

**PUBLIC SUPPORT FOR THE EUROPEAN UNION**  
**BUILDING TRUST**

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# Contents

## Foreword

<b>I</b>	<b>European policy and public support</b>	<b>9</b>
	<b>I.1 Waning public trust in the EU</b>	<b>9</b>
	<b>I.2 Pooling of competences, sovereignty and optimal capacity to act</b>	<b>15</b>
<b>II</b>	<b>European decision-making procedures and parliamentary involvement and control post-Lisbon</b>	<b>19</b>
	<b>II.1 European decision-making procedures</b>	<b>19</b>
	<b>II.2 The role of the European Parliament and national parliaments post-Lisbon</b>	<b>21</b>
<b>III</b>	<b>Specific problems in the field of economic and financial governance</b>	<b>26</b>
	<b>III.1 Economic governance and the legitimacy issue</b>	<b>26</b>
	<b>III.2 Political leadership and national parliamentary control</b>	<b>28</b>
	<b>III.3 Administrative legitimacy of public bodies</b>	<b>31</b>
	<b>III.4 Community versus intergovernmental economic and financial perspective of the EU</b>	<b>32</b>
<b>IV</b>	<b>Legitimacy of European policy: a multi-track approach</b>	<b>34</b>
	<b>IV.1 Further democratisation</b>	<b>34</b>
	<b>IV.2 Strengthening legal legitimacy</b>	<b>41</b>
<b>V</b>	<b>Conclusions and recommendations</b>	<b>43</b>
<b>Annexe I</b>	Summary of the advisory report	
<b>Annexe II</b>	Request for advice	
<b>Annexe III</b>	European Semester	
<b>Annexe IV</b>	List of abbreviations	

## Foreword

In 2014 the European Union is very much the focal point of political and social attention. A lively debate prompted by this year's European Parliament elections in May is taking place in the media, but there is also a clash of views on sovereignty and what is regarded as integration by stealth.<sup>1</sup> What citizens think about the European Union is the subject of a fresh opinion poll almost weekly. The general picture that emerges from these polls is an increasingly critical attitude towards the EU and waning confidence in its ability to function adequately. The criticism tends to focus above all on the direction in which the Union is moving and the extent to which EU decisions actually help to resolve problems such as the economic and financial crisis. The EU is no longer regarded as a given; doubts are increasingly cast on the manner in which it is evolving.

In its request for advice of 13 December 2013, the government basically asks the Advisory Council on International Affairs (AIV) to advise on how European decision-making and policy can remain close to the member states and can be organised in such a way that citizens feel their views are taken more into account and their interests better protected.<sup>2</sup> The main questions in the request are:

- 1) Where, according to the AIV, does the key to strengthening democratic legitimacy lie (national parliament, European Parliament, a combination of the two or elsewhere)?
- 2) What would be a good balance between 'effectiveness of control' and 'legitimacy of control' of EU governance at the various levels?
- 3) What are the limits of the intergovernmental and Community methods (and hybrid forms)?

The request for advice is contained in Annexe II.

In answering these questions the AIV treats the great value of the European Union and Dutch membership of the Union as a given. The EU provides the European countries with a framework for regional cooperation which is essential in a world in which the effects of globalisation and growing competition from Asia and Africa are increasingly apparent. The Union also plays an important role as guardian of shared values and protector of the rule of law in Europe.<sup>3</sup>

1 G. Majone (2005), *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, Oxford, Oxford University Press.

2 Citizens are hardly a homogenous group: their composition differs from one policy field to another and there are also varying degrees of political involvement. The impact of European policy is greater on some groups than others. For the purposes of this advisory report the different groups are considered together. Here, therefore, a citizen is taken to be an average citizen.

3 See the recent advisory report by the Advisory Council on International Affairs entitled *The Rule of Law: safeguard for European citizens and foundation for European cooperation*, Advisory Report no. 87, The Hague, January 2014.

The AIV's second point of departure is that no matter how important strengthening democratic procedures may be in itself, it is not sufficient to restore public trust in the Union. Strengthening democratic legitimacy through institutional reforms does not automatically lead to greater public support and acceptance of EU action. For example, although European rules or treaties such as the Stability and Growth Pact are adopted in accordance with democratic procedures, they still have insufficient public support.<sup>4</sup> The advisory report therefore takes as its starting point the public's lack of confidence in politics and government in general and hence also in existing institutions. The AIV is convinced that a multitrack approach is required in order to achieve broader strengthening of the EU's democratic legitimacy, thereby also helping to restore public trust in the Union. This is not only about strengthening the member states and national institutions, but also about a more far-reaching politicisation of the debate in which politicians take the lead and convey a clear and coherent view of the key functions of the Union and in which citizens, civil society, trade unions, businesses and so forth also play an active role. Accordingly, representative and participatory democracy should be more closely interconnected. Changes are therefore necessary not only at the European level but also and above all at the national level because the Union and the member states have a collective responsibility.

The AIV does not claim to provide a comprehensive analysis of the causes of the public mistrust of the EU. Instead, it focuses on what the member states and the national institutions can do to enhance the legitimacy of the European cooperation process. The report is organised as follows. First, it describes the problem of the waning confidence in the Union and places it in the context of the debate on integration by stealth, the transfer of powers, sovereignty and the democratic legitimacy of the Union. It studies how these key concepts from the request for advice should be understood and how they are defined in the literature as well as how they relate to the different tiers of government at European and national level and the extent to which they are politically, administratively and legally intertwined (Chapter I).

Chapter II deals with the present national and European parliamentary influence and control over the European decision-making process and the various forms this can take. Of particular importance in this connection is the role assigned to the national parliaments post-Lisbon through the yellow and orange card procedure and how this may help to increase the democratic legitimacy of European decisions. As a major factor in the present criticism of the EU is the manner in which it has shaped economic and financial governance in response to the crisis, Chapter III considers the foundations of this governance within the Union and the specific problems to which it gives rise in terms of democratic legitimacy.

The budgetary supervision exercised by the EU clearly reduces the freedom of manoeuvre of national governments. The procedure in the event of budgetary deficits and the involvement of the Troika (consisting of the IMF, the ECB and European Commission) in the programme countries has prompted questions about democratic legitimacy and sovereignty in parliaments in the member states as well as in the European Parliament. The intergovernmental basis of, say, the European

4 F.A.W.J. van Esch, 'Zijn Europese anticrisismaatregelen wel zo ondemocratisch?' (Are European anti-crisis measures really so undemocratic?), *Trouw*, 28 March 2013.

Stability Mechanism (ESM) currently provides a pragmatic solution, but what about the democratic legitimacy and accountability of this new method of cooperation? The same applies to a certain extent to the Banking Union. This advisory report focuses above all on the European Semester, since this enables the AIV to show how European and national politics and governance are closely interwoven and to identify the shortcomings in the system of democratic accountability and control. Chapter IV addresses the various means by which the legitimacy of European policy can be increased. In addition to further democratisation, this includes strengthening the administrative and legal legitimacy of the Union.

The recommendations examine the improvements that can be made to the structure and operation of the EU's political system of governance both inside and outside the framework of the present treaties. Naturally, the report will take account of the previous findings of other bodies such as the Advisory Department of the Council of State,<sup>5</sup> the activities of the House of Representatives under the direction of rapporteur Leegte, and the AIV's own previous advisory reports. A summary of the advisory report is given in Annexe I.

To prepare this advisory report a combined committee was established consisting of Professor L.A.J. Senden (chair), Professor A. van Staden (vice-chair), Professor M.G.W. den Boer, Dr F.A.W.J. van Esch, Dr P.C. Plooij-van Gorsel, Dr A. Schout, C.G. Trojan, Ms M.C.B. Visser and N.P. van Zutphen (members of the European Integration Committee), D.J. Barth and Dr M. Drent (members of the Peace and Security Committee) and T.P. Hofstee (member of the Human Rights Committee). The executive secretary was Ms P.H. Sastrowijoto, assisted by L. van Haaften and Ms E.A.M. Meijers (trainees). Ms M. de Jong was involved in the preparation of this report in her capacity of civil service liaison officer of the Ministry of Foreign Affairs.

In the course of preparing this report the committee consulted a number of experts, including T.J.A.M. de Bruijn, R.H. Cuperus, Professor C.N. Teulings and Professor W.J.M. Voermans. The AIV is very grateful to them for their contribution.

The AIV adopted this advisory report at its meeting on 4 April 2014.

5 Information about embedding democratic control in the reforms of economic governance in Europe, 18 January 2013.

# I European policy and public support

## I.1 Waning public trust in the EU

### *The mood in the Netherlands*

Since the late 1990s the EU has no longer been automatically regarded as the motor for prosperity. The economic and financial crisis, centring around the rescue of sovereign states and banks in southern Europe and Ireland, has increased opposition to the EU. The free movement of persons causes tensions, particularly where it results in displacement in the labour market. The public debate about the arrival in the Netherlands of workers from Poland, and now possibly from Bulgaria and Romania as well, is a reflection of this dissatisfaction.<sup>6</sup> This is a problem, certainly in times of economic crisis and rising unemployment. For many Dutch people the 2005 referendum on a Treaty establishing a Constitution for Europe (often referred to in political debate as the Constitutional Treaty), which included symbolic but legally superfluous provisions on flag and anthem, was a step too far in the integration process for many Dutch people. Of the 63.3% of the Dutch electorate who voted in this referendum, 61.5% voted against. This result, following the previous rejection in France, signalled the end of the Treaty. Brussels, as 'capital' of the Union, is viewed as a bastion where decisions are taken about citizens but without their participation. Although the powers of the European Parliament, as a representative of the citizens of Europe, have been expanded as a result of the Treaty of Lisbon, this has not brought the EU closer to the people.

Criticism of the EU is increasing among all sections of the population in the Netherlands. It is not only the less educated and supporters of the political parties that are known to take a decidedly Eurosceptic stance who are questioning the European project. Representatives of the parties of the centre and leading opinion makers have also expressed doubts about the direction in which European cooperation is moving. One thing is clear: there is no agreement about what kind of EU people want. On the other hand, there is often agreement about the analysis of the problem: integration has been too rapid and too many decisions such as the introduction of the euro and the enlargement involving the addition of 12 new member states in a short space of time have had unexpected side-effects. The Swiss referendum, in which citizens voted by a narrow majority to limit immigration from the EU, is also resonating within the member states. However, there is less agreement about solutions. Some advocate marking time, repatriating competences, questioning the euro and the free movement of persons and establishing a moratorium on any further enlargement. Others believe the lack of democratic legitimacy could be solved by holding a referendum on Dutch membership of the euro area, as recently proposed by Wouter Bos, the former Minister of Finance.<sup>7</sup>

A few figures may illustrate this: only 33% of Dutch people were satisfied with European politics at the end of 2013 compared with 50% in 2010, according to a study by the

6 For the time being the number of migrant workers entering the Netherlands is limited, (see: [www.nieuws.nl/economie/20140116/Roemeense-invasie-arbeidsmigranten-blijft-uit](http://www.nieuws.nl/economie/20140116/Roemeense-invasie-arbeidsmigranten-blijft-uit)).

7 'Wouter Bos: *alsnog een referendum over de euro*' (Wouter Bos: holding a referendum on the euro after all), *NRC Handelsblad*, 11 March 2014.



Netherlands Institute for Social Research.<sup>8</sup> 62% of Dutch people consider that things are going wrong with the Netherlands and point an accusing finger at the EU. The Eurobarometer shows that public trust in the EU is low, not only in the Netherlands but also in other European countries. 57% of the Dutch believe that their vote does not count in the Union (compared with an EU average of 66%) and 37% are pessimistic about the EU's future (compared with an EU average of 43%). At the same time, there is still support for the monetary union and the euro (71%), although the public debate on this issue reveals an altogether more negative picture.<sup>9</sup> Surveys by TNS NIPO at the end of January 2014 show similar trends. The first major opinion poll among Dutch voters in this election year indicates that turnout will be low, as it was in previous European parliamentary elections. Only one in three of the electorate stated that they would certainly vote, while over 52% indicated that they were not interested in Europe and 24% indifferent to it.<sup>10</sup> However, the public's aversion to government and politics is not confined to the European Union and its institutions. According to the Netherlands Bureau for Economic Policy Analysis (CPB), public trust in Dutch politics is also at a low ebb (39%). An advisory report entitled *Het onbehagen voorbij* (Beyond discontent) published by the Dutch Council for Social Development in early 2013 talks of a general sense of discontent in Dutch society with all tiers of government. What is striking, but not illogical, is that the more remote the tier of political decision-making, the greater the discontent. At the same time, the declining turnout percentages at national, provincial and local elections also paint a sombre picture of belief in representative democracy.

The AIV notes, like the government, that despite the calls for 'less Europe' there are also calls for 'more Europe', for example in the form of closer cooperation in the economic and financial field (according to the Eurobarometer of November 2013, 73% of Dutch people are in favour of economic and financial cooperation, although, as we have seen above, a different picture emerges from the public debate), further harmonisation of the fireworks legislation and the preparation of EU lists of doctors who have been barred from practising on the grounds of incompetence (following the Jansen-Steur scandal in the Netherlands).

Support for the EU is therefore no longer a given, unlike the position in the first few decades of the European integration process. However, it should be noted that in the past support probably took the form of tacit consent (or 'permissive consensus')<sup>11</sup> or even indifference rather than explicit approval by either the House of Representatives or the general public. In the absence of opposition or criticism, it was simply assumed that consent was forthcoming. There was little, if any, direct involvement of citizens in

8 Netherlands Institute for Social Research, *Burgerperspectieven 2013/4* (Rolling survey of public opinion), The Hague, 2013.

9 Eurobarometer 80.

10 'Europees debat begint weer bij nul' (European debate back to starting point), *NRC Handelsblad*, 11 January 2014. An article on the TNS NIPO poll commissioned by the University of Amsterdam.

11 L.N. Lindberg and S.A. Scheingold (1970) *Europe's would-be polity: Patterns of change in the European Community*, Englewood Cliffs, Prentice-Hall, p. 41.

major constitutional changes such as the Treaty of Maastricht,<sup>12</sup> which was approved by a parliamentary ratification procedure based on a simple majority.<sup>13</sup> In addition, European cooperation was for a long time focused on technical legislation which had little political content and was often relatively uncontroversial in political terms. Europe was not an integral part of party political democracy but was instead the exclusive preserve of 'Europe specialists' in the parliamentary parties. In addition, the parties have created an artificial distinction between European and national governance, which they have kept in place down to the present day. Politicians have also failed to show the public how European and national governance have become increasingly intertwined. On the contrary, they still quite often deny that national political parties themselves play a part in European decision-making. For example, both the coalition parties and the opposition have used the term 'salami tactics' to describe decision-making in Europe. Nor have they provided any idea of how they see the future of the Union in the long term. In brief, they have for a long time managed to avoid political debate on the substance of European policy. The AIV believes that more debate – not only in terms of for or against Europe – would be beneficial from a democratic point of view (see also Chapter IV); it would be a sign that the Union as a political project is coming of age.

### *Origin*

What is the origin of the present decline in public confidence in the European Union? Countless explanations have been put forward, besides those described above. Some people point to the EU's meddling in aspects of daily life such as employment, income and welfare. Naturally, the spectacular wastefulness of the monthly travelling circus between Brussels and Strasbourg as the European Parliament shuttles back and forth for its monthly plenary sessions is also cited. Others believe the problem lies in the inadequate powers to influence and scrutinise European decision-making and that the democratic legitimacy of the Union is therefore the main problem. And others again seek the explanation in the Union's opaque procedures and seemingly maze-like institutional structure, the (stealthy) transfer of national competences which limits the freedom of national governments to make policy, and the EU's lack of effectiveness, particularly in times of economic crisis. Another explanation is the accession of countries to the Union which were not ready for it. The ongoing membership negotiations with candidate countries such as Turkey, the former Yugoslav Republic of Macedonia, Montenegro and Serbia and with potential candidates such as Albania, Bosnia and Herzegovina, and Kosovo are causing unrest. Many people view enlargement no longer as exporting stability but as importing instability. The EU's policy results are therefore failing to live up to the expectations of its citizens in a good many fields.

This finding is also certainly true of the measures to tackle the financial crisis. Indeed, the EU is seen as part of the problem rather than as a solution. If the criteria for accession had been consistently applied, some of the countries which are now members of the EU/EMU would never have been able to join in the first place. The public has the feeling that the EU never learns from its past mistakes because the enlargement is

12 W. Voermans, Wim Voermans' contribution to the Round Table Talks of the EU Affairs Committee of the House of Representatives, Citizens' Initiative: *Maak Europa Politiek* (Make Europe Political), 11 September 2013, p. 8.

13 Article 91 (3) of the Dutch Constitution states that provisions of a treaty that conflict with the Constitution require approval by a two thirds majority of the States General. Whether there is a conflict is a matter for the legislator itself to decide.

going ahead despite the opposition to it. The bailout operations for the benefit of the south European member states (and Ireland) have also undermined the EU's popularity among both donor and recipient countries. No one could fail to see that the initial reaction to the crisis and its management left much to be desired, in the sense that it was too little, too late.<sup>14</sup> Although the crisis was initially imported from the United States this did little to stem the negative sentiment in the EU or the waning confidence in its institutions. The perception is that the EU is partly responsible for the crisis and that it has lacked the capacity to provide the member states with a satisfactory resolution to the difficulties. Nor was this picture changed to any significant extent by the agreements that were gradually made to strengthen crisis management, tighten up budgetary and fiscal discipline, coordinate economic policy, reinforce financial regulation and establish a Banking Union.

At the same time, the strongly centralising tendency as a consequence of these measures has increased some people's fears about the alleged formation of a European government and about a marked political role for the European Commission and the European Central Bank, without sufficient consideration and testing of national alternatives.<sup>15</sup> This in turn arouses fears of loss of national identity, which is a particularly sensitive issue in a period of globalisation when many citizens are losing control of their existence owing to uncontrollable external forces. The European political culture of the last 20 years is partly responsible for this and is well illustrated by a statement made by Jean-Claude Juncker, the previous President of the Eurogroup, former Prime Minister of Luxembourg and currently one of the candidates for the presidency of the European Commission. 'We decide on something, leave it lying around and wait and see what happens. If no one kicks up a fuss, because most people don't understand what has been decided, we continue step by step until there is no turning back.'<sup>16</sup> Statements of this kind, as well as pronouncements by those in authority in Brussels advocating a further strengthening of European governance (especially in the context of the EMU), create a perception that the EU is increasingly eclipsing the member states. Each centralisation of a decision-making power fuels the public's anti-European sentiment, as it seems to suggest that the EU is on the way to becoming a superstate. Broad support for all these explanations can be found throughout society, and they contribute to what the Council of State has described as the 'democratic alienation of the citizen'.

#### *Democratic legitimacy in the European Union*

The above suggests that the EU has a wide-ranging problem of democratic legitimacy. This concept requires further explanation with a view to answering the first question in the request for advice. The central issue is what is the basis for the right of those in positions of political authority and political bodies to take decisions binding on society. Democratic legitimacy is mainly about the acceptability of these decisions for a clear

14 Advisory Council on International Affairs, *The EU and the Crisis: lessons learned*, Advisory Report no. 68, The Hague, January 2010.

15 A. Schout and T. Buirma, 'Tien jaar Barroso: laf of "smooth operator"' (Ten years of Barroso: spineless or a smooth operator?), *Internationale Spectator*, Volume 68, no. 2, February 2014.

16 *Der Spiegel*, 27 December 1999.

majority of citizens.<sup>17</sup> Why would those citizens accept measures even if they are not always in agreement with their content? A decisive factor is confidence in the political institutions that are competent to make choices between competing interests and values.

There are two dimensions to democratic legitimacy.<sup>18</sup> First, there is 'input legitimacy', i.e. the legitimacy of the initial stage of the decision-making process in which citizens, political parties and interest groups formulate political wishes and make demands on political office holders. To determine the nature of democratic legitimacy it is important to examine to what extent citizens can exert influence, directly or indirectly, over the selection of office holders and the policy they pursue. In this connection, ex-post control and accountability are relevant. In the context of a representative democracy, in which referendums on policy issues play little if any role, the quality of representation is of real significance. Do citizens feel truly represented by their representatives? Do they feel that they are listened to and their interests taken into account? Do they have sufficient scope to influence decision-making and to initiate control and accountability procedures? As will be discussed in Chapter II, the EU has shortcomings in this area.

The final stage of the political process is concerned with 'output legitimacy', in other words the extent to which decisions and actions based on them lead to the resolution of important social problems and meet the needs of citizens. In the long run, political systems cannot survive – or find it hard to survive – on output legitimacy alone. The same can be said of systems which offer citizens maximum opportunity for participation but fail to solve major issues. Neither input nor output legitimacy is therefore sufficient on its own. In the AIV's opinion, the feeling prevalent among large sections of the population, namely that the EU is taking decisions for which voters have not asked or which are at odds with their presumed interests, is having a disastrous effect on the desired level of both input and output legitimacy. As is apparent from what has been said above, the EU is not living up to the expectations of its citizens in many fields and is therefore failing in this respect as well. In this connection, reference can also be made to the importance of safeguarding the nature of the rule of law in the Union.<sup>19</sup>

Finally, a fundamental aspect of democratic legitimacy concerns the question of whether citizens feel connected with one another within the limits of a political system to such an extent that there can be said to be a polity.<sup>20</sup> Where there is a sense of solidarity and shared destiny as well as common values, there is a basis for democratic legitimacy,

17 Democratic legitimacy is not the only form of legitimacy: there is also legal and administrative legitimacy. Legal legitimacy is about matters such as lawfulness and due care, and administrative legitimacy about the expertise and independence of public bodies and the feasibility and effectiveness of their decisions. These are dealt with in Chapters III and IV respectively.

18 The account given below is based on the report of the Advisory Council on Government Policy (WRR) entitled *Europa in Nederland* (Europe in the Netherlands) (2007), pp. 31-58.

19 Advisory Council on International Affairs, *The Rule of Law: safeguard for European citizens and foundation for European cooperation*, Advisory Report no. 87, The Hague, January 2014.

20 The words *demos* (people) and *nation* are purposely avoided here because they wrongly suggest that ethnic homogeneity is essential for the formation of a political community. The example of the United States shows that a vigorous political community can develop in an ethnically diverse country.

particularly when it comes to acceptance of a redistributive policy. After all, the transfer of resources from one group of citizens to another will be accepted by the former only if they have a sense of mutual obligation. For this purpose, an overarching political identity is required. However, most citizens still feel it most natural to identify with their nation state. Their loyalty and support is therefore primarily for national institutions and only secondarily for their European counterparts. Decisions taken in the name of the EU can rely only to a limited extent on support generated by a positive attitude towards common European ideals. The absence of a European public space is often cited as one of the main reasons for the EU's weak development as a polity.<sup>21</sup> The impression that European cooperation is, above all, an elite project is strengthened by the fact that members of the establishment in the member states have no difficulty in communicating with one another owing to their command of foreign languages.

*Possible solutions: the debate*

Since the French and Dutch voted 'No' to the Treaty establishing a Constitution for Europe, the member states and EU institutions have worked on ways to increase democratic legitimacy. For example, the Treaty of Lisbon has strengthened the role of the European Parliament<sup>22</sup> and also includes a number of new solutions: the European Citizens' Initiative and the greater involvement of national parliaments through the yellow and orange card procedure. Recognising the lack of public trust in the EU, the government proposes to concentrate on the focus, balance and legitimacy of the Union, in particular by making a clear distinction between matters that need to be regulated at EU level and those that can be resolved at national level: 'Europe where necessary, national where possible' is its adage. Comparable positions are being taken in other member states, notably the United Kingdom but also Germany. The government also believes that part of the solution may involve changing the composition and procedure of the European Commission. For others the solution would be to hold referendums whenever a transfer of competences is proposed. Many think-tanks argue that the solution would be to increase the power of the national parliaments or perfect the yellow and orange card procedures. This is also in keeping with the position taken by the Dutch rapporteur from the House of Representatives on democratic legitimacy.<sup>23</sup> In the British House of Commons the idea has even been floated of a parliamentary right of veto at national level. The thinking behind such a proposal is that this would not only narrow the gap between citizens and Europe but also strengthen the democratic legitimacy of the entire EU architecture. The slogan adopted by the European Parliament for the elections is 'This time it's different', and as long ago as 2012 its President, Martin Schultz, launched a 10-point plan to put the EU on a stronger democratic footing.<sup>24</sup> He advocated, among other things, a fully-fledged right of initiative of the European

21 However, a global public space is developing on the internet. As English is the language of communication here, there is no language barrier and citizens can stand up for their interests in a new civil society.

22 The European Parliament now acts as a democratically legitimate co-legislator across almost the entire range of decisions.

23 Dutch House of Representatives, *Eerste gezamenlijke standpunt over democratische legitimiteit en de rol van nationale parlementen* (First common position on democratic legitimacy and the role of national parliaments), House of Representatives doc. 2014D01697, 20 January 2014.

24 M. Schulz, 'Democratic Europe – 10-point plan to put the EU on a new democratic footing', speech by the President of the European Parliament at the Humboldt University of Berlin, 24 May 2012.

Parliament and the transformation of the European Commission into a European government. In May EU citizens will have greater choice if the largest party is able to nominate a candidate for Commission President. However, much depends on the calibre of the candidates and the extent to which they can be seen as credible reformers of the EU. Will they be able to offer answers, for example to the voters who regard the labour market competition from Eastern Europe as a threat and something they experience on a daily basis? It should be noted, incidentally, that the German Chancellor, Angela Merkel, and the Dutch Foreign Minister, Frans Timmermans, have indicated that they will not automatically accept the candidate of the largest party as Commission President. The European Council is scheduled to meet just a few days after the elections in May to discuss the election result and the total package of appointments.

## **1.2 Pooling of competences, sovereignty and optimal capacity to act**

The procedures and arrangements for exercising competences and making decisions within the Union will therefore have to strike an adequate balance between input and output legitimacy. This ties in with the second question of the request for advice, namely 'What would be a good balance between 'effectiveness of control' and 'legitimacy of control' of EU governance at the various levels?'

In relation to EU governance effectiveness is interpreted by the AIV as referring not only to swift action but also to content and result. Clearly, the requirements of political control may be inconsistent with those of administrative effectiveness. Too much emphasis on control may compromise the problem-solving capacity of a political and administrative system, but calls for greater effectiveness may never go so far that competences are exercised unsupervised. It is about striking the right balance between the two requirements. As regards the EU, the AIV feels that the public's lack of trust in European decision-making and in the direction in which the European cooperation process is moving to be so great that the incorporation of extra control mechanisms in the form of increased involvement of national parliaments is justified. In cases where the EU failed in the past to find timely solutions to important questions, this was due mainly to clashes between different national interests and the absence of any sense of urgency. However, things will not be all that different in the future, as delays will now be due to more extensive democratic procedures. In addition, an EU policy that does not have the support of a majority of the population is bound, sooner or later, to encounter major problems of implementation.

The AIV would point out first of all here that in the political and social debate the transfer of competences to the Union and the loss of national sovereignty are often mentioned in one breath. This is particularly true of measures taken to deal with the economic and financial crisis, such as the financial support to Greece and the creation of the Banking Union.<sup>25</sup> The debate has become polarised because there is talk of a 'choice' between 'Brussels diktats' and national sovereignty,<sup>26</sup> and the Union is described as an attack

25 Communication from the Commission – A blueprint for a deep and genuine economic and monetary union: Launching a European Debate, COM(2012), 777 final/2, and Conclusions of the European Council of 13/14 December 2012, EUCO 205/2012.

26 'Wilders: wij gaan niet mee in dictaat Brussel' (Wilders: we're not going to go bow to Brussels diktat), *De Volkskrant*, 21 April 2012.

on the nation state.<sup>27</sup> This suggests an antithesis – a conflict of interest between the Union and the Member States and an image of the Union as some kind of foreign power. Moreover, this transfer of competences is often described as taking place by stealth.

The AIV believes that this debate is based on a false premise, because national sovereignty is seen too much as an absolute quantity and more powers for the Union as something that is negative by definition. The attention is therefore focused rather unilaterally on the transfer of competences as a possible limitation or loss of the member states' right of self-determination. This refers to the extra dimension of sovereignty. This vision is rather at odds with the approach in the Dutch Constitution, which does not expressly recognise sovereignty and the maintenance of sovereignty as a constitutional value, but does provide for the possibility of transferring legislative, executive and judicial powers to international organisations by treaty (article 92). Furthermore, the Constitution is very open in providing for the acceptance and effect of international and European law (articles 93 and 94).

The AIV favours an approach that focuses mainly on the question of what interest would be served by action at European level and what would be the point of granting more competences to the Union (or enabling the Union to exercise more competences). To what extent would it be in the state's interests to share competences with the Union in order to maximise its capacity to act and resolve problems? This requires a very well-considered decision on the extent to which the scope for national policy-making is circumscribed and what the state obtains in return. The globalisation and cross-border effects of all kinds of problems means that states must be able to pursue an effective policy even within this context, and that a degree of cooperation with other levels of authority (such as the EU) is therefore necessary for the effective resolution of certain problems. The key question is where European cooperation has added value. In the AIV's opinion, this added value lies in the fields of the internal market (including the free movement of persons), the common trade policy, the environment and common foreign and security policy, as well as in other areas where national policy is ineffective, such as banking transactions, combating human trafficking and other forms of serious cross-border crime.

The competences granted by treaty to the Union,<sup>28</sup> particularly the catalogue of competences granted by the Treaty of Lisbon,<sup>29</sup> in themselves reflect fundamental choices of the member states concerning the nature of the added value and what matters may be arranged by whom, in what field, with what intensity and by means of what procedure.<sup>30</sup> This catalogue distinguishes between exclusive and shared

27 Baudet (2013), *De aanval op de natiestaat* (The nation state under attack), Amsterdam, Uitgeverij Bert Bakker.

28 See articles 4 (1) and 5 (1) and (2) of the Treaty on European Union (TEU) and article 1 (1) of the Treaty on the Functioning of the European Union (TFEU).

29 See articles 2-6 TFEU.

30 Article 48 TEU provides that the member states themselves may subsequently amend these choices. It is, in fact, apparent from the Treaty of Lisbon that the member states have not made use of this opportunity to repatriate powers to themselves but have, on the contrary, expanded the competences of the Union, for example in the field of judicial cooperation in criminal matters.

competences of the Union and between its coordinating, complementary and supporting competences. One of the few fields in which the Union has exclusive competence is that of monetary policy for the euro area member states. Here the Union is competent to adopt rules and take decisions to the exclusion of the member states. It is no coincidence that this is a policy field in which the Netherlands had in fact already lost its sovereignty owing to its strong economic and financial dependence on Germany. Competences in most EU fields, including the internal market, are shared, which means that the member states can still introduce legislation in so far as the EU has not already done so and its legislation still allows scope for this. Member states have thus retained some policy freedom in this field. In many other fields, such as economic policy and employment, health, education and tourism, the EU has only coordinating or complementary competences and the possibility of harmonisation of legislation and displacement of national rules is therefore excluded. The AIV believes that in most cases it is thus more accurate to speak of a pooling or division of competences between the European Union and the member states rather than of the transfer of competences from the member states to the Union.

What is of greater importance is that this pooling of competences does not entail a loss of ownership by the member states:<sup>31</sup> not only can member states obtain repatriation of competences (article 48 TEU), but they also do not lose control over how the Union exercises the competences granted to it. The member states themselves largely control the pace and direction of European cooperation not only through the position they take in the European Council, which defines the Union's general political directions and priorities (article 15 (1) TEU), but also through the application of the principles of subsidiarity and proportionality in the European legislative process. Besides the European Commission and the European Parliament, national governments (within the framework of the Council of Ministers) and national parliaments also have an important role to play in monitoring proposals for European legislation by reference to the principles of attribution, subsidiarity and proportionality. Recent examples of proposed European legislation judged problematic on the basis of these principles are the proposals for a directive on the right to strike, a Soil Framework Directive, a European Public Prosecutor's Office and quota rules to ensure greater representation of women on supervisory boards and at listed companies.

Monitoring of this kind can and should not be carried out solely on the basis of political conviction and expediency, but instead requires careful consideration of factors such as the legal, socioeconomic and administrative burden and rule-of-law issues, including human rights considerations. Express attention must also be paid to whether the member states are sufficiently able to guarantee supervision and enforcement of the European rules. For example, it is clear from the operation of EMU in practice that for a properly functioning currency union (and internal market) it is necessary for all member states to have their affairs in order and that a joint European economic policy is required in order to make the necessary structural reforms in the member states.<sup>32</sup> This example also shows that policy decisions and integration steps may have unforeseen consequences that necessitate follow-up steps, for example where action at national level to enforce and supervise European rules proves inadequate. It is this

31 A. von Bogdandy and Jürgen Bast (2006), *The Vertical Order of Competences*, in A. von Bogdandy and Jürgen Bast (eds.) (2006), *Principles of European Constitutional Law*, Oxford, Hart, p. 237.

32 J. Dijsselbloem (2014), Speech at the OECD Seminar 'The Euro Area at a crossroads'.



spillover effect of previous decisions, resulting almost inevitably in follow-up steps that largely derive their political justification from them, which is viewed as a transfer of competences by stealth. This can be understood from the perspective that people see European cooperation moving in a direction they were unable or unwilling to contemplate in advance, yet at the same time it cannot be denied that not only EU institutions but also national governments (through the European Council and the Council of the European Union) and national parliaments (through national mandate systems, parliamentary reservations, the yellow and orange card procedure and ratification procedures) have played an active role in this process. Member states should also do more to anticipate what problems may occur if the supervision and enforcement of new European rules are left too much to the member states themselves to prevent spillover effects of this kind. Although a given interpretation of EU competences may also be seen as unduly liberal or extensive, this may once again be largely attributable to the member states themselves. In the past they have quite often put a broad interpretation on what is now article 352 of the Treaty on the Functioning of the European Union (TFEU), which provides for the possibility of further action by the Union within the framework of the internal market.

Member states therefore exercise control within a different structure of authority and in this sense ownership also means responsibility; the national institutions concerned have a shared responsibility for the extent to which EU legislation affects their capacity for action and scope for policy-making and, in particular, for the direction in which the Union is moving and the structure and functioning of the European decision-making procedures. An open, transparent, informed and properly researched debate is necessary in order to determine how the balance of competences should look, what is the possible added value of European policy and how the decision-making can be structured in such a way as to strike a good balance between input legitimacy (control) and output legitimacy (effectiveness). Attention must therefore also be focused on what degree of public support is forthcoming for the pooling or exercise of certain competences. Relevant to this subject are the various European decision-making procedures. These procedures may differ from one policy field to another, depending on the applicable legal basis. This also means that there are differences from the perspective of parliamentary involvement and hence of democratic legitimacy. This is the subject of the following chapter.

## II European decision-making procedures and parliamentary involvement and control post-Lisbon

Partly in view of the third question put to the AIV – What are the limits of the intergovernmental and Community methods (and hybrid forms)? – all decision-making procedures are set out below (section II.1). The extent of parliamentary involvement differs greatly from one procedure to another. Thereafter, the report considers the roles of the European Parliament and the national parliaments in the European decision-making processes in order to reveal the limitations of democratic legitimacy (section II.2).

### II.1 European decision-making procedures

Depending on the chosen legal basis, decisions that involve the exercise of exclusive and shared (and sometimes also complementary) competences of the Union are made through the ordinary legislative procedure or a special legislative procedure (article 289 TFEU). In this sense the ‘Community method’ is not uniform, but reflects the differing involvement of the Commission, the Council and the Parliament. The Community method tends to be of a supranational nature where the Council decides by qualified majority, but of a more intergovernmental nature where it decides by unanimity.

The **ordinary legislative procedure** applies, for example, to the introduction of legislation in the broad field of the internal market (article 114 TFEU), and is a shared competence of the Union and the member states. This procedure requires a proposal of the European Commission and joint decision-making of the Council – by qualified majority – and the European Parliament. In this procedure the European Parliament is therefore co-legislator and can, as such, propose amendments and, in the last resort, also prevent legislation. It follows that in the case of legislation introduced by the Community method, citizens can clearly exercise influence through the European Parliament as well as through the national parliament (see III.2) and the Commission in the consultation stage (see IV).

Decision-making under article 352 TFEU (referred to above) takes place on the basis of a **special legislative procedure**, which in this case consists of a proposal from the Commission, a decision passed unanimously by the Council and the approval of the European Parliament. But under article 113 TFEU, a special legislative procedure may also mean that the European Parliament is only consulted, for example in connection with the harmonisation of taxation.

Since the Lisbon Strategy (2000) the **open method of coordination** has been introduced to achieve further convergence of employment policy. This method is mainly used in fields in which the EU is not permitted to harmonise legislation, but does have coordinating, supporting and complementary competences. As such, it is designed to achieve the coordination and convergence of policy in the member states (for example in the fields of employment, social policy and education). This is arranged by sharing information, preparing national action plans, exerting peer pressure and exchanging best practices, not by adopting binding legislation. The role of the European Parliament is fairly limited here, whereas the national governments are involved in adopting policy objectives at European level and national parliaments in adopting national action plans.

**Purely intergovernmental arrangements** are of great importance. These are forms of cooperation between national governments in which there is little if any role for the

Commission, the European Parliament or the Court of Justice. Such arrangements have been made by the member states, particularly the euro area member states, to resolve the economic and financial crisis, but they do not have a legal basis in the European treaties. Examples are the European Stability Mechanism and the future European Resolution Fund (ERF) in the context of the Banking Union and the approval procedure for the provision of support to programme countries such as Greece. In these cases the role of national governments is therefore dominant and the European Parliament plays no part in the decision-making procedure. Parliamentary involvement in the international treaties concluded in this way mainly takes the form of consent by the national parliaments.

Where **Community and purely intergovernmental methods overlap** in a given field, it is more difficult for national parliaments and hence for citizens to understand the subject matter. This is the case, for example, with the European Semester, which will be considered at length in the following chapter. Here, European and national powers are so intertwined that it is hard to determine if and to what extent national institutions and parliaments can still exercise influence.

As regards the Common Foreign and Security Policy (including the Common Defence Policy), the pre-Lisbon situation has not really changed. Although this policy admittedly forms part of EU cooperation, it is organised along intergovernmental lines. While the member states have retained their competences in respect of the deployment of national forces (and, in the case of the Netherlands, the House of Representatives can hold the government directly accountable, for example for participation in international operations), the more intense the defence cooperation is, the less room for manoeuvre the governments concerned have in practice and the more account they must take of their partners' expectations.<sup>33</sup>

The European treaties therefore largely determine what decision-making procedure must be applied, depending on the choice of the legal basis. It should be noted, however, that in some cases the member states have opted for a purely intergovernmental arrangement outside the treaties in preference to a European decision in accordance with the Community method, for example under article 352 TFEU, where this would seem to have been a possibility. An example is the ESM Treaty, which was later the subject of litigation in the Pringle case. In its judgment the European Court of Justice held that the member states were entitled to make this choice. In choosing the intergovernmental method the member states seem to have wished to exclude as far as possible any involvement of the Commission and the European Parliament and to keep parliamentary control primarily at national level through the process of ratifying international treaties.<sup>34</sup>

In a more general sense the AIV notes that the purely intergovernmental method does not necessarily result in faster decision-making or, indeed, in better decision-making from the perspective of output legitimacy, and also that the parliamentary involvement is mainly of an *ex post* nature and can have little substance. In the case of decision-

33 Advisory Council on International Affairs, *European Defence Cooperation: sovereignty and the capacity to act*, Advisory Report no. 78, The Hague, January 2012.

34 See, for example, A. van den Brink and J.W. van Rossem, *De zaak Pringle en de eurocrisis: juridische paradoxen en constitutionele perspectieven* (The Pringle case and the euro crisis: legal paradoxes and constitutional perspectives), *Nederlands Tijdschrift voor Europees Recht*, 2013 (7).

making based on article 352 TFEU, individual national governments are all accorded the same weight owing to the unanimity requirement, but at the same time there is also more scope for a parliamentary contribution on matters of substance, particularly if the European Parliament and the national parliaments can join forces (see II.2). It should be noted, by the way, that the political pressure exerted by the large member states has the most effect in the case of purely intergovernmental arrangements.

## **II.2 The role of the European Parliament and national parliaments post-Lisbon**

Unlike any previous European treaty, the Treaty of Lisbon recognises the importance of adequate support for the Union among European citizens.<sup>35</sup> The Treaty contains provisions to close the gap between Europe's citizens and its institutions and hence to increase democratic legitimacy at all levels of government. It aims to strengthen the political aspects of European citizenship by bolstering the role of citizens in the decision-making process. First of all, the new Title II TEU concerning democratic principles expressly states that the functioning of the Union is to be founded on representative democracy, namely through the direct representation of citizens in the European Parliament, through the representation of the member states in the European Council and the Council, and through strengthening the role of national parliaments. This is supplemented by forms of participatory and direct democracy (articles 10-12 TEU, discussed in Chapter IV below).

### ***European Parliament***

Since the Treaty of Lisbon the European Parliament has become a more fully-fledged institution both as co-legislator and in setting budgets and scrutinising the exercise of competences. The influence of the European Parliament outside the formal rules of the Treaty has also increased. Examples are the concessions which the Commission was forced to make and which were recorded in the Interinstitutional Agreement in 2010.<sup>36</sup> The involvement of the European Parliament in decision-making varies according to the legal basis applicable under the European treaties.

The European Parliament has become an influential institution in all fields in which the ordinary legislative procedure applies. However, where the member states opt for purely intergovernmental arrangements outside the treaties, the European Parliament is sidelined.<sup>37</sup> The AIV's advisory report number 81 examines at length the changes in the powers of the European Parliament following the Treaty of Lisbon. For the sake of brevity, reference should be made to that advisory report for a more detailed account of these

35 This was also specified as a requirement in the Laeken Declaration, European Council, 15 December 2001.

36 Framework Agreement on relations between the European Parliament and the Commission, October 2010, providing, among other things, that the Commission President will seriously consider asking an individual member of the Commission to resign if the European Parliament so requests. In the Agreement the Commission also gives an undertaking that if the European Parliament requests the Commission to come forward with a legislative proposal it will indicate within a period of three months whether or not it will do so, and that it will arrange for the participation of the European Parliament in coordination meetings for the benefit of concluding international agreements and for the European Parliament to have access to information about infringement procedures against member states.

37 The European Parliament has started an inquiry into the decisions made in connection with the financial and economic crisis and the ESM. The lessons learned can serve as a basis for more effective action in the future.

changes.<sup>38</sup> Here, the AIV will deal mainly with the following problems.

Although the directly elected European Parliament now has a right of co-decision in respect of many legislative proposals, including proposals relating to the EU budget, on the whole little is still known of its work. This is one reason why many citizens feel that they are underrepresented or not represented at all by the European Parliament. European elections are therefore dominated by national themes and national political party electoral lists. The absence of a truly European government seems to be a major cause of the disinterest of many citizens in European elections. After all, an important motive for citizens to vote in national elections is to help decide who is going to govern them. This question does not arise in the case of European elections.

There is also the matter of the precise form which accountability and control take within the Union. The Commission is accountable to the European Parliament, but as a fellow administrative body it can be voted out only in its entirety. Individual members of the Commission may continue to hold office, even if they have lost a motion of no confidence, as long as the entire Commission has not lost such a vote. If anything, this problem has been exacerbated by the assignment of additional duties and powers to the Commissioner for Economic and Monetary Affairs, who is responsible for supervising the budgets of the member states. The EU's input legitimacy therefore has shortcomings.

Following the entry into force of the Treaty of Lisbon, the method by which the President of the European Commission is appointed has been altered. The Council must now take account of the results of the parliamentary elections and hence of the wishes of the majority in the European Parliament (i.e. the largest parliamentary group decides who is appointed Commission President). All parliamentary groups have now put forward a candidate for the post of Commission President. This makes the elections more political and establishes a link, albeit indirectly, between the voter and the President of the European Commission.

### ***National parliaments***

The above is in itself a compelling argument for strengthening the role of national parliaments in the process of European decision-making. As the public tend to identify more closely with national parliaments than with the European Parliament, the former play a crucial role in the democratic legitimacy of European decisions too. Indeed, national parliaments play an essential and indispensable role as intermediary between Europe's citizens and its institutions. Whether national parliaments are willing and able to play this role naturally depends on their political interest, involvement and expertise in matters relating to the EU. In this section the AIV examines existing procedures and how they could still be improved. Chapter IV examines other ways in which it believes this intermediary role could be enhanced.

### ***Card procedures***

The new instrument of yellow and orange cards introduced in the Treaty of Lisbon gives national parliaments the right to take joint action at EU level against proposed legislation which they consider to be in breach of the principle of subsidiarity. This is the indirect instrument by which citizens can exercise influence through representative democracy. The national parliaments are kept informed by the Commission about new proposals

<sup>38</sup> Advisory Council on International Affairs, *The Netherlands and the European Parliament: investing in a new relationship*, Advisory Report no. 81, The Hague, November 2012.

and have eight weeks to object to draft legislation on the grounds of subsidiarity. Interparliamentary cooperation between member states is therefore becoming increasingly important; national parliaments which communicate systematically and proactively with parliaments of other member states will be able to apply this instrument more quickly and easily than parliaments that have confined their activities to their own national borders. Citizens can thus indirectly influence decision-making through their own national parliament, although they could hardly be said to be aware of or much interested in the existence of this possibility. The Dutch parliament is one of the national parliaments leading the way in terms of interparliamentary coordination and debate about European legislative proposals.<sup>39</sup> The House of Representatives has twice shown a yellow card in cooperation with other parliaments, once in connection with the proposal for a European Public Prosecutor's Office and once in connection with the proposal to limit the right to strike. The latter proposal was withdrawn by the Commission. Although the procedure can be used in all areas of EU law, it will be largely ineffective in cases where the member states circumvent the treaties by using the intergovernmental method or where the subject is mainly implementation measures (see Chapter III).

National parliaments have been invited to develop and use the instrument of the yellow and orange cards in the correct manner and to involve citizens in determining the response (see also Chapter IV). The AIV would once again emphasise (see also AIV advisory report number 81) that the possibility for national parliaments to initiate a 'green card procedure' is something for the future. However, the AIV is in favour of expanding the assessment to include not only subsidiarity but also proportionality and legal basis (this is already happening informally). A broader assessment of this kind would enable national parliaments not only to give a red or green card to an EU proposal but also to check its lawfulness in advance and make constructive suggestions about its content. The AIV believes that an extension of the deadline is not necessary in view of the possibilities of exerting influence in the preliminary stage (see also Chapter IV, consultation).

Have these measures to strengthen the formal involvement of national parliaments in European decision-making helped to make citizens feel that they are now better represented? The AIV is not yet convinced of this. However, it is too early for a final judgment since relatively little experience has been gained of the yellow and orange card procedure of the national parliaments and there is certainly still scope for better communication with the public. It is debatable whether further measures to enhance formal parliamentary involvement will be able to change views. The Council of State has commented in the following terms on the democratic alienation of citizens: 'Resolving this is not about introducing new or additional institutional arrangements but about political conviction (persuasive force) and appeal.'<sup>40</sup> The AIV shares this opinion and will try to explain in Chapter IV what action could help to restore public trust.

39 Swedish Institute for European Policy Studies, *Scrutiny in Challenging Times – National Parliaments in the Eurozone Crisis*, European Policy Analysis, 2014:1.

40 Council of State, *Voorlichting inzake de verankering van de democratische controle bij de hervormingen in het economisch bestuur in Europa ter bestrijding van de economische en financiële crisis* (Information on the embedding of democratic control in the reforms of economic governance in Europe to combat the economic and financial crisis), W01.12.00457/1, 18 January 2013.

### *Internal procedures*

Representatives of the Council and the European Council are subject to the scrutiny of the national parliaments. Members of parliament can express an opinion on the government's measures and results and hold it to account. However, the direct influence of citizens on the functioning and long-term priorities of the Council and the European Council as a whole is minimal. The national parliament discusses the annotated agenda of each European Council with the government, but not the strategic policy objectives of the European Council for the future, unlike the position with regard to the Commission's work programme.

Since 2002 the House of Representatives has worked steadily to increase its involvement in European decision-making, and the results are encouraging. However, as members of parliament Schouw and Ten Broeke rightly noted in their evaluation of the extra back-up provided for the House in EU-related matters in the period 2007-2011, continuing commitment and alertness are required.<sup>41</sup>

Since the increase in the assistance provided by the civil service to the House of Representatives in EU matters, European subjects have received more attention in the other specialised committees. However, the AIV believes there is still room for improvement here. For example it would be possible to organise a strategic agenda by synchronising the treatment of European topics at national and European level and to hold joint briefings of ministers, MPs and MEPs.

Since the Treaty of Lisbon entered into force, the instrument of the scrutiny reservation has been introduced on the initiative of the House of Representatives.<sup>42</sup> This instrument allows the House, both before and after negotiations, to question the government about its negotiating stance and the outcome of the negotiations. The key elements are therefore the right to question and debate, but the government may still disregard the opinion of the House. This problem could be resolved by issuing, prior to the negotiations, a formal, stricter mandate that would limit the minister's room for manoeuvre in the Council and the European Council. This could encourage political debate at national level. However, the sweeping application of this instrument might also have the effect of choking up the EU's decision-making process.<sup>43</sup> It is important to strike a good balance between *ex ante* control and the capacity to act. The AIV believes that in times of crisis the government's capacity to act must not be hindered, provided, of course, that there is adequate provision of information in advance followed by debate and subsequent accountability. In such cases the House of Representatives is free to pass a motion.

41 Swedish Institute for European Policy Studies, *Scrutiny in Challenging Times – National Parliaments in the Eurozone Crisis*, European Policy Analysis, 2014:1.

42 House of Representatives of the States General (2008), *Modified amendment of MPs Wiegman-van Meppelen, Scheppink and Ten Broeke*, Parliamentary Paper 31384-(R1850) no. 23, 8 June 2008.

43 Council of State, *Voorlichting inzake de verankering van de democratische controle bij de hervormingen in het economisch bestuur in Europa ter bestrijding van de economische en financiële crisis* (Information on the embedding of democratic control in the reforms of economic governance in Europe to combat the economic and financial crisis), W01.12.00457/1, 18 January 2013.

*Strengthening relations between the European Parliament and the national parliaments*

In its above-mentioned advisory report on the European Parliament, the AIV made a number of suggestions to improve cooperation between the European Parliament and the Dutch parliament. The AIV believes that too little is still being done to encourage more frequent involvement of MEPs in the activities in the House of Representatives and the interparliamentary work (including COSAC<sup>44</sup> and the article 13 TSCG conferences). The staff and members of the House have put much effort into the dialogue with the Commission as part of the strengthened European coordination of economic and budgetary policy,<sup>45</sup> but there is still plenty of scope to improve interparliamentary cooperation within COSAC (where the Dutch representation is still small) and the article 13 conferences. With the exception of the EMU debates, the idea of synchronising debates at European Parliament and national level has not been followed up. The European Parliament needs to realise that since the Treaty of Lisbon the national parliaments have become a player in the initial stage of legislative debates and not merely in the scrutiny of national governments. The European Parliament must accept this new role and take it seriously – something which it has unfortunately not always done.

44 Conférence des Organes Parlementaires Spécialisés dans les Affaires de l'Union des Parlements de l'Union Européenne (Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union).

45 H. Beun (2014), *Tweede Kamer voert al dialoog met Europese Commissie* (House of Representatives already in dialogue with the European Commission), *Internationale Spectator*, no. 45.



# III Specific problems in the field of economic and financial governance

## III.1 Economic governance and the legitimacy issue

### *Background*

Within a year of the signature of the Treaty of Lisbon the financial crisis broke out in earnest. The AIV notes that when the banking crisis led to a sovereign debt crisis of unparalleled severity and the euro got into difficulties the EU institutions and member states proved ill-equipped to cope with the situation. The European treaties, which are based on the no bailout clause, make no provision for giving large-scale financial support to manage such a crisis. The initial response was therefore hesitant and fragmented. As a result, the euro crisis gradually undermined the confidence of both the financial markets and the European public. The AIV explained this development in an advisory letter of February 2012.<sup>46</sup>

The first bailout operations for Greece consisted of bilateral loans from the International Monetary Fund (IMF) and the euro area countries. When the next bailout operations were mounted (Ireland and Portugal), lending facilities were created in the form of the European Financial Stability Facility (EFSF) and the European Financial Stability Mechanism (EFSM) on the basis of international law. The permanent mechanism introduced subsequently, namely the European Stability Mechanism (ESM), is also purely intergovernmental, save for an indirect connection with the amended article 136 TFEU. Initially, this permanent emergency fund had insufficient ‘firepower’ to convince the financial markets. Ultimately, it took Mario Draghi’s statement ‘to do whatever it takes’ and the European Central Bank’s decision ‘to provide a fully effective backstop to the government bond markets’ to allay the doubts in the financial markets.

Under the pressure of the crisis the EU took far-reaching, centralising decisions to strengthen the foundations of the EMU and economic and financial governance in the EU. New measures were taken in respect of financial regulation, bank supervision, budget and debt discipline and the coordination of economic policy. However, it should be noted that these measures, and in particular the European Semester discussed below, involve a joint exercise of national powers. Although the European Commission and the Commissioner for Economic and Financial Affairs (referred to below as the EU Commissioner) are charged with a number of supervisory and enforcement tasks, this does not mean that decisive responsibilities have been allocated to a higher level. The AIV therefore wishes to emphasise that the practicability and effectiveness of every form of European economic and financial governance depends on properly functioning national institutions. A major part of the efforts must therefore be focused on this. Without strong member states and strong national institutions effective economic and financial governance is not possible.

### *The European Semester*

Enhanced budget supervision and the joint approach to tackling macroeconomic imbalances are combined in the European Semester, which has been operational since

<sup>46</sup> Advisory Council on International Affairs, *Towards Enhanced Economic and Financial Governance in the EU*, Advisory Letter no. 19, The Hague, February 2012.

2013. For the sake of brevity, reference should be made to Annexe III to the advisory report for the timeline of the European Semester and the powers of the institutions and parliaments. It is mainly in this field that the European and national decision-making procedures have become increasingly interwoven. Moreover, the arrangements of the European Semester are having a major impact on national budget procedures and have increasingly become the frame of reference for national economic policy in fields traditionally seen as key competences of the nation state. The introduction of the European Semester and the enhanced budget supervision by the European Commission have brought about a new situation. The Excessive Deficit Procedure has been given teeth: it is now possible to impose fines on states that fail to comply with their budget commitments. In addition, the Macroeconomic Imbalances Procedure provides an effective means of encouraging structural reform. As noted previously, it is therefore in this field that the question of the legitimacy of European measures is most relevant. Hence, the European Semester is used in this advisory report as a framework for exposing the issue of the democratic legitimacy of the EU in all its complexity.

Owing to the complex legal structure of the euro area (Community/intergovernmental) and the fact that different legislation applies to different geographical areas (EU/euro area), it is no easy matter to explain economic governance in a way that the general public can understand. Moreover, implementing the necessary democratic involvement and control in practice is made harder because it takes place at two levels: those of national parliaments and the European Parliament. The key issue is how democratic control can be organised across the entire administrative governance process implemented in the European Semester. How can national parliaments scrutinise administrative processes that take place at several levels? Where and when should this be a task for the European Parliament? How can the legitimacy of the enhanced European Commission and EU Commissioner be safeguarded? And how can public support for and confidence in the joint economic policy be strengthened?

#### *The role of the Commission and the EU Commissioner*

Besides the Council of Ministers and the European Council, the European Commission plays a central role in implementing the European Semester. It draws up the growth forecasts and evaluates the macroeconomic policy of the member states and is involved in making recommendations and monitoring their implementation. The situation for programme countries differs in that the monitoring is carried out by the financial Troika (European Commission, ECB and IMF) and can be enforced through the terms of the loans. In addition, the Troika's findings are decisive when determining whether a country should be allowed more time to carry out necessary reform measures and imposing additional conditions. While emergency assistance as such (and any expansion of it) requires the approval of the national parliaments, the activities of the Troika are not subject to the democratic control of the European Parliament, despite the clear involvement of the Commission. The ECB's co-responsibility for drawing up the support programmes also gives rise to questions of democratic accountability.

Under the European Semester, extraordinary powers are granted not only to the Commission as such but also to the EU Commissioner. In economic governance a distinction is made between economic analysis (in the Netherlands, a responsibility of the CPB) on the one hand and supervision and enforcement on the other. These new procedural rules set economic analysis apart from Commission decisions proper. As such, economic analysis is a responsibility of the EU Commissioner and a verification role is played by the independent Chief Economic Analyst, who may issue opinions at the request of either the EU Commissioner or the Commission President. Economic analysis

does not therefore form part of the collegiate decision-making process. Whether the independence of the analysis is guaranteed in this way will become apparent in practice. The use of economic analyses produced in an expert and independent manner in the various member states can help to boost public confidence in policy.

A large amount of expertise has already been hired for this purpose. The independence of the analyses also benefits from the fact that heads of cabinet play no part in the preparation and adoption of the economic analyses. However, the service responsible for producing the analytical data has been made part of the Directorate-General for Economic and Financial Affairs (DG ECFIN), which also makes the country-specific recommendations and is responsible for supervision. To guarantee the independence and objectivity of the economic analyses even more effectively, the AIV believes that consideration should be given to the possibility of establishing an autonomous service modelled on EUROSTAT. This would benefit both output legitimacy and public confidence in the European Semester.

The actual decisions in the fields of coordination and economic and budget policy and, in particular, the country-specific recommendations form part of an accelerated written procedure initiated at the request of the EU Commissioner and launched and managed by the Secretariat-General. The possibilities for suspending this procedure and thus compelling subscription to the Commission's agenda are so strictly formulated that this will not occur in practice, nor did it occur in 2013. In addition, the Commission's decisions on preventive measures under the Excessive Deficit Procedure or in the context of enhanced surveillance are taken by mandate, and the Commission itself is not involved as an organisation. In principle, this procedure applies even to the quasi-automatic recommendations relating to sanctions.

### **III.2 Political leadership and national parliamentary control**

The entire European process clearly shows that the national budgetary procedures are being brought forward de facto and that Europe has increasingly become the frame of reference. The political decision-making procedure for next year's budget has in essence been brought forward to the spring. It is therefore advisable for the national parliaments to be actively involved in the European process from the outset in order to strengthen input legitimacy.

Even if the country-specific recommendations are not formally binding and countries continue to be able to choose national instruments, the member states policy discretion has certainly shrunk as a result of these new measures, particularly for euro area countries with excessive budget deficits. This became apparent during the debate on the 2014 draft budget. However, the knife cuts both ways. As a major exporter the Netherlands also stands to benefit from a situation in which macroeconomic and budgetary policy are properly regulated in the other EU countries. This requires structural reforms, which are the responsibility of the member states. In the AIV's opinion, any failure to introduce such reforms will undermine the financial stability of the euro area and frustrate economic growth. It is not for nothing that the Minister of Finance, Jeroen Dijsselbloem, advocates a proactive approach to the coordination of economic policy that promotes structural reforms.<sup>47</sup> The Netherlands therefore has every interest in ensuring that economic governance for all member states is realised within the

47 J. Dijsselbloem (2014), 'The Euro Area at a crossroads', speech at OECD Seminar.

framework of the European Semester. Accordingly, the Netherlands must not only look inwards. The AIV is convinced that the Netherlands must argue its case when the European Council sets its priorities and country-specific recommendations are adopted.

This is primarily a task for the Dutch political representatives in the Council and the European Council. They must actively argue the Dutch position in the discussions and also make their contribution visible to the general public. This can help to dispel the impression that economic governance under the European Semester is an EU diktat, and clearly show that the Netherlands has a vote in the decisions and also intends to make its voice heard.<sup>48</sup> This may help to convince the general public that they have a say in economic and budgetary policy, thereby boosting confidence.

For the same reason and in the interests of democratic legitimacy, the AIV believes it necessary for national parliaments to be closely involved in this process. It should be clear from the above that the involvement of national parliaments and the European Parliament and the exercise of control by them is complicated even more by the co-existence of Community and intergovernmental instruments as well as the specific legislation for euro area countries. The democratic legitimacy of economic and financial governance would therefore be enhanced if optimal transparency, control and accountability were to be observed in both the national parliament and the European Parliament.<sup>49</sup>

At national level, increasing emphasis will be placed on parliamentary scrutiny of the government's contribution to the debate at Union level. The debate at the spring meetings of the Council and the European Council are important points of reference that fully justify a plenary debate in the House of Representatives. The House of Representatives will also have to make its voice heard in the preparation of the Dutch Stability and Reform Programme, which must be sent to the Commission in April. The AIV notes that the Dutch parliament has acted with commendable speed to take the measures necessary to guarantee parliamentary involvement in the various phases of the European Semester. However, as the national budget cycle is so closely intertwined with the European Semester, members of the national parliament will have to adopt a very different mindset because economic and financial problems will in future have to be viewed in a European context. As the economic and financial problems are complex and closely intertwined, the parliament will have to be given extra expertise and support. It is essential to strengthen the expertise in this field through the provision of better support.<sup>50</sup> As the country-specific recommendations are explained in the national parliaments by the EU Commissioner, this is a step in the right direction (greater transparency and clarity in relation to the new economic governance). However, the Six Pack rules also provide for the possibility of inviting representatives of the Commission (including civil servants) to attend a debate. The AIV is glad to note that this is already

48 E.P. Wellenstein, L.J. Brinkhorst, J.P.G. Kapteyn and C. Trojan, 'Misleidende discussie over Europa in Nederland' (Misleading debate about Europe in the Netherlands), *NRC Handelsblad*, 6 December 2013.

49 M. Bos and B. van Riel, 'Verder investeren in de EMU' (Continuing to invest in the EMU), *Internationale Spectator*, volume 68, no. 2, February 2014.

50 Advisory Council on International Affairs, *The Netherlands and the European Parliament: investing in a new relationship*, Advisory Report no. 81, The Hague, November 2012.

becoming established practice in the Netherlands.<sup>51</sup>

#### *Interparliamentary conference*

Finally, article 13 of the Treaty on Stability, Coordination and Governance (TSCG) also provides a basis for involving members of the national parliament, together with MEPs, in the administrative process from the start of the European Semester, although it is hard to see how a conference can contribute to the legitimacy of the decision-making.<sup>52</sup> Nonetheless, an interparliamentary conference as referred to here could help national parliaments to exchange information with one another and coordinate their position on recommendations of the Commission and proposals of the Council and the European Council. In this way, it could help to promote the different mindset referred to above.

#### *Control by the European Parliament*

As explained previously, accountability and control are important elements of democratic legitimacy. As citizens tend to identify more with the national representatives and national parliament than with the EU institutions, the AIV believes that government ministers and MPs have an important role to play in the democratic legitimation of economic policy as advocated by the EU. Nonetheless, the European Parliament can also play a role here through the Community method. First of all, the duty of the Commission (and the EU Commissioner) to account to the European Parliament also exists in the area of economic governance. In addition, the European Parliament was involved as co-legislator in the underlying legislation of the European Semester (Six Pack/Two Pack). This legislation provides for an Economic Dialogue in the form of regular consultation between the European institutions in the ECOFIN Committee of the European Parliament. The President of the Council, the European Council, the Eurogroup and the European Commission can thus be heard by the European Parliament in the various stages of the administrative process. Finally, in the case of country-specific recommendations the ECOFIN Committee of the European Parliament can invite the member state concerned and the Commission to engage in an exchange of views.

Nonetheless, formally speaking the European Parliament has only a limited role in the European Semester. The Council and the Commission render account mainly *ex post* in the relevant parliamentary committee. The scope for the European Parliament to actually influence the administrative process is also limited. This is particularly true of the country-specific recommendations (see above). The scrutiny by the European Parliament is made extra complicated by the existence of different rules for euro area and non-euro area countries.

As regards the last point, the Council of State advocates a special parliamentary body for the euro area. According to the government, the most obvious solution would be a subcommittee under the ECON Committee of the European Parliament, although there does not appear to be a majority for this in the European Parliament itself. The question that naturally arises in this connection concerns the indivisibility of the

51 H. Beun (2014), *Tweede Kamer voert al dialoog met Europese Commissie* (House of Representatives already in dialogue with the European Commission), *Internationale Spectator*, no. 45, pp. 44-45.

52 W. Voermans, *Rol van het Nederlandse parlement bij EMU: rondetafelgesprek commissie Europese Zaken Tweede Kamer Staten Generaal, deel II over de Economische en Monetaire Unie* (Role of the Dutch parliament in EMU; round-table meeting of the European Affairs Committee of the House of Representatives, part II about the Economic and Monetary Union) , 7 December 2012.

European institutions. There is nothing at all to prevent the establishment of such a subcommittee. However, it does not appear possible to exclude members from non-euro area countries. Even if this were possible, the AIV would not consider it advisable to make the EU even more politically remote, particularly from the United Kingdom, by making a formal distinction between the parliamentary representation of euro area and non-euro area countries. This would be welcome ammunition for the eurosceptics on the other side of the English Channel who want the UK to leave the EU. This is not in the interests of the Netherlands.

The AIV therefore advocates expanding the role of the European Parliament as a whole. This could be done by arranging for the exchanges of views with the Commission in the various stages of the European Semester to be less informal. For example, the European Parliament could give a formal ruling on the priorities for economic growth and employment set by the Commission on the basis of the annual analysis of the European economies. The question of the correct balance between a policy of retrenchment and a policy of stimulation, relative to the state of the economic cycle, must have a central place in the parliamentary debate. If the European Parliament disagrees with the Commission, the latter should be obliged to explain its position. In its spring meeting, the European Council should take into account the views of the European Parliament when the priorities were set. Serious consideration could be given to applying the same procedure prior to the approval by the Council (late June or early July 2014) of the specific recommendations for the various member states. In this stage the representatives of the non-euro area countries are expected to play a backseat role.

Although, formally, this falls outside the European Semester, the AIV would point out for the record that regular exchanges of views also take place between the European Parliament and the European Central Bank (ECB) in the context of the Monetary Dialogue. Naturally, this does not affect the independence of the ECB as a monetary authority. This independence is a precious good. Recent history has demonstrated this very clearly. Here too, however, greater openness can lead to greater confidence, in this case in the ECB. The ECB's role as bank supervisor is of a different nature. Here the European Parliament most certainly has a control function.

### **III.3 Administrative legitimacy of public bodies**

As noted above, strong national institutions are essential for effective European economic and financial governance. However, this requires not only strong national democratic control but also stronger administrative legitimacy, in other words the expertise and independence of public bodies and the practicability and effectiveness of their decisions. This form of legitimacy is closely connected with output legitimacy, as it concerns confidence in the problem-solving capacity of the European institutions. The AIV believes that the European Commission and the EU Commissioner must be capable of exercising the new powers expertly and independently and thus continue to enjoy the trust of the member states and Europe's citizens. But stronger administrative legitimacy is also required at national level. It is not for nothing that the Six Pack provides for each member state to have independent national authorities charged with monitoring compliance with the budgetary rules. As the European Commission must be able to depend on having reliable national economic analyses and statistics, this presupposes an important role for the CPB and institutions such as the Netherlands Court of Audit and the Tax Administration. Although member states themselves must therefore remain responsible, the AIV believes there would be a real benefit in having independent assessment of the member states' national institutions, similar to that for

aviation safety. The administrative legitimacy of these institutions can help to enhance the output legitimacy of European economic governance and thus increase public trust in a thorough and fair procedure.

In some member states such as Greece, there are still clear deficiencies in this area and a catch-up operation is being mounted with the help of the EU. In the case of the Netherlands, the AIV would be in favour of granting the CPB formal, independent status in order to avoid any semblance of political interference in its opinions. There also seems to be growing support for the idea of giving the Council of State a role in the implementation of the Two Pack. It is argued that as a budgetary institution the Council of State should assess to what extent the government is complying with European legislation. The AIV does not think this would be a good idea as it would place an unnecessary (political) burden on the Council of State and make undue demands on the economic and financial expertise available to it. Moreover, the addition of an extra provision of this kind would cause unnecessary duplication, given the expertise available at the CPB. An independent CPB would therefore be the most appropriate authority for monitoring compliance with the budgetary rules.

As noted above, the administrative legitimacy of the EU service tasked with producing analytical data could be increased by uncoupling it from DG ECFIN and converting it into an autonomous service. In view of the special position of the EU Commissioner, the AIV thinks there is much to be said for having this officer appointed directly to the post, as is the case with the Commission President and the High Representative for Foreign Affairs. This would benefit the authority and independence of the EU Commissioner concerned. The same procedure could be followed as in the case of the Commission President: i.e. nomination by the European Council, subject to a vote of approval by the European Parliament acting by majority (it should be noted that in the case of the High Representative the European Parliament becomes involved only in the context of the approval of the Commission as a whole). This procedure would mean that the EU Commissioner falls outside the scope of the system under which Commission portfolios are assigned by the Commission President. The EU Commissioner would also be a Vice-President of the Commission and would attend meetings of the European Council at which economic and financial items are on the agenda. By analogy with the double-hatted High Representative for Foreign Affairs and Security Policy, there is much to be said for having the EU Commissioner also chair the ECOFIN Council/Eurogroup, but the AIV realises that this would probably be a bridge too far. Although the Treaty makes no provision for this appointment procedure, it could form part of an Interinstitutional Agreement.

#### **III.4 Community versus intergovernmental economic and financial perspective of the EU**

Under the present treaty framework it is not possible to mount bailout operations within a Community context and the ECB is therefore obliged to explore the limits of the treaties in order to be able to safeguard financial stability in the euro area. Germany's Federal Constitutional Court in Karlsruhe has had to give judgment on a number of occasions on the constitutionality of bailout operations and recently referred a case to the European Court of Justice (ECJ) for a preliminary ruling on whether the ECB's Outright Monetary Transactions (OMT) programme was compatible with the treaties. The ECJ had previously given judgment on the ESM in response to a reference for

a preliminary ruling from the Irish Supreme Court (the Pringle Case).<sup>53</sup> As these uncertainties hang over the market, it is hardly surprising that Germany in particular is advocating a treaty change.

The AIV has previously stated that the Community method provides the best safeguard for an effective and well-considered policy and that the leakage of competences to parallel, purely intergovernmental structures was not in the interests of the Netherlands. An example of this is to be found in the TSCG, whose legal obligations largely overlap with those of the EU framework (Six Pack/Two Pack). The Council of State rightly points to the tensions that exist in relation to parliamentary involvement.<sup>54</sup>

As far as the TSCG is concerned, integration within the legal framework of the EU still seems the most obvious solution as article 16 of the Treaty provides that the necessary steps must be taken to achieve this integration within five years of the entry into force of the Treaty.

However, integrating bailout operations into a Community framework would have snags. The EU is not a budget union, nor is there much prospect of its becoming one. Bailout operations involve national resources and guarantees, for which the national taxpayer ultimately foots the bill. If it is desired to bring these operations within the Community framework, the AIV considers that various safeguards will have to be built into the system. This could be done by ensuring that decisions on future bailout operations enter into force only after they have been approved by the member states in accordance with their constitutional requirements. That is to say, in accordance with the same procedure by which the Union's own resources are created (article 311 TFEU). This would provide a double safeguard: unanimity and national parliamentary approval. A similar safeguard could be incorporated in the future European Resolution Fund (ERF) if and in so far as national resources are still required in addition to the funds available under bail-in procedures and the contributions made by banks.

The AIV believes that measures to strengthen the foundations of EMU should take place within the institutional framework of the EU. Intergovernmental solutions such as the ESM, the TSCG and the ERF may provide respite in a transitional period, but do not provide sufficient guarantees for effectiveness, parliamentary influence and accountability, in short the key elements of democratic legitimacy.

53 European Court of Justice (2011), Case C-370/12.

54 Council of State, *Voorlichting inzake de verankering van de democratische controle bij de hervormingen in het economisch bestuur in Europa ter bestrijding van de economische en financiële crisis* (Information on the embedding of democratic control in the reforms of economic governance in Europe to combat the economic and financial crisis), W01.12.00457/1, 18 January 2013.



## **IV Legitimacy of European policy: a multi-track approach**

As noted previously in this advisory report, the AIV feels that, given the current state of European cooperation, measures to strengthen the legitimacy of this cooperation should be taken mainly at national level. This would allow national interests and public concern about the direction in which European cooperation is moving to be debated at a fundamental level, enabling each country to determine its national position and ultimately argue this in the course of the European decision-making process. Not only must representative and participatory democracy be strengthened but also a better link must be established between them. However, steps can also be taken at EU level to help create a process of European cooperation that enjoys greater public support. In this chapter the AIV outlines the various courses of action that can be identified and developed, in addition to those already described in Chapters II and III.

### **IV.I Further democratisation**

On the basis of the general principle of sincere cooperation as laid down in article 4(3) TEU, member states are required to take any appropriate measure, general or particular, to ensure compliance with Union law and to refrain from any measure which could jeopardise the attainment of the Union's objectives. This principle underlines how important it is for the member states and all key national players to 'own' the European integration process. Where necessary, the political culture and attitudes may also have to be modified or transformed.

#### *Strengthening the intermediary role of the national parliaments*

The AIV has already discussed in section III.2 how the parliamentary procedures can be improved with a view to involving the national parliament more closely in the European decision-making process, including the relationship between the European Parliament and the national parliament. However, any such improvement would still not be sufficient on its own to legitimate European decision-making. The question is also how the national parliament can strengthen its links with the public when determining its position on important European events and trends.

In the AIV's opinion, there is still room to improve the manner in which parliament gets to grips with the subject matter of proposed European legislation and how the public and other national stakeholders can play a part in determining what position should be taken on this.<sup>55</sup> The Dutch parliament is given notice of legislative proposals directly by the European Commission and is therefore able to consider them at an early stage of the EU legislative process, for example by means of debate and commentary on the Commission's White Papers and Green Papers. In addition, the Commission's annual and multiannual work and legislative programme makes it possible to put items on the agenda and discuss them in good time. Since 2007 the House of Representatives has routinely debated this programme, but the electorate, the experts, civil society and others affected by the programme could be more actively involved through open consultations and round-table discussions on specific subjects. Such consultations could contribute to the legitimacy of both the input and the output by involving at a very

<sup>55</sup> Swedish Institute for European Policy Studies, *Scrutiny in Challenging Times – National Parliaments in the Eurozone Crisis*, European Policy Analysis, 2014:1.

early stage those who must ultimately also arrange for implementation of and compliance with the European rules and hence gauge both the suitability of the proposals and the degree of public support for them. In addition, the Permanent Representation (PR) and the representative of the House of Representatives in Brussels are aware at an early stage of the topics on which the Commission services are working. The House of Representatives is therefore able to adopt a more firmly underpinned position in the pre-consultation stage. This is important if it is to exert maximum influence.

#### *Politicisation of the national debate*

The intermediary role of the national parliament could be strengthened not only by a more firmly embedded consultation process but also by further politicisation of the national debate on Europe. By politicisation the AIV means the process by which political differences are made visible and thus become the subject of debate among political parties. The European subsidiarity procedure introduced since 2009 and discussed in Chapter II.2 and the instrument of parliamentary scrutiny reservation are now two important bases for the further development of this process. From among the suggestions already made, the AIV particularly favours the idea of monthly 'Europe debates' and accountability debates in the House of Representatives.<sup>56</sup> The legislative proposals that are high on the agenda for a subsidiarity review or parliamentary scrutiny reservation (and are therefore judged to have a major impact on the Dutch legal order) could be the subject not only of specific consultations but also of a wide-ranging political and social discussion through the instrument of the Europe debate. The significance of such proposals should be highlighted and their usefulness and desirability discussed in all openness. This applies even more to important European measures that fall outside the scope of the EU treaties and are to be introduced in the form of international treaties or agreements and to measures that will have a decisive impact on the future development of the Union in general. One example would be the accession of new member states.<sup>57</sup>

The Council of State could make an important contribution to such debates. It currently advises on EU legislation in the implementation stage, i.e. the stage of transposition from EU to national law. However, it could also play an advisory role in the negotiating stage, when proposals for directives and regulations are submitted to the Council, the European Parliament and national parliaments. Since the Council of State Act was amended, the States General has been authorised to refer such matters to the Council of State for advice. To avoid overwhelming the Council with requests, the House of Representatives could apply the criterion that requests for advice must be confined to

56 W. Voermans, *Rol van het Nederlandse parlement bij EMU: rondetafelgesprek commissie Europese Zaken Tweede Kamer Staten Generaal, deel II over de Economische en Monetaire Unie* (Role of the Dutch parliament in EMU; round-table meeting of the European Affairs Committee of the House of Representatives, part II about the Economic and Monetary Union), 7 December 2012.

57 An example is the motion of the GreenLeft party which would give the House of Representatives the final say on the free trade agreement to be concluded between the EU and the United States. The motion envisages that the free trade agreement can enter into force only after it has been approved by parliament. The argument is that double parliamentary approval (i.e. approval by the European Parliament and the national parliaments) would increase democratic control in the case of a mixed agreement.

proposals that have a real impact on the Dutch legal order.<sup>58</sup>

If the debate on Europe is to be politicised, *all* political parties will have to adopt a more active and pronounced stance on the issues outlined above and politicians will have to be willing to look beyond the end of their own term of office and take a position on European issues that may perhaps only lead to actual decisions in the term of office of a following government. Politicians should also convey an unequivocal and consistent vision of the future of European cooperation.

As a corollary, the AIV wishes to emphasise how important it is for the business community to contribute to the European debate, particularly by revealing how European cooperation benefits the Dutch economy.

#### *Referendums and constitutional review*

Whether referendums in a general sense are useful and necessary has long been debated in Dutch politics. Although no prior experience had been gained of referendums on local or national issues, a consultative referendum was held for the first time in the history of the Kingdom of the Netherlands in 2005 on the question 'Are you for or against approval by the Netherlands of the Treaty establishing a Constitution for Europe?' The result was a 'No', and since then neither the government nor parliament has suggested the EU as the subject for a referendum. However, the House of Representatives has passed a bill on consultative referendums in general, which will be considered by the Senate this spring. As a result of the Civic Forum-EU Initiative petition, for which 63,000 signatures were collected, it proved possible in January of this year to table a motion for a debate in the House of Representatives about the need for a referendum in the event of transfer of competences to the EU. Although the debate itself showed that there was no majority in favour of holding a referendum, it did result in the passing of the Omtzigt and Segers motion requesting the Council of State to advise on strengthening safeguards for the transfer of competences.<sup>59</sup>

The AIV does not believe that a referendum would provide a lasting solution to the problems of the democratic deficit and lack of public support for the EU. It takes this view not only because this instrument could be employed inappropriately, but also because its advantages do not outweigh its disadvantages.<sup>60</sup> Although a referendum gives citizens a direct say in the decision-making process (particularly if the result of the referendum is binding) and can serve as a catalyst to increase public interest in EU affairs, the AIV shares the view of the Council of State that this would not automatically make citizens feel less remote from the Union. First of all, a referendum provides little scope for adopting a nuanced and constructive position; a voter is either for or against something and cannot influence the content and form of a decision as such. This also creates the risk of an oversimplified representation of reality. For example, the question

58 Hitherto, the Council of State has provided advice of this kind on only one occasion, namely in relation to the personal data protection bill.

59 See Parliamentary Paper 33848-12 of the House of Representatives of the States General, 21 January 2014.

60 The reasoning has already been partly explained in T. van den Brink and L.A.J. Senden (2013), *De Europese Unie en nationale soevereiniteit. Wel degelijk verenigbare grootheden* (Reconciling national sovereignty and European Union membership), *Ars Aequi*, AA20130355, p. 370.

of the transfer of competences to the Union should not be seen in isolation from the question of what alternative is available and how problems could be effectively tackled and policy objectives realised in some other way. Furthermore, a referendum is a sound instrument only if voters receive complete and correct information in good time, the question is phrased unambiguously, clear positions are taken by the political parties and there is a broadly organised and balanced public debate in which the arguments for and against receive equal coverage. The experience of the referendum on the European Constitution in 2005 shows that this is problematical, certainly in the Dutch context where the instrument of the referendum is not part of the constitutional tradition. Also, the fact that the European and national legal orders are strongly interwoven makes the referendum an unsuitable instrument as this point is constantly raised in the debate and tends to encourage thinking in terms of opposites, for example 'Us against Brussels'. In the AIV's opinion, the system of representative democracy means that in general elections citizens can choose how to vote by the importance they attach to the positions taken by the political parties on EU issues. However, it is the responsibility of politicians to make these positions clear in the election campaigns and to accord these issues the weight they deserve in the debate.

Finally, the AIV would point to the potential contribution which the instrument of constitutional review can make to the development of European political awareness and citizenship. Matters of the kind mentioned in the Pringle case referred to in Chapter II.1 concern important European developments raised by citizens before their own constitutional courts, in this case in Ireland. But constitutional courts in a number of other member states such as Germany and the Czech Republic have also given citizens the possibility of making their voices heard on the direction taken by European integration and having the national constitutionality of these developments reviewed by an independent institution not driven by political interests and differences. By way of illustration, Germany's Federal Constitutional Court in Karlsruhe held on 18 March 2014 that the ESM is not contrary to the German constitution. This judgment is in keeping with an earlier judgment of the court in September 2012 and can no longer be overturned. Over 37,000 German citizens had petitioned the Federal Constitutional Court to rule on the emergency fund, as they took the view that the ESM undermined the power of the *Bundestag* to make decisions. In interim injunction proceedings the Federal Constitutional Court held, however, that sovereignty of the *Bundestag* had not been compromised. This judgment was upheld on 18 March 2014.<sup>61</sup> This shows that constitutional courts can play an important role in assessing the legality of European developments and can also provide a real boost for both the political and the social debate on Europe. Constitutional courts should therefore not be dismissed out of hand as an obstacle to European cooperation, as is quite often the case at present. In the AIV's opinion, they deserve further study.

#### *Politicisation at European level and EU political citizenship*

The legal status of 'citizen of the European Union' was introduced in the Treaty of Maastricht in 1993. This status confers a number of rights, such as the right to live, work and study elsewhere in the EU, the right to vote there in local and European Parliament elections and the right to consular assistance in other EU member states. The European Court of Justice has described European citizenship as destined to become the fundamental status of nationals of the member states. This is in addition to national citizenship. Hitherto, the focus had mainly been on strengthening and

61 See: <<http://www.nieuws.nl/economie/20140318/ESM-niet-in-strijd-met-Duitse-wet>>.

protecting the individual rights of citizens of the Union and on citizens as consumers. The Commission's 2013 EU Citizenship Report<sup>62</sup> describes a wide range of actions<sup>63</sup> to make EU citizens' rights a reality, but pays very little attention to the political definition of EU citizenship. The new Title II of the TEU concerning the 'democratic principles' of the Union does, however, provide a basis for such a definition as it establishes a connection not only with various aspects of participatory and direct democracy but also with EU citizenship. EU political citizenship could be strengthened in various ways.<sup>64</sup>

The first possibility would be to politicise candidacy for the European Commission. To encourage the interest of Dutch citizens in European elections and thus narrow the gap between citizens and the EU still further, the Dutch parties could be requested to announce their Commission candidates in advance or to put them on their voting lists. As noted in the AIV advisory report 'The Netherlands and the European Parliament', it is too soon for transnational voting lists. National identification is still too strong and there is as yet no real European public space for debate and opinion-forming. However, it would be worthwhile indicating on the ballot paper to what political family or alliance a party belongs. The AIV believes that the direct election of the Commission President would help to strengthen citizens' ties and identification with the EU.

The European Commission and Brussels red tape are often mentioned in one and the same breath. Few people identify with the European Commission, which is perceived as a technical and bureaucratic law-making machine. A contributing factor is the size of the Commission, which now consists of no fewer than 28 EU commissioners: a Commission with a representative from each member state opens the door to more legislation. It has been seen in practice that an increase in the number of commissioners leads to a growth in the number of directorates-general. In the AIV's opinion, this is bad for the EU's legitimacy in terms of both input and output. The AIV therefore considers it advisable for the size of the Commission to be reduced without delay, namely in 2018, and for the incoming President to be given the freedom in the intervening period to streamline the Commission and cluster portfolios. This could lead to the creation of a two-tier Commission in which only the upper tier has the power to make legislative proposals.<sup>65</sup>

However, the Commission is trying to develop a European public space through its practice of consultation which has evolved over the years and has now been incorporated in Title II of the TEU. This not only obliges the Commission to 'consult

62 Europe Now, 'EU Citizenship Report 2013: 12 new actions to make EU citizens' rights a reality', see: <[http://www.europa-u.nl/id/vj9gmeb6xjps/nieuws/burgerschapsrapport\\_2013\\_concrete?ctx=vh6ukzb3nnt0](http://www.europa-u.nl/id/vj9gmeb6xjps/nieuws/burgerschapsrapport_2013_concrete?ctx=vh6ukzb3nnt0)>.

63 These actions range from cutting red tape in member states and developing a quality framework for traineeships to cross-border recognition of vehicle roadworthiness certificates, an EU disability card, EU model ID documents and solutions for situations in which EU citizens who move to another member state lose their voting right in general elections in their country of origin.

64 E. Hirsch Ballin (2014), *Citizens' Rights and the Right to be a Citizen*, Leiden, Brill.

65 Advisory Council on International Affairs, *Bridging the Gap between Citizens and Brussels: towards greater legitimacy and effectiveness for the European Union*, Advisory Report no. 27, The Hague, May 2002, and *Follow-up report. Bridging the Gap between Citizens and Brussels: towards greater legitimacy and effectiveness for the European Union*, Advisory Report no. 32, The Hague, April 2003.

widely' before proposing legislative acts, but also requires the European Parliament and the Council to maintain an open, transparent and regular dialogue with representative associations and civil society.<sup>66</sup> The aim of this consultation is to improve the quality of policy (output legitimacy) and increase the participation of the political parties concerned and citizens in the European decision-making process (input legitimacy).<sup>67</sup> To be credible a legislative process requires a frequent and intense exchange of good quality information between officials, legislators and experts of various kinds. It is important to strike the correct balance between transparency and open consultation on the one hand and informal discussions and dialogues that take place behind the scenes on the other. By Dutch standards, the European Commission and the European Parliament are very open and transparent and are accessible to thousands of lobbyists from both the private and the public sectors. These European institutions are constantly in contact with civic organisations, NGOs, businesses, trade and professional organisations, trade unions, think-tanks, regional governments, cities, and so forth. Like the European Commission, the European Parliament has now become a prime target of lobbyists, who recognise its growing influence over the European legislative process.<sup>68</sup>

Although these contacts are therefore essential to ensure both that European decisions are reached by democratic means and that policy is adequate to meet the needs and reality, critics point out that relatively small groups can exercise a disproportionate degree of influence over decision-making through this large lobbying network. Indeed, some text proposals of the Commission or amendments by MEPs are even penned by lobbyists or national officials. Decisions should be made as transparently as possible and in keeping with the law and ethical principles, avoiding inappropriate and unlawful pressure and the influence of the old-boy network. To this end the European Parliament and the Commission have established a transparency register with which lobbyists must register. In doing so they agree to abide by a code of conduct. 3,500 of the 15,000 lobbyists thought to be either temporarily or permanently active in Brussels have registered. However, it seems reasonable to ask whether this legal framework still provides adequate safeguards.

Citizens can respond to consultation papers published by the European Commission. In 2014 they can give their opinion on 20 topics. The Commission publishes the responses on its website and thus enhances the transparency of the procedure. Although it must take account of the responses in its ultimate legislative proposal, it is under obligation to adopt them. The actual influence on policy is therefore not immediately apparent. It is evident from the evaluations of the Commission's consultations that there is little satisfaction about the feedback provided by the Commission, nor can citizens as yet be said to have a right of participation. The Commission therefore has a wide discretion about who it does and does not consult and what it does with the responses. The AIV would recommend studying how a better framework could be developed for consultation within the EU, for example in the context of general European legislation

66 Article 11 (1-3) TEU and article 2 of Protocol 2 to the Treaty of Lisbon on the application of the principles of subsidiarity and proportionality.

67 European Commission, *Your voice in Europe: Consultations*, see: <[http://ec.europa.eu/yourvoice/consultations/index\\_en.htm](http://ec.europa.eu/yourvoice/consultations/index_en.htm)>.

68 Advisory Council on International Affairs, *The Netherlands and the European Parliament: investing in a new relationship*, Advisory Report no. 81, The Hague, November 2012.

on administrative law, which is now under discussion and is intended to provide general rules for good European governance.

A second more direct way of creating a European public space and influencing European decision-making is to start a European Citizens' Initiative (ECI).<sup>69</sup> ECIs too are based on Title II of the TEU. Since 1 April 2013 every citizen may start a citizens' initiative inviting the European Commission to draft legislation in a specific field. To qualify for consideration by the Commission an ECI must be signed by at least one million EU citizens from at least a quarter of the member states in the twelve months following its announcement. Moreover, the topic must come within both the scope of the treaties and the Commission's right of initiative.

Although ECIs enable citizens to get an item placed on the European legislative agenda, their influence is limited without a corresponding obligation of the Commission to prepare a legislative proposal.<sup>70</sup> However, the Commission is obliged to explain in a hearing before the European Parliament what further action, if any, it proposes to take on an ECI and why. It is necessary to wait and see to what extent the ECI will be used and how the Commission will respond. At present, seven initiatives are in preparation on subjects varying from the legalisation of cannabis and authorisation of electronic cigarettes to media pluralism. The first ECI, entitled Right2Water, for which more than 1.6 million signatures were gathered (including over 22,000 in the Netherlands), received a positive response from the Commission on 20 December 2013.<sup>71</sup> The initiative calls on the Commission to prepare a legislative proposal recognising the right to water and sanitation as a human right for all EU citizens. In its reaction of 19 March 2014<sup>72</sup> the Commission announced seven new actions, but did not commit itself to excluding water and sanitation services from the EU internal market rules as requested by the ECI, since this is an area in which the member states have primacy (article 345 TFEU). However, the Commission will launch an EU-wide public consultation on the Drinking Water Directive, monitor implementation of existing legislation and promote the exchange of information about best practices between member states. In view of the length of the ECI procedure and the costs necessarily incurred in verifying all signatures in 25 member states, the Commission's reaction is disappointing.

In the AIV's opinion, political parties should do more to bring the instrument of the ECI to the attention of citizens and perhaps perform a coordinating and information role. It is also important for this instrument to be assessed on its merits in the future and for its conditions of application to be reviewed.

69 European Commission, 'The Citizens' Initiative: Official Register', see <<http://ec.europa.eu/citizens-initiative/public/welcome?lg=nl>>.

70 See also L.A.J. Senden, 'Het Europees burgerinitiatief. Symboolwetgeving of daadwerkelijke democratische versterking van de Unie?' (The European Citizens' Initiative: symbolic legislation or actual democratic enhancement of the Union?), *Nederlands Tijdschrift voor Europees Recht*, 2011, issue 9.

71 Teletext, 17 February 2014.

72 See: <[http://europa.eu/rapid/press-release\\_IP-14-277\\_en.htm](http://europa.eu/rapid/press-release_IP-14-277_en.htm)> and <[http://ec.europa.eu/transparency/com\\_r2w\\_en.pdf](http://ec.europa.eu/transparency/com_r2w_en.pdf)>.

## IV.2 Strengthening legal legitimacy

Not only the democratic and administrative legitimacy of the European cooperation process can be improved; even greater confidence in the process could be achieved if its legal legitimacy were to be strengthened as well. Legal legitimacy concerns not only the lawfulness of the cooperation but also the care with which the European decision-making process is conducted at the level of both legislation and governance.

### *Better legislation*

In the past two decades the Commission has gradually developed a legislative policy designed to prevent overregulation, improve the quality of legislation and consolidate and simplify existing legislation.<sup>73</sup>

In carrying out its impact assessments of proposed legislation the Commission focuses not only on providing a better explanation of the justification for EU action but also on the intensity, organisation and design of the legislation. This involves not only a cost-benefit analysis but above all analysis of the social and environmental impact of proposed legislation.<sup>74</sup> In the AIV's opinion, the impact assessment policy should continue to be developed in the future. For example, impact assessments are already being carried out by the European Parliament as well, but a coordinated, interinstitutional approach is still lacking. Impact assessments should also be carried out at Council level, particularly if changes are made by the Council to legislative proposals. In addition, explicit consideration should be given to not only the regulatory but also the enforcement aspects. In other words, do proposed European policy and legislation provide sufficient certainty that member states will be willing and able to comply with the rules? The field of economic and financial governance shows that this has received insufficient attention in the past. Finally, it needs to be asked once again whether a European Council of State is necessary or desirable in order to monitor and advise on the quality of proposed legislation. One possibility would be for the present Impact Assessment Board, which is part of the European Commission and assesses the quality of impact assessments, to evolve into an independent institution.

### *Better governance*

The public perception of European decision-making is largely shaped by the consultations that take place in the European Council, not seldom in night-time sessions at times of crisis. Although the EU has committed itself by treaty to ensuring the transparency of its actions, its openness in terms of access to available information and documents leaves something to be desired. There could even be said to be a culture of secrecy. Indeed, the manner in which the Council applies the rules on openness of and access to documents limits the scope for parliamentary control.<sup>75</sup>

The problem of secrecy occurs at various levels in the EU. At the low level of the civil service preparations for European legislation, the contribution of the member states in

73 European Commission, *Smart Regulation*, see <<http://ec.europa.eu/smart-regulation>>.

74 See the Impact Assessment Guidelines of the European Commission, SEC(2009)92. For a more in-depth examination, see A.C.M. Meuwese, *Impact Assessment in EU Lawmaking*, Kluwer Law International, 2008.

75 D. Curtin, *Challenging Executive Dominance in European Democracy*, Amsterdam Centre for European Law and Governance Working Paper Series 2013-09, December 2013, pp. 23-24.



the working groups that discuss the Commission's proposals is virtually invisible owing to strict secrecy. These discussions are wrongly viewed more as diplomatic negotiations than as part of the legislative process that should, where possible, be conducted in openness. And at the highest political level the problem is that the European Council, ECOFIN and the Eurogroup often take important decisions in informal meetings on the basis of a few written documents and in the presence of just a few advisers. The formal meetings held subsequently then do little more than rubber stamp what has already been agreed. This practice too puts the parliaments in a relatively weak position in relation to the Council.<sup>76</sup> Often it is unclear what member states have and have not argued in favour of certain proposals. In the case of the Commission it is also difficult to discover what political considerations have been taken into account in drawing up country-specific measures, as already referred to above. The AIV is convinced that greater openness could help to increase public trust in the EU institutions.

Under article 298 TFEU the European Parliament and the Council may establish provisions to create an 'open, efficient and independent European administration'. This has already resulted in a proposal for a European administrative procedural law act, drafted by academics and supported by the European Parliament. This contains rules for good European governance, and the AIV is in favour of its further development.<sup>77</sup>

<sup>76</sup> Ibid, p. 24 ff.

<sup>77</sup> See: <<http://epthinktank.eu/2013/01/12/a-law-of-administrative-procedure-for-the-eu>>. Last consulted on 7 April 2014.

## V Conclusions and recommendations

### Introduction

Citizens' sense of alienation from government and politics is a process that has been underway for some time. This is reflected in diminished trust in political institutions. Although the European Union has democratic checks and balances in place at all levels of government, this does not alter the fact that citizens have the feeling of not being involved in EU decision-making. They feel that they have no influence over the institutions in Brussels and that they are subject to an ever-growing body of European rules which have been promulgated by a 'foreign government' and over which their own country has no control. As parliament has not yet succeeded in making debates on EU issues into real politics, European decision-making takes place out of sight of Dutch citizens. As detailed and technical EU issues, when aggregated with a large number of smaller EU decisions on particular aspects of larger issues, nonetheless prove to have a considerable effect on the direction in which the Union is moving, voters have the feeling of being 'orphaned'.

### **Question 1 – Where, according to the AIV, does the key to strengthening democratic legitimacy lie (national parliament, European Parliament, a combination of the two or elsewhere)?**

The AIV feels that the dissatisfaction felt by many citizens with the EU is due to a variety of causes and that although it is admittedly necessary to strengthen the democratic legitimacy of the Union, this is not in itself sufficient to restore public trust. It would be wrong to focus solely on restructuring institutions and modifying procedures. The key to increasing support among the population lies instead in the interplay of institutional and non-institutional measures and actions; in other words, a multi-track approach and not a one-size-fits-all approach. Apart from measures and actions at European level solutions must also be sought that help to strengthen the democratic, administrative and legal legitimacy of the institutions in the member states themselves. Measures to monitor the quality of the rule of law must also receive the attention they deserve.

The AIV is also convinced that the democratic legitimacy of European policy can be achieved only if government ministers and MPs recognise its importance and work to this end. This is why it is essential for ministers and MPs not to criticise the European institutions as they so often do at present, but instead make it clear to the public in both word and deed that they themselves are participants in the European decision-making procedure and thus also share responsibility for the decisions that are taken. And it is no less important for all political leaders to convey a persuasive, consistent and succinct view of the EU's functions.

For the AIV the great value of the European Union remains a given. It is unlikely that the European countries could effectively protect their interests and values in a rapidly changing world without the cohesive force of the EU.<sup>78</sup>

78 On this point see J. Holslag (2014), *De Kracht van het Paradijs. Hoe Europa kan overleven in de Aziatische Eeuw* (The strength of paradise: how Europe can survive in the Asian Century), Antwerp, De Bezige Bij.

## Optimising current mechanisms and instruments

- On the subject of the EU's institutional structure, the AIV basically recommends that the **scrutinising role of the national parliaments** should be strengthened, but that the relationship between national parliaments and the European Parliament should not be viewed in zero-sum terms. Close cooperation between the two is required (as also advocated in AIV advisory report number 81), and the European Parliament must be less defensive about the new role of its national counterparts. For example, depending on the policy field progress may perhaps be made with an upgraded yellow and orange card procedure (similar to that used in the internal market, criminal law and flanking policy fields). However, in a field such as economic governance such a procedure is of little use owing to the limited role assigned to the national parliaments in this respect. The AIV believes that in the field of governance legitimacy should be strengthened above all by upgrading the role of other national institutions, such as national audit offices and the like.
- Since the increase in the assistance provided by the civil service to the House of Representatives in EU matters, European subjects have received more attention in the specialised committees. However, the AIV believes there is still room for improvement here. For example it would be possible to organise a strategic agenda by synchronising the treatment of European topics at national and European level and to hold joint briefings of ministers, MPs and MEPs. As the EMU debates are synchronised at national and EU level, this could serve as an example for other policy fields.
- Under article 298 TFEU the European Parliament and the Council may establish provisions to create an 'open, efficient and independent European administration'. This has already resulted in a proposal for a European administrative procedural law act, drafted by academics with the support of the European Parliament. This contains rules for good European governance, and the AIV is in favour of its further development.
- The AIV believes that too little is still being done to encourage more frequent involvement of MEPs in the activities in the House of Representatives and the interparliamentary work (including COSAC and the article 13 TSCG conferences). The staff and members of the House have put much effort into the dialogue with the Commission as part of the strengthened European coordination of economic and budgetary policy, but there is still plenty of scope for improving the interparliamentary cooperation within COSAC (where the Dutch representation is still small) and the article 13 conferences.
- Often it is unclear which member states have and have not argued in favour of certain proposals. In the case of the Commission it is also difficult to discover what political considerations have been taken into account in drawing up country-specific measures. The AIV is convinced that greater openness could help to boost public trust in the EU institutions. If public trust is to be increased, the procedures will have to be made more transparent. The AIV recommends that the talks be continued at both Council and national level to provide access to documents and dispense with the limited circulation classification.

### **New instruments for the future**

- The AIV feels that it would be worthwhile examining whether constitutional review, as is customary in various other member states, would be useful and desirable in the Netherlands. Constitutional review gives citizens the possibility of making their voices heard on the direction taken by European integration and having the national constitutionality of these developments reviewed by an independent institution not driven by political interests and differences. This could also provide major impetus for the political and social debate on Europe.
- Having a large Commission opens the door to more legislation: an increase in the number of EU commissioners tends to be matched by an increase in the number of directorates-general, which try to justify their existence by producing legislative proposals. The AIV therefore recommends that the size of the Commission be reduced without delay, namely in 2018 after reopening the discussion in the Council, and that the incoming President be given the freedom from the autumn of 2014 to streamline the Commission, cluster portfolios and limit the right to initiate legislation to the Vice-Presidents of the Commission. This would create a *de facto* two-tier Commission in which only the President and the Vice-Presidents have the power to make legislative proposals.<sup>79</sup> The AIV would be very much in favour of streamlining of this kind.
- In the AIV's opinion, the impact assessment policy should continue to be developed in the future. A coordinated, interinstitutional approach is still lacking. Impact assessments should also be carried out at Council level, particularly if changes are made by the Council to legislative proposals. In addition, explicit consideration should be given to not only the regulatory but also the enforcement aspects.

### **Economic governance**

- In the field of economic and monetary policy existing procedures have yet to reach full maturity, but the Dutch parliament in any event seems to be making every possible effort within the permitted limits. The AIV notes that more must still be done to expand support and expertise.<sup>80</sup> The knowledge is concentrated too much in the hands of just one rapporteur and a few MPs. The AIV therefore recommends the establishment of a special parliamentary committee for the European Semester and the provision of additional administrative support.
- As regards the European Semester there is admittedly little scope for further strengthening of democratic legitimacy through the national parliaments, but the AIV feels that there is still certainly scope for bolstering administrative legitimacy. More independent, national institutions such as national courts of audit and CPB-like bodies would help to bring about the necessary economic and financial reforms in the member states and ensure that they are more robust. The EU benefits, after all,

79 This was advocated by Minister of Foreign Affairs Timmermans during his speech in London on 20 May 2013, see: <<http://unitedkingdom.nlembassy.org/news/2013/may/game-of-thrones-speech-timmermans.html>>.

80 Swedish Institute for European Policy Studies, *Scrutiny in Challenging Times – National Parliaments in the Eurozone Crisis*, European Policy Analysis, 2014:1.

from the existence of strong and reliable institutions in the field of macroeconomic policy at national level. If weaker member states fail to make adequate provision, Europe becomes the dominant partner by default in data collection, analysis and the provision of advice. The AIV is not in favour of this. It believes that national agencies for economic policy analysis within the Union should have a statutory and independent role and calls on the Dutch government to advocate this within the Union and regulate the independence of the CPB by law.

- The AIV is not in favour of giving the Council of State a role in the implementation of the Two Pack, namely by acting as a budgetary institution that assesses to what extent the government is complying with the European legislation. The role of the Council of State is to advise and the AIV does not think it should be independently involved in assessing whether or not the Netherlands complies with the EU's budgetary rules. Moreover, as a government advisory body the Council of State should not be dressed up as a budgetary authority with all the administrative support and resources this would necessitate. This is a job for a strong and independent CPB, which already possessed many of the required capacities.
- The European Parliament should be given a stronger role in the European Semester. The exchanges of views with the Commission and the European Council in the various stages of the European Semester could be made less informal and should extend beyond the procedural aspects of the Semester. For example, the European Parliament should also be able to express an opinion on the priorities for economic growth and employment and the Commission should be obliged to explain its reasons for departing from the line advocated by the European Parliament.
- To guarantee even more effectively the independence and objectivity of the economic analyses, the AIV believes that consideration should be given to the possibility of establishing in Brussels an autonomous service to gather data from the national institutions. This could be modelled along the lines of EUROSTAT. This might boost public confidence in the European Semester.
- Unlike the Council of State, the AIV is not in favour of having a separate parliament for the euro area as this would cause a schism between the 18 euro area countries and the other member states of the Union. This would increase the sense of remoteness of the United Kingdom and possibly cause negative reactions there. Moreover, an extra Parliament would be even more confusing to the public. Instead, the AIV recommends that maximum use be made of article 13 of the TSCG and calls on parliament to give effect to this interparliamentary process. Consideration might also be given to the possibility of establishing a euro area subcommittee in the European Parliament, although there does not appear to be a majority for this in the European Parliament itself. The AIV also favours holding regular, intensive talks between the EU Commissioner concerned and the national parliament about the country-specific recommendations, which would lead to a motion or negotiating mandate for the government. The AIV also believes that action should be taken to rectify the serious deficiencies in the democratic accountability of the Troika, consisting of the Commission, the ECB and the IMF. The present ad hoc briefings for the European Parliament on programme countries should be recorded in an Interinstitutional Agreement.
- The position of the EU Commissioner also needs to be improved. Olli Rehn, the present commissioner, takes part in the ECOFIN deliberations and the Eurogroup,

but in view of the importance of his portfolio there is much to be said for giving him a standing invitation to attend the European Council, similar to that extended to the High Representative for Foreign Affairs. This would strengthen his authority and political independence. For the same reasons, consideration could also be given to raising his status to the same level as that of the High Representative.

### **Politicisation and citizen participation**

- Political debate on EU matters in the House of Representatives is mainly the preserve of EU specialists. To increase the democratic legitimacy of the debate and hence public support, the AIV recommends that the prime minister and the leaders of the parliamentary parties should themselves take a prominent part in the annual parliamentary debate on the State of the European Union. In addition, the House could hold a weekly question time on EU matters as well as regular accountability debates.
- The House of Representatives discusses the Commission's work programme annually. The AIV recommends that the strategic policy goals of the European Council also be made a subject of discussion between the government and the House. In the AIV's opinion, the House should consult citizens about EU affairs more frequently and at an earlier stage than formerly. One example would be consultations about the European Commission's White Papers and Green Papers. In this way, the House could gauge the views of the public, the business community and civil society at an early stage.
- The Treaty of Lisbon opens the way for greater political involvement of citizens because the European Council is required to take account of the results of European Parliament elections when nominating the President of the Commission. This is currently resulting in intensified political debate within the political families concerning the nomination of candidates for the office of Commission President. The AIV believes that this will help to strengthen citizens' ties and sense of identification with the EU.
- As noted in the AIV advisory report 'The Netherlands and the European Parliament', it is too soon for transnational voting lists. National identification is still too strong and there is as yet no real European public space for debate and opinion-forming. However, it would be worthwhile indicating on the ballot paper to what political family or alliance a party belongs.
- Formally, the Commission can be voted out only in its entirety. In practice, however, the AIV believes that individual commissioners are no longer protected by the principle of collegiality. It therefore recommends that the government use its best endeavours during the forthcoming negotiations with the Council on the Interinstitutional Agreement between the Council, the Commission and the European Parliament to secure the inclusion of an individual right of dismissal.
- The AIV is not in favour of referendums as it does not believe that they provide a lasting solution to the problem of the Union's democratic deficit; they can be employed inappropriately and their advantages do not outweigh their disadvantages. A referendum provides little scope for adopting a nuanced position on the content and form of a proposed decision or for assessment of possible alternatives.

- The AIV believes that the political parties should do more to bring the instrument of the ECI to the attention of citizens and perhaps perform a coordinating and information role. It is also important for this instrument to be assessed on its merits in the future and its conditions of application to be reviewed.

**Question 2 – What would be a good balance between effectiveness of control and legitimacy of control of EU governance at the various levels?**

Before answering this question, the AIV feels it necessary, for a proper understanding of the context, to revert to the question of what is sometimes described as the transfer of powers by stealth to the EU and is often regarded as objectionable since it involves a loss of sovereignty. The AIV believes that people are being misled by the suggestion that this is a key problem in the relationship between the EU and its citizens.

First of all, there can hardly be said to be a transfer of powers by stealth in the context of either the purely intergovernmental method or the Community method. Both national governments and national parliaments are actively involved in that process in various ways. In the case of the Community method, they often support a given interpretation of existing Union competences. Although this interpretation may perhaps be perceived as unduly liberal or extensive, it does not formally amount to a transfer of competences by stealth. If the spillover effects of previous decisions result in ongoing integration that goes further than anticipated, the proper response is a more involved and carefully thought-out form of *ex ante* scrutiny of important European proposals, as advocated in this advisory report.

Second, the debate on how Union powers should be interpreted and exercised should focus not on ‘national sovereignty’ but on the state’s capacity to act, in other words, what method of operation – at national, international or European level – would best serve national interests? If the state is better able to resolve problems by sharing powers with the Union, this contributes to the output legitimacy of its actions. The control should therefore focus on ensuring that Union competences are exercised in a manner which maximises the chances of achieving the intended output/results.

In answer to the question, however, it is clear that the requirements of political control may be inconsistent with those of administrative effectiveness. Too much emphasis on control may compromise the EU’s capacity for decisive action, which is an extra concern because the Union already has a complex and time-consuming decision-making system. However, the AIV believes that calls for greater effectiveness may never go so far that powers are exercised unsupervised. This would only serve to strengthen the harmful impression given to the public that European integration is an unchecked and unstoppable process. Procedural rules may assist in striking a good balance, but it is equally important for the bodies concerned (implementing institutions and parliaments) to perform their role correctly. The guiding principle should be self-limitation. Where national parliaments have in any way played a greater role in European decision-making to date, their behaviour has given little cause to fear that they will abuse their position by repeatedly blocking decisions. Although finding broad parliamentary support at national level may delay decisions, the AIV judges this to be a price worth paying in view of the great importance of democratic legitimacy.

The balance between executive action and parliamentary control should be largely determined by the situation. Where there is an ordinary legislative process and no pressure of time, there is in principle sufficient scope for effective parliamentary

involvement at national level too. By contrast, where there is a crisis situation that requires rapid action on the part of European authorities, parliaments must accept that executive bodies are given sufficient discretionary powers and that scrutiny can take place only after the event through a system of ex-post accountability. However, reference should be made here to the importance of proper and timely anticipation of the spillover effects of major steps in the integration process, unlike what happened in the past in the context of the EMU. Such consequences or effects should be recognised and taken into account at the earliest possible stage in the political and social debate at both European and national level. If it is desired to draw up rules of conduct governing the limits of national parliamentary control in a European or a national context (e.g. rejection of a right of national parliaments to veto ordinary legislation), it would be worthwhile differentiating between the various situations in which decisions have to be taken.

Finally, the AIV welcomes the active role played by the Dutch parliament and some other national parliaments within the EU. The parliament should consolidate and expand the expertise which it is now accumulating. At the same time, the AIV warns against improper use of the yellow and orange card procedure for the principal purpose of obstruction, since the Union's capacity to act should be strengthened rather than weakened. The AIV endorses the need for good interparliamentary consultations, including consultations with the European Parliament. It agrees with the House of Representatives that assessment by reference to proportionality, expediency, legal basis and the rule of law should also be possible.<sup>81</sup> The AIV considers that parliaments should work together effectively before new instruments are created.

### **Question 3 – What are the limits of the intergovernmental and Community methods (and hybrid forms)?**

The AIV emphasises that strong member states are essential not only from an economic and financial perspective but also in the interests of the effective functioning of the internal market. Europe should be based on the strength of the member states and the EU should help to bolster both the member states and their economies. Only then can the EU succeed in its long-term mission.

Under the provisions of the European treaties, different policy areas require a different approach and method of governance. For example, the Community method prevails in the broad field of the internal market where voting is by qualified majority. In the tax field, however, the Community method involves passing decisions by unanimous vote. Both the Community method and the open method of coordination (OMC) apply in the social field. The intergovernmental method is dominant in the field of economic governance. The question that needs to be answered is which of these methods of governance is most conducive to the state's capacity for action. Although the intergovernmental method may seem attractive at first sight, owing to the (formal) right of veto which each member state has over decision-making, its exercise may be problematic in practice. In the current political and economic climate, with Germany being so dominant, there may perhaps be insufficient counterweight. Although the AIV appreciates that the intergovernmental basis of economic governance can provide a means of acting quickly in times of crisis, it recommends that a Community method be adopted in subsequent treaty changes. This safeguards democratic legitimacy, ensures the full involvement

<sup>81</sup> Advisory Council on International Affairs, *The Rule of Law: safeguard for European citizens and foundation for European cooperation*, Advisory Report no. 87, The Hague, January 2014.



of the European Parliament and avoids the need for national parliaments to make ad hoc arrangements through the national system. Clearly, the limits of the Community method are reached in cases where the member states wish to continue exercising their national prerogatives, especially in the financial field. This plays a major role, above all, in the debate on the EU as a transfer union and on debt mutualisation. It is only to be expected that the countries that provide financial support such as Germany, Finland and, not least, the Netherlands will continue to oppose a system of majority decision-making in which they could be forced against their wishes and interests to cooperate in the transfer of substantial sums to ailing member states. In such cases, Communitisation could also involve making decisions by unanimity in the Council and approval by national parliaments, as is also presently the case when the EU creates own resources.

On the other hand, the intergovernmental method loses its legitimacy if the larger member states confront the smaller member states with *faits accomplis* in the form of 'pre-fab' solutions, reducing their right of veto to little more than a paper tiger in the reality of European power politics. The AIV is not in favour of hybrid forms of the intergovernmental and Community methods since the decision-making procedures would then be even less clear, making it still harder for national parliaments to get a grip on the process. Moreover, it would create an uncertain situation that would probably not be legally tenable. Nonetheless, the AIV recognises that such forms may sometimes have to be accepted as second-best solutions that are the inevitable outcome of the differing interests and views of the member states.

**Summary of the advisory report**

The EU is generating much public debate, particularly in a year in which the elections for the European Parliament are imminent and EU budget rules have a bearing on painful cuts in current public spending.

Dissatisfaction with the EU is not confined to the less educated (who are often perceived as among globalisation's losers). It is expressed across a broad social spectrum in criticism of the rapid pace of integration (particularly on the financial and economic front), the free movement of persons and what many regard as the unduly rapid enlargement of the EU by over ten new member states. Citizens have the feeling that they are being swamped by EU rules and have no influence over EU decision-making and the institutions in Brussels. There is also a heated political debate on sovereignty and what is seen as a creeping transfer of powers to the European Union. Nor is the EU the sole focus of this resistance; there is also a crisis of confidence affecting all tiers of government. Falling turnout rates at national, provincial and local elections illustrate this growing lack of confidence in representative democracy.

Against this background the government submitted a request for advice to the Advisory Council on International Affairs (AIV) in December 2013, in which it raised the following questions:

1. Where, according to the AIV, does the key to strengthening democratic legitimacy lie (national parliament, European Parliament, a combination of the two or elsewhere)?
2. What would be a good balance between effectiveness of control and legitimacy of control of EU governance at the various levels?
3. What are the limits of the intergovernmental and Community methods (and hybrid forms)?

In answering these questions the AIV has taken as its point of departure the public's lack of trust in politics and government and hence in existing institutions. The AIV believes that institutional modifications to certain elements could help to restore public trust in the EU, but that this alone is not sufficient. Another key aspect of the issue is how those in authority discharge their responsibilities and to what extent they are prepared to enter into an open debate with interested citizens about controversial European issues. The question of how far the integration process can or should go plays an important role here. It is reasonable to expect national political leaders, in particular, to clearly acknowledge that they themselves form part of the EU decision-making system.

In its report the AIV first examines the current state of public trust and then considers what types of democratic legitimation exist and to what extent the Treaty of Lisbon has contributed to the democratic legitimation of the EU. The AIV devotes extra attention to the democratic legitimacy of the entire package of financial and economic crisis measures that have culminated in what is known as the European Semester, since this policy field is the best illustration of the tensions that underlie the above three questions. The introduction of the euro has resulted in far-reaching, mainly intergovernmental European measures that directly impact the functioning of the State and raise questions about democratic legitimacy.

### *Transfer of powers*

The AIV believes that citizens are being wrong-footed in the debate on what is described as the 'creeping' transfer of powers. Powers are not being transferred by stealth. Both government and parliament are actively involved in intergovernmental and Community decision-making. Moreover, the AIV does not perceive the issue of the transfer of powers in terms of loss or gain. National sovereignty is closely bound up with the capacity to act. At the core of the debate is the question of the level at which the Netherlands' capacity to act would be greatest. In cases where the pooling of powers at EU level would best serve Dutch interests, the AIV considers this to be the preferred option. The AIV believes that in such cases oversight efforts should focus on how EU powers are exercised.

### *Democratic legitimacy*

From the broader perspective of democratic legitimacy and restoring public trust, the AIV concludes that the focus should not be solely on the operation, reorganisation and democratisation of certain institutions and procedures as such. Instead, the key to achieving the stated objective lies in the adoption of a wide range of measures and actions and in the interplay between them, with an important role being given to how political leaders interpret their remit. In other words, a differentiated solution is preferable to a one-dimensional approach. In the AIV's opinion, it is also necessary to strengthen not only the *democratic* legitimacy but also the administrative and legal legitimacy of national institutions. To this end the mechanisms for monitoring the quality of the rule of law should definitely receive the attention they deserve. The AIV would point out that although democratic legitimacy may be properly regulated in theory, it has shortcomings in practice, and measures should therefore be taken to strengthen legitimacy in terms of both input (influence of citizens) and output (implementation).

The AIV is convinced that the only way in which European policy can gain sufficient democratic legitimacy is if government ministers and members of parliament recognise that EU decision-making and the direction of European integration is a shared responsibility of the member states and the EU. This means that politicians should take greater responsibility for their own role. Greater 'ownership' implies that they should enter into a regular, wide-ranging and open debate with citizens on how the EU is developing and about specific EU proposals, and should define their own position in this debate. The utmost should be done to avoid giving the impression that citizens are being presented with *faits accomplis*.

The AIV also feels that the EU benefits from having strong member states and national institutions. The Treaty of Lisbon has introduced a number of innovations relating to the involvement of national parliaments and citizens. Although this is a good start, the innovations have by no means yet become standard practice. The AIV believes that the national parliaments should have strong powers to scrutinise EU legislation both before and after its adoption. This is why it takes the position that parliaments should in future not only be able to assess legislation for compliance with the principle of subsidiarity, but also to express an opinion on its proportionality and legal basis. In this way parliaments could conduct a more substantive and hence also broader debate. The Dutch parliament actively seeks contact with other parliaments, but its role could be strengthened if there were to be a closer connection with the European agenda and if the prime minister and the leaders of the parliamentary parties were themselves to take part in the annual parliamentary debate on the State of the European Union. The AIV therefore recommends holding a regular debate or question time on EU matters alongside regular accountability debates. The national parliament can serve as a bridge between the public and the EU by actively consulting citizens about proposed EU policy

and the Commission's work programme. This role can be amplified still further. A debate about the strategic policy goals of the European Council can also be conducted between the government and the House of Representatives.

National institutions such as the Netherlands Bureau for Economic Policy Analysis (CPB) can also contribute to the EU's effectiveness, enhancing its overall democratic legitimacy and building public trust. The AIV is convinced that the EU benefits from the existence of strong and reliable institutions for macroeconomic policy at national level. The problems responsible for the euro crisis were due in large part to defective national socioeconomic institutions, such as insufficiently capable and insufficiently independent budgetary authorities and economic policy analysis institutes, failing bank supervisors and poorly functioning tax authorities. In the Netherlands, the Court of Audit, the CPB and the Council of State are all involved in the European Semester. The AIV believes that the CPB's independence is an important factor in ensuring that the statistics supplied to the EU are reliable and verifiable, and would argue that the independent status of such institutions, including the CPB itself, should be regulated by law in all member states. The AIV is not in favour of centralising the collection of data in the hands of the European Commission. The member states themselves should remain responsible, although the AIV does feel that it would be worthwhile arranging for independent assessment of the functioning of the national institutions of member states, as for example in the case of aviation safety. The AIV notes that there is a trend towards giving the Council of State a role in determining whether the Netherlands complies with the EU's budgetary rules. The AIV believes this to be inadvisable as it will unnecessarily increase the (political) burden on the Council of State and make heavy demands on its already limited financial and economic expertise.

Besides politicisation of the EU at national level, as described above, the AIV also advocates politicisation at EU level. The politicisation being sought through the election of the Commission President has just started with the nomination of candidates by the political families in the European Parliament. The AIV welcomes this development.

As regards the Union's economic and monetary policy the AIV notes that the procedures already set in motion have yet to reach full maturity. Although the Dutch House of Representatives seems to be making every possible effort, it should realise that the relevant knowledge is concentrated among too few members. The AIV therefore recommends not only the establishment of a special parliamentary committee for the European Semester, but also an expansion of the support provided by the civil service. The AIV is also in favour of intensive dialogue between the House of Representatives and the EU Commissioner responsible for country-specific recommendations, resulting in a negotiating mandate for the government. The cooperation between the House of Representatives and the European Parliament on economic governance must be strengthened through the interparliamentary process, for which provision is made in article 13 of the Fiscal Stability Treaty. In the AIV's opinion, the establishment of a Eurozone Parliament would not help to bring citizens closer to European governance. Indeed, if anything the existence of a second parliament at EU level would cause confusion among the public. The position of the EU Commissioner responsible for economic and monetary affairs needs to be bolstered. The AIV believes that the status of this position should be similar to that of the High Representative for Foreign Affairs. This would enhance not only the Commissioner's authority but also his or her independence. In the AIV's opinion, the administrative legitimacy of the European Commission could be increased if its size were to be reduced. The AIV is therefore in favour of an accelerated reduction in size after 2018. At the same time, the incoming President must have the

freedom to streamline the Commission and cluster together portfolios from the autumn of 2014 onwards. In addition, the European Parliament should be given a stronger role in the European Semester. Its exchange of ideas with both the Commission and the European Council during the Spring Summit should be of a less discretionary nature and must go beyond simply assessing the procedural aspects of the European Semester. This means that the European Parliament should also be able to voice an opinion on matters of substance, such as the priorities for growth and employment and that the Commission should be obliged to explain itself if it deviates from the line taken by the European Parliament.

Some regard referendums as the ultimate bridge between government and voter. However, the AIV disagrees, as referendums do not provide a structural solution to the Union's democratic deficit and should not be used indiscriminately. In the opinion of the AIV, their advantages are outweighed by their disadvantages. For example, a referendum leaves no scope for a nuanced opinion on the form and content of a proposed decision or for the assessment of possible alternatives. The AIV also takes the view that in a representative democracy citizens can cast their vote in periodic general elections according to the importance they attach to the positions taken by political parties on EU issues. It is the responsibility of politicians to clearly state these positions in election campaigns and give them the weight they deserve. The AIV would also point to the potential contribution which the instrument of constitutional review can make to the development of European political awareness and citizenship. In some other member states such as Germany, Ireland and the Czech Republic, the existence of constitutional courts enables citizens to make known their opinion on the course of European integration and to have its constitutionality assessed by an independent institution not motivated by political interests and differences. This could provide major impetus for the public debate on Europe. It would be worthwhile looking into the advantages and disadvantages of this instrument as well.

Although there is little political identification by citizens with Europe and there is as yet no European public space, the AIV notes with approval that the Commission consults at length with civil society organisations and other interested parties at the start of a legislative procedure. The first steps have also been taken to introduce the European Citizens' Initiative, which will enable members of the public to bring subjects to the attention of the Commission and get them on the European agenda.

#### *Balance between effectiveness and control*

Clearly, the requirements of democratic legitimacy and political control may clash with those of administrative effectiveness. Too much emphasis on control may jeopardise the EU's capacity for decisive action. It is hard to generalise about how this trade-off should be achieved in practice, and the balance will differ from one policy area to another, depending on its specific characteristics and, above all, the urgency of action required. However, the AIV believes that calls for greater effectiveness should never go so far that powers are exercised unsupervised. This would only serve to strengthen the harmful impression given to the public that European integration is an unchecked and unstoppable process. Procedural rules may assist in striking a good balance, but it is equally important for the bodies concerned (implementing institutions and parliaments) to perform their role correctly. The guiding principle should be self-limitation. The balance between executive action and parliamentary control should be largely determined by the situation. In cases where the legislative process can progress as normal, with no time constraints, there is in principle sufficient scope for effective parliamentary involvement at national level too. By contrast, where there is a crisis situation that requires rapid

action on the part of European authorities, parliaments must accept that executive bodies are given sufficient discretionary powers and that scrutiny can take place only after the fact, through a system of ex-post accountability. However, reference should be made here to the importance of proper and timely anticipation of the spillover effects of major steps in the integration process, unlike what happened in the past in the context of the EMU. Such consequences or effects should be recognised and taken into account at the earliest possible stage in the political and social debate, at both European and national level. If, in either a European or a national context, there is interest in drawing up rules of conduct governing the limits of national parliamentary control (e.g. rejection of a right of national parliaments to veto ordinary legislation), it would be worthwhile differentiating between the various situations in which decisions have to be taken.

The AIV welcomes the active role played by the Dutch parliament and some other national parliaments within the EU. The parliament should consolidate and expand the expertise it is now accumulating. At the same time, the AIV warns against improper use of the yellow and orange card procedure for the principal purpose of obstruction, since the Union's capacity to act should be strengthened rather than weakened.

#### *Community and intergovernmental method*

Under the provisions of the European treaties, different policy areas require a different approach and method of governance. For example, the Community method prevails in the broad field of the internal market whereas both the Community method and the open method of coordination (OPC) apply in the social field. The intergovernmental method applies in fiscal matters and the Community method in various other areas such as the environment. The intergovernmental method is dominant in the field of economic governance, partly because the member states quite often choose to regulate matters that fall outside the scope of the treaties by means of international agreements. Accordingly, the choice of which method is applicable in specific cases tends to be a political one, made for the most part on the basis of the desired degree of political control over the exercise of European powers. From a national perspective the most important question is which of these methods of governance is most conducive to the State's capacity for action. Although the intergovernmental method may seem attractive at first sight, owing to the (formal) right of veto which each member state has over decision-making and the fact that the European Commission and the European Parliament are involved only to a limited extent, if at all, its exercise may be problematic in practice. In the current political and economic climate, with Germany being so dominant, there may be insufficient counterweight, certainly from the small member states. Although the AIV appreciates that the intergovernmental basis of economic governance can facilitate swift action in times of crisis, it recommends that a Community method be adopted for the subsequent treaty changes. This safeguards democratic legitimacy, ensures the full involvement of the European Parliament and avoids the need for national parliaments to make ad hoc arrangements through the national system.

Clearly, the limits of the Community method lie where the member states wish to keep their national prerogatives, especially in financial matters. This plays a major role, above all, in the debate on the EU as a transfer union and on debt mutualisation. It is only to be expected that the countries that provide financial support, such as Germany, Finland and, not least, the Netherlands, will continue to oppose a system of majority decision-making in which they could be forced against their wishes and interests to cooperate in the transfer of substantial sums to ailing member states.

On the other hand, the intergovernmental method loses its legitimacy if the larger member states confront the smaller member states with *faits accomplis* in the form of 'pre-fab' solutions, reducing their right of veto to little more than a paper tiger in the face of European power politics. The AIV is not in favour of hybrid forms of the intergovernmental and Community methods since they would detract from the desired clarity of the decision-making procedures, making it harder for national parliaments to get a grip on the process. Moreover, such a move would create an uncertain situation of doubtful legal tenability. Nonetheless, the AIV recognises that such forms may sometimes have to be accepted as second-best solutions that are the inevitable outcome of the differing interests and views of the member states.

**Request for advice**

Mr F. Korthals Altes  
Chairman of the Advisory Council  
on International Affairs  
P.O. Box 20061  
2500 EB The Hague

Our reference MINBUZA-2013.341250

Date 13 December 2013

Re Request for advice on the joint exercise of competences and democratic legitimacy in the EU

Dear Mr Korthals Altes,

The government observed in the State of the European Union 2013 that the financial and economic crisis had strengthened the links between national and EU tiers of government. In this new dynamic, measures are being taken in areas where the legal orders of the two tiers intersect, especially regarding political and administrative decision-making on budgetary and economic policies in the euro area (eurozone governance).

National governments' capacity to act, particularly in the field of economic and financial affairs, is increasingly being restricted by countries' growing interdependence and the operation of international markets, to say nothing of ongoing EU integration. The member states in the eurozone have therefore agreed to coordinate their economic and budgetary policies in order to restore their capacity to act in this field.

The European debate often counterpoints EU and national governance. It is uncertain whether such a polarisation really exists since 'Europe' has become an integral part of national governance. In this context, the word 'sovereignty' often implies that a member state can act autonomously in an environment of transnational power and influence provided the 'alien' power, Europe, is kept at as great a distance as possible. Too often, this picture is a caricature of reality.

When a volcano erupts, a foreign sex offender is arrested in Amsterdam, E. coli breaks out, horse meat is sold as beef or banks collapse, the call for a decisive EU is heard from all sides. An EU response is required to crises and challenges that transcend the strict national level, but at the same time people feel alienated from the EU. This tension cannot be sustained indefinitely: without popular support the EU cannot act effectively, and an effective EU is a prerequisite for popular support.

In the interests of both the Netherlands and the EU as a whole, the government will remain critical and constructive in its efforts to help devise and build an effective EU and repair the imperfections in the Economic and Monetary Union (EMU). Where powers are exercised jointly, however, the government thinks it is vital to safeguard the democratic legitimacy of EU decision-making at both national and EU level.



Within the EU, the government has attempted, for example, to initiate a review of subsidiarity under the guiding principle of 'European where necessary, national where possible'. Major crossborder challenges and problems (such as the completion of the single market, the prevention and resolution of financial crises, pandemics, etc.) are best tackled jointly. In other, less important areas the EU should show restraint, so as to avoid unnecessary regulatory pressure. The government believes a stronger focus on subsidiarity would be achieved not so much by a treaty amendment but by a change of behaviour among the EU institutions, especially the European Commission.

A fundamental debate on EU cooperation in the national political arenas (in the Netherlands the two Houses of the States General) would prompt discussion in the media, at schools and in society at large and thus help politicise the EU debate and increase understanding of EU cooperation. The national parliaments of several member states, including that of the Netherlands, are becoming more closely involved in EU decision-making. At EU level, the parliamentary elections in 2014 and the subsequent formation of a new Commission are opportunities to deepen the debate on how EU accountability structures can be strengthened. Against this background, the Advisory Committee on International Affairs (AIV) is asked to clarify:

1. How the role of national parliaments and/or other national institutions can be strengthened with a view to creating public support for EU decisions. More broadly, where, according to the AIV, does the key to strengthening democratic legitimacy lie (national parliament, European Parliament, a combination of the two or elsewhere)? To answer this question, the AIV can draw on the House of Representatives' first common position paper on democratic legitimacy in the EU (17 October 2013), the advisory report of the Council of State,<sup>1</sup> which specifically refers to 'democratic alienation', and the AIV's own advisory report on the European Parliament (no. 81, November 2012); and
2. The interplay between EU governance and national governance and the pros and cons of pooling and sharing sovereignty. This question concerns not only stricter controls and countervailing power for the sake of legitimacy but also how the legitimacy of effective governance can be interpreted. In other words, what would be a good balance between 'legitimacy of effectiveness' and 'legitimacy of control' of EU governance at the various levels? Further to the Council of State's advisory report, the AIV could draw on the debate on the intergovernmental and Community methods (and hybrid forms). It would be interesting to consider the limits of the two methods.

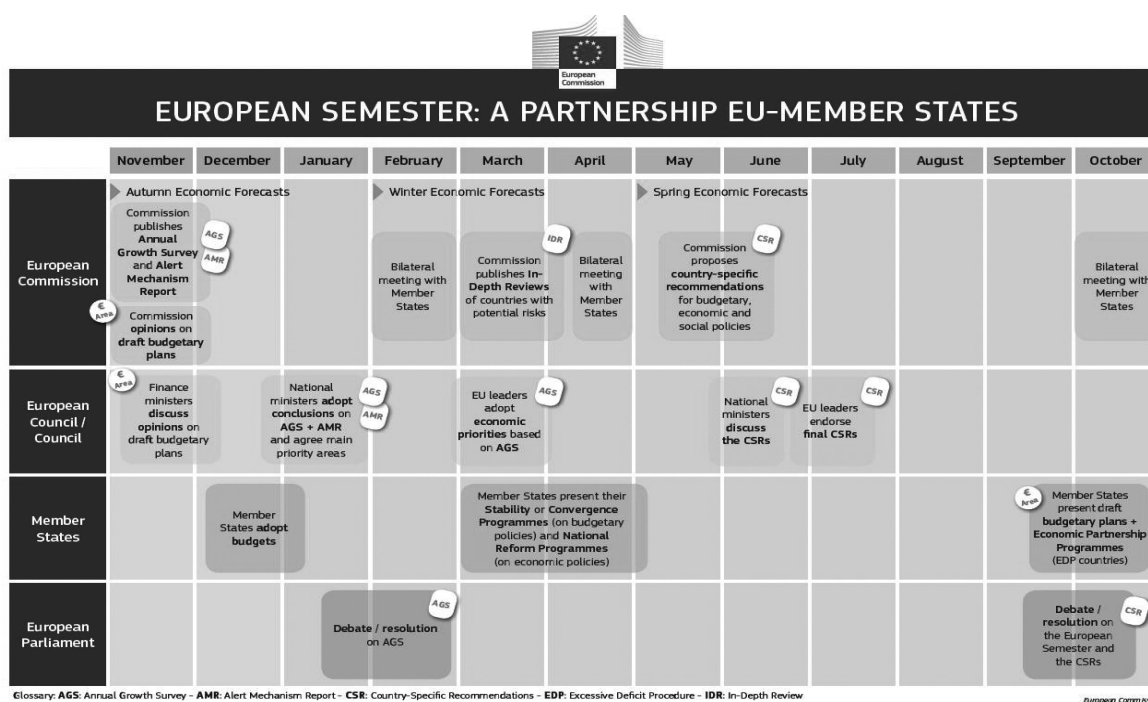
I look forward to your advisory report with interest,

Yours sincerely,

Frans Timmermans  
Minister of Foreign Affairs

1 Council of State, Advisory report (*Voorlichting*) on embedding democratic control in the reform of EU economic governance, 18 January 2013.

## European Semester



All member states have committed themselves to achieving Europe 2020 targets and have translated them into national targets and growth-enhancing policies. But only if the individual efforts of all the countries are coordinated and focused can they result in the desired impact on growth.

Therefore the European Commission has set up a yearly cycle of economic policy coordination called the European Semester. Each year the European Commission undertakes a detailed analysis of EU member states' programmes of economic and structural reforms and provides them with recommendations for the next 12-18 months.

The European Semester starts when the Commission adopts its Annual Growth Survey, usually towards the end of the year, which sets out EU priorities for the coming year to boost growth and create jobs.

**In March**, EU heads of state and government issue EU guidance for national policies on the basis of the Annual Growth Survey. The Spring meeting of the European Council – based on the annual growth survey – takes stock of:

- the overall macroeconomic situation
- progress towards the five EU-level targets
- progress under the flagship initiatives

It provides policy orientations covering fiscal, macroeconomic structural reform and growth enhancing areas, and advises on linkages between them.

**In April**, member states submit their plans for sound public finances (Stability or Convergence Programmes) and reforms and measures to make progress towards smart, sustainable and inclusive growth, in areas such as employment, research, innovation, energy or social inclusion (National Reform Programmes).

**In May/June**, the Commission assesses these programmes and provides country-specific recommendations as appropriate. The Council discusses and the European Council endorses the recommendations. Policy advice is thus given to member states before they start to finalise their draft budgets for the following year.

Finally, at the **end of June or in early July**, the Council formally adopts the country-specific recommendations.

Where recommendations are not acted on within the given time-frame, policy warnings can be issued. There is also an option for enforcement through incentives and sanctions in the case of excessive macroeconomic and budgetary imbalances.

Ministerial meetings on specific policy issues are crucial for peer review and monitoring progress towards EU headline targets, and for advancing Europe 2020 flagship initiatives.

In order to implement the required policies and ensure wide ownership, close cooperation will be maintained with the European Parliament and other EU advisory bodies (Committee of Regions and European Economic and Social Committee) with the full involvement of national parliaments, social partners, regions and other stakeholders.

Source: <[http://ec.europa.eu/europe2020/making-it-happen/index\\_nl.htm](http://ec.europa.eu/europe2020/making-it-happen/index_nl.htm)>.

**List of abbreviations**

<b>COSAC</b>	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
<b>CPB</b>	Netherlands Bureau for Economic Policy Analysis
<b>ECB</b>	European Central Bank
<b>ECI</b>	European Citizens' Initiative
<b>ECJ</b>	European Court of Justice
<b>EFSF</b>	European Financial Stability Facility
<b>EFSM</b>	European Financial Stability Mechanism
<b>EMU</b>	Economic and Monetary Union
<b>ERF</b>	European Resolution Fund
<b>ESM</b>	European Stability Mechanism
<b>EU</b>	European Union
<b>IMF</b>	International Monetary Fund
<b>MEP</b>	Member of the European Parliament
<b>MP</b>	Member of Parliament
<b>OMC</b>	Open Method of Coordination
<b>OMT</b>	Outright Monetary Transactions
<b>PR</b>	Permanent Representation
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TSCG</b>	Treaty on Stability, Coordination and Governance

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