

DMYTRO VOLODIN

LUISS Guido Carli School of Government, Italy

## How to legitimate the European Union and the integration process: EU governance approach

### 1. Introduction

“A democratic regime is one in which political power is based on the will of the people, and which provides all citizens with the opportunity to participate equally in the political life of the state”<sup>1</sup>. The EU Treaties indeed claim that the Union is now a democratic regime with its own system of democracy. This is evident from the preamble of the Treaty on European Union (TEU) whereby the EU draws inspiration from certain values including democracy; it declares attachment to the principle and also desires the democratic and efficient functioning of its institutions<sup>2</sup>.

Both the TEU and the Treaty on the Functioning of the European Union (TFEU) refer to the ‘peoples of Europe’<sup>3</sup> showing that the Union is intended to be more than just a simple association of states; it is designed to bring together the citizens of Europe in unity. This suggests that according to the Treaty of Lisbon it is they who limited their sovereign rights through the Member States to create a body of law which binds them and the states themselves<sup>4</sup>, and that the powers of the Union come from the people not just governments. This presupposes some form of participation of the people in the process of integration. It has been long established that citizens have been given the possibility to rely on Treaty rights in the national courts through the doctrine of direct effect<sup>5</sup>. People therefore naturally wish to have a voice in European lawmaking through democratic processes.

In Art. 10(1) TEU it is acknowledged that the functioning of the EU is now founded on representative democracy. Yet the Treaty of Lisbon received strong criticism from the German Constitutional Court in the *Gauweiler case*<sup>6</sup>, claiming that the EU is still far from being such a regime. It will be examined in this paper whether the above mentioned claim to being a representative democracy is legitimate or still more needs to be

---

<sup>1</sup> Neuwahl, Wheatley, *The EU and Democracy – Lawful and Legitimate Intervention in the Domestic Affairs of States?*, Chapter 13, in: *Accountability and Legitimacy in the European Union*, eds Arnall, Wincott (OUP, 2002), p. 223.

<sup>2</sup> *Treaty on European Union* [2010] OJ C 83/13, Preamble paras 2, 4 and 7.

<sup>3</sup> TEU Preamble para 13; *Treaty on the Functioning of the European Union* [2010] OJ C 83/47, Preamble para 1.

<sup>4</sup> See Case 6/64 *Costa v ENEL* [1964] ECR 585, para 3 on the limitation of sovereignty.

<sup>5</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I, p. 12.

<sup>6</sup> 2 BvE 2/08 *Gauweiler v Treaty of Lisbon*, Judgment of 30 June 2009 (hereinafter ‘Gauweiler’).

done to achieve this after the new Treaties. Our discussion will also focus on whether the supposed democratic features of the EU are sufficient to legitimate the process of integration. Due to the changes brought about by the Lisbon Treaty being very recent, there is little experience yet on their practical application. However the new institutional setting, the processes and the increased role of the European Parliament and national parliaments will provide plenty of guidance to examine these fascinating issues in detail.

## 2. The democracy challenge

### 2.1. The need for the EU to be democratic

Does it matter whether the EU is democratic? After all it is not a sovereign state, so some might even question the necessity of this discussion. However it would be odd for the Treaties to mention the concept of democracy so openly if there was no expectation for people to be represented in the Union. In fact even if the EU is not a state, it can neither be said that it is merely a classic international organisation such as the United Nations or the Council of Europe.

The identity of the Union<sup>7</sup> has been debated ever since it was created, causing several theories to be developed. The initial arguments centred on the ideas of intergovernmentalism and supranationalism<sup>8</sup>. The former was shown by the Luxembourg compromise in 1966 allowing governments to retain total control of the legislative process. The *Van Gend en Loos* judgment<sup>9</sup> on the other hand suggested that the EU was rather an entity above the nation states. Others suggested ideas of federalism, whereby a constitutional settlement was contemplated by delegating power to a higher form of government<sup>10</sup>, and functionalism that focused on fulfilling the needs of the people, rather than the form of regime under which this was to be done<sup>11</sup>. Anyhow it became clear that the Union was to become more of a state-like entity with its own legal system<sup>12</sup>.

Since this early perception of the Union, it has undergone very fundamental changes in the last two decades. The Treaty of Maastricht introduced the Common Foreign and Security Policy and Justice and Home Affairs (later named Police and Judicial Co-operation in Criminal Matters) as separate pillars. The latter of these now has full application after the abolition of the pillar structure by the Lisbon Treaty. This means that the Union has increasingly been tapping into areas which were traditionally re-

---

<sup>7</sup> First called the European Economic Community (EEC) and then the European Community (EC).

<sup>8</sup> Chalmers, Davies, Monti, *European Union Law*, 2<sup>nd</sup> ed, (CUP, 2010) ('Chalmers et al'), p. 2.

<sup>9</sup> *Supra*, note 5.

<sup>10</sup> Rosamund, *Theories of European Integration*, Macmillan, 2000, p. 1.

<sup>11</sup> *Ibidem*, p. 1–2.

<sup>12</sup> *Supra*, note 4.

served to nation states. The EU was also creating more legislation more intensely than ever before<sup>13</sup>.

There is no doubt that once EU legislation was increasingly affecting their rights, people started to have similar expectations for the EU as for domestic politics and political institutions<sup>14</sup>. Additionally it has been observed that as Europeans became more prosperous they were less willing to accept government by unaccountable elites<sup>15</sup>. Therefore there is now a sense of a need for democracy in Europe. Only then will the process of integration be accepted by citizens and this process will only become legitimate in their eyes. They must therefore be given a chance to influence decisions that are affecting their lives. It is not settled, however, in what way this must be achieved. The *Gauweiler case* acknowledged that this does not need to be done in the same way as it is in Member States<sup>16</sup>. Nevertheless it is submitted here that the democratic processes must be visible and should confer a real possibility of participation on citizens. Whether this has been achieved is a matter for detailed analysis.

## 2.2. Democracy in the Lisbon Treaty

As seen above, the new Treaty makes clear references to the democratic commitment of the Union. Title II of the TEU is entirely devoted to 'provisions on democratic principles'.

Art. 9 TEU exposes the principle of equality of citizens. Art. 10 TEU points out two distinct features of democracy: representative and participatory democracy. The latter is developed by Art. 11(4) TEU, which includes the 'citizens' initiative', allowing a minimum of one million citizens to invite the Commission to submit a proposal for consideration. Arts 11(1) to (3) TEU aim to allow increased citizen participation through exchanges of views, dialogue and consultations. Art. 12 TEU gives greater rights to national parliaments in the legislative process.

Before considering these institutional changes in more detail in section 3, other new features must be pointed out. The TFEU in Arts 2–6 contains a catalogue of EU competences whose aim is to ensure that these are clearly observed and the areas reserved for the Member States are not encroached upon. Art. 6(1) TEU makes the Charter of Fundamental Rights legally binding, which offers increasing protection for citizens under EU law, and ensures that these rights are not hidden away in the judgments of the Court of Justice of the European Union (CJEU), as before. The protection of such rights is a typical feature of a democratic system. As will be seen below, the 'co-decision procedure' has now become the 'ordinary legislative procedure'<sup>17</sup>, indicating that the involvement of the Parliament is now a standard feature of the legislative process.

---

<sup>13</sup> Chalmers et al, p.26.

<sup>14</sup> *White Paper on European Governance*, COM (2001) 428, [2001] OJ C 287/1 ('the White Paper'), p. 27.

<sup>15</sup> Arnall, *Introduction: The European Union's Accountability and Legitimacy Deficit*, Chapter 1, in: *Accountability and Legitimacy in the European Union*, eds Arnall, Wincott, OUP, 2002, p. 7.

<sup>16</sup> Gauweiler, para 272.

<sup>17</sup> See Art. 294 TFEU.

Despite these efforts of the drafters of the Treaty, the German Constitutional Court still claims that the Treaty of Lisbon does not lead to a new level of development of democracy<sup>18</sup>. Nevertheless it must be acknowledged that democracy in the EU has been made more visible by the new Treaty. More possibilities have been opened up for people to participate and have themselves heard through consultation, the citizens' initiative and the enhanced role of national parliaments. It is another matter that this is not considered sufficient by some. The opportunities are there to be used.

### 3. The democratic institutions of the Union

The institutions of the Union are set out in Art. 13(1) TEU. The three key players in Union law making are: the Parliament, the Council and the Commission<sup>19</sup>. These are very different as regards their composition. The Parliament is where citizens are represented, the Council brings together Member State governments, while the Commission is composed of experts responsible for a particular field. So how can citizens influence the decision making process? After all it is they who need to determine public authority in a democracy<sup>20</sup>. The role of the institutions and ways ordinary people can participate in these processes will now be examined.

#### 3.1. The European Parliament

The European Parliament (EP) is a key institution for ensuring legitimacy through representative democracy, as it is where 'citizens are directly represented at Union level'<sup>21</sup>. It now has equal powers to the Council in the ordinary legislative procedure as defined in Art. 294 TFEU. This procedure now applies to 40 new areas<sup>22</sup> after amending the old treaties, giving the Parliament more influence in law making than ever before. Representation is degressively proportional, with small Member States being guaranteed a minimum of 6 seats<sup>23</sup>. Since 1979 the Parliament is directly elected, every citizen of the EU having the right to vote or stand as a candidate in its elections<sup>24</sup>. In many respects it resembles national parliaments where a state's citizens are represented. This feature aims to give the EU greater legitimacy through increasing democracy.

However, this institution has been subject to fierce criticism. In *Gauweiler*, the applicants argued that the Parliament did not comprise the characteristics of a representative body since Member States with low number of inhabitants are granted a disproportionately large number of votes<sup>25</sup>. The Court agreed with this saying that the Parliament

---

<sup>18</sup> Gauweiler, para 295.

<sup>19</sup> Procedure set out in Art. 294 TFEU.

<sup>20</sup> Gauweiler, para 211; see also *supra*, note 1.

<sup>21</sup> Arts 10(2) and 14(2) TEU.

<sup>22</sup> Chalmers et al., p. 47.

<sup>23</sup> Art. 14(2) TEU.

<sup>24</sup> Art. 22(2) TFEU.

<sup>25</sup> Gauweiler, para 104.

cannot comply with the principle of equal political right to vote of all citizens, as required at national level<sup>26</sup>. It essentially calls into question the principle enshrined in Art. 9 TEU with respect to the EP. It also points out that it lacks a system of government and opposition<sup>27</sup>. Others also comment that it has several weaknesses when compared to national parliaments, such as not having a right of legislative initiative (which is reserved to the Commission) and not having a decisive function in all EU law making<sup>28</sup>. It has even been claimed prior to Lisbon that no one who votes in EU elections has a strong sense of affecting critical political choices<sup>29</sup>.

These criticisms are true to a large extent since although there are political groups at European level, they are composed of representatives of national parties and none of them is likely to have a majority in the Parliament. Therefore parties cannot just rely on their majority to pass legislation conforming to a set of policies, as it is often done at national level. In parliamentary systems legislative chambers and governments are often interlinked (just like in the UK House of Commons), so voters can choose not only MPs, but also the party whose MPs will form members of the government including the Prime Minister (or other head of government). This is not possible at EU level as electors only elect people who can then vote on legislative proposals without being able to carry out a policy programme. Furthermore, national parties often tend to reserve their best candidates for national elections, leaving less able or at least less well-known figures to stand as MEPs. These representatives are less likely to be able to connect to voters at home, causing even more alienation of people from European politics. This means that it must be accepted that the European Parliament still cannot be equated to national legislatures, even after Lisbon.

On the other hand there are additional features that enable the EP to control EU procedures. It has already been stressed that a lot more legislation are subject to parliamentary control than under the old treaties. In addition the European Parliament also has some influence over the European Commission, a body responsible not only for initiating legislation, but also having an executive role. First of all under Art. 17(7) TEU it is the EP that proposes a candidate for the President of the Commission and then it is responsible for electing him or her. According to Art. 17(8) TEU the Commission once appointed is responsible to the Parliament. The latter can even vote on a motion of censure of the Commission.

While the Parliament has limited power in overseeing the work of the other institutions it has some role of consultation. For example the European Council President must present a report to it after each meeting<sup>30</sup>. It must be consulted before appointment of members of the European Central Bank and the Court of Auditors<sup>31</sup>. It can also propose one panel member for giving opinion on the judges to be appointed to the CJEU<sup>32</sup>.

---

<sup>26</sup> Ibidem, para 271.

<sup>27</sup> Ibidem, para 280.

<sup>28</sup> Brecht, *Prospects and Limits of Democratic Governance in the EU*, "European Law Journal" 2011, vol. 17, 35, p. 38.

<sup>29</sup> Weiler, *European Democracy and its Critics: Polity and System*, Chapter 8, in: Weiler, *The Constitution of Europe*, CUP, 2000, p. 266.

<sup>30</sup> Art. 15(6) TEU.

<sup>31</sup> Arts 283(2) TFEU and 286(2) TFEU.

<sup>32</sup> Art. 255 TFEU.

This shows that the EP does have some role related to the other decision makers, albeit clearly a very limited one. However, the problem regarding equality of citizens can be countered. The German Federal Government in the *Gauweiler case* pointed out that the reason for not having equality of voters in the European elections is due to the principle of equality of states<sup>33</sup>. Tomuschat also observes that the Court's argument in this respect is erroneous as it misunderstands the logic of a federal entity. By that rule the US Senate (upper chamber) would lack democratic legitimacy<sup>34</sup>. This problem is not a unique EU feature as even Member States cannot always achieve equality in domestic constituencies<sup>35</sup>. Domestic systems are still regarded as legitimate.

A possible solution could be a European list from where let's say 10 per cent of MEPs could be elected<sup>36</sup>. However it would still have to be ensured that small Member States get sufficient seats to have at least some voice in European politics.

### 3.2. The Council and the Commission

The other legislative institutions possess quite different features to the Parliament and it is questionable, whether their respective roles fit into the idea of the Union's functioning being founded on representative democracy.

The *Council* comprises the ministers of the democratically elected governments of the Member States<sup>37</sup>, so it does represent citizens, albeit indirectly. It contributes to EU-level democracy since together with the Parliament it is said to give the EU a 'double democratic mandate'<sup>38</sup>. Moravcsik also agrees with this and claims that indirect representation in the Council together with direct representation through the EP with increasing powers is sufficient to ensure the representation of citizens<sup>39</sup>.

The 'double qualified majority' under Art. 16(4) TEU and Art. 238(3) TFEU also has some legitimising effect<sup>40</sup> as votes in favour of a legislation now have to comprise at least 65% cent of the population of the Member States. So unequal distribution of votes cannot be argued against this procedure. The Council can therefore be seen as more of a representative of the majority of the Union's population. On the other hand this still does not make the Council a representative body of citizens, especially that opposition parties are not represented there. It is therefore questionable as to what extent this institution can be a representative of the views of the people, even after the Treaty amendments.

<sup>33</sup> Gauweiler para 148.

<sup>34</sup> Tomuschat, *The Ruling of the German Constitutional Court on the Treaty of Lisbon*, "German Law Journal" 2009, vol. 10, 1259, p. 1260.

<sup>35</sup> In the UK in the East Midlands for example Melton has 38 266 voters while Charnwood has 130 936, see <http://boundarycommissionforengland.independent.gov.uk/east-midlands/>.

<sup>36</sup> Lord, *Assessing Democracy in a Contested Polity*, "Journal of Common Market Studies" 2001, vol. 39, 641, p. 652.

<sup>37</sup> See Art. 16 TEU.

<sup>38</sup> *White Paper*, p. 4.

<sup>39</sup> Moravcsik, *In Defence of the 'Democratic Deficit': Re-assessing Legitimacy in the European Union*, "Journal of Common Market Studies" 2002, vol. 40, 603, p. 605.

<sup>40</sup> Discussed in Wohlfahrt, *The Lisbon Case: a Critical Summary*, "German Law Journal" 2009, vol. 10, 1278, p. 1279, although the author points out the Court's critical approach towards this argument.

The *Commission* is the EU's executive body, also having overseeing, coordinating and external representative functions, and it has the sole right of legislative initiative<sup>41</sup>. It is a completely independent body. Its members are proposed by national Governments, but then recommended by the President-elect and then elected by the Parliament as mentioned above. It is comprised of experts of different fields, so is regarded as a non-representative technocratic body. Its members are not directly accountable to citizens, although as already mentioned the Parliament has some control over it.

Some have argued in the early years of European integration that legitimacy could be ensured simply through the gains which technocracy secured<sup>42</sup>. It is true that the Commission is free from political pressure from voters, enabling it to fulfil its role in the best possible way, without having to engage in mistaken policies just to please voters. However at the same time it may act against the interests of EU citizens in the absence of direct democratic control. The 1999 corruption scandal shows that the Commission indeed needs to be closely scrutinised. So it is submitted here that while there are benefits from having an expert led body in the EU, the Commission will continue to contribute to the democratic deficit of the Union and its nature will make it harder to legitimate the EU in the eyes of the peoples of Europe.

### 3.3. National Parliaments

Member State Parliaments now have an increased role in European law-making and they can directly take part in it in accordance with the procedure in Art. 12 TEU. They can no longer be regarded as mere national institutions, but must also be construed as institutions of the Union<sup>43</sup>. Their involvement had been identified as an issue by the White Paper, which now seems to have been put into effect<sup>44</sup>. First of all they have a role in being consulted and documents and draft legislative acts must be forwarded to them<sup>45</sup>. An eight-week period is given for them to consider these, before they can be placed on the provisional agenda of the Council<sup>46</sup>. EU nationals tend to be more closely connected to their home country's parliaments so this should enable them more influence over EU legislation. National parliaments can therefore provide a major source of public debate on important European issues<sup>47</sup>. This procedure contributes to ensuring that European politics is brought closer to the people.

It is also important to ensure that the Union institutions comply with the principle of subsidiarity whereby decisions are taken as closely to the citizen as possible, meaning

---

<sup>41</sup> Art. 17 TEU.

<sup>42</sup> Craig, *The Nature of the Community: Integration, Democracy and Legitimacy*, Chapter 1, in: *The Evolution of EU Law*, eds Craig, de Búrca, OUP, 1999, p. 7.

<sup>43</sup> Niedobitek, *The Lisbon Case of 30 June 2009: A Comment from the European Law Perspective*, "German Law Journal" 2009, vol. 10, 1267, p. 1268.

<sup>44</sup> *White Paper*, p. 13.

<sup>45</sup> Protocol (No. 1) on the Role of National Parliaments in the European Union, Arts 1–2.

<sup>46</sup> *Ibidem*, Art. 4.

<sup>47</sup> Auel, *Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs*, "European Law Journal" 2007, vol. 13, 487, p. 498.

that the EU should only act if the objectives of the action cannot be achieved by the Member States<sup>48</sup>. The national legislators can now oversee this under the procedure in Protocol No. 2<sup>49</sup>. Art. 5 obliges that draft acts contain detailed reasons regarding their compatibility with the principles. If parliaments are still not satisfied, under Arts 7(2) and 7(3) they can issue a “yellow card” through reasoned opinion by one third of national parliaments regarding non-compliance of the act, or an “orange card” by a simple majority. These seem to make national legislators quite powerful in the process. There are two issues to consider. First of all these procedures may be regarded as purely nominal, since if there is so much opposition from Member States it is very difficult to get the necessary qualified majority in the Council anyway<sup>50</sup>. Secondly will parliaments actually use these powers? Auel observed that they even rarely make use of their formal rights to influence their home government’s vote in the Council<sup>51</sup>. While the opposition may be able to take part in the debate, they usually have to go with the governing majority’s position. This could well mean that national parliaments will only oppose measures when national representatives also oppose it in the Council.

The way in which these procedures can nevertheless contribute to securing democracy is through public debate at the national level. People should be able to have their say at national forums about European issues in their countries, which would then be transmitted to the EU legislature. At the moment there is a big question mark as to how this will turn out in practice. There is a danger that there will be ‘more votes’ in discussing domestic issues such as tax, health care and education and there will continue to be a lack of interest in areas of EU competence.

### 3.4. Other legislative procedures

It must be mentioned that there are certain procedures of legislation that allow the democratic institutions to be effectively bypassed. Art. 290 TFEU allows legislative powers to be delegated to the Commission, or legislative acts can confer implementing powers on the Commission (or the Council in some cases) under Art. 291 TFEU. According to Chalmers et al. 69 per cent of Regulations are in the form of delegated legislation<sup>52</sup>. These are made behind closed doors, without public scrutiny, through the procedure known as comitology<sup>53</sup>. The Parliament has gained very limited rights in the procedure as pointed out by Hofmann<sup>54</sup>, although it can now oppose certain measures within the “regulatory procedure with scrutiny”<sup>55</sup> since 2006.

<sup>48</sup> Art. 5(3) TEU.

<sup>49</sup> Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

<sup>50</sup> Chalmers et al, p. 129–131.

<sup>51</sup> Auel, p. 493, especially due to the fact that governing parties often have a majority in Parliament.

<sup>52</sup> Chalmers et al, p. 100.

<sup>53</sup> For details see: Chalmers et al, p.117–125; and Decision 1999/468/EC [1999] OJ L 184/23 as amended by Decision 2006/512/EC [2006] OJ L 200/11.

<sup>54</sup> Hofmann, *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality*, “European Law Journal” 2009, vol. 15, 482, p. 499.

<sup>55</sup> Decision 1999/468/EC Art 5a (inserted after amendment).

These seem problematic on the face of it, but it is submitted that they do not in fact call into question the democratic nature of the EU. Delegated legislation is very widely used at national level such as statutory instruments in the UK. Art. 290 TFEU only allows delegation 'to supplement or amend certain non-essential elements of legislative acts' meaning that the most important legislation will still be subject to the standard procedures. Should these be abused, the Parliament or the Council can always revoke the delegation under Art. 290(2), reasserting democratic control in the process. Even though these procedures may be less democratic, they are necessary for the efficient functioning of the EU and the better allocation of resources.

### 3.5. Processes of participatory democracy

As we have seen, Art. 10(3) TEU refers to citizens' right to participate in the democratic life of the Union. These are secured through the openness of procedures and are also very much essential to ensure the democratic functioning of the EU institutions. The CJEU stated that "openness contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them"<sup>56</sup>. There are several manifestations of these in the Treaty also. Art. 11 TEU introduces the 'citizens' initiative' as discussed above in section 2.3. Art. 15 TFEU encourages participation of civil society and its paragraph 3 gives EU citizens a right of access to documents<sup>57</sup>. Further, Art. 296 TFEU paragraph 2 states that legal acts must state the reasons on which they are based. These must be adequate so that the persons concerned can ascertain the reasons for the measure and the competent court can exercise its power of review<sup>58</sup>.

There has been some doubt as to the strength of these provisions and individuals' ability to seek judicial review against legislation. The argument based on a violation of the duty to state reasons failed both in the *Biotechnology Directive* and the *Deposit Guarantee Directive* cases<sup>59</sup>. It was held that for the application of subsidiarity it was sufficient to state that the scope of the protection provided by the Directive has effect on [intra-Union] trade<sup>60</sup> and that even no express reference to subsidiarity was required<sup>61</sup>. In fact it is important to state that until now there has not been a case which failed on the principle of subsidiarity, which calls into question the strength of judicial protection.

On the other hand cases regarding refusals to access to documents have succeeded in *Sweden and Turco*<sup>62</sup> and *Williams*<sup>63</sup>. These decisions clearly show that the Court is in

---

<sup>56</sup> Joined Cases C-39/05 P and 52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, para 59.

<sup>57</sup> This is regulated in detail by Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

<sup>58</sup> Case C-113/00 *Spain v Commission* [2002] ECR I-7601, para 47.

<sup>59</sup> Case C-377/98 *Netherlands v Council* (Biotechnology Directive) [2001] I-7079 and Case 233/94 *Germany v Council* (Deposit Guarantee Directive) [1997] I-2405.

<sup>60</sup> *Ibidem*, *Biotechnology Directive case*, para 32.

<sup>61</sup> *Supra*, note 64, *Deposit Guarantee Directive case*, para 28.

<sup>62</sup> *Supra*, note 61.

<sup>63</sup> Case T-42/05 *Williams v Commission* [2008] ECR II-156.

fact prepared to scrutinise institutional decisions on the request of individuals, fulfilling the purpose of openness as set out in Recital 2 of Regulation 1049/2001<sup>64</sup>. These democratic features of the Union will contribute to the legitimacy of the integration process which will be the focus of the next section.

#### 4. The legitimacy of the EU

We have discussed the features of EU democracy and saw that the European Parliament now plays a significant part in most EU law-making with national parliaments also been given some involvement in the process lately. These are complemented with the range of possibilities for citizens to get information about the EU and participate in its procedures. But are these enough to legitimate the European integration process?

Arnulf distinguishes two types of legitimacy: formal and social legitimacy<sup>65</sup>. The powers to the EU have been voluntarily transferred and the treaties have been freely entered into by states, so the former is difficult to call into question. But social legitimacy entails that the allocation and exercise of authority commands general acceptance<sup>66</sup>. In section 2 we have established that the EU is a different entity from a nation-state, although it now has a number of state-like features. Commentators have also observed that since the EU has very different institutions from national governments it would be difficult to have the same idea of representative democracy for it<sup>67</sup>. Even the German Constitutional Court concluded that as long as the principle of conferral is adhered to in the EU, the legitimation provided by national parliaments and governments complemented and sustained by the directly elected EP is sufficient in principle<sup>68</sup>. So even if the EU is not a complete representative democracy, at least if judged by nation-state standards, it can still be legitimate together with the integration process. After all it was the national parliaments which gave consent to their countries joining the EU (together with citizens through referenda). They still remain in control of the states' EU membership as now withdrawal from the Union is expressly permitted<sup>69</sup>.

So where does the problem lie then? The hostile attitude of some segments of the European public is still visible nowadays, for example through the recent failed referenda. One possible solution to the question may be that the public still does not know much about the EU. This was identified a decade ago by the White Paper alleging that Member States did not communicate well about what the EU was doing and many people did not know the difference between the institutions<sup>70</sup>. In addition people still thought of EU rules as foreign laws<sup>71</sup>. In this respect the role of the media and the press would be crucial. However the White Paper's criticism is still valid today. Ordinary

<sup>64</sup> *Supra*, note 62.

<sup>65</sup> *Supra*, note 15, p. 3–4.

<sup>66</sup> *Ibidem*.

<sup>67</sup> Brecht, *supra* note 33, p. 40.

<sup>68</sup> Gauweiler, para 262.

<sup>69</sup> Art 50 TEU; discussed in Gauweiler para 329.

<sup>70</sup> *White Paper*, p. 5.

<sup>71</sup> *Ibidem*, p. 21.

people are unlikely to look at EU specific portals online and it is hard to find many reports on the EU agenda in ordinary newspapers' front pages. At a national level, in the UK for example, pure domestic issues such as health care, tax, education, tuition fees, budget cuts, together with foreign conflicts and natural disasters continue to dominate the political agenda.

Another issue discussed by Weiler is that there is still no European '*demos*',<sup>72</sup> including a feeling of 'being European'. There are only "peoples" of Europe as opposed to "people" and they are reluctant to take part in European democratic life. This is clearly linked to the lack of popular understanding of the integration process. In the 1950s the desire for peace, unity and economic rebuilding provided a clear rationale<sup>73</sup>. Now the process is a lot more complex. Europeans need to understand it a lot better in order to feel part of the same political community.

Finally the level of mistrust of the German Constitutional Court is striking in the *Gauweiler* judgment. The German Court does not trust that the institutions will keep an appropriate check on each other to see if they are acting *ultra vires*<sup>74</sup>. However it would be essential in a democratic system that the institutions are trusted by the public and national authorities, only then can they all see the process as fully legitimate.

## 5. Conclusion

It has been said that the EU now approaches a polity of a traditional representative democracy after the European Parliament's significant increase of powers<sup>75</sup>. While this is certainly true, the inter-governmental element can still be very strongly felt through the role of the Council. It must be recalled that the expert-led European Commission is still very powerful after Lisbon and such an institution is not present in traditional democracies. New arrangements have been made for citizen participation and national parliamentary oversight of EU processes, but these are still considered to be weak. While the foundations of democracy are now present at EU-level to some extent, these still do not *actually* make the EU a full representative democracy.

It has been argued that due to the nature of the EU, this finding does not mean that the EU and the integration process cannot be legitimated in the eyes of citizens. The changes by the new treaties have increased the possibilities to have their say in European politics. What is needed is better information about the nature of the EU, the benefits of integration and the work of the institutions. Both the governments and the media should take part in communicating effectively the democratic qualities of the Union. Only then can a common European political culture be formed and only then will popular acceptance of the EU be increased across the 27-nation entity.

---

<sup>72</sup> Weiler, *The Constitution of Europe*, supra note 34, p. 269.

<sup>73</sup> De Búrca, *The Quest for Legitimacy in the European Union*, "Modern Law Review" 1996, vol. 59, 349, p. 373.

<sup>74</sup> Kiiver, *German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Parliamentary Clearance Procedures*, "German Law Journal" 2009, vol. 10, 1287, p. 1291.

<sup>75</sup> Bredt, supra note 33, p. 38.

## References

### Textbooks and chapters:

- Neuwahl, Wheatley, *The EU and Democracy – Lawful and Legitimate Intervention in the Domestic Affairs of States?*, Chapter 13, in: *Accountability and Legitimacy in the European Union*, eds Arnall, Wincott, OUP, 2002.
- Chalmers, Davies, Monti, *European Union Law*, 2<sup>nd</sup> ed, CUP, 2010.
- Rosamund, *Theories of European Integration*, Macmillan, 2000.
- Arnall, *Introduction: The European Union's Accountability and Legitimacy Deficit*, Chapter 1, in: *Accountability and Legitimacy in the European Union*, eds Arnall, Wincott, OUP, 2002.
- Weiler, *The Commission as Euro-Skeptic: A Task Orientated Commission for a Project Based Union, a Comment on the First Version of the White Paper*, in: *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, eds C. Joerges et al., Jean Monnet Working Paper 6/01, EUJ and NYU, 2002.
- Weiler, *European Democracy and its Critics: Polity and System*, Chapter 8, in: Weiler, *The Constitution of Europe*, CUP, 2000.
- Craig, *The Nature of the Community: Integration, Democracy and Legitimacy*, Chapter 1, in: *The Evolution of EU Law*, eds Craig, de Búrca, OUP, 1999.

### Articles:

- Bredt, *Prospects and Limits of Democratic Governance in the EU*, "European Law Journal" 2011, vol. 17, p. 35.
- Tomuschat, *The Ruling of the German Constitutional Court on the Treaty of Lisbon*, "German Law Journal" 2009, vol. 10, p. 1259.
- Lord, *Assessing Democracy in a Contested Polity*, "Journal of Common Market Studies" 2001, vol. 39, p. 641.
- Moravcsik, *In Defence of the 'Democratic Deficit': Re-assessing Legitimacy in the European Union*, "Journal of Common Market Studies" 2002, vol. 40, p. 603.
- Wohlfahrt, *The Lisbon Case: a Critical Summary*, "German Law Journal" 2009, vol. 10, p. 1278.
- Niedobitek, *The Lisbon Case of 30 June 2009: A Comment from the European Law Perspective*, "German Law Journal" 2009, vol. 10, p. 1267.
- Auel, *Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs*, "European Law Journal" 2007, vol. 13, p. 487.
- Hofmann, *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality*, "European Law Journal" 2009, vol. 15, p. 482.
- De Búrca, *The Quest for Legitimacy in the European Union*, "Modern Law Review" 1996, vol 59, p. 349.
- Kiiver, *German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Parliamentary Clearance Procedures*, "German Law Journal" 2009, vol. 10, p. 1287.

### Treaties, legislation and documents:

- Treaty on European Union* [2010] OJ C 83/13.
- Treaty on the Functioning of the European Union* [2010] OJ C 83/47.
- White Paper on European Governance*, COM (2001) 428, [2001] OJ C 287/1.
- Decision 1999/468/EC [1999] OJ L 184/23 as amended by Decision 2006/512/EC [2006] OJ L 200/11.

Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

**Cases:**

Case 6/64 *Costa v ENEL* [1964] ECR 585.

Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR.

2 BvE 2/08 *Gauweiler v Treaty of Lisbon*, Judgment of 30 June 2009.

Joined Cases C-39/05 P and 52/05 P *Sweden and Turco v Council* [2008] ECR I-4723.

Case C-113/00 *Spain v Commission* [2002] ECR I-7601.

Case C-377/98 *Netherlands v Council* (Biotechnology Directive) [2001] I-7079.

Case 233/94 *Germany v Council* (Deposit Guarantee Directive) [1997] I-2405.

Case T-42/05 *Williams v Commission* [2008] ECR II-156.

**Websites:**

[http://www.europarl.europa.eu/parliament/archive/elections2009/en/turnout\\_en.html](http://www.europarl.europa.eu/parliament/archive/elections2009/en/turnout_en.html).

<http://boundarycommissionforengland.independent.gov.uk/east-midlands/>.

### Summary

This article addresses and responds to the question of changes in the European Union governance and how we can legitimate the process of European integration according to internal facilities. Some of the main conclusions refer to the lack of institutions capable of performing their functions as well as the key elements for achieving possible changes towards democracy.

