall be taken...with the aim of incorporating the substance of this Treaty into the legal framework of the European Union*”.<sup>529</sup> Another issue concerned turns out to be whether to endow the EU institutions with new responsibility is likely to constitute the violation of the EU law. De Witte makes a distinction between tasks and powers, indicating that to place new tasks on one institution does not necessarily come along with conferring new powers, and the international treaties will not be inconsistent with the EU legal framework as long as they empower the institutions with no new decision-making powers.<sup>530</sup> However, as it has been argued, the Fiscal Compact is very likely to have empowered the Commission with the competence of binding standard-settings with

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<sup>525</sup> Observations of Pringle, at page 7, in Case C-370/12, Pringle v. Ireland. Para. 3.97.

<sup>526</sup> Observations of Pringle, at page 7, in Case C-370/12, Pringle v. Ireland. Para. 3.100-3.101.

<sup>527</sup> Observations of Pringle, at page 7, in Case C-370/12, Pringle v. Ireland. Para. 3.129-3.149.

<sup>528</sup> De Witte, B. (2012). European Stability Mechanism and Treaty on Stability, Coordination and Governance: Role of the EU Institutions and Consistency with the EU Legal Order. *Challenges of multi-tier governance in the European Union*, 84.

<sup>529</sup> De Witte, B. (2012). European Stability Mechanism and Treaty on Stability, Coordination and Governance: Role of the EU Institutions and Consistency with the EU Legal Order. *Challenges of multi-tier governance in the European Union*, 84; Art.16 of the *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*.

<sup>530</sup> De Witte, B. (2012). European Stability Mechanism and Treaty on Stability, Coordination and Governance: Role of the EU Institutions and Consistency with the EU Legal Order. *Challenges of multi-tier governance in the European Union*. 83-84. Bruno discussed roles given by the ESM and Fiscal Compact to the Commission respectively and conducted a point-by-point rebuttal that the role to negotiate and monitor the Memorandum of Understandings is consistent with the Council Regulation 407/2010 of 11 May establishing a European Financial Stabilization mechanism, the role to report and assess belongs to the Commission's existing competence with regard to economic policy and the formal role to challenge states before the ECJ in case of certain acts has not be conferred finally.

Article 3 (2) of this Compact for the establishment of a correction mechanism.<sup>531</sup> Further, the possibility that in the implementation of these Treaties there will be a substantial empowerment to the EU institutions (the Commission) shall not be excluded beforehand. The chances are that these treaties may be challenged before the ECJ at least once more for the reason that the implementation of them has come out with equivalent effect (indirectly) with violation of the EU law.

Second, to conclude international treaties outside the EU legal framework has lead to the jettison of the Treaty Amendment Procedures.<sup>532</sup> Under the context of the crisis and counter-crisis measures, many rules in the Lisbon Treaty has been conceived as “outdated” and have difficulties in matching the orientation towards an integrated economic and fiscal union; However, national leaders choose to adopt new rules through the international treaties outside the EU legal framework rather than trigger the procedure to amend the Lisbon Treaties.<sup>533</sup> According to the Lisbon Treaty, the Treaty Amendment Procedure is rather complex, fussy and time-consuming, involving the participation of nearly all the EU institutions and the Member States into countless discussions, negotiations and votes with high threshold to pass; Afterwards, the amendment is supposed to be accepted by the Member States in accordance with domestic constitutional requirements, and national referendum is very likely to be held in some Member States.<sup>534</sup> The ratification could be full of unforeseen incidents and results considering what have happened to the European Constitutional Treaty in France and in Netherlands, and some of those consequences under the context of emergent Euro crisis might be unbearable. Be that as it may, the substantial amendment to the EU law bypassing the formal amendment procedure undermines the legitimacy of the rescue actions and the EU who claims itself as a Union under the rule of law.<sup>535</sup> Considering the significant role the law plays in the

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<sup>531</sup> Pernice, I. (2013). What future (s) of democratic governance in Europe: learning from the crisis. *Challenges of multi-tier governance in the European Union*. 15.

<sup>532</sup> Scicluna, N. (2013). *Politicization without democratization: The impact of the Eurozone crisis on EU constitutionalism* (No. 341). Collegio Carlo Alberto.19.

<sup>533</sup> Leino, P., & Salminen, J. (2013). Should the Economic and Monetary Union Be Democratic after All; Some Reflections on the Current Crisis? *German LJ*, 14, 861.

<sup>534</sup> Art. 48 TEU.

<sup>535</sup> Art. 2 TEU.

integration process<sup>536</sup> and the European constitutional traditions where the rule of law forms an integral part, the practices of “Governance bypassing the law” could be harmful to the long-term stability and legitimacy of the Union.

Third, in these international treaties, unanimity as an institutional requirement for the Treaties’ entry into force and the taking of the certain actions has been abandoned. With the Fiscal Compact the unanimity was for the first time be dropped as the threshold for the intergovernmental treaties to enter into effect, stipulating that “*this Treaty shall enter into force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification, or on the first day of the month following the deposit of the twelfth instrument of ratification by a Contracting Party whose currency is the euro, whichever is the earlier*”<sup>537</sup> rather than that approval from every contracting states is needed.<sup>538</sup> Besides, the quasi-automatic intervention from the Commission on non-compliance of the agreement and it could be derogated only “*where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them is opposed to the decision proposed or recommended*”<sup>539</sup> by the Commission in case of “future veto threats”.<sup>540</sup> This transformation signals not merely the evolutions in the procedural threshold. According to Weiler, unanimity “*embodying the principle of sovereign equality and consent is typically a hallmark of internationalism*” while majoritarian idea stands for “*the willingness to submit one’s collective self to the discipline of majority decision-making, even at the very high constitutional level...of loyalty and commitment which imply subjugation to a newly drawn collective and its will*”, namely, the constitutionalism.<sup>541</sup> However, it is precisely with the form of

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<sup>536</sup> For more information, see: Cappelletti, M., Seccombe, M., & Weiler, J. H. (1986). *Integration through law: Europe and the American federal experience* (Vol. 1). Walter de Gruyter.

<sup>537</sup> Art. 14(2) Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

<sup>538</sup> Fabbrini, S. (2013). Intergovernmentalism and its limits assessing the European Union’s answer to the Euro crisis. *Comparative Political Studies*, 1019.

<sup>539</sup> Art. 7, Treaty on Stability, Coordination and Governance

<sup>540</sup> Fabbrini, S. (2014). After the euro crisis: a new paradigm on the integration of Europe. *Available at SSRN 2441201*. 10.

<sup>541</sup> Weiler, J. H. (2002). A constitution for Europe? Some hard choices. *Journal of Common Market Studies*, 40(4), 565-566.

international treaties that the constitutionalization process is developed.<sup>542</sup> Literarily paradoxical, though, this practice is by no means original or unprecedented. The Treaties that framed the European Communities in the 1950s were not interpreted as establishing the *sui generis* legal system from the very first day, very likely to be taken as international treaties as numberless of their predecessors. Besides, as above mentioned, the fact that rules in these international treaties are supposed to be integrated into the EU legal framework when the time is ripe also helps to justify the gap between the nature of those rules (constitutionalization) and the form they adopt (international treaties). However, the concern continues with regard to the small Member States' position being undermined even marginalized with the big states' dominance of the agenda of mechanisms established by these international treaties.

Fourth, the legal spillover of the EU objectives has bridged the EU legal framework and the international treaties based on intergovernmental method, where the EU objectives constitute the shared sources to the teleological interpretations of actions taken under both legal frameworks.<sup>543</sup> Andrea Manzella has concluded four principles indicated by these international treaties for enhanced cooperation, echoing the rules in the Treaties, including “*the prevalence of the community objectives in the assessment of the agreements between Member States*”, “*the inviolability of the common institutional framework*”, “*the character of temporal subsidiarity...in the last resort*” and “*the open character of the cooperation and condition of equality of all EU Member States*”.<sup>544</sup> In other words, the EU objectives have spilled over from the EU legal framework to the international treaties' framework, functioning as the common roof to both legal frameworks. With the shared objectives and their role as the source of the teleological interpretation, rules from both legal frameworks could be coordinated and integrated in the process of interpretation and compliance, and also contribute to the final absorbance of international legal framework in serve for enhanced cooperation into the EU legal framework and advance the maturity of international treaties' legal framework integration to the EU legal framework. In short,

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<sup>542</sup> Manzella, A. (2012). Is the EP legitimate as a parliamentary body in EU multi-tier governance? *Challenges of multi-tier governance in the European Union*, 145.

<sup>543</sup> Manzella, A. (2012). Is the EP legitimate as a parliamentary body in EU multi-tier governance? *Challenges of multi-tier governance in the European Union*, 143.

<sup>544</sup> Manzella, A. (2012). Is the EP legitimate as a parliamentary body in EU multi-tier governance? *Challenges of multi-tier governance in the European Union*, 142-143. See also Art. 20 TEU.

the shared objectives play the role of the junction point of both legal frameworks in the transition period.

#### 4.2.3.3 Pros and cons of the multi-speed integration approach

The establishment of the Eurozone embodied the idea of double-speed (or multi-speed) European and was explicitly reaffirmed by the “Enhanced Cooperation” clause in the Lisbon Treaties.<sup>545</sup> This idea was then elaborately developed as the “differentiated integration” by Wallace as “*the most straightforward and most neutral term used to denote variations in the application of European policies or variations in the level and intensity of participation in European policy regimes*”.<sup>546</sup> Giandomenico Majone distinguishes the public goods and the club goods with that, compared with the former, the club goods could be exclusive to some individuals and the member of the clubs should bear the costs for the club goods.<sup>547</sup> He also points out that “*harmonization occurs in response to market integration, but only when heterogeneity is not too great*”, and new clubs then would be created when the difficulties and costs appear to be too huge for a highly heterogeneous community to achieve internal harmonization.<sup>548</sup> Based on that, Majone indicates that the European integration is becoming a society consisting of various clubs where the Member States could choose to join clubs available or to create a new club according to their assessment based on the cost-benefit analysis.<sup>549</sup> The Eurozone is a typical illustration of clubs only open to states reaching certain standards, and to join different clubs within the Union represents different preferences of the extent of European integration. That forms the basis for the double-speed or multi-speed European integration. This trend turns out to be much more explicit during the Euro crisis when a series of actions, which have

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<sup>545</sup> Art. 20 TEU.

<sup>546</sup> Differentiated integration. (2000). In D. Dinan (Ed.), *Encyclopedia of the European Union*. Boulder, CO: Lynne Rienner Publishers, Inc.. Retrieved from [http://search.credoreference.com/content/entry/lrpenceu/differentiated\\_integration/0](http://search.credoreference.com/content/entry/lrpenceu/differentiated_integration/0)

<sup>547</sup> Majone, G. (2012). Rethinking European integration after the debt crisis. *UCL, The European Institute, Working Paper*, (3), 2012. 24.

<sup>548</sup> Majone, G. (2012). Rethinking European integration after the debt crisis. *UCL, The European Institute, Working Paper*, (3), 2012. 24-25.

<sup>549</sup> Majone, G. (2012). Rethinking European integration after the debt crisis. *UCL, The European Institute, Working Paper*, (3), 2012.

been adopted with the Open Coordination Method (OCM) to tackle the crisis through closer cooperation, coordination and further integration, have accelerated the speech of integration within the Eurozone, including more fiscal policy coordination and surveillance and economic policy as well as budgetary policy review.

The European Union has been established on various constitutional compromises, including the compromise between the Member States inside and outside the Eurozone.<sup>550</sup> During the Euro crisis, further integration ranging from fiscal policies to economic policies has been advanced among the EMU member states, leaving the non-Euro member states, including the UK and the Denmark steadily marginalized.<sup>551</sup> The advancement in the EMU member states not only establishes different rules and mechanism for states inside and outside the Eurozone but also prepares the “*legal and institutional context favorable to the deepening and broadening of their integration*” which has enlarged the distinction and gap between different groups of member states.<sup>552</sup> Differentiation would inevitably lead to more complexity to the governance structure and the set of rules in the EU.<sup>553</sup> With various governance and coordination mechanisms, the EMU has become an assembly of legal and regulatory frameworks who have differentiated participants,<sup>554</sup> and the European Union as an organization of complexity as such, will have to face legitimacy challenges regarding transparency and democratic accountability from the citizens.<sup>555</sup> Differentiated integration and governance mechanisms also create challenges to the parliamentary control over those mechanisms and differentiated policies. Different from those differentiated mechanisms, the European Parliament has been designed as the Union institution to

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<sup>550</sup> Fabbrini, S. (2014, March). The Euro crisis and the constitutional disorder of the European Union. In *21st International Conference of the Council for European Studies, Panel on "The Political and Economic Dynamics of the Eurozone Crisis"*, Washington DC (Vol. 15). 4-7.

<sup>551</sup> Fabbrini, S. (2014, March). The Euro crisis and the constitutional disorder of the European Union. In *21st International Conference of the Council for European Studies, Panel on "The Political and Economic Dynamics of the Eurozone Crisis"*, Washington DC (Vol. 15). 10.

<sup>552</sup> Chiti, E., & Teixeira, P. G. (2013). The constitutional implications of the European responses to the financial and public debt crisis. *Common Market Law Review*, 50(3), 694.

<sup>553</sup> Pernice, I. (2013). What future (s) of democratic governance in Europe: learning from the crisis. *Challenges of multi-tier governance in the European Union*, 13.

<sup>554</sup> Chiti, E., & Teixeira, P. G. (2013). The constitutional implications of the European responses to the financial and public debt crisis. *Common Market Law Review*, 50(3), 692.

<sup>555</sup> Pernice, I. (2013). What future (s) of democratic governance in Europe: learning from the crisis. *Challenges of multi-tier governance in the European Union*. 8.

represent the peoples of the European Union rather than certain percentage or groups of the European peoples. Then the question arises whether those differentiated integrations should be democratically controlled by the whole European Parliament or the MEPs of the member states who have participated in those mechanisms. The European Parliament is in a dilemma. If all the MEPs are entitled to supervise those mechanisms, it would lead to the tricky result, which is inconsistent with the conventional constitutional idea in Europe that “No Taxation without representation”, that MEPs elected by the people outside certain mechanism get involved in the deliberation and supervision of that mechanism.<sup>556</sup> However, if the European Parliament forms several European Parliaments with different components according to the member states of certain mechanisms, it will not only undermine its unitary character but also initiate another unprecedented project, besides the European integration, in the world.<sup>557</sup> As for the national parliaments, Wessels has established that their role has been undermined with the differentiated integration<sup>558</sup>, not to mention the vision to supervise those mechanisms with the national parliaments.

Beyond that, the differentiated integration through international treaties also transforms the internal differentiation to external differentiation and from legal differentiation to institutional differentiation.<sup>559</sup> Where the participants of certain mechanism enable themselves to advance economic governance with new authorization to the EU institutions (and thus the EU institutions will be competent in regulating those issues within the Eurozone Member States), other EU Member States would have to rely on bilateral agreements on close cooperation to achieve the same

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<sup>556</sup> Dehousse, R. (2012). Is the ‘community method’ still relevant. *Challenges of multi-tier governance in the European Union: Effectiveness, efficiency and legitimacy*. Directorate General for Internal Policies, Compendium Notes, 88; Wessels, W. (2013). National Parliaments and the EP in Multi-tier Governance: In Search for an Optimal Multi-level Parliamentary Architecture Analysis, Assessment Advice. *Challenges of multi-tier governance in the European Union*, 103.

<sup>557</sup> Dehousse, R. (2012). Is the ‘community method’ still relevant. *Challenges of multi-tier governance in the European Union: Effectiveness, efficiency and legitimacy*. Directorate General for Internal Policies, Compendium Notes.93.

<sup>558</sup> Wessels, W. (2013). National Parliaments and the EP in Multi-tier Governance: In Search for an Optimal Multi-level Parliamentary Architecture Analysis, Assessment Advice. *Challenges of multi-tier governance in the European Union*, 102.

<sup>559</sup> Fabbri, S. (2014, March). The Euro crisis and the constitutional disorder of the European Union. In *21st International Conference of the Council for European Studies, Panel on "The Political and Economic Dynamics of the Eurozone Crisis"*, Washington DC (Vol. 15). 14.

effect in the practice of conferral of banking supervision tasks on the ECB.<sup>560</sup> The solidarity also faces its crisis when the Euro zone Member States have actually dominated the agenda of the whole European Union and pursue their integration preferences instead of the preferences for the general interests of the whole European Union and discard the preferences of non-Euro zone states. The legitimacy and public support of the EU are also at stake when citizens are facing the complex net being knitted with various treaties, rules and institutions.

#### **4.2.3.4 from democratic deficit to democratic default?**

Democracy is one crucial element of the western constitutional traditions, constituting part of the constitutional identity of the European Member States. In the Laeken Declaration published in 2001, the European leaders affirmed that “*The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the power and instruments it possesses...the European project also derives its legitimacy from democratic, transparent and efficient institutions*”.<sup>561</sup> On the other hand, the European project has long been haunted by the “democratic deficit” challenges and questions regarding its legitimacy which primarily focuses on its democracy advancement. The Euro crisis and a series of rescue measures to the financial and economic crisis, which have been decided in emergency, has constantly undermined the democratic basis and the current legitimacy and public support this project enjoys has been under erosion. With the role expansion of independent institutions (the ECB), the marginalization of representative institutions and the situation of “vote without choice” in periphery Member States, systematic democratic deficit even democratic default has emerged in the European Union.

First of all, the steaming-ahead of independent institutions’ role and power in the European Union continues, especially the ECB. As discussed before, the democratic legitimacy problem emerges when the ECB is suspected with certain factual basis begins to exercise powers beyond what has been stipulated in the Lisbon Treaties—the power to monetary policy in serve merely for price stability, that is, to

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<sup>560</sup> Chiti, E., & Teixeira, P. G. (2013). The constitutional implications of the European responses to the financial and public debt crisis. *Common Market Law Review*, 50(3), 694.

<sup>561</sup> Laeken Declaration of the Future of the European Union.



making economic policies and to implement redistribution of wealth across the European Union. The EMU has been interpreted to be the triumph of technocrats over the democracy.<sup>562</sup> With the monopoly over the currency liquidity, the ECB has extended its role to the Eurozone economic governance, and may take the chance to impose pressures on states and national government when they fail to realize survival.<sup>563</sup> And according to the differentiation made by Majone between “efficient” and “redistributive” policies, the former could be delegated to the non-majoritarian while the latter is supposed to be determined by institutions with democratic basis.<sup>564</sup> However, under the current system it is hard to find out the actor which is able to exert significant influence on the ECB and not to mention to hold the ECB accountable. After several rounds of games, the ECB still appears to be securing the superior position to the European Parliament.<sup>565</sup> During the crisis and the rescue, the ECB even involved themselves in domestic politics with the example of Italy.<sup>566</sup> What is even worse is that not only the common citizens has been excluded from negotiations which will shape the future framework of EU project, the small states also have to accept the programs proposed by the Troika (including the ECB) for the interests of their stronger brothers.<sup>567</sup> As for the role played by the ECB with regard to budgets in north European member states, it still remains a question to be answered whether the constitutional constraints established by the German Federal Constitutional Court would be adequate in securing the budgetary sovereignty of the parliaments in practice. If the answer turns out to be negative, the institutional formulation for the democratic control over the ECB and to hold it accountable might be of necessity to be written into the political agenda of European political leaders.

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<sup>562</sup> Dyson, K. H., & Featherstone, K. (1999). *The road to Maastricht: negotiating economic and monetary union*. Oxford University Press. 801.

<sup>563</sup> FONTAN, C. The ECB: A Democratic Problem for Europe? 4.

<sup>564</sup> Verdun, A. (1998). The institutional design of EMU: a democratic deficit? *Journal of Public Policy*, 18(02), 107-132.

<sup>565</sup> Jabko, N. (2003). Democracy in the age of the euro. *Journal of European Public Policy*, 10(5), 710-739.

<sup>566</sup> Dario Stefano Dell'Aquila, Stephan Kaufmann, & Jannis Milios. (2014). Blackbox ECB: The Power and Impotence of the European Central Bank. See: [https://www.rosalux.de/fileadmin/rls\\_uploads/pdfs/Materialien/Materialien2\\_BlackboxEZB\\_engl\\_web.pdf](https://www.rosalux.de/fileadmin/rls_uploads/pdfs/Materialien/Materialien2_BlackboxEZB_engl_web.pdf), last accessed on 25<sup>th</sup>, August 25, 2016.

<sup>567</sup> Majone, G. (2014). From regulatory state to a democratic default. *Journal of Common Market Studies*, 52(6), 1216-1223.

Second, the representative institutions have been further marginalized during the crisis. In combating the financial crisis and the dilemma of collective action, the European leaders and the intergovernmental institutions emerge to be the decision-making body and leave the supranational institutions especially the European Parliament little role. The decision-making mechanism, whether efficient in dealing with the economic crisis, has provoked political crisis regarding the legitimacy and accountability problems within the European Union as well as the newly established institutions outside the EU. The government bodies, both at the national level and the European level, have dominated the process of major decision-makings and excluded the representative institutions.<sup>568</sup> During the crisis, the European Parliament fails to propose its own version of the monetary reform program, not to mention to deliberate or make amendments to the decisions already made.<sup>569</sup> The European Parliament is also frustrated in persuading the European Council to establish the ESM within the Union framework.<sup>570</sup> Even though some legislative acts were adopted according to the ordinary or the special legislative procedures where the European Parliament has a role to play, consultative or decisive, in the new treaties concluded the European Parliament was deprived of the role as the policy-maker.<sup>571</sup> In the ESM and the Fiscal Compact, the European Parliament was not empowered a significant role; the control of national parliaments over the governments was also undermined by the limitations imposed by these measures, especially the Commission's role in reviewing the budgets of member states.<sup>572</sup> Along with the marginalization of the European Parliament, its reduction in powers has not been compensated with the increase of national parliaments' role and power if we assess the power of representative

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<sup>568</sup> Schmidt, V. A. (2012). The Eurozone Crisis and the Challenges for Democracy. *The State of the Union (s): The Eurozone Crisis, Comparative Regional Integration and the EU Model*, 104.

<sup>569</sup> Montani, G. (2015). *The German Question and the European Question. Monetary Union and European Democracy after the Greek crisis* (No. 0105). University of Pavia, Department of Economics and Management. 12.

<sup>570</sup> Tomkin, J. (2013). Contradiction, circumvention and conceptual gymnastics: the impact of the adoption of the ESM Treaty on the State of European Democracy. *German LJ*, 14, 173-174.

<sup>571</sup> Fabbrini, S. (2014, March). The Euro crisis and the constitutional disorder of the European Union. In *21st International Conference of the Council for European Studies, Panel on "The Political and Economic Dynamics of the Eurozone Crisis"*, Washington DC (Vol. 15).10.

<sup>572</sup> Dawson, M., & Witte, F. (2013). Constitutional Balance in the EU after the Euro - Crisis. *The Modern Law Review*, 76(5), 832.

institution systems in the European Union as a whole.<sup>573</sup> The power reduction of national parliaments, as discussed in the former chapter, has caused an impact on their function in input the will of the people into decision-making and national budget by the OMT program. The OMT Program implemented by the ECB and the European Semester enables the ECB to transfer the budget of certain member states to another member states without the approval from the parliament. What is even worse, it enables in practice the Commission to review national budgets even before national parliaments could exert any influence. Besides, the European Council, as the real decision-maker, is responsible neither to the European Parliament nor to national parliaments. National parliaments, which have no power to dismiss the European Council as a whole body, are only entitled to remove the single member of the European Council, namely, the president or the prime minister of their own. With the marginalization and power deprivation of representative institutions at both the national and European level, the input of the will of the people into the decision-making process has become rather blocked. The counter-crisis measures have advanced the Eurozone to be a full-fledged Union consisting of monetary union, banking union and fiscal union while deviating from existing legal and political accountability mechanism constructed by the Lisbon Treaty. Currently there is no alternative architecture in sight which could enhance the democracy in the European Union and hold the newly-emerged government accountable.<sup>574</sup> During the crisis, most concentrations were paid to the solutions to the national debt crisis rather than the social and political crisis concerned, causing revolts against Brussels, Berlin and even the integration project.<sup>575</sup> However, as it has been pointed out, the long-term efficiency of the counter-crisis efforts, after all, depends on the implementation and compliance in the member states where the democratic basis of those decisions and implementations plays a crucial role. Therefore, to rebuild the democratic base and the accountability mechanism in both the European and national level shall be of uppermost priority.

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<sup>573</sup> Fasone, C. (2014). European economic governance and parliamentary representation. What place for the European Parliament?. *European Law Journal*, 20(2), 183.

<sup>574</sup> Dawson, M. (2015). The Legal and Political Accountability Structure of 'Post - Crisis' EU Economic Governance. *JCMS: Journal of Common Market Studies*, 53(5), 976-993.

<sup>575</sup> Scharpf, F. W. (2015). After the crash: A perspective on multilevel European democracy. *European Law Journal*, 21(3), 384-405.

#### 4.2.3.5 The Hybridity of governance institutions and fragmentation: diffused democracy?

The idea of “diffused democracy” was proposed as an interpretation of what has happened to the power distribution and decision-making process during the European integration in the past decades of years where the fragmented government formed the crucial part of this model.<sup>576</sup> The power of the government has been constantly delegated to agencies or independent institutions.<sup>577</sup> Besides, the power of the Commission’s government power has also been limited by other intergovernmental bodies under the influence of the member states, namely the agencies and the Comitology.<sup>578</sup> Even before the Euro crisis, the European Commission’s power in setting the agenda and policy adoption has been gradually expropriated by the European Council, degrading the Commission only to be the general secretary and executor as has been discussed in the second chapter. The accountability and the “unity and integrity of the government function”<sup>579</sup> has been at risk in a newly formulated governance structure of hybridity and fragmentation seriously worsened by the crisis and the counter-crisis mechanisms. According to Imelda Maher’s conclusion, the economic governance in the European Union has witnessed hybridity in four aspects: the highly integrated monetary policy and the fragmented economic policies, the exclusive domination on monetary policies of the ECB and the responsibility for economic governance between several EU institutions, the combination of hard laws (Treaties, Union legislations) and soft laws (SGP) and that non-euro zone states free from sanctions triggered by excessive deficit and the uniform application of multilateral surveillance applied to all member states.<sup>580</sup> The hybrids go even further during the crisis for the newly established mechanism within and also outside the EU legal framework. Besides the hybrid of hard laws and soft

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<sup>576</sup> Costa, O., Jabko, N., Lequesne, C., & Maignette, P. (2003). Diffuse control mechanisms in the European Union: towards a new democracy?. *Journal of European Public Policy*, 10(5), 666-676.

<sup>577</sup> Costa, O., Jabko, N., Lequesne, C., & Maignette, P. (2003). Diffuse control mechanisms in the European Union: towards a new democracy? *Journal of European Public Policy*, 10(5), 668-669.

<sup>578</sup> Craig, P. (2012). *EU administrative law*. Oxford University Press. 114.

<sup>579</sup> Craig, P. (2012). *EU administrative law*. Oxford University Press. 156.

<sup>580</sup> Maher, I. (2006). Economic governance: Hybridity, accountability and control. *Colum. J. Eur. L.*, 13, 682-683.

laws, there also emerges the double pillar structure combining the Economic and Monetary Union and internal market where different governing rules may share the same legal basis from the other pillar while both of them apply to certain member states.<sup>581</sup> Further, there appears also the hybrid of supranational EU law and the intergovernmental international treaties, and the supranational institutions, namely the Commission, the ECB and the ECJ, have also been entrusted with responsibilities with regard to the economic governance.<sup>582</sup> When the decisions have been made mainly through coordination by different institutions and political bodies, and when the major actions were mostly determined and taken in the European Council or Euro Summit through collective decision-making, the question arises about the accountability problems with regard to decisions made by many actors collectively or substantially involved. Hodson and Maher have raised the problems with the demarcation of responsibilities between actors in the decision-making process when there are numerous participants involved.<sup>583</sup> Besides, as for the legislative control end, the power of the legislative branch has always been fragmented. The European Parliament has comparatively sufficient time and resources for deliberation and involvement in the legislation process but its democratic base is undermined by the rather low election turnout and usually seen as the second-order elections; besides, the European Parliament is also often argued to have problems in connecting with the citizens and the communication with European Union policies. Besides, even the composition of the European Parliament is fragmented. The European Parliament is composed of nine party caucuses and the biggest party among them, the European People's Party has only a few more than 200 seats, holding only less than 30% of the whole seats and the European Parliament could function and reach certain conclusions only through the "Grand Coalition" combining the European People's Party and the Progressive Alliance of Socialists and Democrats.<sup>584</sup>

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<sup>581</sup> De Witte, B. (2015). Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation? *European Constitutional Law Review*, 11(03), 442.

<sup>582</sup> De Witte, B. (2015). Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?. *European Constitutional Law Review*, 11(03), 443.

<sup>583</sup> Hodson, D., & Maher, I. (2001). The open method as a new mode of governance: the case of soft economic policy co-ordination. *JCMS: Journal of Common Market Studies*, 39(4), 719-746.

<sup>584</sup> Fabbrini, F. (2015). Representation in the European Parliament: Of False Problems and Real Challenges. *Zeitschrift Fuer Auslaendisches Oeffentliches Recht Und Voelkerrecht*. 838-839.

On the other hand, although the national parliaments have always been seen as the first-order representative institutions and that empirical analysis has found that the euro crisis issue has already formed an important part of the discussions and deliberations happening in the national parliaments<sup>585</sup>, they are nonetheless marginalized in the European decision-making process partly because that current mechanism for the national parliaments' involvement at the European level is rather limited and mainly focuses on the subsidiarity review. The fragmentation rather than separation of powers between different representative institutions makes them even difficult to defend their existing powers written in the Treaties and national constitutions, as what we have seen during the euro crisis, not to mention to formulate sufficient control and supervision over the fragmented European government. The hybrids of governing institutional structure and the fragmented power both within the government and the legislative branch not only constitute obstacles to the achievement of accountability when the decision-making and the rules turn out to be overlapped since that would lead to the consequence that neither the targeting of the responsible institutions nor the procedure and mechanisms to hold the targeted institutions to be responsible remains tricky business. What is even worse is that the diffuse of power is very likely to turn out to be either inefficient in governance or the fragmented political power. Consequently it would result in the dominance by the few the other way round<sup>586</sup> when the accountability process remains only to be in formality and motivate the political actors to compete to be the real decider.

### **4.3 Conclusion: centralized fragmentation and the alienation of EU project**

The Euro crisis breeds an occasion to reveal the problems accumulated during the decades of years' integration process especially those arise and develop after the Maastricht Treaty and the EMU project. The euro crisis could be partly chalked up to the incompatibility between the centralized monetary policy exclusively entrusted to

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<sup>585</sup> Auel, K., & Höing, O. (2014). Parliaments in the euro crisis: can the losers of integration still fight back? *JCMS: Journal of Common Market Studies*, 52(6), 1191-1193.

<sup>586</sup> Maduro, M. P. (2013). A new governance for the European Union and the Euro: democracy and justice. *Yearbook of Polish European Studies*, (16), 111-140.

the ECB and the decentralized economic policies of the member states when the voluntary coordination on economic policies between member states has been proven to be inefficient under the logic of collective action dilemma and further fiscal discipline needs to be adopted.<sup>587</sup> This incompatibility, which has cut part to the interrelations between the economic and monetary policies, has generated consequences at both the European and national level: it not only deprives the possibility from the member states to use the monetary policy to intervene in the economy but also that the uniform monetary policy made by the ECB fails to satisfy the various local economic realities.<sup>588</sup> However, with the efficiency of counter-crisis measures remaining to be seen, those measures aiming at strengthening the fiscal discipline and economic policies coordination have caused numerous new problems, transforming the economic crisis to be the also political and social crisis in nearly all EU member states. Through the series of counter-crisis efforts, the European integration has witnessed the unique process of what could be named as “Centralized Fragmentation” embodying the centralized but at the same time fragmented decision-making and responsibility. On one hand, as we shall see, the powers to make decisions ranging from monetary policies to economic policies as well as policies of other areas have been gradually centralized at the European level through the Community Method, the OMC or international treaties with legally binding force with regard to detailed domestic issues. Economic policy, after the monetary policy, has been less and less seen as a domestic issue but more of Union issues along with a substantial transfer of responsibility from the member states to the European Union, resulting in that single member state are less likely to determine its economic policy alone. This transformation has been further advanced partly based on the facts the Euro crisis has revealed the extent of external effects of economic policies in one member state on other member states and other Eurozone member states considering that they have been integrated to be a single internal markets as well as monetary

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<sup>587</sup> Fabbrini, S. (2014, March). The Euro crisis and the constitutional disorder of the European Union. In *21st International Conference of the Council for European Studies, Panel on "The Political and Economic Dynamics of the Eurozone Crisis"*, Washington DC (Vol. 15).12; Jones, E., Kelemen, R. D., & Meunier, S. (2016). Failing forward? The euro crisis and the incomplete nature of European integration. *Comparative Political Studies*, 49(7), 1010-1034.

<sup>588</sup> Ruffert, M. (2011). The European debt crisis and European Union law. *Common Market Law Review*, 48(6), 1793.

union adopting single currency<sup>589</sup>. That deprivation of the monetary policies from the broad economic policies and the then centralization to another authority with largely different jurisdiction domain leads to governance default for both of them.<sup>590</sup> On the other hand, the mechanism and procedures for the realization of those centralized power and responsibility are precisely fragmented in the European level and the implementation process between the EU and responding national institutions, with numerous institutions and committees involved, with the collective decision-making in the Council and the European Council as well as the separation of name and actuality regarding the institutional responsibilities between different EU institutions especially between the European Council and the Commission. In one respect, the difficulties in the demarcation of powers and responsibilities caused by excessive joint and behind-closed-door decision-making has placed institutional accountability at risk when the targeting of the responsible institution is becoming unlikely because of the institutional complexity. In the other respect, the separation of name and actuality regarding the distribution of powers and responsibilities between different institutions substantially dismantles the architecture for democratic control and supervision, if they are currently more or less efficient since the real decision-maker inevitably bypasses the control and supervision mechanism which has design to target the one who is merely the decision-maker in name.

Alienation also happens to the EU institutional evolution during the decades of years' integration through the top-down design especially after the Lisbon Treaty and the Euro crisis. The European Commission, whose role has always been set to be an institution to focus on and promote the interests of the whole Europe and endeavor to mediate and reach compromise different interests between member states especially between the strong and the weak member states and avoid partisanship in balancing them, has become what is precisely opposite to its original institutional objectives. As discussed before, the European Commission has gradually become the secretary general and the executor of the European Commission, where the decision-making is generally thought to be based on international political games rather than to introduce

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<sup>589</sup> De Schoutheete, P., & Micossi, S. (2013). On Political Union in Europe: The changing landscape of decision-making and political accountability. *CEPS Essays*. 6.

<sup>590</sup> Ruffert, M. (2011). The European debt crisis and European Union law. *Common Market Law Review*, 48(6), 1777-1805.



policies based on a cautious assessment from the perspective of the whole European interests. During the crisis, the European Commission even involved itself into the direct negotiations, appearing to be the agent of a certain bloc of member states with some other member states despite its role as the mediator of all member states, raising insurgency against the Brussels and causing severe damage to its credibility as an impartial actor. The alienation also arises with the European integration in a more general scope. In the year of 2012, the European Union was awarded the Nobel Peace Prize “for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe”. Although the European Union has long been recognized as the driving force for promoting civil freedom and democracy in the world, the democracy and accountability problem within itself is emerging and becoming increasingly salient.<sup>591</sup> Political self-determination forms an integral and crucial part of democracy, and it is also what the stability and legitimacy of any political system is based on.<sup>592</sup> However, the Euro crisis has led to the decision-making power being transferred to the closed-door, intergovernmental forum where the transparency and the democratic control and supervision are in serious shortage of. The citizens in the central European part witness their budget being utilized without the approval from their representative institutions while their counterparts in the periphery European states would have to accept major economic and fiscal decisions and bear the consequences of those decisions which have been made thousands of kilometers away from their territory.<sup>593</sup> Besides, the report released by the Dutch Council of State also put forward the problem of democratic alienation, mentioning the phenomenon that although the democratic procedure has been observed, citizens find themselves more and more unlikely to be connected with decisions being taken and become increasingly disengaged in the public political process.<sup>594</sup> What happens during the crisis and the counter-crisis measures only work

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<sup>591</sup> Le Cacheux, J., & Laurent, E. (2015). The Democratic Paradox of the EU. In *Report on the State of the European Union*. Palgrave Macmillan UK. 7-19.

<sup>592</sup> Dawson, M., & Witte, F. (2013). Constitutional Balance in the EU after the Euro - Crisis. *The Modern Law Review*, 76(5), 817-844.

<sup>593</sup> Scharpf, F. W. (2015). After the crash: A perspective on multilevel European democracy. *European Law Journal*, 21(3), 393.

<sup>594</sup> Dutch Council of State (2013) Request for Information on the Embedding of Democratic Control in the Reform of Economic Governance in Europe to Combat the Economic and Financial Crisis. No. W01.12.0457/1.

to advance this trend since most major decisions have been made by national political leaders in the intergovernmental EU institutions and representative institutions at both national and European level severely marginalized, the role of representative institutions and the voice of the people are almost eliminated during the counter-crisis stage. What the European integration project deploys as its objectives, the balance of interests, the independence of supranational institutions, the enhanced democracy (political self-determination) and accountability is becoming rarely visible in the European political process and decision-makings but that what is going on in the EU political process shifts exactly to the opposite directions.

## Chapter 5. Conclusion

The idea of an integrated European is not a fresh idea after the Second World War. Not later than the year of 1815, when the French Emperor Napoleon was defeated by the monarch group, the mechanism named “the Concert of Europe” as the initial efforts for international governance was established, characterized by “*automatic leadership, bellicosity, an incomprehension of the value of freedom and the power of social change*”, though.<sup>595</sup> In spite of its final destiny, the protectionism and the nationalism shortly before and during the First World War, this one century’s evolution and embodiment of that idea has been prophetic in constructing the theoretical basis and institutional practices, including the idea of civil servants’ dominance while precluding the politicians, the idea of “trade promotes peace”.<sup>596</sup> These ideas have been relaunched when the new wave of European integration was reactivated after the Second World War. However, what has been inherited goes beyond the inspirational part of that project; the fear of an uncontrolled international government also runs its course.<sup>597</sup> There arises the issue of a democratized European Union. As has been discussed in the first chapter, the discussions on the EU democracy face a dilemma. What is the appropriate way to assess the democracy within a supranational and multi-level governance structure when the elements of democracy have been mainly concluded under the context of nation states? This question may echo with the animated discussion on the democratic deficit problem of the European Union. As a response to that question, the concept “Transnational democracy” has been suggested and also various patterns for future transnational democracy. However, those proposals are still defected and challenged in their component elements, the nature of transnational organizations, and the approach of their system structure as well as their actual necessity. These discussions advance the dimension and the knowledge of democracy as a crucial concept in modern political

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<sup>595</sup> Mazower, M. (2012). *Governing the world: the history of an idea, 1815 to the present*. Penguin. 3-12.

<sup>596</sup> Mazower, M. (2012). *Governing the world: the history of an idea, 1815 to the present*. Penguin. xiv-xv. More detailed development of those ideas, see chapter 2- chapter 4 of this book.

<sup>597</sup> Mazower, M. (2012). *Governing the world: the history of an idea, 1815 to the present*. Penguin. 410-415.

process and pave the way for the patterns of democratic international governance. With the full recognition of the significance out of those discussions, this thesis chooses to adopt the approach to make a review on actual operation of institutions in the EU decision-making especially the government-legislative relations, testing whether the government power has received due control in the decision-making process and problems aroused if there is the overwhelming of one party to the other.

## **5.1 Accountability crisis resulting from the legislative and government bodies**

One of the key issues in the institutional architecture on the democratic control is the Targeting. That is to say, the democratic control will be effective in controlling the government only if its mechanism is capable of approaching the genuine decision-maker and thus holds the latter accountable, namely, the genuine decision-maker falls within the “strike range” of the control mechanism. With the approach of the distinction between the government political and the administrative, the European Council, which has actually played the role of political direction determinate and the productive engine of major policies, has become the genuine government political in the European Union, relegating the European Commission which is supposed to be the guard of the general European interests and the sole policy initiator to be more like the secretariat to the European Council and the Commission has substantially transferred or at least shared the power to initiate with the European Council. There are reasons for the emergence of that pattern in that it empowers the Commission to guarantee its initiatives will be mostly accepted by the Council and the Parliament with the endorsement of the European Council and also provide the Commission with a channel to be involved into areas where it is supposed to be very marginalized according to the Treaties. However, this pattern also leads to consequences. First, since the existing mechanisms for democratic control in the EU are designed to impose control and supervision on the Commission, when the decision-making body has changed from the Commission to the European Council, those mechanisms fail to target the genuine government to impose supervision and no other mechanisms are currently available to perform that function and therefore now there are no efficient mechanisms for the control over the European Council except

that national elections of certain member states could change only one of the 28(or 27) members and usually the members of the European Council are removed not because of their EU policies but their performances on domestic issues. What is possible to be even worse is that, the European Commission which is responsible for the mission to balance the interests between the big and the small member states especially for special attend to the smaller ones has deviated from its institutional role even though it tactically finds a path to advance its political agenda through the substantial sharing of its power to initiative with the European Council. Its failure to perform its role and function is very likely to raise challenges and instability to the EU architecture by exposing the interests of small member states to be neglected or even encroached by the big member states.

Loss of power control is brought about not only by the defect in the government branches, but also that in the legislative branch. The legislative branch constitutes crucial part of the democratic deficit problem. The legislative branch is addressed to provide the European Union with democratic legitimacy through a dual democratic basis (currently maybe triple democratic basis if national parliaments are taken into account). However, the authority structure of the legislative branch has been so fragmented as to be incapable of accomplishing the fundamental function as a representative institution and thus aggravates the problem on member-voters linkage, performing as a re-split of the legislative power. For the European Parliament, although the increases in its entrusted powers and its influences, its representation and democratic basis are still in question and its roles in the decision-making process are also fundamentally marginalized. Besides, although the Council is composed democratically elected ministers, the democratic legitimacy enjoyed by the single member of the Council does not help the counterpart of the Council as a whole a lot considering two institutional facts. First, which is also shared by the European Council, there is no channel for the European voters to change the whole Council in one election but the member of the Council could be removed only by national elections where domestic issues take the priority. Second, the decision-making process in the Council is generally in strict secret and the public is very limited in receiving adequate and efficient knowledge about that and thus hardly could they get access to and supervise through various channels. For the part of national parliaments, the actual function of the newly-introduced mechanism is still in doubt since that

mechanism is not activated so far, and the lack of institutional practice makes it inconvenient to carry out assessment of its performance. However, certain likely problems could be preliminarily deduced that the Early Warning Mechanism may lead to more bureaucracy and may constitute breaching of certain fundamental political formulas and even to lead to constitutional dilemma or deadlock. From the functionalistic perspective, the legislative branch structure fails to accomplish the complete function of a representative institutions which includes the democratic input of policies, the deliberation of policies and the feedbacks to the public and the voters made by the representatives, not about the number of the “representative institutions” established for granted to participate the decision-making process. In certain cases, more bodies established to perform the same function represents the severity of authority fragmentation and the failure in fulfilling certain functions, merely raising more problems.

## **5.2 The contribution of the Euro Crisis to the accountability crisis**

The Euro Crisis further aggravates the imbalance of powers between the legislative and government branch. During the Crisis and the counter-crisis programs, the power regarding economic policies and financial policies which used to be reserved to the member states governments have been centralized to the European institutions, with the independent institutions like the ECB being authorized to deploy the budget of creditor member states to rescue the debtor member states while the intergovernmental institutions including the European Council, the Council, the ECOFIN as well as the Euro group become the substantial decision-making body for economic policies imposed on the debtor member states. However, this unprecedented *de facto* transfer of power and sovereignty transformed those intergovernmental institutions to be the European economic government which has already started the project to develop the common/harmonized European economic and financial policies and is gradually performing the wealth redistribution among the EU member states. However, the institutional construction of democratic control and accountability over those powers newly transferred fails to keep peace with those powers transferred from the member states to the EU institutions. During the Euro crisis and the counter-crisis

programs, the European Parliament and the national parliaments have been largely marginalized from the decision-making process and lay out to be only granting endorsement to those decisions made in closed door meetings, sometimes even totally irrelevant when the endorsement and approval in formal is not necessary. Besides the uncontrolled power exercised by the EU institutions and national leaders in the European Council and other intergovernmental institutions (the Council, the Euro Group, the ECOFIN), the EU also faces the challenge of an unbalanced structure of different interests, especially the interests of big and small member states. The mechanisms which aim at the improvement of the efficiency of EU decision-making and deeper integration, also give rise to the problem of the ignorance of small member states' interests. Particularly, the European Commission, which is assigned with the task to guard the general interests of the Union and to achieve the balance between different interests, has deviated their institutional roles not only by their sharing the power to initiate with the European Council but also by the roles they play during the crisis and the bail-out programs. The cost the Commission pays for the sharing the power to initiate with the European Council is that it turns out to be incompetent in performing the function to balance different interests since it has to accept the conclusion of those intergovernmental institutions whose decision-making process is usually shaped not by the superficial equality between member states but by the Realpolitik between different blocs of member states, leading to the decline and dissolution of the institutional legitimacy/value for the Commission as an independent institution as well as the de-solidarity and resentment among the member states and their peoples. Besides, during the crisis and the bail-outs, the Commission chooses to step into the disputes among member states, not working as a mediator or coordinator, but on behalf of certain bloc of member states, constituting a flagrant violation of its institutional roles and openly abandon its responsibility as the ultimate (or possibly the only) institutions in the EU to achieve the balance between member states. That is a more profound impact brought by the Euro Crisis compared with current economic, financial or even democratic problems, detrimental to the cause of the European integration. The consequence actually has been emerging. More and more revolts against the EU have been in sight and many of them have directed their brunt of criticisms not only at the bail-out programs or the closer integration (like what happened in 2005 in France and the Netherlands), but the whole European integration

cause. There is nothing paralleling with that in the more than half centuries' history of European integration.

## 5.3 To reiterate the spirit of the Luxembourg Compromise

Unprecedented situation, fantastic enough, usually finds its solution standing within the conventional wisdoms. In many cases it is the compromise, rather than revolutionary action, that bring the European integration project further. For the European Union, it is the Luxembourg Compromise that helped the integration to sustain through the first major crisis the Union is confronted with, the Empty Chair Crisis. Even forty years after, disputes regarding the Compromise continue. Part of those arguments relates to the nature of the Compromise, namely, whether this compromise is a constitutional convention or merely an expression of political will;<sup>598</sup> or whether this compromise has actually established a veto power rule for the member states whose fundamental interests will be influenced by the Union decision-making in process.<sup>599</sup> In spite of those arguments, certain agreement is however shared widely, as Paul Craig puts it, “*the Compromise fostered a climate in which majority voting prejudicial to the interests of a particular state was avoided...the Council will however search for consensus even where the formal voting rules provide for a qualified majority*”.<sup>600</sup> In other words, the Compromise has cultivated a consensual culture in the Council that member states would endeavor to reach consensus and characterized by unanimous decision-making instead of a game with explicit winners and losers. Since then, it is mentioned that about 80% of all decisions are made in consensus, indicating most measures advancing the integration has been adopted not through battles but compromises,<sup>601</sup> contrary to what the critics of this Compromise

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<sup>598</sup> Baquero Cruz, J. (2006). The Luxembourg Compromise from a Legal Perspective. Constitutional Convention, Legal History or Political Myth? *Visions, votes, and vetoes: The empty chair crisis and the Luxembourg Compromise forty years on*. 251-277.

<sup>599</sup> See: Novak, S. (2010). Decision rules, social norms and the expression of disagreement: the case of qualified-majority voting in the Council of the European Union. *Social science information*, 49(1), 83-97; Teasdale, A. L. (1993). The life and death of the Luxembourg Compromise. *JCMS: Journal of Common Market Studies*, 31(4), 567-579.

<sup>600</sup> Craig, P., & De Búrca, G. (2015). *EU law: text, cases, and materials*. Oxford University Press. 135.

<sup>601</sup> Craig, P., & De Búrca, G. (2015). *EU law: text, cases, and materials*. Oxford University Press. 135.



have proclaimed regarding its impeding effect towards the efficiency of EU decision-making. In confronted with the unbalanced structure within the EU especially the new development during the crisis, it is worth noticing that the EU is, after all, established on the basis of voluntary transfer of sovereignty to the Union while holding the right to exit as the last resort as well as “the masters of the Treaties” and that the decision-making in the way of unanimity never precludes the force and influence of Realpolitik which contributes to the advantages of the big players. To reiterate the spirit of the Luxembourg Compromise does not necessarily lead to the reintroduction of the veto method, but to seek feasible mechanism to remedy the losses of their sovereignty and dominance over issues or policies essential to their country during the Euro crisis and to give special attend to the interests of small member states since theirs are more vulnerable to the international Realpolitik and usually have more at stake when their means to self-protection is comparatively more limited. The request made by the Visegrad Group on the veto power towards the future Brexit deal<sup>602</sup> actually suggests that these four member states, even acts as a team, has no formal power to prevent EU decision-makings against their essential interests under current institutional systems. More important, those mechanism to be established for the service of special attend to small member states’ interests will play the role as a buffer before the small member states head directly towards the ultimate way of self-protection: the withdraw (from the Union) procedure. However, the specific institutional design for that mechanism is more of a political issue than an academic one; therefore this thesis will step back from proposing any drafts of that.

Sixty years after the end of Second World War, the first Treaty for the European Union including the eminent term “Constitution” was rejected by two of its six founding members; forty years after its first enlargement to extend its range from the frontier of the former Charlemagne Empire to the Caledonia area which even falls outside the vast territory of the Roman Empire, the European Union was awarded the Nobel Peace Prize for its contribution in maintaining and promoting peace and prosperity in the continent where the tragic two world wars have ground and fired nearly everything into ashes. The integration process is never at ease and challenges

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<sup>602</sup> BBC: *Visegrad Group of EU states 'could veto Brexit deal'*, <http://www.bbc.com/news/world-europe-37396805>, last accessed: October 24, 2016.

as well as crisis comes from time to time, expectedly or accidentally. This time, challenges may be different: the mingling of financial and migration crisis, the economic and the political one. Also, the European Union receives unprecedented challenging movement by its former, maybe still current beneficiaries, not merely the refusal to further integration or closer cooperation but the question and doubt about the whole cause of European integration. Certain member state votes to leave, certain are in embryo to leave and some member states even compare the Union to the collapsed Totalitarian Empire. *Things fall apart; the centre cannot hold; Mere anarchy is loosed upon the world*—does this poetic prophecy of Yeats signal the situation and the future that the European Union happens to face? Not necessarily. What shapes the human civilization and the realization of grand design is usually not the clichéd restatement of ideas, creeds or dogmas but the practical wisdom, mostly originating from the prudentially responsive dealing with real-world problems confronted with. If the European Union is to sustain and sail further, it is not because of the greatness of the idea itself when we think of the Tower of the Babel; if the European Union is to decline and fall onto the ground like a Comet across the night sky in the human history, it is nor because of the Utopian fantasy part of its idea itself when we are reminded of things we are enjoying and taking for granted nowadays, namely, freedom, rule of law and the equality between citizens which appear to be so unreasonable and unimaginable merely several centuries ago. What does matter for the future of the European integration is whether the European peoples and especially their leaders would be willing and courageous to face up to the problems nowadays as well as those coming to knock at the door of this continent in the future and deal with them sincerely and wisely. After all, as the historian Tony Judt has pointed out with deep concern but also optimism about the future of this continent, “*it was the Europeans who were now uniquely placed to offer the world some modest advice on how to avoid repeating their own mistakes*”.<sup>603</sup> And the European Union, as the most remarkable response to the history of world wars, constitutes an essential part of that.

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<sup>603</sup> Judt, T. (2010). *Postwar: A history of Europe since 1945*. Vintage (London). 800.

## Reference:

Abels, G. (2009). Citizens' deliberations and the EU democratic deficit: Is there a model for participatory democracy? *Tübinger Arbeitspapiere zur Integrationsforschung (TAIF)* No, 1.

Aberbach, J. D., Putnam, R. D., & Rockman, B. A. (1981). *Bureaucrats and politicians in western democracies*. Harvard University Press.

Alesina, A., & Summers, L. H. (1993). Central bank independence and macroeconomic performance: some comparative evidence. *Journal of Money, Credit and Banking*, 25(2), 151-162.

Allerkamp D. K. (2010). Who sets the agenda? How the European Council and the team presidencies are undermining the commission's prerogative. In Standing Group on European Union Politics of the European Consortium for Political Research in Porto, Portugal (pp. 24-26). Porto, Portugal: European Consortia for Political Research Standing Group on the European Union.

Alonso, S. (2014). 'You can vote but you cannot choose': Democracy and the Sovereign Debt Crisis in the Eurozone. See: <http://e-archivo.uc3m.es/bitstream/handle/10016/18315/IC3JM-2014-282.pdf?sequence=3>, access time: July 8, 2016.

Anderson, J. (2002). Questions of democracy, territoriality and globalization. *Transnational democracy: Political spaces and border crossings*, 6-38.

Anderson, M. C. (2013). *Government in France: an introduction to the executive power*. Elsevier.

Andersen, S. S., & Eliassen, K. A. (Eds.). (1996). *The European Union: how democratic is it?* London: Sage.

Andrews, D. (2003). The Committee of Central Bank Governors as a source of rules. *Journal of European Public Policy*, 10(6), 956-973.

Apel, E. (2003). *Central banking systems compared: The ECB, the pre-euro Bundesbank and the Federal Reserve System* (Vol. 20). Routledge.

Armingeon, K., Guthmann, K., & Weisstanner, D. (2016). How the Euro divides the union: the effect of economic adjustment on support for democracy in Europe. *Socio-Economic Review*, 14(1), 1-26.

Auel, K. (2005). The Europeanisation of Parliamentary Democracy: Introduction. *The Journal of legislative studies*, 11(3), 303-318.

Auel, K. (2007). Democratic accountability and national parliaments: Redefining the impact of parliamentary scrutiny in EU affairs. *European Law Journal*, 13(4), 487-504.

Auel, K., & Höing, O. (2014). Parliaments in the Euro crisis: Can the losers of integration still fight back?. *JCMS: Journal of Common Market Studies*, 52(6), 1184-1193.

Auel, K., & Höing, O. (2014). Scrutiny in Challenging Times—National Parliaments in the Eurozone Crisis. *SIEPS European Policy Analysis*, 2014(1). 1-16.

Aus, J. P. (2008). The mechanisms of consensus: coming to agreement on Community asylum policy. In *Unveiling the Council of the European Union* (pp. 99-118). Palgrave Macmillan UK.

Baquero Cruz, J. (2006). The Luxembourg Compromise from a Legal Perspective. Constitutional Convention, Legal History or Political Myth? *Visions, votes, and vetoes: The empty chair crisis and the Luxembourg Compromise forty years on*. 251-277.

Barrett, G. (2008). *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other member states legislatures*. Clarus Press.

Bauer, M. W., & Ege, J. (2012). Politicization within the European Commission's bureaucracy. *International Review of Administrative Sciences*, 78(3), 403-424.

BBC: Visegrad Group of EU states 'could veto Brexit deal',  
<http://www.bbc.com/news/world-europe-37396805>.

Becker, F., & Merschmann, A. (2014, April). National Constitutional Reservations with Respect to Budget Policy. In *The EU Between 'an Ever Closer Union' and*

*Inalienable Policy Domains of Member States* (pp. 187-200). Nomos Verlagsgesellschaft mbH & Co. KG. 187-200.

Bekkers, V. J. (Ed.). (2007). *Governance and the democratic deficit: assessing the democratic legitimacy of governance practices*. Ashgate Publishing, Ltd.

Bellamy, R., & Kröger, S. (2014). Domesticating the democratic deficit? The role of national parliaments and parties in the EU's system of governance. *Parliamentary Affairs*, 67(2), 437-457.

Benz, A. (2004). Path-dependent institutions and strategic veto players: National parliaments in the European Union. *West European Politics*, 27(5), 875-900.

Benz, A. (2005). Conclusion: Linking research on Europeanisation and national parliaments. *The Journal of Legislative Studies*, 11(3-4), 508-521.

Berman, G. A. (2005). Executive power in the new European constitution. *Int'l J. Const. L.*, 3, 440-447.

Berman, S., & McNamara, K. R. (1999). Bank on Democracy-Why Central Banks Need Public Oversight. *Foreign Affairs*, 78(2).2-8.

Bernhard, W. (1998). A political explanation of variations in central bank independence. *American Political Science Review*, 92(02), 311-327.

Bernhard Wessels. "Institutional change and the future political order" in Katz, R. S., & Wessels, B. (1999). *The European Parliament, the national parliaments, and European integration*. Oxford University Press.

Besselink, L. F. (2006). National Parliaments in the EU's composite Constitution; a plea for a shift in paradigm. In *National and regional parliaments in the European constitutional order* (pp. 117-132). Europa Law Publishing.

Blinder, A. S. (1998). *Central banking in theory and practice*. Mit press.

Bindseil, U., & Hantke, C. (1997). The power distribution in decision making among EU member states. *European Journal of Political Economy*, 13(1), 171-185.

Bini Smaghi, L. (2014). Austerity, A Threat to Democracy? *The International Spectator*, 49(1), 7-17.

- Bohman, J. (2006). Beyond the democratic peace: an instrumental justification of transnational democracy. *Journal of social philosophy*, 37(1), 127-138.
- Borras, S. (2009). The politics of the Lisbon Strategy: the changing role of the Commission. *West European Politics*, 32(1), 97-118.
- Boyce, B. (1993). The democratic deficit of the European Community. *Parliamentary Affairs*, 46(4), 458-478.
- Börzel, T. (2010). European governance: negotiation and competition in the shadow of hierarchy. *JCMS: Journal of Common Market Studies*, 48(2), 191-219.
- Bulmer, S. J. (1996). The European Council and the Council of the European Union: shapers of a European confederation. *Publius: the journal of federalism*, 26(4), 17-42.
- Campbell, C., & Peters, B. (1988). The politics/administration dichotomy: death or merely change? *Governance*, 1(1), 79-99.
- Campbell, H. M. (Ed.). (2011). *A History of Western Civilization: Advances in Democracy: From the French Revolution to the Present-Day European Union*. Britannica Educational Publishing.
- Caporaso, J. (2005). The Emergence of the EU Supranational Polity and its implications for democracy. *Democracy and Federalism in the European Union and the United States—Exploring Post-National Governance*, 57-75.
- Carey, J. M., & Shugart, M. S. (1995). Incentives to cultivate a personal vote: A rank ordering of electoral formulas. *Electoral studies*, 14(4), 417-439.
- Carroll, A. (2003). *Constitutional and administrative law*. Pearson Education.
- Chalmers, D., Davies, G., & Monti, G. (2010). *European Union law: cases and materials*. Cambridge University Press.
- Chamon, M. (2015). The Institutional Balance, and Ill-Fated Principle of EU Law? *European Public Law*, 21, 371-391.
- Chiti, E., & Teixeira, P. G. (2013). The constitutional implications of the European responses to the financial and public debt crisis. *Common Market Law Review*, 50(3), 683-708.

Christiansen, T., Högenauer, A. L., & Neuhold, C. (2014). National parliaments in the post-Lisbon European Union: bureaucratization rather than democratization? *Comparative European Politics*, 12(2), 121-140.

Cini, M. & Borragán, N. P. S. (2007). *European Union Politics* (2<sup>nd</sup> Edition), Oxford University Press.

Collignon, S. (2004). Is Europe going far enough? Reflections on the EU's economic governance. *Journal of European Public Policy*, 11(5), 909-925.

Conrad, M. (2011). The European Citizens' Initiative: Transnational Democracy in the EU at last? *Stjórnmal og stjórnsýsla*, 2011, 7(1): 5-22.

Cooper, I. (2006). The watchdogs of subsidiarity: National parliaments and the logic of arguing in the EU. *JCMS: Journal of Common Market Studies*, 44(2), 281-304.

Cooper, I. (2010). A Virtual Third Chamber for the European Union. *National Parliaments Under the Treaty of Lisbon. Paper prepared for the ECPR Joint Sessions, Munster, Germany*, 22-27.

Costa, O., Jabko, N., Lequesne, C., & Magnette, P. (2003). Diffuse control mechanisms in the European Union: towards a new democracy?. *Journal of European Public Policy*, 10(5), 666-676.

Cotta, M. (2014). Changing Equilibria between democratic and technocratic principles in the European Elite System after the Crisis, *conference paper for "Technocracy and democracy in Times of Financial Crisis"* (Technische Universitaet Darmstadt), 6-7 March 2014. See: [http://www.academia.edu/6636700/Changing\\_Equilibria\\_between\\_Democratic\\_and\\_Technocratic\\_Principles\\_in\\_the\\_European\\_Elite\\_System\\_after\\_the\\_Crisis](http://www.academia.edu/6636700/Changing_Equilibria_between_Democratic_and_Technocratic_Principles_in_the_European_Elite_System_after_the_Crisis). Access time: July 8, 2016.

Craig, P. (2005). European governance: executive and administrative powers under the new constitutional settlement. *Int'l J. Const. L.*, 3, 407-439.

Craig, P. (2010). *The Lisbon Treaty: law, politics, and treaty reform*. OUP Oxford.

Craig, P., & De Búrca, G. (2011). *EU law: text, cases, and materials*. Oxford University Press.

Craig, P., & De Búrca, G. (Eds.). (2011). *The evolution of EU law*. OUP Oxford

Paul, C. (2012). *EU Administrative Law*. Oxford University Press.

Craig, P. (2015). The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility. *Indiana Journal of Global Legal Studies*, 22(2), 243-267.

Crombez, C. (2000). Codecision: towards a bicameral European Union. *European Union Politics*, 1(3), 363-381.

Crum, B. (2003). Legislative-Executive Relations in the EU. *JCMS: Journal of Common Market Studies*, 41(3), 375-395.

Crum, B. (2005). Tailoring representative democracy to the European Union: does the European constitution reduce the democratic deficit? *European Law Journal*, 11(4), 452-467.

Curtin, D., & Egeberg, M. (2008). Tradition and innovation: Europe's accumulated executive order. *West European Politics*, 31(4), 639-661.

Curtin, D. (2009). *Executive power of the European Union: law, practices, and the living constitution* (Vol. 12). OUP Oxford.

Curtin, D., Hofmann, H., & Mendes, J. (2013). Constitutionalising EU Executive Rule - Making Procedures: A Research Agenda. *European Law Journal*, 19(1), 1-21.

Curtin, D. (2014). Challenging executive dominance in European democracy. *The Modern Law Review*, 77(1), 1-32.

Cygan, A. (2013). *Accountability, Parliamentarism and Transparency in the EU*. Edward Elgar Publishing.

Dahl, R. A. (2005). Is international democracy possible? A critical view. Sergio Fabbrini (Hg.): *Democracy and federalism in the European Union and the United States. Exploring post-national governance*. London/New York: Routledge, 194-204.



- Dawson, M., & Witte, F. (2013). Constitutional Balance in the EU after the Euro - Crisis. *The Modern Law Review*, 76(5), 817-844.
- Dawson, M. (2015). The Legal and Political Accountability Structure of 'Post - Crisis' EU Economic Governance. *JCMS: Journal of Common Market Studies*, 53(5), 976-993.
- De Haan, J. (1997). The European Central Bank: independence, accountability and strategy: a review. *Public Choice*, 93(3-4), 395-426.
- Dehousse, R. (2012). Is the 'Community Method' still relevant. *Challenges of multi-tier governance in the European Union: Effectiveness, efficiency and legitimacy. Directorate General for Internal Policies, Compendium Notes*, 85-94.
- Dell'Aquila, D.S, Stephan Kaufmann, & Jannis Milios. (2014). Blackbox ECB: The Power and Impotence of the European Central Bank. See: [https://www.rosalux.de/fileadmin/rls\\_uploads/pdfs/Materialien/Materialien2\\_BlackboxEZB\\_engl\\_web.pdf](https://www.rosalux.de/fileadmin/rls_uploads/pdfs/Materialien/Materialien2_BlackboxEZB_engl_web.pdf).
- De Schoutheete, P., & Micossi, S. (2013). On Political Union in Europe: The changing landscape of decision-making and political accountability. *CEPS Essays*.
- De Vreese, C. H., Banducci, S. A., Semetko, H. A., & Boomgaarden, H. G. (2006). The news coverage of the 2004 European Parliamentary election campaign in 25 countries. *European Union Politics*, 7(4), 477-504.
- De Waele, H., & Broeksteeg, H. (2012). Semi-Permanent European Council Presidency: Some Reflections on the Law and Early Practice, The. *Common Market L. Rev.*, 49, 1039-1074.
- De Witte, B. (2012). European Stability Mechanism and Treaty on Stability, Coordination and Governance: Role of the EU Institutions and Consistency with the EU Legal Order. *Challenges of multi-tier governance in the European Union*, 78-84.
- De Witte, B. (2015). Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?. *European Constitutional Law Review*, 11(03), 434-457.

Dickson, J., & Eleftheriadis, P. (2012). *Philosophical Foundations of European Union Law*. OUP Oxford.

Dimitrakopoulos, D. G. (2001). Incrementalism and path dependence: European integration and institutional change in national parliaments. *JCMS: Journal of Common Market Studies*, 39(3), 405-422.

Dinan, D. (2000). *Encyclopedia of the European Union, Updated Edition*. Lynne Rienner Publishers, “Differentiated integration” see [http://search.credoreference.com/content/entry/lrpenceu/differentiated\\_integration/0](http://search.credoreference.com/content/entry/lrpenceu/differentiated_integration/0) .

Djilas, M. (1962). *Conversations with Stalin* (Vol. 63). Houghton Mifflin Harcourt.

Duignan, B. (2009). *The executive branch of the federal government: purpose, process, and people*. The Rosen Publishing Group.

Duina, F., & Oliver, M. J. (2005). National parliaments in the European Union: are there any benefits to integration? *European Law Journal*, 11(2), 173-195.

Dyson, K. H., & Featherstone, K. (1999). *The road to Maastricht: negotiating economic and monetary union*. Oxford University Press.

Earnshaw, D., & Judge, D. (1995). Early days: The European Parliament, co - decision and the European Union legislative process post - Maastricht. *Journal of European Public Policy*, 2(4), 624-649.

Egeberg, M. (2006). Executive politics as usual: role behaviour and conflict dimensions in the College of European Commissioners. *Journal of European Public Policy*, 13(1), 1-15.

Egeberg, M. (Ed.). (2006). *Multilevel union administration: the transformation of executive politics in Europe*. Springer.

Egeberg, M. (2008). European government (s): Executive politics in transition? *West European Politics*, 31(1-2), 235-257.

Egeberg, M., Gornitzka, Å., & Trondal, J. (2014). A not so technocratic executive? Everyday interaction between the European Parliament and the Commission. *West European Politics*, 37(1), 1-18.

Elgie, R. (1998). Democratic accountability and central bank independence: Historical and contemporary, national and European perspectives. *West European Politics*, 21(3), 53-76.

Elgie, R., & Thompson, H. (2012). *The politics of central banks*. Routledge.

European Parliament News: “Parliament elects Jean-Claude Juncker as Commission President”, see:

<http://www.europarl.europa.eu/news/en/news-room/content/20140714IPR52341/html/Parliament-elects-Jean-Claude-Juncker-as-Commission-President>, Retrieved 2015-7-14

Fabbrini, S. (2013). Intergovernmentalism and its limits assessing the European Union’s answer to the Euro crisis. *Comparative Political Studies*, 1003-1029.

Fabbrini, S. (2014). After the euro crisis: a new paradigm on the integration of Europe. *Available at SSRN 2441201*.

Fabbrini, S. (2014, March). The Euro crisis and the constitutional disorder of the European Union. In *21st International Conference of the Council for European Studies, Panel on “The Political and Economic Dynamics of the Eurozone Crisis”*, Washington DC (Vol. 15).

Fabbrini, F. (2015). Representation in the European Parliament: of false problems and real challenges. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 75, 823-846.

Fabbrini, F. (2016). A Principle in Need of Renewal? The Euro-Crisis and the Principle of Institutional Balance. *Cahiers De Droit European*. 8.

Fasone, C. (2014). European economic governance and parliamentary representation. What place for the European Parliament? *European Law Journal*, 20(2), 164-185.

Featherstone, K. (1994). Jean Monnet and the ‘democratic deficit’ in the European Union. *JCMS: Journal of Common Market Studies*, 32(2), 149-170.

Follesdal, A., & Hix, S. (2006). Why there is a democratic deficit in the EU: A response to Majone and Moravcsik. *JCMS: Journal of Common Market Studies*, 44(3), 533-562.

Fontan, C. (2015), 'the ECB: A Democratic Problem for Europe?' See: [http://www.booksandideas.net/IMG/pdf/20150430\\_bce\\_en.pdf](http://www.booksandideas.net/IMG/pdf/20150430_bce_en.pdf), access time: July 8, 2016.

Fraga, A. (2005). After the Convention: The future role of National Parliaments in the European Union (and the day after... nothing will happen). *The Journal of Legislative Studies*, 11(3-4), 490-507.

Franchino, F. (2000). Control of the Commission's Executive Functions Uncertainty, Conflict and Decision Rules. *European Union Politics*, 1(1), 63-92.

Franklin, M. N. (2001). How structural factors cause turnout variations at European Parliament elections. *European Union Politics*, 2(3), 309-328.

Franklin, M. N., & Hobolt, S. B. (2011). The legacy of lethargy: How elections to the European Parliament depress turnout. *Electoral Studies*, 30(1), 67-76.

Fromage, D. (2015). National parliaments and governmental accountability in the crisis: theory and practice. *The Never-Ending Reform of the EU: Another Chain in the Semi Permanent Treaty Revision Process?* 149-171.

Garcia - Arias, J., Fernandez - Huerga, E., & Salvador, A. (2013). European periphery crises, international financial markets, and democracy. *American Journal of Economics and Sociology*, 72(4), 826-850.

Geiger, R., Khan, D. E., & Kotzur, M. (Eds.). (2015). *European Union Treaties; a Commentary: Treaty on European Union: Treaty on the Functioning of the European Union*. Hart.

Giorgi L and Crowley J. (2006). The political sociology of the European public sphere ||, in: Giorgi Liana, Von Homeyer Ingmar and Parsons Wayne (eds.), *Democracy in the European Union: Towards the emergence of a public sphere* (London/New York: Routledge). 1-23.

Goebel, R. J. (2010). The European Council after the Treaty of Lisbon. *Fordham Int'l LJ*, 34, 1251-1268.

Grimm, D. (2015). The democratic costs of constitutionalisation: The European case. *European Law Journal*, 21(4), 460-473.

Grzeszczak, R: *Progress in European integration process and its consequences for parliamentary democracy*, in Bodnar, A., Kowalski, M., Raible, K., & Schorkopf, F. (Eds.). (2003). *The emerging constitutional law of the European Union: German and Polish perspectives* (Vol. 163). Springer Science & Business Media. 118-119.

Hagemann, S. (2008). Voting, Statements and Coalition-Building in the Council from 1999 to 2006. In *Unveiling the Council of the European Union* (pp. 36-63). Palgrave Macmillan UK.

Häge, F. M. (2008). Who decides in the Council of the European Union? *JCMS: Journal of Common Market Studies*, 46(3), 533-558.

Hasse, R., Weidenfeld, W., & Biskup, R. (1990). *The European Central Bank: perspectives for a further development of the European Monetary System* (Vol. 2). Bertelsmann Foundation.

Hayes - Renshaw, F., & Wallace, H. (1995). Executive power in the European Union: the functions and limits of the Council of Ministers. *Journal of European Public Policy*, 2(4), 559-582.

Hefftlar, C., Kreilinger, V., Rozenberg, O., & Wessels, W. (2013). National parliaments: Their emerging control over the European council. *Notre Europe Policy Paper*, 89.

Heisenberg, D. (2005). The institution of 'consensus' in the European Union: Formal versus informal decision - making in the Council. *European Journal of Political Research*, 44(1), 65-90.

Héritier, A. (2003). Composite democracy in Europe: the role of transparency and access to information. *Journal of European public policy*, 10(5), 814-833.

Hix, S. (1997). Executive Selection in the European Union: Does the Commission President Investiture Procedure Reduce the Democratic Deficit? *European Integration online Papers (EIoP)*, 1(21).

Hix, S. (2002). Constitutional agenda-setting through discretion in rule interpretation: why the European Parliament won at Amsterdam. *British Journal of Political Science*, 32(02), 259-280.

Hix, S. (2002). Parliamentary behavior with two principals: Preferences, parties, and voting in the European Parliament. *American Journal of Political Science*, 688-698.

Hix, S., Raunio, T., & Scully, R. (2003). Fifty years on: Research on the European Parliament. *JCMS: Journal of Common Market Studies*, 41(2), 191-202.

Hix, S., & Marsh, M. (2007). Punishment or protest? Understanding European parliament elections. *Journal of Politics*, 69(2), 495-510.

Hix, S., Noury, A. G., & Roland, G. (2007). *Democratic politics in the European Parliament*. Cambridge University Press.

Hix, S., & Høyland, B. (2011). *The political system of the European Union*. Palgrave Macmillan.

Hobolt, S. B., & Wittrock, J. (2011). The second-order election model revisited: An experimental test of vote choices in European Parliament elections. *Electoral Studies*, 30(1), 29-40.

Hodson, D., & Maher, I. (2001). The open method as a new mode of governance: the case of soft economic policy co - ordination. *JCMS: Journal of Common Market Studies*, 39(4), 719-746.

Holzhacker, R. (2002). National parliamentary scrutiny over EU issues: Comparing the goals and methods of governing and opposition parties. *European Union Politics*, 3(4), 459-479.

Holzhacker, R. (2005). The power of opposition parliamentary party groups in European scrutiny. *The Journal of Legislative Studies*, 11(3-4), 428-445.

Howarth, D. and Loedel, P. (2005). *The European Central Bank: The New European Leviathan?* Revised, second edition (Basingstoke: Palgrave).

Huerta de Soto, J. (2014). In defense of the euro: an Austrian perspective (with a critique of the errors of the ECB and the interventionism of Brussels). *Journal des? conomistes et des? tudes Humaines*, 19(1), 1-28.

Issing, O. (1999). The Eurosystem: Transparent and Accountable or 'Willem in Euroland'. *JCMS: Journal of Common Market Studies*, 37(3), 503-519.

Issing, O. (2001). *Monetary policy in the euro area: strategy and decision-making at the European Central Bank*. Cambridge University Press

Jacobs, F., Corbett, R., & Shackleton, M. (1992). *The European Parliament. Longman current affairs*.

Jabko, N. (2003). Democracy in the age of the euro. *Journal of European Public Policy*, 10(5), 710-739.

Jacqué, J. P. (2004). Principle of Institutional Balance, *The. Common Market L. Rev.*, 41, 383-391.

Joerges, C. (2014). Brother, can you paradigm? *International Journal of Constitutional Law*, 12(3), 769-785.

Johansson, K. M., & Tallberg, J. (2010). Explaining chief executive empowerment: EU summitry and domestic institutional change. *West European Politics*, 33(2), 208-236.

Jones, E., Kelemen, R. D., & Meunier, S. (2016). Failing forward? The Euro crisis and the incomplete nature of European integration. *Comparative Political Studies*, 49(7), 1010-1034.

Judge, D., & Earnshaw, D. (2002). The European Parliament and the Commission crisis: A new assertiveness? *Governance*, 15(3), 345-374.

Judt, T. (2005). *Postwar: A history of Europe since 1945*. New York: The Penguin Press.

- Juncker, J. C., Tusk, D., Dijsselbloem, J., Draghi, M., & Schulz, M. (2015). Completing Europe's economic and monetary union. *Brussels: European Commission*. 18.
- Karlas, J. (2012). National parliamentary control of EU affairs: Institutional design after enlargement. *West European Politics*, 35(5), 1095-1113.
- Karlsson, J. (2008). Democrats without Borders. *A Critique of Transnational Democracy*. Department of Political Science; Statsvetenskapliga institutionen.
- Kassim, H., Peterson, J., Bauer, M. W., Connolly, S., Dehousse, R., Hooghe, L., & Thompson, A. (2013). *The European Commission of the twenty-first century*. OUP Oxford.
- Katz, R. S. (2001). Models of Democracy Elite Attitudes and the Democratic Deficit in the European Union. *European Union Politics*, 2(1), 53-79.
- Katz, R. S., & Wessels, B. (1999). *The European Parliament, the national parliaments, and European integration*. Oxford University Press.
- Kiiver, P. (2006). *The national parliaments in the European Union: a critical view on EU constitution-building*. Kluwer law international.
- Kiiver, P. (2010). The Lisbon Judgment of the German Constitutional Court: A Court - Ordered Strengthening of the National Legislature in the EU. *European Law Journal*, 16(5), 578-588.
- Kleine, M. (2014). Informal governance in the European Union. *Journal of European Public Policy*, 21(2), 303-314.
- Kochler, H. (2005). European Constitution and the Imperatives of Transnational Democracy, The. *SYBIL*, 9, 87.
- König, T., & Junge, D. (2008). Veto player theory and consensus behaviour. In Daniel Naurin and Helen Wallace (Eds.). *Unveiling the Council of the European Union* (pp. 81-98). Palgrave Macmillan UK.
- Kreppel, A. (2002). *The European Parliament and Supranational Party System: a study in institutional development*. Cambridge University Press.



- Kundnani, H. (2015). *The paradox of German power*. Oxford University Press.
- Lasok, D., & Lasok, K. P. E. (2001). *Law and institutions of the European Union*, 7th edition. Butterworth.
- Laursen, F. (Ed.). (2012). *The EU's Lisbon Treaty: institutional choices and implementation*. Ashgate Publishing, Ltd.
- Le Cacheux, J., & Laurent, E. (2015). The Democratic Paradox of the EU. In *Report on the State of the European Union* (pp. 7-19). Palgrave Macmillan UK.
- Leino, P. (2000). The European Central Bank and Legitimacy Is the ECB a Modification of or an Exception to the Principle of Democracy?. *Jean Monnet Working Papers*.
- Leino, P., & Salminen, J. (2013). Should the Economic and Monetary Union Be Democratic after All; Some Reflections on the Current Crisis. *German LJ*, 14, 844-868.
- Lenaerts, K., & Verhoeven, A. (2002). "Institutional balance as a guarantee for democracy in EU governance" in Joerges & Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, 35-88.
- Letter by President Donald Tusk to the Member of the European Council on his proposal for a new settlement for the United Kingdom within the European Union*, <http://www.consilium.europa.eu/en/press/press-releases/2016/02/02-letter-tusk-proposal-new-settlement-uk/?from=groupmessage&isappinstalled=0>, time for last visit: February 26, 2016.
- Levy, D., Pensky, M., & Torpey, J. C. (2005). *Old Europe, new Europe, core Europe: transatlantic relations after the Iraq war*. Verso.
- Lewis, J. (2000). The methods of community in EU decision-making and administrative rivalry in the Council's infrastructure. *Journal of European public policy*, 7(2), 261-289.
- Locke, J. (1980). *Second Treatise of Government* (Indianapolis and Cambridge, Hackett Publishing Company).

- Maduro, M. P. (2013). A new governance for the European Union and the Euro: democracy and justice. *Yearbook of Polish European Studies*, (16), 111-140.
- Magnette, P. (2003). European governance and civic participation: beyond elitist citizenship? *Political studies*, 51(1), 144-160.
- Maher, I. (2006). Economic governance: Hybridity, accountability and control. *Colum. J. Eur. L.*, 13, 679-703.
- Majone, G. (1993) .The European Community: An “Independent Fourth Branch of Government”? *EUI Working Paper SPS No. 94/17*.
- Majone, G. (1994) .The Rise of the Regulatory State in Europe. *West European Politics*, 17(3), 77–101.
- Majone, G. (1996). The European Commission as Regulator. *Regulating Europe*, 61-79.
- Majone, G. (1998). Europe's ‘Democratic Deficit’: The Question of Standards. *European law journal*, 4(1), 5-28.
- Majone, G. (1999). The regulatory state and its legitimacy problems. *West European Politics*, 22(1), 1-24.
- Majone, G. (2000). The credibility crisis of community regulation. *JCMS: Journal of Common Market Studies*, 38(2), 273-302.
- Majone, G. (2002). Delegation of regulatory powers in a mixed polity. *European Law Journal*, 8(3), 319-339.
- Majone, G. (2012). Rethinking European integration after the debt crisis. *UCL, European Institute, Working Paper*, (3).
- Majone, G. (2014). From regulatory state to a democratic default. *JCMS: Journal of Common Market Studies*, 52(6), 1216-1223.
- Mancini, F. (2000). *Democracy and constitutionalism in the European Union: collected essays*. Hart Publishing.

- Manzella, A. (2012). Is the EP legitimate as a parliamentary body in EU multi-tier governance. *European parliament: Directorate General for Internal Policy Department C, Challenges of multi-tier governance in the European Union: Effectiveness, efficiency and legitimacy*, 138-151.
- March, J. G., & Olsen, J. P. (1998). The institutional dynamics of international political orders. *International organization*, 52(04), 943-969.
- Martin, L. L. (2000). *Democratic Commitments: Legislatures and International Cooperation*. Princeton, NJ: Princeton University Press.
- Mattila, M. (2003). Why bother? Determinants of turnout in the European elections. *Electoral studies*, 22(3), 449-468.
- Mattila, M. (2004). Contested decisions: Empirical analysis of voting in the European Union Council of Ministers. *European Journal of Political Research*, 43(1), 29-50.
- Maurer, A., & Wessels, W. (2001). *National Parliaments on their Ways to Europe. Losers or Latecomers?* (p. 521). Nomos Verlag.
- Mazower, M. (2012). *Governing the world: the history of an idea, 1815 to the present*. Penguin.
- McCormick, J. P. (2007). *Weber, Habermas and Transformations of the European State: Constitutional, Social, and Supranational Democracy*. Cambridge University Press.
- Meiers, F. J. (2015). Introduction: Europe's Powerhouse. In *Germany's Role in the Euro Crisis*. Springer International Publishing.
- Miklin, E. (2014). EU politicisation and national parliaments: Visibility of choices and better aligned ministers? *The Journal of Legislative Studies*, 20(1), 78-92.
- Miller, R. A. (2013). Germany v. Europe: The Principle of Democracy in German Constitutional Law and the Troubled Future of European Integration. *Va. J. Int'l L.*, 54, 579.
- Moberg, A. (2002). The Nice Treaty and voting rules in the Council. *JCMS: Journal of Common Market Studies*, 40(2), 259-282.

Mommsen, Wolfgang J. (1992). *The Political and Social Theory of Max Weber: Collected Essays*, University of Chicago Press.

Monar, J. (2011). The European Union's institutional balance of power after the Treaty of Lisbon. *The European Union after the Treaty of Lisbon: visions of leading policy-makers, academics and journalists*: 60-89.

Montani, G. (2015). *The German Question and the European Question. Monetary Union and European Democracy after the Greek crisis* (No. 0105). University of Pavia, Department of Economics and Management.

Montesquieu. *The spirit of laws* / de Secondat, Baron de Montesquieu. Translated from the French by Nugent. - London : Nourse and Vaillant- 2. ed. corr. and considerably improved.

Moravcsik, A. (1994). *Why the European Community strengthens the state: domestic politics and international cooperation*. Center for European Studies Working Paper Series #52. See: [https://ces.fas.harvard.edu/files/working\\_papers/CES\\_WP52.pdf](https://ces.fas.harvard.edu/files/working_papers/CES_WP52.pdf), time for last access: 26<sup>th</sup>, April 26, 2016.

Moravcsik, A. (2002): In Defense of the Democratic Deficit: Reassessing Legitimacy in the European Union, *Journal of Common Market Studies* 40(4), 603 - 624.

Moravcsik, A. (2003) The EU Ain't Broke. *Prospect*, March, 38–45.

Moravcsik, A. (2004) 'Is there a "Democratic Deficit" in World Politics? A Framework for Analysis'. *Government and Opposition*, 39(2), 336–363.

Moravcsik, A. (2008). "The Myth of Europe's Democratic. Deficit," *Intereconomics: Journal of European Public Policy* (November-December 2008), pp. 331-340.

Moskalenko, O. (2016). The Institutional Balance: a Janus-faced concept of EU constitutional law. *Politeja-Pismo Wydziału Studiów Międzynarodowych i Politycznych Uniwersytetu Jagiellońskiego*, 13(45), 125-143.

Motion for a European Parliament Resolution:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2007-0351+0+DOC+XML+V0//EN>, access time: March 10<sup>th</sup>, 2017.

- Murswiek, D. (2014). ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014. *German LJ*, 15, 147-166.
- Naurin, D., & Lindahl, R. (2008). East-North-South: Coalition-building in the Council before and after enlargement. In *Unveiling the Council of the European Union* (pp. 64-78). Palgrave Macmillan UK.
- Naurin, D., & Wallace, H. (2008). *Unveiling the Council of the European Union: Games Governments Play in Brussels*. Springer
- Neunreither, K. (1994). The democratic deficit of the European Union: towards closer cooperation between the European Parliament and the national parliaments. *Government and Opposition*, 29(03), 299-314.
- Norris, P. (1997). Representation and the democratic deficit. *European Journal of Political Research*, 32(2), 273-282.
- Norris, P. (2001). The twilight of Westminster? Electoral reform and its consequences. *Political Studies*, 49(5), 877-900.
- Noury, A. G., & Roland, G. (2002). More power to the European Parliament? *Economic Policy*, 17(35), 279-319.
- Novak, S. (2010). Decision rules, social norms and the expression of disagreement: the case of qualified-majority voting in the Council of the European Union. *Social science information*, 49(1), 83-97.
- Novak, S. (2013). The silence of ministers: Consensus and blame avoidance in the Council of the European Union. *JCMS: Journal of Common Market Studies*, 51(6), 1091-1107.
- Nugent, N. (1999). *The government and politics of the European Union*, 4<sup>th</sup> edition. Durham, NC: Duke University Press.
- O'Brenan John and Tapio Raunio. Deparliamentarisation and European Integration, in (eds.) J. O'Brennan, T. Raunio, *National Parliaments within the Enlarged European Union*. Abingdon: Routledge, 2007. pp.1-26.

- Paczynski, W. (2003). ECB Decision-making and the Status of the Eurogroup in an Enlarged EMU. *CASE Research Paper*, (262).
- Pernice, I. (2012). What future (s) of democratic governance in Europe: learning from the crisis. *Challenges of multi-tier governance in the European Union*, 4-26.
- Peterson, J. (2006). The college of commissioners. *The institutions of the European Union*, 2, 147-168.
- Peterson, J., & Shackleton, M. (2012). *The institutions of the European Union*. Oxford University Press.
- Pianta, M. (2013). Democracy lost: The financial crisis in Europe and the role of civil society. *Journal of Civil Society*, 9(2), 148-161.
- Piris, J. C. (2010). *The Lisbon Treaty: a legal and political analysis*. Cambridge University Press.
- Pochet, P., & Degryse, C. (2013). Monetary union and the stakes for democracy and social policy. *Transfer: European Review of Labour and Research*, 19(1), 103-116.
- Pogge, T. W. (1997). Creating Supra - National Institutions Democratically: Reflections on the European Union's "Democratic Deficit" . *Journal of Political Philosophy*, 5(2), 163-182.
- Pollack, M. A. (1997). Delegation, agency, and agenda setting in the European Community. *International organization*, 51(01), 99-134.
- Popper, K. R. (1966). *The Open Society and Its Enemies Volume 1 Plato*. Routledge Paperbacks. Chapter 7.
- Popper, K. R. (1966). *The Open Society and Its Enemies Volume 1 Plato*. Routledge Paperbacks. Chapter 19. Marx's Prophecy: the Revolution, Section V.
- Posner, R. A. (2006). *Not a suicide pact: The Constitution in a time of national emergency*. Oxford University Press

- Puetter, U. (2012). Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance. *Journal of European Public Policy*, 19(2), 161-178.
- Putnam, R. D. (1973). The political attitudes of senior civil servants in Western Europe: A preliminary report. *British Journal of Political Science*, 3(03), 257-290.
- Quaglia, L. (2007). *Central banking governance in the European Union: a comparative analysis*. Routledge
- Ratnapala, S. (1993): John Locke's Doctrine of the Separation of Powers: A Re-Evaluation, *American Journal of Jurisprudence*: Vol. 38: Issue.1, 189-220.
- Raunio, T. (1999). Always one step behind? National legislatures and the European Union. *Government and Opposition*, 34(2), 180-202.
- Raunio, T., & Hix, S. (2000). Backbenchers learn to fight back: European integration and parliamentary government. *West European Politics*, 23(4), 142-168.
- Raunio, T. (2009). National parliaments and European integration: What we know and agenda for future research. *The Journal of Legislative Studies*, 15(4), 317-334.
- Raunio, T. (2008). Ensuring democratic control over national governments in European affairs. *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures*, 3-28.
- Raunio, T. (2011). The gatekeepers of European integration? The functions of national parliaments in the EU political system. *Journal of European Integration*, 33(3), 303-321.
- Rehbinder, E., & Stewart, R. (1985). Integration Through Law. Europe and the American Federal Experience. *Environmental Protection Policy*, 57-104.
- Reif, K., & Schmitt, H. (1980). Nine second - order national elections—a conceptual framework for the analysis of European Election results. *European journal of political research*, 8(1), 3-44.
- Ringe, N. (2010). *Who Decides, and how?* Oxford University Press.

Rittberger, B. (2003). *Removing conceptual blinders: Under what conditions does the 'democratic deficit' affect institutional design decisions?* (No. p0023). University of Hamburg, Faculty for Economics and Social Sciences, Department of Social Sciences, Institute of Political Science.

Rittberger, B. (2003). The creation and empowerment of the European Parliament. *JCMS: Journal of Common Market Studies*, 41(2), 203-225.

Ruffert, M. (2011). European Debt Crisis and European Union Law. *Common Market L. Rev.*, 48, 1777-1806.

Saalfeld, T. (2005). Deliberate delegation or abdication? Government backbenchers, ministers and European Union legislation. *The Journal of Legislative Studies*, 11(3-4), 343-371.

Sabathil, G., Joos, K., & Kessler, B. (2008). *The European Commission: An Essential Guide to the Institution, the Procedures and the Policies*. Kogan Page Publishers.

Sbragia, A. M. (2002). Conclusion to Special Issue on the Institutional Balance and the Future of EU Governance: The Treaty of Nice, Institutional Balance, and Uncertainty. *Governance*, 15(3), 393-412.

Sbragia, A. M. (2005). Post-national democracy as post-national democratization. *Democracy and Federalism in the European Union and the United States: Exploring Post-National Governance*, 167-179.

Scharpf, F. W. (1997). Economic integration, democracy and the welfare state. *Journal of European public policy*, 4(1), 18-36.

Scharpf, F. W. (2011). Monetary union, fiscal crisis and the pre-emption of democracy. *Zeitschrift für Staats-und Europawissenschaften (ZSE)/Journal for Comparative Government and European Policy*, 163-198.

Scharpf, F. W. (2015). After the crash: A perspective on multilevel European democracy. *European Law Journal*, 21(3), 384-405.



Schiek, D. (2014). The German Federal Constitutional Court's Ruling on Outright Monetary Transactions (OMT)-Another Step towards National Closure. *German LJ*, 15, 329-342.

Schmitt, H. (2005). The European Parliament elections of June 2004: still second-order? *West European Politics*, 28(3), 650-679.

Schmidt, V. A. (2012). The Eurozone Crisis and the Challenges for Democracy. *The State of the Union (s): The Eurozone Crisis, Comparative Regional Integration and the EU Model*, 103-116.

Schmidt, V. (2012). Democratizing the Eurozone. *Social Europe Journal*, 15.

Schmidt, V. A. (2013). Democracy and legitimacy in the European Union revisited: input, output and 'throughput'. *Political Studies*, 61(1), 2-22.

Scicluna, N. (2013). *Politicization without democratization: The impact of the Eurozone crisis on EU constitutionalism* (No. 341). Collegio Carlo Alberto. 1-19.

Scully, R. M. (1997). The European parliament and the co-decision procedure: A reassessment. *The Journal of legislative studies*, 3(3), 58-73.

Selck, T. J., & Steunenberg, B. (2004). Between power and luck: The European Parliament in the EU legislative process. *European Union Politics*, 5(1), 25-46.

Siebers, Stephen C. (2008). The Treaty of Lisbon and Its Impact on the European Union's Democratic Deficit, *Columbia Journal of European Law* .14(3), 446-455.

Senden, L. A. (2005). Soft law and its implications for institutional balance in the EC. *Utrecht L. Rev.*, 1, 79-99.

Sherrington, P. (2000). *Council of Ministers: Political Authority in the European Union*. A&C Black.

Sinn, H. W. (2014). *The Euro trap: on bursting bubbles, budgets, and beliefs*. OUP Oxford.

Smismans, S. (2002). "Institutional balance as interest representation. Some reflections on Lenaerts & Verhoeven" in Joerges and Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, 89-108.

- Soares, A. G. (2015). EU Commission participation in the Troika mission: is there a European Union price to pay?. *Revista Brasileira de Política Internacional*, 58(1), 108-126.
- Stasavage, D. (2007). Cities, constitutions, and sovereign borrowing in Europe, 1274–1785. *International Organization*, 61(03), 489-525.
- Tallberg, J. (2004). The power of the presidency: Brokerage, efficiency and distribution in EU negotiations. *JCMS: Journal of Common Market Studies*, 42(5), 999-1022.
- Tallberg, J. (2007). Executive politics. *The handbook of European Union politics*, 195-212.
- Tallberg, J. (2008). Bargaining power in the European Council. *JCMS: journal of common market studies*, 46(3), 685-708.
- Taylor, C. (2000). The role and status of the European Central Bank: Some proposals for accountability and cooperation. *After the Euro: Shaping Institutions for Governance in the Wake of European Monetary Union*, 179-202.
- Teasdale, A. L. (1993). The life and death of the Luxembourg Compromise. *JCMS: Journal of Common Market Studies*, 31(4), 567-579.
- Thomson, R., & Hosli, M. (2006). Who Has Power in the EU? The Commission, Council and Parliament in Legislative Decision - making. *JCMS: Journal of Common Market Studies*, 44(2), 391-417.
- Tomkin, J. (2013). Contradiction, circumvention and conceptual gymnastics: the impact of the adoption of the ESM Treaty on the State of European Democracy. *German LJ*, 14, 169-190.
- Torres, F. (2013). The EMU's legitimacy and the ECB as a strategic political player in the crisis context. *Journal of European Integration*, 35(3), 287-300.
- Trondal, J. (2010). *An emergent European executive order*. Oxford University Press.
- Tsebelis, G. (1994). The power of the European Parliament as a conditional agenda setter. *American Political Science Review*, 88(01), 128-142.

Tsebelis, G., & Garrett, G. (2001). The institutional foundations of intergovernmentalism and supranationalism in the European Union. *International organization*, 55(02), 357-390.

Tuori, K. From expert to politician and stakeholder? Constitutional drift in the role of the ECB. *The European Union in Crises or the European Union as Crises?* 491-660.

Turner, C. (2004). Jürgen Habermas: European or German? *European Journal of Political Theory*, 3(3), 293-314.

Van den Brink, T. (2016). National Parliaments and EU Economic Governance. In Search of New Ways to Enhance Democratic Legitimacy. In *Democracy and Rule of Law in the European Union* (pp. 15-24). TMC Asser Press.

Van Rompuy, H. (2010). Lessons from a crisis: reflections on economic governance for Europe. *European View*, 9(2), 133-139.

Verdun, A. (1998). The institutional design of EMU: a democratic deficit? *Journal of Public Policy*, 18(02), 107-132.

Vile, M. J. C. (2012). *Constitutionalism and the Separation of Powers*, 2ed edition, Liberty Fund, Inc.

Vilpišauskas, R. (2013). Eurozone crisis and European integration: functional spillover, political spillback? *Journal of European Integration*, 35(3), 361-373.

Von Bogdandy, A. (2012). The European lesson for international democracy: the significance of Articles 9 to 12 EU Treaty for International Organizations. *European Journal of International Law*, 23(2), 315-334.

Wallace, H., Pollack, M. A., & Young, A. R. (Eds.). (2015). *Policy-making in the European Union*. Oxford University Press.

Ward, L. (2005). Locke on executive power and liberal constitutionalism. *Canadian Journal of Political Science/Revue canadienne de science politique*, 719-744.

Warntjen, A. (2008). Steering, but not Dominating: the Impact of the Council Presidency on EU Legislation. In *Unveiling the Council of the European Union* (pp. 203-218). Palgrave Macmillan UK.

Weber, M. (1978). *Economy and society: An outline of interpretive sociology*. University of California Press. Volume II, Chapter XI, *Bureaucracy*, 956-1003.

Weiler, J. H. (2002). A constitution for Europe? Some hard choices. *JCMS: Journal of Common Market Studies*, 40(4), 563-580.

Wendel, M. (2014). Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference. *European Constitutional Law Review*, 10(02), 263-307.

Wessels, B. (2005). Roles and orientations of members of parliament in the EU context: Congruence or difference? Europeanisation or not? *The Journal of Legislative Studies*, 11(3-4), 446-465.

Wessels, W. (2013). National Parliaments and the EP in Multi-tier Governance: In Search for an Optimal Multi-level Parliamentary Architecture Analysis, Assessment Advice. *Challenges of multi-tier governance in the European Union*, 95-109.

Wessels, W. (2016). *The European Council*. Palgrave Macmillan

Werts, J., & TMC Asser Institute. (2008). *The European Council* (p. 143). London: John Harper Publishing.

Wille, A. (2012). The politicization of the EU Commission: democratic control and the dynamics of executive selection. *International Review of Administrative Sciences*, 78(3), 383-402.

Wille, A. (2013). *The normalization of the European Commission: Politics and bureaucracy in the EU executive*. OUP Oxford.

Yuratich, D. (2017). Article 13 (2) TEU: Institutional Balance, Sincere Co-Operation, and Non-Denomination during Lawmaking. *German LJ*, 18, 99-125.

# Lists of Rules, Cases and Documents

## Rules

The Treaty on European Union (the TEU) (Consolidated Version)

The Treaty on the Functioning of the European Union (the TFEU) (Consolidated Version)

Treaty on European Union (Maastricht)

Treaty on European Union (Amsterdam)

Article 57 of the Constitution of The People's Republic of China

*“The National People's Congress of the People's Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress.”*

Statute of the ESCB and of the ECB (Protocol No.4)

Treaties on Stability, Coordination and Governance in the Economic and Monetary Union

Laeken Declaration of the Future of the European Union

## Cases

Case C-70/88, European Parliament v. Council, [1990] ECR I-2041 ("Chernobyl")

Case 9/56 , *Meroni & Co, Industrie Metallurgiche SpA v High Authority of the European Coal and Steel Community* [1957 and 1958] ECR 133

Case C-409/13, Council v Commission[2015], ECLI:EU:C:217

"Principal proceedings ESM/ECB: Pronouncement of the Judgment and referral for a preliminary ruling to the Court of Justice of the European Union", see:  
<http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-009.html>

"Constitutional Complaints and Organstreit Proceedings against the OMT Programme of the European Central Bank unsuccessful", see:  
<http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html>

Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag [2015] ECLI: EU: C: 400

Main Point of the OMT Judgment by the Bundesverfassungsgericht:

<http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html>

Case C-370/12 Pringle v Government of Ireland [2012] ECLI: EU: C: 756

## **Documents**

European Parliament Resolution of 4 July 2013 on improving the practical arrangements for the holding of the European elections in 2014

Dutch Council of State (2013) Request for Information on the Embedding of Democratic Control in the Reform of Economic Governance in Europe to Combat the Economic and Financial Crisis. No.W01.12.0457/1.