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Europe: not without the people

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Europe: not without the people!

The dismal state of democracy in the European Union und how to mend it

Edited by "democracy international"

VSA: Publishers Hamburg

www.vsa-verlag.de

www.democracy-international.org

www.erc2.org

Translated from German into English by Paul Carline

The German edition of this study is published entitled
"Europa: Nicht ohne uns! Abwege und Auswege der Demokratie in der Europäischen Union" (ISBN 978-3-89965-360-1)

The French edition of this study is published entitled
"L'Europe: pas sans les citoyens!
Détours et recours de la démocratie dans l'Union européenne"
(ISBN 978-3-89965-362-5)

Both are available at

www.mehr-demokratie.de

Coverphoto: Michael von der Lohe
Printed and bound in Germany by Fuldaer Verlagsanstalt
ISBN 978-3-89965-361-8

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Gerald Häfner

Europe – not without us!

Mehr Demokratie (More Democracy) is getting involved. We are getting involved in an absolutely crucial debate with major implications. The debate has already begun, but until now it has been conducted without the citizens. That does not bode well. Quite the reverse: locking Europe's citizens out of the debate and engaging in a one-way traffic of communication via TV and other media is a surefire way of ensuring that it will fail.

The debate is about Europe! That means it's about us, our lives, our future. And about the future of democracy – about how we can be part of the decision-making process, involved in shaping our own future and that of others in our corner of the globe. Europe is a great idea – the idea of progressively overcoming barriers and boundaries, of working more closely together and of ensuring lasting peace. We share that idea and those ideals. And we also recognise that from climate policy to protecting the seas from pollution and over-fishing there are many issues which need to be tackled and solved transnationally, in cooperation with other states.

The EU can and must make a major contribution to this. But this is only one side of the coin. The other side is at least as important to us. It's about the way the EU has been constituted up to now and how it will be constituted in the future; it's about the way EU decisions are made and how they become binding on the citizens of the member states; it's about the debate on the structure, the "constitution" and the future of the European Union. In a nutshell: it's about democracy!

Democracy is a precious possession. Generations have fought for it and over it. And yet we are carelessly throwing it away. Democratic values and ideas are on the wane in Germany, and have been for some time. And we're not the only country where this is happening. But hardly anyone is resisting. Why?

There is no single cause of the erosion of democracy; the reasons are many. Several of them lie in the political and social structures of our own country. Others lie in the current worldwide dominance of economics over politics. But the cause of what is by far the most dramatic loss of democracy lies in the way the EU is currently constituted.

Politics on the slippery slope

The political "playing-field" between Brussels and Berlin (and the other European capitals) is not level. It's more like a slippery slope – one that slopes down towards Brussels. Like snow sliding down a roof that has no snow guards, political decision-making power is constantly slipping down the slope towards Brussels. But this is not about snow – we're talking about substantial political competences and democratic rights.

The decision-making structures within the EU are not sufficiently democratic – or transparent; people cannot see clearly what is happening. Europe's citizens are remote and powerless spectators to a process which is almost invisible to them. It's clear what the problem is: laws are made in the EU; those laws are binding on states and people; but the laws themselves are not bound to what is the essential core of the principle of democracy: the sovereignty of the people. To be sure, we have "European Elections" every five years – but the Parliament which we elect does not have full law-making powers. It is not able to initiate laws. Laws are drawn up by the Commission and approved by the Council of Ministers and also – but by no means in every case – by the European Parliament. So the process is dominated by heads of government and bureaucrats who are all representatives of the executives (national and EU). This means that the current structure of the EU contravenes not only the principle of popular sovereignty, but also the other fundamental democratic principle of the separation of powers. None of this is essentially changed by either the Reform Treaty or the Lisbon Treaty, despite some minor improvements.

Does it have to stay like this? Is there an alternative? We say: YES! Even if the EU is not a state, that doesn't mean that it has to continue to be a largely democracy-free zone. There's no reason why a cooperative union of states – even such a unique one as the EU – cannot be organised democratically.

That is why we make use of a concept of democracy which transcends national boundaries. The EU is the first and most important application of this concept. Mehr Demokratie wants to contribute to the development of the concept. The proposals in this book for a significantly more democratic Union are our contribution to the debate.

Authors' Preface

This book is the result of a collaboration by members of the staff of Mehr Demokratie. Its line of reasoning is based on the particular concept of democracy which distinguishes our organisation. And yet the book as a whole does not represent the position of Mehr Demokratie, but that of its authors.

Our aim is to make a contribution to a vital debate. So we are interested in what our readers think. If you would like to respond, please write to me at: michael.efler@mehr-demokratie.de.

In a document of this size and with a subject-matter of this complexity it is highly unlikely that we have entirely avoided the occasional error. If you find any, please let us know.

We owe a debt of gratitude to several people, in particular Felix Wünsche, Daniela Beer, Claudia Löhle and Ulrich Müller. Without their help this document would not have reached the state of maturity in which you find it here.

Berlin and Munich, January 2009
Michael Efler, Gerald Häfner, Roman Huber and Percy Vogel

Introduction

European integration is the outcome of a centuries-long desire for peace in Europe. But the right moment for it to come into being did not occur until after the two terrible world wars of the first half of the 20th century. It would not have happened, however, without the determination of its founders, who made intelligent use of an historic opportunity – just as Europe was splitting itself in half again ideologically. More than half a century later we can say that the long-term "European Peace Project" has been a success.

But as we know, every solution to a problem can create new problems which also have to be tackled. One of the problems which European integration has created is the frequently identified "democratic deficit" of the EU. Though our older readers in particular may think that a deficit of democracy is less of a threat than war, this is not a problem to which we should turn a blind eye. For if it is true that peace is a precondition of democracy, it is also true that democracy seems to have made a major contribution towards peace between countries around the world.[1] Germany's aggressive role in both world wars can be traced to the failure of the democratic revolution in the middle of the 19th century. Above all, however, it is a fact that the democratic system of government nominally embodies those central shared values of the member states of the EU – first and foremost the ideal of universal freedom – which belong in the catalogue of fundamental human rights.

Thus democracy also makes the claim to be the *vehicle* of peace, just as it should be the vehicle of *all* other policies. In the opinion of the authors, therefore, the democratisation of the EU should be viewed as a precondition for long-lasting peace in Europe.

1 So far there have been no wars between democracies. Many academics find a causal relationship in this. For a critical view see: Rosato, S., 2003. The flawed logic of democratic peace theory. *American Political Science Review,* 97(4), p. 585-602.

But if democratic values really are shared and prized in the EU, why then does the EU suffer from a "democratic deficit"? Perhaps the answer can be formulated as follows: What seemed like a good idea in terms of the politics of peace turns out to have been a fundamentally flawed design in terms of democracy. The main aim of the first treaties was to secure peace between countries which had previously been enemies of each other – so foreign policy was likewise aimed at the same goals. Since then the European Community has been built up on treaties between states – with the result that it has remained essentially in the control of the national governing executives. What is fateful in this is the fact that in democratically-constituted states foreign policy is typically *the* area of politics which is least under democratic control. Foreign policy neither plays a significant role in the elections – which are normally focused on domestic policy – nor are the procedures for controlling or having any input into foreign policy on the part of parliaments or the electorate especially well defined.[2] To date, therefore, "interstate cooperation" has in fact meant "inter-governmental cooperation" – not at all, or only to a small extent, "cooperation between parliaments and the citizens of the member states". European integration has taken place, so to speak, in the "blind spot" of democracy – at the same time as it has acquired greater and greater direct influence on the lives of Europe's citizens.

Where there is politics, there must also be democracy. But no proper place was given to democracy at the outset. Quite the reverse: many of the founders of the EU project were thinking of possible strategies for circumventing democratic participation and national claims to sovereignty. Others were openly striving to "overcome nationalism" – ignoring the question as to what the achievement of this goal would mean for European democracy. As treaty followed treaty, the EU began to take on more and more of the character of a state, without ever formally becoming one. The proposed new Lisbon Treaty includes the following: EU citizenship; distinct EU judicial, executive and legislative organs with wide-ranging political powers; a directly-elected assembly based on a general right to vote; freedom of movement within the entire EU; separate EU fundamental human rights; the EU to have its own legal identity. Then there is the common foreign policy, police and judicial cooperation in criminal matters – and even the promotion of a common defence policy.

2 Switzerland – and to a lesser extent Ireland and Denmark – are notable exceptions.

But this phase – of a process of centralisation of which the public has been largely unaware – is now over. With integration increasing from treaty to treaty, the calls for democratisation also grew louder. At the latest by the time the draft constitutional treaty was published, the demand for democratisation and for genuine democratic legitimacy for the EU could not be ignored; they have become a growing part of the public debate. The EU is no longer judged merely on the practical outcomes of its policy decisions – their effects on the lives of its citizens – but also on the way those decisions are reached. Both in the national parliaments and in civil society, people have begun to raise the issue of political power and to call into question the balance of power which has obtained until now.

The calls for democratisation did not entirely fall on deaf ears; the EU has begun to react to the new demands. But contrary to the expectations of those involved with the treaty reforms, the public response has not been uniformly positive. This is due in part to a kind of reaction which must seem ungrateful from the point of view of the EU reformers: when the EU claims to be concerned to democratise itself, its actions are measured by the public against the normative criteria of democracy with which people are familiar from their own member-state countries.

Thus a step towards democratisation, which to the reformers in the EU institutions may appear as a significant improvement, may well be seen by the citizens as far too small, or even as a withholding of more radical measures. We will show later why this "ingratitude" on the part of the citizens is by no means unfounded: the Lisbon Treaty reveals that the EU is still "off-course" democratically.

We are not at all suggesting that it will be easy to come up with possible solutions to the problem, or that such solutions would meet with general approval. On the contrary, there is a partial dilemma about democratising the EU: more democracy at the EU level necessarily means more limited democratic room for manoeuvre in the member states. And as long as there is no agreement within Europe as to whether the EU should be a federation of states (like Germany and Switzerland), or merely an association of states based on inter-governmental cooperation, the EU will continue to develop as a mongrel construct of both types – which will make democratisation difficult. On top of this, the multi-lingual nature of the EU and other factors which tend to fragment its civilian basis impede the development of the vital communication space for public discourse and also make effective representation in the European Parliament difficult.

Being realistic, we will probably have to suffer the situation for a while longer – if we actually want to preserve this community of nations. However, the situation is tolerable *only* as a temporary or transitional state of affairs; *in principle* it is completely intolerable. Revealing the structural dilemma and its historical origin may help to explain, but in no way can it justify, the EU's democratic deficits. The EU still has to demonstrate – and preferably sooner rather than later – that it is consistent with the democratic values it itself propounds, for only from this can it derive its legitimacy.

The task of an NGO which calls itself "More Democracy" – the organisation which commissioned us to write this book – can only be that of measuring the EU against the normative criteria of democracy and of making appropriate proposals for reform. In doing so, we aim to refrain to the greatest extent possible from expressly "political" commentary – even though this is extremely difficult to achieve, since the EU is a dynamically self-evolving system whose current institutional form is closely connected with its own self-awarded political aims. Nonetheless, that remains our goal. We therefore limit our critique to the contents of the various treaties, to procedures within the institutions of the EU, and to other aspects relevant to democracy. We do so, moreover, in the full aware-

Early prophets of European Integration

In 1693, *William Penn* (1644 – 1718), founder of the colony of Pennsylvania (part of today's USA) wrote his Essay towards the Present and Future Peace of Europe. His idea for European integration came to him in London during the politically insecure and tense period between 1691 and 1693. Penn explains in his essay why he had decided to campaign for the establishment and preservation of peace in Europe. He envisioned a league of states and a European Parliament.

Immanuel Kant (1724 – 1804) was a German philosopher of the Age of Enlightenment. In his essay Perpetual Peace – a Philosophical Sketch, published in 1795, Kant wrote that states could injure each other merely by their proximity and that it was therefore their duty to move from a "natural" condition of being merely separate states to a "law-based" condition. The observance of law between states could best be guaranteed by the creation of a confederation.

Victor Hugo (1802 – 1885) was a French novellist and poet. In 1849, as president of the second International Peace Congress, he called for the founding of the "United States of Europe".

ness that it is very much easier to draw attention to problems and to suggest solutions "on paper" than it is to remove the former and implement the latter in the real world of politics.

The primary aims of this book are, therefore, firstly an appraisal – a kind of "stock-taking" – of the state of democracy in the European Union as a league of states; and, secondly, the presenting of some ideas as to how democratisation could be achieved. Our hoped-for "target group" is all those readers from whom we expect the strongest desire for greater democracy – above all parliamentarians and citizens who are active in civil society. There is as yet hardly any real public debate on this issue, but such a debate is vital because – as history shows – there is little reason to expect adequate democratisation to be handed down "from above".

In line with those twin aims, the book is roughly divided into two parts: in the first part, entitled "Problems", we attempt an evaluation – using democratic criteria – of the EU treaties, how they came about and how they have been used in pratice in the EU. The evaluation is based both on the Nice Treaty currently in force and on the Lisbon Treaty which is now awaiting ratification – with the emphasis on the latter, for the obvious reason that it is considered to be the most progressive treaty in democratic terms, and *specifically* by comparison with the Nice Treaty, whose democratic deficits the new treaty is meant to remove. The Lisbon Treaty represents the goal towards which the EU is currently striving – the standard by which we can measure it. The second section of the book, entitled "Solutions", presents our proposals for the democratisation of the EU. The primary aim of the various proposals is the effective empowering of citizens in relation to EU affairs, first and foremost the right to have the final say.

Our concept of democracy

Presenting a critical evaluation of the quality of EU democracy only makes sense if it is clear to begin with what the authors mean by democracy. As members of *Mehr Demokratie* (More Democracy), we endorse its emphasis on the design, introduction and sensible implementation of procedures of *direct democracy*, because we believe that the quality of a democracy is fundamentally measured by the extent to which citizens have genuinely effective possibilities of influencing the political process through (legal and "constitutional" i.e. statutory) binding democratic procedures. For us, democratic control, or "checks and balances", means that political systems and procedures are able to respond to changing majorities of citizens with an appropriate change of policy.[3] In our view, such "checks and balances" must necessarily include the right of final appeal (the "last word", including the "power to self-empower") i.e. the possibility for citizens to vote not only on procedural and constitutional matters, but also on proposed laws. Whether and to what extent the overall aim of effective control (checks and balances) is achieved, depends on a number of specific criteria:

Political appointments must 1. result from free, equal, general elections which are based on a genuine choice between politically significant alternatives (parties or candidates); 2. have short chains of legitimation (few electoral steps between the voters and the office), in which the degree of political significance of the office should be in relation to the degree of legitimation; 3. be subject to recall in line with changing majorities in the electorate; 4. be responsible exclusively for the specific area to which the elections apply (national representatives from general elections, MEPs from European elections etc.); 5. the actions of the office-holder must be transparent and open to evaluation; 6. the positions must be independent.

Substantive political decisions should be 1. made by political mandate holders elected according to the above provisions; or by the citizens themselves; 2. able to be challenged by voters in a referendum; 3. not mortgage the future and be reversible; 4.

3 This definition suggests a strong overlap with the allied concept of "responsivity". Democratic control is not to be confused with what in a state governed by the rule of law are the equally important checks on compliance with laws and standards, for which the judiciary, the administration and the police bear responsibility.

be selected from a range of genuine alternatives; 5. be based on transparent and documented democratic procedures; 6. not be pre-structured in respect of content by any non-transparent extra-parliamentary interests – for example, as a result of certain forms of lobbying; 7. not lead to disempowerment of citizens; 8. within federal structures be reached at the correct level i.e. the level which has been allotted competence in the relevant treaty or constitution.

One may agree or not with these criteria. However, listing them like this should make it easier for our readers both to understand how and why we make our judgements, and to form their own opinion. What is important in any event, before making a critical analysis, is to set out in advance the criteria on which the assessment of the quality of democracy is to be based. Only in this way is it possible to make clear the difference between the ideal and the reality. And only in this way can we really take to heart Beate Kohler-Koch's admonition "that we should not *lower* our normative standards to make them fit the EU reality".[4]

4 From: Kohler-Koch, B., 1999. Europe in Search of Legitimate Governance. *ARENA Working Papers*, WP 99/27, Available at: http://www.arena.uio.no/publications/wp99_27.htm.

Part 1
Problems

In Part I of the book we attempt an evaluation of the EU according to democratic criteria. The heading chosen by us – "Problems"– describes both our starting assumption and our conclusion. Our starting point, therefore, is the existence in the EU of a democratic deficit – especially when it is judged against our chosen concept of democracy (see Introduction). The democratic deficit has been a long-running theme among political scientists and experts in constitutional law, and has been the subject of a host of publications, mostly for a professional readership. But even the heads of state and government accept that there is a problem of democracy, as is clear from the 2001 Laeken Declaration (see box on p. 22). The challenge now is to identify the specific problems and to determine how serious they are and to what extent they can be resolved by the Lisbon Reform Treaty – or not. Our conclusion will be that even with the Lisbon Treaty the EU is still off-course in terms of democracy.

This section is divided into two parts. In the first part we examine the "vertical dimension" of the EU, i.e. the relationship of the member states to the EU level. This dimension includes both the way the treaties themselves have come about and what the treaties say about the relationship of the member states to the EU, where the main issue is how the various powers are allocated to the different levels and to what extent this is done in line with democratic principles. In the second part we then look at the "horizontal dimension", i.e. the way the organs of the EU function and inter-relate.

1. European Integration

The process of European integration began in 1951 with the creation of the European Coal and Steel Community (ECSC) – an economic cooperation between the founding countries of Belgium, Germany, France, Italy, Luxembourg and Holland. In 1993, the Maastricht Treaty transformed the economic confraternity into a political union which was progressively deepened and strengthened in a succession of treaties and which has been significantly expanded by the recent inclusion of (mainly former Communist) countries from Eastern and Central Europe.[5] Integration is fundamentally grounded in the treaties which have been agreed between the individual member states – such as the Maastricht Treaty of 1993 and the Lisbon Treaty put forward in 2007. In these treaties the member states surrender parts of their sovereign powers. These are transferred to the EU, which is then permitted to exercise them in line with the conditions set out in the treaties. The treaties primarily regulate two things: firstly, which areas of policy (e.g. monetary affairs, economic policy, environment policy etc.) are to be transferred to the EU; and secondly, which EU institution will be responsible for the exercise of the powers. The treaties thus create the framework for political decision-making – similar to the way constitutions govern the activities of states.

The creation of constitutions, or treaties with a constitutional character, touches upon the most basic level of democracy: the voluntary nature of being part of a political community, and the right to determine its rules. It is precisely in this respect that there has been a constant lack of democratic control throughout the integration process – a lack which still persists, demonstrated most

5 For the history of European integration cf. Brunn, G., 2004. Die Europäische Einigung von 1945 bis heute, *Bundeszentrale für politische Bildung (bpb)* (German only).

recently in the circumstances under which the Lisbon Treaty came into being.

European integration as foreign policy

In essence, the democratic deficit of the EU lies in the democratic deficit in foreign policy which characterises most countries. This is because the political basis of the EU rests on the inter-state treaties – which, as foreign policy, fall within the traditional powers of governments. The specific drafting of a treaty is carried out by officials, after which the treaty is signed by governments and presented to parliament for approval (ratification). Neither the citizens themselves nor their representatives in the parliaments are directly involved in the treaty negotiations, and only in very few EU countries is the finished treaty put to the voters in a referendum. In addition, the negotiations on the articles of the treaties often take place behind closed doors and are thus not transparent. With this method of working, there is no possibility for a critical public debate or for the public to reach an informed judgement on the issues, which would at least allow for an expression of public will outwith the political institutions.

The fact that it is difficult to change the treaty articles also derives from their character as inter-state treaties. Christoph Möllers describes the situation as follows: "The commitments one has entered into towards other states persist, regardless of democratic elections. If not exactly irreversible, they can only be changed to a very limited extent. The simple ability to alter arrangements – a core element of democratic governance – is lacking in the international relationships. In the international order there are no democratic caesuras brought about by elections and referendums, which put new oxygen in the lungs of democracy. That order is dominated by a slowly advancing continuity".[6]

6 Möllers, Christoph, 2008. Demokratie – Zumutungen und Versprechen. Berlin: Klaus Wagenbach, p. 94.

Changing the content of a treaty is only possible by means of an elaborate renegotiation, to which all the treaty partners have to give their agreement. If the Lisbon Treaty enters into force, an amendment would be subject to the no less elaborate "normal amendment procedure", which involves all member states and the EU institutions. This rigidity of the treaties conflicts with the right to self-determination of Europe's citizens and thus with a democratic political process. Irreversibility becomes a special problem because the treaties do not merely create a general framework for political activity within the EU, but in some cases codify certain fixed political positions – such as the much-criticised commitment to improving the military capabilities of the member states.

The inter-governmental nature of the treaties also explains their enormous size, their complex and confusing structure and the resulting inaccessibility. The previous treaties, together with all the supplements and protocols, covered around 2800 pages. This situation was supposed to have been ameliorated with the drafting of a standardised "constitutional treaty", but even this text was around 475 pages in length in the German version. After the failure of the constitutional treaty the governments rejected this attempt at standardisation. The outcome was the 250-odd pages of the Lisbon Treaty, which in its original form was purely a treaty of amendment i.e. an addendum to the existing treaties, valid and comprehensible only in combination with these. All that was initially presented were the changes to the existing treaties. So we had, for example, the following: "b) In the first sentence of paragraph 2 the words "and the High Representative" are inserted after the words "to the Council". In the second sentence, the words "once a year" are replaced by the words "twice a year", and the words "including Common Security and Defence Policy" are added at the end. It was not until mid-April of 2008 that the European Council made the official consolidated version of the amended treaties generally available on the Internet i.e. the text of the two basic treaties with the amendments agreed in the Lisbon Treaty.

On the one hand, it has to be said that no direct comparison can be made in respect of comprehensibility and size between the texts

of treaties between inter-governmental organisations and the constitutions of nation states. On the other hand, however, the EU is precisely not some common-or-garden league of states with a limited sphere of cooperation (as was the case in the beginning with the ECSC). It is the only league of states in the world with direct legislative powers and a state-like institutional structure. These characteristics raise the bar on the requirement that treaties be generally comprehensible. In the case of the Lisbon Treaty, as we shall see, incomprehensibility was even part of the strategy.

The Constitutional Treaty: Convention and Ratification

Between 28th February 2002 and 20th July 2003 a total of 50 sessions of a special assembly took place in Europe. This was the "Convention on the Future of Europe" ("Convention" for short) which was tasked with the drafting of a "constitution" for Europe.[7] It was widely seen as both a high-point and a new beginning for the process of European integration. The so-called "constitutional treaty" was to usher in a more democratic EU. At least that had been the wish expressed by the heads of state and government in their "Laeken Declaration" of 2001 (see box, p. 28). The Convention was mandated by those leaders to produce a draft constitutional treaty which would embody such common European values as human rights and democracy.

Without doubt, the Convention was a memorable step in the path of development of the European Union. For the very first time, the governments of the member states temporarily ceded their role as "masters of the treaties" to a larger body composed of appointees from a variety of institutions. For the period of its existence, the Convention was assigned negotiating rights – though the European Council naturally had the last word on the outcome.

7 Website of the Convention: http://european-convention.eu.int/.

An assessment of the Convention, however, depends on whether one is judging it merely by previous EU practice, or rather by democratic criteria – such as the heads of state and government themselves had appealed to in the Laeken Declaration.

The fact that the Convention on the Future of Europe was composed primarily of parliamentarians is often taken as evidence that it was democratically legitimated. But the parliamentarians in the Convention had not been elected by the voters for this specific task and therefore bore no direct mandate. They were simply chosen from an elected assembly – a national parliament or the European Parliament. The democratic legitimacy of those representatives of national governments and of the European Commission who also took part in the Convention was even lower, since they could be linked to an electoral act only in a far more indirect way.

Not least due to the indirect way in which the Convention came into being, there was a gulf separating the Convention from the citizens. This was clear from the fact that very few people in Europe knew about the Convention or were at all clear about its purpose and its significance. A poll taken three months after the last session of the Convention revealed that only 38% of EU citizens knew of the Convention's existence. Although the Convention sessions were open to the public and the relevant documents were published on the Internet, the Convention itself never reached any of its decisions through an open, democratic vote.

Decisions were made solely by the Convention praesidium, which met behind closed doors and whose discussions were not fully minuted. In practice, it was only a few members of the praesidium – in particular its chairman Valéry Giscard d'Estaing, who had been appointed by the heads of state and government – who actually decided whether to accept or reject the Convention's proposals. It was this handful of people who established the "consensus" within the Convention – in a manner which made it little different from a diktat from on high. During the sessions of the 12-member praesidium there were long periods when there was no simultaneous translation. Many of the documents were available only in French. One result was that some members of the praesid-

ium were in practice excluded from the discussions and got only a vague impression of what was being spoken of.[8]

Another problem was the considerable time pressure under which the work of the Convention was carried on. The precise wording of the articles of the constitutional treaty was only put forward at a very late moment within the Convention process, and then only step by step. Major parts of the draft, such as, for example, the whole of Part III, which contained the greater part of the entire document – no less than 321 of the total of 448 articles – were scarcely debated at all.[9] It was not only the time pressure which was to blame for this, but mainly the governments. In June 2003 they withdrew from the Convention the mandate for the revision of Parts III and IV, even though both the Convention and the European Parliament had urgently requested changes to be made. As a consequence, there were inconsistencies between Parts I and III of the draft constitution which had still not been removed by the time the ratification process began.[10]

The ratification of the draft constitutional treaty

Ratification by popular vote of the draft constitutional treaty was provided for in only 10 of the then 25 member-states of the EU. In the remaining countries it was the parliament which ratified the treaty – even in those countries in which a large majority of the population and many constitutional experts had expressed support for a referendum. In Germany, for example, several polls found that around 80% of citizens wanted a referendum. Despite this, in May 2005 the German Parliament rejected – by a majority

8 Gisela Stuart, member of the Praesidium, in: Stuart, G., 2003. Caught in the coils of Giscard's folly. TIMES online, December 7, Available at: http://www.timesonline.co.uk/article/0,,2092-921964,921900.html.

9 Cf. Wehr, Andreas, 2004. Europa ohne Demokratie? Die europäische Verfassungsdebatte – Bilanz, Kritik und Alternative. Cologne.

10 Kaufmann, S.Y. & Wolfram, J., 2008. Die EU und ihre Verfassung. Linke Irrtümer und populäre Missverständnisse zum Vertrag von Lissabon. Hamburg: Merus Verlag, p. 28.

of 96% of the votes – a motion by the FDP parliamentary group which would have enabled a referendum to be held. It is difficult to imagine a greater discrepancy between the voters and their elected representatives!

It was decided that the referendums and the parliamentary ratifications in the member-states should be staggered over a period of two years. This ruling meant that the individual decisions were not independent of each other, because the outcome of each referendum was made known immediately, potentially influencing subsequent referendums. The problem was exacerbated by the fact that the chosen sequence of ratifications was not politically neutral. The empirical proof for this assertion is provided in Fig. 1 (page 32). Countries in which there was a low level of support for the treaty in autumn 2004 tended to be assigned a date towards the end of the ratification period. The arrangement of dates also gives evidence of the attempt to increase the pressure on the voters in those countries where a referendum was to be held; there was a tendency here also to position the referendums at the end of the ratification period, as, for example, in the UK, Poland, the Czech Republic, Ireland and Denmark. The rationale was based on the expectation that by then most countries would have approved the draft treaty and that a rejection in the referendums would be less likely. The referendum dates for those countries where there was a relatively high level of support for the draft constitution were positioned earlier. The available data is insufficient to demonstrate unequivocally whether the pattern of dates was the result of strategic considerations, or merely unconscious intuition. But even if it were possible to answer that question, it would not change the fact that the observed trends represent a further problem for democracy in the ratification process.

But that is not all. In those countries where voters were able to decide on the constitutional treaty in a referendum, the governments tried – as one might expect, but also in part with unfair means – to influence the outcome in favour of a "yes". When it came to handing out money for the public debate, those who were critical of the draft treaty were often clearly discriminated against.

The Laeken Declaration

The "Laeken Declaration" was accepted on 15th December 2001 at a meeting of the European Council – the meeting of the heads of state and government – in Laeken (Belgium). It commits the EU to more democracy, and to greater transparency and efficiency. The following are extracts from the Declaration:

"Within the Union, the European institutions must be brought closer to its citizens. Citizens undoubtedly support the Union's broad aims, but they do not always see a connection between those goals and the Union's everyday actions. They want the European institutions to be less unwieldy and rigid and, above all, more efficient and open. Many also feel that the Union should involve itself more with their particular concerns, instead of intervening, in every detail, in matters by their nature better left to Member States' and regions' elected representatives. This is even perceived by some as a threat to their identity. More importantly, however, they feel that deals are all too often cut out of their sight and they want better democratic scrutiny."

"Thus the important thing is to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union. This can lead both to restoring tasks to the Member States and to assigning new missions to the Union, or to the extension of existing powers, while constantly bearing in mind the equality of the Member States and their mutual solidarity."

* Full text of the Declaration at: www.european-convention.eu.int/pdf/LKNDE.pdf.

In Spain[11] and Holland,[12] for example, the supporters of the treaty received almost ten times as much money as the opponents. Governments in the referendum countries put real pressure on the voters to approve the draft treaty; for example, the Prime Minister of Luxembourg, Jean-Claude Juncker, threatened to resign if the vote went against the treaty.

The public debate after the referendums in France and the Netherlands was accordingly characterised by one-sidedness. The main question was how to explain the majority rejection of the constitutional treaty by the voters in these two countries. By contrast, the question as to the means by which a majority "yes" was secured in Spain was of little interest. The message from this biased debate was that the "No"-voters had behaved irrationally and out of ignorance, while those who had voted "Yes" were sensible and well-informed. In reality, of course, there are no doubt plenty of *irrational* reasons for voting *for* the treaty. In the analysis of the French referendum, the media and almost all politicians repeatedly asserted that the vote had been strongly influenced by domestic political concerns and that the public had been expressing its disapproval of French President Chirac himself and of his government. But we also see voting behaviour unrelated to the issue at hand in parliaments – for example when Party A rejects a motion for the sole reason that it was put forward by Party B. Nonetheless, even such votes – motivated purely by party-political power considerations – are binding and have real consequences. If one also takes into account the fact that the French voters occupied themselves extremely intensively with the draft constitution – more than a million books on the subject were sold during this time – the charge that the vote was not on the issue at hand must be questioned. But quite apart from any counter-arguments: it is simply unacceptable to deny legitimacy to a democratic decision

11 Cf. Democracy International & Mas Democracia: Monitoring report on the Spanish Referendum, Madrid/Cologne 2005, Available at: www.democracy-international.org/monitoring.html.

12 Cf. Nijeboer, A., 2005. Peoples vengeances: The Dutch referendum, *European Constitutional Law Review,* no 1, p. 394-405.

Views on the Convention

"I have been involved in European politics for 20 years. I have never before seen such a lack of transparency – an arrangement which was completely impenetrable and which avoided the democratic contest of ideas which should precede the formulation of policy. The Convention has been trumpeted as the ›Great Democracy Show‹. I have never before seen a darker darkroom than this Convention".
Jean-Claude Juncker (Prime Minister of Luxembourg)*

"The Convention's draft constitution was the product of an intense, public and thus democratic process of debate … Never before in the history of international politics has the draft for such an important multilateral international agreement come about in such a democratic way as this draft constitution."
Sylvia-Yvonne Kaufmann (MEP, member of the Convention) and *Jens Wolfram* (her colleague).**

"The real discussions [within the Convention] took place in the Praesidium, or between the Presidency, the Secretariat and in private conversations with certain member states. Even the working groups […] were regularly skipped or their conclusions ignored."
David Heathcoat-Amory (British Member of the House of Commons, Convention member)***

* In: Der Spiegel, 16th June 2003.
** In: Kaufmann, S.-Y. & Wolfram, J., 2008. Die EU und ihre Verfassung. Linke Irrtümer und populäre Missverständnisse zum Vertrag von Lissabon. Hamburg: Merus Verlag.
*** In: Heathcoat-Amory, D., 2003. The European Constitution and what it means for Britain, *Center for Policy Studies*, June, p. 33.

after the fact, merely because one does not like the outcome. The same applies also to the ratification method laid down in the treaties. The Nice Treaty – like all the earlier treaties – requires unanimity: all the parties are required to ratify. When some countries failed to ratify, some politicians and organisations used the argument that it was undemocratic for a couple of countries to block a treaty which had been ratified by many more countries. Here again we see the tendency to want to change the rules retroactively when the outcome does not suit.

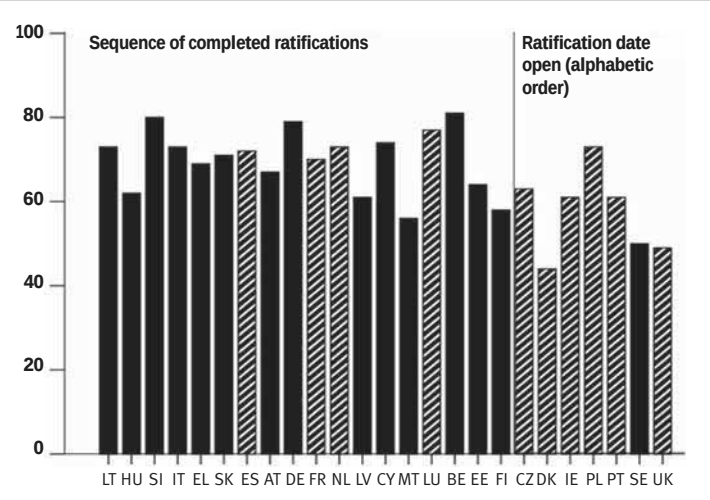
From the crisis to the Lisbon Treaty

After the EU constitution was rejected by the French and Dutch voters, "Project Europe" fell into a deep hole. To give themselves time to recover from this heavy blow, the heads of state and government agreed to insert a lengthy period of reflection. A decision on how to go forward would not be taken for two years – until the summit meeting to celebrate the 50th anniversary of the founding of the EU. In March 2007 the heads of state and government committed themselves to bringing in a new treaty by 2009. In order to make the EU more effective, the main amendments were to be retained and implemented as soon as possible. A date for a new inter-governmental conference was quickly arranged. In October 2007, under a Portuguese presidency, the leaders agreed the so-called "Reform Treaty", which was finally signed by the heads of state and government of the member states as the "Treaty of Lisbon" on 13th December 2007.

In terms of content, the Lisbon Treaty is almost exactly the same as the Constitutional Treaty rejected by the French and Dutch voters. Essentially symbolic changes were made, limited to expunging from the treaty all those elements which might evoke fears of a "European Superstate" – such as references to a European flag, a European "national" anthem, and a Europe Day.

The result is a treaty which significantly alters the two basic treaties (TEU and TEC), but which fails to combine these into an

Fig. 1 A strategic ratification schedule for the Constitutional Treaty?



The columns show the voters' rate of approval (as a %) for a European constitution in the separate member states. The solid black columns indicate purely parliamentary ratification; the columns with cross-hatching refer to ratifications where there is the possibility of a referendum. Three features point to strategic sequencing:
1. there is a tendency for countries with lower approval rates to be given later dates (further to the right in the table) than those with higher approval rates (more to the left);
2. countries in which ratification was subject to referendum were likewise allotted later dates in the sequence than countries with purely parliamentary ratification;
3. the approval rate in the four countries which have already completed ratification is higher on average than in the six countries still awaiting ratification.

agreement which is reasonably clear and comprehensible. By no means can it be said that it is more transparent. Clearly they had learned from the experience with the constitutional treaty that to be transparent means to be vulnerable to attack. So in reshaping the constitutional treaty into a reform treaty, they chose the form of the amendment treaty[13] and exploited its lack of transparency to hide things that they did not want to be discovered. Valérie Giscard d'Estaing openly recommended this strategy: "There's a final trick which consists in planning to retain some of the innovations of the constitutional treaty but in disguising these by splitting them up and placing them in several different texts. The most innovative provisions would then become simple additions to the Maastricht and Nice treaties. The technical improvements would be reassembled in a treaty which had become bland and inoffensive. All these texts would be passed to the parliaments which could then express their views in separate votes. In this way public opinion would be led to adopt, without knowing it, the proposals that we dare not present to them 'directly'." [14]

The success of this strategy seemed secure – for only a few "anoraks" among parliamentarians would be likely to enjoy examining in detail such an unreadable treaty, about which the assurance had been given that it was "in substance" almost identical to the Constitutional Treaty. It would be far easier just to approve it. By the time the much more accessible "consolidated version" appeared in mid-April 2008, nine national parliaments and the European Parliament had already ratified the unreadable Lisbon Treaty. But as Ireland showed, it is not safe to assume that the public will also exhibit such an automatism. According to a poll carried out just before the referendum on the Lisbon Treaty in June 2008, 30% of those Irish who intended to vote "No" gave as their reason the incomprehensibility of the treaty text.

13 An amendment treaty merely lists the changes to be made to the existing treaty; it does not contain the fully revised text, which only appears in the "consolidated version".

14 In: *Le Monde*, 14th June 2007 and *The Sunday Telegraph*, 1st July 2007.

The ratification of the Lisbon Treaty

The plan was to have the Lisbon Treaty ratified in all member states by the end of 2008. In virtually all the states this would be done purely by a vote of approval in the national parliaments. Only in Ireland, where constitutional amendments have to be ratified by the people and where the surrender of sovereign rights is recognised by the courts as constituting such a constitutional amendment, would the voters be allowed to decide whether to ratify the Lisbon Treaty or not. The governments of all the other countries which had wanted to submit the constitutional treaty to a referendum, or had actually done so, now decided against holding a referendum on the Reform Treaty. This happened in part as a result of political pressure from Brussels and was openly discussed.

In France, which had rejected the constitutional treaty in a referendum three years earlier, the constitution was even specially amended to prevent another referendum from taking place. Both the Senate and the National Assembly voted on 4th February 2008 by large majorities to insert the following sentence into the French constitution: "France can participate in the EU under the conditions of the Lisbon Treaty signed on 13th December, which modifies the Treaty on European Union [TEU] and the Treaty establishing the European Community [TEC]." The French newspaper *l'Humanité* reported that in a poll carried out in February 2008, 59% of those polled wanted a referendum – which didn't, however, prevent President Sarkozy from adding his own signature to complete the ratification.

British Prime Minister Gordon Brown continues to reject the possibility of a referendum. The UK parliament voted on 5th March 2008 against a popular vote – which Brown's predecessor, Tony Blair, had promised for the Constitutional Treaty. Government circles in the UK maintain that the Lisbon Treaty bears little resemblance to the Constitutional Treaty and scarcely affects British sovereignty. But even German Chancellor Angela Merkel has openly admitted that the text of the "new" treaty is basically the same as that of the Constitutional Treaty of 2005.

A referendum was refused even in Denmark. The Danish constitution says that there has to be a referendum if a legal examination finds that sovereignty would be transferred to the EU by the treaty. But Prime Minister Rasmussen stated that the Justice Ministry had examined the final text of the treaty, agreed by the heads of state and government in October 2007, and had found no evidence that Danish sovereignty would be surrendered – so the government was not obliged to hold a referendum. A referendum had been announced for the Constitutional Treaty, and in respect of earlier treaties Denmark was one of the countries – together with Ireland – for which it could be assumed that there would be a referendum. But now the Danish parliament decreed that there would be no referendum on the Lisbon Treaty.

In Germany, the treaty had already been approved by the Bundestag. The timing of the vote was full of symbolism. It took place on 23rd May, the anniversary of the creation of Germany's own constitution (its "Basic Law"), and only five weeks after the publication of the consolidated text.[15] However, there are three outstanding appeals to the German Constitutional Court against the Lisbon Treaty: one by the CSU Bundestag representative Peter Gauweiler (who had earlier taken legal action against the Constitutional Treaty), one by the ÖDP (the Ecological-Democratic Party), and one by the Party of the Left. Because the Federal Constitutional Court has not yet delivered its rulings on these appeals, the German President has so far withheld signature of the treaty (this also happened with the Constitutional Treaty) and thus ratification cannot be finalised and take legal effect. There were also concerns from the point of view of constitutional law about the Collateral Law to the Lisbon Treaty. In order to save ratification, Federal Chancellor Merkel is now planning to change the Basic Law – though this would require 2/3 majorities in both chambers. According to a Forsa poll commissioned by More Democracy, 82%

15 The printed, free copy of the consolidated Lisbon Treaty did not appear in the Info Centre of the Berlin Representation of the EU Commission until the end of July 2008.

of Germans believe that citizens in each of the EU member states should be able to vote directly on an EU constitution.

But then came the referendum in Ireland. As already mentioned, Ireland remained the only country in the EU that would hold a referendum: a mandatory referendum as prescribed in the Irish constitution for all constitutional amendments. All eyes were now on this little country as its voters were summoned to the ballot box on 12th June 2008. Indeed, the Irish referendum became in a sense the representative vote for the whole of the EU. Although it had been announced long before that the referendum would take place on 12th June, the date was officially confirmed only four weeks beforehand. This tactic interfered with and effectively cut short the public debate. The European Commission weighed in, providing informational materials (paid for out of taxes from the whole EU, including Ireland) and the country was treated to visits by EU representatives. Since this was a purely national referendum on ratification, the EU involvement (or interference) represented a clear overstepping of its own treaty principles. In addition, politicians from other EU countries made public statements or even paid official visits to Ireland – including German Chancellor Merkel. NGOs from other countries also invaded the Emerald Isle, trying to convince the Irish of their own particular views. In the event, 53.1% of the electorate turned out and 53.4% of them said "No" to the Lisbon Treaty. Many heads of government and also the European Commission publicly blamed the Irish government for the outcome and demanded another Irish referendum on the same treaty.

What is remarkable about the result of the vote is that – as recorded by the Eurobarometer of Spring 2008 – Ireland actually boasts the highest level of support for EU membership in the whole EU (73%). So the "No" cannot be explained by any general ennui with the EU. What then were the reasons? Apart from a number of more or less well-founded concerns relating to loss of identity, loss of sovereignty, and economic consequences (see below), the main reason for the rejection was that people felt that they did not sufficiently understand the issue they were supposed to be voting on. This is confirmed by polls carried out both immediately before the referendum and also later in the year, in September 2008.[16] Of those who said before the referendum that they were going to vote "No", 30% gave as their main reason an inadequate understanding of the proposed treaty. Just under one in four also referred to a wish to preserve Ireland's influence and identity, and a further 17% said that they felt obliged to vote "Yes". In the September poll after the referendum, a much higher percentage (45%) of those who had actually voted "No" gave a lack of understanding as the main reason for their decision. Significantly, an almost identical percentage (46%) of the large number of Irish citizens who had not voted at all also quoted the same reason. Those who voted "Yes" to the Lisbon Treaty did so out of a general approval of EU membership and its positive consequences for Ireland. Their level of general knowledge about the EU (ascertained through four questions) was significantly higher than that of the "No"-voters (whether they were also better informed about the content of the Lisbon Treaty is unknown, but it seems likely). It seems clear at this point that the strategy of making the Lisbon Treaty less transparent than the Constitutional Treaty did not work in Ireland, but on the contrary contributed to its rejection.

Several polls were carried out after the referendum as a result of the repeated calls on the Irish government for a re-run. One poll carried out by the Red C company in July 2008 showed not only that 71% of those polled rejected the idea of a repeat referendum, but that the percentage of those opposed to the Lisbon Treaty had risen significantly (to 62%) with a corresponding fall in the number of supporters to only 38%. It is difficult to interpret these figures in any other way than that the Irish perceived the EU-wide calls for the referendum to be repeated as patronising. It was not until November 2008 that poll results were published which reported a reversal in the acceptance : rejection figures – but then only in connection with special treaty concessions to Ireland.

16 We refer here to a poll by the Irish Times immediately before the referendum and to a study by the Department of Foreign Affairs in September 2008.

At the summit meeting in December 2008, the Irish government succeeded in pushing through these concessions, resulting in the promise of a second referendum on the Lisbon Treaty. The Irish government's demands were apparently based on public opinion polls which demanded: 1. the retention of the principle that each member state appoints a member of the European Commission. According to the Lisbon Treaty, the number of Commissioners was to be reduced to 15 from 2014, and a rotation system introduced. The reason for the desired reduction was the general perception that the Commission bureaucracy and its centralising activities would get out of hand if the number of Commissioners continued to rise; 2. no EU intervention in Irish taxation policy; 3. no EU interference in "ethical" issues such as abortion, homosexuality and euthanasia; 4. the preservation of Irish neutrality. The second referendum on the thus amended Lisbon Treaty is supposed to be held by November 2009.

Concluding remarks

If we draw a graph curve which begins with the Laeken Declaration and ends with the renewed treaty crisis after the Irish referendum, it is clear that from a democratic perspective the curve has a downward trend. Where in the Laeken Declaration governments were calling for a democratisation of the EU, in the ensuing treaty reform process they have successively taken away from the citizens their possibility to have some influence on that process. As a result, the EU is now less, rather than more, democratic than it was before.

Some might object that in terms of democracy the new treaty is better than the old one, and that in the French, Dutch and Irish referendums the citizens themselves turned their backs on a process of democratisation, thus behaving irrationally. This is the line repeated again and again by EU politicians both before and after the referendums. In subsequent chapters we will conclude that the Lisbon Treaty is indeed democratically superior to the Nice Treaty

in many respects – but overall not as extensively and not as unambiguously as is often asserted. But even without a close textual anaysis we believe that there are understandable and even good grounds for rejecting a treaty which promises greater democracy:

1. the text of the treaty offered to the voters in Ireland was difficult to understand. The polls cited above clearly indicate that this was the decisive reason for the rejection of the treaty in Ireland. We consider inadequate comprehensibility to be a valid reason for voting against a proposal, as comprehensibility is an important precondition for democracy. This is all the more the case given the public admission that the Lisbon Treaty had been *deliberately* made difficult to understand.

2. The referendum question was "overloaded" in terms of content. With a single vote, citizens were being asked to decide for or against reforms to the internal working arrangements of the EU; the relationship between the Union and the member states; the political part of the treaty with many separate elements; a new Charter of Fundamental Human Rights; and the admission of new member states. Many of these elements would merit separate referendums. Linking them all together in a single referendum proposal is certainly possible (and preferable to the alternative of not having a referendum at all), but places an unreasonable demand on the average citizen – besides increasing the risk of failure for the initiators. In several countries, a proposal such as this presented for decision in a national referendum would probably be ruled invalid as violating the criterion of "Unity of Subject Matter", which means that a referendum may deal with only one issue – not several different ones – so that it is clear what the outcome relates to.

3. Many people may have felt, when voting in a referendum on an EU treaty, that they had no real choice – because there was no Plan B in the event of a rejection. A referendum on a package of measures that one is under pressure not to reject – because one is being repeatedly told by EU politicians that rejection would be extremely damaging – is no longer a democratic referendum and

Open expression of democratic envy: In a demonstration outside the Irish Embassy in Berlin shortly before the referendum in Ireland in June 2008, a group of protesters makes the point that by far the majority of people in Europe are not allowed to vote on the Lisbon Treaty. Similar demonstrations took place in 12 other European capitals.
Photos: Michael von der Lohe.

perhaps deserves to be rejected for that reason alone. In the case of Ireland there is empirical evidence of an attitude of rejection (see above), which may well have been reinforced by the knowledge that the pressure on the country – as the only EU country to hold a referendum on the Lisbon Treaty – to vote "Yes" was at its maximum to date.

The positive aspects of the reforms are not automatically sufficient for a "Yes"-vote to be seen as the only sensible option. On the contrary, the route taken for the reform and ratification of the treaties reveals a repeated denial of democracy. To begin with, some governments allowed their citizens a measure of effective decision-making influence, but when the voters did not produce the desired outcome, their further participation was deliberately blocked. Are the voters to blame if they then withhold their approval in the referendums?

2. The political system of the EU

In the previous section we looked at European integration and in particular at the treaty reform process since the Convention. We now want to turn to a consideration of the procedures and institutions which are set in place by the treaties themselves and which govern the day-to-day politics of the EU. In the first part we deal with the relationship between the EU-level and the member states and ask: how are the political powers distributed? and what checks are there on that distribution? We go on to examine the major EU organs and their relationship to each other. Finally, under the heading of "government practice", we summarise the lower-level arrangements, procedures and measures which are relevant for an evaluation of the EU in terms of democratic principles and practice.

Division of political competences between the EU and the member states

A key question, which has been posed repeatedly since the start of European integration and to which the treaties have to give an answer, is the question of the division of powers or competences between the EU and its member states. Which level is to be responsible for which areas of policy? And who has the right to allocate responsibility: who has the power to decide the division of power? If we look back, we can see that more and more powers have been transferred to the EU ("centralisation"), and the Lisbon Treaty continues the trend in making provision for and enabling further extensions of power.

What effect European centralisation has on a representative democracy such as Germany is illustrated by some figures from the Federal Ministry of Justice, the result of a request by a member of the federal parliament. The ministry compiled a list of the acts of legislation which were voted on in the Bundestag between 1998 and 2004, and then compared the number of acts originating in the Bundestag with the number originating in the EU. No less than 84% of the acts originated in Brussels, with the remaining 16% coming from the Bundestag itself.[17] In a newspaper article of January 2007, former Federal President Roman Herzog and Lüder Gerken (Director of the Centre for European Policy Studies) commented on these findings as follows: "The figures from the Federal Ministry of Justice make it clear: by far the greatest majority of the laws obtaining in Germany are decided in the Council of Ministers by the Federal Government, not the German Parliament. And every directive which the Federal Government passes in the Council of Ministers has to be turned into German law in the Bundestag. But according to the German constitution, the federal parliament is the central actor in the organisation of political life. The question must therefore be asked: can one any longer unequivocally define the Federal Republic of Germany as a parliamentary democracy?"[18]

In this chapter we wish to highlight the reasons for and mechanisms of the expansion of powers, and also the lack of checks and balances, while making no claim to completeness. In our opinion, the allocation of competences is a process which demands extra-special legitimation, because 1. the giving of powers to a higher level normally implies a reduction of power at the lower level; the result is that the member state democracies lose the ability to control their own affairs; and 2. the way the EU functions is far less democratic than the member states (at least for the time being).

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17 Question by Member of Parliament Johannes Singhammer in the Bundestag on 29th May 2005. It must be borne in mind that the figure for the number of legislative acts relates only to acts passed at the federal level. An accurate picture of the influence of EU legislation would have to include acts passed in the regional parliaments. But as the federal states account for relatively few laws, it is unlikely that there would be any significant change to the clear preponderance of EU legislation.

18 Roman Herzog and Lüder Gerken, in *Die Welt,* 13 January 2007.

These two criteria are in accord with those of the German Constitutional Court (see box p. 46).

The powers of the European Union

The Nice Treaty already gave the EU the right to make legislation in virtually all policy areas. If implemented, the Lisbon Treaty would once again extend the powers and responsibilities of the EU – now explicitly listed for the first time and assigned to three categories, according to the degree of influence the EU can exercise. The Treaty differentiates between "exclusive", "shared", "supporting", "coordinating" and "supplementing" powers. This is primarily an attempt to be systematic: in terms of the overall concept, these categories are already there in the existing treaties. Special rules apply to the Common Foreign and Security Policy (CFSP) and to the coordination of economic, employment and social policies.

Article 3 of the Treaty on the Functioning of the European Union (TFEU) details the areas of "exclusive" power, over which the EU has the sole right to legislate – in particular competition, commerce, customs union and monetary policy. In these areas, therefore, the member states have entirely ceded their sovereignty to the EU. The "shared competences" (Art. 4) cover the largest and most weighty areas of EU policy, primarily Single European Market policy, domestic and legal policy, social policy, the environment, consumer protection, agriculture and fisheries, transport and energy. In these areas the member states are allowed to pass their own laws – but only "to the extent that the Union has not exercised its competence" and as long as the principle of subsidiarity (see below) is not contravened. Article 6 covers the "supporting, coordinating and supplementing competences", which include the sectors of industry, the protection and improvement of human health, education, vocational training, culture, civil protection and tourism. In these areas "The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States" – as long as these are judged to be measures which have "European objectives". It is true that in these policy areas the member states have sole competence

in terms of decision-making power; however, the EU can exercise an influence over the member states' legislation – through instruments for the coordination of policy – which should not be underestimated and which can cloud the democratic decision-making process, making it non-transparent. For citizens and the media it can be difficult in individual cases to determine to what extent the success or failure of a particular measure can be attributed to one's national parliamentarians or the EU.

The idea of "shared competences" suggests, to begin with, an equality between the EU and the member states in relation to legislation. In practice, the EU takes precedence, as Article 2.2 makes clear: "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence." "The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6." (Article 4.1)

This means that in the area of shared competences the EU can supplant the actions of the member states, and it is the EU (and especially the European Commission) from which the initiative to do so originates. This ruling was copied from German constitutional law and it is well-known that in Germany it has led to a creeping centralisation of powers (cf. Art. 72.1 of the German Constitution). It is true that the appropriation of competence has to be justified against the principle of subsidiarity, but, as we shall see, the Lisbon Treaty favours the EU level in this respect.

There is, to be sure, a general principle within the EU commonly referred to as the "conferral of powers". It means that the EU may not act in any way it pleases in the areas to which it has been assigned competence. It must observe the limitations on the powers conferred on it by the treaties. This is designed to prevent the EU from asserting universal competence – the power to decide itself

The Ruling of 12th October 1993 on the Maastricht Treaty by the Federal Constitutional Court*

In its Maastricht ruling, the Federal Constitutional Court in Germany affirmed the compatibility of the Maastricht Treaty with the German Constitution. It rejected the claim that the transfer to the EU of certain competences – especially through the creation of the Single Market and Monetary Union – had set aside the principle of democracy and the protection of human rights guaranteed by the Constitution. However, the ruling included some statements on the conditions of integration and on the democratic obligations of the EU. Here are a few excerpts:

"The principle of democracy does not prevent Germany from becoming part of a supranationally organised international community. However, it is not possible in such a community to secure democratic legitimacy in the same way as can be done in a nation-state. For that reason, the democratic principle sets limits to the expansion of the European Community's duties and powers. Substantial duties must remain with the Federal Parliament."

"It is a condition of membership that there be a guarantee of legitimation and influence flowing from the people even within such a community of nations. The EU declares itself to be a union of democratic states. If it gives itself sovereign responsibility for certain tasks, it is the prerogative of the peoples of the member states to grant democratic legitimacy to its actions through their national parliaments."

"With the expansion of responsibilities comes a greater need to add extra democratic legitimacy through a European Parliament. The European Parliament currently exercises a supporting role in relation to legitimation, which can be strengthened if it is elected according to uniform electoral rules and if its influence on the politics and the legal position of the EC can grow. The democratic foundations of the Union would have to be reinforced in tandem with increasing integration."

* BVerfGE 89, 155, 12 October 1993, Az: 2 BvR 2134, 2159/92

"Thus what is decisive from the perspective of both the treaties and constitutional law is that the reinforcement of the democratic foundations of the Union keeps step with integration and that as integration proceeds a living democracy is still preserved in the member states."

which powers it shall have. In practice, however, this very welcome provision is subverted by a host of general clauses and by the simple fact that many powers are relatively vaguely formulated.

One problem in this connection is the overlapping of competences. It has already happened many times that on the basis of the powers relating to the integration of the Single European Market (Art. 114, 115 TFEU) decisions have been taken which have nothing to do with the Single European Market. For example, the area of employment and labour market policy is only to a limited extent part of the EU's powers, but it can be severely impacted by laws on the Single European Market or rules on competition. One example is the EU services directive, designed to enable the free provision of services throughout the EU. Its provisions affect many national regulations in other policy areas – such as employment law and labour market policy, which have then to be adapted to the requirements of the directive. The EU is thus creating law in areas over which it has no competence, supplanting in the process – by undemocratic means – national rules which have far greater democratic legitimacy.

A further example of the misuse of the article on the Single European Market is the issuing of the EU directive on data retention. To be sure, the European Court had determined, in its much-noted judgement on the tobacco advertising directive, that Art. 114 (ex-Art. 95 TEC) does not confer on the EU a "general power to regulate the Single European Market", i.e. not everything that has some kind of connection to the Single European Market is covered by this area of competence. Nonetheless, such EU acts as the above-mentioned directive on data retention rely specifically on this article.

The directive on data retention should have been decided within the third pillar of the EU (police-judicial cooperation in criminal affairs), but it would have failed due to Dutch opposition.[19] The current lack of clarity in the demarcation of competences allows EU officials and politicians extensive room for political manoeuvering. The drive towards unrestrained regulation which one can observe in Brussels means that regulations are often generated for things which do not need to be harmonised across Europe.

The Lisbon Treaty would assign further areas of competence to the EU (for energy, civil protection, administrative cooperation, tourism, humanitarian aid, space travel, and sport) within which the EU could act to differing extents. Common commercial policy, many areas of which have to date been shared competences between the EU and the member states, would become exclusive competences of the EU (Art. 3.1e TFEU). Foreign direct investment would for the first time become an exclusive EU competence. The member states would thereby lose the right to conclude their own investment agreements with other states. The powers of the EU to act in such sensitive areas as intellectual property rights and services would be expanded (Art. 207.1 TFEU).

In the drafting of the Lisbon Treaty, relatively small changes to the wording in places resulted in far-reaching changes in actual content. For example, in Article 42.2 TEUnew of the provisions on the common security and defence policy it is stated that: "The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides." The wording in the Nice Treaty was different: it said that the common security and defence policy *could* lead to a common defence. The difference is slight – but with potentially enormous consequences. In the Lisbon Treaty, the EU commits itself definitely to developing a common defence capability – in practice a

19 From the lecture by Prof. Dr. Marion Albers on the theme: "Protection of the Constitution in Germany and Europe", given at the conference of the Humanistic Union on data retention on 17th September 2007 in Berlin.

European army – whereas the previous treaty position was that this was merely one option.

Europeanisation marches on also in areas which still lie within the main competence of the member states. One example is economic policy, which was not mentioned in European law until as recently as 1992. Article 119 TFEU does indeed leave economic policy in principle within the powers of the member states, but the states have to view their economic policy as a matter of common interest and coordinate it closely with the other EU states (Art. 5 TFEU). In European law, therefore, it is scarcely possible for member states to pursue their own independent economic policy. Article 5 states that the European Council shall "adopt measures, in particular broad guidelines, for these policies", and the Commission is charged with monitoring compliance with them ("multilateral surveillance"). A member state may receive a warning if it contravenes these principles, and it may be handed recommendations for "correcting" its economic policy.

The Lisbon Treaty would also significantly increase those areas of European policy to which qualified majority voting applies – either by means of new authorisations or by transferring areas from unanimity to majority voting – more clearly than in any previous treaty reform. Depending on how they are counted, the tally ranges from a minimum of 40 (official report of a House of Commons committee), to 44 (Centre for European Policy Studies), to at least 60 (open europe), and even as many as 68 (online platform x09.eu). Irrespective of other related pros and cons, the expansion of majority voting facilitates the creation of new EU regulations for the simple reason that a majority decision is easier to obtain than a consensus one.

Can EU powers be returned to the level of the member states? Article 48, which deals with the "ordinary revision procedure" for the treaty, states that proposals for amendment (by a member state government, the EP or the Commission) "may serve either to increase or to *reduce* the competences conferred on the Union in the Treaties". This is the first explicit mention in any Union treaty of the possibility of competences being taken away from the EU.

In practice, however, it does not generate any new options, for it was of course already possible in the Nice Treaty to propose revisions which would effect returns of competences. The paragraph does, however, testify to a growing sensitivity and probably also a growing concern within the Union about its progressive centralisation.

Much the same applies to secession from the EU, which is already allowed; it is explicitly mentioned and regulated in Article 50 TEUnew.

The flexibility clause

The so-called "flexibility clause" in the Union treaties allows the Union to increase its competences, which in practice allows it to bypass the "principle of conferral".

The Lisbon text states: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament" (Art. 352.1 TFEU, corresponding to ex-article 308 TEC, with the difference that in the latter the European Parliament was merely to be "consulted").

To be sure, the Lisbon Treaty points out that the flexibility clause cannot be used to extend the competences of the Union or to introduce treaty amendments, but the history of the use of this clause shows just how frequently treaty restrictions are actually ignored. In the past, the flexibility clause was one of the most frequently used pieces of EU law. For example, in the absence of specifically designated powers, a series of in part very controversial regulations to do with combatting terrorism were pushed through based on this clause – revealing just how strong the temptation is in Brussels to circumvent the principle of conferral, despite what the treaties say.

Because the Lisbon Treaty dispenses with the "three pillars" structure, the range of applicability of the flexibility clause would now be extended to every area of policy for which the EU has competence – including the Common Security and Defence Policy (CSDP, part of the Common Foreign and Security Policy – CFSP) and the area of freedom, security and justice, though there is only limited applicability in the case of CSDP. The Declaration on Art. 352 of the TFEU – which is not, however, legally binding – limits the purposes which Art. 352 can be used to justify.[20]

The new flexibility clause creates an instrument which can be used by the EU as the basis for rules which increase the powers assigned to it by the treaties. Such an expansion of centralisation would not be legitimated by, nor be under the control of, either the national parliaments or the voters. The stipulation that proposed measures are subject to approval by the European Parliament gives the appearance of a democratic legitimation for the use of the clause, but hardly provides for a real brake on its excessive use. The Parliament also has a vested interest in an increase in EU regulation, because its own sphere of influence is thereby expanded.

The dismantling of the three pillars

The European Union only came into existence with the Maastricht Treaty. Prior to this there was the European Community (EC), which was first and foremost an economic community whose aim was the creation of a common Single European Market. The Maastricht

20 „The Conference underlines that, in accordance with the settled case law of the Court of Justice of the European Union, Article 352 of the Treaty on the Functioning of the European Union, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose."

Treaty brought the EC, the Common Foreign and Security Policy (CFSP), and Police and Judicial Cooperation in Criminal Matters (PJC) under the single "roof" of the EU. The three main areas of policy form the so-called "three-pillar structure" which supports the "roof" of the political union (the EU).

The first pillar is the European Community. Policy in this area is a community matter i.e. it is determined by the central EU institutions: the Council of Ministers, the European Parliament and the European Commission. This pillar covers all those areas of policy which are connected in the broadest sense with the Single European Market – including the policies on trade, customs, monetary union, competition and agriculture, but also many policy areas which are only partially "communitarised".[21] EU competences within the first pillar are regulated by the "Treaty establishing the European Community" (TEC). The second pillar comprises the Common Foreign and Security Policy (CFSP). Policy in this area is determined by the governments of the member states and is coordinated between the states within the framework of the EU. The central institutions – especially the European Parliament – have practically no influence here. The third pillar, finally, covers cooperation in the areas of justice and home affairs. As with the second pillar, policy is determined by the member states and coordinated at the EU level. The competences and procedures for the second and third pillars are regulated by the "Treaty on European Union" (TEU).

The Lisbon Treaty would abolish the three-pillar structure, leading inevitably to an expansion of the powers of the EU. Until now the policies within the second and third pillars have been decided inter-governmentally i.e. collectively by the governments of the member states. As a rule, decisions are governed here by the principle of unanimity, and – unlike the first pillar – legislation passed in this way does not necessarily supercede national law. In these

21 When we refer to "communitarisation", we mean the transition from consensus decisions by the governments to majority decisions by the governments or the European Parliament. This does not imply that the earlier requirement for unanimity can be endorsed from a democratic point of view.

areas the EU has no legal identity and is thus unable to conclude international agreements which would be binding on the member states. The abolition of the pillar structure would 'communitarise' all policy areas except for CFSP i.e. it would make them subject to EU law, as was the case previously with the first pillar.

The abolition of the pillar structure would also bring about the explicit creation of a legal personality, which would now apply to the entire EU (Art. 47 TEUnew). This would allow the EU to conclude agreements within the framework of the WTO, for example, which would have priority over national laws and constitutions. Legislation passed on both CFSP and PJC matters would also take precedence over member state law. Significantly, the Lisbon Treaty no longer explicitly states this right of precedence in the main text (it *was* explicit in the draft Constitutional Treaty). Instead, it is hidden at the end of the Treaty in Declaration 17: the "Declaration concerning Primacy", which states: "... the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States". The implementation of the Lisbon Treaty would drastically blur the distinctions between the once separate pillars. The PJC in particular – a core element of national sovereignty – would be extensively communitarised.

The Lisbon Treaty would not only expand the EU's sphere of action in relation to foreign policy, but it would above all significantly increase the range of EU competences on internal and legal matters. It is especially in this area that many majority decisions would be enabled. The existing possibility for member states to propose legislation would be severely restricted. Full competence for almost all areas of internal and legal policy would be transferred to the European Court of Justice, and a completely new institution – the European Public Prosecutor's Office – would be created (Art. 86 TFEU). In addition, Art. 71 TFEU would establish within the European Council a "Standing Committee on Internal Security" (COSI), tasked with "ensuring that operational cooperation on internal security is promoted and strengthened within the Union". There would also be – for the first time – a common policy on asylum (Art. 78 TFEU). Also worth mentioning, finally, is the

introduction of European criminal law which would apply to ten "cross-border" crimes (including terrorism, drugs and arms trafficking, money laundering, sexual exploitation of women and cyber-crime) (Art. 83 TFEU). "Other areas of crime" could be added by a decision in the European Council. The powers of EUROPOL would also be increased slightly (Art. 88 TFEU).

"Playing off the cushions"

The principle of subsidiarity is supposed to ensure that only those issues are dealt with at EU level which cannot or should not rather be dealt with by the member states themselves. In practice, however, it is clear that it is precisely the member states – i.e. their governments – which are themselves often driving forward the process of centralisation. The EU offers them very seductive incentives – because at the EU level it is the governments which represent the member states and where they are able to enact legislation. Using the EU route often enables them to have legislative proposals accepted which were really only intended for their own country, but for which they had not received the necessary support from their government colleagues or from parliament. This kind of politicking is known in Brussels jargon as "playing off the cushions" (a reference to an indirect shot in billiards or snooker, where the cue ball is first aimed at the cushions before striking the intended target; it could also be called "pulling a flanker").

The manoeuvre is launched by a member-state ministry – the French Ministry of Economy, Finances and Industry, for example – when the latter is unable to get a draft law passed at the national level, whether due to opposition from the French Environment Minister, or because it was not possible to secure a majority in parliament. The Economy Minister discreetly 'encourages' the relevant Directorate-General in Brussels to have the proposal implemented at the EU level i.e. for the whole of the EU. The suggestion normally enjoys a positive reception in Brussels. The proposal – which has now become a draft European law – passes through the usual legislative process. Finally, the Council of Ministers (an assembly of all the national ministers of the relevant policy area),

plus the European Parliament, decides whether the proposal shall become law. But the particular session of the Council of Ministers will – in most cases – be attended by the very same ministry which launched the proposal in the first place, plus the relevant specialist ministries of the other member states – and *only* those. The decision is thus made by 27 Economics Ministers – with no oppositional Environment Minister, no opposing voices from the parliament, no critical members of the public or media. If approved, the outcome will be a ruling for the entire EU for a proposal which was originally intended for only one country and which could not be democratically implemented even there.

This tactic of "playing off the cushions" contravenes the principle of subsidiarity, routinely circumventing the essential trade-offs and accommodations between different political spheres. Other ministries and especially the national parliaments are excluded from the decision-making process. Their involvement is taken for granted in the passing of laws at the national level and is actually prescribed in the constitutions of the member states.[22]

Treaty amendment procedures

It is reasonable to expect that the major transfers of competence take place through amendments to the treaties. One of the significant innovations in the Constitutional Treaty, which has been preserved in the Lisbon Treaty, concerns the "ordinary treaty revision procedure" (Art. 48.2-5 TEUnew). Until now, only governments or the Commission could present proposals for a revision of the treaty. The Lisbon Treaty assigns this right also to the European Parliament. In addition, after having been passed to the Council and the European Council, the proposal must also be "brought to the attention of the national parliaments". If a simple majority in the European Council approves the proposal as the basis for a treaty revision, the President of the European Council convenes a Convention – like the previous Convention on the Future of Eu-

22 Cf. Herzog, Roman & Lüder, Gerken, 2007. Europa entmachtet uns und unsere Vertreter. *Die Welt,* 13 January.

rope – consisting of representatives of the national parliaments, the heads of state and government, the European Parliament and the Commission. The task of the Convention is to examine the revision proposals and arrive at a consensus agreement on its recommendations.

However, the summoning of a Convention – which despite all the above-mentioned failings can nonetheless be seen as a welcome sign of progress – can be circumvented in a number of ways. The first possibility is that the European Council can decide by simple majority not to convene the convention if it believes that the scope of the revision is too small, and the European Parliament must then either accept or reject the Council's position. This option seems the easiest to justify since in practice it is subject to a right of veto by the European Parliament, which would itself be represented in the convention.

Approval by the European Parliament could of course lead to democratically problematic transfers of competence, for instance if the revision proposals were to lead to a disempowerment of the national parliaments and a corresponding increase in power for the European Parliament.

In addition to these "ordinary revision procedures" – which actually comprise two different procedures – the Lisbon Treaty contains a further two "simplified" treaty revision procedures. The first – a new ruling – is in Art. 48.6 TEUnew. This states that the European Council may – by a unanimous vote – amend Part III of the Treaty on the Functioning of the European Union (with the main exception of the Common Foreign and Security Policy and the provisions which relate to the institutions) without resorting to an inter-government conference, without summoning a convention and without the agreement of the European Parliament – as long as the decision brings about no expansion of the powers of the EU. Part III of the Treaty deals with by far the largest part of European policy and comprises 172 articles. The member states have to "approve" the unanimous decision of the European Council before it can enter into force. In contrast to the normal treaty revision procedure detailed in Art. 48.2 TEUnew, there is no mention here of

"ratification", but only of the revision not entering into force "until it is approved by the Member States in accordance with their respective constitutional requirements".

It thus remains unclear whether the approval of the national parliaments is required or not. In Germany, for example, it would be sufficient for a revision to be approved by the government; ratification by the Parliament or the Federal Council would not be required.

It remains to be seen whether the proviso that there must be no expansion of competences will really put a stop to the trend towards further centralisation, for the proviso refers to "competences" in respect of areas of policy. But the Union already enjoys competence in practically all areas of policy. Of primary importance for the shaping of EU policy are the enabling powers and policies within those areas of policy for which competence has already been transferred. Some doubt remains as to whether this simplified revision procedure can prevent them from being extended. The fact that in this procedure proposals for treaty revision do not have to be submitted to the national parliaments at an early stage is certainly deserving of criticism.

The second "simplified revision procedure" (Art. 48.7 TEUnew) is often referred to as the "bridging clause" or "passerelle". It allows the European Council – by unanimous vote and with the subsequent consent of the European Parliament – to authorise the Council to act by qualified majority instead of unanimity, or to adopt acts by the ordinary instead of the special legislative procedure. The national parliaments must be "notified" of this intention and if any individual parliament "makes known its opposition" within six months the European Council decision will be dropped. In formal terms this represents a strong right of veto, though it would be important to examine under what circumstances such a veto could realistically be expected. If there were to be a treaty revision by means of the passerelle, national referendums – prescribed in some member states for constitutional amendments – would not be possible. Thus it could happen, for example, that a switch to qualified majority voting could be made in respect of

some aspect of CFSP or taxation policy against the wishes of the voters. Only "decisions with military implications or those in the area of defence" are explicitly excluded from this provision.

Subsidiarity

In constitutional law, the principle of subsidiarity means that the various tasks within a state or state-like entity are undertaken at the smallest practicable level e.g. by local authorities. Only when a local authority is unable to handle a task on its own, or if it does not make sense to deal with it at the local level, is the next highest level – for example, a region, a federated state, or the national state – responsible for taking on the task or for lending support to the local authority. The smaller entity enjoys a priority in terms of action, the large one has a duty of support. The explicit purpose of the principle is to keep politics close to the citizens and prevent unnecessary centralisation of rules and procedures.

As more and more areas of policy moved into the sphere of competence of the EU during the process of European integration, so did the calls grow louder for the trend to be reversed. The result was that in the Maastricht Treaty of 1993 on political union, the principle of subsidiarity was written into both the Preamble and the text of the treaty itself (Art. 2 TEU), and the specifics of its usage were set out in a related protocol. The principle of subsidiarity applies, of course, only to those areas of policy to which competence has not been clearly assigned – primarily the so-called "shared competences", which are first mentioned explicitly only in the Constitutional Treaty and the Lisbon Treaty. In these areas the EU has, so to speak, the right to make the first move – to forestall the member states – though qualified by the principle of subsidiarity.

In practice, this means that the Commission makes a proposal for a measure in an area of policy covered by shared competence, at the same time giving its reasons as to why the proposal does not contravene the subsidiarity principle. Let us look a little more closely at how the current Nice Treaty and the proposed Lisbon Treaty regulate control of subsidiarity.

In the Nice Treaty, the organs of the EU are committed to "ensuring compliance" with the principle of subsidiarity. There are no further controls at the EU level. In effect, the EU – as the higher level of administration – is monitoring and controlling itself, while the subordinate administrative level of the member states which is directly affected by the principle has no formal role in ensuring compliance. Once again, the dual role of the members of the Council – which has to decide on the question of subsidiarity as both the main legislative organ *and* the final (extra-judicial) authority – is problematic.

This unsatisfactory situation led to efforts to introduce reforms during the drafting of both the Constitutional Treaty and the Lisbon Treaty. Within the Convention, the representatives of the national parliaments demanded to be involved in ensuring compliance, because it is they who suffer the greatest loss of power from the collaboration of their governments in the Council. The outcome was as follows: to begin with, the Lisbon Treaty repeats the Nice Treaty commitment by the EU organs to ensuring compliance, and the Commission continues to be obliged to listen to the points of view of all the parties affected by a law and to check all draft laws for compliance with the principle of subsidiarity. What the Lisbon text adds is a monitoring and controlling role for the national parliaments, which must be informed promptly of any new legislative proposals. They then have a period of eight weeks after notification (the Constitutional Treaty allowed them only six) within which to make their views known formally to the President of the Commission, to the European Parliament, and to the Council. In their submission, the parliaments give the reasons why they believe that the proposed EU legislation does not conform with the principle of subsidiarity – despite the argument put forward by the EU. But in order to oblige the EU to look at the matter again, it is no longer sufficient for a single state to object: objections must be received from a prescribed minimum number of states. Each member state has two votes, so that bicameral states can have one vote for each chamber and the votes can be counted separately. The normal quorum to be achieved is one third of the total of par-

liamentary votes; in the case of draft laws in the area of freedom, security and justice, the quorum is one quarter. If the quorum is reached, the initiating organ (normally the Commission) may "decide to maintain, amend, or withdraw the draft. Reasons must be given for this decision" (Art. 7.2 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality). If it is an "ordinary legislative procedure" (for which the Lisbon Treaty gives the EP co-decision-making rights: Art. 48 TEUnew), the quorum is 50% of the parliaments; but the Commission does not have the last word in all cases. If the Commission decides to ignore the objections of the parliaments, it must submit its new position – together with that of the parliaments – to the legislative organs of the EP and the Council. The latter review the draft law once again, taking into account the checks and/or the stated positions of the Commission and the parliaments. In the likely event of disagreement among the members of the Council and the EP, a final vote (55% majority in the Council; simple majority in the EP) decides whether the proposed law is compatible with the subsidiarity principle, or whether it should "not be given further consideration".

This ruling is presented as one of the most important achievements of the Lisbon Treaty. It is certainly true that it is the first time that the national parliaments have been given a role on questions of subsidiarity in any treaty. However, it is difficult for us to see the new provision as offering a solution to the problem in question. The most obvious point of criticism is that the procedure is non-binding. In the final analysis, the national parliaments have only a right to be consulted – a right which is, moreover, subject to a quorum provision. They have no effective blocking right. In the first place, it is the European Commission which initiates the majority of draft laws, and it is again the EU organs of the Commission, the European Parliament and the Council which decide on compliance with the principle of subsidiarity.

One could only speak of an effective and meaningful control of subsidiarity if the decision-making power lay with the parliaments; but in the Lisbon Treaty system they have only a reactive role. At the same time, a greater burden of proof is imposed on

them – in terms of both content and complexity – in the form of quorums and a tight deadline. This problematic state of affairs is exacerbated by the fact that the principle of subsidiarity derives, on the one hand, from objective criteria – as is clear, for example, from the relevant article of the Lisbon Treaty, which defines subsidiarity as follows: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." (Art. 5.3 TEUnew).

The issue relates to the "sufficient" or "better" achievement of actions at the lower or higher levels. According to the Protocol, the judgment relies on "qualitative, and wherever possible, quantitative indicators" (Art. 5 of the Protocol). In principle, the requirement of objectivity de-politicises the question of the division of powers between the different levels. There is no room here for the diverging points of view of parties and politicians. Whether parliaments have a chance of succeeding with their point of view is dependent solely on supposedly objective criteria, as if we were dealing with purely administrative matters.

On the other hand, it is only too apparent that the presumed objectivity on the issue of subsidiarity simply doesn't exist. Who is really in a position to judge what is "sufficient" or "better" in each individual case? What criteria should be applied? In contrast to the Nice Treaty (which does at least list two criteria, even if the wording is very general), the Lisbon Treaty has none. Of course it will be possible in each individual case to find some "good" arguments, but overall there remains a good deal of room for interpretation – and thus for rather less than objective motives, which in the checks and position-takings can be packaged into objective-sounding rationales. After all, we are dealing with competing power interests, which exist even in the absence of arguments.

The illusion of objectivity in the ensurance of compliance with the principle is carried to absurd lengths by the addition of quo-

rum rules for the parliamentary objections – mixing the qualitative requirement in respect of the argumentation with the purely quantitative requirement for a numerical quorum of parliaments. Whereas the exchange of checks and position-statements between the EU and the parliaments implies that the resolution of the disagreement depends solely on objective criteria, the quorum rule applies to a vote in which all the different arguments have been reduced to a simple "yes" or "no". It is possible to imagine circumstances in which a majority of parliaments submit responses, but the Commission judges that only a handful have provided convincing arguments; or alternatively, that the quorum is not reached, but that all the submitted responses are convincing even to the Commission. What is to happen in such cases? To marry a check on compliance of a principle based on the content of a proposal together with a voting process makes little sense.

The authors are unaware of the existence of a similar construct in any of the member states with federal systems. In these, issues of subsidiarity are decided either politically by majority voting procedures (in the runup to which factual arguments are of course put forward), or individual actors submit an appeal i.e. they take a legal route – an option which is also open at the EU level, where the European Court of Justice is responsible for examining appeals on subsidiarity. In its Protocol on Subsidiarity (Article 8), the Lisbon Treaty also accords the national parliaments a right of appeal which has hitherto been available only to governments. A glance at the track record of judgements on subsidiarity by the European Court gives little reason for optimism, however. The President of the Court, Hans-Jürgen Papier, has pointed to the fact that since the introduction of the principle of subsidiarity in 1992, not one single proposed piece of legislation has ever been judged by the European Court to be in contravention of the principle. We see once again how assigning control of subsidiarity to one of the organs of the EU is more of a hindrance than a help in ensuring compliance with the principle. Moreover, the new right of appeal does not apply to regional parliaments or local authorities. Only the Committee of the Regions or, in certain cases, the second chamber of

a national parliament have the right to appeal. The only recourse of a federal German state that was affected by proposed legislation would be to make its appeal via the Federal Council – in which only the state governments are represented.

What overall assessment can thus be made of the measures in the Lisbon Treaty for ensuring compliance with subsidiarity? To begin with, we share the view that Lisbon does represent an improvement over the previous rules, which gave governments the sole role as representatives of the member states. The inclusion of the national parliaments means that other players are involved who are more representative of the member states and who would tend to favour the level of the states when interpreting the rules on subsidiarity. Yet such an assessment cannot hide the fact that the role the parliaments have been assigned is an intentionally weak one. In the "battle of words" (arguments) which the Lisbon Treaty foresees, the EU level has been given a clear competitive edge and the final decision-making power, whereas the lot of national parliaments is potentially a great deal of bureaucratic effort and expense. This preferential position of the EU is not altered even when a parliament decides to take the legal appeal route instead of submitting an objection to the EU organs – because the matter is once again dealt with by an organ of the EU. It seems likely that the national parliaments will make more and more frequent use of the European Court (as a nominally neutral entity) for a final decision when the normal path of negotiation has failed to produce a satisfactory outcome – or merely as a way of bypassing the bureaucratically cumbersome normal procedure.

It is perhaps still necessary to state what the system of parliamentary involvement in compliance is *not*. It is *not* a system of parliamentary control in the normal sense, for the principle of subsidiarity is not a substantive political issue on which a decision can be made by parliamentary majority; the issue is one, rather, of ensuring compliance with existing principles. The significance for European citizens is that their electoral vote has no effect on whether and how subsidiarity is complied with, because this does not depend on the composition of their parliament. The national

parliaments represent the citizens of their respective countries – something to be welcomed – but the Treaty provisions merely strengthen the position of the parliaments as organs of representation; nothing is done to help the voters make informed electoral choices. This should be borne in mind when the new compliance system is depicted as progress in democratisation – as something the voters ought to welcome.

Moreover, controls on *subsidiarity* are not at the same time controls on *sovereignty* – even if there is overlap between the two concepts. It would be necessary to make parliamentary control of sovereignty dependent not merely on factual criteria, but in the final analysis also on the democratic expression of political will in the parliaments via the creation of majorities whose decisions had genuinely effective i.e. 'sovereign' consequences. In the first place, however, the national parliaments can become involved in the compliance process only by putting forward counter-arguments – not through an (internal) voting process; secondly, the real issues of sovereignty have already been decided in the Treaty, in its distribution of competences to the various levels – including the "shared competences" which are of relevance here. The Treaty's awarding of priority to the EU to act in this area is intentional, and the tendency for powers to be transferred to the EU level is already implicit in the EU's structure.

It remains to be hoped that the national parliaments will know how to make use of the possibilities offered by the new instrument. If the control system involving the national parliaments is introduced, it is to be expected – and hoped – that the parliaments will get themselves organised collectively. In the first place they would do so in order to communicate more efficiently with one another, as the deadline of a response within eight weeks for perhaps as many as 14 parliaments is a tight one. A parliament with concerns about a draft law will want to know quickly whether other parliaments share its views and thus whether the quorum can be achieved. But the parliaments will want to join forces also in respect of the content of their response. Although the Protocol on Subsidiarity provides for individual submissions by parliaments,

there is no explicit ban on parliaments conferring and agreeing on the best arguments to be put forward. The more the parliaments can present a unified position in terms of content, the greater will be the political weight of their votes, as the potential discrepancy between the qualitative aspect of content and the quantitative aspect of pure numbers of votes already referred to will then have been overcome. It remains to be seen whether and how the parliaments will make use of their newly-won political influence. What is certain, however, is that the Lisbon Treaty – if implemented as it stands – will perpetuate the structural discrimination in favour of the EU level.

Concluding remarks

Overall, like earlier treaties, the Lisbon Treaty too favours an expansion of the powers of the EU – without adequate controls by those who are affected: the national parliaments and the citizens of the member states. In the main, it is EU organs which decide on an expansion of competence or judge its appropriateness. That the EU would continue to function in this way if the Lisbon Treaty is implemented is obvious from the goal which it sets itself: ".. to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity" (from the Preamble; similar forms of words are to be found in earlier treaties). The stated goal implies a self-imposed commitment to self-empowerment; it explains why in the interpretation of the principle of subsidiarity and other mechanisms for transferring powers the EU has been given the greater leverage. This has correspondingly negative consequences for democracy: power continually flows away from the more democratically legitimated member states along a slippery slope towards the less democratic level of the EU. Among other reasons, the slope exists because the treaties impose no commitment on the EU to democratise itself in line with the new powers it has been granted.

The "ever closer" Union is thus not automatically an "ever more democratic" Union. The principle of subsidiarity has long since re-

placed the principle of sovereignty in the EU – the root form "sovereign" never appears once in the Lisbon Treaty – turning the issue of competence into a purely technical question. It ought rather to be a question of democracy.

We are therefore left merely with the hope that the Lisbon Treaty will bring greater democracy to the way the EU operates, in line with its powers. The analysis we present in the next part, however, suggests that any hope of this will be dashed.

The EU Organs

After examining the procedures between the EU level and the level of the member states, we turn now to a consideration of the main organs of the EU – the European Council,[23] the Council of Ministers, the EU Commission and the European Court of Justice – their relationship to each other and the question of their democratic ties to the citizens of Europe.

The European Council

According to the Nice Treaty, the European Council[24] is composed of the heads of state and government of the member states and the President of the European Commission. The Lisbon Treaty also provides for the participation of the President of the European Council (see below) and the Vice-President of the Commission – the "High Representative for Foreign Affairs and Security Policy" of the EU – who "shall take part in its work" (Art. 15.2 TEUnew). However, the President of the Commission, the President of the Council and the High Representative have no voting rights in the European Council. In contrast to the Nice Treaty, the foreign ministers of the member states are no longer included in the European Council, unless they are deputising for a head of government who is unable to be present.

Article 15.1 TEUnew states that: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof." This means that it is the governments of the member states who retain the right to have the last word on the treaties and thus on the shape of the EU. It is also the duty of the European Council to resolve issues on which the Council of Ministers (see below) was unable to reach agreement. It is the EC which nominates the President of the European Commission and coordinates the Common Foreign and Security Policy. The Lisbon Treaty also provides for the EC to elect the High Representative, the President of the European Council and the Board of Governors of the European Central Bank. The EC meets four times a year. Unlike the Council of Ministers (see below), the EC "does not exercise legislative functions" (Art. 15.1 TEUnew). The Lisbon Treaty retains the provision that the EC's decisions are taken by consensus; and it would accord the EC the status of EU organ.

As already mentioned, the Lisbon Treaty creates a new post – that of the President of the European Council. The incumbent, who may not hold a national office, is elected by the EC for a period of two and a half years (renewable once). His duties include chairing and "driving forward" the work of the EC, convening its meetings, preparing the report to the European Parliament after each meeting, and (together with the High Representative) ensuring "the external representation of the Union on issues concerning its common foreign and security policy" (Art. 15 TEUnew).

Until now, these tasks have been carried out in the context of the six-monthly rotating presidency of the Council of Ministers. The creation of the office of President is designed to ensure better continuity and coherence. The President of the EC is appointed, and can also be removed, by the EC but is otherwise subject to

23 The European Council would acquire the status of an organ of the EU only with the implementation of the Lisbon Treaty and the abolition of the "pillar structure". We do not examine here the two other organs of the EU – the Central Bank and the Court of Auditors.

24 The European Council is not to be confused with the Council of Europe, which is a separate organisation existing independently of the EU. Within the EU, the distinction has also to be made between the European Council and the Council of Ministers. The abbreviated form "the Council" which is used colloquially refers only to the Council of Ministers.

no further controls. The EU acquires a post and a person with whom it can be identified, but one which has little democratic legitimacy.

The members of the EC have a dual role. They are the most powerful politicians in the member states and collectively, as the European Council, they are the most powerful organ of the EU. It is the EC which alone makes the final decision on the content of the Union's treaties. Moreover, it has a powerful influence on the Council of Ministers, which is composed of representatives of the national governments who in their national function are subordinate to the respective members of the EC. The EC is thus able to influence European legislation – despite the claim in the Lisbon Treaty that it "does not exercise legislative functions". The Commission is also dependent on the EC, as the Commissioners are proposed by the national governments and selected by the European Council, and the latter also nominates the President of the Commission. There are two problems with this dual role of the members of the EC: firstly, because the members of the EC are also members of the national governments, they thus exercise – at the EU level – power which is at the same time "governmental" (through the power to "define the general political directions and priorities" of the EU), "treaty-related" (through the factual power to determine the content of the Union's treaties), and legislative (through their influence of the Council of Ministers). The result is that there is no 'horizontal' separation of powers. The dual roles of "EU government" and national government which come together in the individual members of the EC means that the vertical separation of powers between these two political levels also becomes blurred. The way the EC functions in practice leads to a multi-faceted erosion of the democratic separation of powers. One consequence of the blurred vertical separation of powers is the possibility for individuals and institutions to "play off the cushions" (see above): the option of using the EU route allows the members of the EC to circumvent national democratic controls. They can make decisions at the EU level which are binding on national policies, but it is difficult to hold them to account in their own countries.

We have already described this strategy in greater detail and in relation to the Council of Ministers.

Lastly, the EC lacks democratic legitimacy and there are no adequate democratic controls on its actions. At the EU level it is democratically accountable neither to any of the other EU organs nor to the voters, for its members – as also the Council as a whole – are neither elected nor can they be removed. As heads of state and government they are theoretically accountable to the citizens of their countries, but in the European elections little attention, if any, is paid to their function as members of the EC. They were not elected with a view to their future role in the EC.[25] The lack of legitimacy is more extreme in the case of the provision in the Lisbon Treaty for the new post of President of the EC, who would be appointed by the EC itself. There is a gaping hole between the claim, on the one hand, that the creation of this post gives the EU a "representative face" and the long chain of legitimacy on the other hand, leading one to suspect that the President of the European Council will get little backing from the citizens of Europe.

Common Foreign and Security Policy and its "High Representative"

One of the most important duties of the European Council is the formulation and coordination of the EU's "Common Foreign and Security Policy" (CFSP). Until now, this has been done within the "third pillar" in the form of inter-governmental agreements. All the major decisions on CFSP are made in consensus, so that no decisions can be taken against the wishes of any state. Among other considerations, this respects the fact that control of the military has always been one of the most sensitive aspects of any democracy.

CFSP is subject to an especially weak democratic control, because the European Parliament has no right to be involved in the

25 The mixing of the levels – where the Prime Ministers of the federal states also sit in the legislatively active Federal Council – is widely seen as a problem for democracy in Germany. In other federalist states such as the USA and Switzerland, the federal states or cantons elect special representatives to work at the federal/national level.

decisions, and the European Court of Justice "shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions" (Art. 275 TFEU). The Lisbon Treaty changes nothing here. The European Parliament has only the right to be "consulted" (Art. 36 TEUnew) and, as mentioned above, the European Court of Justice is explicitly barred from ruling on the CFSP. Since it relies on inter-state cooperation, the CFSP ought to be controlled by the member states. But the national parliaments are reluctant to intervene as they do not wish to place obstacles in the way of European integration and in any case have at their disposal mostly very inadequate possibilities for controlling foreign policy.

Together with the weak democratic control at the EU level, decisions taken within the CFSP also have far-reaching effects on national policies. Many view with concern, for example, the way that the Lisbon Treaty places even greater emphasis on the build-up of arms. It states that member states "shall undertake progressively to improve their military capabilities" (Art. 42.3 TEUnew), and that this process will be coordinated and monitored by a "European Defence Agency" (initially referred to as the "European Armaments Agency"). The option of military engagements outwith the borders of the EU ("missions outside the Union") is also provided for, using troops from the member states (15 so-called "European battlegroups" [EUBG] have been fully operational since the beginning of 2007).

The office of a High Representative for the Common Foreign and Security Policy ('High Representative' for short) was instituted with the Amsterdam Treaty in 1997. As of now, the function is performed by the Secretary-General of the Council, who supports the President of the European Council in relation to CFSP. With the Lisbon Treaty, the High Representative (whom the Constitutional Treaty proposed to rebrand as the "European Foreign Minister"), is given considerably greater powers than previously. The High Representative is nominated by the European Council, "conducts the Union's common foreign and security policy" (Art. 18.2 TEUnew – this includes the common security and defence policy) and represents the Union to the outside world. In addition, he presides over the Foreign Affairs Council and "ensures the consistency of the Union's external action" (Art. 18.3 & .4 TEUnew). This relates to the common policy on trade (WTO, GATS etc.), cooperation with non-EU countries, cooperation on development and relations with international organisations.

Thus the office of the future "High Representative" unites three functions in the one person: that of the Commissioner for foreign relations, that of the "High Representative of the Union for Foreign Affairs and Security", and that of the President of the Foreign Affairs Council (see below). He belongs to the Commission as Vice-President, takes part in all the deliberations of the European Council and presides over the Foreign Affairs Council (Council of Ministers). He is supported in his work by a "European External Action Service".

The High Representative is subject to even more minimal democratic control than the Commission, since he cannot be removed by the European Parliament. Only the Council has the right to do so – either on its own initiative or at the suggestion of the President of the Commission. If the Parliament approves a motion of censure on the Commission, the High Representative would only have to resign from his position as a Commissioner – his post as High Representative would not be affected.

Even though there is currently no indication that the heads of government of the member states are prepared to relinquish control of foreign policy, on the basis of the areas of responsibility conferred on it the office of the "High Representative" looks likely to become one of the key centres of power within the EU. Taken together, the spectrum of responsibilities almost corresponds to that of the president of a nation-state; there is a need to make his responsibilities crystal clear both as a political imperative, and also from the point of view of legitimacy, which appears to be woefully inadequate. Firstly, there is no parliamentary or judicial control of CFSP, where the new "Foreign Minister" will play an important role; and secondly, as the areas of policy, listed above, over which the

High Representative has control or influence make clear, the ministerial separation of foreign and defence policies which is taken for granted in every democracy is not assured in the case of the EU.

The Council of Ministers

The Council of Ministers, often referred to simply as "the Council", consists of the representatives of the members states at the ministerial level. Depending on the particular policy area under consideration, the relevant ministers come together in the Council meetings. Thus, in terms of its composition, there is no single Council, but several different Councils – such as the Council of the Economics and Finance Ministers, or the Council of the Environment Ministers. Together with the European Parliament, the Council of Ministers is the EU legislator; it concludes the international agreements negotiated by the Commission and, also together with the European Parliament, approves the EU budget. When the Council uses majority voting, it follows voting weightings which are set out in the treaties and which take into account the relative population sizes of the member states; the weightings are always highly controversial politically. In legislating, the Council can act only at the initiative of the Commission. In most areas, the Council has so far shared its legislative power with the European Parliament, but in many areas it is the sole legislator. Each minister in the Council is authorised to make decisions which are binding on his own country.

From the point of view of a democratic structure of institutions, similar considerations – with some reservations – apply to the Council of Ministers as to the European Council. Here too members of the national governments formulate policy through legislation which is binding on their own parliaments – who are the real democratically legitimated legislators.

The members of the Council have not been elected for their membership of the Council, cannot be de-selected, and are perceived in their own countries as national politicians, scarcely at all as European politicians. Christoph Möllers draws the following conclusion: "The European legislator consists, therefore, of members who operate without transparency in the interest of their own country and of their own portfolio."[26]

In respect of individual ministers (but not of the Council as a whole), there is the possibility for the member states to fashion their own democratic control mechanism. The options range from a binding negotiation mandate (as, for example, in Denmark, Austria and Finland), to the right to issue non-binding position statements (e.g. in France, Great Britain and Germany), to merely the right of the government to submit information retrospectively on a case-by-case basis (e.g. in Greece, Spain and Luxembourg). In practice, the Danish parliament, with its participatory procedures concentrated in its European Affairs Committee, stands out clearly from every other parliament. By contrast, the options open to the Finnish, German and Austrian parliaments are used far less frequently.[27]

In the past the criticism was often voiced that the sessions of the Council were not open to the public. The mounting pressure from various sides resulted in a change of policy: those sessions in which the Council decides on legislation are now open – though this practice is not yet grounded in a treaty, but is simply part of the internal procedural rules of the Council – and the still largely restricted "openness to the public" consists only of the audio-visual transmission of proceedings to a media room.[28] This facility, introduced by means of the rules of procedure, comes in anticipation of a treaty ruling foreseen for the Constitutional Treaty/Lisbon Treaty (Art. 16.8 TEUnew).

At this point it is appropriate to shed some light on the two different decision-making procedures which are used in the EC and the Council of Ministers: consensus (CV) and majority voting (MV). Consensus voting, originally used in both organs, is supposed to ensure that the proposed measures are backed by all the coun-

26 Möllers, C., 2008. Demokratie – Zumutungen und Versprechen. Berlin: Klaus Wagenbach, p. 91

27 Becker, Peter & Mauer, Andreas. Die Europafähigkeit der nationalen Parlamente. *swp,* Available at: www.swp-berlin.org/common/get_document.php?asset_id=1354.

28 Details of the rules can be found at: http://www.consilium.europa.eu.

tries represented in the Union, without exception. It gives the parliaments and voters the feeling that consensus only emerges in non-contentious cases and that the issue would therefore probably be approved by a majority in the domestic parliament. In formal terms, too, the consensus procedure appears to preserve the nation-states' sovereignty – embodied, so to speak, in the government representatives – since no country is outvoted or overruled. The reality of consensus in the EU departs in some key aspects from the ideal, however. The consensus procedure has the effect of making the deliberations which precede unanimity non-transparent (and not open to the public), the aim being presumably to conceal the preliminary disagreement so as not to call into question the final outcome. It is only too well known of the EU that this lack of transparency is used to hide all sorts of "horse-trading" – in effect the bartering of approval on a whole range of substantive issues.

But precisely because CV means that each person enjoys a right of veto, it cannot be a genuinely democratic procedure: "When everyone has a veto right", says Christoph Möllers,[29] "then there's no longer any need for a democratic community", for it is only with "the possibility of being outvoted that the possibility arises of outvoting others" [i.e. of being in the democratic majority]. Unlike the consensus process, a majority process encourages public debate, makes it clear and open (i.e. transparent) which point of view is held by how many other people present, and facilitates a learning process between the successive votes. However, for the special case of such inter-governmental bodies as the EC or the Council of Ministers, it does not follow that a majority voting procedure is automatically to be preferred – since here the voters are the representatives of sovereign states and a majority decision would represent an infringement of the sovereignty of the outvoted state or states. Taking the point of view of the citizens of an individual country, one would have to say that the laws of their own country

29 Möllers, C., 2008. Demokratie – Zumutungen und Versprechen. Berlin: Klaus Wagenbach.

had been determined by representatives of other states against the wishes (the votes) of their own elected representatives – a striking contravention of the principle of democracy which is normally accepted only in such federal states as Germany and Switzerland. Finally, the formation of a majority decision does not of itself make a procedure democratic; it must also be possible to make the decision-makers democratically accountable for their voting behaviour. Yet, as we have already mentioned, in terms of their Council function, the members are neither elected, nor can they be deselected. There remains only the (slim) possibility of holding the members of the national governments to account for their decisions.

The EU finds itself on the horns of a dilemma in respect of consensus or majority decision-making procedures in the EC and the Council of Ministers. Choosing consensus entails an undemocratic procedure, but one which is kinder to the member state democracies; majority voting is in principle a more democratic procedure – but in a body composed of government representatives it is in practice undemocratic. The authors see no satisfactory solution to the problem and thus refrain from giving a recommendation for or against the one or other procedure. We do, however, draw one conclusion: procedures which due to the particular context cannot be designed in an adequately democratic manner require a high level of democratic legitimacy. If the procedure itself cannot be democratic, it can still be democratically legitimated – and that legitimacy must be provided. The legitimacy of each individual decision by the Council is at least increased within the ordinary decision-making procedure through the mandatory involvement of the European Parliament.

The European Elections and the European Parliament

A parliamentary assembly came into being already with the creation of the European Coal and Steel Community. At that time it consisted of 142 representatives of the national parliaments, who, however, had no authority to pass legislation. Since then the powers of the assembly have been progressively expanded.

In 1979, the assembly – which had in the meantime conferred on itself the title of "European Parliament" – was for the first time directly elected by the citizens of the member states. In its composition, therefore, the EP is the EU organ with the greatest democratic legitimacy.

Elections for the EP are held every five years, with the precise election procedure being determined by the member states, which have so far been unable to agree on a standardised common procedure (see below). Candidates for the elections come from the national party lists (of the roughly 160 national parties) or regional/local constituencies. After the elections, the MEPs join one or other of the existing cross-party groupings (sometimes referred to as "fractions") in the EP, or create a new one – which requires a minimum of 19 MEPs from at least one-fifth of the member states. There are currently seven such groupings in the EP. In addition, there are some MEPs who belong to no group. At the moment, "European parties" exist only in the form of associations of parties i.e. there is as yet no genuinely transnational party with a transnational list of candidates and/or official spokespersons.[30]

In the absence of transnational parties, party lists and elections, each member state sends a specific number of representatives to the EP. The numerous additions to the EU in recent years have led to increasingly distorted levels of representation of the member states in the EP. As a result, the Lisbon Treaty provides for the number of seats from each member state to be held to a maximum of 96 (with a minimum of six), and for the total number of MEPs to be cut to 750 from the current figure of 785. The actual number of MEPs per country – between the minimum and maximum numbers – is to be determined on a degressively proportional sliding scale: the numbers increase with the size of the country, but not fully proportionally, with a gradual approach to the maximum of 96. The system gives slightly higher representation to the smaller states as against the larger ones. The Treaty offers no definitive

30 This may change with the 2009 European Elections. The EU-wide movement Newropeans has announced that it will enter the elections as the first pan-European party.

method for calculating the distribution of seats, in order to preserve some flexibility in the event of new accessions. It is left to the EP to make a proposal for such a calculation.

The EP plays a role in legislation in many areas: by calling upon the Commission to generate an initiative; by reviewing the Commission's proposals; and in many cases by passing laws in conjunction with the Council in a co-decision process. Together with the Council, the EP also has a certain responsibility for the EU budget, and it "elects" the President of the Commission and the Commission as a whole by "consenting" to their appointment. The Commission – again, as a whole – may also be deselected.

The transition from the Nice Treaty to the Constitutional Treaty/Lisbon Treaty in particular promised a further strengthening of the EP. If the Lisbon Treaty – which adopts to a very great extent the changes introduced in the Constitutional Treaty – is ratified, the EP will be granted the following additional powers: 1. an extension of the co-decision procedure to many more areas of policy; in contrast to the Nice Treaty, co-decision would thereby become the norm. However, some areas would remain off-limits for the EP – such as the areas of the CFSP, police and judicial collaboration in criminal affairs, and intellectual property rights; 2. expanded rights in relation to the budget (even if not full rights as is often asserted); the Lisbon Treaty would also make the agriculture budget (based on the EU's Common Agricultural Policy, or CAP) – by far the largest single budgetary expense of the EU, accounting for over 40% of the overall budget – dependent on the approval of the EP; 3. approval and veto rights for the EP on EU trade agreements (e.g. with the WTO) and international agreements; 4. approval and veto right for the EP on the use of the flexibility clause[31] and on the simplified treaty revision procedure; 5. the right to take part in the Convention in the context of the ordinary treaty revision procedure; 6. the right of initiative to propose treaty revisions.

31 This extension of powers does not in itself, in terms of its basic concept, represent greater democracy, because the flexibility clause is about the self-empowerment of the EU over and against the member states. As the EP is itself an organ of the EU, it cannot be viewed as an appropriate organ of control.

All these extensions of power are seen as bringing about better and greater democracy at the EU level[32] (though not necessarily in the quality of democracy between the EU level and the member states!). As such – together with the new "European Citizens' Initiative" – they symbolise the efforts to democratise the EU. But though most of the Lisbon Treaty reforms represent an improvement over the Nice Treaty, this still says little about the extent to which the EU has come closer to the expectations of an ideal parliament. We therefore believe it necessary to point to the unresolved and unbridged gulf which still separates what the Lisbon Treaty offers in the way of reform from the justified demands for an ideal parliamentary democracy. In making this assessment, what counts are not merely the powers of the EP in themselves, but also the processes which determine how it is composed.

The EP's own claim is that it directly represents the citizens of Europe. But two things would be necessary for that claim to be fulfilled: 1. the creation of Europe-wide lists of candidates and manifestos; 2. a uniform method of voting for the entire EU, in which each citizen's vote would have the same weight regardless of his or her nationality. The reality is rather different. The principle of "one man, one vote" does not apply in the European elections, and so far there are no EU-wide lists of candidates. The direct election of the EP in 1979 was carried out in accordance with the national electoral rules, which differed considerably from each other. Since then, attempts to introduce a pan-European electoral law have so far failed – or their implementation has been put on ice. In fact, the member states did actually make some progress towards rapprochement, even in the absence of a treaty ruling,

32 Sarah Seeger also foresees potential disadvantages. Her fear is that "the voting procedures in the legislative process between the Council and the Parliament will in future become more closely enmeshed and that they may turn into informal arrangements for sounding out each others' opinions in advance. The upgrading of the Parliament's role in legislation to that of central actor next to the Council will thus result in an increase in complexity and a greater lack of transparency." Seeger, S., 2008a. Die Institutionen- und Machtarchitektur der Europäischen Union mit dem Vertrag von Lissabon. In W. Weidenfeld, ed. Lissabon in der Analyse. Der Reformvertrag der Europäischen Union, (p. 63-98), p. 69. Munich: Nomos.

when they finally agreed on proportional representation (as opposed to a "first-past-the-post" system). The EP's 1998 proposal to have 10% of the MEPs elected through EU-wide lists has also been ignored to date. The current rules are based on the 2002 version of the Direct Elections Act,[33] which still contains no uniform proposals and does not provide for transnational lists. Instead, the Council has again postponed a solution, promising a further examination in the runup to the 2009 European elections. The EP itself remains the most powerful advocate of its own Europeanisation. But with the continued election of candidates who are only listed nationally and with member-state representation determined by a prescribed distribution of seats, the EP remains for the time being in a half-way house position between being a genuine parliament and being only a debating-chamber for an association of states.[34]

No direct inference can be drawn, however, from this observation to the effect that with the "Europeanisation of the European Parliament", as indicated above, the EU would necessarily become more democratic in the eyes of the citizens. There would be good grounds for the citizens to reject full "European parliamentarisation" – for example, because the language barriers would make it extremely difficult to have intensive discussions with candidates from other language areas; or because they find it important to know that they are being represented by MEPs from their own country. Two things become clear when we ask about the role of the EU: 1. as a multi-lingual union of states the EU needs its own specific institutional solutions; not every solution which would bring about greater democracy at the national level will automatically do the same at the EU level; 2. if the EP is to be a citizens' parliament, then the procedures which regulate the way

33 Decision and Act concerning the election of the representatives of the European Parliament by direct universal suffrage, Version as promulgated 20 September 1976 (Federal Law Gazette 1977 II, p. 733/734), last amended by Council Decision of 25 June 2002 and 23 September 2002 (Federal Law Gazette 2003 II, p. 810; 2004 II, p. 520).

34 Data from: von Arnim, H.H., 2006. Das Europa-Komplott. Wie EU-Funktionäre unsere Demokratie verscherbeln. Munich: Carl Hanser Verlag.

it comes into being must be legitimated by the citizens – which points to the importance of having EU-wide referendums on institutional issues.

We will now return to the question of the powers of the EP which would result from the Lisbon Treaty. The extension of powers proposed by the Treaty primarily affects the balance of power between the EP and the other EU institutions – especially the Council. In so far as the EP is the most democratically legitimated organ of the EU, this is to be welcomed (even if only by ignoring the possibility that a strong EP could bring about a weakening of democracy in the member states). To be sure, the increased powers primarily relate to rights of co-decision-making in processes which the Parliament has not initiated and for which it is therefore not directly accountable. Only with the initiative for a revision of the treaty does it acquire a right of initiative – which would, however, be rarely used and which will remain non-binding. Thus, even with the boost in powers proposed by the Lisbon Treaty, the EP will continue in its primary role as an organ of consultation and occasional veto, still lacking the powers which at least some national governments grant to their citizens: 1. the right of initiative; and 2. the right to elect the government.

The Lisbon Treaty does not alter the Commission's exclusive right to initiate legislation. The role of the EP is limited to calling upon the Commission to produce draft legislation on a specific issue; to making proposals for amendments to the treaty; and to passing laws (a right shared with the Council). It is possible to argue that the EP will be deeply involved with and have a significant influence on the legislative process; it does, after all, have the last word (together with the Council) and thus once again a right of veto. But the lack of a proper initiative right means that it lacks one of the most fundamental rights of any democratic parliament: the right to prepare draft legislation whose political origin is clearly attributable and is directly expressed in the very wording of the draft.

Similar considerations apply to the election of the "government" (executive). In the case of the Commission, the nomination and selection of candidates is not done by the EP itself; it merely votes on the proposals, which come from "outside". There is no possibility to choose between different candidates, but only a choice either for or against the list of candidates put forward by the Council i.e. rather a right of veto, which it can also exercise during the tenure of the legislature as a motion of censure. In the case of the office of President of the European Council proposed in the Lisbon Treaty, the EP has no influence at all, and just as little in relation to the appointment or deselection of the High Representative – who is simultaneously the Vice-President of the Commission. Thus because the EP plays no part in forming the executive, there is no competition for supremacy in the Parliament between the various political groupings and no fraction leaders.

The lack of these two rights – the right of initiative and the right of bringing into being a government – devalues the EP in the eyes of the citizens and the media. For if political responsibility does not reside ultimately in the Parliament, and is contested even there, then it is difficult for the citizens to assess the parliamentary work of the different "fractions" and to use the assessment in deciding who to vote for in the next elections (something that can be difficult enough even at the national level). When this is added to the absence at the EU level of the principle of discontinuity,[35] the voters do not see European elections as the (potential) switching-points for policies that they perhaps ought to be, but which in practice they can scarcely be. This perception is not likely to be much altered by the increase in the powers of the EP, because the hope of having a real impact on the direction of policies is far from being the last thing on the voters' minds. The reforms offered by the Lisbon Treaty are of advantage primarily to the members of the EP. Whether they are also viewed by the vot-

35 The "discontinuity principle" refers to the idea that there should be a complete organisational renewal at the end of each term of office of the legislature. Legislation which is still pending at the time of the new elections is dropped, and electoral mandates expire. The application of the discontinuity principle is normal in many parliaments; in Germany it applies to the Federal Parliament. The principle does not exist within the EU, not least because the governments represented in the main legislative organ – the Council – do not have concurrent terms of office.

ers as being of equal advantage to them remains to be seen; we doubt it. The lack of opportunities for having any effective control of the direction of EU policy explains why many (in some cases the vast majority) of voters shun the European ballot box, and why the media find so little of the day-to-day work of the Parliament newsworthy. We are convinced that it is the absence of any possibility of effecting change that the voters are referring to when they say that their votes "do not count" in the EU. And it is a simple fact that previous enhancements of the status of the Parliament since 1979 did not result in an increased turnout in the European elections – quite the contrary. There is little doubt that the frustration with European elections which produce no changes helps to explain the withholding of consent by many voters in the referendums on the Constitutional Treaty and the Lisbon Treaty.

The European Commission

The European Commission (EUC) is the central organ of administration of the EU and has powers which are similar to those of governments. The Commission comprises the Commissioners, the President of the Commission and the Commission civil servants. The President of the Commission is nominated by the heads of state and government of the member states and is "elected" by the European Parliament (in fact the EP merely "consents" to his appointment). In practice, the individual Commissioners are elected by the national governments. Each country provides one Commissioner. The Lisbon Treaty actually provides for an eventual (in the longer term) reduction in the number of Commissioners to 15, but at the print deadline (for the German edition of this book) there appeared to be a pulling back from this new ruling. The EUC is nominally independent of the national governments; it is supposed to represent and protect the interests of the entire EU: "The Commission shall promote the general interest of the Union and take appropriate initiatives to that end" (Art. 17.1 TEUnew). Article 17.2 TEUnew states the Commission's exclusive right to propose legislation. Other tasks include ensuring "the application of the Treaties and of the measures adopted by the institutions pursuant to

them", executing the budget, and overseeing the application of Union law. If a member state is deemed to have failed to observe Union law, the Commission can initiate legal action for a breach of treaty rules. In addition, it represents the Union externally to a limited extent and negotiates international treaties. The Commission is a bureaucracy with almost 30,000 employees. Measured against the population of the EU and taking into account the EU's multilingual character, the figure does not seem excessively high. On the other hand, it should be remembered that execution of Union law is primarily the task of the member states and the direct execution of Union law by an EU organ is an absolute exception.

The position of the Commission contributes significantly to the extraordinary influence of the governments and administrative bureaucracies in the EU. The first factor in this "overweighting" of the executive is the key role of the national governments in the European Council and the Council of Ministers; the second factor is the Commission's monopoly on initiative for draft legislation and the subtle influence of the bureaucratic apparatus on EU policies. The Commission's monopoly of legislative initiative allows it – within the framework of the treaties – to control the political agenda to a very large extent. Legislative proposals are drawn up solely by the Commission, with the EP being permitted to comment and propose amendments. The Commission acquires further influence from its responsibility to coordinate the policies of the member states within the framework of its "supporting powers" and thus to influence member state legislation. In addition, the EUC plays a major part in the resolution of disputes about subsidiarity (q.v).

Beyond its powerful position in relation to the other EU organs, the structural strength of the Commission's administrative apparatus contributes to the Commission's democratic inaccessibility. It is divided into 36 so-called "Directorates-General", each of which is presided over by a "Director General". Each Directorate-General is assigned to a Commissioner. The Directors General are not appointed solely by the Commissioners. The Commissioner for Personnel and Administration and the President have a say in who

is appointed. The Directors General are empowered to direct the work of the Directorate and are thus able to determine to a large extent what information reaches the Commissioners. In the day-to-day operation of the Brussels political merry-go-round, their influence is often greater than that of the Commissioners, because they have usually been in their posts for longer than the latter and they are often more adept at negotiating the bureaucratic labyrinth. As a result, their opinion often carries over that of the Commissioners who are nominally responsible. Commission Vice-President Günter Verheugen himself complained of this in an interview he gave in 2006: "It is my contention that overall too much is decided by officials. […]. The Commissioners have to watch like hawks to ensure that major issues are decided in their weekly meetings, instead of civil servants deciding things among themselves. […] The more Commissioners there are, the more Directorates-General there are – and that's the problem. The way the EU has developed over the last few decades has given the civil servants such a panoply of power that the major political task of the 25 Commissioners now is simply to monitor the apparatus and keep it under control. Sometimes they lose control of it. There is a running battle for power between Commissars and high officials, many of whom say to themselves: "The Commissioner will be gone in five years' time; he's only a temporary occupant of the post. But I will still be here."[36]

Other civil servants, such as the Commissioners' Chiefs of Staff, also wield considerable influence. Each Commissioner has a personal office of six staff, known as a "cabinet", led by the so-called "chef de cabinet". The cabinet can essentially decide which acts the Commissioner gets to see, and its members can also sign documents in the name of their Commissioner. There is a meeting of all the chefs de cabinet every Monday afternoon, where they decide the agenda for the next meeting of the Commissioners on the following Wednesday. Many issues are decided in advance here.

36 Günter Verheugen (Vice-President of the European Commission, Commissioner for Enterprise and Industry), in an interview with Alexander Hagelüken, *Süddeutsche Zeitung,* 4 October 2006.

In 2001, for example, a proposal by the then Commissioner for the Environment, Margot Wallström, to ban batteries containing the poisonous nickel-cadmium by 2008 was consigned to the dustbin by the chefs de cabinet; by means of aggressive lobbying, the French battery manufacturer Saft had succeeded in isolating the Swedish politician within the Commission.[37]

Thanks to its traditionally assigned monopoly of initiative, the EUC (together with the European Court of Justice) has been the driving-force behind integration. The Lisbon Treaty reinforces this function by authorising the Commission to "initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements" (Art. 17.1 TEUnew). The expansion of qualified majority voting in the Council (q.v.), provided for in the Lisbon Treaty, would bring further indirect reinforcement to the EUC, as it would give the Commission's proposals a better chance of being adopted. It also appears that for the moment the principle of "one Commissioner per country" will be retained i.e. the complement would remain at the current level of 27 Commissioners.

Form a democratic point of view, what is problematic about the EUC is the mismatch between its supposedly (officially – deriving from the early days of the Community) neutral and apolitical character and its simultaneous monopoly on initiative. Appointed by the national governments and with a treaty obligation to promoting "the general interest of the Union", the Commission is independent of the make-up of the European Parliament, even if the views of the latter are supposed to be taken into account in the selection of its candidates. This means that the citizens of the EU have no influence at all on the organ which possesses the key lawmaking power in the Union – the right of legislative initiative. The (weak) checks and balances accorded to the European Parliament hardly mitigate the imbalance of power, because the EP can intervene only "after the fact" – for example, in the case of a motion of censure, or when Commission proposals are amended

37 Cf. Oldag, A. & Tillack, H.-M., 2003. Raumschiff Brüssel ("Spaceship Brussels"). Berlin, p. 81.

and/or passed into law. Even with the Lisbon Treaty changes, the Commission remains a democratically weakly legitimated (and supposedly apolitical) organ, despite the obvious fact that it engages in politics – indeed extensively, in practically every area of EU policy, including areas where its involvement is highly controversial. It is extremely difficult to see how it can be made democratically accountable.[38]

The European Court of Justice

The Court of Justice of the European Communities, commonly referred to as the European Court of Justice (ECJ), based in Luxembourg, is the highest court in the EU, with the final say on matters of EU law. It consists of the Court of Justice, the General Court (formerly Court of First Instance), and various specialised courts (Art. 19 TEUnew). Each member state contributes at least one judge, who is appointed by the national governments for a period of 6 years. The central function of the ECJ is to oversee the correct interpretation and application of the EU treaties. Appeals to the ECJ can be made by the member states, the EU organs, as well as by individuals and legal entities. The possibilities for individual citizens to submit appeals are severely limited in EU law, as any appeal requires the person to have been "directly and personally affected". In the past, this ruling was interpreted in a very restrictive way by the ECJ. The Lisbon Treaty extends the ECJ's juridical competence to further areas. Except where special rules apply and provide for alternative arrangements, the ECJ's competence applies to all areas of EU policy. The special rules apply in particular to the Common Foreign and Security Policy.

The jurisdiction of the ECJ primarily reinforces the powers of the EU organs and weakens the sovereign rights of the member states. In a whole series of policy decisions, it has laid down important principles of EU law which are not contained in the treaties – especially the principle of the primacy of Union law over that of the

38 Möllers, C., 2008. Demokratie – Zumutungen und Versprechen. Berlin: Klaus Wagenbach, p. 92.

member states (including constitutional law), but also in relation to the direct applicability of parts of the European legal acts. Furthermore, it instituted the system of financial penalties for member states which fail to convert EU directives into national law within the prescribed period – a system with no basis in the treaties. The assignment of new areas of competence also derives in part from rulings by the ECJ. Thus, the ECJ awarded the EU the right to issue directives on energy policy – again without any basis in the treaties.[39] Such extensions of EU competence by means of rulings by the ECJ have been incorporated into the Constitutional Treaty and the Lisbon Treaty and are thus practically irreversible.

One of the important responsibilities of the ECJ is to ensure that the EU institutions respect the principle of subsidiarity. As one might expect from an organ of the EU, the ECJ tends to decide that competences are better kept within the EU than with the member states. It is an extraordinary fact that the ECJ has never once judged the subsidiarity principle to have been broken![40] – a rather depressing fact in view of the right of appeal which has been granted to the national parliaments in the Lisbon Treaty. Former Federal President and President of the Federal Constitutional Court, Roman Herzog, and the director of the Centre for European Policy, Lüder Gerken, conclude: "The ECJ, as guardian of subsidiarity and protector of the interests of the member states, is unfit to be the court of ultimate resort. This is hardly surprising. Firstly, the ECJ shares the commitment to working to bring about "an ever closer union" (Article 1, TEU). Secondly, ECJ jurisdiction which is biased in favour of the EU leads to the range of its own jurisdiction being extended and that of the national courts being correspondingly reduced, so that its own influence continually increases".[41]

39 Ruge, R., in Berg/Kampfer, ed. Verfassung für Europa: Der Taschenkommentar für Bürgerinnen und Bürger, p. 168-169.

40 Papier, H.-J., 2006. Das Subsidiaritätsprinzip als Bremse des schleichenden Zentralismus in Europa?, Ringvorlesung im Rahmen des Studium generale an der Universität Tübingen, 28 November 2006, p. 9.

41 Herzog, Roman & Gerken, Lüder, 2008. Stoppt den Europäischen Gerichtshof? ("Stop the European Court of Justice?"). *Frankfurter Allgemeine Zeitung,* 8 September 2008, p. 8.

From a democratic point of view, the ECJ fails to act appropriately within the system of "checks and balances". Its rulings ought to have a restraining influence on the legislative activity of the Commission, the Parliament and the Council of Ministers. But in treating the legislative desires of these organs with 'kid gloves', in practice the ECJ undermines the institutional balance of power.

The system for appointing judges also leaves a lot to be desired. Article 253 TFEU states that judges are appointed for a period of six years "by common accord of the governments of the member states". There is a clear deficit of legitimacy here, as neither the national parliaments nor the European Parliament have any influence on the decision. Art. 94 of the German Constitution stipulates that the judges of the Federal Constitutional Court be appointed in equal numbers by the Bundestag (German Parliament) and the Federal Council (the second chamber, representing the federal states). Article 255 TFEU provides for ECJ nominees to be vetted by a special panel (the Council is to "adopt a decision establishing the panel's operating rules and a decision appointing its members"). However, the basic problem of the lack of legitimacy will remain.

Direct Democracy

We use the term "direct democracy" to refer to all those procedures by means of which citizens can bring about legally binding decisions through popular votes/referendums. It is possible to distinguish four different procedures: 1. a popular vote which results from a popular initiative proposal; certain signature quorums must be reached for the vote to take place; 2. a facultative (optional) referendum: in this case the proposed legislation has come from the parliament and is being challenged by the voters; here too the vote depends on signature quorums having been reached; 3. an obligatory or mandatory referendum: in this case, a referendum is legally or constitutionally prescribed for certain subjects or proposed legislation (normally changes to the constitution); 4. a plebiscite: this popular vote is called by the government or the parliament on a case-by-case basis. We support only the first three types of procedure, as plebiscites tend to empower the politicians rather than the citizens. As well as these binding procedures, there is also the popular petition, which allows its initiators – subject once again to a signature quorum – to present their issue to the parliament, which, however, has no obligation to consider it. The popular petition is often the necessary first step; if the parliament ignores or rejects the request, a second collection of signatures can force a popular vote.

Direct democracy is establishing itself more and more at the national level. Since 1990, 290 popular votes/referendums have taken place in Europe, and since 1972 more than 150 million Europeans have voted in 42 referendums on European issues (EU accession, Maastricht Treaty etc.).[42] Yet none of the three direct-democratic instruments (popular legislative proposal, facultative referendum, obligatory referendum) through which European voters could decide on substantive issues by referendum has ever been available at the EU level.

And yet: the Lisbon Treaty (as also previously the Constitutional Treaty) offers a small improvement in the area of popular participation in decision-making. There is to be a European Citizens' Initiative right (ECI) at the EU level. It will allow citizens to present a legislative proposal to the European Commission. An initiative must have been signed by at least a million citizens from a "significant number of countries". (Art. 11.4 TEUnew) The proposal has the status of an invitation to the Commission to initiate a law. It thus obliges the Commission to start a legislative procedure – subject to the citizens' initiative having been declared valid. The Commission is not obliged to hold to the wording of the citizens' initiative. And even if the Commission should draft a law along the lines of the citizens' initiative, the Council and the European Parliament are not bound by the proposal. At the nation-state level experience with this type of initiative has been at best mixed, and

42 Correct as of October 2008.

often bad; initiatives make big demands on the citizens but are often simply ignored by those in power.[43]

Why do we have nothing better than this minimalist model of a non-binding citizens' initiative? The argument that is most often used – over and above the usual reservations about direct democracy in general – relates to the EU-specific balance of power between the different institutions. If EU citizens were permitted to make their own legislative proposals, which might be taken up by the Commission and even lead to an EU-wide referendum, they would then have more extensive powers than the European Parliament (recalling that even the Parliament can only invite the Commission to propose a law on a specific issue; it cannot make its own legislative proposals).

It is the view of the authors that the lack of effective – i.e. binding – direct-democratic procedures at the EU level probably represents the most serious democratic omission in the whole EU. If citizens had available to them the facultative referendum, they would have a right of recall which they could always use whenever the EU departs too far from the preferences of the majority of its citizens. Political scientist Heidrun Abromeit is someone who has pointed especially clearly to the benefits of such a right of veto at the EU level.[44] The procedure which has been proposed most often – but has still not been introduced – is the obligatory referendum for changes to the treaties. It is only by having such direct-democratic procedures that the citizens would really have the right to have the last word – in our opinion, the signature of a true democracy.

43 Cf. Efler, M., 2006. European Citizens Initiative, Available at: http://eu-buergerbegehren.org/download/2006-12-eci-studie-englisch.pdf.

44 Abromeit, H., 1998. Democracy in Europe. Legitimising Politics in a Non-State Polity. Oxford: Berghahn Books; Abromeit, H., 1998. Ein Vorschlag zur Demokratisierung des europäischen Entscheidungssystems. *Politische Vierteljahresschrift,* 39 (1), p. 80-90; Abromeit, H., 2002. Wozu braucht man Demokratie? Die postnationale Herausforderung der Demokratietheorie. Opladen: Leske + Budrich.

Protection of fundamental human rights and freedoms

Tailor-made protection of fundamental human and civil rights at the EU level is necessary as a direct consequence of the primacy of EU law over national law. If an EU law violates a fundamental right, protection cannot be sought in the fundamental rights embedded in the national constitutions, as these would be ineffective against EU law. The same applies to measures which the member states adopt in order to implement EU law. Legally binding protection against EU acts is an urgent necessity in view of the ever more all-embracing legislative activity of the EU, which is increasingly moving into such sensitive areas as freedom and justice, which directly affect fundamental rights. The rulings of the ECJ have established the protection of fundamental rights as case law, but there is as yet still no anchoring of provisions in the treaties. A specially convened convention drafted a specific EU Charter of Fundamental Rights as long ago as 1999 – but this still has no binding legal status. The Constitutional Treaty/Treaty of Lisbon is supposed to give such legal status to the Charter, according it the same status in law as the treaties. However, at the insistence of Great Britain, the text of the Charter itself will not be included as such in the Lisbon Treaty (it was in the Constitutional Treaty) – which hardly promotes transparency. In its Article 6 TEUnew, the Lisbon Treaty merely states that it "recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7th December 2000, as adapted at Strasbourg on 12th December 2007", and promises that the Charter "shall have the same legal value as the Treaties" (the Declaration concerning the Charter of Fundamental Rights appended to the Treaty also states that the latter has "legally binding force").

Although the Charter of Fundamental Rights is repeatedly praised as representing significant progress, closer examination reveals a number of residual problems. Its "Declaration Concerning the Explanations Relating to the Charter of Fundamental Rights", which is designed to assist in interpreting the rules in the event of legal disputes, and which "shall be given due regard by the Courts of the Union and of the Member States", places certain

limitations on the rights and freedoms which the Charter is meant to protect:

(1) The Right to Life: The Explanation to Art. 2 of the European Convention on Human Rights (ECHR) states: "deprivation of the right to life" (a euphemism for murder?) "shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

(2) Abolition of the Death Penalty: Article 2.2 of the Charter, which appears to introduce a total ban on the death penalty ("No-one shall be condemned to the death penalty, or executed") is qualified by Explanation 3(b) which refers to Article 2 of Protocol No 6 to the ECHR, which allows states to introduce the death penalty for acts committed "in time of war or of imminent threat of war". However, this reference would appear to be out-of-date since the entry into force on 1st July 2003 of the 13th Supplementary Protocol to the ECHR, which introduced a total ban – without exception – on the use of the death penalty. According to Art. 52.3 of the Charter of Fundamental Rights, rights which are set out in both the Charter and the ECHR are to be interpreted according to the formulation given in the ECHR. The absolute ban on the death penalty would thereby also apply to Union law. To date, however, not all EU member states have ratified the 13th Supplementary Protocol. It thus remains unclear whether that protocol is binding on Union law. All that is clear is that the absolute ban on the death penalty applies to the EU itself – the position in respect of the member states remains unclear. The question arises as to why the relevant "Explanations" are not simply deleted – rendering all speculation superfluous.

(3) The Right to Liberty and Security: the limitations on the right to liberty clearly date from a different age. They have been taken over from the version of the ECHR agreed in 1950 and permit "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants" (Explanation to Art. 6 of the ECHR).

(4) Respect for Private and Family Life, Home and Communications: these fundamental rights can be limited "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (Explanation to Art. 7 of the ECHR).

We believe that the fundamental rights listed above represent substantial citizens' rights. It should not be permissible to limit them to this degree. Fundamental principles such as the abolition of the death penalty and the right to life must be unequivocally codified in the Charter of Fundamental Rights, so that there is no uncertainty as to their interpretation.

But there is a further problem in connection with the Charter. Article 6.1 TEUnew of the Reform Treaty states that the Charter "shall not extend in any way the competences of the Union". The Charter applies to the organs of the EU and to the member states only when they are implementing EU law. But the Charter's fundamental rights often concern areas for which the EU has either no, or only restricted, competence. Examples are the right to marry and have a family (Art. 9 Charter), the right of access to "vocational and continuing training" and to "free compulsory education" (Art. 14.2 Charter),[45] as well as an entitlement to "social security benefits and social services" (Art. 34 Charter).[46]

A number of problems result from these discrepancies. Firstly, the lack of clarity means that citizens often form mistaken impressions of the various rights and responsibilities, which could result

45 The Lisbon Treaty states explicitly that the Union "fully" respects "the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity" [and for] "the content and organisation of vocational training" (Arts. 165 and 166 TFEU).

46 The member states determine the basic principles of social security; in particular, EU measures "must not significantly affect the financial equilibrium" of their social security systems (Art. 153.4 TFEU). The term "social services" does not occur once in the treaty text, with the sole exception of a mention in the Charter provisions.

in future in many appeals being rejected outright. Secondly, this could create additional political pressure to grant the relevant powers to the EU in future treaty revisions. Thirdly, the ECJ could use the Charter of Fundamental Rights as a basis for creating further Union powers – even when the Charter itself actually rules this out – and thus drive centralisation forward. In recent years, the EU Commission tried to base many articles of legislation on the Charter – even before the latter was ratified. For example, the Commission wants to extend the much-criticised anti-discrimination directive to other areas mentioned in the Charter. That is why Roman Herzog, who was also President of the European Convention on Human Rights, proposed the insertion into the Reform Treaty of a clause which would permit the Charter to limit the actions of the EU and prevent any new powers from being established or legislative measures justified by reference to it.[47]

Even with the new Charter, an EU citizen whose fundamental human rights have been violated has scarcely any possibility of pursuing an individual action at the ECJ. This puts citizens in a worse position legally than is the case in many member states. In Germany, for example, every citizen has the right to make a personal appeal to a court on an institutional issue. A similar appeal right for violations of fundamental rights at the EU level was rejected primarily because of fears that it would create too much work for the European Court.[48] This does not constitute a legitimate reason and the excuse is scarcely convincing.

EU law does include an individual right of appeal to the ECJ (Art. 19.3 TEUnew), which natural and legal persons can use to try to overturn acts which contravene EU law – including violations of fundamental rights. The criteria of applicability are, however, high: an action must either be directed specifically at the individual (rare), or the latter must be directly and personally affected.

47 Herzog, R. & Gerken, L., 2007. Von roten Karten und stumpfen Schwertern, Eine Grundsatzkritik des EU-Verfassungsentwurfs. Anforderungen an den zukünftigen Grundvertrag, *Centrum für europäische Politik,* p. 7.

48 Korte, in: Berg/Kampfer, Verfassung für Europa, Der Taschenkommentar für die Bürgerinnen und Bürger, p. 97.

The latter criterion in particular is interpreted very restrictively by the ECJ.[49] If no appeal to the ECJ is possible, citizens can address an appeal to a national court.

Concluding remarks

In respect of the manner of functioning of the EU organs we have been looking at, the Lisbon Treaty introduces some innovations. On the plus side is the enhancement of the status of the European Parliament, which is given new powers previously enjoyed only by the Council. To the extent that the Parliament is the EU organ with the greatest legitimacy, the reforms represent an increase in democracy. But a closer examination of the likely effects of the reforms suggests the need to attach some caveats to the general approval. The European Parliament continues to have no right of initiative and no role in electing the executive; for this reason it will continue to be seen by the citizens of Europe as an apolitical organ by comparison with the national parliaments. As with the EU institutions as a whole, the Parliament is not subject to the "principle of discontinuity"; elections (to the European Parliament) bring about no significant political change of direction. Overall, the Parliament is only strengthened in terms of its balance of power relationship to the Council. The Parliament is not strengthened, by contrast, in its ability to give visible expression to the fluctuations in the relative influence of its different political groupings which result from each European election. This means that for the voters, the Lisbon Treaty reforms have no detectable consequences. Sarah Seeger of the Centre for Applied Policy Research (CAP) in Munich summarises the situation as follows: "Because European politics is based on and dominated by what are essentially systems of negotiation, decision-making does not take place within, nor is it communicated through, a large party-political network, but is rather characterised by interlinked, consensus-oriented and, from the outside, frequently non-transparent bartering processes. The

49 Pache, in: Vedder/Hentschel von Heinegg, Europäischer Verfassungsvertrag, Handkommentar, 2007, Art III-365, RN 27-45.

opposition party principle and the debating of substantive political issues against the background of well-known Right/Left alternatives, familiar to national politics [...] is so far not well-developed [in the EU]. The politicisation of practical issues which happens as a result in the national political arenas, and the possibility of clearly identifying political positions is lacking at the EU level. The faultlines do not necessarily occur between the fractions in the European Parliament, but rather between the European Parliament as a coherent actor and the Council."[50]

The Lisbon Treaty also strengthens the Council, in that the consensus procedure (more difficult in terms of negotiation processes) gives way in many cases to the more efficient qualified majority procedure. We can expect that in future the Council will reach its decisions more easily and thus more frequently than beforehand. Their effectiveness is, of course, increasingly dependent on the consent of Parliament within the co-decision procedure which the Lisbon Treaty raises to the status of a "normal" procedure. This means, firstly, that the two other EU organs involved in legislation – the Commission and the Parliament – are also strengthened, and thus the EU level as a whole in relation to the member states. In all likelihood, therefore, appropriations of competences by the EU will also be more common. Secondly, it means that countries can outvote each other – also problematic from a democratic point of view. The European Council is to appoint a High Representative, who is responsible only to it (but not, for example, to the Parliament) and is to be given considerable powers. It remains as yet unclear as to what the exact relationship of the High Representative to the two other "top jobs" in the EU – those of the President of the Commission and the President of the Council – will be.

At the time we went to press it appeared that the Commission was going to retain the principle of "one Commissioner per member state". It was originally intended by the Lisbon Treaty that the number would be reduced from 2014 on. But after the Irish 'No'

50 Seeger, S., 2008b. Die EU im Spannungsfeld von Demokratiedefizit, Politisierung und Vertragsratifikation. In: W. Weidenfeld, ed., Lissabon in der Analyse. Der Reformvertrag der Europäischen Union. (pp. 235-254). Munich: Nomos, p. 237.

in the summer of 2008, the Irish government made the repeal of the new ruling one of the conditions for them holding a repeat referendum on what is otherwise an almost entirely identical treaty. This means that 27 portfolios have to be found for the current complement of 27 Commissioners, with a corresponding increase in the number of civil servants. It is only to be expected that all the Commissioners will want to make a name for themselves and will therefore want to make extensive use of their powers – especially the right of initiative. In this respect, even with the Lisbon Treaty reforms, the Commission is still scarcely at all accountable to the Parliament, for it can only be approved or dismissed as a whole. Overall, the Lisbon Treaty fails to resolve any of the existing "democratic deficits" of the Commission. It remains an institution that has little democratic legitimacy, is difficult to control, but one which has core competences and is extremely influential. It makes policy under a treaty obligation to "promote the general interest of the union" without being politically electable.

The European Court of Justice remains largely untouched by the Lisbon Treaty. Some judicial rulings it has given have now become an integral part of the Treaty. It retains its role as court of last resort for the maintenance of the principle of subsidiarity – so the problem of the interpretation and application of subsidiarity remains. The Court of Justice will continue to contribute to the creeping centralisation of the EU.

The Lisbon Treaty does nothing to cure the democratic deficit in relation to direct democracy at the EU level. It did not even go so far as to introduce a non-binding pan-European referendum on reform treaties. The only gesture in the direction of direct democracy is the European Citizens' Initiative, but this is only a kind of popular petition – an "invitation" to the Commission to prepare a draft law. As long as the EU holds to the principle of the exclusive initiative right of the Commission, there is no reason to hope for the introduction of any form of popular EU-wide legislation. As far as we know, no consideration at all has been given in political circles to the possibility of introducing the facultative referendum, which would be of real use specifically at the EU level.

Our survey of the way the EU organs function, of the democratic procedures, and of the protection of fundamental human rights results in the following picture: when listed separately, the Lisbon Treaty reforms in the area of democracy can be easily presented as demonstrating real progress. But if one looks at them as integral parts of the overall structure, progress seems disappointingly little – if not even partially cancelled out as a result of parallel institutional changes.

Aspects of government practice

After examining the way the EU organs and procedures operate, we want now to turn our attention to a number of selected areas which are less often mentioned in the debate on the EU's democratic deficit, but which are, however, important for an evaluation of the overall situation. Specifically, attention must be directed at: the work of the committees, which are very influential, but which escape public control to a great extent; at the role of lobbying in relation to the Commission and the Parliament; and at the attempt by the Commission to engender legitimacy for itself through the outcomes of its policies and ways of eliciting the views of others.

The importance of the committees

The official executive of the EU is the Commission and the politicians in the Council of Ministers and the Parliament. In practice, however, it is very often the lower levels of administration which pre-empt the political decisions. Neither in the weekly meetings of the Commissioners nor in those of the Council of Ministers, and not even in the debates in the European Parliament, is there time and space even for the most basic evaluation and discussion which ought to precede a political decision. Most of the ministers in the Council of Ministers in particular – who of course also have heavy responsibilities in the national governments – are quite unable to deal with the complex and wide-ranging issues at EU level.

The real political work of assessing whether new rules are necessary, and what areas these should cover, is therefore handed to the committees, which prepare the decisions. The committees of the Commission and the Council of Ministers are staffed by civil servants; those of the Parliament by parliamentarians who have specialist skills.

Probably the most important of the committees is the "Committee of Permanent Representatives" in the Council of Ministers (usually referred to by its French acronym COREPER) which is governed by Art. 240.1 TFEU. This committee is comprised of the foreign ambassadors of the member states. It has the task of preparing the work of the Council. In practice, it does a lot more than that.

The ambassadors coordinate the positions of the member states on a draft legislative proposal by the Commission and formulate the wording of the text which will be voted on in the Council of Ministers. They thus have a decisive influence on the content of the draft law; as civil servants they shape policy. The former German Permanent Representative, Wilhelm Schönfelder, conceded that his chair ought really to be occupied by someone of cabinet minister rank.[51]

In turn, COREPER relies on a large number of sub-committees, which clarify legal details and offer points of view on the issues which are to be legislated on. In this labyrinth of committees, subcommittees and other advisory bodies, any semblance of transparency is lost, and with it any control over the political process. Complex and multilayered discussions in a committee which, for example, might be elucidating the advantages and disadvantages for the public of some proposed environmental legislation, may in the next higher committee – where the views of industry are also heard – be reduced to a brief, one-page statement. When the issue finally reaches COREPER, any "problems" with the legislation may well have "disappeared". On the long route through the committees, concerns get left by the wayside and finally only those points of view are heard which appear relevant to the particular

51 Cf. Oldag, A. & Tillack, H.-M., 2003. Raumschiff Brüssel. Berlin, p. 147.

civil servants, or which have been given prominence as a result of pressure from vested interests.

COREPER does not act on its own initiative. Its work is preceded by a decision in the European Council or by the drafting of new legislation by the European Commission. But in the political reality, there is often considerable latitude in the way that proposals are actually formulated. The fact is that between 80 and 85 percent of the decisions and draft laws passed in the Council of Ministers are in the form put forward by COREPER. These are the so-called "A-points" on the agenda, which are dealt with in machine-like fashion at the beginning of a session of the Council: the ministers just raise their hands and rubber-stamp the proposals by the dozen.

European comitology

Within the EU, the Commission is charged with implementing the legislative process. Through its so-called "powers of implementation" it can determine how a particular law is implemented in practice. In this it has in part considerable political room for manoeuvre.

"Comitology" is the name given to the EU system of committees which have the task of advising the Commission in the formulation and exercise of its "powers of implementation". The overall system comprises more than 250 committees which form around each draft legislative proposal. The members of the committees are representatives of the authorities of the member states, presided over by the Commission. The work of these committees serves to gain a hearing for the views of the member states and to make recommendations as to how the laws can and should be implemented. The recommendations can be either purely advisory, or also binding, but the Council of Ministers – as the organ representing the member states – always has the last word.

The same considerations apply to the comitology as to the Committee of Permanent Representatives. Those who sit in the comitology's committees have no democratic legitimacy, but despite this they exercise considerable political influence. From a democratic point of view, the crucial point is that important issues are

being shifted into committees of "advisory" experts who are in practice making political decisions. There is no longer any space for the open and pluralistic formation of political views which is one of the most important characteristics of democracy. The result is that political authority comes to rest to a far greater extent with the executive apparatus than with the citizens.

The advisory committees

In addition to the committees which are a regular part of the Brussels bureaucracy, the Commission routinely appoints ad hoc committees on specific political issues, charged with developing recommendations for EU policy. These committees are usually staffed by civil servants from the Commission, politicians from the member states and the European Parliament, plus representatives from industry, commerce and civil society, for example. In creating these committees – which often continue their work for a couple of years or longer – the Commission opens up its policy-making to organised interest groups, with the aim of enhancing and improving its own executive actions. The representatives from industry, the trade unions and civil society are meant to bring their own specialised knowledge into the political process and build a bridge between the political world and the voters. The issues which these committees are asked to advise on often relate to fundamental political decisions. Their recommendations are not binding, but in practice they have a considerable influence on the political position of the Commission.

From an official EU point of view, these committees are believed to represent an element of "participatory democracy" – as an opportunity for citizens to take part in the decision-making process. They are seen as helping to give the policies of the European Commission and the EU in general greater legitimacy. The Commission can then say that it has listened to and incorporated different points of view. But these committees are problematic from the perspective of democratic participation.

The representatives of the various interest groups are selected by the Commission according to criteria which it itself determines.

Thus the Commission decides de facto which social groups are to be allowed to have their points of view flow into the political process, and which not. Only organised interests are taken into account; the very large number of interests which are not represented by an organised group simply get no hearing. Only those interests which are represented in the committees are listened to. The relative "weight" of the various groups determines the outcome.

The Commission alone deals with the results of the work of the committees. Neither the citizens nor their representatives have any say on whether that work will lead to specific political directives or not. They remain dependent on the EU to decide whether it will bestow on them – from above – the blessings of "good government".

In practice, therefore, the committees of the EU comitology are not so much opportunities for democratic participation, but rather subtle vehicles for special interest lobbying. Only influential organisations get the chance of being invited to join one of the committees. Once there, they can convert their vested interests into official policy under the smokescreen of an official procedure.

A large part of Brussels politics operates along comitology lines. In addition to the committees already mentioned, there are still other, in some cases extremely influential, committees – such as the powerful Committee on Economic Development, Finance and Trade, which works in a similar way to COREPER in preparing the meetings of the Economy and Finance ministers; or the Political and Security Committee, which "advises" the Council of Ministers on foreign policy – but which also directs the Union's practical military activity; or the Employment Committee, which again "advises" the Council of Ministers in the area of employment and labour market policy.

Very few committees have as much influence as the Committee of Permanent Representatives, but practically every political decision is based on the selective preparatory work of one committee or another. Through the way this preparatory work is carried out – for example in the selection of material, through the manner and scope of the consultations, but also through the specific wording

of recommendations – many decisions are in practice pre-empted. When they are presented to the relevant politicians or Commissioners, the recommendations or wordings can appear as simple "facts" or "compelling arguments", although closer examination reveals them to be neither of these. The manner in which civil servants can exert influence in this way leaves no public traces and thus entirely circumvents any form of democratic control.

Lobbying

The term "lobbying" has primarily negative connotations. It originally referred to the "lobby", or entrance hall, of the parliament, where representatives of different interests traditionally tried to exert an influence on the political decision-makers. Lobbying in itself is not at all illegal; on the contrary, within certain limits it is a legitimate means for groups, associations and those engaged in trade and commerce to have their interests included in the shaping of political policy. In Brussels, the lobbyists organise events on specific issues or policy areas, arrange meetings with decision-makers (e.g. members of the Commission, MEPs), and distribute information packs. Often, however, the borderline between the legitimate democratic representation of interests and an illegitimate exerting of influence on decision-makers becomes very hazy. Even where there is no overt corruption, it becomes a problem for democracy when the content of political decisions is "pre-structured" by representatives of non-transparent extra-parliamentary interest groups. For it is not uncommon for lobbyists to be directly involved in formulating draft legislation.

Brussels quickly became the "lobbying capital" of Europe. It is estimated that there are between 15,000 and 20,000 lobbyists in the city. There is no reliable data on the number of lobbyists and their financial resources since to date (see below) there is no requirement for them to be registered or to reveal how they are financed. The vast majority of the lobbyists work for trade associations and individual companies. Virtually all the national interest groups in this area are now represented, plus more than 200 multinational companies, who are represented in the EU "capital" by

a local lobby office. Large numbers of lobby agencies have existed since the mid-1980s, and there are now some 250 lobby firms and agencies.

Lobbying is already problematic at the nation-state level. In the European Union it has become a serious threat to democracy. There is scarcely a single directive which does not come about without the involvement of lobbyists. For it is much more common for lobbyists to be brought in as political advisors at the EU level – where representatives of interest groups are invited to sit on the advisory committees – than it is in the nation-states. The European Parliament and the Council of Ministers are not supported by anything equivalent to the German Bundestag's Research Services to provide them with information and advice.

One of the reasons why lobbying is a serious problem, especially in the EU, is a direct result of the exclusive initiative right of the Commission, because it means that lobbyists can target the largely unobserved Commission civil servants and have a direct influence on the first drafts of a legislative proposal – indeed, even prompt new legislation themselves. But the lobbying directed at MEPs is also problematic, as there are only weak rules governing the disclosure of so-called secondary employment. Several MEPs have been found to be engaged as lobbyists in addition to their parliamentary work.[52]

Personal contacts and insider knowledge are vital to the art of lobbying. The "revolving door" phenomenon – people moving from politics to industry (or lobby groups) and vice versa, giving them scope for exercising considerable influence – exists within the EU at the level of the Commissioners and of high-ranking staff. In 2001, for example, the head of the Directorate-General Environment, Jim Currie, moved to British Nuclear Fuels; und in 2007 and 2008 several senior EU civil servants moved to join corporate law firms which also offer lobbying services.[53] Despite protests from

52 Cf. the Spinwatch study: "Too close for comfort" of July 2008, Available at: www.spinwatch.org.uk/images/too%20close%20for%20comfort.pdf.

53 Cf. at http://www.worstlobby.eu/2008/vote/info/9/worstgreenwash.

civil society, the "revolving door" problem has so far been consistently ignored by the EU Commission.

Public control of lobbying will only be possible if the process and those involved in it are subject to far greater transparency. But despite the increasing importance of this sector, effective control measures are very thin on the ground. Many commentators go so far as to speak of a "fifth estate" (based on the idea of the media as the "fourth estate"),[54] for the entanglement of lobbyists and politicians in Brussels has now become an almost impenetrable thicket. In June 2008, as a result of public pressure, the Commission introduced a register of lobbyists.

But unlike its American counterpart, registration is not compulsory and the register is in any case not designed in such a way as to produce the necessary transparency. It does not include the names of the individual lobbyists or precise financial details: the lobbyists are allowed to state their budgets to the nearest 50,000 euro. Lobby agencies are permitted to quote the sums of money paid to them by their clients as 10% tranches of their total income i.e. all that is shown is the relative share – to the nearest 10% – of the overall turnover a particular client has contributed (clients who contribute 10% or less do not have to be named). The "nearest 10%" would be 200,000 euro for an agency with a turnover of 2 million euro. The bigger the agency, the less transparent it has to be – an absurd system.

It is already clear that voluntary registration will bring no substantial improvement in the transparency of the Brussels lobby-jungle. By the end of October 2008, just under 500 lobby organisations had registered – but only 39 of them were lobbying agencies or firms. The Public Affairs Directory for Brussels, however, lists around 2,500 lobbying organisations which are based solely in Brussels. The number of lobbying organisations not based there, but which operate there, is unknown. Some major associations and federations, and big lobbying agencies such as Hill & Knowl-

54 Cf. Leif, Thomas & Speth, Rudolf, Lobbyismus in Deutschland – einflussreich und unkontrolliert?, Available at: http://www.rudolfspeth.de/PDF/Lobbyismus.pdf.

ton, are not listed in the Directory. Those who wish to continue working behind the scenes can do so without fear of serious sanctions.

There are, however, two possible avenues through which improvements might be made: firstly, the EU Commission plans to assess the register of lobbyists after a year and, depending on the outcome, consider imposing stricter criteria in respect of the obligation to register. The assessment will not be easy, however, since although the organisations which have already registered will be known, the number of lobby groups which have not registered will of course remain unknown.

Secondly, a working group which combines members of the European Parliament and the Commission is supposed to be presenting plans for a new, common register. In May 2008, the EP had called for a stricter compulsory register of EU lobbyists which would contain the names of the lobbyists and significant financial information. The working group presents a real opportunity to bring in an improved register. One proposal is for the passes which allow people to enter the EP on a regular basis to be linked to the entries in the lobbyists' register, so that greater pressure is brought to bear on the lobbying organisations to register. This will not, however, resolve the problem of the vagueness of the data in the register. So NGOs such as the ALTER-EU network[55] are demanding further improvements in the quality of the data (such as the scrapping of the 10% option for agencies, and much more precise financial information e.g. budget statements to the nearest 10,000 euro instead of 50,000).

Rules of transparency such as a compulsory register of all lobbyists will not remedy structural imbalances of power. However, they represent a first and urgently needed step in the process of making lobbying in the EU transparent and therefore open to public control. In addition, the EU must set limits to lobbying and end the preferential treatment given to corporate interests. Strict "cooling off" periods are necessary before EU decision-makers should be allowed to work as lobbyists.

55 The Alliance for Lobbying Transparency and Ethical Rules (www.alter-eu.org), a Europe-wide coalition of more than 160 civil society groups, trade unions and academics founded in 2005, campaigns for mandatory rules of transparency for lobbyists. All Brussels lobbyists should sign a register and disclose who they are working for, on what issues, how much money they are paid for their work and how much they spend on it.

Legitimation through policy?

The information materials for citizens which the EU Commission produces routinely contains lists of the measures which the EU is going to adopt or has adopted and the goals which it is setting itself or has already achieved. The intention appears to be to convince the citizens that the EU is acting in their interests, that it has "good" policies – especially in such important areas as the economy, the environment or research. In democratic states this kind of self-promotion mainly comes from political parties and the government, which want to be elected or re-elected. But what is the purpose of propaganda of this kind in the EU? The Commission – the organ which most resembles a government – places itself out of reach of the voter; it does not require the voters' approval in order to be re-elected. So why the expensive propaganda? The answer is that the EU has always sought to legitimise itself by referring to its achievements, its "output". The assumption has been that if the voters approve of the policies initiated by the Commission – even if only in retrospect – then they will continue to support the EU project. The EU would then be legitimised through its good and sensible "outputs".

As logical as this way of proceeding might appear, from a democratic perspective it is problematic. In a democracy, legitimation only derives from the democratic expression of the voters' political views i.e. through elections and referendums. Promises and outcomes play a role in shaping the voters' views, but they cannot replace them, since voters have different opinions on what is promised and achieved and in voting make a choice between different political offers.

With their electoral vote, their approval or rejection of a referendum proposal, they themselves define what they see as a desirable outcome. In a democracy, legitimation arises only "proce-

The European Round Table of Industrialists

No discussion of why the EU is the way it is would be complete without mention of the European Round Table of Industrialists (ERT), founded in 1983. In its own words, ERT is "an informal forum bringing together around 45 chief executives and chairmen of major multinational companies of European parentage". Only representatives of industry can be members – and only by invitation. The aim of this 'think tank' is to have a direct influence on EU policy. Unlike conventional lobby groups, ERT is not interested in influencing specific policy guidelines, buton gaining acceptance for whole policy orientations – achieved through the personal connections which its members have with members of the Commission and the Council. The internal market, competition policy, the single currency, European Central Bank policy, infrastructure policy, Eastern European enlargement – these and other areas have all developed strongly in the direction promoted by ERT. Hardly any other lobby group enjoys the level of influence ERT has on the EU institutions and on the wording of the Union treaties. But the public is scarcely aware of this. ERT claims legitimacy for its work on the basis of the economic importance and high employee numbers of the companies its members direct.*

* Borrowing from: Balanya, Belen; Doherty, Ann; Hoedemann, Olivier; Ma'anit, Adam; Wesselius, Erik, 2004. Europe INC: Regional and Global Restructuring and the Rise of Corporate Power. London: Pluto Press.

durally" – through the democratic process.[56] By contrast, "output

56 Arguments against output-legitimation can be found inter alia in: Abromeit, H., 2002. Wozu braucht man Demokratie? Die postnationale Herausforderung der Demokratietheorie. Opladen: Leske+Budrich; Lauth, H.-J., 2004. Demokratie und Demokratiemessung: Eine konzeptionelle Grundlegung für den interkulturellen Vergleich. Wiesbaden: VS Verlag für Sozialwissenschaften; Möllers, C., 2008.

legitimation" only has meaning in non-democratic systems. Dictators, for example, seek to justify their procedurally unchallengeable power through policies which claim to be in the common interest i.e. of the majority. "Democracy doesn't promise 'the good life'", writes constitutional law professor Christoph Möllers, "so equally, the good life cannot be the basis for democratic legitimacy. Authoritarian regimes can also provide welfare, material security and 'good outputs'".[57]

Thus when the EU attempts to impress the voters with its achievements, it exposes its own democratic deficit – regardless of whether we like what it is doing for us or not. Because the Commission does not emerge from the EU Parliament as an elected executive, and because it – and not the Parliament – has the right of initiative, the European elections have no effect (or at least no discernible effect for the voters) on the EU's policy outcomes. The Commission's self-marketing efforts are an attempt to compensate in some measure for the democratic deficit. But the more it succeeds in this aim, the more it actually increases the deficit; for the more the voters approve of the Commission's policies, the less will they consider a democratisation of the EU to be necessary. Even citizens with a strong sense of democracy can be corrupted, as soon as they begin to believe that their cherished goals can be achieved without having to go through the normal laborious democratic processes – whose outcome is always open and uncertain. We forget all too easily why we actually want to live in a democracy.

In the words of Christoph Möllers: "Everyone would like to be able to secure their own particular preferences without having to go through a democratic process; and because it's the same for everyone, we're able to agree on democratic procedures. […] We don't accept a democratic regime in order to solve particular problems, but because such a system best expresses the way we see

Demokratie – Zumutungen und Versprechen. Berlin: Klaus Wagenbach; Nelson, W. N., 1980. On justifying democracy. London: Routledge.

57 Möllers, C., 2008. Demokratie – Zumutungen und Versprechen. Berlin: Klaus Wagenbach.

ourselves: as free individuals with a mutual acknowledgement of everyone else's freedom."

Opinion polls and consultations

The outcomes-oriented stance of the EU Commission has its historical origin in the fact that the first European treaties of the post-war period were strategic alliances relating to certain restricted areas (coal and steel, nuclear power, internal common market). The Commission had a duty to prove to the governments on a regular basis that it was achieving the goals set by the treaties. The EU has now become something much bigger than a narrowly-focussed strategic alliance. It is active in all important areas of policy – and thus ought to be subject to far greater democratic control. This would mean that the Commission would no longer be primarily accountable to the governments – which can install it and also uninstall it – but instead to the voters i.e. the Commission would have to be elected by them and be also subject to recall by them. But because there is no possibility under the present circumstances for the Commission to obtain its legitimacy in this way, the Commission is forced to make a direct appeal to the citizens – as well as to governments – to ignore the problem of legitimacy and focus instead on the "outcomes" (a "never mind the quality, feel the width" approach).

To do that the Commission relies on opinion polls and consultations and develops whole "communications strategies", which it presents in so-called "White Papers".[58] The most recently declared aim of the Commission is to bridge the "communication gap" between the citizens and the EU institutions. The stated rationale is that the citizens have a "right to be informed about Europe and its specific projects, to be able to express their views on Europe, and to be listened to". The aim is to create a "partnership" and agree "common principles".[59] The overarching goal of the communications strategy is to make a contribution to "healthy democracy" in

58 White Paper on Communication 2006, Available at: http://europa.eu/documents/comm/white_papers/pdf/com2006_35_en.pdf.

59 Op. cit.

the EU. The Commission's aims are summarised as: citizens to be better informed about EU affairs; a dialogue between the EU institutions and the citizens; a public debate about the EU; a clear picture of public opinion in Europe on the part of the Commission.

Yet although opinion polls and consultations can be useful in certain contexts, they are not sufficient for a "healthy democracy", because in themselves they do not represent genuinely democratic tools in the narrower sense. They are procedures which can also be used by undemocratic regimes (those not subject to being voted out). They are not binding, and the citizens have no control over the political decisions which are derived from them – nor is it possible to see how those decisions have been arrived at. Opinion polls are problematic because they rely on spontaneous answers to potentially a host of different issues and thus circumvent what ought to be a lengthier and more considered process of forming opinions. Democracies ought really to be based on voting decisions which have been made after a period of reflection. Consultations do create a better environment for debate and the exchange of opinion, but they are rarely representative – and, above all, not democratically legitimated.

3. Conclusions

We have reached the end of a wide-ranging analysis of democracy in the European Union. The analysis was based on certain explicit criteria (see Introduction). Its subject was recent developments and general practices in the EU, as well as the provisions of the treaties in relation to the EU institutions – in particular to the Lisbon Treaty, which has not yet been ratified, but which in the opinion of most EU politicians promises the most far-reaching improvement in democracy to date. Our approach was strictly normative. Democracy is a reference value, a *sine qua non* of governance; to that extent, a stock-take of democracy must measure itself against the normative ideal. One shortfall in the appraisal is that we are unable to make an adequate assessment of the precise factors which have led to the current *status quo*. We are aware that without the personal dedication and commitment of many politicians the EU would not have reached even the level of democratisation outlined in the Lisbon Treaty. Our analysis likewise fails to mention many of the individuals who are responsible for the absence of more far-reaching reforms. Although these are important factors, ignoring them means that we were able to place significantly greater emphasis on determining the precise state of affairs as the necessary basis and starting-point for future action by politicians and civil society.

What overall assessment can we make of the Lisbon Treaty, if we apply the democratic criteria we have listed? Does it really introduce more democracy into the EU? In short, we have to say: not really. What the Lisbon Treaty does bring is an additional empowerment of the European Parliament in respect of its effective decision-making powers, in particular in relation to the Council. The co-decision procedure becomes the "ordinary" procedure i.e. the norm. Whilst this is certainly a welcome development – because the Parliament has the greatest democratic legitimacy of all the EU organs – one must not fail to mention at the same time the associated drawbacks and omissions. Firstly, the strengthening of the Parliament takes place within the context of a general reinforcement of the EU level as against the democracies of the member states. Unfortunately, we see no reason to assume that the Lisbon Treaty rules will prevent – or provide significantly greater legitimacy for – further centralisation. This is particularly problematic from a democratic point of view, because – secondly – even with the Lisbon Treaty the EU would function overall in a far less democratic way than the individual member states. The democratisation of the EU thus lags far behind its expansion of powers. Thirdly, the Lisbon Treaty contains not a single reform which would give the citizens effective opportunities for monitoring and control. It remains the case that the executive is not elected by the Parliament and therefore cannot be held to account by the voters by means of the European elections. Nor are any genuinely direct-democratic procedures to be introduced. The citizens' participation is limited to the right to elect a (counterfeit) parliament via an electoral method which is not uniform. Moreover, the Treaty merely promises the citizens that they will receive "equal attention from [the EU's] institutions, bodies, offices and agencies" (Art. 9 TEUnew) and be given "the opportunity to make known and publicly exchange their views" (Art. 11.1 TEUnew). Nor is the much-praised European Citizens' Initiative an effective instrument of democratic control.

Thus the only genuine element of greater democracy in the Lisbon Treaty is the strengthening of the Parliament in relation to the other EU organs – but there is no corresponding strengthening of the citizens in their control of the Parliament, of the treaties or of EU legislation. Ultimately, therefore, there is no discernible change for the voters, whose only role will continue to be that of voting every five years for one party or another.

Expressed in its simplest form, the democratic deficit of the EU lies in the fact that the "power to self-empower" (also called "competence-competence") rests with the governments and not with the citizens. (Of course, the diagnosis applies equally to many re-

publics with democratic constitutions; but the comparison should not be used to justify the poor state of affairs in the EU. We will return to this topic later). In order for the voters to have the final say, there would above all have to be procedures of direct democracy – and the understanding of democracy associated with them. In that concept of democracy, members of parliament and governments are the mandated representatives of the people – until they are recalled – who give continuity to politics. The voters can respond to what their representatives do either by objecting (with the facultative referendum) or submitting their own proposals (citizens' initiative and referendum); the mandatory referendum ensures that major decisions (e.g. on changes to the constitution) can only be made with the explicit agreement of a majority of the electorate. This concept of democracy implies that EU treaty reforms, which are equivalent in their significance to a constitutional reform in a nation state, would need to acquire special legitimation through the institution of a directly-elected Convention – and final legitimation through referendums on the amended treaty text. (We give details of these procedures in the following section entitled "Solutions"). Unless and until such procedures are introduced the citizens will not enjoy their democratic right to have the final say; and only with their introduction will the representative system acquire genuine democratic legitimacy.

Ultimate control by the citizens is central to the issue, because it (alone) gives legitimacy to all the other organs and procedures which result from it – even if in individual cases some of these might depart from the democratic ideal in the way they function. This is especially important in the case of the EU, whose structural peculiarities mean that the introduction of wide-ranging and unequivocally satisfactory (direct-democratic) procedures seems scarcely possible at present – or at least appear to be nowhere on the horizon. The majority voting procedure in the Council, for example, which in itself is problematic from a democratic point of view, could become acceptable if it were chosen explicity – and preferably directly – by the voters, who would also have the right to withdraw it. The same applies also to transfers of competences to the

EU. If these are controlled by the citizens, they become far less a matter for concern. The deficiencies of the Parliament which we have criticised here – such as its inability to elect and control the executive – would also be partially removed if the voters had the power to vote down – in a facultative/optional referendum with all the attached conditions such as minimum signature quorums – any piece of EU legislation of which they did not approve, instead of this right belonging, as at present, only to the executive. The introduction of direct democracy would to some extent compensate for the absence of the discontinuity principle, since draft legislation which is not automatically dropped when a new Parliament is elected could still be individually challenged by facultative referendum. All these considerations argue in favour of conferring special legitimacy on EU treaties by means of a democratically elected Convention, which would create the democratic basis for all the organs and procedures resulting from its work.

A common argument against direct democracy is that it is impractical at higher federal levels, where the primacy of purely representative democracy is even increased. We would challenge this argument by pointing out that it is precisely the generation of fair and effective representation which becomes more difficult, the larger and thus more heterogeneous the political entity is. It seems to us completely unrealistic to assume that a 750-member EU parliament can adequately represent around 500 million citizens from 27 or more countries – and with many more than 27 different languages, cultures and political orientations. That would be so even if that parliament were based on general elections carried out according to a standardised model which ensured equality – which is not currently the case. The importance of the Parliament lies not so much in representing all the relevant groups within the EU as in creating a shared, continuous, democratically controllable space where policies are debated and agreed.[60] Given the extent of its power over so many people, its "controllability" is no less impor-

60 Cf. Möllers, C., 2008. Demokratie – Zumutungen und Versprechen. Berlin: Klaus Wagenbach.

tant – indeed it is far more important – than in the case of a local legislative and executive body (such as a regional or local parliament in some EU countries). But such controllability can only be provided by the direct-democratic procedures referred to above. Switzerland provides us with the paradigmatic example of the operation of the democratic principle of popular control. Direct democracy plays such a large role there not because the diminutive size of the Alpine confederation makes it possible, but because it is made necessary by the country's considerable cultural and political diversity, its pronounced federalism and the resulting "concordance", or consensus, form of democracy.[61]

The question thus arises as to whether we can have any realistic expectation that the EU – in the longer term i.e. beyond the Lisbon Treaty – will democratise itself. Our conclusion is that the trend of developments so far suggests there is no hope of that expectation being met. The concept of democracy which is inscribed in black and white in the treaties, and the way the EU has behaved during the latest treaty ratification process, indicate that the EU has distanced itself even further from the concept of democracy advanced by us here. In addition, we wish to issue a clear warning against the danger of looking at the EU's democratic deficit as largely a technical problem for which no-one has a satisfactory solution. There are, to be sure, certain dilemmas, as we have shown. But we also have to ask: who stands to gain from a continuing failure to democratise the EU? It would in any case be naïve to assume that the political system is going to suddenly fulfil all our desires with the right reforms, as many politicians want us to believe. On the contrary, history shows us that in most cases democracy had to be established and defended in the face of opposition from those in power.[62] The resistance of a powerful elite becomes evident whenever citizens demand more effective participatory rights, because these would challenge the power interests of the entire political class. Civil society ought, therefore, to take the trouble to identify those individuals and/or groups which are blocking the democratisation of the EU and/or are driving forward an undemocratic centralisation of power.

61 The term "concordance" or "consensus" democracy describes a form of governance which aims to involve the maximum number of actors (parties, associations, minorities, civil groups etc.) in the political process and to make decisions only after a consensus has been achieved. As a consequence, majority voting as a way of making decisions does not play a key role in the political system. The contrary model to that of consensus democracy is referred to as "competitive democracy" or "majoritarian democracy". Consensus democracy generates stability, since there is no such thing as a formal opposition in the parliaments.

It should be remembered that the future of democracy in the European Union is intimately linked to the future of democracy in the member states. The EU and its institutions ultimately arise out of the member states and the shape of the former is to some extent delimited by the expectations which the member states bring to the "communal hotpot". The experience which Mehr Demokratie has gained from the attempt to introduce direct democracy at the federal level in Germany confirms this. Twenty years ago, the level of political opposition was much higher than it is today – which we attribute not least to the fact that direct democracy has been progressively extended in the federal states of Germany, giving citizens and local politicians the opportunity to gain experience of the procedures involved. This then has an overall positive effect on the standpoint of the central government and the national parliament. We can expect similar effects between the member-state level and the EU.

Strong forces, in civil society and in national and local parliaments, are engaged in the struggle for democracy both within their own countries and also, through various pan-European networks, in relation to the EU. The success of this Europe-wide movement for democracy will crucially depend on how well these forces are able to ignore their political differences and work together for the common goal of European democracy. As an organisation which from the outset decided against pursuing any particular political policy goals other than campaigning for the introduction and expansion of (direct) democratic procedures, Mehr Demokratie oc-

62 Remarkable and gratifying exceptions – such as the voluntary abdication of a monarch in Burma and his replacement by a democratic republic – merely confirm the rule.

cupies a position which is still largely the exception in Europe. It is to be hoped that more like-minded organisations will come into being in other countries of the EU and join networks such as Democracy International. But of course the organisations with a political agenda are also indispensible for the achievement of greater democracy. What is important is that we all recognise the value of democracy and that we refrain from the practice of scoring (political or other) points against each other to the detriment of our own interests and those of the European Union – and those of democracy itself.

Part 2
Solutions

After the foregoing in-depth – even if necessarily incomplete – analysis of the democratic deficit in the European Union, we do not wish to leave it at that and, so-to-speak, walk away from the problem. Rather we wish to search for possible ways out of the plight we find ourselves in. In doing so, we will take as our starting point the same democratic criteria as we used in the analysis (see Introduction), which outline the ideal to be aimed at. The general goals are, firstly, the establishment of ultimate control by the citizens over the form of the EU; and secondly, an EU whose institutions react effectively and perceptibly to the changing majority positions within the electorate – as reflected in the democratic decision-making processes of elections and referendums.

We would like to present three proposals here for debate. The first relates to the issue of final control by the voters: a new basic or foundation treaty should be drawn up by a directly elected convention and the final draft submitted to the citizens of the EU for approval – or not – in a referendum. The second relates to the introduction at the EU level of direct-democratic procedures; we also suggest what form these should take. Thirdly, we sketch out an institutional structure for the EU as a visionary concept of what the EU of tomorrow might look like…

We see the proposals presented here as a contribution to a debate which has as yet hardly begun within civil society. Some of the proposals – such as, for instance, the democratic convention, or the introduction of direct-democratic procedures – correspond to the official position of Mehr Demokratie. This does not apply to some of the other suggestions – such as the precise form of the procedures or the democratic structure of the institutions. The authors take personal responsibility for these.

A Democratic Convention for Treaty Reform

In the earlier part of the present book we subjected the Convention which produced the Constitutional Treaty – and thus essentially also the Lisbon Treaty – to an examination based on democratic

principles. Our assessment of its results and *modus operandi* was overall negative – with the main positive aspect being the basic idea of commissioning a special body comprising a wider cross-section of interested parties than merely the national heads of state and representatives of the Commission. How could this basic idea be given genuinely democratic form?

In asking how the EU should be organised it is all too easy to forget who ought really to be answering the question. In our opinion it should be the voters and/or their directly mandated representatives. Parliaments and governments do not qualify as decision-makers in this context, as they have been elected as legislators and/or members of the executive, firstly, on the basis of the national constitutions and/or EU treaties valid at the time of their election; and, secondly, for a specific legislative term. Based on our concept of democracy, we do not believe that they have a mandate to draw up or amend constitutions and/or the relevant contents of EU Treaties. And they have no mandate to institute a national assembly or a convention on their own account, as happened in the EU. John Locke wrote about this as long ago as 1689: "The legislative cannot transfer the power of making laws to any other hands, for it being a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the Commonwealth."[63]

This is why we are suggesting that future EU Treaties on the functioning of the European Union should be drawn up by a directly elected convention and that the draft treaty should be presented to the voters for approval, or not, in a referendum. Because this proposal relates to the transfer of the "competence-competence" from the governments to the people, it is of central importance for the realisation of our concept of democracy.

History has many examples of constitutive assemblies having been called into being by elections – such as, for example, the German National Assembly which produced the Weimar Constitution after WWI. But it is not only when states are newly founded (or re-

63 John Locke, Second Treatise on Government (1689), 141.

founded) that such assemblies play a role; far-reaching constitutional reform can also make them necessary. Exemplary in this respect in recent times is the total revision of the Constitution of the Swiss canton of Zurich. Frequently, however, the direct election of a constitutive assembly was bypassed by the political elite – as happened in Germany, for example, after re-unification. At the time, the provisional Constitution/Basic Law – which was itself neither based on a directly elected assembly nor approved by referendum – should have been converted into a constitution using appropriate means. But the ruling politicians of the time decided neither to convene a special assembly nor to hold a referendum.

Of course the EU is not a state, so one might object that an elected convention – the equivalent of a constitutive assembly in a nation state – is not appropriate. To pursue this line of reasoning, however, would be to apply the wrong criteria i.e. purely formal criteria. What matters is not whether we are dealing with a "formally-defined" state i.e. one which satisfies the formal criteria – but how far-reaching is the influence of the particular union of states in question. The political significance of the EU is so great and the already existing level of development and sophistication of its organs and institutions so high – and so similar to those of a state – that an equally sophisticated democratic approach to its constitutional/treaty foundations has become essential.[64] The objection that there is no "European people", and that only peoples can govern themselves democratically can be dismissed for the same reasons. If these same European peoples can be governed by weakly-legitimated politicians and Commissioners, as is the case in the EU, then it is difficult to see why they cannot govern themselves democratically – even harder to see why self-government should be less legitimate than the *status quo*. But the central argument is that it is up to the people of the various nation states to decide to what extent they see themselves as part of the European community, and to what extent as independent

64 Schmitz, T., 2003. Das europäische Volk und seine Rolle bei einer Verfassungsgebung in der Europäischen Union. *Europarecht,* p. 217ff.

nations and/or peoples. What counts is not some self-appointed arbiter's definition of what constitutes "a people", but solely the desire (or lack of it) of those affected to see themselves as part of a political entity.

The three stages of the Convention process

The convention process ought to have the following three main stages:

– direct election of the convention members
– working out of a draft treaty
– EU-wide referendums on the draft

The members of the convention would come from all the member states of the European Union. Some of the candidates should be selected by means of internal selection procedures in the individual countries; others would be nominated by the different political camps across Europe. But the citizens would have the final say: on the same day across the whole of Europe, they would vote to select the members of the convention from among all the candidates put forward.

The work of the convention would have to be organised democratically and be transparent for both its members and the outside world. Once the composition of the convention had been determined, its members would elect a praesidium from among themselves, whose task it would be to moderate the convention process. The praesidium would *explicitly* have no decision-making power. All the sessions of the convention would be open to the public. Decisions within the convention would be made only after detailed and extensive debate.

The referendum on the draft cannot be a simple pan-European popular vote; firstly, because that would infringe the sovereignty of the member states guaranteed by the treaty, and secondly, because the citizens of the smaller and very small states would have disproportionately little influence on the outcome: a foundation treaty could be imposed on them against their will. We are therefore proposing that there should be national referendums, held on the same day across Europe. A "double majority" would be re-

Democratic Constitutional Reform in the Swiss canton of Zurich

A complete revision of the Zurich cantonal constitution took place between 1999 and 2006. The process is so exemplary from a democratic point of view that it deserves to be shown here in outline.*

1991	Member of the Cantonal Parliament Leo Lorenzo Fosco calls for a new constitution "for the millennium".
13th June 1999	In a referendum, 66% of those who voted say "yes" to a reform of the constitution by a Constitutional Council.
18th July 2000	The 100 members of the Constitutional Council are elected by the citizens of Zurich: 29 women and 71 men from six different party alliances.
13th September 2000 to May 2003	The Constitutional Council starts its work. Committees generate proposals, there are votes on amendments, an editing committee checks and revises the wording. The initial draft is published and the public invited to comment.
15th July 2003 – 15th November 2003	Thousands of citizens order the draft, read the explanations and debate the proposals. Trade Unions and associations, political parties, local communities and private persons submit comments, which are assessed in the secretariat of the Constitutional Council.
January 2004 to March 2004	The separate committees of the Constitutional Council discuss the feedback and make changes to the relevant parts of the draft constitution.
June and July 2004	The Constitutional Council deliberates over the new final draft and makes further changes and corrections.
28th October 2004	The Constitutional Council votes on the amended draft: the result is 64 "for" and 26 "against", with five abstentions.
February 2005	The voters of Zurich approve their new constitution in a referendum by 64.8% "for" to 35.2% "against".
1st January 2006	The new constitution enters into force.

* Information mainly derived from the official pre-referendum publication of the Constitutional Council of 3rd December 2004.

quired for the draft to be accepted i.e. majorities would be necessary both in respect of the total number of votes and also of the separate national votes. The fact that the referendums would be held on the same day would prevent the outcomes from influencing each other.

The advantages of the proposed procedure would be:

- simply the announcement of a democratic convention process would in itself be seen by the citizens as grounds for greater trust in the institutions, thus improving the image of the EU;
- it is probably the most effective means imaginable for raising the level of awareness about the EU and for initiating a public debate;
- with its elections, debates and referendums, the convention process would involve the citizens and allow them to choose between different options;
- it would produce a draft treaty that would stand a very good chance of being adopted by a majority, because the involvement of the voters in the selection of the convention would give them an opportunity to appreciate the necessity for compromise;
- the integrating force of (simultaneous) European elections and referendums would help people to identify much more strongly with Europe;
- the voters would gain the "competence-competence" (the power to determine the rules of the game and thus the distribution of power) and acquire democratic control over the European Union.

Mehr Demokratie published these proposals for a democratic convention process immediately after the referendum on the Constitutional Treaty in France, and soon after brought them to the attention of all the members of the EU and national parliaments. In the meantime, other civil society organisations have made similar proposals, in particular the European network Attac.

And the citizens? The Germans at least can take some pride and pleasure in the proposal for a directly elected convention. In the Spring of 2007, when the EU was still deep in crisis after the fail-

ure of the Constitutional Treaty, Mehr Demokratie commissioned a sample opinion poll (see box). The result showed a relative majority in favour of "a convention specifically elected for this task" as the appropriate author of a new treaty (at that time still a "constitution"). The poll result gives encouragement for an EU-wide debate on the option of a democratic convention.

Proposals for the design of the convention process

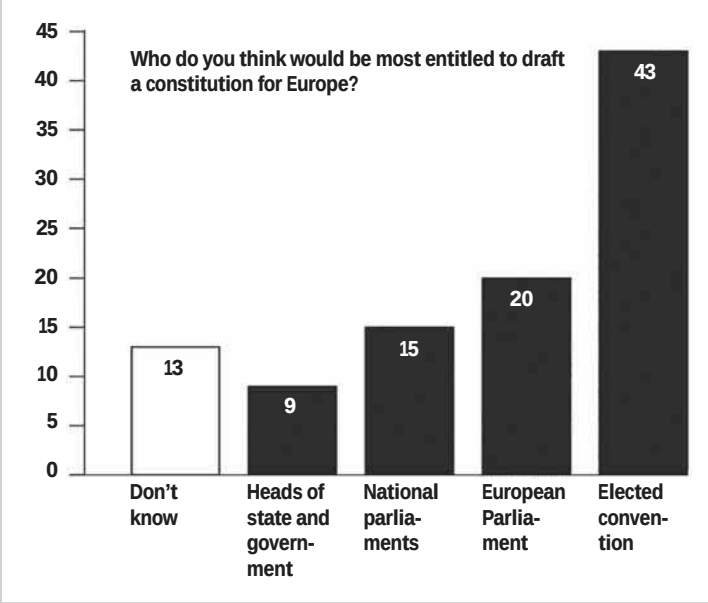
The above section set out the broad outlines of our proposals for the design of the convention process. We would now like to complement those with some further suggestions.

The new foundation treaty we are proposing would have the effect of transferring the power to shape the European integration process from the governments to the citizens. In terms of international law, the process would have to be regulated by a treaty amendment, in which the EU member states would commit themselves – before the convention is appointed by the citizens – to respect the independence of the convention and accept the results of the referendums. The amendment should cover the details of both the agreed convention process and the subsequent referendums. The amendment would be adopted using the current procedural rules.

Transitional treaty: Because the entry into force of the new treaty would be delayed by perhaps as much as two years (allowing adequate time for the convention process), it might be necessary to agree and ratify a transition treaty. This specific suggestion is especially relevant to the current situation, in which the Lisbon Treaty is still "on the table" and awaiting full ratification. A transitional arrangement could be secured if the major, democratically acceptable, innovations of the Lisbon Treaty were to be approved at the same time as the above-mentioned agreement to institute the democratic convention process. Such an arrangement would meet the governments half-way (they are, of course, still currently responsible for the treaties). However, it must be clear that such a transitional treaty would only be workable and acceptable if it did, in fact, endorse the convention model.

German opinion poll: Citizens in favour of a democratic Convention

An opinion poll commissioned by *Mehr Demokratie* and carried out by Forsa in April 2007 revealed that German citizens did not want to entrust the preparation of a Constitutional Treaty to government politicians. Only nine percent of those polled believed that the heads of state and government had the right to draft a constitution for Europe. A further 15% thought it should be done by the national parliaments, and 20% by the European Parliament. But a significant 43% of those asked said they believed that the work should be carried out by a constitutive assembly (a Convention) elected by the citizens of the EU and specifically charged with the task of drafting a constitution.



Composition of the Convention: We propose that the Convention should have four times as many members as the number of EU member states. With the current total of 27 member states, that would give us 108 convention delegates – with each member state contributing two delegates, and the remaining 54 being selected from lists of candidates nominated by the main European party groupings. Between nomination and election to the Convention each candidate would have the opportunity to outline his/her position to the media.

Selection of the Convention: The delegates from the member states would be directly elected on the same day throughout Europe. Each member state parliament would prepare a list of members of the public who are of good standing – in a process similar to that for nominating candidates for the German Presidency. The candidates from the European party alliances would be presented for election by the voters in a common list for the whole of Europe; each vote would count as one. The proportional voting method would be used, so that the party groupings would be represented in the Convention according to the percentage of votes each obtained. It should also be possible for voters to influence the composition of the list by voting directly for a single candidate (rather than for a party group). We propose a preferential voting system for both groups of candidates – in which the voters would rank the candidates in order of preference (1, 2, 3 etc.).[65] In the case of the candidates selected by the national parliaments, no run-off ballot would be required if no candidate – or just one candidate – was given first preference by a majority of the voters.

Task and modus operandi of the Convention: The task of the Convention is to prepare a draft foundation treaty. The text of the treaty is meant not only for legal experts, but for the ordinary citizens of the EU, and must therefore be easy to understand, be clearly presented and not be too long.

65 More on preferential voting at: http://en.wikipedia.org/wiki/Preferential_voting.

The work of the Convention must be transparent. Suggestions from the general public would be considered and potentially taken into account throughout the process of consultation. Proposals could be submitted to the Convention at any time by individuals, civil society groups and organisations, subject to them being supported by the signatures of at least 100,000 EU citizens. The procedure for signature-gathering would thus be the same as the one which will be used for the European Citizens' Initiative.[66] The Convention is obliged to discuss the proposals, but it would not have to incorporate them into its draft; it would retain the right to put forward its own independent proposals.

In order for the citizens to be able to see clearly how the work is progressing, the Convention would have to divide its work into a certain number of sections, on which it would present provisional reports. The work of the Convention should not be subjected to any pressure of time, and decisions would be taken only after in-depth discussion of all points of view. The decision-making method would essentially follow the consensus principle, but where it was impossible to reach agreement, decisions would be taken by a binding majority vote.

Where there are key aspects of the new Treaty which are contentious or disputed, the Convention can come up with alternative proposals, which the voters would then be able to approve or reject in a referendum. If a qualified majority of at least one-third of the members of the Convention supports an alternative proposal, this would have to be included in the Convention's final proposal – and thus form part of the text presented for approval in the subsequent EU-wide referendums. There are even historical precedents for this type of referendum. In 1946/47, after the Allies had arranged referendums on all seven regional (federal state) constitutions in the American and French occupation zones, special

66 The draft Lisbon Treaty provides for a "European Citizens' Initiative" (Art. 11.4 TEUnew), by means of which a minimum of one million European citizens can "invite the European Commission … to submit an appropriate proposal" for new legislation. The procedure for the collection of signatures and other design elements will be the subject of a forthcoming EU regulation. Proposals on this have come from civil society. Cf.: www.democracy-international.org/eci.html.

referendums were held at the same time in Hesse, Rhineland-Palatinate and Bremen on articles of their constitutions which were particularly contentious.[67]

Referendum/popular vote: After the publication by the Convention of its final draft, EU voters would have the opportunity to vote on the draft and also, if necessary, on any alternative proposals for particular sections of it – again using the preferential voting system. How these referendums would be managed is quite crucial. As mentioned above, referendums should take place on the same day in all the member states of the European Union. We believe that from a democratic perspective it is quite obvious that, as with the elections, they should be on the same day; staggered referendums bring the risk of referendum outcomes influencing each other. To ensure that the smaller states were able to exert sufficient influence, a "double majority" would be necessary i.e. the Convention draft would be adopted if it had been approved by a simple majority of all the votes cast and had also received a majority of the votes in four-fifths of the member states (the authors' proposal).

What happens if the draft treaty is rejected? Let us assume that the draft treaty secures an overall majority of the votes but is rejected in one state – or in up to a fifth of all the states (with 27 member states that would be five). The foundation treaty would enter into force even though a majority of the voters in five countries had voted against it. Provision for such an eventuality would have to be made at the time the convention process and the referendums were being agreed; rules could be included in the transition treaty, for example. We reject equally the idea that the 'dissident' states would be subject to an automatic exclusion or that they would have the approved constitution simply imposed on them. There are a number of conceivable ways in which the treaty process could be continued in such a case.

67 Cf. Jung, Otmar, 1993. Daten zu Volksentscheiden in Deutschland auf Landesebene (1946-1992). *Zeitschrift für Parlamentsfragen* 24, p. 5-13 (6, with commentary p. 7f.).

The foundation treaty itself might include the option for member states to commit to different degrees of cooperation i.e. the treaty would not necessarily impose all its provisions on all states. So there ought to be two options open to those countries in which a majority of the voters rejected the foundation treaty.

The first option would be for the country or countries in question and the EU to reach agreement on the provision of exemptions for the contested aspects, to be followed by new referendums on the amended version of the foundation treaty. Democratic considerations require that the voters in the remaining EU member states also be allowed to vote on the exemption(s). However, it is questionable whether such an option would be viable in a Union of 27 states.

The option has been used in the past, however. The Danes had two referendums on the Maastricht Treaty, with the second referendum being on an amended text which allowed them certain "opt-outs". The Treaty was accepted in this second referendum.

The second option would be for the EU to negotiate an individual treaty with the country or countries in question, so that there would be within the EU both "fully-integrated" countries, and others which were integrated to differing degrees. This option, too, is already in use – for example in respect of the EEC, which has four non-EU members (Iceland, Liechtenstein, Norway and Switzerland) which have adopted up to 80% of the regulations on the Single European Market. A Convention proposal which would be acceptable to all countries would in all likelihood have to incorporate the idea of a "Europe of different speeds". This would at last allow the European Union to be placed on new treaty foundations.

The specific suggestions for the design of the convention process presented here are intended to make it easier to imagine what a democratic convention process would entail. But the priority for the public debate should remain simply the core idea – and thus the question as to whether we actually want such a process. The present authors, at any rate, believe that it is something which the European Union is in urgent need of.

Direct-democratic procedures

There have never been any binding direct-democratic procedures in the EU. The European Citizens' Initiative, as provided for in the Lisbon Treaty, does not in any way replace such procedures, for the simple reason that it is non-binding i.e. it does not compel the Commission to produce the requested legislation and it does not provide for the voters to "have the last word" on any proposed legislation in a binding popular vote (cf. the relevant passages in Part 1). Proper direct-democratic procedures, in addition to the convention process we have proposed, would give EU citizens that final say which we consider to be indispensable. We believe the following three procedures would be necessary:

1. popular legislation: i.e. an initiative and referendum right which would allow citizens/citizens' groups to put forward proposals for new legislation and/or specific changes to treaties and have the final say on them in referendums which would be binding on the institutions and governments. In terms of the right to initiate and approve legislation, the voters would thus acquire the same status as the other EU legislators (currently the Council of Ministers and the EU Parliament). The initiative process has three parts: it begins with a citizens' initiative (a proposal made to the Parliament for new legislation or a change to a treaty); if the proposal is not accepted by a majority in the Parliament, an individual citizen or a citzens' group can start a formal EU initiative process which involves collecting signatures of support; if the initiative succeeds in securing the specified (very large) number of signatures, the proposal must then be submitted to the whole EU electorate for a final binding decision in an EU-wide referendum.

2. a right to challenge EU decisions: this is the so-called "facultative" or "optional" referendum right already referred to, which would allow EU voters (if they so choose) – within a specified maximum period of time, and provided that they satisfy the signature requirements – to force a binding referendum on a challenge to an EU law, or perhaps to object to the accession of a new member state.

3. a statutory referendum – the so-called "obligatory" or "mandatory" referendum – for changes to the Union treaties (proposed by the governments and/or institutions).

In order to reduce the risk of minorities and small and medium-sized countries being routinely outvoted, we propose that a "federal" element should be incorporated into the referendum rules: a referendum result would only be valid if there was a "double majority" – an overall majority of all the votes cast throughout the EU, plus approval majorities in a majority of the member states. For treaty amendments, the same majority requirements would apply as in the proposed referendum on a draft treaty produced by the Convention.

Citizen lawmaking

As mentioned above, our suggestion is that the legislative initiative procedure should be a three-stage procedure. It would begin with an EU Citizens' Initiative to submit a proposal for a new law to the European Parliament and the Council of Ministers (in our reform proposals this would be the EU Parliament and the Assembly of States – the proposed second chamber). If the institutions do not take up the proposal, the initiators can launch a petition for a referendum.[68]

The initiative committee then has to secure the support (through their signatures) of a large number of EU voters before the proposed law can be taken to an EU popular vote/referendum. If they succeed, and if the legislative proposal is accepted in the referendum, it would automatically and immediately enter into force as EU law (or other form of legislation). The EU institutions would have no authority to intervene at this stage.

A legislative initiative can have as its subject any area of EU competence – in particular regulations and directives. Amend-

68 The procedures for the different stages of the initiative and referendum process – and the names attached to them – vary across Europe. In this book we have chosen to adopt the three-step procedure for citizen-lawmaking used in Germany. A petition or request for a referendum (in German: "Volksbegehren") is the equivalent of what is known in Switzerland as the "Volksinitiative" (popular/citizens' initiative).

ments can also be proposed to existing EU treaties or to a proposed foundation treaty. Essentially, no subject area is excluded from this type of initiative. The initiative group has a right to claim back some or all of the organisational expenses: we suggest something like 10 cents per vote cast for an EU popular vote/referendum and 5 cents per signature for citizens' initiatives.

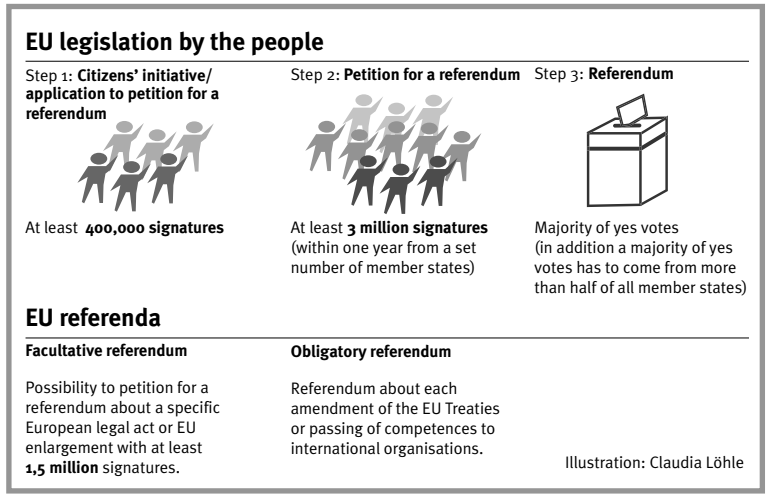
The EU Citizens' Initiative

Any individual or organisation within the EU would be able to launch an EU Citizens' Initiative. Before the proposal could be accepted for debate in the European Parliament and the (proposed) Chamber of States it would have to attract the support (by verified signature) of 400,000 EU voters. There would be no restrictions of time or geography on the collection of signatures by the initiators. If the required number of signatures was collected, the proposal would be submitted to the EU Parliament and the Chamber of States and the initiators would have the right to explain their proposal in person to both of these bodies. If the proposal was not subsequently enacted in a form satisfactory to the initiators, they would have the right to launch a full-scale EU Citizens' Initiative. An initiative could be withdrawn or its content amended before the full-scale procedure was launched.

The function of the first stage of the initiative and referendum process is to initiate a dialogue between the citizens and the political institutions. The citizens' suggestions should not be put directly to a popular vote (which would mean sidelining the normal legislators – the Parliament and the Council of Ministers), but should be first discussed with the politicians. If the proposals are adopted in an appropriate form by the legislators, or, alternatively, if counter-arguments by the latter persuade the initiators to withdraw their proposals, then the process is finished. But if the proposals are rejected and the initiators still wish to pursue the matter, they would be able to use the full initiative and referendum procedure to work towards a final decision in a referendum.

The EU Citizens' Initiative, presented here as the first stage of a three-part process of popular legislation, should develop out of

Fig. 2 Options for the direct participation of citizens in decision-making within the EU.



and be based on the European Citizens' Initiative (ECI) included in the Lisbon Treaty.

Petition for a Referendum

The Petition for a Referendum would enable an EU referendum to be held on a legislative proposal (draft law) submitted through a citizens' initiative. This Petition for a Referendum could be preceded by a preliminary citizens' initiative (as described above), but it would not necessarily have to go through that first stage. An application for this more direct route to an EU referendum would have to be supported by the signatures of at least three million EU voters. The initiators would have a year within which to collect the necessary signatures.

To prevent a Petition for a Referendum from being used to promote the special interests of an individual member state – rather than cross-border or EU-wide issues – the rules should state that the signatures must come from several member states. For example, the requirement could be that signatures must come from at least five countries and that the number of signatures must repre-

sent between .25% and 1% of the total electorate, depending on the size of the population. Signature collection could take place anywhere, but it should also be possible for voters to sign in designated regional and local authority offices. The option of collecting signatures online (E-voting) would need to be explored as a priority.

If the required number of signatures was reached, the proposal would be submitted to the EU Parliament and the Chamber of States, which would have the option of adopting the proposal unchanged as a new law or regulation. If they did not do so within a specified period, the initiators of the Petition for a Referendum could insist on a popular referendum. A Petition for a Referendum could also have as its goal a change to the EU treaties. In this case, six million signatures would be required. If collected, the draft amendment(s) would be put to an obligatory referendum.

Referendum

The EU referendum is the vehicle for the citizens of Europe to decide on the draft legislation proposed in the Petition for a Referendum. The EU institutions would be able to present an alternative, or so-called "counter-proposal", for decision in the same referendum.

The popular vote would take place between nine and eighteen months after the Petition for a Referendum had satisfied the signature requirement. The proposal would be adopted if it secured both a simple majority of the total votes cast plus approval majorities in more than half of the member states (currently 14 out of the 27 states). This provision would bolster the position of the countries with smaller populations and respect the federalistic constitutive character of the EU. The relative influence of this provision would also be heightened by its likely effect of inspiring more of the population in the smaller countries to vote – which would also strengthen their position.

Politicians – especially in Germany – often challenge the legitimacy of referendums where less than half of the electorate has

turned out to vote. As a result, turnout and/or approval quorums – expressed as a prescribed minimum percentage of the total registered electorate – are often attached to popular votes in the Federal Republic. One ought to bear in mind, however, that the party "fractions" or coalitions which pass laws in the national parliaments rarely represent more than half of the electorate. They often have only a slim majority in parliament, and voter turnout across Europe never reaches more than 70% or 80% at best.

In countries with a "first past the post" electoral system, the situation is even worse. After the 2005 General Election in the UK, the Labour government headed by Tony Blair had a clear majority in parliament of 30 seats, even though only 22% of the voters had voted Labour – meaning that a party which represented only 22% of the electorate had the power to determine all the laws and influence the direction of the entire political agenda for the next four or five years.

With representative decision-making assemblies there is always uncertainty as to whether the decisions taken really reflect the majority will of the populace – a problem which does not exist with direct-democratic decisions. But the major problem with turnout and approval quorums for referendums is that they encourage the 'no'-side to use tactical boycotting of the vote to try to ensure that the quorum is not reached, resulting in a distortion of the outcome and the effective sabotage of direct democracy. For these reasons we would also reject the use of turnout and approval quorums at the EU level. They are also little used in Switzerland.

The facultative referendum

In representative systems of democracy there are many possible reasons why specific pieces of legislation would not secure majority approval if they were put to the direct vote of the electorate. It is reasonable, therefore, that citizens have the opportunity to express their disapproval of legislation which they believe should not have been passed. This would be the function of the facultative (optional) referendum, which would give voters the possibility to reject EU legislation through an initiative and referendum

process. Political scientist Heidrun Abromeit[69] sees the facultative referendum as a suitable vehicle for democratising the EU. When a great diversity of culture and personal circumstances makes effective representation impossible, it becomes even more important that citizens have a statutory option of making a formal objection to central legislation.

In our proposed scheme, citizens would be able to call for a referendum on a specific piece of legislation if they submit an appeal within 100 days of the official publication of the legislation – normally laws passed by the European Parliament and the Chamber of States. The appeal for a referendum would have to be supported within the 100-day deadline by the signatures of a minimum of 1.5 million voters from at least three member states. If the signature quorum is reached in the time allowed, the entry into force of the contested law or regulation is held back for the time being. The referendum takes place not earlier than three months and not later than six months after the signature quorum is reached. The law/regulation only becomes effective if the citizens' objection is defeated in the referendum i.e. if a majority votes to approve the EU decision. The majority requirements should match those for the Referendum: approval by a majority of the total votes and majorities in more than half of the member states.

As we stated in the section on federalism, the citizens should be able to decide on the accession of further countries to the EU. The facultative referendum procedure should be used in this case. We explicitly reject the use of government-initiated "referendums" (more accurately termed "plebiscites"), as there is a risk of these being used solely to solicit support for the government's own position; as a rule, such plebiscites are fashioned and carried out in such a way that the outcome is not open.

69 Abromeit, H., 1998. Democracy in Europe. Legitimising Politics in a Non-State Polity. Oxford: Berghahn Books; Abromeit, H., 1998. Ein Vorschlag zur Demokratisierung des europäischen Entscheidungssystems. *Politische Vierteljahresschrift,* 39 (1), p. 80-90; Abromeit, H., 2002. Wozu braucht man Demokratie? Die postnationale Herausforderung der Demokratietheorie. Opladen: Leske + Budrich.

The obligatory referendum

In future, any changes to the treaties must be put before the citizens for decision in a referendum. This rule applies also to the accession of the EU to international organisations to which the EU would cede policy-making powers. The initiative to amend the treaties could come not only from the organs of the EU, as has been the rule hitherto, but also from the citizens. In our concept of the EU institutions, the right to put forward proposals for changes to the treaties would belong to the European Parliament as well as to the citizens.

The draft amendment would be voted on in an EU-wide referendum after a suitable period of time for debate. The draft would be accepted if it had been approved by a majority of the overall votes and by majorities in four-fifths of the member states.

If the aim or consequence of the amendment was to return powers from the EU level back to the member states, approval by a simple majority of the total votes would be sufficient for the amendment to be accepted.

For those countries which had rejected the draft amendment there would be the range of options for qualified or modified integration which we described earlier.

The Referendum Commission

To ensure that citizens receive fair and balanced information on the issue to be voted on in a referendum, a Referendum Commission ought to be set up before each referendum – as happens in Ireland. The task of the Referendum Commission would be to prepare accurate, clear and easily understood information on the forthcoming referendum, and to encourage people to vote. It would not only ensure public access to balanced information, but through its publicity and public relations work it would also promote and support EU-wide debates on the pros and cons of the proposal – helping to create a European "public space".

To achieve these goals it could, for example, publish a detailed information booklet on the forthcoming referendum, distribute a "voting pack" to all households, take out information slots on ra-

dio and television and set up a telephone hotline for enquiries. The leaflet would contain all the important information about the referendum – such as the full wording of the referendum proposal, the arguments for and against, background information and comparative analyses. It would point out what will happen if the proposal is adopted – or rejected – and would list the contact addresses and numbers of both supporters and opponents. It would be prepared by the Referendum Commission in good time before the referendum and would be freely available either by online download or on request in print form. The "voting pack" would be a shortened version of the booklet, with the pros and cons of the issue and the contact details of the "yes" and "no" camps.

The Referendum Commission would be convened by the Parliament at the request of the European Ombudsman, who would select the members of the Commission. The chairperson would be a former judge of the European Court of Justice. There would be four other members, who could be members of parliament, for example. The Referendum Commission would be housed in the offices of the Ombudsman. It would be paid for out of the EU budget.

A democratic institutional framework for the European Union

As our critique has shown, democracy in the EU suffers from an excessive tendency to centralisation, from an overweighting of the governments and the EU bureaucracy in the distribution of power, and from the lack of possibilities for EU citizens to play a significant role in political decision-making. Removing all these defects and deficiencies would necessitate a comprehensive reshaping of the European Union. Regrettably, there is little real prospect of such a radical democratic re-alignment taking place in the foreseeable future. Nonetheless, we wish now to sketch out the outlines of a democratic EU of the future, in the hope that it might provide some encouragement and inspiration for the debate on the crucial question: What kind of EU do we really want?

Our future EU should have the following characteristics:

1. Political decision-making must be decentralised i.e. decisions must be made much closer to the citizens – so as to counter the tendency to centralise power. We therefore suggest the creation of federal political structures with clear boundaries between competences, adequate checks and balances on power, and the facilitation of transfers of competences back to the member states.

2. The European Parliament should be given greater powers to as to confer greater legitimacy on EU decisions. It should be given effective powers to monitor and control the European Commission and set the legislative agenda. In our scheme the Council would hand over its current legislative role to a Chamber of States, whose members would be chosen by the national parliaments from among their own ranks of representatives. This would introduce a bicameral parliamentary system. A system of mutual controls, in line with the principle of "checks and balances", would preserve the political balance of power between the EU institutions.

3. Effective direct-democratic procedures should be built into the political system. The mere fact of their existence would align policies more closely to the needs of the general public, and through them direct control of legislation and the treaties would become possible.

These measures would bring the political system of the EU closer to the citizens. The competences and procedures would be clearly formulated. The voters would enjoy a significant measure of control over EU policies, tying them in more closely to their wishes and needs. European elections would become more important, since the European Parliament would have become the central, decision-making institution at the EU level. As the national political parties would no longer be able to exert their accustomed level of influence on European politics via the national governments, pan-European parties would come into being which would be involved in decision-making through the strengthened European Parliament. The emergence of transnational parties at the EU level, and the possibility for voters to play a direct (and likewise transnational) role in decision-making through the instruments

of direct democracy, would gradually bring about the creation of a "European public", which would in turn strengthen democracy.

A federal orientation for the EU

Federalism refers to the joining together of states – or other political subdivisions – in a larger, higher-level entity in which the sovereign political rights of the component parts are still largely preserved. The central guiding principle for the distribution of powers within a federation is that of subsidiarity: the principle that the powers of the central level are restricted to those areas which the component entities *themselves* decide they are unable or unwilling to perform i.e. it must be possible for the smaller entities to apply the subsidiarity principle even against the wishes of the larger unit – doing so by exercising their sovereign rights. What is crucial in a federal set-up is that the citizens' representatives and/or the citizens themselves have the power to legislate – not the state governments, as is currently the case with the Council of Ministers.

In fact, the EU already has major elements of a federal structure. The member states have come together in a union, and in many countries there is even a third or fourth subordinate level – such as the federal states and local authorities in Germany, or the autonomous regions of Spain. But in terms of practical politics, the federal character of the EU does not ensure adequate respect for the 'lower' (but democratically more legitimate) levels. A radical reform of the EU must therefore return powers from the central EU level to the national and/or regional level, and the various competences of the different levels and entities must be clearly defined and delimited. The EU level should be allowed to pass laws only in certain clearly defined areas, for which it has been allotted responsibility.

Decentralised distribution of powers

One of the greatest democratic deficits of the current EU is the centralisation of powers for which there is scarcely any democratic legitimacy. In order to counter this deficit, we propose that

the powers of the member states and the EU be redistributed, clearly demarcated and circumscribed. In addition, the EU must no longer be able to extend its own powers. From a democratic point of view, the central EU level should have relatively few – and clearly restricted – powers. What is even more important, however, is that the right to decide on the distribution of powers should be democratically assigned i.e. it should be exercised as closely to the voters as possible.

The various powers should be listed and defined in a "catalogue of competences". The subsidiarity principle serves as an important guideline for the allocation of powers, but the final decision must be reached through democratic procedures in the form of majority votes. This would be the task of the democratically legitimated Convention (see above). In allocating powers, it is important that the right of self-determination of the regional and communal (local authority) entities be properly respected.

In relation to the revision of the EU treaties by an elected Convention, we propose that the EU institutions should have significantly fewer powers than they currently enjoy. The boundary lines of competences should be set to match the different areas of policy – such as foreign policy, the environment, employment, and economic and monetary union, for example. This does not rule out the possibility of the EU being given new powers in areas where action at the international level is unavoidable.

Reform of the distribution of powers should include a review of the existing laws, regulations and directives of the EU with the aim of thinning out the tangled undergrowth. Legislative procedures ought to be simplified and the number of different pieces of legislation reduced. The discontinuity principle also needs to be established – a principle taken for granted in national and regional legislative practice, according to which any draft legislation which has not been enacted by the end of the term of office of the legislature (i.e. of parliament) is automatically dropped. So far it has been common practice in the EU for individual proposals for guidelines and directives to be carried forward from one legislative term to another, which places restrictions on the ex-

tent of democratic control which elections to the European Parliament ought to generate.

Even if there is no comprehensive reorganisation which would clearly define and delimit the powers of the EU, there must at the very least be a prohibition on further expansions of EU power. In future it must not be possible to justify new laws on the basis of the stated general aims of the EU, as expressed in Articles 2, 3 and 4 of TEC and in the Preambles to the Treaty on European Union and the Lisbon Treaty. In line with the principle of conferral (Art. 5.1 TEC), the EU should only be able to act on the basis of specific, narrowly defined powers.

A further instrument for appropriating powers has been the so-called "flexibility clause" (Art. 352 TFEU, ex-Art. 308 TEU; cf. relevant section of Part 1). This clause ought also to be removed. The same applies to the provisions for the "approximation of laws" and harmonisation of the internal market which authorise the EU to "approximate" (harmonise) "the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market" (Articles 114 and 115 TFEU).

In any event, but especially if there were to be no radical realignment of the distribution of competences, the voters must have the possibility to return powers to the nation-state level. This applies especially to decision-making powers which the EU has appropriated to itself on its own initiative, or which were assigned to the EU without adequate checks. The return of powers ought to be possible through the vehicle of an EU-wide Petition for a Referendum with a subsequent pan-European referendum.

Democratic integration

We are convinced that the EU can only work if it is based on a broad consensus of the people of Europe – freely arrived at – that they want to be "integrated" i.e. that they agree with the stated goal of an "ever closer union". The agreement has to be voluntary; that is the only workable basis on which to generate the trust and solidarity necessary for such a political community to develop and

flourish. The foundation treaty which we have proposed would set the framework for the European Union and govern to what extent and in what areas the member states would be "integrated". Changes to the treaty which would affect all the member states would be possible using procedures which would be detailed in the treaty itself.

The framework for the EU created by the treaty would allow both for greater integration and also for a roll-back of integration if that was wanted. It should be possible – as Article 20 TEUnew also allows – for larger or smaller groups of countries to choose "enhanced cooperation" for themselves. States such as these could take further steps in integration in accordance with the provisions of the foundation treaty, whilst leaving open the possibility that other states might subsequently wish to join the group and share their enhanced cooperation. The group which had chosen to work more closely together would keep the remaining states informed about the nature of their enhanced cooperation and support any state which wanted to join it.

The option of having different levels of integration actually corresponds to the current reality of the EU, despite the official image of a largely uniformly integrated Union. It clearly reflects and accommodates the differing wishes people have for the EU. That this diversity of integration is long since a reality in Europe is shown very clearly by the two examples of the euro as the common currency and the Schengen Agreement, which provides for the removal of systematic border controls. Only 15 of the 27 member states have so far adopted the euro, and Great Britain, Ireland, Rumania, Bulgaria and Cyprus are not full parties to the Schengen Agreement.

In our view, closer cooperation between individual countries should be something that the people of those countries decide to pursue, and not the governments. We therefore propose that a provision for binding referendums on proposals for enhanced cooperation should be incorporated into the cooperation process.

The foundation treaty should also – under certain circumstances – provide for a roll-back of individual integration measures. We

propose that in the event of citizens in a particular country making political decisions that were inconsistent with the EU treaties there should be a special procedure which would allow both sides to decide freely whether the departure from the treaty rules should go ahead or not. The country in question would be free to apply for an exemption, and the EU could decide whether it was prepared to grant one. We believe that such a move would only secure an adequate democratic foundation if the voters both of the country in question and of the EU in general gave their approval to it. In our view, therefore, the application for exemption should be the subject of a referendum in the country concerned, and the voters in the rest of the EU would also have to approve the application in a referendum. If the majority of votes in 4/5 of the member states went against the application, the exemption would not be granted.

To give a practical example: let us suppose that the citizens of Austria decided in a referendum to ban the use of any genetically modified seeds – a move which would contravene the EU's competition rules – then the Austrian government would have to try to negotiate an exemption with the EU. The application for an exemption would become the subject of an EU-wide referendum. If the majority were not against the exemption i.e. if a majority of the votes in 4/5 of the member states was in favour of granting Austria the exemption, it would be approved.

The procedure would in principle be the same as that which already operates when individual countries are granted exemptions when treaties are renegotiated. The Lisbon Treaty, for example, includes an exemption allowing Great Britain not to be bound by the European Charter of Human Rights. Ireland and Poland have also reserved the right to claim a similar exemption. The procedure we are suggesting incorporates the citizens' self-determination, and it keeps the rules of the treaties open to future change. What is important is that it is only the citizens themselves who should decide about exemptions, not the governments. This protects the procedure against political misuse – against using it as a form of blackmail, for example.

No restriction should be placed on the right of self-determination of a member state to voluntarily secede from the Union – as is also provided for in Article 50 TEUnew.

The citizens of the existing member states should also be able to decide on accessions of new countries to the EU. Their expression of opinion would secure democratic legitimacy for the expanded political union and help to build a foundation of mutual respect, tolerance and solidarity which could only strengthen the democratic life of the EU. We therefore propose that decisions on accession be made via referendums (cf. Facultative referendum).

Regional self-determination and a Europe of the regions

Politics within the reach of the average citizen is more democratic than the centralised exercise of power. Regional and local self-determination (the right to make political decisions locally), and regional and/or local cooperation strengthen democracy and thus people's freedom and right of self-determination. Regional and local self-determination should be one of the core political principles of the EU. Beyond self-determination, regional cooperation in a "Europe of the Regions" is a vision for a more democratic EU.

Creating a federal level comprising regions and local authorities would help to ensure that politics was carried out closer to the citizens. Political decisions would be made on the basis of local expertise and a local knowledge of problems and needs; it would be easier to get people involved in the political process; and it would be easier to implement checks and balances on politicians.

The decentralisation and regionalisation of political competences could be based, for example, around areas of common culture and/or language within a state, or around regions which share a common focus (often cross-border) on various types of tourism, nature reserves or the like. Examples of the first type (i.e. mostly within a state) would be Scotland, Brittany and Bavaria – but also the (cross-border) Basque Country. Examples of the second type are many of the cross-border regions which typically emerge in border zones, such as Euregio (a section of the Dutch-German border area covering parts of the Dutch provinces of Gelderland, Overijs-

sel, and Drenthe as well as parts of the German federal states of North Rhine-Westphalia and Lower Saxony. The region spans some 13,000 km² and includes around 3.37 million inhabitants).

Fundamentally, the self-determination of regions and local authorities cannot be prescribed or regulated by EU-wide reform measures. The necessary changes are the responsibility of the citizens, the parliaments and the governments of the individual member states. In the case of smaller states in particular, regionalisation may not be necessary or appropriate. But the EU ought to acknowledge the autonomy of regions and local authorities and accord them effective means of protecting their rights – for example, by the right of appeal on the grounds of subsidiarity.

A federal orientation of the EU means that the self-determination of the separate political communities in the EU is promoted and protected. Thus member states must have the option of leaving the EU, of cooperating more closely within the EU, or in exceptional cases of reversing aspects of integration with the approval (by referendum) of the citizens of the EU.

In respect of the distribution of powers, it would also be necessary to distinguish clearly between the competences of the EU and those of the member states. Political powers ought to be divided in line with the different policy areas and exercised autonomously. A redistribution of competences with a view to returning them, where necessary, to the member states, is just as essential as the prevention of further centralising tendencies.

Democratic institutions

Our proposals foresee a continuation of the existing institutions at the central EU level. The character and tasks of the institutions and the extent of their political powers should derive from the principles of federalism and both representative and direct democracy – resulting in equal rights of participation in the political process for the member states, equal rights in the election of the European Parliament for all citizens, and the most direct form of (s)election

of the decision-makers. The organs of a democratic EU must be able to hold each other in check and thus create a balanced distribution of political power.

Reform of the institutions should observe the following four main principles:

1. The more directly an organ is (s)elected, the greater is the democratic legitimacy conferred on it by the voters. As a consequence, those organs which can demonstrate a high level of legitimacy ought to have more say in the legislative process than those which have not been directly elected by the people.

2. An organ with executive powers must be elected – and must be able to be deselected – either directly by the voters themselves, or by their parliamentary representatives.

3. The member states must have equal political rights. There must also be equal representation for the citizens of the EU in the European Parliament (equal votes). In addition, the Chamber of States and the EP should have equal rights of participation in decision-making.

4. The separation of powers between the executive (governments and administrations), the legislative (parliaments), and the judicial organs (the courts) must be guaranteed. There must likewise be a separation of powers between the EU level and the member states.

We are proposing an institutional framework for the EU organised around a bicameral parliament. The European Parliament would constitute one chamber, the proposed Council of States the other. The two chambers would be jointly responsible for legislation. In addition, the European Parliament would control the European Commission, which would continue to exercise administrative functions at the EU level. The European Council could also continue as the coordinating organ for the governments of the member states. The rights and responsibilities of the European Court of Justice would be strictly limited to the competences of the EU level. Its judges should in future be elected.

The reform of the EU institutions must be tackled as part of a comprehensive reform of the EU, to include the distribution of pow-

ers. The power of the European Parliament in particular must be significantly reinforced to prevent the perpetuation of the factual disconnect between the citizens of the EU and its politics.

The European Parliament (first chamber)

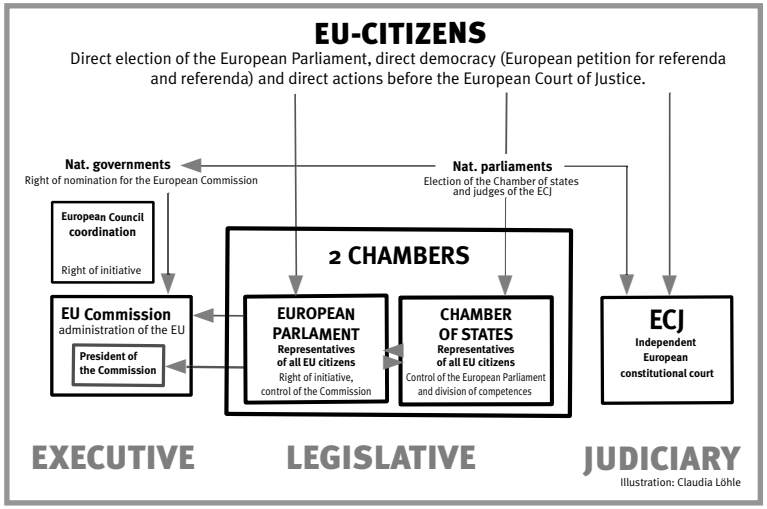
In our scheme, the European Parliament (EP) would represent the interests of the citizens of the EU at the central level. It would look after its own interests and those of the entire EU, and would itself embody the democratic principle of the equality of all citizens. It would be vital for the EP to offer the widest possible representation of people and their interests, reflecting Europe's diversity. There should therefore be no barrier to representation in the form, for example, of a clause barring a party from the Parliament unless it had gained a specified minimum number of seats.

The EP would be elected directly by the citizens. The elections should be based on proportional representation and the rules of procedure should be the same in all member states. The latter criterion is important since only uniformity of procedure can ensure genuine equality of the vote. It should be possible for voters to change the order of ranking of the candidates in the electoral lists. It should also be possible for people to stand as independent candidates. The distribution of seats in the Parliament between the member states should likewise be based on the principle of equality. The number of seats each country was apportioned would depend on the size of its population. However, there would be a departure from the strict principle in respect of the smaller countries. We propose that every country should have at least four seats.

The EP should have the right to initiate proposals for new legislation. Jointly with the second chamber – the Chamber of States – it would be responsible for passing EU law. It would continue to have overall responsibility for "establishing" and approving the annual EU budget, prepared by the Commission.

The President of the Commission would be chosen by the EP. The EP would also be responsible for nominating the president. It would also select the individual Commissioners. The EP would have the right to dismiss the President of the Commission and individual Commissioners. If this happened, the Chamber of States, or the President of the Commission, would have to nominate new candidates.

Fig. 3 The EU of tomorrow? – an alternative proposal



For a recall by the EP of the entire Commission during its term of office a simple majority would be sufficient instead of the two-thirds majority currently required. A further change would give the EP the right to vote on a motion of censure in respect of individual Commissioners, the President of the Commission, and the High Representative. As of now, a motion of censure can only be directed at the whole Commission.

Our plan for a democratic European Union would accord the European Parliament the same right to propose changes to the Foundation Treaty as the citizens (also provided for in the Lisbon Treaty, in Art. 48.2 TUEnew).

The Chamber of States (second chamber)

We propose the creation of a "Chamber of States", which would represent the interests of the member states of the Union. The Chamber of States would replace the current Council of Minis-

ters. It would embody the federal principle of the equality of all the states which have joined together in a union – as was originally the case in the Council of Ministers. Unlike the Council of Ministers, however, it would not be composed of representatives of the national governments. As our critique has shown, this arrangement contravenes the principle of the separation of powers and leads to a dominance of the executive institutions in the EU and a loss of democratic control. The representatives of the governments of the member states should not be able to remove powers from their national parliaments by means of EU legislation. The Chamber of States would, therefore, be a chamber for the national parliaments.

The Chamber would be composed of an equal number of representatives from each member state. Alternatively, there could be small variations in the numbers; for example, small states with up to two million inhabitants would send two delegates, medium-sized states of up to 30 million three, and states with over 30 million four. The main aim in distributing the seats would be to reinforce the federal principle, so the difference in seat numbers should not be too great. Each representative would have one vote.

The Chamber members would be chosen by qualified majority vote in the national parliaments from among their own parliamentarians. They would serve on the Chamber for the same length of time as the term of office of their national parliament. This would preserve the strong ties to the member states and their interests. As a result, the composition of the Chamber would be constantly changing, but would never change en masse, thus preserving the continuity necessary for it to fulfil its tasks. A Chamber member could serve more than one term if re-elected. The extent of control exerted by the national parliaments on their Chamber representatives would be determined by the member states themselves.

The Chamber of States would exercise the legislative power jointly with the European Parliament. It would have a right of initiative i.e. the right to propose new laws, and it would have to give its approval to any law which did not fall within the exclusive competence of the EU. If the Parliament and the Chamber of States were

unable to agree on a common draft for a law, recourse would be had to a process of mediation. However, within the mediation process the Chamber of States would have a right of veto which could not be overruled by the Parliament.

One important task of the Chamber of States would be to supervise and control the division of competences between the national and EU levels. It would be able to block laws which threatened to contravene the principles of subsidiarity and decentrality and thus infringe the powers of the national parliaments – another reason for choosing its members from those parliaments. In essence, therefore, the Chamber of States would be taking further, in a consistent and effective way, the procedure for the monitoring and control of subsidiarity set out in the Treaty of Lisbon.

The European Commission

The current treaties give the European Commission, in addition to its role as the EU's "civil service", a considerable influence on EU legislation through its exclusive initiative right. It has scarcely any democratic legitimacy, is subject to very weak controls, and exerts a powerful influence on the entire political structure of the EU through the special role it plays in the renewal and further development of the Union's treaties. The position of the Commission is a major element in the overweighting of the executive in the current Union.

We therefore propose that the rights and responsibilities of the Commission be very clearly circumscribed. It should function as the executive administrative organ of the EU and be responsible for the implementation of EU measures and the management of the annual budget. The Commission would represent the EU outwardly (in relation to other countries) in respect of all those areas of policy which fell within the competence of the EU. It would also provide information and advice to the other organs. For example, MEPs could commission it to prepare proposals for draft legislation, or ask it to check points of law.

The Commission would no longer have any responsibility for shaping EU policy – such as the further development of the treaties

– and would no longer be able to "take initiatives [to] promote the general interest of the Union" (a function which has led to centralisation). It would henceforth be responsible only for tasks which belong explicitly to the central EU level. Most of the practical executive tasks should be carried out at the more decentralised level of the national states and/or the regions.

The number of Commissioners would equate to the number of policy areas regulated at the central EU level, but would be no more than 15. The member states would prepare lists of nominees for the post of Commissioner, from which the President of the Commission would make the final selection. Before being nominated, every prospective Commissioner would have to be quizzed and approved by the EU Parliament. If the Parliament rejected a candidate, the President would have to find a replacement. The President of the Commission him-/herself would be proposed by the Chamber of States and confirmed by the EP. He or she could be rejected by a two-thirds majority. Direct control of the Commissioners by Parliament should reinforce its effort to control the EU bureaucracy and make it directly responsible for its political decisions.

The choice of Commission President should not be led by the interests of the national governments, but should relate to the relative positions of the party groupings resulting from the European elections. That is why s/he would be proposed and selected by the EP. The Commissioners would be proposed by the President with the aim of ensuring constructive working relations within the Commission. The final choice of Commissioners would be made by the EP.

The European Council

The transformation of the Council of Ministers into the Chamber of States would mean that the national governments would lose their direct influence on legislation and the treaties. The European Council would, however, remain as an important forum for the coordination of national policy. At the EU level it should be able to play a role in shaping policies by having a right to propose new legislation. By a simple majority vote, the Council could submit a

legislative initiative to the European Parliament and the Chamber of States. As the representative of the national states, the Council should continue to contribute to the shaping of EU policy in an advisory capacity, as the national governments are the ones most familiar with the day-to-day political business of the member states. The Convention we have proposed would of course be free to grant the European Council further rights, for example in relation to the EU's Common Foreign and Security Policy.

The European Court of Justice

The track record of the European Court of Justice shows that it has consistently delivered rulings which have contributed to an illegitimate transfer of powers to the EU level. Moreover, the nomination procedure for its judges carries with it the risk of the latter being dependent on – and potentially too heavily influenced by – the national governments.

In our reform model, the ECJ would continue to be responsible for appeals in relation to contraventions of EU law and of the way it is implemented. Both the Committee of the Regions and regional parliaments should continue to have a right of appeal to the ECJ. In its role as a constitutional court it would also be a court of appeal for questions of subsidiarity. Consequently, both regional and national bodies could appeal to it. The proposed redistribtion and clear demarcation of powers would limit the competences of the central EU level and thus also the rights and responsibilities of the ECJ.

As now, each member state would appoint one judge to the ECJ. As a means of limiting the influence of the national governments on the judges, we propose that appointed judges should serve for a term of eight years (instead of six as at present), and that the judges should be elected. Selection could be carried out by special selection committees composed of equal numbers of senior judges and members of parliament of the particular member state; or it could be made by the national parliaments. Judges should serve only one term to rule out the possibility that decisions might be made with a view to re-election.

Protection of fundamental human rights

In revealing the enormous extent to which EU policies now influence the daily lives of EU citizens, our critical analysis made a strong case for the political actions of the EU to be constrained by being bound to statutory human rights. The question arises, nonetheless, as to whether a Charter of Fundamental Human Rights *specific* to the EU – which the Lisbon Treaty now proposes to make legally binding for the first time – is really necessary.

In the first place, the ECJ has afforded protection for human rights since 1969 without the need for a written charter. The legal basis of this protection was the shared constitutional traditions of the member states, plus the European Convention on Human Rights and Fundamental Freedoms (ECHR).

Secondly, having at the same time both a binding Charter of Fundamental Human Rights *and* the ECHR will inevitably lead to problems of demarcation and conflicting interpretation – as the example of the death penalty quoted above shows (Part 1, p. 91-92).

Thirdly, by dispensing with the Charter, the EU could remove a controversial item from the agenda, and specifically avoid a confrontation with the UK. However, simply scrapping the Charter would not be a satisfactory solution; the EU ought at the same time to ratify the ECHR. In fact, Article 6.2 TEUnew already states that "the Union shall accede to the European Convention"; formal EU ratification of the ECHR ought, therefore, to pose no problems politically, as all the member states have already ratified it. This would bind the EU to a clear catalogue of human rights – and it would provide significant added benefits for the citizens, since individual appeals are much easier to make with the ECHR (and are also free).

The bottom line: a federal and democratic European Union

In this section we wish to summarise the main solutions to the current crisis of democracy in the European Union. We propose that a directly elected Convention should be established to work out the future structure of the EU – the way it should be constituted in future. The Convention's final proposals would be submitted for approval by all the citizens of the EU in referendums. This procedure ensures that the future shape of the EU is outlined by the directly elected representatives of the peoples of Europe and is given the necessary final seal of approval by the people themselves. It would significantly strengthen people's sense of identification with the European Union, and such an early and far-reaching token of popular sovereignty would increase the likelihood of the proposals receiving majority approval.

In our scheme, a federal division of powers would be of vital importance for a reformed EU. There must be absolute clarity as to which competences are exercised at the EU level and which remain within the control of the member states. This would be for the Convention to determine, as a core part of its task of deciding the future "constitution" of the EU (i.e. its structure and the relationship between its "parts"). In our view, it makes sense – and it would also be important – to arrange for a significant decentralisation of powers and to clearly define the boundaries of the EU. This would ensure – in line with the principle of subsidiarity – that competences are always owned by the smallest practicable units; federal levels also within states would be granted more far-reaching powers. Competences would be divided according to the different policy areas.

In those areas for which the EU was responsible, decisions would be made by the European Parliament jointly with the Chamber of States, the body representing the member states. Both institutions would have the right to propose new law – giving the representatives of both the citizens of the EU and the national parliaments a share in setting the political agenda. The two bodies

would also provide checks and balances on each other. The voters would also have the right to propose new law (initiative right) and have the final say in a referendum (decision-making right). In our scheme they would also have a potential right of veto – through the facultative referendum – on laws passed by the Parliament and the Chamber of States. Future changes to the foundation treaty of the EU would be subject to mandatory referendums.

Appeals against existing law could be made to the European Court of Justice, which would function as a constitutional court and issue rulings on questions of subsidiarity – guaranteeing effective control of the EU's legislative organs. Breaches of treaty rules could also be referred to the ECJ. We propose that the European Council continue to exist in an advisory capacity, but with the exception of the right of initiative to propose new law it would have no further influence on legislation. A democratised European Commission elected by the European Parliament would serve as the executive – but primarily in an administrative capacity and with the responsibility for implementing agreed EU measures. The Commission would also be responsible for the external representation of the EU.

Democratic control of the institutions is the key factor in our scheme. It would be achieved in three main ways. Firstly, the separation of powers – a basic precondition for any democracy – would be systematically implemented. The transfer of legislative powers from the European Council to the EP and the Chamber of States would dismantle the current "executive legislature", whose powers would pass into the hands of directly and indirectly elected representatives.

The move to a system of elected judges for the ECJ would be a radical innovation, taking the power to influence the judiciary away from the national governments. An independent, elected judiciary would be a further key component of the separation of powers. The Commission, as the executive organ of a reformed EU, would no longer have a monopoly on legislative initiative, handing its legislative competences to elected representatives of the people.

Secondly, the European institutions would monitor and control each other. Within the legislative branch this would be the European Parliament and the Chamber of States, which would both be subject to rulings by the ECJ. An elected ECJ would likewise be subject to democratic control, as would a reformed European Commission staffed by officials selected by the European Parliament. In our scheme, consistent application of the principle of "checks and balances" would in future prevent such an accumulation of power as is currently to be found in the European Council.

Ultimately, the citizens of the European Union would control its institutions through elections and elements of direct democracy. Legitimacy is the core principle of democracy: the political decisions of the EU must reflect the wishes of the voters. Anything other than this runs counter to the fundamental principles of democracy.

Mehr Demokratie

Mehr Demokratie was founded in Bonn in 1988 by a group of activists. Today we have 12 regional (federal state) associations and around 5,000 members and sponsors – making *Mehr Demokratie* the largest non-party citizens' organisation for direct democracy in the European Union. We campaign for:

- the introduction of national referendums in Germany (they exist so far only at the state [Bundesland] and local levels)
- fair rules for citizens' initiatives in the federal states and local authorities
- other democratic and parliamentary reforms, including up-to-date electoral procedures
- freedom of information
- the democratisation of the European Union

Our vision: a vibrant democracy. We want to see a political culture which promotes dialogue and participation. Citizens' initiatives and referendums, and other forms of participation, encourage citizens to become involved in shaping political policy. *Mehr Demokratie* remains politically neutral i.e. we express a view only on procedural questions of democracy – not on specific policies. Our overriding goal is to try to ensure that it is the citizens themselves who make the decisions on the major issues.

We campaign in a variety of different ways for direct democracy at all political levels. Our work is carried out by a core team of professionals backed up by hundreds of volunteers. Our Board of Trustees – which has a complement of more than 50 people from a wide range of backgrounds in academia, the arts, the economy and politics – provides advisory support for the organisation in its work.

Our work is financed through donations and membership fees. We receive no public funding. This guarantees our independence.

Since 2003, *Mehr Demokratie* has been active also at the EU level, initially campaigning for direct democracy in general and for referendums on the Constitutional Treaty in particular. Our campaigning work played a significant role in ensuring that the European Citizens' Initiative was included in the Constitutional Treaty, and that a referendum on the Treaty was held in Holland. In 2005, Mehr Demokratie became a founding member of the EU-wide campaign network *Democracy International*, which had democratic treaty reform (including a directly elected Convention) as one of its goals.

Our goal is a European Union whose democratic form is shaped and controlled to a much greater degree by the citizens than is presently the case.

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