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Challenging Executive Dominance in European Democracy

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Abstract

Executive dominance in the contemporary EU is part of a wider migration of executive power towards types of decision making that eschew electoral accountability and popular democratic control. This democratic gap is fed by far-going secrecy arrangements and practices exercised in a concerted fashion by the various executive actors at different levels of governance and resulting in the blacking out of crucial information and documents – even for parliaments. Beyond a deconstruction exercise on the nature and location of EU executive power and secretive working practices, this article focuses on the challenges facing parliaments in particular. It seeks to reconstruct a more pro-active and networked role of parliaments –both national and European – as countervailing power. In this vision parliaments must assert themselves in a manner that is true to their role in the political system and that is not dictated by government at any level.

Keywords: European Union, executive power, representative democracy, secrecy, parliaments, co-operation

Introduction

Why does executive dominance matter in the context of the European Union? One reason is the nature and reach and intensity of EU governance as it has evolved, in recent years in particular. European governance embraces the Treaty-based and other powers of the various key political actors (the European Council, the Commission, the Council, the European Parliament), in particular their role in law making and execution. The European Council sets the agenda and directs the law-making institutions, the Commission proposes the content of far-reaching legislation, ensures its implementation and negotiates international agreements and the Council is co-legislator, main decision-maker and executive actor depending on the policy area. European governance also covers the (considerably greater) executive power of the European Union that is exercised to a considerable extent by a host of more 'hidden' but nonetheless formal actors towards the backstage of European governance (for example, European level agencies and 'comitology' committees).¹ Agencies that provide key certification of airplanes or medicines or food and committees that decide which tracts of land to place on the environmentally protected area list are adopting decisions that are seemingly 'technical' but may also be politically salient in a host of ways. All these decisions matter, also ultimately for the European citizen, even if they only sporadically or invisibly affect him or her.

Another reason to be concerned about executive dominance is the manner in which democracy is hollowed out in the context of the EU. The phenomenon of strong executive power sidelining the institutions of representative or liberal democracy often consolidates and intensifies in times of emergency or crisis. The US security emergency had repercussions worldwide and also in Europe and continues to be felt today.² The fight against terrorism has spawned a variety of disputed legal acts and legislation in Europe with fundamental implications for the privacy and civil liberties of citizens and non-citizens.³ Unilateral control over information and

¹ See further, D. Curtin, H. Hofmann and J. Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda' (2013) 19 ELJ 1.

² See for a long standing challenge to the blacklisting of terrorists by the EU, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Case C-584/10P *Commission and others v Kadi*, judgment of 18 July 2013, not yet published.

³ See for example the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and

decision-making at the expense of parliaments is a long-standing feature of more 'inter-governmental' arenas of decision-making including the EU's Common Foreign and Security Policy (CFSP).⁴ The Terrorist Finance Tracking Program (TFTP) Agreement with the US for example allows the sharing between the EU and the US of the personal banking records of suspected terrorists.⁵ Europol, the EU policing organisation, oversees the implementation of the TFTP agreement by the US but as we now know in the aftermath of the Snowden revelations, the US simply continues to take the information it wants directly anyway and operates in a largely law free and parliament free zone.⁶ In what became known as the "SWIFT" affair, power was exercised through the depoliticisation of the TFTP as well as a depoliticised understanding of the European fight against terrorism finance in general.⁷

The most recent emergency or crisis, the economic crisis, resulted in an acceleration of decision taking by supranational and national executives at the European level, often with a very profound and wide-reaching national impact.⁸ The new role of the European Union in the adoption process of national budgets is obviously of direct consequence to the financial wellbeing of citizens across Europe.⁹ Plans for a single supervisory mechanism for banks¹⁰ and for a banking resolution

prosecution of terrorist offences and serious crime, COM (2011) 32 final, 2 February 2011. The EP was set to vote on this proposal on 10 June 2013, but the vote has been delayed.

⁴ See further, the special issue of the *Journal of European Public Policy* edited by H.Sjursen, *The EU's Common Foreign and Security Policy: The Quest for Democracy* (2011) 18 JEPP.

⁵ See, Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purpose of the Terrorist Finance Tracking Program, O.J. 2010, L 195/5.

⁶ The EU is debating suspending the agreement as a result. See speech by Commissioner Malmstrom to the EP Civil Liberties Committee, 24 September 2013. On the inadequacy of legal remedies see, E.Fahey, "Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress and Remedies in EU-US Passenger Name Records and the Terrorist Tracking Program" *Yearbook of European Law* (2013) 1-21.

⁷ See, M. Wesseling, *The European Fight against Terrorism Financing: Professional Fields and New Governing Practices*, PhD thesis defended on 2 September 2013, University of Amsterdam

⁸ See in general, F. Scharpf, 'Monetary Union, Fiscal Crisis and the Pre-emption of Democracy' (2011) MPIfG Discussion Paper 11/11; J. Habermas, *The Crisis of the European Union: A Response* (Cambridge: Polity Press, 2012); J. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy, and the Political Messianism of European Integration' (2012) 34 *Journal of European Integration* 825; M. Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice,' (2012) RSCAS Policy Papers, PP, 2012/11; K. Nicolaïdis, 'European Democracy and Its Crisis' (2013) 51 *JCMS* 351; B. Crum, 'Saving the Euro at the Cost of Democracy?' (2013) 51 *JCMS* 614.

⁹ See, eg, D. Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *ELJ* 667.

¹⁰ See, Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank

authority¹¹ touch on very sensitive areas of national policy. Executive dominance by EU institutions and by (some) national actors at the European level has now reached into such sensitive policy fields as national budgets and macro-economic decisions (for example with regard to Cyprus).¹²

The phenomenon of executive dominance in the EU context should not be seen as particularly exceptional or *sui generis* in comparative terms. Rather it can be understood as part of a much wider phenomenon of the migration of executive power towards types of decision-making that eschew forms of electoral accountability and popular democratic control in a context where there is 'less party on the ground'.¹³ Peter Mair's work shows how the very rationale behind the EU, long before the economic crisis, conforms closely to more general thinking about the role and the drawbacks of popular democracy. He analysed the EU as a deliberate construction by national executives as 'a protected sphere' in which policy making can evade the constraints imposed by representative democracy at the national level.¹⁴ This democratic gap is fed by far-going secrecy arrangements and practices exercised in a concerted fashion by the various executive actors at different levels of governance and resulting in the 'blacking out' of crucial information and documents –even for parliaments.¹⁵ Unilateral executive control over whatever information the executive chooses to consider sensitive disconnects part of the essential machinery of representative democracy. The contemporary challenge is to overcome, in the words of Jürgen Habermas, 'the reluctance of the political elites to contemplate replacing

Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, COM (2013) 0520 final, 10 July 2013.

¹¹ See, Council Regulation (EU) No.../2013 of conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No.../2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, both adopted by the European Parliament on 12 September 2013 and awaiting publication in the O.J.

¹² See too, J.Fossum, 'The Structure of EU Representation and the Crisis' in S. Kroger (ed), *Political Representation in the European Union. Democracy in a Time of Crisis* (London: Routledge, 2014), forthcoming.

¹³ R.Katz and P.Mair, *How Parties Organize: Change and Adaptation in Party Organisation in Western Democracies* (London: Sage, 1994).

¹⁴ See further, P. Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso, 2013) in particular Chapter 4, 99. See too, P.Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press, 2010).

¹⁵ See further, D. Curtin, 'Overseeing Secrets in the EU: New Frontiers, Old Challenges' (2014) 52 JCMS, forthcoming.

the established mode of pursuing the European project behind closed doors with the shirt-sleeve mode of a vociferous, argumentative conflict of opinions within the broad public.¹⁶

This article is premised on an understanding of democracy that is representative in nature but informed by deliberation and publicity.¹⁷ Its focus is on the role of parliaments (and only incidentally of courts) in operationalising mechanisms of executive accountability that are tailored to the evolving practices of executive actors in complex multi level governance systems. It leaves to one side for now the debate on the desirability and reality of more ‘participatory’ democracy in the EU context, important though this is as a complement.¹⁸ Beyond a deconstruction exercise on the nature and location of EU executive power, I seek to focus on the challenges facing the democratic actors, (national) parliaments in particular.¹⁹ This should not be confused with a search for a parliamentary democracy at the European level as such. It is not. Rather my overarching goal here is to make a contribution to (incomplete) reconstruction, contributing to a larger and continuing conversation about the necessarily pro-active and networked role of parliaments (both the national parliaments and the European Parliament) in order to provide democratically legitimate countervailing power to an executive power in Europe that migrates and expands in an often accelerated manner, in particular over the course of the past decade or so.

¹⁶ See, Habermas, n 8 above, 6.

¹⁷ See further, J. Habermas *Between Facts and Norms - Contributions to a Discourse Theory of Law and Democracy* (1996) Massachusetts: Massachusetts Institute of Technology); J. Mansbridge, ‘Rethinking Representation’ (2003) 97 *American Political Science Review* 515 and M. Saward, *The Representative Claim* (Oxford: Oxford University Press, 2010) and Fossum, n 6 above.

¹⁸ But see, for example, B. Kohler-Koch, ‘Zivilgesellschaftliche Partizipation: Zugewinn an Demokratie oder Pluralisierung der Europäischen Lobby?’ in B. Kohler-Koch and C. Quittkat, *Die Entzauberung Partizipativer Demokratie, Zur Rolle der Zivilgesellschaft bei der Demokratisierung von EU Governance* (Frankfurt/New York: Campus Verlag, 2010) and J. Mendes, *Participation Rights in EU Rulemaking. A Rights-based Approach* (Oxford: Oxford University Press, 2011).

¹⁹ A. Von Bogdany speaks more broadly of the ‘European lesson’ for ‘international democracy’: ‘The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations’ (2012) 23 *EJIL* 315.

EU executive power: ever deeper and wider?

Fragmented EU government(s)

The European Economic Community as it was originally known embodied a special form of international relations among the governments of the Member States, bounded by the rule of law. Executive power was never meant to reside at the European level.²⁰ The Commission was the original public administration with clearly defined tasks and functions.²¹ Most prominently the Commission exercised supranational executive power in imposing sanctions on companies for infringement of the Treaty competition rules as well as having a policy leadership role. There are in addition well over 40 agencies at the EU level that exercise an expert driven or technocratic executive power, also operationally at times.²² This has included the creation of more quasi-autonomous 'satellites' (agencies and novel entities such as the European External Action Service) with their own distinct roles and functions, especially in the field of foreign policy and economic policy. If anything the 'agencification' process has deepened and intensified as a result of the response to the economic crisis in the EU – a phenomenon which is considered more specifically elsewhere.²³

Executive power has long been the 'residual', hard to define and rarely attempted, category and as exercised within the EU political system it is clearly not unitary.²⁴ It consists of supranational institutions *and* the governments and civil servants of the Member States (with the input of 'experts'). The two most important

²⁰ See in general D. Curtin and M. Egeberg, 'Tradition and Innovation: Europe's Accumulated Executive Order' (2008) 31 WEP 639 and D. Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution* (Oxford: Oxford University Press, 2009).

²¹ See further, A. Wille, *The Normalization of the European Commission. Politics and Bureaucracy in the EU Executive* (Oxford: Oxford University Press, 2013). See also, Curtin (2009), n 20 *ibid*.

²² See for example E. Chiti, 'European Agencies' Rulemaking: Powers, Procedures, and Assessment' (2013) 19 ELJ 93; M. Busuioc, 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope' (2013) 19 ELJ 111; J. Pollak and P. Slominski, 'Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders' (2009) 32 WEP 904; M. Busuioc, D. Curtin and M. Groenleer, 'Agency Growth Between Autonomy and Accountability: The European Police Office as a 'Living Institution' (2011) 18 JEPP 848.

²³ See further, H. Hoffmann and A. Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive Through 'Agencification'' (2012) 36 *European Law Review* 419; M. Everson, 'A Technology of Expertise: EU Financial Services Agencies' (2012) LEQS Paper No. 49, available at <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper49.pdf> (last visited 27 September 2013) and Busuioc (2013), *ibid*.

²⁴ N. Barber, 'Prelude to the Separation of Powers' (2001) 60 *Cambridge Law Journal* 59.

institutions in this context are the European Council, 'the alpha and omega of executive power in the EU'²⁵ and the hierarchically inferior Council. The Councils of the EU are in fact the institutions in the EU political system where the most powerful actors reside- the member state governments.²⁶ National executives are involved both at the level of ministers and prime ministers in the Council and the European Council and also at the lower levels of institutions (working parties, committees) where civil servants operate in largely invisible supporting roles.²⁷ Executive actors and administrative constellations transgress levels of governance and national borders in a manner that challenges the coherence of national governments in an unprecedented way. The result is an increasingly compound and accumulated 'order' of executive power in contemporary Europe.²⁸ The chameleonic and variegated nature and function of the executive at the European level, with the supranational intertwined with the national, has a habit of popping up often in an unpredictable and novel manner in evolving legal and institutional practices.²⁹ It also evolves and changes -unpredictably- over time. Thus, executive power within the Council of Ministers has migrated away from it in recent years as a result of the shift of some sensitive and operational policy areas either to the Commission in the case of police and judicial cooperation³⁰ or to the new High Representative for CFSP and the European External Action Service (EEAS) in terms generally of foreign affairs.³¹ Yet the Council still retains executive powers of a more operational kind, for example over areas such as the imposition of sanctions and the blacklisting of terrorists.

²⁵ Curtin (2009), n 20 above at 71.

²⁶ H. Wallace and F. Renshaw, *The Council of Ministers* (Palgrave MacMillan, 2006). See also, D. Naurin, 'Representation in the Councils of the EU' in: S. Kroger (ed), *Political Representation in the European Union. Democracy in a Time of Crisis* (London: Routledge, 2014), forthcoming.

²⁷ K. Juncos and A. Pomorska, 'Invisible and Unaccountable? National Representatives and Council Officials in EU Foreign Policy' (2011) 18 JEPP 1096.

²⁸ Curtin and Egeberg, n 20 above.

²⁹ See further, D. Curtin and I. Dekker, 'The European Union from Maastricht to Lisbon: Institutional and Legal Unity out of the Shadow' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011).

³⁰ See, in general, S. Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press, 2011).

³¹ See Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, O.J. L 201/30; S. Vanhoonaeker and N. Reslow, 'The European External Action Service: Living Forwards by Understanding Backwards' (2010) 15 EFAR 1 and S. Blockmans et al., *EEAS 2.0: A legal commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service* (CEPS, 2013).

One of the key characteristics of the practice of executive type power by various institutions and actors as it has emerged over the past decades in particular is its fragmentation.³² To state the obvious: there is no single, comprehensive and unitary European executive institution or body that can in any meaningful way be described as an EU government in the sense that we know it from the national domain. The fragmentation is both at the political level of executive power and also in terms of the administrative apparatus.³³ At the same time if one shift is reinforced by the EU's reaction to the economic crisis in particular it is the shift that has taken place from a more normative or rule-making type of governance to one clearly and explicitly exercising hands on executive power even in such sensitive policy fields as national budgets and macro-economic decisions. Crisis management by the European Council in particular has shifted from 'economic governance' in the sense of a rules-based normative system to 'economic government' entailing discretionary executive decisions.³⁴ All the 'governance' literature and analysis of recent years notwithstanding,³⁵ 'government' in a non-unitary sense is also part of what must be studied and understood in the context of the evolving political system of the EU. In this line two main actors are the focus of more detailed attention: the European Council in the lead and the Council where the (national) executive power legislates and supranational executive power is also exercised.

The European Council leads and constructs (also extramurally)

The 'ever mighty' European Council is authoritatively considered as the top-level 'leader' of the European Union as such.³⁶ It has seen its executive powers consolidated and even expanded in processes of incremental institutionalization, first in layers of legal and institutional practices and more recently in formal Treaty provisions after the Lisbon Treaty. It was already for a long time the motor behind

³² See, B. Crum, 'Executive Accountability in the European Union' (2013) paper presented at the EUSA Thirteenth Biennial Conference, Baltimore, USA, May 9-11 2013.

³³ H. Sijursen, 'Not so Intergovernmental After all? On Democracy and Integration in European Foreign and Security Policy' (2011) 18 JEPP 1078, 1082.

³⁴ See, P. de Schoutheete and S. Micosi, 'On Political Union in Europe. The Changing Landscape of Decision-making and Political Accountability' (2013) CEPS Essay No.4, 21 February.

³⁵ For an overview see, J. Zeitlin and C. Sabel (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford: Oxford University Press, 2010).

³⁶ Editorial Comments, 'An Ever Mighty European Council—Some Recent Institutional Developments' (2009) 46 CMLRev 1383.

many important steps in the European integration process, particularly those at its outer edges, such as initially justice and home affairs, foreign and defence policy and most recently the EU reactions to the economic and financial crisis.³⁷ With the Lisbon Treaty it formally became an institution of the Union subject to its rules, rather than floating outside it and its powers were explicitly stated to be non-legislative, defining the 'general political directions and priorities'.³⁸ The European Council has gradually developed into a very significant agenda setter of the larger developments of the EU, in spite of the Commission's monopoly of legislative initiative.³⁹ An example is in the area of justice and home affairs where the European Council sets out five-year programmes (Tampere, Stockholm) with the Commission required to keep within these leading parameters. Empirical evidence points to a 'progressive erosion' of the Commission's power of initiative and the European Council's detailed setting of the legislative agenda is pronounced.⁴⁰ The European Council is in addition a type of default 'crisis manager' of the EU, handling successive events such as the constitutional crisis of 2005 and the economic crisis of 2008 and onwards.⁴¹ Given that the EU has found itself in a more or less perpetual crisis in recent years this key role accentuates a strong executive power. This does not mean of course that other actors at the supranational level such as the Commission and the European Central Bank (ECB) do not also get significant powers in this context but generally the European Council keeps an overall supervisory role and has also become an effective supervisor of the Council of Ministers.⁴²

The European Council has a President, Mr. Van Rompuy, with his own Cabinet and supported by the Council.⁴³ This new President plays a fundamental

³⁷ See in general, Curtin (2009), n 20 above and L. van Middelaar, *The Passage to Europe* (Yale University Press, 2013).

³⁸ Article 15 (1) TEU.

³⁹ See further, P. Bocquillon & M. Dobbels, "An elephant on the 13th floor of the *Berlaymont*? European Council and Commission relations in legislative agenda setting" JEPP, (2013), forthcoming.

⁴⁰ See further, D. Corana et al, *The Power of Initiative of the European Commission: A progressive Erosion* (Paris: Notre Europe, Studies and Research no 89, 2012). See too, EP Resolution of 12 June 2013 on strengthening European democracy in the future EMU (2013/2672, RSP), points 2-4, <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0271&language=EN>

⁴¹ See Naurin, n 26 above.

⁴² U. Puetter, 'Europe's Deliberate Intergovernmentalism: The Role of the Council and the European Council in EU Economic Governance' (2012) JEPP 161, 162.

⁴³ See further, S. Blavoukos, D. Bourantonis and G. Pagoulatos, 'A President for the European Union: A New Actor in Town?' (2007) 45 JCMS 231; H. de Waele and H. Broeksteeg, 'The

role in enabling the European Council in practice to be the agenda-setter and effective coordinator and power broker of Union institutions and the Member States.⁴⁴ These tasks belonged in the past to the Commission but the Commission has seen its position progressively weakened over the years as bit-by-bit the role of legislative initiator and *de facto* supervisor of implementation have been assumed to some extent in practice by the European Council.⁴⁵ The professionalization of the support of the European Council has meant that it has been able to increase greatly the frequency with which it meets, over and above the four a year prescribed in Article 15 (3) TFEU. Thus, in 2011 no less than six European Council summit meetings took place including one 'informal' one.⁴⁶ The Euro Summit emerged as a potential rival to European Council summits since the end of 2011. These are composed of the euro area heads of state or government, the President of the Euro Summit (now von Rompuy) and the President of the Commission. These new meetings quickly became a decisive element in defining strategic orientations for the conduct of economic policies in the euro area. In current practice these Euro Summits are often held in the full European Council format⁴⁷ and the General Secretariat of the Council supports the Euro Summits.⁴⁸ Yet the agenda of the Euro Summits is prepared by the Eurogroup meetings composed of the national finance ministers of the Euro area. The administrative support of the Eurogroup is provided by the national civil service holding the Presidency. The Dutch civil service currently provides this support as the first President is Dutch. Moves are however already afoot to turn the Presidency of the Eurogroup into a permanent one with a supranational professional staff (the Council General Secretariat most probably).⁴⁹ This illustrates the more general conundrum of the 17-member euro-zone relying on

Semi-permanent European Council Presidency: Some reflections on the Law and Early Practice' (2012) 49 CMLRev 1039.

⁴⁴ See, special issue of *Western European Politics* edited by D. Naurin and A. Rasmussen, *Linking Inter- and Intra-institutional Change in the European Union* (2011) 36 WEP.

⁴⁵ See too, M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-crisis' (2013) 76 MLR 817, 830.

⁴⁶ H. Van Rompuy, *The European Council in 2011* (2012) and H. Van Rompuy, *The European Council in 2012* (2013). The Euro Summits were formalized at the October 2011 meeting. Since that date the European Council has met 11 times (last checked on 21 October 2013).

⁴⁷ See, eg, <http://www.eurozone.europa.eu/summits/>.

⁴⁸ See Article 8(1) of the Rules of Procedure of the Euro Summits, 14 March 2013, <http://eurozone.europa.eu/media/401510/20130314-eurosummits-rules-of-procedures.pdf>

⁴⁹ See C. de Gruyter, 'Mr. Euro' Ligt Onder Vuur' (2013) NRC Handelsblad, 28 May (Dutch). For translations, see <http://www.presseurop.eu/nl/content/article/3814641-mr-euro-ligt-onder-vuur> (last visited 27 September 2013).

the 28-member EU institutions, which produces a strong discrepancy between the problem structure and the supporting decision-making structure.⁵⁰

The centrality and sheer leading power of both types of summit meetings are now very visible as a result of the debt crisis measures in particular and this contributes to their empowerment. In addition, the political salience of what is being discussed has led to repercussions at the national level, in particular in debtor states, in the shape of governmental crises and political downfalls.⁵¹ The European Council calls the shots in general terms and largely tells the Commission (and the Council) what to do if formal legislation needs to be adopted. In the early days of the debt crisis for example it seemed as if the Commission would emerge as the institutional winner with it exercising its normal role of initiation on the 'European Semester'.⁵² This 'soft' new procedure seeks to coordinate economic and budgetary policies between the EU and member states of the Euro-area.⁵³ Based on an annual growth survey, the Commission systematically reviews national budget plans and publishes detailed budget recommendations for Member States, potentially touching on sensitive issues such as wage setting, pension age and social spending. Moreover, the introduction of 'reverse qualified majority voting' in the context of the implementation of the European semester strengthened the position of the Commission *vis a vis* the Council. 'Hard' new rules allowed for easier sanctions against member states with excessive deficits.⁵⁴ A new monitoring mechanism was

⁵⁰ See, in general, R.Gualtiere and R. Trzaskowski, 'Draft Report on Constitutional Problems of Multi-Tier Governance in the European Union', Committee on Constitutional Affairs, 2012/2078 (INI), 10 July 2013.

⁵¹ W. Wessels et al., 'Democratic Control in the Member States of the European Council and the Euro Zone Summits' (2013) study requested by the Constitutional Affairs Committee of the European Parliament, DG for Internal Policies study, Annex II: In-depth reports on 12 Member States, the reports on Greece and Italy regarding the resignation of Greek PM Papandreou over the bail-out packages in 2011 and the fall of the Berlusconi III government (2008-2011) over Berlusconi's increased isolation at European Council summits.

⁵² Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, O.J. L 306/12.

⁵³ See further, K. Armstrong, 'The New Governance of EU Fiscal Discipline' (2013) ELJ, forthcoming.

⁵⁴ The policy package included a directive and five regulations (the so called 'six-pack') that entered into force in December 2011. Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, O.J. L 306/1; Regulation (EU) No 1174/2011 of the

introduced and enforceability of the pact was improved in order to avoid the lenient implementation of the past. The Commission's country specific reports show that there it enjoys in practice (quite) some discretion in the implementation of hard and fast rules.⁵⁵

Later, however, the Commission's role did seem to be weakening. The European Council (pushed arguably by certain Member States within it) took the lead and called on the European Commission to present a legislative proposal on a pan-European supervision of banks (Single Supervisory Mechanism, SSM).⁵⁶ The real 'winner' in terms of tasks at the supranational level is the ECB that is given a leading and unprecedented role in the day-to-day management of financial markets. Once the SSM is in place additional steps towards a full-fledged banking union include a single resolution mechanism for failing banks and a common deposit guarantee scheme.⁵⁷ The visible and new non-monetary powers of the ECB raise novel issues of

European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, O.J. L 306/8; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policy, O.J. L 306/12; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, O.J. L 306/25; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, O.J. L 306/33; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, O.J. L 306/41.

⁵⁵ See the Commission's country-specific recommendations 2013, adopted on 29 May 2013. See Commission press release, 'Moving Europe Beyond the Crisis: Country-specific Recommendations 2013', available at http://europa.eu/rapid/press-release_IP-13-463_en.htm (last visited 23 September 2013). For the separate country-specific recommendations, see <http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/> (last visited 23 September 2013).

⁵⁶ On 15 October 2013 the Council adopted regulations creating a single supervisory mechanism for the oversight of banks and other credit institutions, thus establishing one of the main elements of Europe's banking union. The single supervisory mechanism (SSM) will be composed of the European Central Bank (ECB) and the supervisory authorities of the member states. The ECB will have direct oversight of eurozone banks. See, Council Regulation (EU) No.../2013, of ... conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 2013 ... and Regulation (EU) No .../2013 of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions pursuant to Council Regulation (EU) No.../2013, OJ L 2013...

⁵⁷ See Communication from the Commission to the European Parliament and to the Council, 'A Roadmap Towards a Banking Union,' (2012) (COM)2012 510 final.

delegation of powers to non-majoritarian institutions in the supranational context and in particular the legitimacy of epistocracy.⁵⁸

At the same time the debt crisis has also amplified pre-existing tensions between those states that want closer integration, notably to stabilise the euro-zone, and those that do not want to become euro members, especially the UK, but also Denmark. The Fiscal Compact is an international agreement concluded by 25 Member States outside the context of the EU institutional framework. Most of what it contains in terms of economic governance at the European level could have been adopted through EU legislation or by means of a modification of Protocol No. 12 on the excessive deficit procedure. However, since the governments of the UK and the Czech Republic abstained from signing an amendment to the existing Treaties, the remaining Member States decided to proceed with an intergovernmental treaty outside the existing Treaties but still using the Union institutions of all 28 with some legal review provided by the CJEU.⁵⁹ The European Commission is confined to reporting on whether a contracting state has breached its obligation to implement the balanced budget rule and/or to adopt a correction mechanism, with no power to refer compliance to the CJEU.⁶⁰

The path of intergovernmental treaties by Eurozone members by now further includes the European Stability Mechanism (ESM) and the Euro-plus Pact (including a larger number of countries). The pre-cursor of the ESM, the European Financial Stability Facility (the EFSF) was adopted outside the EU legal framework. In the margins of a meeting of the Ministers of Economy or Finance, the ECOFIN Council, the members of the Council from the (then) 16 Euro area countries 'switched hats' and transformed themselves into representatives of their states at an

⁵⁸ See more generally on the problem of dominant epistocracy as applied to security governance, E. Eriksen, 'Governance Between Expertise and Democracy: The Case of European Security' (2011) 18 *JEPP* 1169-1189.

⁵⁹ See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. For an extensive analysis see P. Craig, 'The Stability, Coordination and Governance Treaty: Principles, Politics and Pragmatism' (2012) 37 *ELRev* 231.

⁶⁰ On the issue whether the EU institutions can be 'borrowed' by the Member States when implementing an international agreement concluded outside the EU legal framework, see contra S. Peers, 'Towards a New Form of EU Law? The Use of EU Institutions Outside the EU Legal Framework' (2013) 9 *European Constitutional Law Review* 37. See too P. Craig, 'Pringle and the Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 *European Constitutional Law Review* 263.

intergovernmental meeting.⁶¹ In that capacity they adopted an executive decision by which they committed themselves to constitute the EFSF outside the EU legal framework and which became immediately operational upon signature by the representatives of the governments without the need to go through ratification by their national parliaments. They established the EFSF as a private company established under Luxembourg law of which the 17-euro states are the only shareholders. By using 'a curious mixture of public international law and private law, a large part of the Council parted company with the Commission and the European Parliament.'⁶² At a later stage, the ESM, the permanent successor of the temporary EFSF was created by means of a fully-fledged treaty between the 17-euro member states even though arguably a EU legal instrument could have been used.⁶³ The ESM was constituted as a separate international organization established under international law rather than as an EU agency. Its legality has been found by the CJEU to be unobjectionable.⁶⁴

It appears from the above that it is not just that the European Council as a formal EU institution is taking the really leading decisions –a smaller group within the European Council may change hats and convert itself into another entity with fewer participants if it needs to because of a looming veto or otherwise and adopts decisions outside the EU altogether. It does this largely *en marge* of a (European) Council meeting. As far as the Council is concerned, the non-euro area Member States can anyway not vote on euro area issues. The smaller group votes, e.g. by the ESM Board of Governors, are done on the margins of the Eurogroup, not on the margins of the subsequent ECOFIN Council meetings. A variety of clever legal constructions are thus used that are tailor-made to each situation - the view being seemingly taken that there is no alternative. The 'extra-mural' decisions are in any

⁶¹ See for details, B. de Witte, 'Using International Law in the Euro Crisis: Causes and Consequences' (2013) Arena working paper no. 4. Available at <http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2013/wp4-13.pdf> (last visited 23 September 2013).

⁶² *ibid*, 7.

⁶³ See, for example, C. Koedooder, 'The *Pringle* Judgment: Economic and/or Monetary Union?' (2013) 37 *Fordham International Law Journal*, forthcoming .

⁶⁴ Case C-370/12 *Pringle v Government of Ireland, Ireland and the Attorney General* [2012] not yet reported. For a detailed analysis see B. de Witte and T. Beukers, 'The European Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: *Pringle*' (2013) 50 *CMLRev* 805 and V. Borger, 'The ESM and the European Court's Predicament in *Pringle*' (2012) 14 (Special Issue) *German Law Journal* 113.

event binding under international law and are subject to some of the constraints of the EU system. If this is the fire brigade of a more politically integrated future EU, it is arguably one that is, like Schengen when it functioned outside of the EU, even more dominated by executives than was the case with the traditional Community method.

The Council of the EU legislates, negotiates and executes

Below the European Council in the (national) executive hierarchy of the EU is the Council - the body originally conceived as the principal decision-making body for European integration. The Council of Ministers, as it was initially known, was designed as *the* political decision-making centre among the institutions of the Union and its predecessors.⁶⁵ It is inter-governmental in conception and composition and has been described as 'a complex and chameleon like beast.'⁶⁶ The Council continues to be perceived as mainly a political organ with (both formal and substantive) legislative power (either autonomous or shared with the European Parliament depending on the policy area). National ministers are predominantly members of the executive power at the national level and legislators at the European level. The residual executive power of the (European) Council would then be vested in the ministers' role of national executives. With the application of qualified majority voting over a wide range of areas individual Member States can be outvoted in Council even if consensus remains the main working method in practice.⁶⁷

After Lisbon the Council's core role as a legislative body became even more prominent.⁶⁸ This legislative power is shared with the European Parliament. Its composition of national ministers and (at the lower levels) national civil servants means that even in a context where the outcome is legislation with direct effect and supremacy, its self-perception is that it remains a forum for intergovernmental

⁶⁵ See W. Wessels, 'The EC Council: The Community's Decision-Making Centre' in R. Keohane and S. Hoffmann (eds), *The New European Community: Decision-Making and Institutional Change* (Boulder CO: Westview Press, 1991), 133. See, in general terms, F. Hayes-Renshaw and H. Wallace, *The Council of Ministers* (Basingstoke: Palgrave Macmillan, 1st edn, 1997).

⁶⁶ H. Wallace, 'The Council: An Institutional Chameleon?' (2002) 15 *Governance* 325, 342.

⁶⁷ Van Middelaar, n 37 above.

⁶⁸ See, in general, R Thomson, *Resolving Controversy in the European Union: Inputs, Processes and Outputs in Legislative Decision-Making before and after Enlargement* (Cambridge: Cambridge University Press, 2011).

negotiations among representatives of the executive power of the Member States.⁶⁹ The operating modus of the Council is still today grounded in conventions of diplomacy and hark back to a different era when the precursor of the EU, the EEC, could be considered as embodying a special form of international relations among the governments of the Member States.⁷⁰ Legislation was originally adopted in the context of the EU (and its predecessors) by a process of diplomatic negotiations among the Member States in the Council. Diplomats typically embrace secrecy as part of their working method.⁷¹ The Council today remains ambiguous about its 'legislative' preparation and in particular the preparation of its own collective position seeking always to ensure that the individual Member States can 'negotiate' freely in a 'blacked out' space.⁷²

At the same time the Council is clearly more than an arena for intergovernmental negotiations. It is an institution with an institutional memory and institutional preferences. Institutional memory directly results from the centralization of the administrative functions of an international organization. This includes keeping the records, minutes and archives.⁷³ As a result the Secretariat also becomes a source of co-ordination, coherence and continuity in the Council's work.⁷⁴ The Council General Secretariat developed into its institutional memory and it also functions as a bridge between various chairs. Its officials support not only the Council in all its formations, but also its preparatory bodies such as the Committee of Permanent Representatives (COREPER) and the various working groups. In addition, the hierarchically inferior Council is now 'joined' and linked in concrete terms to the European Council by the Council General Secretariat. Another clear link is the Legal Service of the Council, which given that the European Council does not

⁶⁹ Naurin, n 26 above.

⁷⁰ See D. Curtin, 'Judging EU Secrecy' (2012) *Cahiers de Droit Européen* 459.

⁷¹ A. Colson, *Secret et transparence à l'égard de tiers en négociation. Contribution à une histoire de la négociation internationale* (PhD thesis), 47-99. See also A. Colson, 'The Ambassador Between Light and Shade: The Emergence of Secrecy as the Norm for International Negotiation' (2008) 13 *International Negotiation* 179.

⁷² See further Case C-280/11P *Council v Access Info Europe*, judgment of 17 October 2013, nyr.

⁷³ See, H. Dijkstra, *Policy-Making in EU Security and Defence. An Institutional Perspective* (Basingstoke: Palgrave Macmillan, 2013), 37.

⁷⁴ See, also, T. Christiansen and S. Vanhoonacker, 'At a Critical Juncture? Change and Continuity in the Institutional Development of the Council Secretariat' (2008) 31 *West European Politics* 751.

have its own advises and represents the European Council (for example in the *Pringle* case when the European Council intervened for the first time).⁷⁵

Due to the rotating nature of the Council Presidency, national governments are given the opportunity to influence the political priorities of the EU, and the visibility of the EU is increased due to the involvement of national politicians. The advent and practice of the European Council has however clearly affected the ability of a Council presidency changing hands every 6 months to perform a concerted agenda-setting role that is long-term oriented and aims to find solutions beyond the common denominator. The European Council has, in effect, provided such political leadership in recent years, and not the Council Presidency even with the advent of more supranational team Presidencies in 2007.⁷⁶ On the other hand, useful management and organisation tasks are efficiently performed by the rotating Council presidency. In addition, the Council Presidency seeks to find solutions aimed at the common denominator and facilitates wider group processes (which increasingly include negotiating with the European Parliament in co-decision).⁷⁷

The introduction of 'political union' in the Treaty of Maastricht twenty years ago changed already in a significant way the nature of the Council and meant that it had to become 'operational' in an executive manner that was not originally envisaged. In many ways its executive type tasks were parallel to those of the Commission but in the newer sensitive policy areas of foreign policy and justice and home affairs.⁷⁸ The structures of the Council itself and in particular the Council General Secretariat acquired a powerful role in these years, especially with regard to areas relating to internal security and external security and foreign affairs.⁷⁹ In this field the Secretariat played an important and influential role in the preparation and implementation of civilian and military missions⁸⁰ and, during missions, it fulfilled

⁷⁵ See De Witte and Beukers, n 64 above, 1.

⁷⁶ The principle of Team Presidencies in the Council came into force on January 1 2007. See Council Decision (2006/683/EC, Euratom) of 15 September 2006 adopting the Council's Rules of Procedure, O.J. L 285/47.

⁷⁷ See, further, A. Schout and L. van Schaik, 'Reforming the EU Presidency?' (2008) 6 *Journal of Comparative Government and European Policy* 35 and A. Cianciara, 'Rotating Council Presidency within the Post-Lisbon Institutional Dynamics: Politically Irrelevant?' (2012) 15 *Yearbook of Polish European Studies* 27.

⁷⁸ See further, Curtin and Dekker, n 29 above.

⁷⁹ See Curtin and Dekker, n 29 above and S. Vanhoonacker, 'At a Critical Juncture? Change and Continuity in the Institutional Development of the Council Secretariat' (2008) 31 WEP 751.

⁸⁰ See, further, in detail, Dijkstra, n 73 above.

certain implementing tasks.⁸¹ Some things changed further when the Treaty of Lisbon entered into force at the end of 2009.⁸² The EEAS was formed from the merger of the external relations services of the European Commission with those of the Council Secretariat and the addition of some seconded national diplomats.⁸³ This is now the most visible expression of Europe's foreign affairs administration and a significant component of EU executive foreign affairs power.⁸⁴ From the viewpoint of the Treaty, the Council takes CFSP decisions. It continues to exercise an important role for example when it comes to sanctions for the financing of terrorism where a firm legal basis is required.⁸⁵

The steady reinforcement over the years of other 'backstage' actors, such as COREPER provide the backbone that enables the Council to function as an institution, aided and abetted by often very powerful, (quasi-) autonomous committees such as the Political and Security Committee (PSC).⁸⁶ Composed of national ambassadors permanently based in Brussels, it has been described as the 'linchpin' of the system of foreign and security policy⁸⁷ and as the 'executive board' of the CFSP.⁸⁸ Also of considerable importance are the various working groups and working parties.⁸⁹ Research suggests that over time these institutions have gained considerable autonomy from the governments they are meant to serve.⁹⁰ The national bureaucratic input into Council decision-making starts at the important Working

⁸¹ See A. Missiroli, 'Euros for ESDP: Financing EU Operations' (2003) Occasional Paper 45, Paris, EU Institute for Security Studies.

⁸² See, in general, P. Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford: Oxford University Press, 2010).

⁸³ *ibid*

⁸⁴ D. Thym, 'The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive' (2011) 7 *European Constitutional Law Review* 453.

⁸⁵ See, generally, C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford: Oxford University Press, 2009). See also Joined Cases C-584/10P, C-593/10P and C-595/10P *Commission, Council et al. v Kadi*, n 2 above.

⁸⁶ A Juncos and C. Reynolds, 'The Political and Security Committee: Governing in the Shadow' (2007) 12 *European Foreign Affairs Review* 127.

⁸⁷ S. Duke, 'The Linchpin COPS: Assessing the Workings and Institutional Relations of the Political and Security Committee' (2004) European Institute of Public Administration Working Paper 05/5, Maastricht: EIPA.

⁸⁸ Thym, n 84 above.

⁸⁹ Juncos and Pomorska, n 27 above.

⁹⁰ S. Vanhoonacker, H. Dijkstra and H. Maurer, 'Understanding the Role of Bureaucracy in the European Security and Defence Policy: the State of the Art' (2010) in S. Vanhoonacker, H. Dijkstra and H. Maurer, 'Understanding the Role of Bureaucracy in the European Security and Defence Policy' (2010) European integration online Papers (EIoP), Special Issue 1, available at <http://eiop.or.at/eiop/texte/2010-004a.htm> (last visited 23 September 2013).

Party level.⁹¹ Here, too, research suggests that national representatives become socialised over time into group norms that may establish a 'we-feeling' among the policy makers. This indicates more generally moves *de facto* beyond strict 'inter-governmentalism'.⁹²

Evolving working practices of EU executive actors

Informational asymmetry and the diplomatic paradigm

The democratic deficit of the EU has been discussed for decades.⁹³ The EP, which will soon be elected by the citizens of the 28 EU Member States, has become a key player in the EU decision-making system. Yet European elections are seen as 'second-order' elections;⁹⁴ they are popularity tests for the national incumbent parties rather than opportunities for real public deliberation on European issues.⁹⁵ Much of the debate in the run up to the EP elections in 2014 focuses on strengthening the accountability relationship between the Commission and the EP, in particular by having a directly elected Commission President at some point in the future.⁹⁶ The evolving relationship between the directly elected EP and the Commission as an important part of the supranational executive (if not the 'government' in any national sense)⁹⁷ is of course important but it will not solve the predominant source of executive dominance in the EU: the lack of democratic accountability of national Prime Ministers in the European Council and under that in terms of power hierarchies the accountability of national Ministers and national civil servants in the

⁹¹ See Naurin, n 26 above.

⁹² Juncos and Pomorska, n 27 above, 1098

⁹³ See, for example, P. Pescatore, 'Les exigences de la démocratie et la légitimité de la Communauté européenne' (1974) 10 *Cahiers de Droit Européen* 499; J.H.H. Weiler, U.R. Haltern and F. Mayer, 'European Democracy and its Critique' (1995) 18 *West European Politics* 4; G. Majone, 'Europe's 'Democratic Deficit': The Question of Standards' (1998) 4 *European Law Journal* 5.

⁹⁴ See however, Commission Recommendation on enhancing the democratic and efficient conduct of the elections to the European Parliament, C(2013)1303 final, Brussels, 12 March 2012.

⁹⁵ See, Y. Papadopoulos, *Democracy in Crisis? Politics, Governance and Policy* (Routledge, 2013) 103.

⁹⁶ See, eg, A. Føllesdal and S. Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533, 554. See further, M. Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice' (2012) RSCAS Policy Papers 11, 19.

⁹⁷ See the discussion by P. Dann, 'The Political Institutions' in A. Von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Oxford: Hart Publishing, 2010), 253.

Council of Ministers. Yet only five years ago the Treaty of Lisbon was hailed as a significant milestone in reducing the deficit in democratic accountability at the European level, as the European Parliament became, virtually across the board, a co-legislator.⁹⁸ This was supposed to be a huge injection for what is known as the directly democratic route of legitimation:⁹⁹ through direct elections the EP would 'represent' the peoples of Europe in the legislative process.¹⁰⁰ This Treaty in addition gave the national parliaments a collective role on legislative subsidiarity (Protocol 2, TEU) and stressed the important role of national parliaments in indirectly legitimating the activities of their (prime-) ministers in the Councils of the EU (Article 10 TEU).

The *indirect* democratic link to the Councils goes via national elections, national parliamentary control over national government, and prime ministerial instruction giving.¹⁰¹ This is what Article 10 of the Treaty of Lisbon explicitly refers to - the link to the electoral process at the national level as justification for what happens at the European level.¹⁰² On this reasoning the representation of Member States in the Council and in the European Council is a vital source of democratic legitimacy. The State or rather the 'democratically organised peoples' of the Member

⁹⁸ See, eg, (then EP President) J. Buzek, 'Welcoming the Lisbon Treaty,' Spiegel online, 30 November 2009: 'The treaty represents an era of increased democracy in the European Union and gives a huge boost to the powers of the European Parliament.' Available at <http://www.spiegel.de/international/europe/welcoming-the-lisbon-treaty-a-change-for-the-better-in-europe-a-664338.html> (last visited 25 June 2013). For a more nuanced view, see J. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, 2010) and S. Sieberson, 'The Treaty of Lisbon and Its Impact on the European Union's Democratic Deficit' (2007) Working Paper Series. Available at SSRN: <http://ssrn.com/abstract=1628869> or <http://dx.doi.org/10.2139/ssrn.1628869> (last visited 27 September 2013).

⁹⁹ The lack of electoral equality featured prominently in the judgment of the German Constitutional Court on the Lisbon Treaty: BVerfG, *Lissabon-Urteil*, 2 BvE 2/08 of 30 June 2009. In the Court's view, 'the European Parliament is not a representative body of a sovereign European people. (...) [It] is designed as a representation of peoples in the respective national contingents of Members, not as a representation of Union citizens in unity without differentiation, according to the principle of electoral equality' (par. 280). See contra, C. Schoenberger, 'Lisbon in Karlsruhe: Maastricht's Epigones at Sea' (2009) 10 *German Law Journal* 1201, 1211-1216, D. Halberstam and C. Möllers, 'The German Constitutional Court Says 'Ja zu Deutschland!' 10 *German Law Journal* 1247.

¹⁰⁰ It is beyond the scope of this article to discuss the problems of 'representation' of the EP in detail but see P. Mair and J. Thomassen (eds), *Political Representation and European Union Governance* (London and New York: Routledge, 2011).

¹⁰¹ *ibid*, and special issue of *Western European Politics*, n 44 above.

¹⁰² See further, D. Curtin and J. Mendes, 'Transparence et participation: des principes démocratiques pour l'administration de l'Union Européenne' (2011) *Revue Française d'Administration Publique* 101.

States emerge as a subject of democracy.¹⁰³ Yet this formal presentation is at odds with the empirical realities that are highlighted below. There are real challenges to establishing the links of accountability - on which Article 10(2) TEU relies - of the democratically elected or democratically accountable members of Government and Heads of State and Government for their actions in the EU institutions they compose. The fact remains that the Council (co-) adopts legislative acts that are directly applicable in the national legal orders or need to be implemented by national authorities, and both the Council and the European Council adopt executive decisions with real effect on Member States and their citizens.

The fact that national governments are key actors at the European level means that to a large extent national parliaments are structurally outsiders, some even speak of them as 'passive bystanders'.¹⁰⁴ National parliaments have on the whole been slow to reassert control of decisions that are taken beyond the confines of the nation-state, and whatever access they have to European politics is mostly filtered through their own executives.¹⁰⁵ It is not only a question of not being structurally consulted - it also (and crucially) has to do with a lack of timely or indeed often any information in advance of decision-making. In this context it is hard for national parliaments to compensate the information advantage that the executives enjoy because of their direct engagement in European politics. As Robert Putnam has famously pointed out many years ago, executives may well want to exploit their innate information advantage by misrepresenting at the national level the negotiation situation they face at the international level. That's the traditional paradigm of diplomacy in international relations.¹⁰⁶ Control over secrecy and openness gives power: it influences what others know and thus what they choose to do.¹⁰⁷ The culture and rules on secrecy are extensive and enforced by the Council in particular in a manner that affects very directly access to information by national

¹⁰³ See, A. von Bogdandy, 'Founding Principles' in A. Von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Oxford: Hart Publishing, 2010) 49.

¹⁰⁴ B. Crum and J. Fossum, *Practices of Inter-Parliamentary Coordination in International Politics. The European Union and Beyond* (ECPR Press, 2013).

¹⁰⁵ See A. Cygan, 'The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments' (2011) 36 ELR 478.

¹⁰⁶ R. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 *International Organization* 427.

¹⁰⁷ G. Simmel, 'The Sociology of Secrecy and of Secret Societies' (1906) 11 *The American Journal of Sociology* 441, 482.

parliaments.¹⁰⁸ If executive officials are given largely unchecked power to conceal from the public and from parliament(s) whatever information they consider sensitive, then part of the essential machinery of democracy is inevitably disconnected.

It seems that both the publicity and the deliberative quality of parliamentary debate is under challenge for both the EP and the national parliaments. The reason lies in large part in the working practices of both the European Council and the Council. It is also because of the rules agreed internally at the EU level as to the non-public nature of many of the crucial documents under discussion. Secret, behind closed doors meetings and discussions and no prior public debate makes effective parliamentary input difficult at any level. At the same time it seems that parliaments – in particular the EP – become sucked into the executive mode of diplomatic and secret negotiations and discussions. This relates both to (early) legislative processes and to non-legislative processes, in particular before the European Council. How can national parliaments be even marginally in the loop during on-going legislative and non-legislative processes if they do not know specifically what national civil servants and (prime-) ministers are putting into the process? I now explore two distinct challenges in this regard. First, in the context of legislative preparation how visible is the Member State input into the ‘low level’ working parties? Second, in the context of ‘high level’ European Council decision-making, what role does the emerging informal and ‘deliberative’ working method play?

Challenging low-level executive secrecy

The working method or process of the Council internally in terms of its preparation of legislation is that Member States first input their views in a rolling ‘negotiation’ process by national civil servants in Council Working Parties of which there are now some 158.¹⁰⁹ In these working party meetings, Commission proposals for legislation are discussed, often including also the latest point of view from the EP, and reformulations are sought that are acceptable both to the Member States and to the Commission. Social science research shows however that many national civil servants who participate regularly in committees at the European level become

¹⁰⁸ See statement by Dutch foreign minister Timmermans to the Dutch Parliament regarding European Council information, Dutch Second Chamber documents 22 112, no 1581, 12 March 2013.

¹⁰⁹ General Secretariat of the Council, ‘List of Council Preparatory Bodies’ (2013) Document No. 5581/13.

'socialised' into this level and develop a working modus that is more akin to deliberation than negotiation in the national interest in line with a strictly circumscribed mandate from the political level.¹¹⁰

The Council has consistently argued that identification of the Member States' delegations that make various legislative proposals at working party level (but also at Council level) would seriously undermine the institution's decision-making process. The Council basically argues that to allow access to the legislative kitchen at this early stage could destroy the ability to 'pre-cook' decisions at the Council level or even to reach boiling point and thus would impede significantly the Council's decision-making process on legislation. The Council perceives itself as engaging in a type of diplomatic 'negotiations' that have to be kept secret in order not to damage the chance of reaching a consensus. The actual input of Member States in this view remain hidden behind notions of diplomacy applied in the context of a legislative procedure and this influences the usual way of doing business within the Council. National parliaments may of course individually make their own arrangements on an ongoing basis with their own governments but if the Council prepares minutes of working party meetings with the governments' names blacked out then it is not evident that many national parliaments will in practice receive more information from their governments at a later stage (although some do e.g. Sweden). The full minutes will not necessarily be classified but will nonetheless be kept secret or 'limited' -for internal use only- and are not intended to be shared 'publicly', even with other public actors such as national parliaments.¹¹¹ The same kind of diplomatic thinking now permeates in a very substantial fashion the early stages of co-decision with the European Parliament.¹¹² The European Parliament too has been sucked into a system of law making at the European level where the executive negotiation of legislation behind closed doors in early stage legislative processes has become the

¹¹⁰ G.J. Brandsma and J. Blom-Hansen, 'The EU Comitology System: Intergovernmental Bargaining and Deliberative Supranationalism?' (2009) 47 *JCMS* 719 and G.J. Brandsma, 'Backstage Europe: Comitology, Accountability and Democracy in the European Union' (2010) Utrecht University: PhD thesis. But see, contra, F.M Håge. (2008), "Decision-Making in the Council of the European Union: The Role of Committees", PhD thesis, University of Leiden.

¹¹¹ See further Curtin, n 15 above.

¹¹² See further, A. Stie, *Democratic Decision-making in the EU: Technocracy in Disguise?* (Routledge, 2012). See too, A. Héritier and C. Reh, 'Codecision and its Discontents: Intra-organisational Politics and Institutional Reform in the European Parliament' (2012) 35 *West European Politics* 1134.

norm. Here too, it may only be through litigation one day that the political actors will be forced to change those of their institutional working practices that undermine fundamental principles of democracy and publicity at the European level.

In a pending court case, Advocate General Cruz Villalón has opined that the entire early legislative procedure before the Council involving the input by the various Member States must be compared to a *national* legislative procedure. Owing to the characteristics of law making at the EU level the requisite level of democratic legitimacy can only be bestowed by 'a procedure based on the principles that have traditionally governed the workings of national legislatures that are representative in nature.'¹¹³ On this reasoning, democratic accountability requires that the identity of those participating in the debate, and in particular the terms on which they are doing so, be made known.¹¹⁴ Member States taking part in an EU legislative procedure 'as members of an institution are more like the common perception of a national legislature than they are like a sovereign body playing a role in relations governed by international law.'¹¹⁵ This really represents a paradigm shift in thinking about the Council's role in the legislative procedure and means that, if followed by the Court, the Council must be fully open as 'openness is an inherent point of the working method of a legislature.'¹¹⁶ It follows that in the opinion of this Advocate General 'there is no such thing as an "internal opinion"' in the context of a legislative procedure, even in its very early stages.¹¹⁷ This reasoning fleshes out the notion of democratic accountability at the supranational level. The Court of Justice dismissed the appeal by the Council against the judgment in favour of the applicant, *Access Info Europe*.¹¹⁸ In my opinion it implies that the Council's own rules on keeping secret any documents in the legislative procedure as such, whether or not these papers reveal the negotiating position of individual Member States, are arguably no longer valid. This definitive judgment upholding openness in the legislative procedure should prod the Council to change its own internal rules to take account of its function as a legislature and its democratic legitimacy in this context.

¹¹³ AG opinion of 16 May 2013, n 72 above, par. 43.

¹¹⁴ *ibid*, par. 71.

¹¹⁵ *ibid*, par. 69.

¹¹⁶ *ibid*, par. 51.

¹¹⁷ *ibid*

¹¹⁸ Judgment of the Court of Justice of 17 October 2013, nyr.

In the context of international relations negotiations the Council maintains similar levels of secrecy, arguing that a 'blacked out' non-public space is imperative to enable effective diplomatic negotiations with third parties. International agreements are traditionally regarded as agreements between two contracting parties (the EU and a third state or international organization) with no direct effects on citizens and limited parliamentary involvement in most national systems. A more substantive understanding of the nature of some recent EU international negotiations however reveals direct and indirect effects on the rights and interests of citizens.¹¹⁹ Practice reveals some of the highly political issues that the EU negotiates with third states or other international organizations, some clearly having a legislative-type impact or effect on citizen's rights or interests. One example is the bilateral agreement between the EU and the US allowing the US to have access to and process financial messaging data (of individuals, including EU citizens) stored by SWIFT, a private company based in the EU.¹²⁰ The European Parliament vetoed an earlier version of this agreement in 2011.¹²¹ During the course of these international negotiations Members of the European Parliament were refused access to (classified) documents despite enjoying a certain 'privileged' access to information under the then existing rules.¹²² Prior to the Council authorisation to open negotiations with the US on this agreement, a Council Legal Service opinion on the competence of the EU to negotiate such an agreement and its legal basis was distributed within the Council and to the Member States. The legal service opinion was classified as RESTRICTED, which is the lowest level in the Council's security classifications and falls outside the scope of Article 9 of the Access Regulation on 'sensitive' (classified) documents.¹²³ According to the Council, irrespective of whether the legal basis chosen for the negotiations was the correct one, any disclosure of information relating to it would have affected the European Union's negotiating position and could have had a negative impact on the substance of the diplomatic negotiations.¹²⁴

¹¹⁹ See further, D. Curtin, 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?' 50 CMLRev 423.

¹²⁰ TFTP agreement, n 5 above.

¹²¹ See J. Monar, 'The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and its Implications' (2010) 15 *European Foreign Affairs Review* 143.

¹²² See further, G. Rosén, 'Can you Keep a Secret? How the European Parliament got Access to Sensitive Documents in the Area of Security and Defence' (2011) RECON Working Paper, No. 22.

¹²³ See further, Case C-350/12 P *In 't Veld v Council*, appeal pending.

¹²⁴ See Case T-529/09 *In 't Veld v Council* [2012] not yet published, par. 42.

Challenging high-level executive informality

Deliberation is a quality of parliaments in principle where a public debate can take place prior to decision-making. The challenge is to ensure that it can take place within parliaments themselves as public and deliberative arenas. But what if executive actors not only negotiate diplomatically as a means of decision taking but also internally improve their own deliberative capacity at the highest levels of decision? Does this executive 'space to think' and decide have consequences for the ability of parliaments at any level to hold those actors to account or to participate in decision taking (as part of their own deliberations or otherwise) in a timely fashion? Does a consensus dependency by actors such as the European Council, the Eurogroup and the Council pre-empt effectively and timely parliamentary oversight? Or is Europe's 'deliberative intergovernmentalism' as it has been called ¹²⁵ contributing overall to democratic legitimacy?

The EU's response to the economic and financial crisis puts at the forefront the (novel) working methods of the European Council and also of the Eurogroup in recent years. Puetter has highlighted how in recent years informal Eurogroup meetings and informal ECOFIN breakfasts enable Ministers (and one adviser) to have face-to-face discussions and react to interventions. Such meetings have become an important venue for EU policy debates in which ministers try to reach a common understanding on specific policy challenges. The use of informal working methods has become much more extensive with policy debates now increasingly dominating the agenda of such meetings. As one EU official explained: 'Sometimes the breakfast lasted for three hours while the normal ECOFIN was only one hour. What was new was that they were also really negotiating on language {for common positions}.'¹²⁶ The allocation of more time to the informal elements of the ECOFIN meeting appears to be even more significant since ministers tend to leave the meetings after the -informal- lunch and leave the conduct of the rest of the meeting to their deputies. The finalization of detailed discussions over policy is now taking place at the highest levels of decision-making and follows a conscious choice on the part of the policy makers in question.¹²⁷

¹²⁵ Puetter, n 42 above, 161-178.

¹²⁶ *ibid*, 173.

¹²⁷ *ibid*, 175.

A similar pattern and working method is arguably also emerging in the context of the European Council, in particular in relation to economic governance issues. Already in one of his first statements as new permanent president, Herman van Rompuy defined the adjustment of working methods as one of his main priorities.¹²⁸ He called for more focussed sessions with fewer officials and a distinction between formal and informal meetings. He also suggested that there should be fewer written documents tabled for discussion, thus allowing more room for open debates between participants. Finally, von Rompuy considered the communication of clear results of the meetings crucial for the acceptance by the public of the work of the European Council. In the words of Puetter regarding such informal deliberative working methods: 'policy deliberation spreads when the negotiation setting provides for the possibility to have open debates and when policy-makers perceive specific policy issues as common challenges. As the case of the co-ordination of responses to the crisis demonstrated, uncertainty reinforces the readiness to engage in open debates.'¹²⁹

The reference to 'open debates' is something of a misnomer as the debates in question are taking place behind closed doors and are informed (as anticipated by von Rompuy) by fewer documents.¹³⁰ The issue of access to the documents of the European Council, if they exist, is underexplored both in relation to the public and in relation to parliaments. The rules of procedure of the European Council specify that the European Council 'may decide' to make public the results of the votes regarding the decisions it adopts, the statements in its minutes and the items relating to the adoption of decisions to make these elements public.¹³¹ The rules on public access to Council documents 'apply *mutatis mutandis* to European Council documents' but it is specifically stated that the deliberations of the European Council are, as a rule, covered by the obligation of professional secrecy.¹³² Given that the Council General Secretariat for now manages the public access provisions for the European Council as well it can be expected that similar rationales for secrecy will prevail in that context.

¹²⁸ T. Barber, 'EU to Plan ten Years of Growth' (2010) *Financial Times*, 5 January; F. Riccardi, 'A Look Behind the News' (2010) *Agence Europe*, 5 January and H. Van Rompuy, 'The Challenges for Europe in a Changing World' (2010) *European Council Press Release*, PCE 34/10.

¹²⁹ Puetter, n 42 above, 176.

¹³⁰ See too. J. Tallberg, 'Bargaining Power in the European Council' (2008) 46 *JCMS* 685, 686.

¹³¹ Article 10(1) of the Rules of Procedure of the European Council (European Council Decision of 1 December 2009 adopting its Rules of Procedure, OJ L 315/52, emphasis added).

¹³² *ibid*, Articles 10(2) and 11. Wessels et al., n 51 above, 6.

That is likely to include a heavy reliance on the process rationale for secrecy – that publicity prior to decision-making would hinder the effectiveness and the ability of the (Prime-) Ministers to take decisions. Unlike the Council, the European Council does not produce an Annual Report on how it applies the public access provisions and the numbers of public and non-public documents in its possession. Further empirical work is needed to unveil what exactly the European Council is withholding from public access and its rationale for so doing. Extramurally, it appears that national courts may order release of previously secret documents in the public interest and against the wishes of EU Member States and co-contracting parties. For example, when Finland demanded collateral from Greece in the context of the Greek loan package, Greece insisted on its terms being kept secret. But the Finnish Supreme Administrative Court held that the terms of the Finnish-Greek collateral agreement were a matter of public interest and so they should be made publicly accessible, in their entirety, with the exception of any credentials relating to the co-contracting banks.¹³³ This shows how national constitutional and administrative rules may force more openness at the European level. When it comes, however, to access by parliaments to information in advance of actual decision-making, the picture is quite varied and fragmented and depends on the national constitutional arrangements and the manner in which these have been implemented. This issue of the balance between the need for executive secrecy and the requirement of parliamentary oversight in a democracy will now be addressed more specifically.

Given the dominant paradigm of diplomatic type negotiations including for (quasi-) legislation, what role has representative democracy to play in checking executive dominance both national and supranational? After all, a key challenge for executive accountability in the EU is that there is ‘no single, comprehensive and integrated European executive body’.¹³⁴ On the contrary, the fact that the EU executive is composed to a significant extent of national governments means that these governments are accountable for implementation through the usual domestic channels, in particular the national parliaments. This does not exclude at the same time a complementary role for the European Parliament as the supranational democratic accountability forum. Yet, have these parliaments –national and

¹³³ See, press release by the Supreme Administrative Court of 14 May 2013, http://yle.fi/uutiset/court_orders_release_of_secret_greek_agreement/6641511 (last visited 27 September 2013).

¹³⁴ Crum, n 32 above.

European –been hollowed out and blacked out to such an extent that they cannot perform their functions as democratic accountability forums? I will now look at the practices that have evolved in various parliaments, national and European, as a response to some of the challenges outlined above.

Evolving oversight practices of parliaments in Europe

Secrecy obstructs the standard mechanisms for oversight utilised by democracies – elections, public opinion and deliberation.¹³⁵ This does not mean that executive actors in a democracy may not legitimately claim secrecy but it will need to be balanced against the citizens' right to information and democratic decision-making and oversight. The problem is that since the calculation of harm caused by the disclosure of information cannot be undertaken in public without revealing the very information, this task is delegated to the executive. In most countries the rules on the provision of information allow for 'executive privilege' where the parliament does not need to be directly informed. Sagar compares this to asking the suspect to provide the evidence.¹³⁶ 'Mediation' promises the benefits of oversight without the potentially adverse consequences of having such oversight conducted in public view.¹³⁷ The general mechanism of mediation resolves in theory the conflict between democratic oversight and executive secrecy by having citizens delegate the task of oversight to the judiciary and to the legislature.¹³⁸ In the EU context this has meant a role for parliaments in the EU in 'overseeing' the executive in policy making which makes use of both classified information (EUCI) and information which is not classified but is still kept secret (CUI). This exists alongside the more established and, in this regard, supplementary role of the judiciary in balancing public access to information against the executive's right to secrecy and in prodding executive actors at all governance levels to provide parliaments with fuller and timelier information in advance of decision-making.¹³⁹

¹³⁵ R. Sagar, 'On Combating the Abuse of State Secrecy' (2007) 15 *The Journal of Political Philosophy* 404, 405.

¹³⁶ *ibid*, 408.

¹³⁷ *ibid*, 410.

¹³⁸ F. de Londras and F. Davies, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *Oxford Journal of Legal Studies* 19.

¹³⁹ In general on the role of European judges in this regard see, Curtin, n 70 above. See more generally, M. Everson and C. Joerges, 'Who is the Guardian of Constitutionalism in Europe

In a representative democracy worthy of its name one of the truly distinctive qualities of parliaments is their publicness, the fact that they constitute a public forum as opposed to an accountability relationship among peers. Public actors performing public activities require publicity for legitimacy. The value of publicity is under challenge also at the European level. Even if we have more widespread involvement of the EP post-Lisbon on legislation, debates have moved more behind closed doors – not less. As a result of the very widespread use in practice of so-called ‘trialogue meetings’ *secret* bargaining and negotiations take place among the legislative partners (Council and the EP) up to the moment of the first reading in the EP.¹⁴⁰ Another virtue of parliaments as accountability forums is that they are essentially institutions for deliberation as opposed to private negotiations. But if the executive power denies parliaments, national and European, crucial information by relying on its own internal rules on document security and the effectiveness of its own decision making then the role of parliaments may be eviscerated. The same may happen if parliaments are given access to categories of information (for example, ‘limited’ documents or those that are classified at lower levels not requiring security clearances) but the executive actors insist that these documents are not made public and are not discussed in public.

(Blacked out) Parliamentary access to information

The right of information of (national) parliaments is of two types. It can be document based and requires that the national parliaments be sent certain documents such as the draft annotated agenda, strategy papers, the government position and a report on the results. Alternatively it can oblige the government (prime minister) to provide explanations in an *oral form* either to a specialised committee or the plenary. In most countries the rules on the provision of information allow for ‘executive privilege’ where the parliament does not need to be directly informed. For example, in the Netherlands, the government is obliged to provide all information ‘unless such provision of information contradicts the interest of the

after the Financial Crisis?’ in S. Kroger (ed), *Political Representation in the European Union. Democracy in a Time of Crisis* (London: Routledge, 2014), forthcoming.

¹⁴⁰ See, in general, C. Lord, ‘The Democratic Legitimacy of Co-decision’ (2013) 20 *Journal of European Public Policy* 1056. See further, EP Activity Report: 14 July 2009 – 31 December 2011 (seventh parliamentary term), presented by the vice-presidents of conciliation. Available at http://www.europarl.europa.eu/code/information/activity_reports/activity_report_2009_2011_en.pdf (last visited 27 September 2013).

state.’ It is of course the executive who decides in these circumstances what is the ‘interest of the State’ and this may be a myopic executive view. Finland is the only country where the Constitution provides an unlimited right of access to information to the parliament.¹⁴¹ Yet many of the meetings with the Finnish Grand Committee are held behind closed doors because the Finnish Government has requested it to ensure confidentiality on the basis of a possible harm to the country’s international relations. This has been granted by the Grand Committee but not without extremely critical remarks concerning the problems of principle relating to the EU related pressure to conduct these debates in secrecy, underlining how ‘democracy also requires that the principles of transparency and public access to documents are realised in the development of EMU.’¹⁴²

Those parliaments that had already been given significant rights on EU affairs in general tend to be the ones leading the way regarding parliamentary influence over European Council meetings.¹⁴³ For example, if we look at Denmark, it is famous for the fact that it’s European Affairs Committee has the formal power to provide the different ministers with a negotiation mandate before Council meetings in Brussels, although this power is apparently not used a lot in practice. The same mandating system is in any event not mandatory for the control of European Council meetings and the Prime Minister. Yet, due to the political dynamic in Denmark the minority government needs to take into account the views of the opposition in order to secure majorities in the House. This makes the European Affairs Committee powerful in view of this constant bargaining between government and opposition parties. National parliaments in fact need information on the different negotiation positions of other member state governments in order to be able to make strategic interventions. The fact that the Danish Parliament has both ex-ante and ex-post control of European Council meetings makes it possible for the Danish MP’s to hold the government accountable for its negotiation position by referring to the previous statements of the Prime Ministers. We find something similar in Finland where the Finnish prime minister and government have a constitutional obligation to inform

¹⁴¹ See further, Wessels et al, n 51 above, Annex 1.

¹⁴² Statement of the Grand Committee 4/2012, *Banking Union and the Future of EMU*, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/econ/dv/finland_/finland_en.pdf See further, P. Leino and J. Salminen, ‘The Euro Crisis and its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-making?’ (2013), *European Constitutional Law Review*, forthcoming.

¹⁴³ This part draws on the country reports in Wessels et al., n 51 above.

the Grand Committee of parliament both before and after the European Council meetings of all the relevant issues and draft decisions. If needed, the prime minister and the government are also in contact with the Grand Committee during the actual European Council meetings when individual government positions can and do change on the hoof during negotiations. In Finland there have been repeated recent debates in plenary sessions in parliament with the result that the government has really been forced to justify and defend its EU policies in public – and this has also occurred when the opposition has attacked the cabinet publicly over the handling of EU matters related to the Euro crisis in particular.¹⁴⁴

There is a certain leapfrog effect of ‘best practices’ discernible among national parliaments and they are on the whole all trying hard to ‘catch up’ with the new and shifting institutional and policy realities. In the Netherlands for example, since the end of 2010, plenary debates have been scheduled in parliament before European Council summits and this practice has underlined the importance of such summits. It is a big change from the previous situation where plenary sessions were held only *after* European Council summits.¹⁴⁵ Other issues of high political importance were also debated in the plenary, for example the plans on the emergency fund for the euro-crisis were on the agenda of the plenary throughout the summer of 2011. Yet a recent debate in the Dutch parliament shows that it too is quite unhappy with the level of information it receives in advance of summits.¹⁴⁶ In the United Kingdom the fact that the country has a largely document based system means that the House of Commons simply does not get even the information that is available on time in order to engage in an informed manner with government prior to summit meetings.¹⁴⁷ The European Parliament is in a better position as it can call in representatives of the European Council (and Council) under the conditions these institutions lay down in their own Rules of Procedure.¹⁴⁸ The fact that (as we have seen) the European Council increasingly meets without formal documents hinders the role it can play in

¹⁴⁴ Wessels et al at

¹⁴⁵ See, M van der Steeg, ‘The European Council's Evolving Political Accountability’ (2010) in M. Bovens, D. Curtin and P. 't Hart (eds), *The Real World of EU Accountability: What Deficit?* (Oxford: Oxford University Press, 2010).

¹⁴⁶ Debate with Foreign Minister Timmermans, Dutch Second Chamber documents 22 112, no 1581, 12 March 2013.

¹⁴⁷ In the UK there has been it seems only one emergency plenary debate on the Stability Treaty ahead of a European Council meeting in March 2012.

¹⁴⁸ Article 230(3) TFEU. See further, A. Maurer, ‘From EMU to DEMU: The Democratic Legitimacy of the EU and the European Parliament (2013) IAI Working Papers, available at <http://www.iai.it/pdf/DocIAI/iaiw1311.pdf> (last visited 29 September 2013).

advance of decision-making. In addition the President of the European Council has to present a report to the European Parliament *after* the meetings of the European Council.¹⁴⁹ These –very thin– powers do not lead to meaningful accountability of the European Council by the EP.¹⁵⁰

There are other ways in which a ‘leap-frog’ effect on parliaments, both European and national, can be discerned. In the Netherlands, the Minister of European Affairs recently granted the Dutch parliament access to ‘limited’ documents (CUI) after it transpired from a COSAC study¹⁵¹ that it was one of the few national parliaments not to receive access to these documents. The Dutch Minister of Foreign Affairs admitted that the internal rules of the Council, applied by all EU institutions, took precedence over national rules and meant that the Dutch parliament which has just been granted access to limited documents had to keep the documents ‘secret’ even though they are not even classified at the very lowest level. The interest of the State as interpreted by the executive is that parliament cannot discuss publicly unclassified information because of internal Council rules that the government co-adopted at the European level!¹⁵² The implication is that if the trust as defined by the executive institutions in Brussels is breached then legal proceedings also against national parliaments may well follow.

Other future leap-frog effects may come from the adoption of new and cutting-edge laws on access to information and participation by national parliaments that are innovatively tailored to some of the more novel institutional realities now found within the EU political system. For example, in Germany we find an interesting recent example of the *Bundestag* being prodded by the Federal Constitutional Court to develop better information rights over the Federal Government, in particular in connection with the ESM and the Euro Plus Pact.¹⁵³ A

¹⁴⁹ Article 15(6)(d) TEU.

¹⁵⁰ Wessels et al, n 51 above, 22-23. See further, C. Fasone, ‘The Struggle of the European Parliament to Participate in the New Economic Governance’ (2012) EUI Working Papers RSC, No 2012/45, 10, 17; P. De Schoutheete and S. Micossi, ‘On Political Union in Europe: The Changing Landscape of Decision-making and Political Accountability’ (2013) *Centre for European Policy Studies* Essay No. 4/21, 9-10.

¹⁵¹ Sixteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, XLVI Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union, October 2011.

¹⁵² See statement by the Dutch Foreign Minister Timmermans to the Dutch Parliament, n 108 above.

¹⁵³ BVerfG, *Organstreit Proceedings Regarding the ESM/Euro Plus Pact*, 2 BvE 4/11 of 19 June 2012, No. (1 – 172).

little over a year later the *Bundestag* adopted a law on its participation in matters concerning the EU which included significant information rights.¹⁵⁴ It is wide-ranging and seemingly comprehensive set of provisions, covering not only the duty of notification of the Federal Government to the *Bundestag* of information on ‘the Federal Government’s decision-making process, the preparation and course of discussions within *the institutions of the European Union* and the opinions of the European Parliament, of the European Commission and *of the other Member States* of the European Union as well as the decisions that have been taken” but also of information relating to “*all preparatory bodies and working groups.*”¹⁵⁵ In addition- and this is very cutting edge and focussed on evolving empirical realities and extramural constructions outside the formal structures at times of the EU itself- it is provided that the ‘duty of notification’ covers ‘the preparation and course of discussions at *informal ministerial meetings, at euro summits* and at meetings of the *Eurogroup* and of *comparable institutions that are held on the basis of international agreements and other arrangements* which complement or are otherwise particularly closely related to the law of the European Union. The same shall also apply to all preparatory bodies and working groups.’ Before meetings of the European Council and the Council as well as the other informal and comparable (extra-mural) meetings, the notification shall consist of ‘each subject of discussion in writing and orally,’ ‘the state of negotiations as well as the negotiating line of the Federal Government and its initiatives.’¹⁵⁶ After these meetings, the Federal Government are required to provide written and oral information on their outcome. This provision also applies in the context of meetings and decisions of CFSP ¹⁵⁷and moreover the Federal Government is obliged to notify the competent committees orally about the meetings of the Political and Security Committee.¹⁵⁸ Finally, the notification to the *Bundestag* shall include *inter alia* ‘the convening of *dialogues and their proceedings* and outcome.’¹⁵⁹ Most importantly if the *Bundestag* delivers an opinion, the Federal Government ‘shall use it as a basis for its

¹⁵⁴ *Act on Cooperation Between the Federal Government and the German Bundestag in Matters Concerning the European Union*, 4 July 2013. Available at http://www.bundestag.de/htdocs_e/bundestag/committees/a21/legalbasis/euzbbg.html (last visited 25 September 2013).

¹⁵⁵ *ibid*, Sect 3(2) (authors emphasis).

¹⁵⁶ *ibid*, Sect 4(4).

¹⁵⁷ *ibid*, Sect 7(1).

¹⁵⁸ *ibid*, Sect 7(4).

¹⁵⁹ *ibid*, Sect 4(1), 2c (authors emphasis).

negotiation.¹⁶⁰The Bundestag will be granted access to the documentary databases of the EU 'that are accessible to the Federal Government.'¹⁶¹ This certainly includes 'limited' documents and 'restricted' documents. In principle it is provided that 'the documents of the EU shall...be transmitted openly.'¹⁶² Yet it is specifically provided that EU security classifications 'shall be respected by the Bundestag' and the reasons for the classification shall be explained on request.¹⁶³ The latter obligation to provide the reasons may not be fully possible if the classification has been made by a third party or by an EU institution or agency as it may also not be clear to what extent it is based on derivative sources.¹⁶⁴ As always a lot will depend on how this new law is applied in practice by the various parties (both government and parliament) and on this only time will tell.

Moving from the national parliamentary arena to the supranational, the *European Parliament* has in fact, already for some years now, been granted some privileged access to EU information. This access was limited to classified information produced and circulated under the auspices of the EU (unless subject to the principle of originator control) and had to be physically consulted on the Council's premises.¹⁶⁵ Early institutional cooperation involved the European Parliament making arrangements to receive and 'handle' sensitive documents as defined in 'secure reading rooms' on the Council's premises as the *quid pro quo* for being informed on the content of in particular the Council's security and defence policy.¹⁶⁶ A -security cleared 'gang of Five' MEP' s were also given classified briefings, although little public information is available as to how often these measures were availed of in practice nor has -surprisingly - an internal evaluation ever taken place as to how it operated. It was described by one of the MEPs concerned as being like a 'bad Le Carré novel'.¹⁶⁷ In a Framework Agreement made with the Commission in 2009,¹⁶⁸

¹⁶⁰ *ibid*, Sect 8(2).

¹⁶¹ *ibid*, Sect 10.

¹⁶² *ibid*, Sect 10(1).

¹⁶³ *ibid*, Sect 10(2).

¹⁶⁴ See further, Curtin, n 15 above.

¹⁶⁵ G. Rosén, 'Can you Keep a Secret? How the European Parliament got Access to Sensitive Documents in the Area of Security and Defence' (2011) RECON Working Paper, No. 22.

¹⁶⁶ Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy' (2002) O.J. C 298, 1.

¹⁶⁷ A. Rettman, 'Secret Documents Group was Like "Bad Le Carre Novel", MEP Says' (2012) EUobserver.com. Available at <http://euobserver.com/institutional/31296> (last visited 17 September 2013).

provision was made to hold committee meetings in camera, attended only by those (select) members of the Bureau and of the EP who satisfied both a 'need to know' requirement and had the appropriate levels of security clearances.

Under the terms of the Framework Agreement the EP agreed to adapt its internal provisions so as to provide for equivalent internal security standards and for the establishment of a specially established oversight committee. In the event, the EP did so in June 2011, after the Council had adopted its new security rules and sought to ensure that its own new security rules would be considered *equivalent* to those of the Commission and of the Council. The EP is clearly keen to reassure both the Council and the Commission that it is very serious about the measures it has taken to ensure the security of classified and unclassified but sensitive information that it receives from either institution and that it can be 'trusted'. This established inter-institutional trajectory culminates with the very recent (and on-going) negotiations of a number of new inter-institutional (draft) agreements with various actors including the Council and the EEAS in particular.¹⁶⁹ It is early days to know how exactly the EP is applying these rules in practice and clearly the Council is adopting an attitude of wait and see (also by building in provisional and far-reaching rules even for the category of 'Restricted' documents).¹⁷⁰

In search of assertive and networked parliaments in Europe

EU government affects citizens often directly and in large numbers. In the aftermath of the economic crisis it affects certain (debtor) states more than others (creditors). Prime Ministers and Ministers go beyond a pure negotiation mode to reach 'consensus' in more and more cases, deliberating also in a 'European' perspective beyond the singular 'national' interest. Yet, the national parliaments even in the best-case scenario (Denmark, Finland, maybe Germany) are engaged only with their own government and are constrained by EU rules (enforced by their governments) to keep secret salient information. Even if EU 'limited' documents are

¹⁶⁸ Framework Agreement on relations between the European Parliament and the European Commission', O.J. L 304/47, Annex 11.

¹⁶⁹ Interinstitutional Agreement between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the Common Foreign and Security Policy' (2012), not yet published.

¹⁷⁰ *ibid*

received by the national parliament from their own government, the national parliament is required to keep them out of the public domain. No genuinely *public* debate is often possible even if there is a trend at the leading edge to more plenary debates in parliaments in advance of important decision-making. The situation is aggravated when it concerns non-EU executive constructions because then the normal scrutiny and information requirements of the respective governments do not generally apply even if a new conference of national parliaments and the EP has been set up by virtue of Article 13 of the Fiscal Compact.¹⁷¹

The European Parliament is not really showing the way in terms of forcing the executive institutions to be more public in their on-going deliberations. The manner in which the EP has allowed itself to be sucked into the secretive vortex of closed door 'negotiations' on legislation before the first reading in plenary (trialogue meetings) and also accepted Council rules on secrecy in a host of inter-institutional agreements giving it some non public access means that the EP is not engaging with the EU level executive actors in a manner that challenges their domination or that is truly leading. This does not of course mean that the EP is not part of the larger answer as Article 10(2) TEU indicates. It is crucial that the EP continues to engage with the collectivity of executive actors at the supranational level (the European Council, the Euro Summit, the Council, the European Central Bank and Europol) and that it does so alongside its evolving relationship with the Commission.

Something may be changing already when it comes to (some) national parliaments. There is, more and more, a realisation of the need to change both their own working practices as well as their need to network more intensively with their European counterparts (other national parliaments, the European Parliament) in order to address the reality of executive domination at all levels. It is not just a matter anymore of learning from those national parliaments that have a stronger scrutiny position *vis a vis* their own government in practice (and here the new German law is innovative and seemingly comprehensive in its reach at least on the books) but also of networking more intensively with their own parliamentary counterparts in order to (semi-) collectively be better informed and exert countervailing power, both

¹⁷¹ Prsidency Conclusions of the Conference of Speakers of EU Parliaments, Nicosia 21-23 April 2013,

<http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/shared/Meetings/Meetings%20at%20administrative%20level/2013/Conclusions%20of%20Speakers%20Conference%20-EN%20FINAL%2024-4-13%5B1%5D.pdf>

individually and collectively. This is crucial and is beginning to happen in practice in a variety of ways. It is particularly important to obtain information about the positions of other member state governments that can then be used to enable national parliaments to put together different bits of the puzzle and to begin redressing the informational advantage that all the governments enjoy.

The many recent practices to increase what is termed inter-parliamentary cooperation, among the national parliaments themselves, do attempt to address some aspects of these information asymmetries.¹⁷² The fact that the national parliaments now have representatives in Brussels and that their offices are next to one another provides the possibility of informal but potentially extensive exchanges of information so that when parallel discussions in parliamentary committees and plenaries of the parliaments take place, individual national parliaments are no longer just dependent on the information given by their own government but can rely as well on a more independent sourcing of available information. Of course as comparative research shows, the degree of re-parliamentarisation strongly depends on the broader pattern of executive-legislative relations in different countries.¹⁷³ Courts can help by prodding parliaments and executive actors to change their working practices and inter-actions but ultimately it is up to parliaments to assert themselves in a manner that is true to their role in the political system and that is not dictated by government at whatever level.

Although publicity is key to democracy, secrecy is currently the practice. A crucial part of the parliaments' push back against the reality of executive domination is the manner in which they assert their own autonomy over the information in their possession. Do they continue to accept that non classified information that does not breach data protection or privacy rules and purely concerns on-going debates within a variety of EU institutions and committees needs to be kept secret by them even when that means that they cannot perform a vital part of their role as parliaments and public forums for deliberation and debate as a result? The issue of governments (and EU institutions) insisting that they control 'limited' documents (and under EU internal rules these cannot be put into the public domain other than when the document stamp is lifted) and that parliament must abide by these EU procedural

¹⁷² Crum and Fossum, n 104 above.

¹⁷³ K. Auel and A. Benz, 'The Politics of Adaptation: The Europeanisation of National Parliamentary Systems' (2005) 11 *The Journal of Legislative Studies* 372.

rules is potentially coming to a head in an unprecedented manner in the national arena. In the UK House of Commons for example, an MP (William Cash) who had obtained a limited document considered very important in the context of the economic bailouts at the time was: 'irrespective of any attempt to impose a *limitée* requirement on me-[able] to raise it as an urgent question with the Speaker, who gave authority for the matter to be exposed in the House of Commons. It was rather an awkward way of having to do it, but that did happen on that occasion.'¹⁷⁴ It goes without saying that some provision must be made for parliaments to keep (highly) classified secrets but at the European level a public debate is missing on when secrets must be kept and how (a type of EU Secrecy law) – as things stand at present it is a matter of total executive prerogative and internal rule-making that is then applied subsequently also to restrict national parliaments.¹⁷⁵

The shift is from (weak) parliamentary dissatisfaction and (unrealistic) promises that national governments will try and get the EU rules changed that the national governments in Council and European Council themselves adopted (the Netherlands) to (strong) parliamentary 'disobedience'. The fact that one national parliament (the House of Commons in the UK) stands up to its government (and the EU rules) makes it easier for another national parliament to do the same. Will the German *Bundestag* or the Dutch *Tweede Kamer* be next? A drop must become a trickle before becoming a flow. We have seen that parliaments are increasingly looking to one another and learning from one another. If in addition the national parliaments organise themselves bottom-up to discuss how to more collectively or at least in parallel exercise more countervailing pressure on the executives individually and jointly we can see the beginnings of a less executive dominated future. New institutions are not essential to do this but existing structures such as COSAC could be reinvigorated in a more innovative manner that goes beyond what the governments themselves are suggesting. In other words, it is up to both the national parliaments and the European Parliament to roll up their individual and collective shirtsleeves and ensure that they are the visible vectors for a genuinely *public* and ongoing debate on the front-stage and back-stage activities of executive actors, both

¹⁷⁴ See, Oral Evidence taken before the European Scrutiny Committee, *European Scrutiny in the House of Commons*, 4 September 2013, available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/uc109-iv/uc10901.htm> (last visited 29 September 2013).

¹⁷⁵ Curtin, n 70 above.

European and national. Information and public debate are pre-requisites to democratic accountability mechanisms worthy of their name.

Courts at different levels have some role to play in prodding parliaments (and executive actors) to be more open and responsive. Both sets of actors –courts and parliaments- have distinct but complementary roles to play in ensuring that systems of representative democracy are not further hollowed out or blacked out as a result of on-going European integration processes.¹⁷⁶ Courts may not be good at the overall picture like parliaments – they are after all dependent on the cases that are brought before them- but they excel in applying even vague norms to real life practices and can study them in detail, calling in evidence where necessary.¹⁷⁷ Parliaments on the other hand can and should keep hold of the structural overview and look at the big picture also in terms of institutional design. The key challenges come from the executive's *de facto* drift towards secrecy in one form or another and informality above and beyond the apparent reach of formal law. There are signs that these topics - which have long been at the periphery of thinking about democracy in Europe - are now moving towards centre stage. It is now up to the parliaments themselves, in various horizontal and vertical constellations, to ensure that a reinvigorated democracy does indeed emerge from the crisis.

¹⁷⁶ On the limited incentives for constitutional engagement by both sets of actors see M. Dawson, 'Constitutional Dialogue Between Courts and Legislatures in the European Union: Prospects and Limits' (2013) 19 *European Public Law* 369.

¹⁷⁷ See, in general, F. De Londras and F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *OJLS* 19.