

# DEMOCRACY AND FINANCIAL CRISIS BETWEEN THE FIVE PRESIDENTS REPORT AND THE BREXIT: IN SEARCH FOR A NEW WAY?<sup>1</sup>

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MUNIN, Nellie. Democracy and Financial Crisis Between the Five Presidents Report and the Brexit: In Search for a New Way? *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 7–28. DOI: 10.1515/iclr-2016-0012.

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**Summary:** In the aftermath of the Brexit, the EU is swinging between a vision of enhanced integration, depicted by the Five Presidents Report, and a decision by the people of one of its leading member states – the UK – to withdraw this alliance, that may be interpreted as a non-confidence vote in the enhanced integration process underlying the EU. This article assumes that non-democratic elements embodied in the measures taken to pull out of the financial crisis and stabilize EU/EMU economies may enhance non-confidence among EU/EMU citizens, serving as incentives for more member states to opt out of this alliance, inspired by the Brexit. While it might have been expected that as the peak of the crisis passed, decision makers would pay more attention to ensure the democratic nature of such measures, comparison of the regulation enacted during the emergency phase and shortly thereafter with later regulation reveals that, despite certain improvements, many non-democratic elements still characterize both the nature of the measures devised and the decision-making processes leading to them. The article suggests that the Brexit should serve as a red light, reinforcing previous criticism calling for improving the democratic nature of such measures and of the decision-making processes involved, to prevent a further drift.

**Keywords:** European union, financial services, single banking supervision, financial crisis.

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1 This work was supported by Masaryk University, Brno, the Czech Republic under the Distinguished Theodor Herzl Chair Grant. The author wishes to thank the Constitutional Law Department at the faculty of law, Masaryk University, Brno, the Czech Republic for the cooperation and academic collaboration on this project. Special thanks to Dr. David Kosař, former head of the department, to Dr. Jaroslav Benak, member of the department, to the students of my course ‘Financial Deficit or Democratic Deficit?’ and to Dr. Jan Grinc from Charles University in Prague, for their enriching comments and contributions to this article.

## **1 Introduction**

In June 2015 the Five Presidents Report<sup>2</sup> was published, suggesting that the way out of the financial crisis the EU/EMU has been experiencing since 2008 involves enhanced integration<sup>3</sup> leading, by 2025, to full economic, financial and fiscal unions, followed by a political union. Turning this vision into reality started a month later – in July 2015, without leaving much room for public discourse regarding this far-reaching plan.

A year later, in June 2016, UK citizens voted by referendum for withdrawing the EU. UK leaders decided to respect the majority's will. Thus, the UK is expected to be the first member state withdrawing the EU since its establishment. At this stage, it is unclear whether it will be the only withdrawing member state, or rather the Brexit may inspire other EU member states to follow.

The Brexit decision took place while the EU has been experiencing four simultaneous crises: the financial crisis, a refugees' crisis, a security crisis and a political crisis. These crises seem to turn the EU into a less attractive alliance than it used to be perceived by its population, bearing their costs. These crises reinforce former seeds of frustration, emanating, for a long time, from the 'democratic deficit' – the feeling that many relevant decisions accepted by EU institutions lack democratic legitimation, as the vast majority of EU citizens, and to a certain extent even their democratically elected representatives, are detached from EU decision-making processes.<sup>4</sup>

One dilemma underlying this issue is that since the process of enhancing financial markets integration in the EU/EMU is highly technical, it is very difficult for most EU citizens to follow it closely. Moreover, the public is generally considered professionally unequipped to contribute to it. Consequently, by and large, decisions regarding this issue are taken by politicians, informed and guided by professional experts. At the same time, the decisions so taken substantially affect the daily lives of EU citizens. During the financial crisis, the Greek and Cypriot cases in particular seem to have highly raised the awareness of EU citizens to this fact, deterring countries like the Czech Republic and Poland<sup>5</sup> from joining the EMU.

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2 JUNCKER, Jean Claude. *Completing Europe's Economic and Monetary Union*, 2015. [Online]. Available at: [http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report\\_en.pdf](http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf)

3 The necessity for enhanced integration is further justified on grounds of global competitiveness, implying enhanced growth: PORTO, Manuel. *The Path Towards European Integration: the Challenge of Globalization*. *European Studies*, 2014, Vol. 1, pp. 41–55.

4 OHANA, Steve. *Désobéir pour sauver l'Europe*. Paris: Max Milo Editions, Collection Essai, 2013.

5 KUNDERA, Jaroslav. Poland in the EU: How to Deal with Economic Crisis. *European Studies*, 2016, Vol. 2, pp. 142–170.

The financial crisis highlighted yet another dilemma EU decision makers face with regard to the regulation of financial issues: flexible and more liberal financial and economic disciplines that existed before the crisis, which allowed more room for political maneuvering and sovereign governments choices, did not prove effective to prevent the crisis. Pursuing a more strictly disciplined regime that seems to be necessary to pull out of the current financial crisis and to prevent future ones involves further erosion of national discretion, in favor of enhanced EU intervention.<sup>6</sup>

Non-satisfaction of the 'democratic deficit' underlying EU regime seems to have been one of the motivations behind the Brexit vote.<sup>7</sup> The UK was never an EMU member. Nevertheless, due to EU's high level of market integration, its economy was indirectly affected by the Euro crisis and by the decisions taken with regard to it. It is a well-known fact that the UK consistently fought for taking into consideration the implications any decision regarding financial regulation of the EMU may have on EU, non-EMU member states.<sup>8</sup> It is further assessed, that austerity served as a major motivation for UK's people voting in the referendum.<sup>9</sup> Other implications of EU financial crisis on the UK economy (e.g. on the banks, on housing prices etc.), and impressions gained from the Greek and Cypriot cases, widely covered by the global media, may have also affected this voting, at least indirectly.<sup>10</sup>

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- 6 JUNCKER, Jean Claude. *Supra* note 2, p. 7. National constitutional courts may play a decisive role in slowing down this process through interpretation that balances EU and national interests. See, for example, HAMULAK, Ondrej, KERIKMAE, Tanel. Indirect Effect of the EU Law under Constitutional Scrutiny – the Overview of Approach of the Czech Constitutional Court. *International and Comparative Law Review*, 2016, Vol. 16, No. 1, pp. 69–82; CĂLIN, Dragoș. The Constitutional Court of Romania and European Union Law. *International and Comparative Law Review*, 2015, Vol. 15, No. 1, pp. 59–85. This dilemma, faced by monetary decision-makers, is underlined by the inherent conflict that may occur between price stability and growth. See, for example, POSPISIL, Richard. The Equilibrium on Money Market and the Central Bank Issuing Policy. *International and Comparative Law Review*, 2015, Vol. 15, No. 1, pp. 141–152.
  - 7 See, for example, EVANS-PRITCHARD, Ambrose. Brexit vote is about the supremacy of Parliament and nothing else: why I am voting to leave the EU? *The Telegraph*, 13.6.2016. [Online]. Available at: <http://www.telegraph.co.uk/business/2016/06/12/brexit-vote-is-about-the-supremacy-of-parliament-and-nothing-els/>
  - 8 See, for example . WINNING, Nicolas, DENDRINO, Victoria. British Prime Minister David Cameron Sets Out EU Reform Demands. *The Wall Street Journal*, 10.11.2015. [Online]. Available at: [http://www.wsj.com/articles/british-prime-minister-david-cameron-sets-out-eu-reform-plan-1447156477?mod=fox\\_australian](http://www.wsj.com/articles/british-prime-minister-david-cameron-sets-out-eu-reform-plan-1447156477?mod=fox_australian)
  - 9 FISHER, Israel. A new research reveals that the austerity regime, not the refugees, caused the Brexit. *TheMarker*, 27.10.2016 (Hebrew). [Online]. Available at: <http://www.themarker.com/wallstreet/1.3104548>.
  - 10 Recent behavioral economy approaches recognize the importance of the psychological dimension to traditional economic models, thus taking account of human emotions and even irrationality. See, for example: BELLOVA, Jana. Behavioural Economics and its Implications on Regulatory Law. *International and Comparative Law Review*, 2015, Vol. 15, No.

The Five Presidents Report explicitly admits that ‘at the height of the crisis, far-reaching decisions had often to be taken in a rush, sometimes overnight.’ The report acknowledges that now, as the peak of the crisis is behind, ‘is the time to review and consolidate our political construct.’<sup>11</sup> One would assume that in this spirit, and in light of the growing criticism, EU decision makers would strive now more determinately to ensure the democratic legitimacy of the decision-making process regarding the financial mechanisms devised to pull out of the crisis and stabilize the EMU, and the democratic nature of its fruits.

This article thus examines, through comparison of certain elements shared by the European Stability Mechanism (ESM), and the Single Banking Supervision Mechanism (SSM), in the context of the Five Presidents Report’s vision, whether the democratic nature of the legal instruments decided at EU level, and the decision-making processes leading to them, improved over time in terms of their democratic nature. For this assumption to prove correct, measures enacted later would bear more democratic (or less non-democratic) elements than measures enacted in time-proximity to the height of the crisis. It is acknowledged that the compared mechanisms are different in essence: the ESM is an emergency financial assistance mechanism. The SSM is a surveillance and preventive mechanism, including certain elements of enforcement. Nevertheless, the two mechanisms form parts of a broader system and vision (specified by the Five Presidents Report), thus being underlined by similar perceptions, and sharing certain common characteristics, on which this article would focus.

## **2 The Democratic Deficit and the Financial Crisis**

Democracy is recognized by EU Treaties as a core value, underlying the EU alliance (Article 3(1) Treaty on the European Union (TEU), Article 9 Treaty on the Functioning of the EU (TFEU)).<sup>12</sup>

However, it seems to be widely recognized that due to EU’s non-majoritarian structure, democracy at EU level cannot be obtained by patterns similar to national, majoritarian models.<sup>13</sup> Nicolaidis<sup>14</sup> contends: ‘the EU was not designed with democracy in mind’, thus mentioning a variety of views regarding

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2, pp. 89–102.

11 JUNCKER, Jean Claude. *Supra*, note 2, p. 17.

12 EUROPEAN UNION. Treaty on the EU (TEU), 2009. [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>; EUROPEAN UNION. Treaty on the Functioning of the EU (TFEU), 2009. [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

13 See, for example, MAJONE, Giandomenico. Europe’s ‘democratic deficit’: The question of standards. *European Law Journal*, 1998, Vol. 4 no. 1, pp. 5–28; MORAVCSIK, Andrew. In defence of the democratic deficit: Reassessing legitimacy in the European Union. *Journal of Common Market Studies*, 2002, Vol. 40, no. 4, pp. 603–624.

14 NICOLAIDES, Kalypto. European Democracy and Its Crisis. *Journal of Common Market Studies*, 2013, Vol. 51, no. 2, pp. 351–369, p. 354.

the EU alternatively as ‘not-a-state’, as a ‘multilateral democracy’, ‘transnational democracy’, ‘compound democracy’, ‘directly deliberative polyarchy’, ‘agonistic democracy’, or holding some of the variants of federal or cosmopolitan democracy, or constitutional pluralism. Others see it as a ‘technocracy’ or even as a ‘nomenklatura.’<sup>15</sup> At the same time, certain commentators suggest that representation and democracy are ensured by the EU architecture, only through a different, non-majoritarian model.<sup>16</sup>

Notwithstanding the *formal* explanations, definitions or structure, the literature reflects the constant anticipation of EU citizens towards *substantive* enhancement of EU regime’s democratic nature and legitimacy. Common consent with regard to the development and functioning of this alliance seems to be inevitable to its existence and future.

National regimes considered to be democratic are divided<sup>17</sup> to formal, *electoral democracies*, i.e. political regimes which merely allow political competition and generally fair elections, and substantial, *liberal democracies*, i.e. regimes which in addition to these formal characteristics effectively protect their citizens’ property rights, political rights and civil rights. By analogy, a similar distinction between the *formal* structure, dictating the decision-making process, and the *essence* of the decisions taken by it may apply to the EU. In terms of essence, EU Treaties encompassing EU supranational regime’s obligations to protect citizens’ rights and act to improve their welfare rightly underline EU citizens’ anticipation for these obligations to be fully respected.

Since democracy is broadly perceived as the ‘government of the people, by the people [and] for the people,’<sup>18</sup> the literature explored whether EU citizens form a ‘People’<sup>19</sup> or ‘Peoples,’<sup>20</sup> sharing common values and interests. As the replies given to this question are varied and controversial, it is alternatively suggested that the underlying motivation for EU citizens to act together may be the enhancement of common, ad hoc, interests.<sup>21</sup>

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15 RODRIK, Dani. Brexit and the globalization trilemma. *Dani Rodrik’s weblog*, 13.6.2016. [Online]. Available at: [http://rodrick.typepad.com/dani\\_rodriks\\_weblog/2016/06/brexit-and-the-globalization-trilemma.html](http://rodrick.typepad.com/dani_rodriks_weblog/2016/06/brexit-and-the-globalization-trilemma.html)

16 See, for example, MAJONE, Giandomenico. *Supra*, note 13; MORAVCSIK, Andrew. *Supra*, note 13.

17 MUKAND, Sharun, RODRIK, Dani. The Political Economy of Liberal Democracy. *Warwick Economic Research Paper Series*, 2015. [Online]. Available at: [https://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/2015/twerp\\_1074\\_mukand.pdf](https://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/2015/twerp_1074_mukand.pdf)

18 LINCOLN, Abraham. The Gettysburg Address (Nov. 19, 1863). In: GIENAPP, William (ed). *This Fiery Trial: the Speeches and Writings of Abraham Lincoln*. Oxford: Oxford University Press, 2002, p. 184.

19 WEILER, Joseph. Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision. *European Law Journal*, 1995, Vol. 1, no. 3, pp. 219–258; GRIMM, Dieter. Does Europe Need a Constitution? *European Law Journal*, 1995, Vol. 1, no. 3, pp. 282–302.

20 NICOLAIDES, Kalypto. *Supra*, note 14.

21 SCHARPF, Fritz. Economic Integration, Democracy and the Welfare State. *Journal of Euro-*

Describing the historic evolution of democracies in the 19<sup>th</sup> and 20<sup>th</sup> centuries, Mukand and Rodrik<sup>22</sup> argue that electoral democracy marks a bargain between the propertied elite, interested in protecting its own (property) rights and little else, preferably by autocracy, and the mobilized masses forming the majority. According to this social bargain, the latter were accorded voting rights in return for their acceptance of the limits on their ability to expropriate property holders. By definition, EU supranational regime limits the direct access of the masses to the decision-making process, mainly exercised by elite groups, which, according to some, serve the interests of particular groups.<sup>23</sup> To a great extent, in the context of the financial crisis, the combination of this fact with the inherent conflict of interests and powers between the elite and the masses, reinforced EU citizens' – or 'people(s)' – frustration. In that sense, acts like the Brexit, the first vote of the Wallonian parliament of Belgium against the CETA in October 2016 (shortly later overturned by a political compromise) and even the vote of the Italian citizens in a national referendum that took place in December 2016 with regard to suggested modifications in the Italian constitution may be seen as attempts by the masses, or by their directly elected representatives, to preserve or regain their right to affect decision-making, according to that social, historic bargain, eroded by the gradual delegation of national sovereign powers to a supranational entity: the EU.

Those who see the EU as merely a mutant evolved by states' politicians, based on their notions of state governance, rather than as a unique phenomenon,<sup>24</sup> may perceive the 'democratic deficit' in the EU as only a symptom, reflecting the general failure of the party system, and a process of depoliticization, experienced by domestic politics of Western countries in general, or maybe even as part of a global 'democratic recession'.<sup>25</sup>

Majone<sup>26</sup> roughly classified the arguments about the democratic deficit in the EU into four groups, according to the standards being used: standards based

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*pean Public Policy*, 1997, Vol. 4, no. 1, pp. 18–36.

22 MUKAND, Sharun, RODRIK, Dani. *Supra*, note 17.

23 RODRIK, Dani. More on the political trilemma of the global economy. *Dani Rodrik's weblog*, 11.3.2016. [Online]. Available at: [http://rodrrik.typepad.com/dani\\_rodriks\\_weblog/2016/03/more-on-the-political-trilemma-of-the-global-economy.html](http://rodrrik.typepad.com/dani_rodriks_weblog/2016/03/more-on-the-political-trilemma-of-the-global-economy.html);

24 MAIR, Peter. Popular Democracy and the European Union Polity. *European Governance Papers*, 2005, no. C-05-03. [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>; MAIR, Peter. *Ruling the Void: the Hollowing of Western Democracy*. London: Verso, 2013; VAN BIEZEN, Ingrid (ed.) *On Parties, Party Systems and Democracy: Selected Writings of Peter Mair*. Essex: ECPR Press, University of Essex, pp. 459–512.

25 DIAMOND, Larry. The Democratic Rollback: The Resurgence of the Predatory State. *Foreign Affairs*, 2008, Vol. 87, pp. 36–48; DIAMOND, Larry. Democracy's Deepening Recession. *TheAtlantic.com*, 2.5.2014. [Online]. Available at: <http://www.theatlantic.com/international/archive/2014/05/the-deepening-recession-of-democracy/361591/>

26 MAJONE, Giandomenico. *Supra*, note 13.

on the analogy with national institutions; majoritarian standards, concentrating mainly on the European Parliament's involvement in the decision making; standards derived from the democratic legitimacy of the member states, concentrating on the balance of powers in the Council of Ministers; and social standards, concentrating on aspects of equality and social justice of the decisions taken.

The broad literature criticizing the measures taken to pull out of the financial crisis<sup>27</sup> refers to all these aspects. It reveals failures to respect the democratic principles, both in terms of formal representation and in terms of the substance of the measures devised.

### **3 Financial Crisis Enhances Financial Integration**

The financial crisis in the EU started in 2008. In 2010, two temporary assistance mechanisms were established: the EFSM (European Financial Stability Mechanism),<sup>28</sup> and EFSF (European Financial Stability Facility).<sup>29</sup>

In 2011, amendment of Art. 136 TFEU enabled the enactment of permanent regulation, to replace the temporary mechanisms. Consequently, in 2011 the 'Six Pack'<sup>30</sup> regulation came into force, followed by the conclusion, in 2012, of the

27 See partial summary in: MUNIN, Nellie. From Financial Deficit to Democratic Deficit? *Journal of Multidisciplinary Studies*, St. Tomas University, Florida, 2013, Vol. 6, no. 1, pp. 5–29; MUNIN, Nellie. The Five Presidents Report: Dogs Bark but the Caravan Moves On? *European Politics and the Society*, 2016, Vol. 17, no. 3, pp. 401–420; MUNIN, Nellie. European Monetary Union's Single Banking Supervision Mechanism: Another Brick in the Wall? *The IUP Journal of International Relations*, 2016, Vol. X, no. 4, pp. 7–31.

28 EUROPEAN COMMISSION. About EFSF, 2013. [Online]. Available at: <http://www.efsf.europa.eu/about/index.htm>; EUROPEAN COMMISSION. European Financial Stability Facility, 2013. [Online]. Available at: [http://ec.europa.eu/economy\\_finance/european\\_stabilisation\\_actions/efsf/index\\_en.htm](http://ec.europa.eu/economy_finance/european_stabilisation_actions/efsf/index_en.htm)

29 European Commission. European Financial Stabilization Mechanism (EFSM), 2013. Available at [http://ec.europa.eu/economy\\_finance/eu\\_borrower/efsm/index\\_en.htm](http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm)

30 EUROPEAN UNION. Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306, 1. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AEN%3AHTML>; EUROPEAN UNION. Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area. OJ L 306, 8. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AEN%3AHTML>; EUROPEAN UNION. Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies. OJ L 306, 12. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AEN%3AHTML>; EUROPEAN UNION. Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances. OJ L 306, 25. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AEN%3AHTML>; EUROPEAN UNION. Council Regulation (EU)

European Stability Mechanism (ESM) Treaty<sup>31</sup> and the 'Fiscal Compact' Treaty (FCT).<sup>32</sup> In 2013 the complementary 'Two Pack' regulation came into force.<sup>33</sup>

While the temporary instruments devised were limited to emergency financial assistance, the later, permanent measures replacing them are underlined by a broader vision, according to which enhanced integration would facilitate financial stability. In this spirit, the FCT provides for stricter convergence criteria, the 'Six Pack' regulation provides for stronger surveillance and enforcement mechanisms with regard to these criteria, whereas the 'Two Pack' regulation subjects draft national budgets to surveillance by the EU Commission, prior to national parliaments' voting.

Simultaneously, efforts were made to strengthen supervision and discipline of the EMU banking sector, which is particularly sensitive to financial crises, where uncertainty meets liquidity shortage.<sup>34</sup> Due to this sensitivity, banks played a decisive role in the American sub-prime financial crisis and in the EU/EMU financial crisis it triggered.

Thus, in 2010 the European Supervisory Authority (European Banking Authority – EBA) was established, as one of three financial services Supervisory Authorities replacing three former supervisory committees for financial services. Together with a Joint Committee of the European Supervisory Authorities,

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No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure. OJ L 306, 33. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AE%3AN%3AHTML>; EUROPEAN UNION. Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the member states. OJ L 306, 41. [Online]. Available at: <http://eurlex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A306%3ASOM%3AEN%3AHTML>

- 31 EUROPEAN UNION. Treaty Establishing the European Stability Mechanism (ESM), 2012. [Online]. Available at: [http://www.european-council.europa.eu/media/582311/05-tesm2\\_en12.pdf](http://www.european-council.europa.eu/media/582311/05-tesm2_en12.pdf) European Union. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), 2012. [Online]. Available at: [http://european-council.europa.eu/media/639235/st00tscg26\\_en12.pdf](http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf)
- 32 EUROPEAN UNION. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2012. [Online]. Available at: [file:///C:/Users/NELLIE/Downloads/st00tscg26\\_en12.pdf](file:///C:/Users/NELLIE/Downloads/st00tscg26_en12.pdf)
- 33 EUROPEAN UNION. Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of member states in the euro area experiencing or threatened with serious difficulties with respect to their financial stability. OJ L 140, 1. [Online]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:140:0001:0010:EN:PDF>; EUROPEAN UNION. Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the member states in the euro area. OJ L 140, 11. [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0473&from=EN>
- 34 PISTOR, Katharina. A Legal Theory of Finance. *Journal of Comparative Economics*, 2013, Vol. 41, pp. 315–330.

the supervisory authorities in the member states and a European Systemic Risk Board (ESRB) responsible for macro-prudential supervision of the EU financial system as a whole, including non-bank sectors and cross-sectoral concerns, they form the European System of Financial Supervision (ESFS).<sup>35</sup> All aim at tightening up the discipline on financial services in EU markets, supervising them at EU level. In performing its supervisory function, the ECB now closely cooperates with these authorities.<sup>36</sup>

In 2013, a Single Rule Book was initiated for all 28 EU member states, aiming at preventing future bank crises; ensuring improved depositor protection by ensuring guarantee for deposits of up to € 100,000; and determining rules for managing failing banks. Its purpose is to decrease the scope of national discretion, to prevent maneuvering during national transposition.

A Single Supervisory Mechanism (SSM) became operational in 2014. The SSM marks a higher degree of market integration than its predecessor. For SSM members it implies far reaching interference of EU/EMU authorities, headed by the ECB, in the national decision making process, and broad delegation of powers from national to supranational authorities, compared to the previous arrangement that implied only coordination and cooperation between national authorities.

A complementary Single Resolution Mechanism (SRM) was established, consisting of a Single Resolution Board (SRB) and a fund (SRF) amounting to € 55 billion within eight years, to be financed by the banks in the Banking Union countries. It aims at facilitating the treatment of banks in difficulties. Deposit guarantee at the EMU, the third pillar of financial stabilization envisioned by the Five Presidents Report, is administered by national deposit guarantee schemes. By 2019 the Commission is to review the current arrangement, to see whether a single, pan European, Deposit Guarantee Scheme (EDIS) should be set up.

#### **4 Did the Democratic Nature of the Decision Making Process Improve Over Time?**

Critics pointed out non-democratic elements in the decision-making processes leading to the regulation described above. The lessons of this criticism

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35 EUROPEAN UNION. Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority). OJ L 331/12, dated 15.12.2010, para. 9, Art. 2. [Online]. Available at: <http://www.esrb.europa.eu/shared/pdf/EBAen.pdf?7f9ce4801b210d0dad7e8ad3a41fa95>

36 EUROPEAN UNION. Council Regulation of 15 October 2013 (EU) No. 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions. OJ L 287/63 dated 29.10.2013, art. 3. [Online]. Available at: <http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32013R1024&from=EN>

were studied and implemented in certain later decision making processes, but not in all of them.

*4.1 Re EU institutions:*

*-Towards formal meritocracy and substantial tyranny of executive institutions?*

More than twenty years ago, Grimm<sup>37</sup> warned that the EU's supranational decision making process would become increasingly independent of nationally organized opinion and will-formation processes.

The context of the financial crisis presented some examples for the growing power and independence of EU institutions. Critiques argued<sup>38</sup> that monetary policies of the European Central Bank (ECB) are completely immunized against political intervention, and that the Commission and standard setting agencies acting as regulators obtain a high level of political independence.

Furthermore, commentators claimed<sup>39</sup> that the evolving EU system of executive federalism produces increasing imbalances in the relationship between the member states, which were reflected in the Euro crisis, and might only be solved by further revision of EU Treaties.

This reality seems to persist, even after the height of the crisis has passed.

*- EU intervention in national priorities and affairs gradually grows*

This criticism was invoked at all stages of the crisis. At the beginning of the crisis, high level of EU intervention in national economies was justified on grounds of emergency. National supreme and constitutional courts approached in different member states, asked whether such intervention would not undermine national sovereignty answered negatively, thus justifying EU intervention to recover the crisis.<sup>40</sup>

37 GRIMM, Dieter. *Supra*, note 19.

38 E.g. SCHARPF, Fritz. *Community and Autonomy*. Frankfurt: Max Planck Institute, 2010, pp. 321–322.

39 E.g. FABBRINI, Federico. From Executive Federalism to Executive Government: Current Problems and Future Prospects in the Governance of the EMU. In: FABBRINI, Federico, BALLIN, Ernst Hirsch, SOMSEN, Han (eds). *What form of Government for the European Government and the Eurozone?* Oxford: Hart Publishing, 2015, pp. 289–306.

40 See, for example, Irish Court: VAN MALLEGHEM, Pieter Augustijn. Pringle: A paradigm shift in the European Union's monetary constitution. 2012. [Online]. Available at: <http://connection.ebscohost.com/c/articles/88010353/pringle-paradigm-shift-european-unions-monetary-constitution>; Estonian Court: TOMKIN, Jonathan. Contradiction, circumvention, and conceptual gymnastics: The impact of the adoption of the ESM Treaty on the state of European democracy. 2012. [Online]. Available at: [http://www.germanlawjournal.com/pdfs/Vol14-No1/PDF\\_Vol\\_14\\_No\\_1\\_169-190\\_ESM%20Special\\_Tomkin.pdf](http://www.germanlawjournal.com/pdfs/Vol14-No1/PDF_Vol_14_No_1_169-190_ESM%20Special_Tomkin.pdf); German Court: VRANES, Erich. German constitutional foundations of, and limitations to, EU integration: A systematic analysis. 2012. [Online]. Available at: <http://www.german->

The Two Pack' legislation, providing for pre-examination of national draft budgets by the EU Commission, to ensure economic stability at the EU/EMU area, was criticized on these grounds.<sup>41</sup> The EU Commission argued that it would only focus on ensuring economic stability, without interfering in national priorities, albeit it is clear that any such intervention would have implications on such priorities. It further noted that its intervention does not imply compulsory directions. Nevertheless, it is clear that under the circumstances, ignoring Commission recommendations would not be advisable, although in this case, unlike in the case of country-specific recommendations resulting from EU Commission's surveillance regarding the macroeconomic imbalance procedure in the European Semester, aimed at coordination of macroeconomic policies (as part of the Six Pack' regulation), no clear link was drawn between recommendations implementation and entitlement of the member state at stake to EU funds.<sup>42</sup>

The SSM implies a high level of intervention by the ECB – the supreme banking supervisor – in national affairs, to ensure the stability of national financial institutions. Recently, a member of ECB's executive board and vice-chair of the ECB's Supervisory Board suggested considering, in cases where a member state does not apply national legislation assimilating EU law into the national legal system, to render the ECB directly competent to apply such national legislation.<sup>43</sup> This is an even farther-reaching perception of intervention in national affairs, unprecedented at EU/EMU context. Being suggested by a senior ECB official, it may serve as an evidence to the spirit of future prospects foreseen by this institution.

All in all, it seems that EU intervention at the national level is, indeed, gradually growing, and the Five Presidents Report suggests expanding it even further, as an inevitable consequence of envisioned higher degrees of market integra-

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lawjournal.org/pdfs/Vol14- No1/PDF\_Vol\_14\_No\_1\_75-112\_ESM%20Special\_Vranes.pdf; WINNING, Nicolas, DENDRINO, Victoria. *Supra*, note 7.

41 SCHMIDT, Vivien. The Forgotten Problem of Democratic Legitimacy: "Governing by the Rules" and "Ruling by the Numbers". In: MATTHIJS, M Matthias, BLYTH, Mark (eds). *The Future of the Euro*. New York: Oxford University Press, 2015, pp. 90–116; BARATTA, Roberto. Legal issues of the 'Fiscal Compact' – Searching for a mature democratic governance of the Euro. EUDO, European University Institute, Florence, Italy, 2012. [Online]. Available at: <http://ssrn.com/abstract=2196998>.

42 See Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, Articles 23–25.

43 EUROPEAN CENTRAL BANK. Single Supervisory Mechanism – Single Supervisory Law? 2016. [Online]. Available at: [https://www.ecb.europa.eu/press/key/date/2016/html/sp160127\\_2.en.html](https://www.ecb.europa.eu/press/key/date/2016/html/sp160127_2.en.html)

tion.<sup>44</sup> Evaluating the meaning of this fact depends on one's perception of the desired level of markets' integration.

Theoretically, globalization does not necessarily undermine national democracy. In certain cases, it may even enhance it.<sup>45</sup> Unfortunately, this is not always the case. Rodrik's globalization trilemma suggests that out of three aims: national sovereignty, democratic politics and hyper-globalization (namely: enhanced stage of market integration), always, two can thrive at the cost of giving up the third one.<sup>46</sup> According to this trilemma, in EU/EMU context, some would opt for keeping the globalized structure of the EU and striving towards further democratizing it (at the cost of compromising national sovereignty),<sup>47</sup> while others, maybe out of disappointment of EU's functioning hitherto, including its functioning with regard to the financial crisis, would rather prefer to strengthen national sovereignty and democracy at the cost of giving up further globalization, or integration.<sup>48</sup>

– *The European Parliament (EP), which is considered to represent EU people(s) more than any other EU institution, is not sufficiently involved in the decision-making process*

This criticism was particularly strong regarding the emergency measures taken when the financial crisis burst.<sup>49</sup> It was seriously taken into consideration in later stages. Thus, for example, the EP President signed the Five Presidents Report while being excluded from the previous, Four Presidents Report.<sup>50</sup>

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44 See, for example, JUNCKER, Jean Claude. *Supra*, note 2, pp. 8, 9, 11.

45 Thus, according to KEOHANE, Robert., MACEDO, Stephen, MORAVCSIK, Andrew. Democracy-enhancing multilateralism. *International Organization*, 2009, Vol. 63, pp. 1–31. [Online]. Available at: <http://www.princeton.edu/~macedo/Papers/Keohane%20Macedo%20Moravcsik%20Democ%20Multilat%20IO%2009.pdf>, multilateralism may enhance democracy by offsetting factions, protecting minority rights, or by enhancing the quality of democratic deliberation.

46 RODRIK, Dani. The inescapable trilemma of world economy. *Dani Rodrik's Weblog*, 27.6.2007. [Online]. Available at: [http://rodrik.typepad.com/dani\\_rodriks\\_weblog/2007/06/the-inescapable.html](http://rodrik.typepad.com/dani_rodriks_weblog/2007/06/the-inescapable.html)

47 VAROUFAKIS, Yanis. Brexit won't shield Britain from the horror of disintegrating EU. *Yanis Varoufakis, thoughts for the post-2008 world*, 25.6.2016. [Online]. Available at: <https://yanisvaroufakis.eu/2016/06/25/brexit-wont-shield-britain-from-the-horror-of-a-disintegrating-eu/>

48 EVANS-PRITCHARD, Ambrose. *Supra*, note 7.

49 See, for example, MADURO, Miguel, DE WITTE, Bruno, KUMM, Mattias. The democratic governance of the Euro. *Policy Paper 2012/08*. Florence: Robert Schuman Centre for Advanced Studies (RSCAS). [Online]. Available at: [http://cadmus.eui.eu/bitstream/handle/1814/23981/RSCAS\\_PP\\_2012\\_08.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/23981/RSCAS_PP_2012_08.pdf?sequence=1); OHANA, Steve. *Supra*, note 4.

50 VAN RUMPOY, Herman. Towards a Genuine Economic and Monetary Union, 2012. [Online]. Available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/134069.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf). Critics note, though, that while that report was written by President of

The Five Presidents Report explicitly addresses the importance of enhanced participation of the EP in the decision-making process.<sup>51</sup> As a result of strong political pressure, SSM regulation provides for full accountability of decision makers to the EP.

On this issue, thus, some improvement of the democratic process occurred over time. Nevertheless, both the Five Presidents Report and the explanatory notes to SSM regulation admit that there is still room – and necessity – for further enhancing EP's involvement in these processes.

To complement the picture, it should be noted, though, that the perception of the EP as best representing the interests of EU citizens is not clean of doubts. Common arguments suggest, among other things, that the rate of voting to EP members in many EU member states is relatively low; that many times, candidates are nationally elected as MEPs based on a national agenda, which is irrelevant to their functioning in the EP; and that in the EP, MEPs function and vote according to the agenda associated with their political affiliation at EU, rather than national, sphere.

#### *4.2 Re the member states:*

*– Economic elites strive to regain autocracy? The economically strong countries, or contributors, dictate decisions. Other voices are heard, but ignored*

The legal theory of finance<sup>52</sup> depicts finance as a hierarchical system, dominated by financially strong countries (and players within these countries) which, in times of crisis, when elasticity and discretion in the application of law are necessary to regain stability, direct the decision-making process in favor of their interests.

In EU context, right from the start of the crisis it was broadly argued that the contributing countries – headed by Germany – led the decision-making process, directing it towards solutions that best served their interests. This argument was invoked regarding decision making processes taken mainly, but not only, by the European Council (EU leaders) and the Council of the EU (ministers of the member states). It refers, among other things, to the definition of the crisis as a 'debt crisis' rather than a financial imbalances crisis;<sup>53</sup> the demand that the assisted countries adopt austerity measures,<sup>54</sup> leading to wage compression and

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the Council, the Five Presidents Report was written by the President of the Commission (an executive authority considered the least 'democratic' authority among EU institutions).

51 JUNCKER, Jean Claude. *Supra*, note 2, p. 17, para. 7.

52 PISTOR, Katharina. *Supra*, note 34.

53 KRUGMANN, Paul. *End this depression now*. New York, NY, and London: W. W. Norton and Company, 2012.

54 HABERMAS, Jürgen. Democracy, Solidarity and the European Crisis. In: GROZELIER, Anne-Marie, HACKER, Bjorn, KOWALSKY, Wolfgang, MACHNIG, Jan, MEYER, Henning, UNGER, Brigitte (eds). *Roadmap to a Social Europe*. Social Europe Report, 2013. pp.

a drive for exports; the standards applied by the ECB<sup>55</sup> and the strong discipline assisted countries were required to meet as pre-condition for financial assistance; the avoidance of adjustments in all EU countries, to close gaps in fields such as prices and lending policies; the establishment of the SSM, and its essence.<sup>56</sup>

It seems that hitherto, the contributing countries did not give up their dominance of the decision-making process regarding the financial crisis. Other EU/EMU member states feel that despite their alleged political equality – e.g. in terms of voting rights – in essence their ability to affect the process is marginal and the solutions chosen do not duly serve their interests. This may well be a case where the fact that an international rule is negotiated and accepted by a democratically elected government does not inherently make that rule democratically legitimate.<sup>57</sup> This gap exacerbates long standing problems with regard to EU's democratic legitimacy and solidarity, turning the financial crisis into a political crisis.<sup>58</sup>

*– EU, non-EMU member states have less access to the decision-making process, although it affects their interests*

To the extent that the financial crisis is addressed as a Euro-crisis, decision making takes place in EMU institutions in which EU, non-EMU member states have no voting rights. This group of countries, which is nevertheless affected by decisions so taken, due to the high level of market integration among EU members, can only affect the decisions taken by consultation. This situation exists with regard to financial assistance by the ESM (to which EU, non-EMU countries are not entitled if they encounter financial difficulties) as well as to the decision-making process in the ECB, regarding the SSM (due to legal constraints dictated by Art. 127(6) TFEU, chosen as the legal basis for this mechanism in order to avoid Treaty changes). This exclusion applies even to EU, non-EMU member states choosing to act in 'close cooperation', namely to apply the SSM voluntarily, thus bearing the same obligations as EMU member states regarding the SSM.

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55 MORAVCSIK, Andrew. Europe after the crisis: How to sustain the common currency. *Foreign Affairs*, 2012, Vol. 91, no. 3, pp. 54–68, p. 56. [Online]. Available at: [http://www.princeton.edu/~amoravcs/library/after\\_crisis.pdf](http://www.princeton.edu/~amoravcs/library/after_crisis.pdf); SANDBU, Martin. Europe's Orphan: the Future of the Euro and the Politics of Debt. Princeton University Press, Princeton and Oxford, 2015, p. 2.

56 HOWARTH, David, QUAGLIA, Lucia. Banking Union as Holy Grail: Rebuilding the Single Market in Financial Services, Stabilizing Europe's Banks and 'Completing' Economic and Monetary Union. *Journal of Common Market Studies*, 2013, Vol. 51 (Annual Review), pp. 103–123; FERRAN, Eilis, BABIS, Valia. The European Single Supervisory Mechanism. *Journal of Corporate Law Studies*, 2013, Vol. 13, no. 2, pp. 255–285.

57 RODRIK, Dani. *Supra*, note 23.

58 SCHMIDT, Vivien. *Supra*, note 41.

This exclusion is undoubtedly a source of great frustration for EU, non-EMU countries. Both the Five Presidents Report (anticipating that all of them finally join the EMU) and the SSM explanatory notes recognize the necessity to change this situation. Nevertheless, obtainment of this goal necessitates a long (and maybe currently politically unfeasible) process of Treaties modification.

EU, non-EMU member states are represented in EBA. However, despite the change of voting formula in EBA regarding standards, in other contexts SSM Members may coordinate their voting, making it very difficult for non-SSM Members to oppose their positions.<sup>59</sup>

#### *4.3 Re the European people(s)*

*– National parliaments are hardly involved in the decision-making process<sup>60</sup>*

By and large, the involvement of EU members' national parliaments in EU decision making processes is rather limited. This reality seems to change gradually, as EU leaders realize the adverse effects of the growing 'democratic deficit' frustration among EU citizens. Thus, the Five Presidents Report explicitly calls for enhanced involvement of the national parliaments, asking EU Commission to work out the details.<sup>61</sup>

The SSM takes one step further, providing that in certain matters, decision makers at EU level (e.g. the ECB and its Supervisory Board) would be accountable to the national parliaments.

In this sense the democratic process has thus allegedly improved, but the details and full implementation are still to be worked out, to ensure not only formal, but effective national parliaments involvement.

*– Direct involvement of EU people(s) is marginal*

This argument provides that the structure of EU decision making processes does scarcely allow for direct citizens' involvement.

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59 VERON, N. Europe's Single Supervisory Mechanism and the Long Journey Towards Banking Union. Bruegel Policy Contribution, issue 2012/16. Available at: <https://www.econstor.eu/dspace/bitstream/10419/72130/1/72687230X.pdf>; BELLING, Vojtěch. Bankovní unie v kontextu krizového vládnutí v EU: právní limity a rizika (Banking Union in the context of crisis governance in the EU: legal limitations and risks, translation: GRINC, Jan.). *Právní rozhledy* 2016, Vol. 6, p. 201.

60 GRATHWOHL, Daphne. German top court may seek readjustment of ESM. DW website, 11.9.2012. [Online]. Available at: <http://www.dw.de/german-top-court-may-see-readjustment-to-esm/a-16229513>.

61 JUNCKER, Jean Claude. *Supra*, note 2, p. 17.

Rare opportunities for such direct involvement occur,<sup>62</sup> for example, in cases of national referenda (e.g. to nationally ratify an EU Treaty). Such referenda do not take place often, due to the high administrative and financial burden they bear as well as due to political concerns about their unpredictable results.

Deliberate avoidance from Treaty amendments is explicitly declared by the Five Presidents Report, justified in terms of efficiency and emergency. However, the report explicitly admits, with regard to decisions taken at the height of the crisis, that '[i]n several cases, intergovernmental solutions were chosen to... overcome opposition,'<sup>63</sup> probably referring to the ESMT and the FCT, concluded as public international law treaties rather than as new EU Treaties or amendments to existing EU Treaties.

Allegedly, existing EU Treaties already represent the will of EU citizens, rendering constant amendments unnecessary. Furthermore, the results of the 2015 Greek elections and the Brexit referendum reflect the shortcomings of this form of direct democracy.

At the same time, avoiding necessary Treaty modifications despite substantial change of circumstances, thus compromising regulation quality (as in the case of non-EMU member states voting exclusion), may be suspected as an attempt to prevent the undermining of measures enhancing integration, desired by EU institutions, by negative national referenda votes.

Due to its technical nature, the SSM suggests only limited opportunities for direct EU/EMU citizens' intervention, confined to initiating certain judicial or semi-judicial procedures this mechanism allows (e.g. approaching the joint Board of Appeal of the European Supervisory Authorities, regarding EBA).<sup>64</sup> These possibilities mark an advancement compared to the lack of semi-judicial, and existence of limited judicial options with regard to the earlier ESM.

## **5 Did the Democratic Nature of the Measures Taken Improve Over Time?**

In all decision-making processes that took place regarding the financial crisis treatment, decision makers were aware of the necessity for democratic legitimacy of regulation and the decision making processes leading to it. While it seems to be attributed a lesser weight at the emergency stage, in later stages serious efforts were made to establish a system that balances the different interests involved. Nevertheless, there is still a great room for improvement.

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62 SCHARPE, Fritz. *Supra*, note 38, pp. 321–322.

63 JUNCKER, Jean Claude. *Supra*, note 2, p. 17.

64 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority). OJ L 331/12, dated 15.12.2010, art. 60. [Online]. Available at: <http://www.esrb.europa.eu/shared/pdf/EBA-en.pdf?7f9ce4801b210d0dad7e8ad3a41fa95>

## **6 Aspects in Which the Democratic Nature of the Measures Devised Improved**

### *6.1 Form of enactment*

The enactment of the ESMT and the FCT as international treaties rather than as EU legislation was criticized on grounds that this form of enactment enables only limited judicial review by the CJEU.<sup>65</sup> The Five Presidents Report recognized the shortcomings of this form of enactment, calling for integrating the ESMT into EU law framework in the second stage of the program.<sup>66</sup>

All later relevant measures were enacted as parts of EU law, thus being fully subject to CJEU judicial review.

### *6.2 Decision making processes in the mechanisms established*

Different elements in the decision-making process the ESMT provides for were criticized. For example: the full discretion accorded to the Board of Governors and to the Board of Directors of the ESM, whether to invite other players to participate in their discussions. The lack of legal obligation to consult with the President of EP, and the lack of obligatory consultation procedures and transparency rules were particularly mentioned. Additionally, the lack of procedure for assessing ESM's operations was criticized.<sup>67</sup>

The Five Presidents Report explicitly acknowledged the deficiencies of the current system, calling for enhanced involvement of the EP and the national parliaments, as representatives of EU/EMU citizens, in the decision-making process.

The SSM encompasses an elaborated mechanism of decision making, consisting of many layers. In each, efforts were made to ensure balanced representation of the relevant stake holders' interests, alas not always with full success. However, accountability of the institutions involved in the process to the EP and in certain cases to the national parliaments is explicitly guaranteed.<sup>68</sup>

### *6.3 Voting and formal equality*

ESM bodies decide according to the following formulas: except for emergency voting, decisions are subject to mutual agreement (in circumstances speci-

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65 Although scholars suggested that these treaties may be subjected to EU law standards, imposing constitutional constraints, by interpretation. E.g. BARATTA, Roberto. *Supra*, note 41. It was noted that paradoxically, due to national constitutional laws, national parliaments are usually involved in ratification processes of international agreements more than in EU implementing legislation.

66 JUNCKER, Jean Claude. *Supra*, note 2, p. 21.

67 MUNIN, Nellie. From Financial Deficit...*Supra*, note 27.

68 MUNIN, Nellie. European Monetary Union's ... *Supra*, note 27.

fied in Article 5(6) ESMT), to qualified majority (80% of the votes cast, in circumstances specified in Article 5(7) ESMT), or to simple majority in all other cases. However, “[i]n respect of all decisions, a quorum of 2/3 of the members with voting rights representing at least 2/3 of the voting rights must be present.” (Article 4(2) ESMT). This provision ensures that a minority of Members would not enforce any decision.

The voting formulas in the SSM differ for each body, and may be much more elaborated. Their detailed analysis is beyond the scope of this article. The varied formulas mark an effort to fine-tune this system as much as possible, devising a different decision making mechanism for each institution, according to its specificities. Two rules are shared by all these formulas: one vote per one member, and decision by majority. In cases involving non-SSM EU member states with voting rights, majority definition necessitates their voting.

#### *6.4 Material equality*

In both the ESM and the SSM, material equality is obtained by taking into account the special circumstances of each Member State for any relevant decision on it.

#### *6.5 Decision review*

The ESM consists of three layers of decision making: a Board of Governors, consisting of finance ministers of the member states, a Board of Directors, consisting of professionals, and a Managing Director, with an inherent review mechanism. There is no external specific review mechanism for its final decisions, beyond the general EU mechanisms (e.g. CJEU, which in the case of the ESMT seems to have limited powers).

The SSM includes a broad network of review mechanisms, including self-review, review by executive authorities, review by semi-judicial and by judicial forums. These forums allow for broader participation in the decision-making, facilitating lesson-learning processes.<sup>69</sup>

#### *6.6 Obligatory recovery*

The lack of ESM procedure to force a process of recovery on a member state that does not request for assistance, although its vulnerable financial situation might risk the other partners, was criticized.<sup>70</sup>

The SSM (which may be perceived mainly as a preventive mechanism, although it may recommend financial assistance in cases of crisis) is obligatory

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<sup>69</sup> MUNIN, Nellie. European Monetary Union’s... *Supra*, note 27.

<sup>70</sup> MADURO, Miguel, DE WITTE, Bruno, KUMM, Mattias. *Supra*, note 49; OHANA, Steve. *Supra*, note 4.

for all EMU members. It is optional only for EU, non-EMU members (none of which decided to join it yet).

This choice seems to mark a preference of EMU member states' general benefit on the account of national sovereign discretion, emanating from the lesson learned through the crisis.

### *6.7 Sanctions*

The following sanctions, potentially imposed by EU regulation on member states in crisis (justified on grounds of deterrence) were criticized for being counter-productive, potentially contributing to further escalation in the situation of these countries:

A member failing to respect its obligations in relation to paid-in shares or calls of capital, or in relation to the reimbursement of the financial assistance, may lose its voting rights (Article 4(8) ESMT), thus losing its ability to affect the decision-making process which might affect it directly.

Severe fines may be imposed, according to the 'Six Pack' mechanism, that would put an extra burden on economies already in severe difficulties.

Heavy fines are imposed by the SSM on member states breaching the financial discipline standards it dictates. Nevertheless, possibly following the criticism on these former provisions, SSM regulation obliges the ECB to ensure the fines are effective, proportionate and dissuasive.<sup>71</sup> These conditions may serve as legal protection, and grounds for a harmed country to challenge controversial ECB decisions at the CJEU.

## **7 Fields Where Further Improvement of the Democratic Nature of the Measures Taken is Necessary**

These aspects are specified in addition to the aspects still necessitating improvement, mentioned before:

### *7.1 Representation*

All EMU member states are represented at ESM Board of Governors and Board of Directors.

All EMU member states are represented in SSM's two major institutions: the ECB's Governing Council and EBA.

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71 EUROPEAN UNION. Council Regulation of 15 October 2013 (EU) No. 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, art. 18(3). OJ L 287/63 dated 29.10.2013. [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1024&from=EN>

Nevertheless, in some of the SSM forums, (e.g. such as the ECB's Administrative Board of Review, the Mediation Panel, the Steering Committee, EBA's Management Board, the Joint Committee of Supervisory Authorities, the Joint Board of Appeal) there is no direct representation of all EMU member states at all times. This practice is justified in terms of efficiency. Decision makers in these authorities are obliged to be impartial and committed to the best interests of the Union. However, this approach substantially differs from the one characterizing most EU institutions.

### *7.2 Voting and equality*

All ESM and SSM voting models rely on majority voting, where each member state has one vote. Some believe that replacement of this system with a system reflecting financial market size would be more democratic.

It has also been argued that where SSM legislation requires a double majority voting – of SSM and non-SSM Members – the latter may be given powers to block rule-making which is relevant for the entire Union.<sup>72</sup>

### *7.3 Broad discretion*

The broad discretion of the ESM Board of Governors to decide how to assist a country that asks for it was criticized for lack of criteria, or set of goals limiting it, and for lack of accountability standards similar to those applying to EU agencies. The only way for a Member State to challenge such a decision is thus to refer the dispute to the CJEU.

By and large, the same criticism applies to the SSM, where the ECB enjoys very broad discretion.

### *7.4 Too high standards*

The ESM may impose on a member state suffering a financial crisis standards that may be too high for it to meet, thus being counter-productive.

SSM standards that may impose a too high threshold for small banks, particularly in economically weak countries. If small banks would not survive this arrangement, market competitiveness may be undermined, leaving only the strong, large banks in the game. Consumers may bear the price.

### *7.5 ECB's status*

In the ESMT context, critiques mentioned the lack of mechanisms for restraining the ECB by governments.<sup>73</sup>

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<sup>72</sup> FERRAN, Eilis, BABIS, Valia. *Supra*, note 56.

<sup>73</sup> MAJONE, Giandomenico. Rethinking European integration after the debt crisis. *Working Paper No. 3/2012*. London: The European Institute, UCL. [Online]. Available at: <http://>

Due to the SSM, the ECB now fulfills two functions, acting both as the liquidity supplier, in charge of monetary policy, and as supreme supervisor, thus enjoying substantive power of decision, bearing distributive implications for the economies of the member states. This fact empowers the ECB even beyond its former status, reinforcing this criticism. Moreover, despite formal denial,<sup>74</sup> in certain cases these two functions may bear conflicts of interests.<sup>75</sup>

### *7.6 Transparency*

EU authorities are subject to general rules on due process and transparency. Nevertheless, in the context of the ESMT and SSM commentators suggested that the general public accountability could have improved by assuming specific, extended transparency obligations on the institutions involved.<sup>76</sup>

## **8 Conclusion**

Comparison of major elements in the structure and functioning of the ESM, enacted as an emergency instrument, and the SSM, enacted after the peak of the financial crisis seems to have subsided, reflects that despite some improvements in the ‘democratic’ nature of the latter, compared to the former, both still share many non-democratic elements.

Already back in 1997 Scharpf<sup>77</sup> foresaw a potential conflict of interests between the strive for economic integration at EU level on the one hand, and national economic interests which do not correlate to it, on the other hand. He further noted that while the process of European integration imposes growing challenges on the economies of EU member states, it drastically and unnecessarily reduces the effectiveness of democratic self-determination at the national level, while at the higher, European level where action might be effective, demo-

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[www.ucl.ac.uk/european-institute/analysispublications/publications/WP3.pdf](http://www.ucl.ac.uk/european-institute/analysispublications/publications/WP3.pdf). On the other hand, the problems emanating from the necessity of ECB's President to work with nineteen governments instead of one (as is the case in the US) were mentioned

74 EUROPEAN CENTRAL BANK. *Establishing the Single Supervisory Mechanism*. 2013. [Online]. Available at: [http://www.ecb.europa.eu/press/key/date/2013/html/sp130129\\_1.en.html](http://www.ecb.europa.eu/press/key/date/2013/html/sp130129_1.en.html)

75 SPEYER, Bernhard. EU Banking Union: Right Idea, Poor Execution. *EU Monitor*, Deutsche Bank, DB Research, 4.9.2013. [Online]. Available at: [http://129.35.230.61/PROD/DBR\\_INTERNET\\_DEPROD/PROD000000000319670/EU+Banking+Union%3A+Right+idea,+poor+execution.PDF](http://129.35.230.61/PROD/DBR_INTERNET_DEPROD/PROD000000000319670/EU+Banking+Union%3A+Right+idea,+poor+execution.PDF)

76 See, for example, EVERSON, Michelle., & RODRIGUES, Frank. Crisis of governance: Can comitology theory help legitimise ECB/ESCB operations pp. 193–228; SCOTTO, Nicola. How does the financial crisis affect the independence of the European Central Bank? p. 347–390, both in: CHITI, Edoardo, MENENDEZ, Augustin Jose, TEIXEIRA, Gustavo (eds). *The European rescue of the European Union? ARENA report No. 3/12*. Oslo: University of Oslo, 2012. [Online]. Available at: <http://pure.au.dk/portal/files/69770796/RECON-report1912.pdf>

77 SCHARPF, Fritz. *Supra*, note 21.

cratic legitimacy is weaker or non-existent. Realizing the potential threat created by the combination of these two facts, he stressed the need to defend and protect the national regimes of social market economies against the legal compulsions of negative integration.<sup>78</sup>

At this time of crisis, the EU/EMU seems to be caught between EU institutions' pressure on decision makers to enhance market integration, and a growing political pressure by EU/EMU citizens to gain access to this decision-making process. While public's pressure for enhancing the democratic nature of the measures devised to pull out of the financial crisis seems to have borne some fruit by now, examination of recent regulation reflects that there is still a long way to go.

The Brexit may serve as a red light signaling that in the current unstable political atmosphere it might be better to stop, or slow down, the enhanced integration process for re-evaluation and start an intensified, open dialogue with EU citizens, further facilitating their involvement, or at least the involvement of their directly elected representatives: the EP and national parliaments, in the decision-making processes, to strengthen the sense of democratic legitimacy and the democratic characteristics of the mechanisms established. National sovereigns' effect on the process may be strengthened, for example, by enhancing mediation exercised by states' democratic systems between EU rules and peoples-as-citizens'.<sup>79</sup> Such mediation may reduce the sense of remoteness underlying the democratic deficit' feeling of EU citizens.

Otherwise, the seeds of non-satisfaction may continue to grow, further risking the EU/EMU alliance.

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78 SCHARPF, Fritz. *Supra*, note 38.

79 NICOLAIDES, Kalypso. *Supra*, note 14, p. 355.