Democratic Principles and the Economic Branch of the European Monetary Union

Massimo Starita

Abstract After the Treaty of Lisbon a variety of rules referring to democracy were incorporated in Title II of the Treaty establishing the European Union (TEU). The way in which representative and non-representative democratic principles are combined in the European Union legal system is not a unitary one, but it changes depending on the fields of competence of the Union. The paper will focus on the effects that the reforms introduced in the period 2011–2013 had on the combination of representative and non-representative democratic principles in the economic branch of the EMU. To that effect the original design of the role of democratic principles in this field will be briefly described. Then, a brief overview of the different rules included in the new law of Economic and Monetary Union, referring to democratic principles, will be provided. Finally, the contribution will evaluate the overall impact of the reforms carried out on democracy in the EMU. The following issues will be particularly addressed: (A) Are these clauses integrated into a complete strategy concerning channels of democratic legitimacy in the law of the EMU? (B) Is this strategy compatible with the TEU stance on democratic principles? (C) Can non-representative democracy principles be considered a real counterweight to the shrinking of representative democratic legitimacy in the EMU and in the fiscal policy of the Member States?

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1 Introduction

Much has been written on the implications of the reforms introduced in the architecture of the EMU as a response to the Euro crisis for democratic Government in the EU. This paper addresses this problem from the perspective of the democratic theories or "democratic models." In particular, I will discuss two questions. First, I will try to understand whether or not the reforms of 2011 and 2013 were inspired by a particular conception of democracy or, at least, a particular combination of democratic principles. Second, I will seek to assess the compatibility of this combination with EU primary law concerning democracy.

Taking the perspective of the democratic principles when discussing the problem of democratic legitimacy of the European Union's economic and monetary Union (EMU) is interesting for at least two reasons.

The first reason is that we live in very complex societies and democratic principles cannot but reflect this complexity. As a consequence, a variety of conceptions of democracy compete in the political debate today. Some of them have been conceived as possible answers to some problems that traditional representative democracy is supposed to have. These theories can be considered as non-representative theories of democracy, although, generally speaking, their aim is not to substitute representative democracy. They have been designed to mix with this basic model, instead. In other words, their goal is to introduce in a representative system some non-representative democratic principles and some institutional mechanisms inspired by these principles.[1]

The second reason is that this complexity is reflected in positive law too. As far as EU law is concerned, the Treaty of Lisbon introduced a variety of democratic principles in Title II of the Treaty establishing the European Union (TEU). Indeed, the new Title II of the TEU affirms that the European Union is founded on different democratic underpinnings, both representative and non-representative. While representative democracy is referred to in Article 10, para. 1, as the basic principle on which the functioning of the Union is founded,[2] Articles 10–12 introduce in the EU legal system rules and instruments linkable to non-representative conceptions of democracy.

This article puts forward two main propositions. The first one is that the recent transition to strengthened economic cooperation has been accompanied by a loss of power of both national and European parliaments. This first proposition is rooted in insights from existing literature on "executive dominance" in the reformed EMU governance. The second proposition is that the European legislator, searching to compensate this representative deficit, subverted the basic idea stemming from the TEU that non-representative democratic principles have to be conceived as *complements* to representation, but not as *substitutes* for it.

[1]See, in general on democratic models and conceptions, Held (2006).

[2]"The functioning of the Union shall be founded on representative democracy".

Before going deeper in my presentation, three preliminary observations are needed. The first concerns the subject of my analysis. I will focus only on the "economic branch" of the EMU, leaving aside the monetary one. This is not to deny that the unconventional operations enacted by the European Central Bank (such as the Outright Monetary Transactions and the Quantitative Easing) have had distributional consequences and pose thereby a problem of democratic control, as is showed by the BVerfG judgment of 21 June 2016.[3] The choice not to deal with this subject is due to the fact that, interesting and significant as it could be,[4] it has to be set in the framework of the well established principle of independence of central banks from the executives. This principle, which is enshrined in Article 130 of the Treaty on the Functioning of the European Union (TFEU), as recognised by the Court of Justice in *Gauwelier*,[5] seems to suggest that the legitimacy of the ECB could be based, at least to some extent, on mechanisms of political accountability different from traditional democratic control.[6] The problem of legitimacy of the procedures provided for in the so-called "Six Pack" and "Two Pack" and, outside the EU legal framework, in the European Stability Mechanism (ESM) Treaty and in the so-called Fiscal Compact, is rather *new* instead.

The second preliminary observation concerns the approach that I will follow. Dealing with democratic legitimacy is always a difficult task for lawyers, because *legitimacy* is a political concept. Thus, it is simply impossible to follow a strict or a *pure* legal approach. However, I will try not to be caught in the opposite trap of making purely political considerations. In particular, I will neither deliver opinions on democratic models as such, nor make proposals in order to improve the democratic structure of the EMU.

Thirdly, I will discuss the problem of democratic legitimacy only in relation to the reforms introduced through EU legislation, since those introduced by the conclusion of international agreements (in particular TSCG and ESM) could not be reviewed in light of the principles heralded in the TEU. However, since from a material point of view the reforms are intertwined, the discussion will draw on insights from those international agreements where relevant to the inquiry.

[3]Bundesverfassungsgericht, judgment of 21 June 2016, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 bei 13/13.

[4]See Joerges (2016), who argues that the ECJ "supports the establishment of a technocratic regime with unlimited discretionary powers and without credible autonomy".

[5]See ECJ 16 June 2015, Case C-62/14, *Gauweilier and Others*, para. 40: "Article 130 is, in essence, intended to shield the ESCB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by primary law." On the independence of the ECB see: Zilioli and Selmyar (2000), who regard the ECB as an independent specialised organisation of Community law; Lastra and Louis (2013).

[6]See Zilioli (2003) and Lastra and Louis (2013). Under Article 284, para. 3, TFEU, "The European Central Bank shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and current year to the European Parliament and the Commission, and also to the European Council. The President of the European Central Bank shall present this report to the Council and to the European Parliament which may hold a general debate on that basis.".

My contribution is made up of five more sections. Section 2 will deal with the original relationship between the EMU and democratic principles. In Sect. 3 I will explain how this relationship was changed by the crisis-led reforms. Then, in the Sect. 4, I will seek to summarise some arguments that have been used to justify the democratic shortfalls of the reforms and the problems with these arguments. The following two sections will be devoted to understanding whether the reforms were inspired by a certain democratic model (or at least a certain idea of combining different democratic conceptions and principles) and whether this conception (or combination) is compatible with the basic idea of democratic governance stemming from Title II of the TEU. This contribution goes a step forward: in its conclusions it suggests, albeit in a short-hand fashion, that the recent EU legislation reforming the economic branch of EMU could be considered, notwithstanding its formal *status*, as instruments of constitutional moment.

2 The Original Relationship Between the EMU and Democratic Principles

Already before the reform, the democratic legitimacy of EU action in the field of economic and monetary union was problematic. As is well known, this question was at the centre of the debate preceding the entry into force of the Maastricht Treaty, although it was focused essentially on the Monetary Union and on the role of the ECB therein, given the huge distance that the Treaty guaranteed to the newly created institution from political pressure.[7] However, Economic Union was problematic too, given the executive-dominated law-making processes that the Treaty outlined in this area of cooperation between Member States.

Indeed, the three basic procedures of the economic coordination policy of the EU were steadily in the hands of the national Governments acting through the Council and the European Council: the procedure for definition of the broad guidelines of the economic policies of the Member States of the Union (from now on, broad guidelines), the multilateral surveillance procedure, and the excessive deficit procedure.

Under the Maastricht Treaty, whose basic provisions regarding economic policy coordination have remained unaltered by the subsequent amending treaties, the broad guidelines are adopted by the Council on the basis of a conclusion discussed by the European Council, acting in turn on the basis of a report from the Council, while the whole process starts with a simple recommendation of the Commission

[7] Leino and Salminen (2013).

(and not with a "proposal" from it, as under the ordinary legislative procedure).[8] The EP has no right to have a say in this quite contorted procedure. All Article 121 TFEU provides in terms of parliamentary control is that

> the Commission shall inform the European Parliament of its recommendation.

The second procedure is the multilateral surveillance procedure organised under Article 121, paras. 3 and 4, TFEU, on the economic policies of the Member States, in order to ensure convergence and consistency with these broad guidelines. This is Council-led too. Here the work is made by the Council, on the basis of reports submitted to it by the Commission,[9] with the EP being simply informed, this time by reports on the results of the multilateral surveillance, formulated by the President of the Council and by the Commission. In addition, the EP may invite the President of the Council to appear before its competent committee if the Council has decided to make public a recommendation addressed to a Member State under the procedure of multilateral surveillance.[10]

Finally, once again a Council-directed surveillance procedure is provided for in Article 126 TFEU for prevention and correction of excessive government deficits by Member States. In this case, the Commission monitors the evolution of the budgetary situation and of the stock of Government debt in Member States (with the participation of the Economic and Financial Committee).[11] However, it is the Council that decides whether an excessive deficit exists (on a proposal of the Commission and having considered any observations the Member State concerned may wish to make) and the consequent recommendations.[12]Furthermore, the Council (acting on a recommendation of the Commission) may address to the Member State concerned decisions concerning corrective measures. Once again, the EP is the recipient of a mere right to be informed.[13]

The Stability and Growth Pact, adopted to ensure stricter budgetary discipline for Member States participating in monetary union, by strengthening the surveillance of the budgetary positions and the coordination of economic policies,

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[8]This is a difference of moment, given that "proposals" are the manifestation of the power of legislative initiative accorded to the Commission and, as such, are strongly safeguarded by the Treaties and by the Court of Justice. See Article 293, para. 1, TFEU, providing that, except in the cases referred to in the provisions of the TFEU mentioned by it, where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously, and Article 293, para. 2, TFEU, providing that, as long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of an EU act. The Court of Justice has been ready to offer even wider—maybe too wide—safeguards to the proposals of the Commission, for example by recognising to it—even if within certain limits—the power of withdrawal. See recently ECJ 14 April 2015, Case C-409/13, *Council of the European Union* v. *European Commission*.

[9]Article 121, para. 4, TFEU.

[10]Article 121, para. 5, TFEU.

[11]Article 126, paras. 2–5, TFEU.

[12]Article 126, paras. 6 and 7, TFEU.

[13]Article 126, para. 11, TFEU.

maintained this scheme, though partly anticipating the alterations that would be introduced by the financial crisis-led reforms.[14]

However, the problem of the marginalisation of the EP in the three procedures summarised above was not considered as serious as today. This can be explained if one considers that the basic constitutional features of the EMU could be seen as respecting or, at least, as not seriously impinging on the *representative* democratic principle, if one understands this principle "holistically", namely in the interrelationship between the EU legal order and the national ones. Member States had of course the legal obligation to avoid excessive government deficits on the basis of the two criteria referred to in Article 126, para. 2, TFEU and specified in the Protocol on the excessive deficit procedure annexed to the Treaties. However, it was largely recognised that national Parliaments "remained in control of their economic policies, including their budgetary and fiscal policy."[15] The EU institutions had a competence of economic co-ordination, but it had to be exercised through the adoption of non-binding acts (i.e. "the broad guidelines"), by means of an intergovernmental and "*consensus*-building" procedure (thanks, in particular, to the participation to the procedure of the European Council),[16] respect for which was guaranteed by a "peer pressure" mechanism.[17] In other words, the almost voluntary character of economic cooperation and the consequent role of national Parliaments in shaping the economic decisions taken at the level of the Member States compensated for the slight influence of the European Parliament over the measures adopted at the EU level.

3 The Relationship Between the EMU and Democratic Principles After the Crisis: A "Strengthened" Representative Democratic Deficit

It is with the adoption of the so-called "Six Pack" and "Two Pack" that the problem of the democratic legitimacy of the EMU has deepened. As Jürgen Habermas observes,

[14]The so-called Stability and Growth Pact was originally made up of a European Council Resolution (the resolution adopted by the European Council in Amsterdam in June 1997, OJEC C236, 2 August 1997) and two Council Regulations (Council Regulation (EC) No. 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the coordination of economic policies and Council Regulation (EC) No. 1467/97 of the same day on speeding up and clarifying the implementation of the excessive deficit procedure, both in OJEC L 209, 2 August 1997).

[15]Lenaerts (2014).

[16]Colasanti (1994), Smits (2002) and Bickerton et al. (2015).

[17]Colasanti (1994) and Louis (2009).

> the executive, as always in times of crisis, felt compelled to empower itself. In an alliance with the Commission and the European Central Bank, the national governments assembled in the Eurogroup and of the European Council have extended their scope of action at the cost of their national parliaments, and as a result have greatly exacerbated the existing shortfall in legitimacy.[18]

There are good reasons to share this argument, with the exception of the fact that in the sentence quoted the EP is not mentioned as one of the parties, albeit unenthusiastic, to the "alliance" that Habermas refers to.[19]

There is already a rich literature exploring these developments and analytically discussing the so-called democratic deficit in the new economic governance. This literature has highlighted a number of features that can be considered as the most likely candidates for explaining Habermas' concept of "exacerbation of the existing shortfall in legitimacy." The most important of these features are three.

Firstly, *the reforms have insulated EMU governance from direct parliamentary contestation*. This is the most important feature of the democratic deficit argument in the field of economic co-operation. As has been noted:

> one of the objectives of the reform of the EMU was to free the application of technical rules on fiscal discipline from political interference.[20]

It can be maintained that insulation is the product of two parallel developments. *At the national level*, the disempowerment of Parliaments in the budgetary process is the effect of the obligation of the Eurozone States under the TSCG to recognise in their constitutions the balanced budget or "golden" rule (under which "the budgetary position of the general government of a Contracting Party must be balanced or in surplus").[21] This constitutional guarantee will thereby protect the golden rule, as well as the neo-liberal theory behind it, from democratic political contestation: both the Executive and the Parliament are under the *obligation* to shape the national budgetary laws in order to ensure respect for the golden rule. The legal constraints on the budgetary policies of the Member States seem likely in particular to have weakened national Parliaments. Insofar as they were used to function in the budgetary process as decision-makers or as political overseers, depending on the State's more general institutional framework, their role have become narrower,

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[18]Habermas (2014). For consideration of the reforms of the EMU as an example of the general tendency of executives to push aside parliaments in times of crises, see also Curtin (2014) and Polou (2014).

[19]Indeed, the EP was a co-legislator in the adoption of the Six-Pack and the Two-Pack and was allowed to participate in the negotiation of the Fiscal Compact. For a discussion see further Sect. 4.

[20]Lenaerts (2014).

[21]See Article 3 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG).

technical surveillance, whose aim is limited to making sure that the executive abide by the European legal constraints.[22]

The insulation of the budgetary process from democratic competition came about *at the EU level*, too. Indeed, the reduction of the space of *manoeuvre* of Member States, and in particular of national Parliaments, in shaping their economic policies, has not been compensated for by an empowerment of the EP, which has been left at the borders of the new European economic governance, instead (as we will see in the next sections, the "economic dialogues" provided by the EU legislation do not lead to real involvement in the decision-making process). A different trend may be identified: in short, the reforms empowered those European institutions whose nature (judicial, the first one; quasi-technocratic, the second one) insulates them from direct political contestation.

Under the TSCG an important role of control is given to the Court of Justice of the European Union. Indeed, the supranational judiciary is entrusted with overseeing respect for the obligation of the States to incorporate the "golden rule" in national Constitutional law.[23] Furthermore, there is some force in the argument that the ECJ

> may over time acquire a role in enforcing the obligation of states to respect the golden rule in the budgetary procedure

assuming that

> it is conceivable that the ECJ may be asked to rule on the compatibility of a state budget with the provisions of EU laws

as a matter of interpretation *ex* Article 263 TFEU.[24]

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[22]It has been argued that the golden rule has depowered national Parliaments only in parliamentary systems where Parliaments function as decision-makers in the budgetary process, while it "may provide instruments for parliamentary opposition to make its voice heard" in "semi-parliamentary systems and in parliamentary systems in which executives have strong and obedient parliamentary majority." Indeed, under this argument, in semi-presidential systems the Executive is already in full control of the budgetary process. Thus, the "golden rule" is likely to give new opportunities for the opposition in Parliament to control the activity of the Executive. See Fabbrini (2013). For a critique to this argument see further Sect. 4.

[23]According to Article 8, para. 1, of the TSCG: "The European Commission is invited to present in due time to the Contracting Parties a report in the provisions adopted by each of them in compliance with Article 3 (2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that such Contracting Party has failed to comply with Article 3 (2), the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties. Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3 (2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court." If a Party does not comply with the decision of the Court, a second case can be bought to the Court, which may impose on the State "a lump-sum or a penalty" (Article 8, para. 2, of the TSCG).

[24]Fabbrini (2013).

But concerns about democracy have also been raised relating to the role of the European Commission. Under the "Six Pack", the strengthening of the economic governance at EU level passes through an enhanced role of this institution, both in directing the economic policies of Member States and in controlling their budgetary behavior. A central feature in this turn is the introduction of the rule of "reverse majority voting", under which the Commission's recommendations are adopted unless the Council decides to reject the recommendations within 10 days of their adoption by the Commission. This rule concerns the adoption of decisions of non-compliance as well as decisions providing for sanctions. Decisions of non-compliance can be adopted, on the basis of Regulations that apply to all Member States of the European Union, as part of the strengthened multilateral surveillance of budgetary positions of Member States,[25] as well as being part of the new surveillance procedure for the prevention and the correction of excessive macroeconomic imbalances.[26] The "reverse majority voting" rule also applies to the adoption of sanctions. Decisions imposing interest-bearing deposits, non-interest bearing deposits, or annual fines can be adopted, on the basis of two Regulations whose scope of application is limited to Member States whose currency is the Euro, where the Member State concerned by a decision of non-compliance has not taken the corrective action recommended by the Council in a previous decision of non-compliance.[27]

The second feature seriously challenging democratic legitimacy is that *the reforms have made EMU governance substantially biased*. All the reforms adopted, those introduced by EU acts as well as those introduced by international treaties, are part of an overall, coherent, strategy of response to the crisis agreed among the Member States. Under this strategy, which is reflected in a number of European Council conclusions and whose cornerstone is the concept of budgetary discipline, the scope for welfare expenditure is narrow. Three main mechanisms were introduced, as part of a broader counter-crisis project, whose aim is to enact this concept. I have already mentioned the first two. They are the balanced budget or "golden" rule and stricter surveillance by European institution on Member States' budgetary processes. The third one is the principle of financial assistance conditionality (under which the granting of any financial assistance to Eurozone Countries facing severe financial difficulties is made "subject to strict conditionality", i.e. on the recipient

[25]Here the Council adopts, by the reverse majority rule, on the basis of the Commission's recommendations, decisions of non-compliance by Member States with the medium-term budgetary objectives provided for in the broad guidelines. See Articles 6 and 9 of Regulation (EU) No. 1175/2011 of 16 November 2011.

[26]Here the Council adopts by the reverse majority rule, on the basis of Commission's recommendations, decisions of non-compliance by Member States with recommended corrective action. See Article 10 of Regulation (EU) No. 1176/2011 of 16 November 2011.

[27]See Article 3, para. 3, of Regulation (EU) No. 1174/2011 of 16 November 2011; and Articles 4, para. 2, 5, para. 2, and 6, para. 2, of Regulation (EU) No. 1173/2011 of 16 November 2011.

State's acceptance of a number of detailed economic policy conditions[28] and on respect for the "golden rule").[29]

This second feature of the reforms is also bound to have implications on the question of their democratic legitimacy. Indeed, this turn in economic governance seems to give more weight to the critique that the EU would suffer from a *substantial* democratic deficit because of a neo-liberal bias in its economic constitution. In other words, as Scharpf argues,

> the most important element in a democratic polity is to maintain the balance between market liberalization and social protection.

Yet, under this view, the EU would miss this objective.[30] Before the reforms, this thesis was criticised by a number of scholars, who objected that there was little evidence of a neo-liberal bias of the EU. Furthermore, Moravcsik argued:

> the level of social welfare provision in Europe remains relatively stable.[31]

However, these counter-arguments are less tenable today, as indicated by the broad *consensus* among scholars (and citizenry) that after the reforms the EMU is driving social protection downward.[32]

The third feature of the new EMU governance that the literature has highlighted as likely to enhance the democratic deficit in this field is that *the reforms have narrowed the scope of democratic principles of the TEU as parameters of legitimacy for EMU governance*. This is the consequence of the fact that only some of the reforms have been introduced by EU legislation, while another part of the reforms has been adopted through international treaties formally outside the framework of the EU legal system. This means that the Council can no longer be considered as the only forum to be used by the Member States for their cooperation in this field; accordingly, the EMU can no longer be considered as "a union within the Union", but as an inter-sectional group of rules of economic coordination and direction stemming from both EU law and international law.

The use of parallel paths not only poses a risk to the unity of the system, but also has a consequence on the question of the democratic legitimacy of the reforms. In particular, this choice entails non-applicability of the principles enshrined in Title II of the TEU as parameters of the democratic legitimacy of the international branch of the reforms. Indeed, it is clear that what has been introduced through international agreements formally outside the framework of EU law cannot be challenged for violating EU primary law (unless a compatibility clause is provided for in the agreement).[33]

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[28]European Council Decision 2011/199/EU amending Article 136 TFEU.

[29]See recital 27 of the TSCG.

[30]Scharpf (1999).

[31]Moravcsik (2002).

[32]Ioannidis (2014) and Polou (2014).

[33]Ruffert (2011) and Leino and Salminen (2013).

4 Views on the EMU Democratic Deficit

While the preceding account can be considered as a representation of a widely perceived democratic deficit of EMU governance, some scholars consider these deficiencies as overstated. In this section I will not review this literature, but I will try briefly to analyze the main arguments under which the democratic deific thesis has been criticised and criticise them in turn.

The first critique of the democratic deficit is based on parliamentary participation in the decision-making processes that led to the adoption of the reforms. Under this argument, either national Parliaments or the EP controlled these processes and finally gave their consent to the entry into force of the reforms. On the one side, those introduced through international agreements were controlled by national Parliaments thanks to their treaty-making powers at the ratification stage.[34] On the other side, most of the reforms introduced through EU legal acts were controlled by the EP insofar as they were adopted through the ordinary legislative procedure.[35]

Yet, as far as the involvement of national Parliaments is concerned it must be borne in mind that, given the general tendency in contemporary democratic states towards executive control over the legislature,

> parliamentary supervision thereafter will usually be interstitial or marginal.[36]

Moreover, the perceived urgency of the measures to be taken and the need to achieve agreements in strict deadlines militated against a thorough deliberation within national parliaments. In almost every state, thereby, "the EFSF, the ESM, and the austerity agreements were passed through parliaments by powerful governments."[37]

This is true even in relation to the EP's role in the decision-making process leading to the adoption of the "Six Pack" and the "Two Pack." The actual capacity of the EP to negotiate in these processes was not only conditioned by pressure under the "urgency" argument, but also by an institutional development, that is the rise of the European Council as a "real" legislative initiator in the EU.[38] Indeed, as is well known, this legislation was adopted on the basis of conclusions of the European Council which instructed the Commission in detail on the proposal to submit to the co-legislators and provided for a strict deadline for the final adoption of the reforms.[39] This evolution is likely to have two consequences on the distributions

[34]Von Rompuy (2012), Beukers (2013) and Tosato (2016).

[35]Beukers (2013). See also Poiares Maduro et al. (2012) and Tosato (2016).

[36]Craig (2011).

[37]Hix (2015).

[38]As is well known, with the Lisbon Treaty, the European Council became an institution of the Union. However, its composition seems to make it to some extent immune to the principle of institutional balance, as it is reflected in the Treaties, and able to impinge on this balance. See Starita (2013).

[39]See Starita (2013).

of powers between political institutions in the EU. On the one side, it clearly encroaches upon the Commission's monopoly of legislative initiative.[40] On the other side, it seems to reduce the impact of the EP exercise of its prerogatives on the final outcome of the legislative process, even where legislation has to be adopted under the ordinary legislative process. This interpretation is confirmed by the negotiating history of the Six-Pack, where the EP was able to produce only a "modest"[41] reinforcement of the position originally accorded to it by the European Council.[42]

A second possible critique of the democratic deficit argument, as it is conceived in relation to post-reforms EMU governance, is based on justification of "insulation" in mature democracies. Insulation can be conceived as the practice of delegating powers to organs protected from political contestation. As is well known, prominent scholars have defended the so-called EU democratic deficit, by recalling that insulation is very well known not only to the EU, but also to Member States' constitutional practice. Moreover, insulation at EU level has been justified because of the "regulatory" character of the policies attributed to the European Union, while more politically salient policy areas, with significant "redistributive" consequence, would be left to the Member States.[43]

Yet, even assuming that the opposition, on which this thesis is based, between regulatory and distributive policies is precise and unambiguous,[44] it would be difficult to maintain that this argument can be reasonably used today to justify insulation from direct democratic control of EMU governance measures. Indeed, the deeper economic integration pursued by these measures is likely to have greater redistributive consequences between the creditor and the debtor states as well as within the debtor states.[45]

A third thesis challenging the democratic deficit argument consists of a tentative minimisation of this deficit and is based on the supposed democratic credential of the main institutional rulers in the new EMU architecture. Not only has the enhanced role of the Commission been welcomed by some authors in terms of efficiency.[46] It has also been seen as adequate in terms of democratic legitimacy. Under this view, this role must be evaluated in light of the more general context of the EU system of "checks and balances", together with the principle of political responsibility of the Commission before the EP established therein. This system would give the Commission's new powers in EMU governance a level of democratic accountability adequate to their width and depth.[47] Under this argument, the

[40]Dawson and de Witte (2013), Starita (2013) and Curtin (2014).

[41]Fasone (2012).

[42]See Dawson and de Witte (2013), Keppenne (2014) and Lenaerts (2014).

[43]Majone (1996) and Moravcsik (2002).

[44]See, however, Scharpf (1999) for the thesis that the EU free movements rights have gradually constrained the Member States' capacity to shape their social policy.

[45]Baratta (2013), Dawson and de Witte (2013) and Hix (2015).

[46]See e.g. Smits (2002).

[47]Keppenne (2014).

new investiture procedure of the Commission introduced with the Lisbon Treaty has been highlighted.[48]

However, this view has been criticised by recalling that it is still difficult, even after the Lisbon Treaty, to consider the relationship between the Commission and the EP as one of political responsibility. Hix further contends that

> European Parliament elections are unlikely to provide a sufficiently strong mandate to the European Commission for its role in scrutinizing national economic policies under the emerging new architecture.[49]

In a similar vein, Baratta underlines the semi-technocratic character of this institution, which would not be adequate in terms of democratic legitimacy for such a prominent role and Fabbrini writes that the Commission has proven to be a technocratic structure in support of the European Council's deliberations.[50]

Some have even attempted to minimise the democratic deficit in terms of EP participation in the implementation of European governance by arguing that this institution would have gained influence with the "Six Pack." Under this view, it should be borne in mind that the EP was completely sidelined by the Maastricht Treaty, which considered it as a mere observer in the EMU decision-making process. This situation would have changed with the establishment of "economic dialogue."[51]

The problem with this argument lies in the choice of the EP, as it was considered under the Maastricht Treaty, as a useful basis for comparing the actual prerogatives of this institution. In fact, what is at stake is the democratic quality of the EU decision-making process on coordination of economic policies of Member States as it appears today. Thus, one may wonder if it is more appropriate comparing the powers of the EP today with those of an "historical" EP or with the powers assigned to the other political institutions of the EU under the revised EMU governance.

Some scholars have ventured further in the attempt to trivialise the democratic deficit argument, by arguing that the recent evolution in EMU governance would reinforce the role of *national* Parliaments. This thesis enhances the "democratic" quality of the obligation of the Member States to create national institutions responsible for producing macroeconomic and budgetary forecasts. Indeed, national Parliaments would finally have

> independent bodies at their disposal for helping them to effectively control the economic and fiscal action of the government.[52]

The problem with this thesis is that control of economic data based on transparent information does not necessarily guarantee a "political" control function.

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[48]Von Rompuy (2012).

[49]Hix (2015).

[50]Baratta (2013), Fabbrini (2015). On the role of the European Council in the new economic governance see Michéa (2012).

[51]Keppenne (2014).

[52]Keppenne (2014).

However performed by Parliaments, this control could have a lighter, apolitical, technical function, where it is not accompanied by the power to decide on basic political choices, such as the distribution of wealth.[53] This is probably what happened to the national Parliaments in the reformed EMU governance, whose prerogatives of control over the executives seem to be conceived as directed essentially at guaranteeing respect for European decisions.

In sum, analysis of the main arguments under which the democratic deficit argument has been criticised allow us to understand that this argument has an important point, if one follows a *representative* democratic approach. Indeed, while significantly reducing the space of *manoeuvre* of Member States *vis à vis* the European Union—and, within Member States, of national Parliaments *vis à vis* the executives—in shaping economic policies, the reforms did not empower the EP, leaving it at the borders of the new European economic governance, instead.

But what happens if one also considers non-representative democratic principles? Will the democratic deficit disappear or, at least, will it appear less serious? This question leads us to the analysis of a constitutional problem on which the last part of our contribution will be focused, that is the problem of assessing the compatibility of the reforms with the "constitutional" democratic principles of the EU, as they are enshrined in Title II of the TEU. Indeed, non-representative democratic principles are expressly mentioned therein.

Two developments in our explanation are needed. First, we need to understand whether a particular model of democracy stems from Title II of the TEU or alternative models are permitted under these provisions, as long as they comply with one or more basic principles (Sect. 5). Once the criteria to assess the compatibility of the reforms with Title II of TEU are supplied, we will try to understand whether the reforms develop a particular model of democracy and then we will finally evaluate the compatibility with EU primary law on democratic governance (Sect. 6).

5 Democratic Principles and Democratic Models Under the Lisbon Treaty

The Lisbon Treaty brought about interesting developments in EU primary law in the field of democracy, expressly introducing the idea that the European Union is founded on the synthesis of at least four conceptions of democracy: representation; deliberation; participation of those affected; transparency.

The development of a more legitimate European law lies thereby both in the idea of representing European citizens in the decision-making processes and in new non-majoritarian strategies. First, there are deliberative conceptions, which focus on the quality of the public debate preceding the adoption of a decision as a

[53]Rosanvallon (2006).

fundamental condition of a legitimate genesis of law.[54] Second, there are participative democratic strategies, which are centred on the principle of the inclusion in the law-making process of stakeholders and those affected by a public decision.[55] Furthermore, market control fashioned democratic strategies, which focus on the transparency principle, according to which a legal system should be

> clear, obvious and understandable without doubt or ambiguity.[56]

In particular, Articles 10–12 introduce in the EU legal system rules and instruments linkable to non-representative conceptions of democracy. First, a very broad right of European citizens to participate in the democratic life of the Union is protected under Article 10, para. 3.[57] Second, under Article 11, para. 1, the European institutions

> shall give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

Third, according to Article 11, para. 2,

> the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

Fourth, a more detailed obligation stems from para. 3 for the European Commission that

> shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

Fifth, Article 11, para. 4, introduces the "European citizens' initiative",[58] a mechanism whose procedures and conditions were determined by Regulation (EU) No. 211/2011.[59] Finally, it must be borne in mind that under Article 12 national Parliaments are now involved in the European inter-institutional machinery ("national parliaments contribute actively to the good functioning of the Union").

[54]On democratic deliberation, see Habermas (2008).

[55]On participation in the European Union law, see Mendes (2011).

[56]See the Opinion of Advocate General Ruiz-Jarabo Colomer of 16 December 2004 in Case C-110/03, *Belgium* v. *Commission*, point 44. On transparency in the European Union law, see Driessen (2012). For a crystal-clear analysis of the relationship of the principle of transparency and market surveillance and control of economic data and information, see Rosanvallon (2006).

[57]"Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.".

[58]"No less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.".

[59]Regulation (EU) No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizen's initiative. OJEU L 65, 11 March 2011, pp. 1–22. See Dougan (2011) and Dehousse and Verhoeven (2013).

By the introduction of these rules and principles, the Lisbon Treaty produces a compromise between representative and non-representative conceptions of democracy that can be represented as an "open" one. This openness is twofold.

Firstly, the compromise varies from one field of EU action to another. For example, it is reasonable to suggest that the relative importance of the representative democratic pillar is strictly dependent on the weight of the EP in the institutional balance achieved by the Treaties in each field of EU competence.[60] But the actual relevance of non-democratic principles depends on a variety of unstable factors, i.e. the strength of the role of the European Commission in the legislative process, some of the mechanisms aimed at implementing non-representative principles being more stringent for the European Commission acting as a legislative initiator.

Secondly, the compromise varies with time, not only because it is not immune to Treaty revisions, but also because a number of democratic principles of the TEU have to be implemented by the EU political institutions, both through the adoption of normative acts and their daily behaviour. Thus, the actual capacity of democratic principles to inform the working out of EU decisions largely depends on the political attitudes of men succeeding one another in European offices.

Still, notwithstanding its open nature, the compromise founded in the TEU seems to be characterised by a sort of hierarchy between the representative and the non-representative democratic pillars of legitimacy. Indeed, under Article 10, para. 1, the TEU expressly states that

> the functioning of the Union shall be founded on representative democracy,

thereby relegating participative and deliberative principles to a secondary *status*. This is not to say that the participation of those interested in EU policies and the deliberative quality of EU decisions do not contribute in bolstering the democratic legitimacy of EU law. On the contrary, the "structural" problems that the electoral pillar of EU democracy faces make those concepts of deliberation and participation even more important than they currently are in Member States' political dynamics.[61]

However, as long as Article 10, para. 1, has a "legal" meaning, i.e. a meaning that can be useful to scrutinise the legality of EU legal acts, this is that non-representative democratic concepts can only reinforce representative democracy, without substituting for it. This means that if one wants to "take seriously" Part II of the TEU, any reform introduced through EU secondary acts should comply with this basic criterion.

[60] However, respect for representative democracy should be guaranteed, where the EP is not involved in the decision-making process on the same foot as the Council, by the national democratic legitimacy of the Council and the European Council. This is the core concept of the so-called "dual legitimacy" theory, which is enshrined in Article 10, para. 2, TEU.

[61] Rosanvallon (2006).

6 Democratic Principles and Democratic Models Under the "Six Pack" and the "Two Pack" Legislation

The fundamental relationship between representative democracy and non-representative democracy established in Article 10, para. 1, TEU is somehow subverted in the architecture of the post-crisis EMU governance, being founded on the idea that in the budgetary field legitimacy should pass more through non-representative democratic paths than the common channels of representative democracy.

The orientation towards a transformation in this relationship is clear in the express mentioning of some democratic values in the Preambles to the "Six Pack" and the "Two Pack" legislation: public dialogue and debate[62]; accountability and transparency[63]; *consensus*-building and inclusion of stakeholders and social partners.[64] These values evoke non-representative conceptions of democracy: deliberative theories of democracy; participative theories of democracy; and transparency or markets' control fashioned theories.[65]

However, I am not suggesting here that the reforms reflect a unitary, coherent conception of democracy. Arguably, a reading of the relevant legislation could indicate that the European legislator took elements from both participative models and deliberative models of democracy, without assembling them into a unitary shape.

This becomes clear if one moves to the question of mechanisms. In fact, not only does the "Six Pack" and the "Two Pack" legislation mention non-representative democratic values, but it also provides for a set of institutional and procedural rules and mechanisms inspired by these principles. Some of those rules and mechanisms do not pass through any Parliament, but consist of obligations placed both on the Member States' Executives and on the Council and the Commission. Others postulate an active role of the EP and, albeit at a lesser degree, national Parliaments.

Preference for mechanisms and procedures involving national Executives and EU political institutions not directly elected by the European citizens is a trait of the principle of *transparency*. In particular, EU legislation reforming the economic branch of the EMU focuses on transparency of macroeconomic and fiscal data and

[62]See recitals 8 and 12 of Regulation (EU) No. 1173/2011; recital 9 of Regulation (EU) No. 1174/2011; recital 11 of Regulation (EU) No. 1175/2011.

[63]See Article 3 of Regulation (EU) No. 1173/2011; Article 6 of Regulation (EU) No. 1174/2011. See also, in Regulation (EU) No. 1175/2011, recital 13 (under which the stability and convergence programmes and the national reform programmes should be made public); recital 20 (under which the Commission should make public the calculation method for the projections it makes on the GDP growth of each Member State); and recital 23.

[64]See Preamble, recital 16 of Regulation (EU) No. 1175/2011; Preamble, recitals 19, 20 and 25 of Regulation (EU) No. 1176/2011; Preamble, recital 11 of Regulation (EU) No. 472/2013.

[65]See *supra*, Section 4.

forecasts and on independent audits in order to control national systems of public accounting and encourage best practices.

A prime example is Directive 2011/85/EU, whose fundamental aim is enhancing the transparency of the budget process by laying down detailed rules concerning the characteristics of the budgetary frameworks of the Member States. It provides that Member States shall abide by a number of transparency-making rules. In particular, they shall have in place public accounting systems subject to internal control and independent audits; shall ensure that fiscal planning is based on realistic macro-economic and budgetary forecasts; shall have in place numerical fiscal rules which are specific to them; shall establish credible, effective medium-term budgetary frameworks; and shall ensure internal control and auditing of their public accounting systems.[66] However, the European Commission too must take its part in enhancing the transparency of the budget process. The Commission's forecasts have to be taken into account by Member States when preparing their budgetary planning. The Commission shall thereby make public

> the methodologies, assumptions and relevant parameters that underpin its macroeconomic and budgetary forecasts.[67]

The principle of transparency has two dimensions, European and national, also under Regulation (EU) No. 1175/2011. On the one side, obligations are placed on national Executives. First, it is established the principle that the stability and convergence programmes and the national reform programmes shall be made public.[68] Then, in the same vein, the principle of statistical independence is added.[69] On the other side, obligations are placed on the European institutions. First, the Commission is required to pursue an objective of transparency in its surveillance tasks, by making public its findings as well as the calculation method it uses.[70] Then, a principle of transparency through motivation is protected by Regulation (EU) No. 1175/2011, whose Article 4, para. 2, provides that

> the Council is expected, as a rule, to follow the recommendations and proposals of the Commission or explain its position publicly.

A second democratic principle whose implementation is guaranteed under the European legislation though non-parliamentary mechanisms and procedures is *participation*.

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[66] See Article 3, para. 1, of Directive 2011/85/EU.

[67] See Article 4, para. 2, of Directive 2011/85/EU.

[68] See recital 13 and Article 4, para. 2, of Regulation (EU) No. 1175/2011.

[69] See Article 1, para. 14, of Regulation (EU) No. 1175/2011, under which Member Sates shall ensure the professional independence of national statistical authorities. "As a minimum this shall require (a) transparent recruitment and dismissal processes which must be solely based on professional criteria; (b) budgetary allocations which must be made on an annual or multiannual basis; (c) the date of publication of key statistical information which must be designated in advance."

[70] See recitals 20 and 23, and Article 1, paras. 13 and 15, of Regulation (EU) No. 1175/2011.