# THE PRINCIPLE OF DEMOCRACY IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE

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**Abstract** This article seeks to explore the way in which the Court of Justice of the European Union ('CJEU') has interpreted and applied the principle of democracy. It examines first the democratization process upon which the EU has embarked since the adoption of the Treaty of Maastricht and how that transformation was a positive reaction to those voices arguing that the EU suffers from a 'democratic deficit'. Next, it is argued that the CJEU has understood the principle of democracy in a way which is respectful of the two sources of democratic legitimacy at EU level, namely the Member States and the peoples of Europe. Accordingly, that understanding of the principle of democracy is illustrated by some relevant examples taken from the case law of the CJEU and the European General Court ('EGC'). Those examples show that the CJEU has strived to protect the prerogatives of the European Parliament, the only political institution of the EU whose members have, since 1979, been elected for a term of five years by direct universal suffrage in a free and secret ballot. Yet, they also show that the principle of democracy is not limited to protecting parliamentary prerogatives. That principle, like all EU constitutional principles, pervades the whole of EU law and, as such, must be read in light of societal changes. As democracy within the EU is not limited to the participation by the European Parliament in the legislative process but also encompasses other forms of governance, in particular rule-making by administrative agencies and the achievement of consensus by social partners, it is for the EU judiciary to make sure that those other forms of governance remain as democratic as possible. This can be achieved, inter alia, by making sure that they enjoy sufficient representation or are subject to parliamentary control. Furthermore, the CJEU and the EGC also take into account new mechanisms which seek to strengthen the principle of democracy, such as the principle of transparency. In so doing, they aim to enhance the democratic legitimacy of the EU by providing sufficient means for EU citizens to hold their representatives accountable. Finally, it is contended that the principle of democracy, as interpreted by the CJEU, draws inspiration from national democracies. In so doing, the CJEU strives to place national and supranational democracies in a mutually reinforcing relationship.

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In *Utopia*, there is a passage where Raphael Hythloday describes to Thomas More the form of government practised on the Island of Utopia. What is particularly interesting about that passage is that certain democratic elements are identifiable in the Utopian form of government, such as the fact that the Prince is elected, albeit indirectly, by and from among Utopian citizens, that the power of the Prince is not unlimited and that he can be removed from power if he intends to enslave the people and that no matter affecting the general public can be decided upon unless it is thoroughly discussed first. The form of government described in *Utopia* stands in sharp contrast with the political reality in which Sir Thomas More lived and, tragically, died. But, as a statesman, humanist, and political philosopher, Sir Thomas More devoted a significant part of his life to reflecting upon the best way of limiting the 'evils of powers' for the greater good of mankind.[1]

Just as Sir Thomas More struggled to answer that question, five centuries later, the European Union ('EU') has, since its creation, faced a similar challenge: how can the power given to a supranational organization be limited in a democratic fashion for the greater good of its peoples? Unlike the author of *Utopia*, I do not, however, claim to describe a utopian form of government nor claim that the EU is a 'perfect democracy'. I have, instead, opted for a more modest approach that draws important lessons from the past. My purpose is, in particular, to explore how the European Court of Justice ('CJEU') has interpreted and applied the principle of democracy. To that end, my contribution is divided into four parts. First, I shall analyse the democratization process upon which the EU has embarked since the adoption of the Treaty of Maastricht and how that transformation was a positive reaction to those voices arguing that the EU suffers from a 'democratic deficit'. Second, I shall explain that the CJEU has understood the principle of democracy in a way that is respectful of the two sources of democratic legitimacy at EU level, namely the Member States and the peoples of Europe. In addition, democracy is seen by the CJEU as a dynamic concept combining constant features that have, since the birth of constitutionalism, formed part and parcel of that principle with new elements that seek to enhance the trust citizens have in the Union. Stated simply, the EU principle of democracy is imbued with elements of both 'continuity and change'. Third, that understanding of the principle of democracy is then illustrated by some

[1] See P Berglar, *Thomas More: A Lonely Voice Against the Power of the State* (Scepter Publishers 1999).

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relevant examples taken from the case law of the CJEU and the European General Court ('EGC'). Last, but not least, my contribution supports the contention that the principle of democracy, as interpreted by the CJEU, draws inspiration from national democracies. In so doing, the CJEU strives to place national and supranational democracies in a mutually reinforcing relationship.

## I. THE DEMOCRATIC TRANSFORMATION OF THE EU

In the early days of European integration, the Treaties were silent on the democratic legitimacy of the then European Economic Community. For Mancini and Keeling, there were at least four reasons why no reference was made to the concept of 'democracy'.[2] First, they posited that traditionally international organizations founded on treaties between States did not normally provide 'for much direct democracy in their decision-making apparatus'.[3] Second, at the outset the transfer of national powers to the Community needed, for political reasons, to remain under the control of the Member States. The setting up of a parliamentary assembly with real legislative powers would have made it much more difficult to keep control of that transfer. Third, in accordance with the European model of parliamentary democracy, the executive may—de facto—often impose its will on the parliament. Given that the original institutional design of the EU made it impossible to recreate that model, the authors of the Treaty of Rome believed that the role played by the parliamentary assembly should be limited to that of a consultative body. And fourth, the early empowerment of the European Parliament would have had a negative impact on the hard-won consensus achieved within the Council.

Unsurprisingly, the absence of any reference to the concept of 'democracy' led some scholars to argue that the Community suffered from a 'democratic deficit'.[4] Those criticisms have not died down with time. On the contrary, for some scholars, they still hold true.[5] As Craig explains, the 'democratic deficit' argument revolves around four main criticisms.[6] First, there appears to be 'a disjunction between power and electoral accountability', given that electoral preferences are not translated into reshaping the policy agenda: at EU level, neither the European Council nor the Council nor the Commission—all of

[2] F Mancini and DT Keeling, 'Democracy and the European Court of Justice' (1994) 57 ModLRev 175, 176–7.
[3] ibid.
[4] But see A Moravcsik, 'Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis' (2002) 39 JComMarSt 336–63 (who argues that the EU does not suffer from a fundamental democratic deficit, given that '[a]bove all, the democratic legitimacy of the EU rests on the fact that nation-states remain influential, democratic and technically competent'). In a similar vein, see also G. Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 ELJ 5.
[5] See A Follesdal and S Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JComMarSt 533.
[6] P Craig, 'Integration, Democracy, and Legitimacy' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 13, 30–1.

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which play a part in policy-making—can be voted out of office by the people.[7] Thus, the EU is said to suffer from a lack of 'input legitimacy'. In the same way, the Commission, the European Central Bank and EU agencies play an important role in the governance of the EU without being subject to 'majoritarian' (ie elective) politics. In other words, they are independent and 'non-majoritarian' entities whose exercise of power does not seem to fit well with the traditional understanding of representative democracy.[8] Second, '[t]ransfer of competence to the EU enhances executive power at the expense of national legislatures.'[9] Indeed, a coalition government facing parliamentary opposition may sometimes decide to transfer power to the EU in the hope of pushing forward its own political preferences. Indeed, the same strategy may be adopted by any national government when having to take unpopular decisions. Third, the delegation of powers to the Commission (comitology) is often preferred to more regular channels of democratic decision-making. Before 2009, the expansion of the powers of the European Parliament was not accompanied by an equivalent role in supervising the way in which the Commission exercised its executive functions. Fourth, complaints were raised in relation to the lack of transparency and to the complexity of the EU decision-making apparatus. Finally, it is said by some commentators that the EU suffers from a constitutional asymmetry since the pursuit of economic objectives outweighs the taking into account of social concerns.

Those criticisms were taken into account by the authors of the successive amendments to the Treaties who have increasingly paid attention to the incorporation of the concept of democracy into the EU legal fabric. Arguably, with the one exception of 'the disjunction between power and electoral accountability', referred to above, these Treaty amendments have largely addressed those criticisms. However, that did not happen right away. It was not until the adoption of the Treaty of Maastricht that the term 'democracy' found its way into the Treaties'.[10] Article F of the 1992 Treaty on the European Union referred to 'democracy' as a principle on which the Union is founded and which is common to the Member States.[11] The Treaty of Amsterdam confirmed this role of the principle of democracy in an identically-worded

[7] See Follesdal and Hix (n 5) 547.

[8] See S Bredt, 'Prospects and Limits of Democratic Governance in the EU' (2011) 17 ELJ 35, 39–41.

[9] See Craig (n 6) 30.

[10] A von Bogdandy, 'The European Lesson for International Democracy : The Significance of Articles 9 to 12 EU Treaty for International Organizations' (2011) Jean Monnet Working Paper Series, No 02/11, available at <www.JeanMonnetProgram.org>.

[11] Art F of the 1992 Treaty on the European Union stated that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.' There was also a reference to 'democracy' contained in the 5th Recital of the Preamble, which stated that the Member States confirmed 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.

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ex-Article 6(1) EU.[12] Currently, Articles 9 to 12 TEU give expression to the principle of democracy in the EU legal order. 'These articles are based on the main positions advanced in what is a 20 years old debate.'[13]

In addition to formally recognizing democracy as a fundamental principle of EU constitutionalism, the authors of the Treaties also sought gradually to empower the European Parliament. As Article 10(2) TEU states: EU democracy rests on developing representative democracy by giving greater powers to the European Parliament.[14] As Craig points out, 'it is not self-evident that the [European Parliament] has less power over legislation than do national parliaments.'[15] Some exceptions notwithstanding, EU law accords the European Parliament co-equal status in the legislative process with the Council. With the entry into force of the Lisbon Treaty, the co-decision procedure, renamed 'the ordinary legislative procedure', has been extended to new areas such as agriculture, the common commercial policy, services, asylum and immigration, the structural and cohesion funds, and the creation of specialized courts.[16] However, unlike national parliaments, the European Parliament has no right of legislative initiative. Nor are its members elected strictly in accordance with the principle of proportional representation.

Besides, the Lisbon Treaty sought to strengthen the role of national parliaments so as to prevent national executives from deciding to transfer powers to the EU as a means of avoiding internal opposition. That is why Article 12 TEU provides that national parliaments are entrusted with ensuring that the EU complies with the principle of subsidiarity.[17] That is also why EU law allows room for parliamentary monitoring—when provided for by national constitutions—of national governments when they act as members of the European Council or of the Council.[18]

[12] Art 2 TEU largely reproduces ex-art 6(1) EU, replacing nonetheless the term 'principle' with the term 'value'.

[13] von Bogdandy (n 10) 7. See generally K Lenaerts and P Van Nuffel, *European Union Law* (3rd edn, Sweet & Maxwell 2011) 735–49.

[14] A good example of this is the role played by the European Parliament in countering the European debt crisis, which required the adoption of important decisions at EU level. Notably, the European Parliament acted as co-legislator in relation to four Regulations forming part of the 'Six-Pack' package. See 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, [2011] OJ L 306/1; 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, [2011] OJ L 306/8; 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, [2011] OJ L 306/12, and 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, [2011] OJ L 306/25.

[15] See Craig (n 6) 31–2.

[16] ibid.

[17] See Protocol (No 1) on the role of National Parliaments in the European Union and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[18] See, in this regard, art 10(2) TEU which states that 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments,

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In relation to delegated law-making, it is worth noting that, in 2006, by means of an amendment to the Second Comitology Decision the Council established the 'regulatory procedure with scrutiny' ('RPS').[19] According to that procedure, the European Parliament was empowered to block a draft delegated act amending non-essential elements of a basic act adopted pursuant to the co-decision procedure, provided that its decision was justified on one of the following four grounds: the draft delegated act was *ultra vires*; it was incompatible with the aim or the content of the basic act; it failed to comply with the principle of subsidiarity; or it was in breach of the principle of proportionality.[20] Arguably, the supervisory role of the European Parliament amounted to an *ex ante* control of the legality of the delegated act in question,[21] as it had no powers to base its intervention on political considerations. This was an important limitation that did not apply to the Council when endorsing a negative opinion of the RPS committee. That is why the authors of the Lisbon Treaty decided to remove that limitation by laying down a 'political safeguard of democracy'.[22] The new Article 290 TFEU empowers the Commission to adopt 'delegated acts', which are defined as 'non-legislative acts of general application to *supplement* or *amend* certain non-essential elements of the legislative act'.[23] In relation to those acts, which are to be distinguished from 'implementing acts',[24] the European Parliament plays an important

themselves democratically accountable either to their national Parliaments, or to their citizens'. In this regard, it is worth noting that the 2011 European Union Act lists a series of EU decisions the approval of which is subject either to referendum, primary legislation or parliamentary approval.

[19] See Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, [2006] OJ L 200/11 (the amended 'Second Comitology Decision'). Article 12 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, [2011] OJ L 55/13, repeals Decision 1999/468/EC. This means that the RPS no longer applies, notwithstanding the fact that the effects of the latter 'shall be maintained for the purposes of existing basic acts making reference thereto'.

[20] See art 5a of Decision 1999/468/EC.

[21] However, the European Parliament had only three months to exercise its veto. If it failed to do so, its only option was to bring an action for annulment against the delegated act in question. See eg Case C-355/10 *Parliament v Council*, judgment of 5 September 2012, not yet reported, para 22.

[22] See R Schütze, '"Delegated" Legislation in the (new) European Union: A Constitutional Analysis' (2011) 74 MLRev 661, 663.

[23] ibid 683. The author notes that art 290 TFEU has codified the 'non-delegation doctrine'. In Case C-355/10 *Parliament v Council* (n 21) paras 64–65, the CJEU explained the rationale underpinning that doctrine. It held that '[t]he essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated', since '[they] require political choices falling within the responsibilities of the European Union legislature'.

[24] See art 291(2) TFEU which states that '[w]here uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 [TEU], on the Council'. Accordingly, in relation to 'implementing acts', the European Parliament has no direct participation. Its role is limited to laying down the general guidelines with which the Commission and, as the case may be, the Council must comply. In this regard, see the new Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the

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supervisory role.[25] Standing on an equal footing with the Council, it may take back the powers delegated to the Commission or, as the case may be, exercise a 'legislative veto'. Most importantly, in exercising those powers, the European Parliament is not limited to an *ex ante* control of the legality of the draft delegated act in question, but may veto it for political reasons.[26] As Schütze stresses, '[f]rom a democratic point of view, [that Treaty provision] represents a constitutional revolution'.[27]

Furthermore, the principle of transparency contributes to ensuring the proper functioning of democracy.[28] As the CJEU explained in *Volker und Markus Schecke*, that principle 'enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system'.[29] Since the 1990s, efforts have been made to implement the principle of transparency within the EU legal order. This has been done in two ways,[30] first by granting citizens a right of access to documents held by EU institutions and second by shedding some light on the traditionally opaque EU decision-making process ('the principle of openness'). It is worth noting that the right of access to documents not only serves to enhance the effective application of the principle of democracy, it also operates as a prerequisite to the effective exercise of the rights of defence in administrative proceedings in fields such as competition law. Both the right of access to documents and openness in decision-making were formally introduced by the Treaty of Amsterdam. As to the 'principle of openness', as a first step, the Treaty of Amsterdam modified Article 1 TEU so as to make clear that the EU institutions are bound to take their decisions 'as openly as possible'. The reaction of the EU political institutions to that Treaty reform was to amend their Rules of

Commission's exercise of implementing powers, [2011] OJ L 55/13. Needless to say, some scholars have already pointed out that, in some cases, it will be very difficult, if not impossible, to draw a clear-cut distinction between those two categories of non-legislative acts. See P Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation' (2011) 36 ELR 671; S Peers and M Costa, 'Accountability for Delegated and Implementing Acts after the Treaty of Lisbon' (2012) 18 ELJ 427. In Case C-427/12 *Commission v Parliament and Council* (pending), the CJEU will be asked to rule on this delicate issue.

[25] For Craig (n 24) 672, whilst delegated acts are 'quasi-legislative' in nature, implementing acts are 'purely executive'. Arguably, from a democratic perspective, the fact that the powers of oversight of the European Parliament are greater in relation to delegated acts than in relation to implementing acts makes sense.

[26] Perhaps, this is the reason why Craig argues that '[the European Parliament] is accorded an important power that it did not have hitherto'. See P Craig, 'The Role of the European Parliament under the Lisbon Treaty' in S Griller and J Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 109, 115.

[27] See Schütze (n 22) 685.

[28] Lenaerts and Van Nuffel (n 13) 746 ff.

[29] Joined Cases C-92/09 and 93/09 *Volker und Markus Schecke* [2010] ECR I-11063, para 68.

[30] See S Prechal and ME De Leeuw, 'Transparency: A General Principle?' in U Bernitz, J Nergelius and C Cardner (eds), *General Principles of EC Law in a Process of Development*, European Monograph 62 (Kluwer 2008) 201.

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Procedure so as to allow outside access to their deliberations.[31] Whilst this improvement was an important step, it nevertheless had a limited impact,[32] since some stages of the decision-making process 'are still shrouded in secrecy'.[33] For example, the Council is only obliged to meet in public in relation to legislative acts.[34]

More recently, the authors of the Lisbon Treaty introduced some changes which foster transparency in relation to the horizontal and vertical allocation of powers.[35] Horizontally, the Lisbon Treaty streamlines and simplifies the EU decision-making process by harmonizing the way in which legislative acts are generally adopted.[36] Some exceptions notwithstanding, EU legislative acts are adopted in accordance with the ordinary legislative procedure. Vertically, transparency has been enhanced in three ways. First, the Lisbon Treaty makes explicit mention of the corollary of the principles of conferral and subsidiarity—ie the fact that all competences not expressly conferred on the Union continue to be exercised at Member State level.[37] Second, it includes a clear categorization of the various Union competences (exclusive, shared and supporting).[38] Third, this categorization is accompanied by an enumeration of the different EU competences of the Union and the Member States.[39]

In addition, Article 11(4) TEU provides that '[n]ot 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.' In accordance with the procedure set out in Article 24 TFEU, the European Parliament and the Council have adopted a regulation[40] implementing that provision. As of 1 April 2012, the citizens' initiative allows one million citizens from at least a quarter of the EU Member States to ask the European Commission to propose legislation in areas that fall within its competence. The organizers of a citizens' initiative—a citizens' committee composed of at least seven EU citizens entitled to vote in European Parliament elections and resident in at least seven different Member States—have one year to collect the necessary support. Organizers of successful initiatives are invited to participate in a hearing at the European Parliament and the Commission

[31] This obligation is now laid down in art 15(3) TEU.

[32] See ME De Leeuw, 'Openness in the Legislative Process in the European Union' (2007) 32 ELRev 295.

[33] See Prechal and De Leeuw (n 30) 207.

[34] See art 16(8) TEU.

[35] See K Lenaerts and N Cambien, 'The Democratic Legitimacy of the EU after Lisbon' in J Wouters, L Verhey and P Kiiver (eds), *European Constitutionalism beyond Lisbon* (Intersentia 2009) 185.

[36] Lenaerts and Van Nuffel (n 13) 741.

[37] See art 5(2) TEU which provides that '[c]ompetences not conferred upon the Union in the Treaties remain with the Member States'.

[38] See art 2 TFEU.

[39] See arts 3–6 TFEU.

[40] See Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L 65/1.

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has three months to examine the initiative and decide what action to take. A number of initiatives have already been registered of which the first, submitted symbolically on Europe Day, 9 May 2012, was Fraternité 2020, whose objective is to enhance EU exchange programmes such as Erasmus and the European Voluntary Service in order to contribute to a united Europe on the basis of solidarity among citizens.

As to the constitutional asymmetry between economic and social objectives of the EU legal order, new provisions introduced by the Lisbon Treaty, notably Article 9 TFEU,[41] force the EU political institutions to take into account the latter objectives when defining and implementing all of their policies and activities.[42] In the same way, Article 11(1) TEU states that the EU 'shall give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action'. This Treaty provision provides a good avenue for civil organizations to raise social issues and thereby to influence policy-makers.

## II UNDERSTANDING DEMOCRACY IN A SUPRANATIONAL CONTEXT

As Craig notes, the debate over the existence of a democratic deficit can be encapsulated by the metaphor that he refers to as 'the different views of the cathedral'.[43] For him, whether one considers that the EU no longer suffers from a democratic deficit will depend on the factors which one prioritizes when assessing the EU's democratic legitimacy. One may place greater emphasis on 'input democracy' and thus argue that a democratic deficit still exists given that citizens cannot directly influence the EU political agenda and that not all EU political institutions are subject to electoral accountability.[44]

Conversely, one may adopt a different view of the concept of democracy and accordingly posit that the EU system of governance contains sufficient checks and balances which prevent the exercise of corrupt and arbitrary power at EU level.[45] One can also choose to give more weight to 'output

[41] See also art 2 TEU ('solidarity' as one of the values on which the European Union is founded) and art 3(3) TEU ('combating social exclusion', 'social justice', 'social protection', 'equality between women and men', 'solidarity between generations'and 'protection of the rights of the child'). See also art 31 of the Charter.

[42] See the Opinion of AG Cruz Villalón in Case C-515/08 *dos Santos Palhota and Others*, delivered on 5 May 2010, not yet reported, para 51 (defining art 9 TFEU as a 'cross-cutting' social protection clause).

[43] See Craig (n 6) 28–9.

[44] See Follesdal and Hix (n 5). In addition, some scholars posit that elections for the European Parliament do not really focus on EU policy. Hence, when citizens cast their votes, they do so following the logic of national politics. Arguably, this lack of perception of the elections for the European Parliament as a recurrent expression of representative democracy, allowing voters to express dissatisfaction with EU policies, might explain, at least to some extent, why referenda on Treaty changes are being used to that effect, leading inter alia to the negative outcome in the French and Dutch referenda held in 2005 on the Treaty establishing a Constitution for Europe. See S Hix and M Marsh, 'Punishment or Protest? Understanding European Parliament Elections' (2007) 69 Journal of Politics 495; and Lenaerts and Van Nuffel (n 13) 743.

[45] See Moravcsik (n 4).

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democracy',[46] according to which democracy at EU level, in the sense of popular consent, is largely ensured by the effectiveness of its policies which helps to confer legitimacy on its actions and thereby overcome any flaws resulting from the limited participation of elected representatives in the decision-making process.

Regardless of where one stands in relation to that long-standing debate, comparisons with national polities should, in any case, be subject to reservations as the EU does not have a fully-formed *demos* that allows for collective self-determination. It follows that the EU model of democracy cannot be measured by reference to traditional nation-State standards. Instead, I would suggest the adoption of the approach suggested by von Bogdandy, for whom the EU rests on a 'dual structure of democratic legitimacy', which is composed not only of the body of EU citizens collectively but also of the various individual peoples of Europe organized in and by their national constitutions. Such a dual structure does not seek to replace the democratic structures of the Member States; it attempts to supplement them.[47]

Democracy in a multilevel system of governance must be driven by a mutually reinforcing relationship, whereby both sources of democratic legitimacy complement each other. EU democracy is indeed composite in nature. On the one hand, since the EU legal order vests EU citizens with new rights that are judicially enforceable even against their own Member State, those citizens must participate and be represented in the policy decisions affecting those rights. Thus, the EU must embrace a conception of democracy which is 'individualistic' in that it guarantees representation, participation in decision-making and debate in accordance with the values that are inherent in the status of Member State nationals as citizens of the Union. On the other hand, EU law must also reassure the Member States that, through their national governments, they have a role to play in European integration. This means not only that they have a 'voice' in the EU decision-making process but also that EU law is respectful of democracy as protected by national constitutions.[48] As an essential component of the national identity of Member States, the democratic arrangements provided for by national constitutions are not to be undermined by EU law.[49] For national constitutional courts, the EU's commitment to respecting national democracies is an essential element without which European integration would come to an immediate halt. In this regard, it

[46] See generally F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999).

[47] von Bogdandy (n 10) 11.

[48] Lenaerts and Van Nuffel (n 13) 738–9.

[49] The same applies in relation to democratically elected regional or local officials. See, in this regard, K Lenaerts and N Cambien, 'Regions and the European Court: Giving Shape to the Regional Dimension of the Member States' (2010) 35 ELR 609. See also K Lenaerts, 'Federalism in 3-D' in E Cloots, G De Baere and S Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 13.

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is worth quoting in full a passage of the ruling of the *Bundesverfassungsgericht* in the *ESM case*:

> As representatives of the people, the elected Members of the German *Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental [governance]. In its openness to international cooperation, systems of collective security and European integration, the Federal Republic of Germany binds itself not only legally, but also with regard to fiscal policy. Even if such commitments assume a substantial size, parliament's right to decide on the budget is not necessarily infringed in a way that could be challenged with reference to Article 38 (1) of the Basic Law. Rather, the relevant factor for adherence to the principles of democracy is whether the German *Bundestag* remains the place in which autonomous decisions on revenue and expenditure are made, including those with regard to international and European liabilities . . . If essential budget questions relating to revenue and expenditure were decided without the mandatory approval of the German *Bundestag*, or if supranational legal obligations were created without a corresponding decision by free will of the *Bundestag*, parliament would find itself in the role of mere subsequent enforcement and could no longer exercise its overall budgetary responsibility as part of its right to decide on the budget.[50]

In addition, democracy is a dynamic concept which evolves hand in hand with societal changes. Whilst some components of democracy are always constant, others have appeared more recently (eg the birth of non-majoritarian agencies, the democratization of alternative means of policy-making and the principle of transparency). This shows that EU democracy must be regarded as incorporating elements of both 'continuity and change'. I refer to 'continuity' because some institutional, substantive, and procedural elements cannot be detached from a form of government without depriving it of its democratic character. I refer to 'change' because no form of government can ever convincingly argue that its democracy is flawless and immutable, as new challenges may appear to which the principle of democracy must adapt.

## III. THE PRINCIPLE OF DEMOCRACY AND THE EUROPEAN COURT OF JUSTICE

### *A. The Principle of Representative Democracy: Ensuring Continuity*

As mentioned above, the authors of the Treaties dismissed the idea of creating a 'Westminster type' of supranational assembly to which Member States would directly transfer competences. Instead, they opted for an atypical institutional framework under which legislative and executive functions are shared among

[50] BVerfG, 2 BvR 1390/12 vom 12.9.2012, Absatz-Nr. (1-248), para 195. It is also worth recalling that, in its *Lisbon Case*, the *Bundesverfassungsgericht* expressed the view that the European Parliament is not 'the representative body of the [European] people' since its members are not elected in accordance with a strict rule of democratic equality, ie the 'one (wo)man one vote' principle. See BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1-421), paras 280–288.

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the different political institutions of the EU. For that horizontal allocation of powers to work properly, '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties', ie each institution must comply with the principle of institutional balance.[51] That means, for example, that neither the Council nor the Commission may encroach upon the powers conferred on the European Parliament by the Treaties. It also means that the European Parliament must respect the prerogatives of the Council and of the Commission. Stated simply, in light of the principle of institutional balance, each institution must act in compliance with the system of 'check and balances' set out in the Treaties.

As the European Parliament is the only political institution of the European Union whose members have, since 1979, been 'elected for a term of five years by direct universal suffrage in a free and secret ballot', the judicial protection of its prerogatives is of paramount importance for the purposes of complying not only with the principle of institutional balance but also with the principle of democracy. Indeed, cases such as *Roquette Frères v Council*,[52] *Les Verts*,[53] *Chernobyl*,[54] and *Titanium Dioxide*[55] demonstrate that the CJEU has endeavoured to protect the powers that the Treaties have conferred on the European Parliament. In so doing, the CJEU has not only invoked the principle of institutional balance,[56] it has also sought to enhance 'the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly'.[57] It is worth noting that with each reform of the Treaties on which the Union is founded, the European Parliament has steadily gained legislative power. Conversely, the number of cases in which the European Parliament has brought an action for annulment seeking to protect its prerogatives has diminished in an inversely proportionate fashion.[58] This may be explained by the fact that, since the co-decision procedure—restyled as the 'ordinary legislative procedure'—is now the standard legislative procedure for passing legislation at EU level,[59] there are fewer conflicts regarding the appropriate choice of the legal basis in the

[51] Art 13(2) TEU.
[52] Case C-138/79 *Roquette Frères v Council* [1980] ECR 3333.
[53] Case 294/83 *Les Verts v Parliament* [1986] ECR 1339.
[54] Case C-70/88 *Parliament v Council* [1991] ECR I-2041.
[55] Case C-300/89 *Commission v Council* [1991] ECR I-2867.
[56] See art 13(2) TEU.
[57] Case C-138/79 *Roquette Frères v Council* (n 52) para 33.
[58] See T Tridimas and G Gari, 'Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001–2005)' (2010) 35 ELRev 131, 172 (who point out that '[i]n the 1990s, the European Parliament was an active litigant following a tactical litigation policy under which it challenged practically any policy measure which allegedly breached its prerogatives even if it agreed with its substantive provisions. But as successive [T]reaty amendments increased its legislative powers, the need to rely on litigation to influence the legislative process steadily declined and the Parliament now finds itself much more often in the role of the defendant than in the role of the applicant').
[59] See art 294 TFEU.

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Treaties for such legislation since that choice only rarely affects the legislative procedure to be followed.

Obviously, one cannot infer from this general tendency that the European Parliament no longer brings actions for annulment against acts adopted by the Council on the ground that the latter erred in choosing the legal basis for such an act. For example, changes brought about by Treaty amendments that result in the empowerment of the European Parliament in areas in which it previously had no say may occasionally give rise to litigation. Thus, by bringing judicial proceedings in such cases, the European Parliament is, in effect, asking the CJEU to define the scope of its new powers. *European Parliament v Council* ('*Listing Procedure Case*') illustrates this point.[60]

### *1. Institutional balance, parliamentary intervention and limitations on the exercise of fundamental rights*

In that case, the European Parliament brought an action for annulment against Council Regulation No 1286/2009[61] amending Council Regulation No 881/2002.[62] The latter Regulation, which was adopted on the basis of ex-Articles 60 EC, 301 EC and 308 EC, implemented Common Position 2002/402/CFSP which, in turn, implemented UN Security Council Resolution No 1390 (2002) by imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban. However, in *Kadi*,[63] the CJEU annulled Council Regulation No 881/2002 on the ground that the Council had failed to comply with the fundamental rights of the defence—in particular, the right to be heard—of the persons who were 'blacklisted'. Accordingly, by adopting Regulation No 1286/2009, the Council sought to give effect to the *Kadi* judgment. It set out a listing procedure that would, in its view, comply with the standards of fundamental rights protection required by primary EU law.

At this stage, it is worth noting that Regulation No 1286/2009 was adopted on 22 December 2009, ie after the entry into force of the Lisbon Treaty. Since the latter repealed Articles 60 EC and 301 EC, Regulation No 1286/2009 was

[60] Case C-130/10 *Parliament v Council*, judgment of 19 July 2012, not yet reported.

[61] Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, [2009] OJ L 346/42.

[62] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, [2002] OJ L 139/9.

[63] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

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adopted on the basis of a new Treaty provision, namely Article 215(2) TFEU,[64] which allows the Council, acting by a qualified majority, to implement a CFSP Decision (formerly, a Common Position) by 'adopt[ing] restrictive measures . . . against natural or legal persons and groups or non-State entities'.

For the European Parliament, the successor of ex-Articles 60 EC, 301 EC and 308 EC was not Article 215(2) TFEU but Article 75 TFEU. Unlike Article 215 (2) TFEU in relation to which the European Parliament plays no role, Article 75 TFEU states that '[to prevent and combat] terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.' The European Parliament put forward two arguments in support of its application. First, it argued that since the new substantive provisions of Regulation No 1286/2009 were limited to setting out a listing procedure, its content was in the nature of a 'framework for administrative measures' as provided for by Article 75 TFEU. Moreover, it argued that Regulation No 1286/2009 aimed at combating terrorism and its financing, ie an objective that does not fall within the CFSP but within the Area of Freedom, Security and Justice ('AFSJ'). Second, in light of the general scheme of the Treaties, the European Parliament argued, in essence, that the Treaties oppose the adoption of measures having a negative impact on the internal market or adversely affecting the fundamental rights of the persons concerned, in so far as those measures are adopted without its intervention. Subjecting those measures to parliamentary scrutiny, as was the case when the Council had recourse to ex-Article 308 EC,[65] would preserve the democratic character of the European Union.

However, the CJEU rejected both arguments. As to the first argument, it observed that the decision-making procedures set out in Articles 75 TFEU and 215(2) TFEU were incompatible and thus it was not possible for the two Treaty provisions to be cumulated in order to serve as a dual legal basis for Regulation No 1268/2009.[66] Next, the CJEU examined the relationship between ex-Articles 60 EC, 301 EC and 308 EC and Articles 75 TFEU and 215 TFEU. In that regard, it found that the successor of ex-Articles 60 EC and 301 EC combined is Article 215(1) TFEU, as the latter enables the Council to adopt trade and financial embargoes against third countries. Article 215(2) TFEU is also the successor of ex-Articles 60 EC, 301 EC and 308 EC combined, given that it empowers the Council to adopt restrictive measures against natural or legal persons and groups or non-State entities not linked to the governing regime

[64] That Treaty provision is located in Part Five of the TFEU entitled 'The Union's External Action'.

[65] Under ex-art 308 EC, the European Parliament had to be consulted.

[66] Case C-130/10 *Parliament v Council* (n 60) para 49.

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of a third country. By contrast, Article 75 TFEU has nothing to do with the interruption or reduction of economic relations with one or more third countries. Rather, its scope is limited to laying down, for the purposes of preventing or combating terrorism, the legal basis for a framework for administrative measures with regard to capital movements and payments. Although the CJEU recognized that the combating of terrorism could be qualified as an objective falling within the AFSJ,[67] it also found that, given the obvious link with international peace and security,[68] such an objective equally falls within the CFSP. That being so and given that the Treaty provisions on the External Action of the Union aim to give effect to the CFSP,[69] Article 215(2) TFEU could be relied upon with a view to adopting restrictive measures against natural or legal persons and groups or non-State entities associated with terrorist activities. As to the second argument, the CJEU held that 'it is to be noted that the duty to respect fundamental rights is imposed, in accordance with Article 51 (1) of the Charter . . ., on all the institutions and bodies of the Union'.[70] For the CJEU, the fact that the authors of the Lisbon Treaty decided to confer a more limited role on the European Parliament with regard to the EU's action under the CFSP does not mean that fundamental rights are left unprotected. On the contrary, all EU institutions are equally bound to honour the mandate laid down in Article 51(1) of the Charter. Accordingly, after noting that the Council had met the conditions for having recourse to Article 215(2) TFEU, the CJEU dismissed the application brought by the European Parliament.

It follows from the *Listing Procedure Case* that the European Parliament does not have a say when, in accordance with Article 215(2) TFEU, the EU adopts Regulations containing restrictive measures against natural or legal persons and groups or non-State entities associated with terrorist activities. However, the exclusion of the European Parliament from the decision-making process does not mean that no account is taken of the principle of democracy. On the contrary, by upholding the principle of institutional balance which militated in favour of protecting the prerogatives of the Council, the CJEU is paying due homage to representative democracy as defined in the Member States.[71] In order to preserve the role of 215(2) TFEU as an instrument at the service of the CFSP, the principle of democracy must operate at national level.[72]

Thus, where the constitutional law of a Member State requires express parliamentary consent in order for measures limiting the exercise of

[67] See art 3(2) TEU.
[68] See arts 21(2)(c) TEU and 43(1) TEU.
[69] In this regard, the CJEU noted that, unlike art 75 TFEU, art 215(2) TFEU creates a 'bridge' between decisions taken under the CFSP and EU restrictive measures. See Case C-130/10 *Parliament v Council* (n 60) para 47.
[70] ibid para 83.
[71] Indeed, as art 10(2) TEU states, 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens'.
[72] Lenaerts and Van Nuffel (n 13) 742.

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fundamental rights to be adopted, the executive of that Member State must—before approving a draft CFSP decision and a draft Regulation to be adopted on the basis of Article 215(2) TFEU which both contain restrictive measures directed against persons associated with terrorist activities—first obtain such consent.

This approach is entirely consistent with the ruling of the UK Supreme Court in *Ahmed et al v HM Treasury*, one of the first judgments ever delivered by that Court.[73] In that case, two individuals challenged Order No SI 2006/2952 of the Treasury ('AQO'), which implemented a series of UN Security Council Resolutions requiring the freezing of their assets on the ground that they were regarded by the UN Sanctions Committee as being associated with the Al-Qaida network and the Taliban. They argued that the AQO was *ultra vires*, since, by not subjecting their designation to judicial review, it had derogated from the right of access to justice without express parliamentary consent. The UK Supreme Court agreed with the appellants. At the outset, it noted that the UN Act of 1946 did not authorize the executive to adopt such restrictive measures against individuals. Next, it went on to stress that common law had long recognized the right of access to justice as a fundamental component of the rule of law. By relying on the principle of legality,[74] the UK Supreme Court ruled that the right of access to justice could only be overridden by clear parliamentary wording. Moreover, referring to the judgment of the CJEU in *Kadi*, the UK Supreme Court held that the fact that the AQO sought to implement UN Security Council Resolutions did not authorize the executive to depart from that basic principle of UK constitutional law. In summary, it follows from *Ahmed et al v HM Treasury* that, in the UK, 'restrictions upon individual rights always need Parliament's express consent'.[75]

### *2. Judicial scrutiny and parliamentary independence*

During the ceremonies surrounding the State Opening of Parliament, the official known as Black Rod is in charge of summoning the Commons to attend the Queen's Speech. With a solemn pace, he walks from the House of Lords to the House of Commons. Before he reaches the doors of the lower House, the doors are closed so that he cannot enter the House of Commons. Black Rod then knocks on the doors three times before he is finally allowed to enter the House. This ritual, which goes back to medieval times, symbolizes the fact that the Commons, as representatives of the British people, are independent from the Monarch. It also stresses the 'sanctity' of the House as a space where

[73] *Ahmed et al v HM Treasury* [2010] UKSC 2 (SC).

[74] *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131.

[75] A Johnston and E Nanopoulos, Case Comment: 'The new UK Supreme Court, the separation of powers and anti-terrorism measures' (2010) 69 Cambridge Law Review 217, 220.

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representative democracy takes concrete shape and which, as such, must be free from all external interferences.

In the EU, the European Parliament is similarly immune to external interference. In particular, its internal management is fully independent. Article 232 TFEU states that the European Parliament adopts its own Rules of Procedure, acting by the majority of its Members.[76] If doubts arise regarding the interpretation or application of those Rules, Rule 211 provides that the President may refer the matter to the relevant committee for examination. If the existing rules suffice to clarify the matter, the committee forwards its interpretation to the President who shall inform the European Parliament at its next part-session. Should the interpretation of the committee be uncontested, it is adopted by the European Parliament and appended in italics as an explanatory note to the appropriate Rule or Rules. Conversely, should a political group or at least 40 Members contest the committee's interpretation, the matter shall be put to the vote of the European Parliament, acting by majority of its Members. In addition, 'interpretations shall constitute precedents for the future application and interpretation of the Rules concerned'.

In this regard, an interesting question arises as to whether the CJEU should defer to the determinations of the European Parliament when the latter has interpreted its own Rules of Procedure and if so, to what extent. On the one hand, one could argue that second-guessing the way in which the European Parliament interprets its own Rules of Procedure constitutes a threat to its independence. On the other hand, one might also contend that, in the absence of any judicial control, incumbent political majorities would be free to interpret those Rules in an arbitrary fashion, so as to prevent political minorities from participating properly in deliberations. That question was precisely the crux of the dispute in *Martinez v Parliament*.[77] The facts of the case are as follows: with a view to obtaining the administrative, financial and parliamentary privileges which are accorded to political groups, several MEPs decided to create a 'Groupe Technique des deputés indépendants (TDI)', whilst making clear that they did not share any political affinities. However, the Presidents of the other political groups raised objections before the Committee on Constitutional Affairs on the ground that the TDI did not comply with Rule 30 of the Rules of Procedure, given that its Members had openly stated that they did not share any political affinities. In an interpretative note, the Committee on Constitutional Affairs agreed with that interpretation of Rule 30. By decision of 14 September 1999 (the 'contested decision'), the European Parliament ratified that interpretative note and declared the non-existence of the TDI with retroactive effect on the ground of failure to comply with Rule 30.

[76] The latest version of the Rules of Procedure can be found at the website of the European Parliament: <http://www.europarl.europa.eu/aboutparliament/en/00a4c9dab6/Rules-of-procedure.html>.

[77] See Case T-222/99 *Martinez and Others v Parliament* [2001] ECR II-02823 (confirmed on appeal by order of the CJEU in Case C-486/01P *Front National v Parliament* [2004] ECR I-6289).

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Considering that the European Parliament's decision had adversely affected their legal position as MEPs, Mr Martinez and other former members of the TDI brought an action for annulment against that decision.

At the outset, the European General Court ('EGC', formerly the Court of First Instance) examined whether the action for annulment was admissible. It held that the contested decision was not an act confined to the internal organization of the work of the European Parliament as that decision adversely affected the conditions under which the parliamentary functions of the MEPs concerned were exercised.[78] On the contrary, the MEPs concerned were, above all, 'representatives of the peoples of the States brought together in the [EU]' and, as such, had to be regarded as third parties for the purposes of the contested decision. The EGC also held that the applicants enjoyed *locus standi* as the contested decision was not limited to providing a general and abstract interpretation of Rule 30, it also contained a declaration stating that the TDI was non-existent *ex tunc* for failure to comply with that provision.[79]

As to the substance, the EGC dismissed the arguments put forward by the applicants. In so doing, it was first called upon to interpret the concept of 'political affinity'. Owing to its subjective nature, that concept had to be interpreted broadly, ie 'as having in each specific case the meaning which the Members forming themselves into a political group under Rule [30] intend to give to it, without necessarily openly so stating'.[80] In addition, in light of the principle of the independent mandate, the fact that Members of the same political group may vote differently cannot be regarded as an indicator of a lack of political affinity amongst themselves. That presumption is, however, by no means irrebuttable, since it is to be disregarded where Members of a group, by their actions and statements, categorically and openly exclude any political affinity between themselves.

Moreover, contrary to the views of the applicants, the EGC found that the contested decision violated neither the principle of equal treatment nor the principle of democracy as the distinction between MEPs belonging to political groups and non-attached MEPs pursued two legitimate aims. First, the dual requirement imposed on the formation of political groups, namely that the members of a political group must share political affinities and come from more than one Member State, 'appears … to be a measure consonant with the efficient organisation of the work and procedures of the institution in order in particular to allow the joint expression of political wills and the emergence of compromises, the latter being particularly necessary owing to the very high number of Members of the Parliament, the exceptional diversity of cultures, nationalities, languages and national political movements represented in it, the great diversity of the Parliament's activities and the fact that, unlike national

[78] ibid paras 59–62.
[79] ibid paras 65–72.
[80] ibid para 102.

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parliaments, the Parliament does not have the traditional dichotomy between majority and opposition'.[81] Second, that dual requirement, the EGC wrote, 'enables local political particularities to be transcended and promotes the European integration sought by the Treaty'.[82] In any event, the EGC held that such a difference in treatment was not brought about by Rule 30 but by other Rules—that reserved financial, administrative and parliamentary privileges to political groups—the validity of which had not been called into question by the applicants.[83]

*Martinez v Parliament* is a positive development in the case law of the CJEU that illustrates the complexity of the concept of representative democracy when applied in a supranational context. That democracy can be seen from three different, and, to some extent, conflicting, perspectives. On the individual level, the concept of representative democracy is grounded in the principle of the 'independent mandate'.[84] Given that each MEP is the representative of the people who elected him or her, he or she is politically accountable only to his or her constituency and not to the political group to which he or she belongs. That is why the EGC reasoned that the concept of 'political affinity' must leave room for political disagreements within the same political group. On the collective level, the concept of representative democracy is inherently linked to the existence of political groups.[85] With 736 Members, it would be impossible for the Parliament to function if each MEP were to promote his or her own political agenda. In order for the European Parliament to participate effectively in the political process,[86] MEPs sharing political affinities must be allowed to come together so as to express themselves with a single voice. That may explain why the European Parliament encourages the creation of political groups, by according them a series of privileges. Moreover, a political majority may not dictate when a group of MEPs shares political affinities, as this would run the risk of impeding the formation of new groups and the splitting of old ones. Last, but not least, representative democracy in the EU must have a supranational dimension, ie the expression

[81] ibid para 146.
[82] ibid para 148.
[83] ibid para 160.
[84] See the 1976 Act concerning the election of the members of the European Parliament by direct universal suffrage.
[85] See art 10(4) TEU which states that '[p]olitical parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union'.
[86] In particular, it is very important for the European Parliament to be united when entering into negotiations with the Council. In this regard, see Case T-222/99 *Martinez and Others v Parliament* (n 77) para 147 (where the EGC held that '… the proper functioning and conduct of the [ordinary legislative procedure] requires that, where recourse must be had to the Conciliation Committee … in order to reach an agreement on a common project, political compromises be first worked out within the Parliament. It is then necessary for the Parliament's delegation entrusted with the task of negotiating with the Council in the Conciliation Committee to be made up of Members able to reflect the political composition of the Parliament, authorised to speak on behalf of other Members and in a position to be supported once an agreement is found with the Council; to that a political group can effectively contribute, unlike a group consisting of Members who do not share political affinities').

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of political ideas must be free from a 'national, regional and local mindset'. The role that the European Parliament must play in European integration is not to defend the interests of the Member States. Its duty is to defend the interests of the peoples of Europe as citizens of the Union. This dimension is crystallized by the fact that the number of MEPs required to create a political group is inversely proportionate to the number of nationalities of its Members. Put simply, the more multinational a political group is, the smaller it can be.

### *3. Parliamentary immunity and the rule of law*

Sir Thomas More was aware of the importance of ensuring that Members of Parliament could embark on political discussions without fear of reprisals from the King.[87] As early as 1523, he advocated the establishment of parliamentary privilege. Currently, under English law, parliamentary privilege has two legal bases, namely Article 9 of the 1689 Bill of Rights ('freedom of speech and debate') and the doctrine of exclusive cognisance of Parliament (ie the exclusion of ordinary courts' jurisdiction in cases where judicial intervention might impinge upon Parliament's sovereignty).

Given that parliamentary immunity and political free speech go hand in hand, the former is of paramount importance for the proper functioning of representative democracy. As the European Court of Human Rights ('ECtHR') has consistently held, 'while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament . . . call for the closest scrutiny on the part of the Court.'[88] However, parliamentary immunity operates as an exception to the principle of judicial protection and, as such, must be interpreted narrowly. If MPs were immune from a broad range of civil and criminal claims having no link with parliamentary business, one could argue that such unlimited immunity ran counter to the very foundations of the rule of law. As the ECtHR stressed in *Cordova v Italy*, '[i]t would not be consistent with the rule of law in a democratic society . . . if a State could . . . remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons.'[89]

It follows that it is for the judiciary to strike the right balance between, on the one hand, the need to protect political free speech as the keystone of democracy

[87] See RS Mehta, 'Sir Thomas' Blushes: Protecting Parliamentary Immunity in Modern Parliamentary Democracies' (2012) 3 EHRLR 309, 313.
[88] See eg ECtHR, *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, pp. 22–23, section 42.
[89] See eg ECtHR, *Fayed v the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, pp. 49–50, section 65.

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and, on the other hand, the need to uphold the rule of law. In *Patriciello*,[90] the CJEU was, for the first time, confronted with that very question. In that case, Mr Patriciello, an Italian MEP, was charged with making wrongful accusations of forgery of public documents—concerning the falsification of the times when drivers were fined because their cars were unlawfully parked near to a neurological institute—against an officer of the municipal police of Pozzili. The European Parliament defended the immunity of Mr Patriciello on the basis of Articles 8 and 9 of Protocol No 7. The former provision of Protocol No 7 provides that '[MEPs] shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.' For its part, subparagraph (a) of the first paragraph of Article 9 requires that Member States afford the same immunity to MEPs as to members of their own national parliaments: '[d]uring the sessions of the European Parliament, MEPs are to enjoy the immunity and privileges with the same substantive and procedural limits as those applied to national MPs.' The referring court noted that, as a matter of Italian law, Mr Patriciello could not benefit from immunity from criminal prosecution.[91] Accordingly, Article 9 was of no relevance for the case at hand. However, bearing in mind that Mr Patriciello might still benefit from the immunity provided for by Article 8 of Protocol No 7, it decided to make a reference to the CJEU, asking the latter to define the substantive scope of that provision.

At the outset, the CJEU stressed that, unlike the immunity provided for by Article 9, the immunity provided for by Article 8 is an autonomous concept. Referring to its previous ruling in *Marra*,[92] the CJEU defined the rationale underpinning Article 8 as follows. '[As] a special provision applicable to all legal proceedings for which the [MEP] benefits from immunity in respect of opinions expressed and votes cast in the exercise of parliamentary duties, [Article 8] is intended to protect the freedom of expression and independence of [MEPs], with the result that it prevents any judicial proceedings in respect of those opinions or votes'.[93] Taking the view that the immunity provided for by Article 8 is grounded in primary EU law, the CJEU held that both the European Parliament and national courts are bound by that provision, in so far as the conditions for its application are fulfilled.[94] Next, the CJEU held that the findings of the European Parliament are not binding upon national courts. It is for the latter alone to determine whether Article 8 applies. Obviously, should conflicts arise between the European Parliament and a national court regarding the

[90] Case C-163/10 *Patriciello*, judgment of 6 September 2011, not yet reported.

[91] ibid para 13. In accordance with art 68 of the Italian Constitution, such immunity 'does not cover extraparliamentary activities unless they are closely linked to the performance of duties typical of the parliamentary mandate, and carried out strictly for the purposes of that mandate'. However, the referring court found that by (wrongfully) accusing a public official of forgery of official documents, Mr Patriciello was not performing any parliamentary duties.

[92] Joined Cases C-200/07 and C-201/07 *Marra* [2008] ECR I-7929.

[93] *Patriciello* (n 90) para 26.

[94] ibid para 27.

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interpretation and application of Article 8, the national court can always make a reference to the CJEU.[95]

Moreover, the CJEU found that the immunity provided for by Article 8 applies outside the precincts of the European Parliament, in so far as the character and content of the opinion or statement in question of the MEP concerned amounts to 'an opinion expressed in the performance of [his] duties' for the purposes of that provision. Consequently, the CJEU went on to define what is to be understood by 'opinion' and by 'in the performance of [his] duties'. It found that freedom of expression requires a broad interpretation so as to 'include remarks and statements that, by their content, correspond to assertions amounting to subjective appraisal'.[96] Regarding the words 'in the performance of [his] duties', the CJEU held that, in order to strike a correct balance between the rule of law and representative democracy, that notion had to convey a 'direct and obvious' connection between the opinion expressed and parliamentary duties. Although that finding was a determination for the referring court to carry out, the CJEU held, in light of the information contained in the file, that the situation of Mr Patriciello appeared 'to be rather far removed from [his parliamentary] duties . . . and hardly capable, therefore, of presenting a direct link with a general interest of concern to citizens. Thus, even if such a link could be demonstrated, it would not be obvious.'[97]

At this stage, I would like to draw some interesting comparisons with the findings of the UK Supreme Court in *Chaytor*.[98] The facts of *Chaytor* involved three MPs charged with false accounting for claiming non-existent expenses. Those three MPs sought to rely on 'parliamentary privilege' as a shield against the jurisdiction of the UK Courts. Similarly to the CJEU, the UK Supreme Court adopted a narrow construction of 'parliamentary privilege' by requiring a link between the actions in question and parliamentary business. The key passage of the judgment of Lord Phillips merits quotation in full:

> [T]he principal matter to which article 9 [of the 1689 Bill of Rights] is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.[99]

Since the submission of claims for allowances and expenses does not form part of the core or essential business of Parliament, which consists of collective deliberation and decision-making, his Lordship ruled that Article 9 was not applicable. In the same way, in relation to the doctrine of exclusive cognisance

[95] ibid paras 39–40.
[96] ibid para 32.
[97] ibid para 37.
[98] *R v Chaytor* [2010] UKSC 52 (SC).
[99] ibid para 47.

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of Parliament, Lord Phillips considered that its application is limited to exceptional circumstances, ie where management functions are so closely and directly linked to parliamentary proceedings that safeguarding Parliamentary sovereignty would militate against judicial intervention. In this regard, Lord Phillips rejected the three MPs' contention that they should be able to rely on that doctrine, given that the submission of expenses claims was a mere administrative matter with no direct and immediate connection to parliamentary business.

Accordingly, *Patriciello* and *Chaytor* demonstrate that parliamentary immunity cannot be equated to impunity for MPs. If freedom of political speech is not under threat, there is no reason why MPs should not face the consequences of their wrongdoing, just as the rest of us do. As Tew puts it, '[parliamentary] privilege cannot be used to shield MPs from acts which stand in stark contrast to the very ideal it is meant to protect: the fostering of accountability and democratic governance through open debate.'[100]

### *B. The Principle of Democracy and the Winds of Change*

In the next section, I shall show that the principle of democracy, as interpreted by the CJEU and the EGC, is not limited to protecting parliamentary prerogatives. That principle, like all EU constitutional principles, pervades the whole of EU law and, as such, must be read in light of societal changes. As democracy within the EU is not limited to the participation by the European Parliament in the legislative process but also encompasses other forms of governance, in particular rule-making by administrative agencies and the achievement of consensus by social partners, it is for the EU judiciary to make sure that those other forms of governance remain as democratic as possible. This can be achieved, for example, by making sure that they enjoy sufficient representation or are subject to parliamentary control. Furthermore, the EU judiciary also takes into account new mechanisms which seek to strengthen the principle of democracy, such as the principle of transparency. In so doing, the EU judiciary aims to enhance the democratic legitimacy of the EU by providing sufficient means for EU citizens to hold their representatives accountable.[101]

#### *1. Independent national supervisory authorities*

With the birth of the 'regulatory State', some scholars have called into question the democratic legitimacy of independent administrative agencies.[102] For

[100] Y Tew, Case Note on *R v. Chaytor* (2011) 70 CLJ 282, at 284.
[101] See K Lenaerts, '"In the Union we trust": Trust-enhancing principles of Community law' (2004) 41 CMLRev 317.
[102] See generally M Thatcher and A Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 West European Politics 1.

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example, following a traditional understanding of representative democracy, it may be argued that independent administrative agencies should, in any case, be subject to oversight, given that their decisions may adversely affect individuals. Independent agencies should thus remain under the control of the government which, acting as the trustee of the parliament, is competent to determine whether their decisions comply with the rule of law. Conversely, one could posit that, in order to guarantee the equal representation of interests laid down in Article 9 TEU, some decisions should be insulated from political influence.[103] Otherwise, 'discrete and insular minorities'[104] having no access to the political process would be left unprotected.

In *Commission v Germany*,[105] the CJEU was confronted with a similar question. In that case, the Commission brought an infringement action against Germany on the ground that the latter had transposed Article 28(1) of Directive 95/46 incorrectly.[106] That provision states that national public authorities responsible for monitoring the application of Directive 95/46 should 'act *with complete independence* in exercising the functions entrusted to them'.[107] When Article 28(1) of Directive 95/46 was implemented, a distinction was made in German law between the processing of personal data by public bodies and the processing of personal data by non-public bodies. Whilst federal and regional authorities responsible for supervising the processing of personal data by public bodies '[were] solely responsible to their respective parliament[s] and [were] not normally subject to any scrutiny, instruction or other influence from the public bodies which [were] the subjects of their supervision',[108] regional authorities responsible for supervising the processing of personal data by non-public bodies and undertakings governed by public law which compete on the market ('outside the public sector') were subject to State scrutiny.

The Commission argued that such State scrutiny was incompatible with Article 28(1) of Directive 95/46, given that the words 'with complete independence' had to be interpreted as meaning 'free from any influence, whether that influence is exercised by other authorities or outside the administration'.[109] By contrast, the German government based its defence on a narrower definition of those words, according to which 'the requirement of independence concerns exclusively the relationship between the supervisory

[103] See eg S Bredt (n 8) 55 ff.

[104] The expression 'discrete and insular minorities' is borrowed from fn 4 in *United States v Carolene Products Company*, 304 U.S. 144 (1938).

[105] Case C-518/07 *Commission v Germany* [2010] ECR I-1885. See also Case C-614/10 *Commission v Austria*, judgment of 16 October 2012, not yet reported.

[106] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281/31.

[107] Emphasis added.

[108] Case C-518/07 *Commission v Germany* (n 105) para 9.

[109] ibid para 15.

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authorities and the bodies subject to that supervision.'[110] In addition, the German government argued that State scrutiny was necessary for ensuring compliance with the principle of democracy as defined by the German constitution which requires the administration to be subject to the instructions of the government which is, in turn, accountable to its parliament.

AG Mazák opined that the Commission was wrong to suggest that the mere existence of State scrutiny implied that regional supervisory authorities did not act with complete independence in exercising their functions. In order to determine whether those supervisory authorities were completely independent, one first had to examine the purpose behind that State scrutiny.[111] In accordance with German law, State scrutiny sought to establish whether the monitoring carried out by supervisory authorities was rational, lawful and proportionate. In that regard, AG Mazák posited that those purposes were prima facie compatible with the system of monitoring set out in Directive 95/46. It was thus for the Commission to prove that the functions of regional supervisory authorities had been adversely affected by such scrutiny. Given that the latter had failed to do so, he invited the CJEU to dismiss the action.

The CJEU took a different view, however. It began by defining the scope of the requirement of independence on the part of the supervisory authorities. It held that the word 'independence' normally means 'a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure'.[112] In the same way, the adjective 'complete' complements the noun 'independence' so as to imply 'a decision-making power independent of any direct or indirect external influence on the supervisory authority'.[113] Stated simply, according to a literal interpretation of the words 'with complete independence', the scope of the requirement of independence of the supervisory authorities had to be interpreted broadly. By examining the purpose of Directive 95/46, the CJEU reached the same conclusion. Drawing on the 62nd recital of the Preamble of Directive 95/46, it held that supervisory authorities are 'an essential component of the protection of individuals with regard to the processing of personal data',[114] given that they are entrusted with ensuring a fair balance between, on the one hand, observance of the fundamental right to private life and, on the other hand, the interests requiring free movement of personal data. In order to strike such a fair balance, supervisory authorities must act 'objectively and impartially'. 'For that purpose', the CJEU wrote, 'they must remain free from any external

[110] ibid para 19. See also Case C-614/10 *Commission v Austria* (n 105) para 43 (where the CJEU held that 'the second subparagraph of Article 28(1) of Directive 95/46 is intended to preclude not only direct influence, in the form of instructions, but also . . . any indirect influence which is liable to have an effect on the supervisory authority's decisions').

[111] See Opinion of AG Mazák in Case C-518/07 *Commission v Germany* (n 105) para 30.

[112] Case C-518/07 *Commission v Germany* (n 105) para 18.

[113] ibid para 19.

[114] ibid para 23.

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influence, including the direct or indirect influence of the State or the *Länder*, and not of the influence only of the supervised bodies.'[115]

Next, the CJEU drew some interesting parallels between Article 44 of Regulation No 45/2001, which concerns the processing of personal data by the EU institutions,[116] and Article 28(1) of Directive 95/46. Just like national supervisory authorities, Regulation No 45/2001 establishes the European Data Protection Supervisor ('EDPS') which is entrusted with the monitoring of the processing of personal data by the EU institutions. Article 44(1) of Regulation No 45/2001 provides that the EDPS shall enjoy 'complete independence' when performing his or her duties. Article 44(2) clarifies the meaning of 'complete independence' by stating that 'the EDPS may neither seek nor take instructions from anybody'. In that regard, the CJEU observed that Article 44(1) of Regulation No 45/2001 and Article 28(1) of Directive 95/46 'are based on the same general concept'. Consequently, 'those two provisions', the CJEU reasoned, 'should be interpreted homogeneously, so that both the independence of the EDPS and that of the national authorities involve the lack of any instructions relating to the performance of their duties.'[117]

Moreover, the CJEU declined to follow the preliminary findings of AG Mazák. Even if by establishing State scrutiny, German law sought to guarantee that the acts of supervisory authorities comply with the applicable national and EU provisions, 'the possibility remains that the scrutinizing authorities, which are part of the general administration and therefore under the control of the government of their respective *Land*, are not able to act objectively when they interpret and apply the provisions relating to the processing of personal data'.[118] For example, regarding the processing of personal data by non-public bodies involved in a private–public partnership or having entered into a public contract or for tax and law enforcement purposes or in order to favour economically important regional interests, the government of the Land concerned may have a conflict of interests, calling into question its impartiality and objectivity.[119]

In relation to the principle of democracy, the CJEU appears to reject an interpretation of that principle, which is confined to the traditional understanding of representative democracy. To that effect, it stressed that the principle of democracy 'does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government'.[120] Independent public bodies are recognized by the constitutions of the Member States and, as Article 28 of Directive 95/46

[115] ibid para 25.
[116] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, [2001] OJ L 8/1.
[117] Case C-518/07 *Commission v Germany* (n 105) para 28.
[118] ibid para 34.
[119] ibid para 35.
[120] ibid para 42.

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indicates,[121] their compliance with the rule of law is guaranteed by the national courts. Moreover, Directive 95/46 does not compel the Member States to insulate supervisory authorities from parliamentary influence. Just as the Council and the European Parliament appoint by common accord the EDPS,[122] national and regional parliaments may also appoint the management of supervisory authorities. Just as the Council and the European Parliament have defined the powers of the EDPS in Regulation No 45/2001,[123] national parliaments may also define the powers of those authorities in compliance with the framework set out in Directive 95/46. Just as the EDPS is obliged to draw up an annual report on his or her activities,[124] national parliaments can impose a similar obligation in accordance with Article 28(5) of Directive 95/46. Hence, the CJEU ruled that 'conferring a status independent of the general administration on the supervisory authorities responsible for the protection of individuals with regard to the processing of personal data outside the public sector does not in itself deprive those authorities of their democratic legitimacy.'[125]

Accordingly, after rejecting the contention that a broad interpretation of the words 'with complete independence' was contrary to the principles of conferral, subsidiarity and proportionality, the CJEU upheld the Commission's application.

One may draw four immediate conclusions from the ruling of the CJEU in *Commission v Germany*. First, it appears that the CJEU endorses a conception of democracy which fits well with the times in which we live. In the EU legal order, democracy is not understood as the 'tyranny of the majority'; rather, it prevents minorities from being alienated. To guarantee the effective protection of constitutional goods, such as fundamental rights, some decisions must be insulated from political influence. That is the case where, for example, the political process does not offer sufficient guarantees to protect the rights of minorities, or where the interests of interstate economic operators, which do not form part of the electorate, lack proper political representation. Majoritarian politics are not always the best way to protect individual interests. It thus seems appropriate to entrust independent agencies with the adoption of policy or individual decisions that take all stakeholders into consideration. Second, ensuring that agencies comply with the rule of law cannot be guaranteed by political institutions lacking the necessary independence. It is through the medium of judicial review that national courts ensure that those agencies carry out their duties lawfully. Third, *Commission v Germany* shows that the CJEU does not apply 'double standards' when it comes to determining

[121] Art 28 of Directive 95/46 states that 'Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts'.
[122] See art 42 of Regulation No 45/2001.
[123] See art 47 of Regulation No 45/2001.
[124] See art 48 of Regulation No 45/2001.
[125] Case C-518/07 *Commission v Germany* (n 105) para 46.

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the degree of independence that the authorities responsible for supervising the processing of personal data must enjoy. Vertically, the EDPS and national supervisory authorities enjoy the same degree of impartiality and objectivity when striking the right balance between the free movement of personal data and the protection of fundamental rights. Horizontally, the CJEU implicitly refused to draw a distinction between cases where a national authority supervises the processing of personal data by a public body and cases where it supervises the processing of personal data outside the public sector. Last but not least, the CJEU took full account of the democratic concerns put forward by the German government. That is why it left the door open to limited parliamentary control. Logically, the latter cannot take place in respect of the exercise by an independent agency of its duties, but rather when appointing the management of those agencies.

### *2. Social partners and democratic governance*

Article 9 TEU encapsulates the principle of equal representation of interests, according to which all stakeholders must be represented in the EU decision-making process. Equal representativity is normally achieved when the European Parliament participates in the adoption of EU legislative acts. However, what happens when the European Parliament plays only a minor role?

For example, in the context of social policy, the dialogue between management and labour is of paramount importance. Since the 1992 Social Policy Agreement which the Amsterdam Treaty has incorporated into primary EU law, there are two procedures for adopting measures in the field of social policy. By virtue of Article 153(1) TFEU, social policy measures are adopted in accordance with the ordinary legislative procedure or, as the case may be, the special legislative procedure.[126] However, Article 155(1) TFEU provides that '[s]hould management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.' The second paragraph of Article 155 TFEU adds that, in matters covered by Article 153 TFEU, at the joint request of the signatory parties, those agreements may be implemented by a Council decision on a proposal from the Commission. The role of the European Parliament is thus limited: 'it shall be informed'. Arguably, that could pose problems of democracy and legitimacy.

The EGC dealt with that issue in *UEAPME v Council*.[127] In that case the applicant, a representative body of small and medium-sized undertakings

[126] The fields where the special legislative procedure applies are the following: '(c) social security and social protection of workers, … (d) protection of workers where their employment contract is terminated, (f) representation and collective defence of the interests of workers and employers, including co-determination, and (g) conditions of employment for third-country nationals legally residing in Union territory'.

[127] Case T-135/96 *UEAPME v Council* [1998] ECR II-2335.

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(SMUs), complained of the fact that it had been left out of the negotiations in respect of a framework agreement on parental leave, thus questioning the representativity of the parties to the framework agreement and therefore the validity of the directive[128] adopted by the Council in order to make that agreement generally binding. In its reasoning the EGC addressed three essential elements: the legitimacy of social dialogue agreements, the representativity of the parties to them and the control by EU institutions of the social dialogue process.[129]

After acknowledging that under Article 155(2) TFEU the role of the European Parliament is limited, the EGC held that this lack of democratic participation is, however, compensated for 'through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at [EU] level'.[130] Obviously, this means that there must be built-in mechanisms which guarantee that those parties are sufficiently representative. This is the case only if the parties to the framework agreement have 'sufficient collective representativity'.[131] In that regard, the EGC required that the social partners, taken together, have a sufficient cumulative representativity with respect to the specific agreement to be concluded.[132] The criteria for this were not really examined by the EGC.[133] The latter limited itself to referring to a 1993 Commission Communication,[134] which defines representativity as implying European scope (cross-industry or sectoral), comprising recognized bargaining organizations in the Member States and being adequate to task at EU level. The number of members represented by the organization seems hardly relevant.[135]

The EGC thus entrusted the task of monitoring such representativity to the Commission and the Council.[136] In so doing, it made an important constitutional choice that greatly impacted upon the autonomy of the social partners. On the one hand, by denying that a right to negotiate for individual social organizations exists, the EGC enhanced the autonomy of social partners, allowing them to choose among themselves with whom they conclude an

[128] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, [1996] OJ L 145/4.

[129] B Bercusson, 'Democratic Legitimacy and European Labour Law' (1999) 28 ILJ 153, 154.

[130] Case T-135/96 *UEAPME v Council* (n 127) para 89.

[131] ibid para 94.

[132] ibid para 90 ff; on the challenges and opportunities resulting from this approach, see B Bercusson, 'Democratic Legitimacy and European Labour Law' (1999) 28 ILJ 153, 165–70; M.-A. Moreau, 'Sur la représentativité des partenaires sociaux européens' (1999) 62 Droit Social 53, 56–7; A Adinolfi, 'Admissibility of Action for Annulment by Social Partners and "Sufficient Representativity" of European Agreements' (2000) 25 ELR 165, 176.

[133] Bercusson (n 132) 155–9; Moreau (n 132) 56.

[134] COM (93) 600 final, para 24.

[135] Case T-135/96 *UEAPME v Council* (n 127) para 102. This has also been the subject of criticism; see Bercusson (n 132) 159; Adinolfi (n 132) 176.

[136] Case T-135/96 *UEAPME v Council* (n 127) para 89.

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agreement.[137] On the other hand, once that agreement is concluded, both the Commission and the Council are required to check whether the parties to the agreement were endowed with sufficient representativity.[138] All this is moreover done under control by the EGC, which is responsible for reviewing whether those two institutions were right to hold that all social parties affected were sufficiently represented.[139] This means that if an organization was prevented from participating in the negotiations and its participation was essential for reaching a sufficient level of representativity, then that organization enjoys *locus standi* to bring an action for annulment. As to the case at hand, the EGC considered that the participation of UEAPME was not necessary and therefore declared its application inadmissible.[140]

The ruling of the EGC in *UEAPME* clearly shows that the EU is based on the rule of law, whilst welcoming a version of the principle of democracy that does not exclude social dialogue at EU level. This is consistent with the approach followed by national constitutions, for which dialogue among social partners is not in conflict with the principle of democracy.

### *3. The principle of transparency*

As mentioned above, the principle of transparency enables European citizens to participate closely in the EU decision-making process. By being well informed on the decisions adopted by the EU legislator and by the EU administration, European citizens may engage in a discussion as to whether they agree or disagree with those decisions. At the same time, transparency enhances the legitimacy of the EU institutions, given that their actions (or their failures to act) are open to public scrutiny. The right of access to documents and the principle of openness give concrete expression to that principle, which will now be explored in more detail.

#### a) The legislative framework

In accordance with Article 15(3) TFEU, '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents [of the EU] whatever their medium.' That Treaty provision also states that '[g]eneral principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by a Regulation adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure.' Article 15(3) TFEU goes beyond its predecessor (ex-Article 253

[137] ibid paras 77–80; Bercusson (n 132) 159.
[138] Case T-135/96 *UEAPME v Council* (n 127) paras 90 ff; Bercusson (n 132) 160–3.
[139] Whether this is the most legitimate or appropriate forum to settle industrial relations is doubted in legal literature, see Moreau (n 132) 58–9; Bercusson (n 132) 170.
[140] Case T-135/96 *UEAPME v Council* (n 127) paras 111–112.

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EC), as it explicitly states that, in addition to the EU institutions, the right of access to documents applies to 'bodies, offices and agencies'. By virtue of Article 42 of the Charter which reproduces Article 15(3) TFEU, the right of access to documents is granted the status of a fundamental right. This means that limitations to that right must comply with Article 52 of the Charter.

In light of the changes brought about by the Lisbon Treaty, the Commission submitted a proposal to the Council and the European Parliament amending Regulation No 1049/2001.[141] To date, however, that proposal is still under discussion.

Regulation No 1049/2001 gives concrete expression to the principle of openness, according to which decisions are taken 'as openly as possible and as closely as possible to the citizen'. As the 2nd Recital of that Regulation states, '[o]penness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article [2 TEU] and in [Article 42 of] the Charter.' In light of the democratic nature of EU institutions,[142] Regulation No 1049/2001 thus aims 'to ensure the widest possible access to documents'.[143] It grants 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State' a right of access 'to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union'.[144] The concept of 'document' is defined broadly, as it includes 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'.[145] Moreover, as the applicant is not obliged to state reasons for the application,[146] it follows that he or she need not prove a particular interest.

However, the right of access to EU documents is not absolute but may be subject to limitations.[147] Since limitations derogate from the principle of 'the widest possible public access to documents', they must be interpreted and applied strictly.[148] That does not mean, however, that, in relation to

[141] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L 145/43.

[142] Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, para 34.

[143] See art 1 of Regulation No 1049/2001.

[144] See art 2(1) and 2(3) of Regulation No 1049/2001.

[145] See art 3(a) of Regulation No 1049/2001.

[146] See art 6(1) of Regulation No 1049/2001.

[147] See the 11th recital of Regulation No 1049/2001.

[148] See eg Case C-266/05 P *Sison v Council* [2007] ECR I-1233, para 63; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* (n 142) para 36; Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, para 73.

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a certain category of documents, the EU institution concerned may not rely on general presumptions. Indeed, documents of the same nature give rise to the same legal issues regarding disclosure. Accordingly, unless the case at hand is based on extraordinary circumstances, a right of access to documents of the same nature should be subject to the same conditions.[149]

Regulation No 1049/2001 provides that restrictions on the right of access to documents are determined by two general categories of exceptions, namely mandatory exceptions and discretionary exceptions. By virtue of Article 4(1) of Regulation No 1049/2001, an institution has no choice but to refuse access to documents where disclosure would undermine the protection of the public interest as regards public security, defence and military matters, international relations, the financial, monetary or economic policy of the [EU] or a Member State'. Refusal to grant access to documents is also mandatory where disclosure would undermine the 'privacy and the integrity of the individual', in particular in accordance with EU legislation on data protection. By contrast, in accordance with Article 4(2) of Regulation No 1049/2001, refusal to grant access to EU documents is discretionary where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

Moreover, in relation to the disclosure of internal-use documents, Article 4 (3) of that Regulation provides for a specific exception which seeks to protect the decision-making process of the institution concerned. A distinction should be drawn between cases where access is requested before the final decision is taken and cases where access is requested thereafter. Before the decision in a given case is taken, Article 4(3) provides that access to a document 'drawn up by an institution for internal use or received by an institution [. . .] shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'. After the decision has been taken, the scope of the limitation is narrowed down. Denying access may only take place in relation to a document that contains 'opinions for internal use as part of deliberations and preliminary consultations within the institution concerned', provided that there is no 'overriding public interest in disclosure'.

Arguably, the exception laid down in Article 4(3) of Regulation No 1049/2001 promotes and, at the same time, limits democracy. On the one hand, by safeguarding the decision-making process of the EU political institutions, Article 4(3) aims at enhancing representative democracy given that excessive

[149] Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* (n 142) para 50; Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, para 54; Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* (n 148) paras 73 ff.

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disclosure may disrupt the proper functioning of the institutions elected by EU citizens (the European Parliament), representing the interests of the Member States (the Council), or entrusted with the protection of the general interest understood as the obligation to treat all stakeholders equally (the Commission). On the other hand, Article 4(3) also restricts the principle of democracy as it prevents citizens from having sufficient information to render the EU institutions politically accountable. In *My Travel*[150] and in *Access Info Europe*,[151] the CJEU and the EGC respectively were called upon to interpret Article 4(3) of Regulation No 1049/2001. These two cases will now be examined.

b) The decision-making process

*Openness in the context of administrative procedures*. In *MyTravel*, the question was whether the Commission was obliged to grant access to its internal deliberations following the judgment of the EGC in *Airtours*,[152] in which the latter set aside the Commission decision prohibiting the merger between Airtours (now MyTravel) and its main competitor, First Choice. During those deliberations, DG Competition and the Commission legal service decided to set up a working group whose task was to prepare a report on whether it was appropriate to bring an appeal against the *Airtours* judgment and to determine the implications flowing from that judgment. The report was concluded on 25 July 2002.

Following the *Airtours* judgment, MyTravel brought an action for damages before the EGC. In order to reinforce its arguments, MyTravel requested access to the report, to the documents relating to its preparation (the 'working documents') and to the documents contained in the file relating to the Airtours/ First Choice case on which the report was based or which were referred to in it (the 'internal documents contained in the file'). That request was made on 23 May 2005, after the expiry of the period allowed for bringing an appeal against the *Airtours* judgment. Prior to that, MyTravel had had no access to the internal documents contained in the file since Article 17(3) of Regulation No 802/2004 implementing the Merger Regulation provides that the right of access to the file shall not extend to internal documents of the Commission.[153]

By two decisions, the Commission refused to grant access to the report and the working documents. As to the internal documents contained in the file, access was only granted to some of them. The Commission based its decisions

[150] Case C-506/08P *Sweden v Commission and MyTravel*, judgment of 21 July 2011, not yet reported.

[151] Case T-233/09 *Access Info Europe v Council*, judgment of 22 March 2011, not yet reported.

[152] Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

[153] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L 24/1. See also Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, [2004] OJ L 133/1.

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on the exceptions laid down in Articles 4(2) and 4(3) of Regulation No 1409/2001. Moreover, it added that there was no overriding public interest in disclosure. MyTravel brought an action for annulment against those two decisions. In essence, the EGC sided with the Commission, holding that the exception for protecting the decision-making process and the exception concerning the protection of legal advice had been rightly invoked by that institution.[154] Implicitly, the ruling of the EGC favoured a general presumption of non-disclosure in relation to internal administrative documents.[155]

As to the exception for protecting the decision-making process, it held that disclosure of the report would have posed a serious threat to the Commission's decision-making process, as the freedom of its authors to express their views would have been called into question.[156] Indeed, for the EGC, disclosure of the report would have forced its authors to practise self-censorship and to cease putting forward any views that might involve the addressee of the report being exposed to risk.[157] That would also prevent the Commission from obtaining frankly-expressed and complete views from its own agents and officials. The EGC pointed out that the risk of the decision-making process being seriously undermined was reasonably foreseeable and not purely hypothetical.[158] Moreover, it reached the same conclusion in relation to the working documents and the internal documents contained in the file.

In relation to the exception concerning the protection of legal advice, the EGC ruled that disclosure of that advice would risk putting the Commission in the difficult position in which its legal service might find itself required to defend a position before the EGC which was not the same as the position for which it had argued internally. Such a risk would be liable to have a considerable effect both on the freedom of the legal service to express its views and on its ability effectively to defend the Commission's definitive position before the Union judicature, on an equal footing with the other legal representatives of the various parties to legal proceedings.[159]

Following the dismissal of its action for damages,[160] MyTravel did not bring an appeal against the judgment of the EGC. Sweden, however, supported by three other transparency-friendly Member States, brought an appeal against the ruling of the EGC. The appellant challenged 'the general and hypothetical line

[154] Case T-403/05 *MyTravel v Commission* [2008] ECR II-2027. However, in relation to working document No 15, the EGC held that the Commission had failed to prove that disclosure of that document could threaten its capacity to carry out inspections, investigations and audits. See ibid, paras 80–81. However, that part of the judgment did not form part of the subject matter of the appeal.

[155] D Adamski, 'Approximating a Workable Compromise on Access to Official Documents: The 2011 Developments in the European courts' (2012) 49 CMLRev 521, 528–9 (opining that 'the General Court established an overarching general presumption of non-disclosure').

[156] Case T-403/05 *MyTravel v Commission* (n 154) para 74.

[157] ibid paras 48–53.

[158] ibid para 54.

[159] ibid paras 124–126.

[160] Case T-212/03 *MyTravel v Commission* [2008] ECR II-1967.

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of reasoning' of the EGC. At the outset, the CJEU stressed the importance of drawing a distinction between internal documents relating to an administrative procedure that has been closed and internal documents relating to an ongoing administrative procedure. In relation to the former, the CJEU held that 'the requirements for protecting the decision-making process are less acute'.[161] When denying access to those documents, the institution concerned must take into account the fact that the administrative procedure has been closed. Whilst concurring with the EGC in that 'the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution', the CJEU ruled that nothing in Regulation No 1049/2001 suggests that such activity falls outside its scope of application.[162] Concerning the report, the CJEU upheld Sweden's argument according to which the findings of the EGC were not supported by detailed evidence. Indeed, the Commission had failed to provide specific reasons as to why disclosure could have undermined its decision-making process, in spite of the fact that the procedure to which the report related had already been closed.[163] The CJEU reached the same conclusion in relation to the working documents and the internal documents contained in the file. It held that 'the Commission has not provided [...] any evidence that access to the said documents would have had an actual impact on other specific administrative procedures'.

As to the exception laid down in Article 4(2) of Regulation No 1049/2001, the CJEU held that the approach followed in *Sweden and Turco v Council* applied to the case at hand. It thus decided that the same rationale applies regardless of whether legal advice is given in the context of a legislative procedure (as was the case in *Sweden and Turco v Council*) or in the context of an administrative procedure (as was the case in *MyTravel*). First, the CJEU rejected the contention that disclosure of the legal advice given by the Commission's legal service should be refused as it could lead to doubts as to the lawfulness of the EU act concerned. On the contrary, 'it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act but also as regards the legitimacy of the decision-making process as a whole.'[164] Second, concerning the argument that the legal service would be liable to be led to display reticence and caution in formulating the advice it gave, the CJEU found that the EGC had based its reasoning on general

[161] Case C-506/08P *Sweden v Commission and MyTravel* (n 150) para 80.
[162] ibid paras 87–88.
[163] See Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* (n 142) paras 59 ff.
[164] Case C-506/08P *Sweden v Commission and MyTravel* (n 150) para 113.

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and abstract considerations.[165] Finally, the CJEU ruled that it cannot be generally assumed that such disclosure undermines the Commission's capacity to defend before the Union judicature the legality of a decision in relation to which its legal service had issued a negative opinion.[166]

*MyTravel* is an interesting development in the case law of the CJEU showing that the latter rejects general presumptions of non-disclosure of internal documents adopted in the context of an administrative procedure. In order for the institution concerned to rely on the exceptions laid down in Article 4(2) and 4(3) of Regulation No 1049/2001, it must take into account the specific circumstances of the case at hand. General and abstract assumptions must be discarded. In particular, special attention must be paid to the fact that the administrative procedure to which the documents relate has been closed. Moreover, *MyTravel* demonstrates that the application of the principle of openness is not limited to the legislative process. Whilst transparency in law-making is more important than in the context of administrative procedures, the CJEU considers that administrative discussions may not be entirely insulated from public opinion. On the contrary, the fact that the public is aware that the EU institutions do not always have a 'monolithic' approach but constantly engage in internal deliberations with a view to finding the best solution to a given legal or policy issue, vests those institutions with enhanced legitimacy.

*Can there be too much transparency in legislative decision-making?* In *Access Info Europe*, the EGC was confronted with the long-standing debate surrounding the effects of transparency in Council proceedings. In that regard, some scholars argue that too much transparency can actually produce the opposite effects from those which are sought.[167] For example, it is said that if Member State delegations sitting in the Council were constantly subject to public monitoring, then their capacity to negotiate would be seriously impaired. They would then look for an alternative and informal framework within which to exchange their points of view. Thus, disclosure of the position of Member State delegations would undermine the Council's decision-making process, by rendering it less open and efficient. As Adamski points out,[168] this was the crux of the dispute in *Access Info Europe*.

In that case, Access Info Europe, an NGO whose aim is to defend the right to know in Europe and globally,[169] sought to have access to a document of a Council working party which contained the proposals for amendments, or for re-drafting, entered by a number of Member States in relation to the Commission's proposal to amend Regulation No 1049/2001. However, the Council only granted partial access, making it impossible to identify the Member States which had put forward those proposals. By relying on Article 4 (3) of Regulation No 1049/2001, the Council argued that, in light of the early

[165] ibid para 115
[166] ibid para 116.
[167] Adamski (n 155) 533.
[168] ibid.
[169] ibid 532.

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stage of the discussions and of the sensitive nature of the subject matter, 'disclosure of the name of the delegations that have made the proposals contained in the document would adversely affect the efficiency of the Council's decision-making process by compromising the Council's ability to reach an agreement on the dossier, and, in particular, narrow those delegations' room for compromise within the Council.'[170]

At the outset, the EGC had to determine whether Access Info Europe still had an interest in having the contested decision annulled given that before the application was lodged, another NGO (Statewatch) had made the full version of the requested document available on its internet website. The EGC replied in the affirmative. It held that nothing prevented the alleged unlawfulness from recurring in the future.[171] In addition, the body responsible for disclosure was not the Council itself but a third party (Statewatch), which did not comply with rules applicable to public access to documents.[172]

As to the substance, the EGC began by stressing the importance of granting access to documents of an EU institution acting in its legislative capacity. Referring to the ruling of the CJEU in *Sweden and Turco v Council*,[173] it held that '[o]penness in that respect contributes to strengthening democracy by enabling citizens to scrutinize all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.'[174] Next, the EGC pointed out that the mere fact that a document concerns an interest protected by an exception is not sufficient to justify the application of that exception. That meant that the Council was obliged to 'weigh the specific interest which must be protected through non-disclosure of part of the requested document—that is to say, the identity of those who put forward the proposals—against the general interest in the entire document being made accessible, given the advantages of a more open legislative procedure'.[175]

However, for the EGC, the Council had failed to weigh those competing interests properly, as its assertions were too general and abstract to establish a sufficiently serious and reasonably foreseeable risk justifying the application of the exception contained in Article 4(3) of Regulation No 1049/2001. For example, the Council unsuccessfully argued that disclosure of the identity of the Member State delegations which put forward proposals would force them to take entrenched positions. Similarly, it contended that the delegations in favour of restricting or reducing openness would be forced to withdraw their proposal for fear of pressure likely to be exerted on them by public opinion. Nevertheless, the Council's line of reasoning was at odds with the principle of

[170] Case T-233/09 *Access Info Europe v Council* (n 151) para 30.
[171] ibid para 35.
[172] ibid para 36.
[173] See Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* (n 142) para 46.
[174] Case T-233/09 *Access Info Europe v Council* (n 151) para 57.
[175] ibid para 60.

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democracy, which requires EU institutions to be held publicly accountable for their actions. 'If citizens are to be able to exercise their democratic rights', the EGC wrote, 'they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information.'[176] The EGC also rejected the argument that disclosure would cause the positions of the delegations to be entrenched, since the proposals at issue, like all proposals, were not intended to be final. Public disclosure did not compromise the ability of a delegation to change its views as negotiations advanced. In addition, the Council did not prove that public opinion was biased regarding transparency. Just as there was a debate within the Council on where to draw the line between secrecy and transparency, the same debate could take place on the streets. Finally, the EGC made clear that the preliminary nature of the ongoing discussions did not in itself provide sufficient grounds to deny full access to the delegations' positions regarding those discussions.[177] Access at an early stage of discussions was indeed envisaged by the first subparagraph of Article 4(3) of Regulation No 1049/2001. Nor was the information at issue in the main proceedings of a particularly sensitive nature due to the possibility of a hostile media reception or of sharp criticism on the part of the public.[178] Accordingly, the EGC ruled that the Council infringed Article 4(3) of Regulation No 1049/2001 and annulled the contested decision.

An appeal has been brought by the Council against the judgment of the EGC in *Access Info Europe* which is now pending before the CJEU.[179] Whilst it is therefore too early to draw final conclusions regarding the soundness of the EGC's legal reasoning, I would like, nonetheless, to point to one implication flowing directly from that judgment. In that ruling, the EGC sought to enhance the political accountability not only of the Council as a whole but also of the Member States individually. Indeed, if the judgment is upheld, it will be possible for the electorate of a Member State to monitor the position taken by that Member State's national government within the Council. The same holds true in relation to national parliaments, which will now be able to check whether the executive has complied with the negotiating position laid down for it. The right of access to documents, as interpreted by the EGC in *Access Info Europe*, makes it very difficult for a national government to avoid taking responsibility for unpopular legislative acts adopted at EU level, if it is apparent from the internal documents of the Council that that government never resisted the adoption of those acts. In the same way, it cannot take credit for an EU legislative act where internal documents prove that it consistently opposed its adoption. Whether all of this undermines the effectiveness of the Council's decision-making process will be a question for the CJEU to decide.

[176] ibid para 69.
[177] ibid para 76.
[178] ibid para 78.
[179] See Case C-280/11P *Council v Access Info Europe* (pending).

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c) Balancing fundamental rights: transparency v privacy

Article 4(1)(b) of Regulation No 1049/2001 precludes the EU institution concerned from granting access to documents whose disclosure would undermine the 'privacy and the integrity of the individual', in particular in accordance with EU legislation regarding the protection of personal data, Regulation No 45/2001. As the CJEU itself has noted, those two Regulations have very different objectives.

Whilst Regulation No 1049/2001 'is designed to ensure the greatest possible transparency of the decision-making process of the public authorities and the information on which they base their decisions', Regulation No 45/2001 is designed 'to ensure the protection of the freedoms and fundamental rights of individuals, particularly their private life, in the handling of personal data'.[180] Those two Regulations were adopted on dates very close to each other and neither of them prevails over the other.

The relationship between those two Regulations could thus give rise to problems, in particular when an applicant requests access to EU documents containing personal data. Obviously, if an EU document contains personal data (eg the names of individuals), then its disclosure would amount to the processing of those data by the EU institution concerned for the purposes of Regulation No 45/2001. In that regard, it is worth recalling that Article 8(b) of Regulation No 45/2001 states that personal data shall only be transferred 'if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced'. However, Article 6 of Regulation No 1049/2001 provides that '[t]he applicant is not obliged to state reasons for the application.' It follows that, under Regulation No 1049/2001, the applicant is not required to prove an interest in having access to EU documents. How are those two provisions to be reconciled? On the one hand, one might argue that the applicant requesting access to an EU document containing personal data must first comply with Article 8(b) of Regulation No 45/2001, ie he or she must prove the necessity of having the data transferred. It is only after having met that requirement that the EU institution concerned may proceed to examine whether the exception for protecting the right to respect for a person's private life laid down in Article 4(1)(b) of Regulation No 1049/2001 applies. Conversely, one might also argue that, regardless of the applicant's need to have the data transferred, it suffices—in order for the institution concerned to be obliged to grant access to EU documents containing personal data—to establish that Article 4(1)(b) of Regulation No 1049/2001 does not apply.

The relationship between those two provisions formed the crux of the dispute in *Commission v Bavarian Lager*,[181] where the EGC and subsequently

[180] Case C-28/08 P *Commission v Bavarian Lager* [2010] ECR I-6055 para 49.

[181] See Case T-194/04 *Bavarian Lager v Commission* [2007] ECR II-4523; set aside on appeal by Case C-28/08 P *Commission v Bavarian Lager* (n 180).

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the CJEU were asked to reconcile two equally important—albeit potentially conflicting—rights, namely the fundamental right to respect for a person's private life and the right of access to documents. In the words of AG Sharpston, '[a] democratic society governed by the rule of law has a fundamental interest both in wide public access to documents and in ensuring the protection of individual privacy and integrity. Both public access to documents and the protection of privacy are fundamental rights duly recognised under European Union law.'[182]

The facts of the case may be summarized as follows: Bavarian Lager, a German beer exporter, lodged a complaint with the Commission in April 1993, arguing that British legislation was contrary to the free movement of goods as it prevented the sale of beer marketed in bottles. As a result of the complaint, the Commission initiated infringement proceedings against the UK. After holding a meeting with UK administrative authorities and the Confédération des Brasseurs du Marché Commun ('CBMC'), the Commission decided to suspend the infringement proceedings, given that the UK authorities had committed themselves to amending the conflicting legislation. After asking unsuccessfully to take part in that meeting, Bavarian Lager sought to have access to the minutes under Regulation No 1049/2001. The Commission granted partial access to those documents: it blanked out five names in the minutes of that meeting because two members of the CBMC had expressly asked to remain anonymous and the Commission had not been able to contact the other three. The Commission observed that Bavarian Lager had not established an express and legitimate purpose or need for such disclosure. Taking the view that the conditions for the transfer of personal data as provided for by Article 8(b) of Regulation No 45/2001 were not met, the Commission decided that the exception contained in Article 4(1)(b) of Regulation No 1049/2001 applied to Bavarian Lager's request.

Bavarian Lager successfully challenged that decision before the EGC, which annulled the Commission decision. The EGC held that, where a situation falls within the scope of Regulation No 1049/2001, the applicant does not need to prove the necessity of disclosure for the purposes of Article 8(b) of Regulation No 45/2001. Otherwise, the EGC reasoned, the imposition of an additional requirement such as that contained in Article 8(b) would be contrary to the objectives pursued by Regulation No 1049/2001, namely ensuring the 'widest possible public access to documents'.[183] The EGC also observed that, even if a person has a right to object to the processing of personal data relating to him or her, he or she does not have such a right where the processing constitutes a legal obligation.[184] An example of such a legal obligation could be found in

[182] See the Opinion of AG Sharpston in Case C-28/08 P *Commission v Bavarian Lager*, (n 180) para 1.
[183] Case T-194/04 *Bavarian Lager v Commission* (n 181) para 107.
[184] ibid para 109.

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Article 2 of Regulation No 1049/2001, according to which EU institutions must grant public access to documents. The only exceptions to that legal obligation are set out in Article 4 of Regulation No 1049/2001. Accordingly, it is only in the context of Article 4(1)(b) thereof that one must take into consideration the right to respect for a person's private life which must be interpreted in light of Article 8 of the ECHR.[185] However, given that Article 4(1)(b) is a derogation from the principle of the 'widest possible public access to documents', it must be interpreted restrictively. Bearing in mind that the members of the CBMC attended the meeting as members of that association, rather than in a personal capacity, and that no opinion was attributable to those persons, the EGC considered that disclosure of their names did not adversely affect the privacy of those people.[186]

On appeal, however, the CJEU took a different view. It considered that the EGC had disregarded the wording of Article 4(1)(b) of Regulation No 1049/2001, which 'requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with Regulation No 45/2001'.[187] In addition to determining whether the contested decision complied with Article 4(1)(b) interpreted in light of Article 8 of the ECHR, the EGC should also have examined whether the contested decision was consistent with Regulation No 45/2001. That meant that the EGC had committed an error in law when wrongfully excluding the application of Article 8(b) of Regulation No 45/2001. In that connexion, the CJEU found that the Commission was right to verify whether the individuals whose personal data were at issue had given their consent to the disclosure of that data.[188] In the same way, the Commission was right to reject the request of Bavarian Lager since it had failed to establish the necessity of disclosure for the purposes of Article 8(b) of Regulation No 45/2001.[189] Hence, the CJEU set aside the ruling of the EGC and dismissed the action for annulment brought by Bavarian Lager.

*Commission v Bavarian Lager* shows that the CJEU endorses a version of democracy that is committed to respecting fundamental rights, in particular the right to respect for a person's private life. Although vitally important, transparency is not an absolute value but can only be applied in so far as its application respects fundamental rights. This means that the burden of proof is shifted from the EU institution to the applicant, who, in order to have full access to EU documents containing personal data, must first establish the necessity of having the data transferred.

[185] ibid paras 110–120.
[186] ibid para 133.
[187] Case C-28/08 P *Commission v Bavarian Lager* (n 180) para 59.
[188] ibid para 75.
[189] ibid para 77.

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## IV. CONCLUDING REMARKS

In the EU legal order, the principle of democracy, as interpreted by the CJEU and the EGC, does not seek to compete against the way in which that principle is interpreted by national constitutional courts. The transfer of powers from the Member States to the EU must not adversely affect national democracies. On the contrary, the EU decision-making process must be accommodated so as to create 'more democracy', be that at national or at EU level. Accordingly, the CJEU and the EGC strive to place national and supranational democracies in a mutually reinforcing relationship. In so doing, the CJEU and the EGC strive to create a 'ius commune' of democracy, which national and supranational polities are committed to protecting. Thus, the CJEU and the EGC seek, as far as possible, to extrapolate the democratic elements contained in the constitutional traditions common to the Member States to a European context.

First, the CJEU is fully aware of the fact that the prerogatives of the European Parliament, the only institution whose members are elected by direct universal suffrage, must be judicially protected. That is why the CJEU will not hesitate to annul or declare invalid an act of secondary EU legislation whose adoption encroaches upon the powers of the European Parliament. As the *Listing Procedure Case* shows, however, the European Parliament may not rely on the principle of democracy with a view to expanding its powers beyond their defined limits, particularly in areas, such as the CFSP, where the authors of the Treaties have specifically determined that the European Parliament should only play a minor role. In so doing, the CJEU rejected the idea that the European Parliament was the only institution capable of limiting the exercise of fundamental rights, given that compliance with those rights is a general obligation binding upon all the EU institutions, regardless of their democratic credentials. It does not follow from the fact that an EU institution, such as the Council, lacks direct democratic legitimacy, that it is not bound by, nor capable of implementing, Article 51 (1) of the Charter. In the same way, the fact that the European Parliament enjoys such legitimacy in no way exempts it from complying with the fundamental rights enshrined in the Charter. This is a positive manifestation of the fundamental nature of those rights which is entirely consistent with European constitutionalism: compliance with fundamental rights applies to all political institutions alike and not even the most democratically legitimate of institutions may derogate from them at will. Moreover, in light of the *Listing Procedure Case,* when the EU implements CFSP measures, the principle of democracy must operate at national level.

Second, *Martinez v Parliament* illustrates that the principle of democracy is a complex multidimensional concept. Individually, the principle of the independent mandate (which can be found in national constitutions) requires that no interference is to take place in the relationship between an MEP and his or her constituents. Collectively, in order to guarantee the proper functioning of the European Parliament, the ongoing formation of political groups must be

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promoted. That means that an incumbent political majority cannot prevent a political minority of MEPs from forming a new political group or from splitting an old one, unless it is obvious that the members of that group share no political affinities. From a supranational perspective, the European Parliament is also an institution which actively contributes to European integration as a forum where political discussions must overcome national bias. Of course, the different facets of democracy in the EU are subject to inherent tensions. Just as disagreements between an MP and his or her political group can be found and are allowed in national constitutions, so they are found in the European Parliament. In the same way, political groups which are created to discuss the European project are naturally permitted to call into question its very existence.

Third, in order to ensure compliance with the rule of law, MEPs may not enjoy unlimited immunity which would amount to impunity for their wrongdoing. That does not mean, however, that MEPs are deprived of their freedom of political speech. In *Patriciello*, the CJEU was called upon to strike a delicate balance between protecting the freedom of political speech of MEPs and the principle of effective judicial protection. In that regard, it held that parliamentary immunity only applies where the action in question has a direct and obvious connection to the parliamentary duties of MEPs. That is consistent with the findings of the UK Supreme Court in *Chaytor*, which also limited parliamentary privilege to 'the core or essential business of Parliament'. Both courts seem to concur in that the award of too many privileges can be counterproductive for democracy. Stated simply, *Patriciello* shows that 'sometimes less is more'.

Moreover, the principle of democracy, as interpreted by the CJEU and the EGC, also applies in cases where the European Parliament or its Members are not directly involved, in particular in relation to new forms of governance. This shows that the CJEU is fully aware of the fact that the principle of democracy must adapt to societal changes that take place at national and EU level. In adapting the principle of democracy to alternative methods of policy making, the CJEU endeavours to respect national constitutional arrangements. Indeed, cases such as *Commission v Germany* and *UEAPME* show that the CJEU embraces a conception of the principle of democracy, which is fully consistent with that enshrined in national constitutions. Just as national constitutions recognize the importance of insulating some constitutional goods from the political process through the medium of 'non-majoritarian' agencies, the CJEU recognizes that such public bodies, which enjoy a high degree of independence whilst remaining subject to parliamentary influence, do not lack democratic legitimacy. Moreover, the CJEU is reluctant to apply 'double-standards' in relation to the degree of independence that non-majoritarian agencies must enjoy. Since those agencies are responsible for protecting the same constitutional good, such as the right to respect for a person's private life, their national or EU origin must not influence the degree of independence they

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enjoy. In the same way, in *UEAPME*, the EGC stressed that the EU principle of democracy does not oppose dialogue among social partners. On the contrary, in so far as all stakeholders are sufficiently represented during negotiations between management and labour, the resulting agreement may enjoy general binding force.

Moreover, the CJEU also endorses a conception of democracy that seeks to enhance the participation of citizens in the adoption of decisions that may affect them. That is why the right of access to documents is an important instrument through which the principle of transparency is judicially enforced. In light of *MyTravel*, the principle of openness applies in relation to both the legislative decision-making process and the administrative procedure. Moreover, in light of *Access Info Europe*, the EGC has taken the view that the right of access to documents may be relied upon not only to render the Council as a whole politically accountable but also the Member States individually. Indeed, if disclosure of the positions of national delegations sitting in the Council is permitted in relation to a Commission proposal, then both individuals and national parliaments may monitor the position defended by their national government. The right of access to EU documents which is, in principle, designed to improve political accountability at EU level, might thus also serve to improve transparency in respect of the Member States. It shows the way in which the EU principle of democracy may supplement the democratic-control mechanisms laid down by national constitutions. Last but not least, the principle of democracy cannot be understood without ensuring compliance with fundamental rights. As *Commission v Bavarian Lager* made clear, the right of access to EU documents must be weighed against the right to respect for a person's private life. That balance must take into account not only Article 8 of the ECHR, which is now largely reproduced by Articles 7 and 8 of the Charter and secondary EU legislation on data protection, notably Regulation No 45/2001.

It is appropriate to conclude with a further brief reference to *Utopia*. Scholars have argued that Thomas More wrote *Utopia* to highlight the contrasts between fiction and reality. In so doing, Sir Thomas sought to stress that some ideals are almost always impossible to implement perfectly in the real world. In his actions as a statesman, however, Sir Thomas proved that he was not an enemy of change but a true 'Renaissance man' open to the possibilities for improvement in governance and, more broadly, in society at large. In my view, one message conveyed by *Utopia* is that ideals have to be assimilated into [?] reality. Accordingly, Sir Thomas' legacy illustrates the point that, in order for ideals to become living truths, room must be left for change to occur incrementally. It is by progressively narrowing the gap between our conception of an ideal form of government and the government which actually rules over us that the former becomes less utopian, as society grows more receptive to the practical reforms implied by those ideals and more of them come to be realized. Ironically, we may never close that gap not only for

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negative but also for positive reasons, since new utopian thoughts have always been the dynamic force through which mankind has moved forward. That description holds true, I believe, both for the way in which the principle of democracy has been incorporated, by degrees, into the constitutional fabric of the UK and for the way in which that principle has become increasingly embedded in the European integration project.

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