



**CURE FOR DEMOCRATIC DEFICIT IN THE EU: THE LISBON  
TREATY?**

**– WITH COMPARATIVE ANALYSIS OF THE FRENCH, GERMAN AND  
HUNGARIAN CONSTITUTIONAL COURT’S “LISBON-JUDGMENTS” –**

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## Abstract

In the present thesis I aim to approach the question of democratic deficit in the European Union somewhat differently than it is common in the relevant literature. After briefly describing the evolution and numerous interpretations of the term democratic deficit I narrow the scope of examination and choose to conduct the research focusing closely on a legalistic – institution based concept.

In the second part of my thesis I try to localize the possible democratic deficit by analyzing the democratic foundation of the European Union's institutional structure involved in decision-making before and especially after the Lisbon Treaty – to get an answer to the question whether this treaty have managed to cure EU's democratic deficit.

I introduce the terms unwanted outsourcing of governmental powers and preparatory/drafting democratic deficit in order to describe my main theoretical findings: that the decision-making processes sometimes reposition the real possibility of control from governments to supranational institutions without strong enough democratic legitimation.

While in the first two main parts I work mostly with the method of systematization and I refer to numerous secondary sources, in the third, main part comparative constitutional methods are used to analyze the judgments of French, German and Hungarian constitutional court regarding Lisbon Treaty, in order to test my findings. The comparative analysis showed – *inter alia* – that although my concerns can not explicitly be read in the decisions, the logic behind them proves that my findings can be underpinned by the reasoning of constitutional courts of some of the EU member states.

## Introduction

It can not be contested that the issue of democratic deficit<sup>1</sup> in the European Union is a highly discussed and an important one. Numerous articles deal with this question, it is approached from almost every possible aspect that can be imagined, and the debate it raises seems to be self-generating<sup>2</sup>. The importance of the topic is clearly showed in the Lisbon Treaty's preamble when stating that it aims "to enhance the 'democratic legitimacy of the Union'"<sup>3</sup>. It has important implication in the member states as well: many constitutional courts delivered a ruling on the issue of constitutional conformity of the Lisbon Treaty heavily relying on the examination of democratic legitimacy of the Union<sup>4</sup>.

The examination of the democratic deficit issue from every aspect would be impossible and useless for the aim of present thesis; some aspects of this particular topic have been already discussed in many details. Still there are some which are not analyzed widely or where a different method seems to be a good and worthy-to-try approach.

In the present thesis I will approach the topic of democratic deficit from a legal point of view: I will check the democratic foundation of the EU's institution in order to see whether they, as the creators of legally binding norms suffer from a deficit of democracy. In order to be able to give a full and precise enough picture, I start with describing the theoretical concept of democratic legitimacy and the evolution of the democratic deficit issue in the course of the European integrations. This is followed by describing the most commonly used arguments for emphasizing the existence of democratic deficit in the EU. This is where I

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<sup>1</sup> It should be mentioned that in the literature the notion democracy deficit is used as well. Still, this term is not that common and it is typical mostly for non-European academics. In present thesis I will operate with the form democratic deficit, according to the „classical” European literature.

<sup>2</sup> TAMARA TAKACS, PARTICIPATION IN EU DECISION MAKING. IMPLICATIONS ON THE NATIONAL LEVEL 25 (2009).

<sup>3</sup> JEAN-CLAUDE PIRIS, THE LISBON TREATY. A LEGAL AND POLITICAL ANALYSIS 112 (2010).

<sup>4</sup> Kristine Kruma, *Constitutional courts and the Lisbon Treaty. The future based on mutual trust*, THE AREA OF FREEDOM, SECURITY AND JUSTICE TEN YEARS ON 38 (2010), <http://www.ceps.eu/system/files/book/2010/06/AFSJ%2010%20years%20final.pdf>

show the need to limit the scope of my research, but the need for using a more different deficit-notion than the usual one as well: in order to be able to study the complete institutional structure of the Union I abandon the approach which puts the European Parliament (as the only EU-institution having directly elected members) into the center of examinations and instead I include other, both EU and national institutions as well. This enables me to deal with issues usually overlooked in the literature but important ones for my hypothesis.

After describing the situation before the reforms introduced by the Lisbon Treaty and localizing the democratic deficit I continue with studying the EU-institutions after Lisbon. What I argue is that a) the institutional structure of the Union (and thus the decisions made by them) can be legitimized not just by directly electing the members of European Union, but by the democracy-giver function of the member states as well<sup>5</sup> and b) that the ineffective possibilities for the national institutions (particularly for member state governments) to have a real influence over and control of (especially) the preparatory/drafting stage of decision making triggers a so-called preparatory/drafting democratic deficit. The process leading to this I call unwanted outsourcing of governmental powers.

My aim is not to examine how in practice this outsourcing of governmental powers and the democratic deficit in drafting procedure works – this would overstretch the boundaries of present work for sure. It is (with the help of introducing the before mentioned terms) to give a new theoretical concept. By conceptualizing a new framework and context for examination I was enabled to provide a new perspective and to answer the question whether the Lisbon Treaty cured the EU's democratic deficit more successfully.

In addition a practical side of the issue is given by having a closer look at three constitutional court judgments from France, Germany and Hungary, regarding the Lisbon

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<sup>5</sup> See Stephen C. Sieberson, *The Treaty of Lisbon and its Impact on the European Union's Democratic Deficit* 14 COLUMBIA JOURNAL OF EUROPEAN LAW 445 (2008).

Treaty. I do not simply examine and analyze these decisions but I critically evaluate and compare them. After localizing the relevant points of comparison the comparative constitutional approach is very much helpful: it enables me to check whether my theoretical findings concerning the outsourcing of governmental powers and the drafting/preparatory democratic deficit appear in the above mentioned judgments, if this is not the case whether they can fit to the context of their decisions, and finally whether those national constitution courts evaluated the Lisbon Treaty as one solving the democratic deficit issue.

In my thesis I try (by introducing some new terms as well) to provide a somewhat different viewpoint of democratic deficit than it is common. To check the sustainability of my ideas I examine the Lisbon Treaty decisions of French, German and Hungarian constitutional courts; this is again a point where I aim to provide added value, since the French and Hungarian decisions are not widely discussed in the literature, and absolutely not in the English one.

## Chapter One: The democratic deficit – What it is about?

Issues regarding the topic of the democratic deficit are not new ones and certainly not related just to the European Union/European integrations. It is (especially nowadays) common to refer to democratic deficit in international organizations<sup>6</sup>, of global governance<sup>7</sup>, democratic legitimacy of governance practices<sup>8</sup>, etc. Then again, even if the term is used in connection to the European integrations, the notion can vary significantly.

Because of this, it is highly important to clarify in what context the “democratic deficit” will be used further on and what will/will not be understood under this term. In the following I will give a short introduction to the so-called theory of democratic deficit and I will briefly summarize when and under which circumstances its use in relation of the European integrations has been started and became more and more frequent.

### *1.1 Theoretical concept*

In order to define the scope of the notion democratic deficit it seems necessary to first deal with the term democracy. It can not be contested that “democracy” meant very different things in the course of history<sup>9</sup>. The present thesis should not deal with the evolution of this concept: it is enough to recognize that “nowadays ... the term democracy is predominantly used as a shorthand indicating simultaneously a type of political system and its presumed objective”<sup>10</sup>, the system being representative democracy (being “the dominant system of

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<sup>6</sup> THOMAS D. ZWEIFEL, DEMOCRATIC DEFICIT? INSTITUTIONS AND REGULATIONS IN THE EUROPEAN UNION, SWITZERLAND AND THE UNITED STATES 1 (2003).

<sup>7</sup> GLOBAL GOVERNANCE AND PUBLIC ACCOUNTABILITY 212 (David Held & Mathias Koenig-Archibugi eds., 2005).

<sup>8</sup> GOVERNANCE AND THE DEMOCRATIC DEFICIT. ASSESSING THE DEMOCRATIC LEGITIMACY OF GOVERNANCE PRACTICES 3 (Victor Bekkers et. al. eds., 2007).

<sup>9</sup> Id. 61.

<sup>10</sup> Id. 7 and 74.



government”<sup>11</sup>) and the objective being a “political organisation, in which the liberties and maximum happiness of the people are guaranteed”<sup>12</sup>.

In order to keep the democracy-model going, democratic legitimacy is needed<sup>13</sup>. According to some authors legitimacy has three main components: input-oriented (“government by the people”), throughput-oriented (“quality of participation by citizens and the quality of ‘checks and balances’”) and output-oriented (“government for the people”) legitimacy<sup>14</sup>. If one (or more) of them is missing, we can speak about democratic deficit.

It is clear that this concept of democratic legitimacy and democratic deficit can be used for analyzing numerous sorts of political structures. Still, there is one political establishment that is scrutinized much more heavily against the before outlined principles than any other nowadays: the European Union, the European integration project. In the following I will briefly introduce how the concept of democratic deficit evolved through years in the context of European integrations.

## ***1.2 Rising concerns about democratic legitimacy in the European Communities***

Issues regarding the topic of the democratic deficit are not new ones<sup>15</sup> and worries attached to it are certainly not carved into stone: they changed (more or less) in the course of the European integration project’s history.

According to one of the “intellectual heavy-weights”<sup>16</sup> of the EU-topics, Andrew Moravcsik, the democratic deficit is basically “part of the system” and being so, it has been

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<sup>11</sup> Id. 72.

<sup>12</sup> Id. 74.

<sup>13</sup> Id. 6-7.

<sup>14</sup> Id. 6.

<sup>15</sup> Keith Michael Dara Purcell, *The democratic deficit in the European Union: the parliamentary perspective with particular reference to the Oireachtas 6 (1998)* (unpublished thesis, University College Dublin).

present from the very beginning; only the debates and/or their key points are new or changed<sup>17</sup>.

The statement about the change in the discourse about the democratic deficit issue has to be accepted as true. The expression in relation to European integrations was firstly used not by David Marquand in his book “Parliament for Europe” from 1979<sup>18</sup>, neither in the 1977 so-called Manifesto of the Young European Federalists, having the first chapter titled “The democratic deficit”<sup>19</sup>. In these cases the term was used referring to the undemocratic process of policy-making in the European Communities or, in the case of Manifesto, in whole Europe. The term first appears in the work of Theo Sommer, published in 1973: “The Community Is Working”<sup>20</sup>. Here he writes that “the Community of the Nine, so we are told, has a democratic deficit, a social deficit, a deficit of visionary power and, most noticeably, a deficit of unified political will in world affairs.”<sup>21</sup>

After the very appearance of the term, in the beginning issues addressed under the alias of democratic deficit were the ones that related to the loosing of power of national parliaments of the European Economic Community member states.

It was argued that sovereign powers of national legislators are transferred to the unaccountable<sup>22</sup>, remote<sup>23</sup> and secretly operating Community-institutions, where the final and “immediately legally binding”<sup>24</sup> decisions “are made behind closed doors in the Council of

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<sup>16</sup> Andreas Follesdal & Simon Hix, *Why There is a Democratic Deficit in the EU? A Response to Majone and Moravcsik* 2 EUROPEAN GOVERNANCE PAPERS 4 (2005), <http://www.connex-network.org/eurogov/pdf/egp-connex-C-05-02.pdf>

<sup>17</sup> Peter Jancarik, *Understanding Democracy in the European Union. Democratic Deficit as a Powerful Myth?* 23 (2006) (unpublished thesis, Central European University).

<sup>18</sup> DAVID MARQUAND, *PARLIAMENT FOR EUROPE* 64 (1979).

<sup>19</sup> <http://www.federalunion.org.uk/the-first-use-of-the-term-democratic-deficit/> Accessed on 10<sup>th</sup> March 2011.

<sup>20</sup> Theo Sommer, *The Community Is Working* 51 (4) *FOREIGN AFFAIRS* 747 (1973).

<sup>21</sup> *Id.* 747.

<sup>22</sup> MICHAEL HESELTINE, *THE DEMOCRATIC DEFICIT. THE BALANCE IN EUROPE FOR BRITAIN TO REDRESS* 15 (1989).

<sup>23</sup> *Id.* 15.

<sup>24</sup> BILL NEWTON DUNN, *WHY THE PUBLIC SHOULD BE WORRIED BY THE EEC’S DEMOCRATIC DEFICIT* 1 (1988).

Ministers”<sup>25</sup>. In other opinion “the frustration of national parliaments is very evident as they feel powers slipping away, first to the Brussels bureaucracy and then, more recently, to the European Parliament”<sup>26</sup>. Others saw the democratic deficit as a “gaping chasm at the centre of the EC; a black hole at the heart of the Community”<sup>27</sup> which “results from the powers transferred by national parliaments, to the European Community”<sup>28</sup>.

As it can be seen, at this stage of the “history” of the democratic deficit, there were different concerns about weakening the national parliaments in contrast to all of the institutions of the European integrations: the weakness of the European Parliament was not a highly emphasized issue at all. Nevertheless, the topic was not a heavily debated one<sup>29</sup>.

The situation changed a lot later on: scholars and researchers of the field agree on that the issue of democratic deficit started to become a big one with the Maastricht Treaty coming into the picture.<sup>30</sup> The so-called “permissive consensus”<sup>31</sup> came to the end with it.

The Maastricht Treaty came up with important novelties: it instituted the so-called pillar-structure, introduced the name “European Union”, reformed the decision-making process and as part of this reform gave more and new powers to the European Parliament, particularly in order to combat the democratic deficit issue. Nevertheless, it was not a smooth sail to have the treaty accepted: it raised considerable public debates, was rejected at the Danish referendum (to be accepted only on a second one, a year later), was challenged in front of national constitutional courts (the decision of the German constitutional court in particular gave alarming signals since it was read as a possible obstacle to further

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<sup>25</sup> Id. 1.

<sup>26</sup> HESELTINE 14, *supra* note 22, at 6.

<sup>27</sup> DAVID MARTIN, EUROPEAN UNION AND THE DEMOCRATIC DEFICIT 19 (1990).

<sup>28</sup> Id. 19.

<sup>29</sup> HANDBOOK OF EUROPEAN UNION POLITICS 317 (Knud Erik Jorgensen et. al. eds., 2007).

<sup>30</sup> See Jorgensen 317, *supra* note 29, at 7, ZWEIFEL 2, *supra* note 6, at 4, Kevin Featherstone, *Jean Monnet and the ‘Democratic Deficit’ in the European Union* 32 (2) JOURNAL OF COMMON MARKET STUDIES 149 (1994), and others.

<sup>31</sup> As Carol Harlow defines it: “When the European project was seen as essentially an affair of elites who could rely on a docile public to support their decisions uncritically, including the low visibility decisions of the Court of Justice.” Carol Harlow, *Voices of Difference in a Plural Community* 50 (2) THE AMERICAN JOURNAL OF COMPARATIVE LAW 339 343 (2002).

integration)<sup>32</sup>. These developments led to have the democratic deficit as a constant issue on the long-run in terms of the integration process: “the damage had been done. The political aura of inevitable integration and the assumption of popular support for it had been tarnished.”<sup>33</sup>

In the following I will present different approaches on formulating a notion for the democratic deficit. These concepts vary very much, so in order to be able to conduct an efficient research, I will narrow the spectrum of my examination along specific lines.

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<sup>32</sup> Jorgensen 321, *supra* note 29, at 7.

<sup>33</sup> EUROPEAN UNION LAW. CASES AND MATERIALS. 27 (Damian Chalmers et. al. eds., 2<sup>nd</sup> ed. 2010).

## Chapter Two: Democratic deficit in the European Union

After reviewing the – continuously evolving – literature on the topic of democratic deficit one striking conclusion emerges: that there is no conclusion. At least regarding a universal notion of the democratic deficit related to the European Union. The concepts followed by different scholars vary heavily depending on their approach, their methods, the sphere of social sciences they are coming from, etc.

In the following I will introduce some of the common attempts to define the democratic deficit and I will summarize the main points where the democratic foundation of the EU is contested. This is necessary in order to be able later on to clarify the context of my arguments. What I eventually suggest is that most of the democratic deficit arguments are (strictly viewed) developed outside of a legal context and concept. In my thesis I am examining the issue of the democratic deficit from a legal(istic) viewpoint, this is why related deficit-concepts are discussed in more details.

### ***2.1 Different democratic deficits – “Why the public should be worried by the EEC’s democratic deficit?”<sup>34</sup>***

There are numerous aspects of the democratic deficit in the literature. It would be probably impossible, but for sure useless for the purpose of examination of the topic in the present thesis, to enumerate all of them. Still it is important to be familiar with the most dominant concepts.

According to the most radical views the European Union as such is a completely undemocratic structure, missing any kind of democratic legitimacy for exercising of its

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<sup>34</sup> DUNN, *supra* note 24, at 6.

powers, a structure where “a rape of popular will”<sup>35</sup> happens. This viewpoint is not shared by notable number of scholars, it is much more opinion sounded by politicians from the far-right or far-left side of the political palette<sup>36</sup>.

The most common criticisms about the EU’s democratic deficit approach the issue from one or more of the following standpoints. It is argued that in the course of the integration project a “transfer of governance” occurs<sup>37</sup>: the executive (which lacks the appropriate democratic legitimation on European level) dominates in the decision-making process<sup>38</sup>, thus the input-output balance tips over “by the transfer of governance in an output regulatory sphere, from the member states to the European institutions, without the parallel growth of a sufficient input sphere of public accountability and governance”<sup>39</sup>. This transfer of governance is problematic not *per se*; it goes hand in hand with transfer of competences, thus “watering up” the national sovereignty<sup>40</sup>. As Jancarik summarizes opinions of some influential scholars<sup>41</sup>: “the democratic deficit is a by-product of the shift of competences from national to supranational level and it represents a serious issue or an obstacle to successful integration and to credibility and legitimacy of the EU.”<sup>42</sup> Mostly it is argued that the transfer of competences weakens national parliaments (being the depositaries of national sovereignty) against the Brussels-based bureaucracy<sup>43</sup>. Some authors find problematic even the situation when the European Parliament gains new powers<sup>44</sup> – it is a strange perception, since

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<sup>35</sup> Sophie Meunier, *The French Exception* 79 (4) FOREIGN AFFAIRS 104 110 (2000).

<sup>36</sup> Karlheinz Neunreither, *The Democratic Deficit of the European Union: Towards Closer Cooperation between the European Parliament and the National Parliaments* 19 (3) GOVERNMENT AND OPPOSITION 299, 299-300 (1994).

<sup>37</sup> MICHELLE CINI & NIEVES PEREZ-SOLORZANO BORRAGAN, EUROPEAN UNION POLITICS 441 (3<sup>rd</sup> ed. 2010).

<sup>38</sup> DAVID WARD, THE EUROPEAN UNION DEMOCRATIC DEFICIT AND THE PUBLIC SPHERE. AN EVALUATION OF EU MEDIA POLICY 1 (2004), EUROPEAN CONSTITUTIONALISM BEYOND LISBON 185 (Jan Wouters et. al. eds., 2009), Follesdal & Hix 4, supra note 16, at 6, PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXTS, CASES AND MATERIALS 133-134 (4<sup>th</sup> ed. 2008), Purcell 5, supra note 15, at 5.

<sup>39</sup> WARD 1, supra note 38, at 10.

<sup>40</sup> Jancarik 16 and 19, supra note 17, at 6, HESELTINE 15, supra note 22, at 6.

<sup>41</sup> Simon Hix and Andreas Follesdal

<sup>42</sup> Jancarik 16, supra note 17, at 6.

<sup>43</sup> HESELTINE 14, supra note 22, at 6.

<sup>44</sup> HESELTINE 14, supra note 22, at 6, MARTIN 19, supra note 27, at 7.

according to the common approach, the European Parliament is usually seen as the only truly democratic institution of European integrations.

A very common approach is the institutional one, saying that European integrations suffer from an institutional deficit<sup>45</sup>. It is argued that European institutions<sup>46</sup> lack democratic legitimacy since their members (except for the Parliament) are not democratically elected on Europe-wide elections<sup>47</sup>. Regarding this deficiency it is emphasized that it could be even impossible to have proper elections, since there is no “European-demos” which would be able to provide the democratic legitimacy as sovereignty holder<sup>48</sup>. The absence of European parties is mentioned as well<sup>49</sup>. Numerous authors suggest that there is a democratic deficit because of the remoteness of the EU-institutions in relation to European citizens<sup>50</sup>. (Partially) this situation triggers a lack of accountability<sup>51</sup>. It is argued that there is a power-imbalance not just between the EU’s and national institutions, but between European institutions as well<sup>52</sup>.

Democratic deficit is localized not just related to the democratically not underpinned competence-transfer from member states to the EU or regarding the institutions of the integration project, it is found to be present in the European decision-making process as well. Scholars points out that this process bypasses the “democracy argument”, raises “substantive imbalance issues”, the judicial control of the legal instruments as final products is weakened,

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<sup>45</sup> Jancarik 16, supra note 17, at 6, CINI & BORRAGAN 441, supra note 37, at 10.

<sup>46</sup> Democratic deficit concepts dealing with legitimacy-issues regarding institutions and particularly the European Parliament will be dealt with under the subsequent heading.

<sup>47</sup> Follesdal & Hix 5, supra note 16, at 6.

<sup>48</sup> WARD 8, supra note 38, at 10, Wouters 154, supra note 38, at 10, Held 235, supra note 7, at 4.

<sup>49</sup> Neunreither 300, supra note 36, at 10, Held 235, supra note 7, at 4, Purcell 5, supra note 15, at 5.

<sup>50</sup> Neunreither 300, supra note 36, at 10, WARD 7, supra note 38, at 10, Follesdal & Hix 6, supra note 16, at 6, CRAIG & DE BURCA 133-134, supra note 38, at 10, HESELTINE 15, supra note 22, at 6, Purcell 5, supra note 15, at 5, Featherstone 149, supra note 30, at 7.

<sup>51</sup> WARD 1 and 7, supra note 38, at 10, Wouters 155 and 239, supra note 38, at 10, Follesdal & Hix 4, supra note 16, at 6, CRAIG & DE BURCA 133-134, supra note 38, at 10, HESELTINE 15, supra note 22, at 6, Held 214 and 228, supra note 7, at 4, Purcell 5, supra note 15, at 5.

<sup>52</sup> Featherstone 150, supra note 30, at 7.

etc<sup>53</sup>. It is said that there is no possibility for (direct) citizen-engagement in the pre-phases of law-making<sup>54</sup>, that the decisions are taken not transparently enough<sup>55</sup>, using way too complex<sup>56</sup> and highly inefficient<sup>57</sup> procedures, by technocratic officials<sup>58</sup>, without a uniform EU-media to report about deliberations<sup>59</sup>. The results are usually bureaucratic deals<sup>60</sup> and “biased policies”<sup>61</sup>, triggering a political deficit as well<sup>62</sup>.

According to the above introduced opinions EU’s democratic deficit seems to be an omnipresent issue. There is even an argued link between EU’s immigration policy and the democratic deficit: Andrew Geddes claims that some features of EU’s decision-making process “serve also to accentuate a participatory deficit that is especially marked for people from immigrant and ethnic minority groups in Union Member States”<sup>63</sup>.

As I already noticed “the most radical meaning would be that the European Union (EU) as such is undemocratic and that its decision-making does not correspond to democratic norms.”<sup>64</sup> Of course there is a “more limited use of the term” democratic deficit “in relation to the institutional system of the EU”.<sup>65</sup> This approach is especially important for my thesis. If we closely examine the above listed deficit concepts, it should be striking that most of them focus on the framework, on the “catalysts” and on the political effects of the democratic deficit. If one wants to examine the issue from a legal viewpoint (which is my intention) the common, political science-type approach is not the one that can be used as starting point.

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<sup>53</sup> CRAIG & DE BURCA 133-134, supra note 38, at 10.

<sup>54</sup> WARD 6, supra note 38, at 10, Held 212, supra note 7, at 4.

<sup>55</sup> Wouters 209, supra note 38, at 10, CRAIG & DE BURCA 133-134, supra note 38, at 10, Human Rights and the 1996-97 Intergovernmental Conference, THE DEMOCRATIC DEFICIT. DEMOCRATIC ACCOUNTABILITY AND THE EUROPEAN UNION 5 (1996).

<sup>56</sup> CRAIG & DE BURCA 133-134, supra note 38, at 10.

<sup>57</sup> Alma Basokajte, The Problem of Democratic Deficit in the European Union. Current Issues and Predictions for the Future 10 (2005) (unpublished thesis, Central European University)

<sup>58</sup> Wouters 153, supra note 38, at 10.

<sup>59</sup> Neunreither 300, supra note 36, at 10, Held 235, supra note 7, at 4, Purcell 5, supra note 15, at 5.

<sup>60</sup> Held 225, supra note 7, at 4.

<sup>61</sup> Id. 233.

<sup>62</sup> CRAIG & DE BURCA 133-134, supra note 38, at 10.

<sup>63</sup> Andrew Geddes, *Immigrant and Ethnic Minorities and the EU’s ‘Democratic Deficit’* 33 (2) JOURNAL OF COMMON MARKET STUDIES 197-213-215 (1995).

<sup>64</sup> Neunreither 299, supra note 36, at 10.

<sup>65</sup> Id. 299.



The European Union is based on founding treaties, ratified by its member states. These treaties are the ones that make it possible for the Union to have its own powers, institutions, decision-making rules and to adopt legally binding instruments. According to Neunreither “one can maintain that the European Union is based on a system of dual legitimacy: the first legitimacy is based on the democratic institutions of member states and the fact that national parliaments have agreed by ratification of the EC Treaty and its amendments to the partial transfer of powers to the European Union and the exercise of powers by the Community institutions according to these treaties. ... Gradually a second source of legitimacy has been building up, mainly based on the direct elections to the European Parliament.”<sup>66</sup> What is important for a legal analysis of the democratic deficit is to check whether the EU’s legal instruments are democratically underpinned, whether they are “validated by representative democracy at national level”<sup>67</sup>. In order to see if this is the case one should examine the democratic legitimacy of the institutions having the power to adopt legally binding rules.

In the following I will explain my approach towards the analysis of democratic deficit of European integrations’ institutions. The law- and decision-making procedures themselves will not be analyzed closely and in much detail. The reason for this is that in my view the democracy-criterion for procedures can not be the same as for institutions: they can not have “democratic deficit” if they are prescribed clearly, publicly, certainly enough and by actors having competence to decide upon them. The EU’s decision-making rules certainly fulfill these criteria.

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<sup>66</sup> Id. 312.

<sup>67</sup> Harlow 343, supra note 31, at 7.

## *2.2 Democratic deficit in typical approach*

Although (as I tried to demonstrate previously) there are numerous approaches to the issue of democratic deficit, the one related to the institutional deficit is present at the overwhelming majority of authors<sup>68</sup>. According to the “classical” concept of the democratic deficit it means that the “basic political choices”<sup>69</sup> are not made “by a body representing the people or through the democratic participation of the citizens themselves”<sup>70</sup>. Under this concept usually it is argued that legislative acts of the EU miss the democratic legitimacy because these acts are adopted by EU-institutions which are not composed based on popular elections. It is also common to emphasize that these pieces of legislation (according to the interpretations of the European Court of Justice) have to be applied directly and with primacy, and that they have direct effect. These characteristics are argued to be contradictory and undermining the sovereignty of the member-states because of the democratic deficit in the procedures of their adoption. But the main characteristic of the approach is that it commonly defines democratic deficit as a “parliamentary deficit”<sup>71</sup>: “a gap between the powers transferred to the Community level and the control of the elected [European] Parliament over them”<sup>72</sup>. Of course it should be mentioned that there are different opinions as well, according to which the “deficit-issue” (written in quotation marks) is not an issue at all. Authors<sup>73</sup> sharing this view argue that “democratic deficit ... might be a part of the EU’s institutional framework but its importance is overrated. It is not just an accidental by-product

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<sup>68</sup> See Purcell, *supra* note 15, at 5, HESELTINE, *supra* note 22, at 6, Human Rights and the 1996-97 Intergovernmental Conference, *supra* note 55, at 12.

<sup>69</sup> Wouters 185, *supra* note 38, at 10.

<sup>70</sup> *Id.* 185.

<sup>71</sup> Neunreither 299, *supra* note 36, at 10, Wouters 131 and 185, *supra* note 38, at 10, Follesdal & Hix 5, *supra* note 16, at 6.

<sup>72</sup> Shirley Williams cited in Jancarik 19, *supra* note 17, at 6.

<sup>73</sup> Andrew Moravcsik, Giandomenico Majone and Mathias Koenig-Archibugi being the most influential. See Jancarik, 17, *supra* note 17, at 6.

of the integration, but it is rather an expectable or even intentional outcome that enables efficient integration.”<sup>74</sup>

In my thesis I am not accepting either of the above mentioned views completely. I already narrowed the scope of my research previously when stating that I will conduct a legal analysis of the EU’s institutions in order to localize the democratic deficit and to check whether the Lisbon Treaty cured successfully the problem. For me to be able to include in the analysis all the European institutions and not just the European Parliament seems rationally to work with a somewhat different notion of the democratic deficit. According to this notion democratic deficit is “the loss of democracy caused by the transfer of powers to the European institutions and to member state executives arising out of European integration. It implies that representative institutions (parliaments) lose out in this process.”<sup>75</sup> Using this definition it is beneficial because it makes possible the inclusion of all the institutions into the scope of the research and in addition it enables to deal with a question which does not arise (at least not so clearly) when operating with the concept of democratic deficit as commonly defined, this question being: which are the means of national parliaments and governments to effectively control if their policies and standings regarding some issues are followed by their representatives/delegates/etc. in the institutions of the EU? In other words do we find real possibilities for an effective control there during the whole course of the decision-making process? The issue of effective governmental/national control is important especially because, as it could be seen from the previous statements and as I will try to demonstrate in the followings, the democratic foundation necessary for the EU should be given through the member states, having all the member states as democracies and as the holders of national sovereignty<sup>76</sup>.

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<sup>74</sup> Jancarik 16, supra note 17, at 6.

<sup>75</sup> CINI & BORRAGAN 441, supra note 37, at 10.

<sup>76</sup> CIVIL SOCIETY PARTICIPATION IN EUROPEAN AND GLOBAL GOVERNANCE: A CURE FOR THE DEMOCRATIC DEFICIT? 4-5 (Jens Steffek et. al. eds., 2008).

In the following chapters I will try to localize the democratic deficit, check what are the novelties introduced with Lisbon Treaty in this regard, in order to finally conclude with a comparative analysis of the French, German and Hungarian constitutional court dealing with the Treaty. The aim to test my findings regarding the “place” and “status” of the EU’s democratic deficit, after Lisbon.

## Chapter Three: Democratic deficit in action – From a legalistic point of view

In this chapter I will review those key points where the democratic legitimacy of EU-institutions is contested in the literature. After briefly explaining their role in the decision-making/legislative process I continue with one-by-one examination of the relevant institutions. It should be emphasized that in present chapter I will try to localize the democratic deficit in the institutional setting before Lisbon Treaty came into force. Having done with this I will revisit the issue in the following chapter in order to check if the Reform Treaty was able to solve the legitimacy-problems.

### 3.1 Introductory remarks

As I showed previously, in order to conduct the examination of democratic deficit from a legal point of view it is necessary to check whether the EU-institutions have the necessary democratic foundations<sup>77</sup>. Of course it should be mentioned that there is criticism to this kind of approach. One is related to substance, arguing that “the democracy deficit is structural, not institutional”<sup>78</sup>. There are contra-arguments as to the methodology itself as well: “In speaking about the ‘democratic deficit’ on the institutional level, we pretend that we have some democracy scale by which we measure the European species of democracy and establish that it is less than we asked for.”<sup>79</sup> I argue with these conclusions. If all the

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<sup>77</sup> Contrary to some other approaches, for example: “The main democratic deficit in the European Union, as presently structured, does not lie in the limited powers vested in the institutions of direct representation, but in the lack of a fully developed and integrated European society and public sphere.” Richard Bellamy & Dario Castiglione, *Building the Union: The Nature of Sovereignty in the Political Architecture of Europe* 16 (4) LAW AND PHILOSOPHY 421 431 (1997). This view approaches much more from the side of political studies.

<sup>78</sup> Steve J. Boom, *The European Union after the Maastricht Decision: Will Germany Be the “Virginia of Europe?”* 43 (2) THE AMERICAN JOURNAL OF COMPARATIVE LAW 177 224 95).

<sup>79</sup> Bert Van Roermund, *Jurisprudential Dilemmas of European Law* 16 (4) LAW AND PHILOSOPHY 357 375 (1997).

institutions have the necessary democratic underpinning, EU's institutional setting as a whole will be democratic. If one or more institution is not "legitimized" enough, the structure is becoming undemocratic as well<sup>80</sup>. As to the critics regarding methodology it should be stated that institutions in the national context are valued whether they are democratic or not as well, not just EU-institutions. Accordingly it can be said that yes, there is a "general measure" of the institutions' democratic underpinning, which is (as it is recognised very broadly in the relevant literature) the possibility for their legitimacy to be traceable back to the citizens of the member states, as to the ultimate holders of sovereignty<sup>81</sup>.

Before the Lisbon Treaty came into force, the decision-making process in the EU was commonly described as based on an institutional "triangle", where the Commission holds the exclusive "authority to draft legislation", the Parliament discusses and the Council decides<sup>82</sup>. Of course other institutional actors played some (basically consultant) role as well, like the Committee of the Regions and the Economic and Social Committee. Decision-making was to be conducted through different types of procedures. In the co-decision procedure the process started with the Commission's initiative, and with having the Council and the Parliament as co-legislators, meaning that the consent of both of them was necessary to have a draft passed. Under the consultation procedure the Parliament had possibility only to give its opinion but in no ways was this opinion tying the hands of the Council, who made the final decision. The cooperation procedure secured more place to move for the Parliament but its amendments could be overruled by Council's unanimous decision. In the assent procedure the Parliament basically held a right to veto but without possibility to suggest amendments to the draft.<sup>83</sup> There were procedures where even consultation with the Parliament was not a prerequisite,

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<sup>80</sup> See Jos de Beus, *Quasi-National European Identity and European Democracy* 20 (3) LAW AND PHILOSOPHY 283 286 (2001). "... there is no deficit as long as national governments are backed by domestic majorities ..."

<sup>81</sup> See Robert Rohrschneider, *The Democracy Deficit and Mass Support for an EU-Wide Government* 46 (2) AMERICAN JOURNAL OF POLITICAL SCIENCE 463 (2002).

<sup>82</sup> Ian Ward, *A Decade of Europe? Some Reflections on an Aspiration* 30 (2) JOURNAL OF LAW AND SOCIETY 236 241-242 (2003).

<sup>83</sup> SYLVIA HARGREAVES, EU LAW 21 (2009).

some of these being the comitology procedures, when the main legislator (concerning implementing measures) is not the Council but the Commission alone, under the scrutiny of committees (partially) made up from representatives of member states. Finally it should be mentioned that the European Central Bank had legislative powers as well.<sup>84</sup>

### ***3.2 Localizing the democratic deficit in the EU***

As it can be seen from the previous introduction, the main actors in EU's decision-making process are the European Parliament, the Council of the European Union and the European Commission. Beside these the European Central Bank has legislative power as well, but in present thesis I will not examine this institution, having regard to its highly specialized role.<sup>85</sup> Neither will I check here the democratic legitimacy of the European Court of Justice, which is an institution that shaped EU-law very significantly<sup>86</sup>, although (being a court) is not part of the law-making process itself<sup>87</sup>. On the other hand I find it useful to take a look of the European Council here, since with the Lisbon Treaty it becomes a "full-time" EU-institution.<sup>88</sup>

I proceed as follows: in the present chapter I show where the democratic foundation of these institutions is contested, in order to (in the next chapter) check what the situation is after the Lisbon Reform and to see what conclusions can be drawn.

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<sup>84</sup> LASZLO BLUTMAN, EU-JOG – MŰKÖDÉSBE (EU-LAW – IN ACTION) 92 (2004).

<sup>85</sup> Although it should be mentioned that democratic legitimacy of the ECB is frequently contested in the literature. Amy Verdun, *The Institutional Design of EMU: A Democratic Deficit?* 18 (2) JOURNAL OF PUBLIC POLICY 107 (1998) and David McKay, *The Political Sustainability of European Monetary Union* 29 (3) BRITISH JOURNAL OF POLITICAL SCIENCE 463 (1999).

<sup>86</sup> BLUTMAN 67-68, supra note 84, at 19.

<sup>87</sup> The ECJ's democratic legitimacy is contested as well, see Grainne de Burca, *The Quest for Legitimacy in the European Union* 59 (3) THE MODERN LAW REVIEW 349 352 (1996) and James L. Gibson & Gregory A. Caldeira, *Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis* 28 (1) BRITISH JOURNAL OF POLITICAL SCIENCE 63 (1998).

<sup>88</sup> CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Article 13.

### 3.2.1 The European Parliament

The European Parliament is the institution of the European integrations whose influence in the decision-making process was gradually strengthened the most: it started as a nothing-but-deliberative organ with delegated national members, receiving more power with the introduction of cooperation procedure, just after becoming the only European organ with directly elected members. After the introduction of the co-decision procedure it was clear that it became a player with considerable weight. By some it is seen as the only possible actor which could provide the necessary democratic legitimacy for the Union<sup>89</sup> and because of this it is argued that to strengthen its role is a must in the course of EU's reform<sup>90</sup>.

Although the Parliament's competence continuously "evolved", there are opinions that since it "enjoys far less power and influence than either the Commission or the Council, [it is] essentially 'illusory' institution"<sup>91</sup>. Some authors speak more harshly when they talk about the democratic deficit "in the form of the relative impotence of the European Parliament"<sup>92</sup>.

Of course, different views can be found, according to which the Parliament should not gain too much power, for different reasons. Much of them are summarized well by Hobsbawm: "A body like the European Union (EU) could develop into a powerful and effective structure precisely because it has no electorate other than a small number (albeit growing) of member governments. The EU would be nowhere without its 'democratic deficit', and there can be no future for its parliament, for there is no 'European people', only a collection of 'member peoples', less than half of whom bothered to vote in the 2004 EU

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<sup>89</sup> Alexander Ballmann et al., *Delegation, Comitology, and the Separation of Powers in the European Union* 56 (3) INTERNATIONAL ORGANIZATION 551 554 (2002).

<sup>90</sup> Michael Keating, *Asymmetrical Government: Multinational States in an Integrating Europe* 29 (1) PUBLIUS 71 85 (1999).

<sup>91</sup> Ward 239, *supra* note 82, at 18.

<sup>92</sup> Mathieu Deflem & Fred C. Pampel, *The Myth of Postnational Identity: Popular Support for European Unification* 75 (1) SOCIAL FORCES 119 137 (1996).



parliamentary elections.”<sup>93</sup> Still it can be concluded that the democratic legitimacy of the Parliament is not contested, the debate is about its scope of power.

### 3.2.2 The European Council

Before Lisbon the European Council was not a full EU-institution, meaning that it was not enumerated as such in the Maastricht Treaty. Composed of the heads of state or government of the member states, with the president of the Commission and the foreign ministers present as well, it was not part of the legislative process but a general political agenda-setter.<sup>94</sup> Probably because of this feature the democratic legitimacy of the European Council is not debated in the literature. One other argument can be that although its members are not directly elected, they are the highest possible representatives of the member states, which is for sure (at least in my point of view) enough to generate a democratic underpinning<sup>95</sup>.

### 3.2.3 The Council of the European Union

Contrary to the situation described above, the democratic deficit of the Council is highly contested. As Julia Paley put it: “the European Union is said to entail a ‘democratic deficit’ due to the myriad unaccountable committees operating secretly and without public record”<sup>96</sup>. It is emphasized that because of this “secrecy”<sup>97</sup> “it is impossible to know how, or why, a particular minister voted in the Council. ... At EU level, government ministers act in a

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<sup>93</sup> Eric J. Hobsbawm, *Spreading Democracy* 114 FOREIGN POLICY 40 41 (2004).

<sup>94</sup> HARGREAVES 17, *supra* note 83, at 18.

<sup>95</sup> Harlow 344, *supra* note 31, at 7.

<sup>96</sup> Julia Paley, *Toward an Anthropology of Democracy* 31 ANNUAL REVIEW OF ANTHROPOLOGY 469 470 (2002).

<sup>97</sup> Ballmann 554, *supra* note 89, at 20.

capacity without most of the procedural safeguards of a parliamentary democracy”<sup>98</sup>. A common argument is that Council members are members *ex officio*, without popular vote taken place<sup>99</sup>. The qualified majority voting<sup>100</sup> is seen as an issue as well, namely that decision can be made even if a particular government opposes it, thus having the nationals of that particular country “unrepresented”.

I find all the above mentioned arguments standing on weak ground. Regarding the “secretive nature” of the deliberation it should be stressed that access to official EU-information became an important issue<sup>101</sup> and nowadays there are appropriate information rights in order to make the problem of “remoteness of the European institutions from the daily lives of the citizens of the Union”<sup>102</sup> disappear. Even if this would not be the case, the circumstances of the decision-making do not have ultimate influence the core issue of legitimacy. Matters related to how and why particular ministers voted are to be regulated on national level, in rules of procedures of national parliaments or other legal norms specifying the control-process of EU-legislation<sup>103</sup>. Accusations that ministers in the Council are not popularly elected are better placed, but it should be beard in mind that in the national setup these very same ministers composing national governments do have legislative power – and the legitimacy of governmental act is not questioned<sup>104</sup>. The chain of legitimacy in their case is longer than in the case of the members of European Parliament, that is true, but ultimately, democratic underpinning is present<sup>105</sup>. And finally, about the issue of qualified majority

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<sup>98</sup> Adam Cygan, *Democracy and Accountability in the European Union. The View from the House of Commons* 66 (3) THE MODERN LAW REVIEW 384 386 (2003).

<sup>99</sup> Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union* 40 (4) JOURNAL OF COMMON MARKET STUDIES 603 605 (2002).

<sup>100</sup> *Id.* 3.

<sup>101</sup> See Stefan Mayr, *Transparency in EC Law. Access to Documents* (2009) (unpublished thesis, Central European University).

<sup>102</sup> Kenneth Campbell, *Access to European Community Official Information: John Carvel & Guardian Newspapers v. EU Council* 46 (1) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 174 (1997).

<sup>103</sup> See TAKACS, *supra* note 2, at 1.

<sup>104</sup> See Keating 82, *supra* note 90, at 20, where the importance of “national political forums” is emphasized.

<sup>105</sup> See the similar reasoning of the Hungarian Constitutional Court under 5.2.1 Democratic legitimacy. Same views in Veaceslav Balan, *Place of the European Parliament in the Institutional Framework of the European*

voting: in my opinion this argument can not stand since the mere possibility (or even the fact) that a decision will be passed even if a particular number of member states votes against it does not abolish the democratic legitimation. It can not be said that citizens of those countries were not represented in the decision-making process. The situation is just like in the national setting, when decisions are made against the will and votes of the opposition. In addition it seems that unanimity is “‘a strong norm in the EU’, where the highly iterative nature of day-to-day decision-making combined with a lack of stable patterns of coalition formation ‘strongly facilitate the universally inclusive, compromise mode of decision-making’”<sup>106</sup>, even in cases when qualified majority voting would be the regular procedure.

### 3.2.4 The European Commission

The possible democratic deficit of the Commission is commonly not emphasized in the literature, at least not in a way that it would be a specific characteristic for this institution, but approaching from a viewpoint that since its members, the commissioners are not elected but appointed by the Council, it lacks democratic legitimacy, just like all other EU-institutions except of the Parliament<sup>107</sup>, its “ties to the public are ... very indirect indeed”<sup>108</sup>. Other arguments regarding the Commission’s democratic deficit put into the center its everyday working process, “the vulnerability of the Commission to be captured by special interests”<sup>109</sup> and that through the Commission bureaucratic and technocratic elites are shaping

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Community. Is There Still a Democratic Deficit in the European Community? 86-87 (2002) (unpublished thesis, Central European University)

<sup>106</sup> FRANCE AND THE EUROPEAN UNION. AFTER THE REFERENDUM ON THE EUROPEAN CONSTITUTION 165 (Emiliano Grossman ed., 2008).

<sup>107</sup> De Burca 352, supra note 87, at 19.

<sup>108</sup> Robert O. Keohane, *International Institutions: Can Interdependence Work?* 110 FOREIGN POLICY 82 92 (1998).

<sup>109</sup> Ballmann 554, supra note 89, at 20, and the same idea in Tamara Kafkova, Interest groups as important actors for the European Commission: Stronger voice of diffuse interest groups (2007) 52 (unpublished thesis, Central European University)

EU's decision-making<sup>110</sup>, since the Commission is highly independent from the member states. The comitology process is heavily criticized as well, where legislation is carried out (although under the supervision of member states) by the Commission. If we adopted previously the view that Council members are democratically legitimized since they have legitimation in the national context, than because of the basic feature of Commission "the democratic decision-making chain breaks ... basically before entering the comitology arena"<sup>111</sup>.

Some of these critics are answered in the literature. Contrary to views that technocracy is a problem it is suggested that democratic deficit is cured by "independent scientific knowledge"<sup>112</sup> of the Commission. As I mentioned in relation to the Council, the "transparency principle" and "participation rights" are important in fighting back the problem of remoteness and secrecy in the context of Commission as well: they "enables individuals and their associations to follow more closely, and hence influence, the course of decision-making"<sup>113</sup>. In order to solve the legitimacy-issue there are proposals that a link between Commission and the people should be established by having the president of the Commission elected on direct, popular, EU-wide election.<sup>114</sup> But sometimes democratic legitimacy is confused with (institutional system) accountability: "Take the European Commission, for instance. If one focuses on its 'think thank' role, one would want to make it as independent as possible from the European Parliament: there is nothing wrong with a technocratic think tank – indeed, this is part of the definition itself of a think tank. But if one focuses on the

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<sup>110</sup> Jeanne Morefield, *States Are Not People: Harold Laski on Unsettling Sovereignty, Rediscovering Democracy* 58 (4) POLITICAL RESEARCH QUARTERLY 659 667 (2005).

<sup>111</sup> Geanina Gabriela Turcanu, *Who guards the guardian's guardian? Case Study: "Life sciences, genomics and biotechnology for healthcare committee"* 11 (2009) (unpublished thesis, Central European University)

<sup>112</sup> Gavin Smith, *When "the Logic of Capital Is the Real Which Lurks in the Background" Programme and Practice in European "Regional Economies"* 47 (4) CURRENT ANTHROPOLOGY 621 625 (2006).

<sup>113</sup> Francesca Bignami, *Three Generations of Participation Rights before the European Commission* 68 (1) LAW AND CONTEMPORARY PROBLEMS 61 62 (2004).

<sup>114</sup> De Beus 287, *supra* note 80, at 18.

executive role of the Commission, clearly accountability becomes an important issue.”<sup>115</sup> In my view institutional accountability should be distinguished from democratic legitimacy: the prior should be dealt with inside the EU’s institutional setting and the latter outside of EU-context (except in the case of popular elections), through national democracy-underpinning.

As it can be seen, fairly enough argument has been made, but none is concerned of the (material) democratic deficit of the Commission. Why is this so important? Since the Commission is the institution which possesses the power to draft legislation it can decisively influence the final outcome of legal instruments. If one takes seriously the above mentioned critics about lobby and other interests “capturing” the Commission’s views, than a deficit (or at least decline) of member states’ interest-enforcing possibilities is present. If the Commission is not democratically legitimized than we have democratic deficit in a very important part of the decision-making process. This I call drafting/preparatory deficit. It is triggered by unwanted outsourcing of governmental powers<sup>116</sup>: because of the supranational feature of the Commission the governments can not have decisive influence on its work. But since it is the only institution having drafting power in the legislative process, the possibility of the governments to control the preparatory phase vanishes and this phase becomes one without control by democratically legitimized organs<sup>117</sup>. These my findings will be examined in the next chapter in the context of Lisbon Treaty and finally scrutinized by comparatively analyzing the Lisbon-related judgments of the French, German and Hungarian constitutional court.

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<sup>115</sup> Alberto Alesina & Roberto Perotti, *The European Union: A Politically Incorrect View* 18 (4) THE JOURNAL OF ECONOMIC PERSPECTIVES 27 33 (2004).

<sup>116</sup> To be distinguished from the „wanted” outsourcing of governmental powers in national context, under what “I understand the efforts of the executive to establish institutions inside of the governmental structure which are different from ministries and which have no clear task-list, having for effect that it becomes highly difficult to identify (mostly the political) responsibility in particular cases”. “Powers of the Parliamentary Opposition – a Problem Analysis: Hungary and United Kingdom”, Separation of Powers Course at Central European University, December 2010.

<sup>117</sup> My argument regarding the importance of control is strengthened by the Maastricht-decision of the German Federal Constitutional Court, having a view according to which “fundamental is that Union legislation be subjected to effective political control”. Boom 224, supra note 78, at 17.

## Chapter Four: The Lisbon Treaty – What does it change?

The examination of Lisbon Treaty is particularly important when one deals with the topic of the democratic deficit, since it was (and still is) widely seen as aiming (amongst others) to cure this issue. There were suggestions that a European constitution would solve the problem: “[would] *per se* make the European Union ‘democratic’”<sup>118</sup>. After briefly sketching the context in which the Reform Treaty was born, in the present chapter I examine the previously localized critical points (where the democratic foundation of EU is or is to be contested) in order to check whether it managed to fulfill the preliminary expectations.

### 4.1 About the Lisbon Treaty

It was the Laeken Declaration which “officially launched the EU’s recent and contentious effort to promulgate a ‘constitution’ ... [and it] identified the major internal challenge as that of bringing the EU ‘closer to its citizens’ and providing ‘better democratic scrutiny’ over its activities.”<sup>119</sup> The enthusiastic process of preparing a constitution for Europe which would solve many of the acute problems nevertheless stopped rather suddenly and quickly. After having the so-called Constitutional Treaty accepted on the Brussels meeting of the European Council in June 2004, its ratification became “jammed” when France and the Netherlands said no to the Treaty on referenda hold in 2005<sup>120</sup>. Interestingly enough although it was widely argued that the Treaty serves the better democratic legitimacy

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<sup>118</sup> Mathias Albert, *Governance and Democracy in European Systems: On Systems Theory and European Integration* 28 (2) REVIEW OF INTERNATIONAL STUDIES 293 305 (2002).

<sup>119</sup> Robert O. Keohane et al., *Democracy-Enhancing Multilateralism* 63 INTERNATIONAL ORGANIZATION 1 3 (2009).

<sup>120</sup> PAUL CRAIG, THE LISBON TREATY: LAW, POLITICS AND TREATY REFORM 20 (2010).

of the EU, amongst the reasons why citizens were encouraged to vote against it was the “new EU” would represent “a diminution of democracy”<sup>121</sup>.

In order to be able to find a solution, a so-called reflection period was announced. A new treaty was drafted, named as Reform Treaty: this became the Lisbon Treaty, after being accepted by member states in 2007, and finally ratified by all of them at the end of 2009. The Lisbon Treaty was formulated in a way to have the previously highly debated issues left out (mostly related to the issue of statehood) but the main goal and most important changes and reforms untouched<sup>122</sup>.

For the present analyses important changes concerning decision-making are that it renamed the co-decision procedure as to ordinary legislative procedure and extended its usage to new areas, while the other procedure are called special legislative procedures.<sup>123</sup> The European Council became a “full-time” EU-institution<sup>124</sup>, but except of this novelty the institutional setup was not modified fundamentally, still having the European Parliament, the Council and the European Commission as the main legislators<sup>125</sup>. Still, it did modify the “constitutional” frame of these institutions – modifications relevant to the possibility of curing EU’s democratic deficit will be looked in more detail in the followings.<sup>126</sup>

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<sup>121</sup> ALLEN KIERAN, REASONS TO VOTE NO TO THE LISBON TREATY: EU CONSTITUTIONAL REFERENDUM 49 (2008?).

<sup>122</sup> CRAIG 20-25, *supra* note 120, at 26.

<sup>123</sup> CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, Article 289.

<sup>124</sup> CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Article 13.

<sup>125</sup> LISBON: WHAT THE REFORM TREATY MEANS 123 (Tony Brown ed., 2008).

<sup>126</sup> ZOLTAN HORVATH & BALINT ODOR, THE UNION AFTER LISBON – THE TREATY REFORM OF THE EU 136 (2010).

## 4.2 *Democratic deficit revisited*

As MacCormick rightly suggests, “discussion of a democratic deficit in Europe needs to take due account of the complexity of the [issue]”<sup>127</sup>. Accepting this caution, in the previous chapter I tried to step back a little to be able to see the broader picture in relation to the EU’s democratic deficit. I basically argued that, as for the institutions which are not composed of directly elected members, “popular democracy at national level justifies elite governance”<sup>128</sup>. But if there is no national-level democratic underpinning, democratic deficit is present. This is why I have found that instead of emphasizing the lack of democratic legitimacy of Council the drafting/preparatory deficit, triggered by unwanted outsourcing of governmental powers should be more closely observed, in relation to the European Commission.

Under the present heading I will follow the same approach I have used in previous chapter: I will check the contested points of democratic foundation of the main EU-institutions involved in the legislative process. It should be mentioned that although under the Lisbon Treaty the Court of Justice of the European Union, the European Central Bank and the Court of Auditors are official, “full-time” EU-institutions<sup>129</sup>, their democratic legitimacy will not be examined in the followings, due to their special role, outside of the law-making process. Accordingly I will check the same institutions as in the previous chapter in order to see whether the Lisbon Treaty managed to cure the argued democratic deficit. As it could be recognized previously, I start with institutions which legitimacy is held to be the strongest, and I go towards those which more possibly have a legitimacy-problem.

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<sup>127</sup> Neil MacCormick, *Democracy, Subsidiarity, and Citizenship in the ‘European Commonwealth’* 16 (4) LAW AND PHILOSOPHY 331 356 (1997).

<sup>128</sup> Harlow 344, *supra* note 31, at 7.

<sup>129</sup> CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Article 13.



### 4.2.1 The European Parliament

The Lisbon Treaty strengthened Parliament's power by widening the circle of areas where ordinary legislative procedure is to be used. According to numerous scholars this is the most appropriate way of curing the EU's democratic deficit, having regard to the fact that the Parliament is the only institution having its members directly elected<sup>130</sup>, although it is highlighted that “[the] strengthened role reinforces its position in relation to the other institutions in Brussels, notably the Council of Ministers, but cannot by itself resolve the broader issue of the legitimacy of the EU”<sup>131</sup>.

Although the democratic legitimacy of the Parliament was never contested, there is considerable debate on what its main role should be under the institutional setting of the Union. There is considerable support behind the idea that it is equally important to have the Parliament “admitted to a larger share in legislative deliberation, if only to the extent of exercising a power of veto or at least of delay on legislation proposed by Commission and Council”<sup>132</sup> as to have more power transferred to it. After the Lisbon Treaty came into force one can argue that the Parliament “looks much more like a legislature than a chamber for debate”<sup>133</sup>, thus its role as a partial legitimacy-provider is stronger than ever.

### 4.2.2 The European Council

The Lisbon Treaty officially recognizes the European Council as an EU-institution<sup>134</sup>. It does not provide any new powers, neither changes it the European Council's main role,

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<sup>130</sup> THE INSTITUTIONS OF THE EUROPEAN UNION 108 (John Peterson & Michael Shackleton eds., 2<sup>nd</sup> ed. 2006).

<sup>131</sup> Peterson & Shackleton 105, *supra* note 131, at 29.

<sup>132</sup> McCormick 356, *supra* note 127, at 28.

<sup>133</sup> Peterson & Shackleton 120, *supra* note 131, at 29.

<sup>134</sup> CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Article 13.

which is to set up the main directions for EU policy-making<sup>135</sup>. Nevertheless it introduces an important novelty: the European Council becomes headed by a president, elected for two and a half years by qualified majority<sup>136</sup>. This new position was welcomed by most of the public, politicians and scholars as well, having a view that a permanent president can strengthen the European Council's role as an agenda-setter for the EU<sup>137</sup>.

I find this newly introduced office not to strengthen the democratic legitimacy of the European Council, but even on contrary, to weaken it. As I argued previously it can be said that EU is legitimated through the respective national governments<sup>138</sup>. A president, who is neither directly elected nor a national official, but having the possibility to influence what will be on the table of the EU's decision-makers, can produce the same preparatory democratic deficit as I mentioned before in connection to the Commission, since the option from which one has to be chosen will become more limited, and the initiative will slip out from the hands of governments, once more<sup>139</sup>.

### 4.2.3 The Council

As I showed in the previous chapter, democratic deficit of the Council is the mostly contested point of the EU's institutional structure, still, the democratic legitimacy is secured: not on the same basis as for the European Parliament but through the member states<sup>140</sup>. There is a "dual accountability" and democratic underpinning: secured by the ultimate sovereignty-holders in member states and by the European Parliament, after Lisbon stronger than ever<sup>141</sup>.

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<sup>135</sup> CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Article 15.

<sup>136</sup> CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Article 15 Section 5.

<sup>137</sup> HORVATH & ODOR 153-155, *supra* note 126, at 27.

<sup>138</sup> See Rohrschneider, *supra* note 81, at 18.

<sup>139</sup> JAN WERTS, *THE EUROPEAN COUNCIL* 209 (2008).

<sup>140</sup> See Moravcsik, *supra* note 140, at 30.

<sup>141</sup> Grainne de Burca, *The Quest for Legitimacy in the European Union* 59 (3) *THE MODERN LAW REVIEW* 349 353 (1996).

The Lisbon Treaty introduced some novelties regarding the decision-making, especially related to the majority voting. For the purposes of present examination these are not relevant, since they do not concern the basic structure and process of the decision-making. Although by introducing the so-called bridging-clauses<sup>142</sup> the qualified majority voting can replace unanimity, this does not change the main concept: and that this that decisions are made by the democratically legitimate Council on the proposals drafted by the Commission suffering from democratic deficit. So the preparatory deficit is present, and the unwanted outsourcing of governmental powers is still there as well. The Lisbon Treaty did not change anything in relation of the Council which would solve this issue, in terms of providing sufficient and effective methods for controlling the preparatory phase of the decision-making by a democratically legitimized organ.

#### **4.2.4 The European Commission**

Previously I argued that because the Commission is the sole EU-institution having power to draft legislative proposals, and since it is not legitimized neither through direct elections neither directly by the member states, a so-called preparatory/drafting democratic deficit is present in the Union. I maintained that it happens because the member states, and especially their governments lack the effective methods of controlling the preparatory phase of law-making in the EU. To understand why this is problematic, one has to remember of the opinions I previously enumerated, regarding the “double-legitimacy” of the Union. Daniel Wincott calls having “two-tier system of European governance” “the ‘perversion’ of European democracy, which has had the effect of cutting down ‘domestic mechanisms of democratic accountability’ and so ‘perverting’ the constitutional balance between executive

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<sup>142</sup> HORVATH & ODOR 80-85, supra note 126, at 27.

and legislative organs at national level.”<sup>143</sup> If the initiative of proposing legislation is solely on the Commission, which has neither democratic legitimacy nor member-state control, the constitutional balance is not just “perverted” but there is no balance any more.

The Lisbon Treaty did not introduce any major changes (related to the issue of democratic deficit) as to the structure, functioning or powers of the Commission<sup>144</sup>. It still possesses the exclusive right of proposing EU-level legislation<sup>145</sup>. It still does lack democratic legitimacy, even though there is a link between the Parliament and the Commission, which is supposed to provide for “more democracy”<sup>146</sup>: the president of the Commission is elected by the having the European Council (acting by qualified majority” nominating a candidate to the European Parliament, “taking into account the elections to the European Parliament and after having held the appropriate consultations”<sup>147</sup>. The „candidate shall be elected by the European Parliament by a majority of its component members”<sup>148</sup>. It can be seen that the aim was to provide democratic legitimacy for the Commission by directly linking it to the Parliament (which is democratically legitimated). Still, this linkage provide legitimacy for its president only, and all other arguments to find the Commission suffering from a democratic deficit (stated in previous chapter) still stay in place – after Lisbon as well.

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<sup>143</sup> Daniel Wincott cited in Harlow 345, supra note 31, at 7.

<sup>144</sup> National Forum on Europe, Government Publication Office, Ireland, A SUMMARY GUIDE TO THE TREATY OF LISBON – EU REFORM TREATY 15-18 (?)

<sup>145</sup> CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Article 17 Section 2.

<sup>146</sup> Cygan 386, supra note 98, at 22.

<sup>147</sup> CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Article 17 Section 7.

<sup>148</sup> CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Article 17 Section 7.

## Chapter Five: Democratic deficit in the French, German and Hungarian constitutional court judgments regarding the Lisbon Treaty – a comparative analysis

In order to test my findings, in the present, most important chapter I examine the decisions of the French, German and Hungarian constitutional courts on the Lisbon Treaty. As to the question why I chose this way of analysis the answer is that since the thesis of national institutions legitimating the EU seems to become some sort of common knowledge, the examination of some of the judgments of national constitutional courts, as institutions having the sole power of interpreting what terms like sovereignty and democracy means for their particular legal system<sup>149</sup>, is a method that opens new horizons. And although relevant constitutional court judgments have been regularly examined and analyzed more closely, comparative analyses are quite rare<sup>150</sup>; analyses having specific points of comparison in order to examine the issue of democratic deficit do not exist according to my best knowledge.

Picking these three particular countries was more or less evident: France traditionally has a strange, “love-hate relationship”<sup>151</sup> with EU and is very much concerned with its national sovereignty<sup>152</sup>. In Germany there is a whole sequence of EU-related constitutional judgments, starting with Solange I<sup>153</sup>, and eventually constituting a coherent standpoint<sup>154</sup> of the constitution court of Germany on the democracy-issue in the EU, which standpoint

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<sup>149</sup> A MI ALKOTMÁNYUNK (OUR CONSTITUTION) 226 (Laszlo Trocsanyi ed., 2006).

<sup>150</sup> For a comparative analysis of constitutional court judgments regarding the Lisbon Treaty see for example Kristine Kruma, *Constitutional courts and the Lisbon Treaty. The future based on mutual trust*, THE AREA OF FREEDOM, SECURITY AND JUSTICE TEN YEARS ON 38 (2010), <http://www.ceps.eu/system/files/book/2010/06/AFSJ%2010%20years%20final.pdf>

<sup>151</sup> David Marrani, *A Love-Hate Relationship: France and European Law* 16 COLUMBIA JOURNAL OF EUROPEAN LAW 171 (2010).

<sup>152</sup> Id. 172-174.

<sup>153</sup> Decision of the German Federal Constitutional Court BVerfG, 2 BvL 52/71 vom 29.5.1974

<sup>154</sup> See Davor Jancic, *Caveats from Karlsruhe and Berlin: Whither Democracy After Lisbon?* 16 COLUMBIA JOURNAL OF EUROPEAN LAW 337, 341-352 (2010) (“Let there be a European Parliament ... unless there is already one ... which may not supplant the national parliament ... and may not affect its duty of transposition ... and is not and need not be like the national parliament.”).

nevertheless has (or could have) important implications regarding further integration<sup>155</sup>. The close examination of the Hungarian Lisbon-decision is a strategic one as well: its worthy to see the mode and method of the inquiry conducted by the constitutional courts of one of the new member states. Hungary, in addition, is a good example because in the decision there is explicit reference to the French and German judgments<sup>156</sup>, so it fits into the context of the comparison. It was an aspect as well that there is no English literature on the Hungarian Lisbon-decision, so my analysis would definitely have an added value. The constitutional court decisions dealing with the Lisbon Treaty were picked (self-evidently) in order to try to demonstrate how the theoretically possible solutions for curing the EU's democratic deficit with this reform of the integration project have been received in the practical-legal surrounding.

In the following I will firstly give a brief insight to the constitutional setting of the mentioned three countries, then I will move to define specific points of comparison in order to finish with the (cross-) examination of the decisions. I conclude with summarizing what I learned from this comparison-experiment.

## ***5.1 Constitutional framework***

After the adoption of the Lisbon Treaty, numerous constitutional courts (or their equivalents) of the member states received applications concerning the unconstitutionality of

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<sup>155</sup> Id. 339-341.

<sup>156</sup> See Decision of the Hungarian Constitutional Court 143/2010. (VII. 14.) AB határozat, <http://isz.mkab.hu/netacgi/ahawkere2009.pl?s1=119/2010&s2=&s3=&s4=&s5=&s6=&s7=&s8=&s9=&s10=&s11=Dr&r=1&SECT5=AHAWKERE&op9=and&op10=and&d=AHAW&op8=and&l=20&u=/netahtml/ahawuj/ahawkere.htm&p=1&op11=and&op7=and&f=G> (hereinafter: Decision of the HCC) point III/1: „The Constitutional Court points out that the petitioner in fact asks the very same questions that were asked in numerous European countries before the ratification of the Lisbon Treaty ... These constitutional courts (e.g. the German federal, the Polish, the French, the Belgian constitutional court) ... The Constitutional Court studied these decisions. ”

the Treaty<sup>157</sup>. Since the present thesis deals with the French, German and Hungarian rulings, it is necessary to provide a short introduction to the constitutional system of these countries regarding the basic rules about the constitutional courts, relation between domestic and EU-law, etc.

### 5.1.1 France

In France the constitutional council<sup>158</sup> received a referral concerning the constitutionality Treaty of Lisbon from the president. Under the Article 54 of the French Constitution of 4<sup>th</sup> October 1958 the president of the republic (amongst others) has the right to refer an “international undertaking” to the constitutional council<sup>159</sup>. If the council “has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution”<sup>160</sup>. The council delivered its decision n° 2007-560 DC on 20<sup>th</sup> of December 2007<sup>161</sup>.

Of course each constitutional court placed the clause of the national constitution which deals with the particular country’s accession to the EU in the center of its examination. Title XV of the French constitution deals with EU-related matters, but the so-called general “EU-clause”<sup>162</sup> (where “the conditions in which the French Republic participates in the

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<sup>157</sup> French Constitutional Council’s decision from 20<sup>th</sup> December 2007, Czech Constitutional Court’s judgment from 26<sup>th</sup> November 2008 and 3<sup>rd</sup> November 2009, Latvian from 7<sup>th</sup> April 2009, German from 30<sup>th</sup> June 2009, Hungarian from 12<sup>th</sup> July 2010, Polish from 24<sup>th</sup> November 2010. Kruma 39, supra note 150, at 33.

<sup>158</sup> In the followings the terms Constitutional Council and Constitutional Court will be used in turn in order to simplify the text when it refers to the appropriate institution of all three countries.

<sup>159</sup> This procedure is regulated under Chapter II of FRENCH INSTITUTIONAL ACT ON THE CONSTITUTIONAL COUNCIL, ORDINANCE N° 58-1067 OF 7<sup>TH</sup> NOVEMBER 1958, [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/en\\_ordinance\\_58\\_1067.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en_ordinance_58_1067.pdf)

<sup>160</sup> Article 54 of the FRENCH CONSTITUTION OF 4<sup>TH</sup> OCTOBER 1958, [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/constitution\\_anglais.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais.pdf)

<sup>161</sup> For the purposes of examination I used the English translation of the decision, which can be found on council’s official web-site: <http://www.conseil-constitutionnel.fr>

<sup>162</sup> Terminology from Trocsanyi 60, supra note 149, at 33.

European Communities and the European Union are specified”<sup>163</sup>) can be found in Article 88-1<sup>164</sup>. What is important for the forthcoming analyses is that the clause allows for French participation in the Union “to exercise *some* of [its] powers in common [with the other member states]”<sup>165</sup>. This kind of phrasing of the exercise of power is not explicitly mentioning the supranational decision-making method but puts the emphasis on the intergovernmental approach – an important detail which will be dealt in more details under point 5.2.3 Institutions.

According to the above mentioned the French constitutional council conducted its examination of the Lisbon Treaty mostly from the viewpoint of national sovereignty. It did not approach the Treaty as a whole: it reviewed it almost article by article, in order to conclude which novelties “require prior revision of the Constitution.”<sup>166</sup>

### 5.1.2 Germany

In its judgment<sup>167</sup> from 30<sup>th</sup> June 2009, considering applications 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, the German federal constitutional court dealt with application submitted on different legal bases. Two applications were lodged with the court on the basis of Article 93 Section 1 point 1 of the Basic Law for the Federal Republic of Germany (23<sup>rd</sup> May 1949). This procedure enables the court to rule “on the interpretation of the Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme Federal organ or of other parties concerned who

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<sup>163</sup> Decision of the French Constitutional Council n° 2007-560 DC – December 20<sup>th</sup> 2007, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/a2007560dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2007560dc.pdf) (hereinafter: Decision of the FCC) point 7.

<sup>164</sup> Amended with the ratification of the Lisbon Treaty without substantial changes in the text.

<sup>165</sup> Art 88-1 of the 1958 French Constitution. Emphasis added by me, Miklos Klenanc.

<sup>166</sup> Decision of the FCC point 9, supra note 163, at 36.

<sup>167</sup> For the purposes of examination I used the English translation of the decision, which can be found on court’s official web-site: <http://www.bverfg.de>



have been vested with rights of their own by the Basic Law or by rules of procedure of a supreme Federal organ”<sup>168</sup>. One of these applications was dismissed as inadmissible while the other was rejected as unfounded. The other four petitions were filed and decided under Article 93 Section 1 point 40, the so-called constitutional complaint procedure<sup>169</sup>. In this procedure “any person [can] allege that one of his basic rights ... has been infringed by public authority”<sup>170</sup>.

The court delivered its ruling putting the EU-clause of the German Basic Law very much in the center, much more than the French and Hungarian court did. Article 23 of the German constitution regulates in detail under which circumstances may “the Federation ... transfer sovereign powers by a law with the consent of the Bundesrat”<sup>171</sup> to the European Union. The aim of this power-transfer is limited by the constitution: it is Germany’s participation “in the development of the European Union that is committed to *democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law*”<sup>172</sup>.

Bearing in mind this formulation it is no wonder that the reasoning of the German court is much more centered on the democratic foundation of the EU than those of the other courts’. Out of the three constitutional courts whose decisions I examine in present thesis the German court took the most, let us say, radical approach. While the French and Hungarian courts stuck to the analysis of Lisbon Treaty and of the question whether it breaches national sovereignty, the German constitutional court decided on the broader issue of democratic

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<sup>168</sup> Cited provision of the German Basic Law as well as of GERMAN LAW ON THE FEDERAL CONSTITUTIONAL COURT (12<sup>TH</sup> MARCH 1951), <http://www.iuscomp.org/gla/statutes/BVerfGG.htm> Article 13 Point 5.

<sup>169</sup> Id. Article 13 Point 8a.

<sup>170</sup> Article 93 Section 1 Point 4a of the German Basic Law.

<sup>171</sup> Article 23 Section 1 of the German Basic Law.

<sup>172</sup> Article 23 Section 1 of the German Basic Law. Emphasis added by me, Miklos Klenanc.

legitimacy of the European Union<sup>173</sup>. This approach is exceeding the others from two points: it is dealing not just with the Lisbon Treaty strictly speaking but with the overall European integration process<sup>174</sup>, and secondly it asks the question of democratic legitimacy more firmly and answers it not just from the national sovereignty approach but heavily on the basis of democratic legitimacy<sup>175</sup> (and especially because of this heaving far reaching possible consequences<sup>176</sup>).

### 5.1.3 Hungary

The Hungarian constitutional court dealt with the Lisbon Treaty on base of an individual complaint. Article 32/A Section 4 of Act XX of 1949 on the Constitution of the Republic of Hungary secures the right “that in the cases specified by statute” everyone can “initiate proceedings of the Constitutional Court”. This is further specified in Act XXXII of 1989 on the Constitutional Court.

Under this act it is possible to have “ex ante examination for unconstitutionality of statutes adopted but not yet promulgated, and of provisions of the rules of procedure of Parliament and of international treaties”<sup>177</sup> if it is initiated by the president of the republic (or the government)<sup>178</sup>. Still, this was not the case, the court dealt with the Treaty according to its competence to have “ex post examination for unconstitutionality of laws...”<sup>179</sup>. This kind of proceeding can be initiated by anyone<sup>180</sup>. The court found that the law which ratified the

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<sup>173</sup> Chalmers 43, supra note 33 at 8.

<sup>174</sup> See Roland Bieber, ‘An Association of Sovereign States’ 5 EUROPEAN CONSTITUTIONAL LAW REVIEW 391 (2009) and Dieter Grimm, *Defending Sovereign Statehood against Transforming the European Union into a State* 5 EUROPEAN CONSTITUTIONAL LAW REVIEW 353 (2009)

<sup>175</sup> Id.

<sup>176</sup> See detailed analysis under 5.2.1 Democratic legitimacy.

<sup>177</sup> Article 1 Point a of the HUNGARIAN ACT XXXII OF 1989 ON THE CONSTITUTIONAL COURT, [http://www.mkab.hu/index.php?id=act\\_on\\_the\\_constitutional\\_court](http://www.mkab.hu/index.php?id=act_on_the_constitutional_court)

<sup>178</sup> Id. Article 21 Section 1

<sup>179</sup> Id. Article 1 point b

<sup>180</sup> Id. Article 21 Section 2

Lisbon Treaty is “from formal point of view a law still in force ... having normative content”<sup>181</sup>. This is how it happened that the Lisbon-provisions were put under constitutional scrutiny after the ratification of the Treaty but still in line with the Hungarian constitutional court rules<sup>182</sup>. The court itself emphasized the fact of *ex post* examination: “the argued constitutional problems regarding the law ratifying the Lisbon Treaty were considered under the power to exercise *ex post* examination, in absence of petition asking for *ex ante* examination”<sup>183</sup>. The court’s judgment 143/2010. (VII. 14.) AB határozat was delivered on 12<sup>th</sup> of July 2010<sup>184</sup>. It should be noted that the court did not take apart the Treaty as the French constitutional council did, but took a more general approach. This is what was justified by emphasizing the absence of *ex ante* considerations.

The Hungarian court conducted the examination of the Lisbon Treaty generally on the basis of national sovereignty, just as the French and the German ones. On first sight it maybe can be thought that the EU-clause of the Hungarian constitution did not play an important role in the court’s consideration. But this is not the situation. According to Article 2/A Hungary (just as France and basically Germany as well) “may exercise *certain* competences ... in conjunction with the other member states ... *to the extent necessary* to exercise rights and perform obligations under the [EU] foundation treaties.”<sup>185</sup> The Hungarian constitutional court used these restrictions to test whether the Hungarian state still is “an independent, democratic state”<sup>186</sup>.

The court found it important to legitimate its decision by underlining why it was able to make considerations regarding, basically, the EU-law: “... there are no obstacles for the

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<sup>181</sup> Decision of the HCC point III/2 fifth paragraph, supra note 156, at 34.

<sup>182</sup> For contrary opinion see dissenting opinion of Dr. Bragyova András.

<sup>183</sup> Decision of the HCC point IV/2.2 fifth paragraph, supra note 156, at 34.

<sup>184</sup> For the purposes of examination I used the Hungarian official version of the decision, which can be found on court’s web-site: <http://www.mkab.hu> All the translations of parts of this judgment appearing in present thesis are done by me, Miklos Klenanc.

<sup>185</sup> Emphasis added by me, Miklos Klenanc.

<sup>186</sup> Article 2 Section 1 of the ACT XX OF 1949 ON THE CONSTITUTION OF THE REPUBLIC OF HUNGARY, <http://www.mkab.hu/index.php?id=constitution>

Constitutional Court to refer to specific norms of the EU-law ... without giving an autonomous interpretation of them or without having a need for this. Reference will be made ... regarding facts of the Lisbon reform which can be viewed as notorious, not falling back upon autonomous interpretation”<sup>187</sup> <sup>188</sup>.

After having introduced the basic constitutional framework a final remark should be made: it is important to emphasize that while France is considered to be a semi-presidential state, Germany and Hungary have parliamentary system of governance<sup>189</sup>. This should be borne in mind when it is striking that in its decision the French court emphasizes the importance of the executive and the German court highlights the role of the parliament. Interestingly the Hungarian constitutional court, contrary to the German one, considers the task of the government much more important in the integration process than the parliament’s.

## ***5.2 Points of comparison***

As I stated before, my goal with examining the above mentioned constitutional court decisions is to cross-test my findings about how the Lisbon Treaty changed the context where the democratic deficit is to be observed and where the deficit really should be localized. With analyzing and comparing these decisions I aim to check whether these particular constitutional courts stated (either explicitly or implicitly) similar conclusions as I did in the previous chapters and to see which are the important points emphasized by them.

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<sup>187</sup> Decision of the HCC point IV/2 third paragraph, supra note 156, at 34.

<sup>188</sup> It should be mentioned that the Hungarian Constitutional Court briefly dealt with the possibility of withdrawal from the EU since one of the arguments of the petitioner was that withdrawal became impossible. The Court briefly cited to newly introduced procedure by the Lisbon Treaty particularly for the case of withdrawal of a member state and ruled that the petitioners argument is unfounded. See Decision of the HCCJ point IV/2.1.

<sup>189</sup> Trocsanyi 47-52, supra note 149, at 33.

In order to be able to do an efficient cross-check, specific points of comparison should be localized and the examination should be carried alongside them. After reading through all three judgments and having regard to my previous analyses and findings, the following points shall provide framework for the forthcoming comparative analysis:

- democratic legitimacy (how the constitutional courts addressed the democratic deficit and the legitimacy issue at a broader plan, what is the framework of the courts' analyses, where the courts localized the connection between member states and EU in the context of democracy and democratic deficit);
- powers (what importance did the constitutional courts attach to EU's new powers, how they evaluated the fact of enlarging the circle of EU-institutions' competences in the context of democratic founding and democratic deficit);
- institutions (how the constitutional courts valued the democratic foundation of the post-Lisbon EU-institutions, how much importance did they attach to the role of national institutions, whether findings from previous chapter regarding the outsourcing of governmental powers and preparatory/drafting deficit are explicitly or implicitly present);
- legislative process (what is the courts' evaluation of the legislative process from the democratic deficit viewpoint, how they evaluated some of the newly introduced procedures, is the importance of the preparatory work/drafting process emphasized);
- national parliaments (how the constitutional courts valued their strengthened role, what sort of attachment is to be found regarding their supposed "democracy-provider" role).

### 5.2.1 Democratic legitimacy

In its judgment the French constitutional council performs the analysis of the Lisbon Treaty basically not in the framework of democratic legitimacy but of national sovereignty. It cites the relevant rules of the French constitutional norms: the Preamble<sup>190</sup> (which makes the Rights of Man and Citizen and the Preamble of the 1946 Constitution legally binding) and Article 3 of the 1958 Constitution<sup>191</sup> and the Article 3 of the Declaration of the Rights of Man and Citizen<sup>192</sup> (both of them recognize the nation/the people as ultimate holders of national sovereignty). The question for the council is not whether the EU is a democratic institution but whether national sovereignty is affected to an unconstitutional extent. Good example for this kind of approach is the conclusion about the European Parliament. It is the opinion of overwhelming majority of scholars<sup>193</sup> that its main “added value” is that gives democratic foot-stone to EU. The constitutional council is not dealing with this issue, they stick to the sovereignty-approach when stating: “the European Parliament ... is not an emanation of national sovereignty”<sup>194</sup>. The council explicitly states its priorities: “When however undertakings entered into for [the purpose of participating in the EU] contain a clause running counter to the Constitution, call into question constitutionally guaranteed rights and freedoms *or adversely affect the fundamental conditions of the exercising of national sovereignty*, authorisation to ratify such measures requires prior revision of the Constitution”<sup>195</sup>.

It could be concluded on the basis of the above mentioned that the French constitutional council says nothing about whether the EU is democratic or not, whether a democratic deficit is present at all, and even that it seems that these questions are not of

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<sup>190</sup> Decision of the FCC point 3, supra note 163, at 36.

<sup>191</sup> Decision of the FCC point 4, supra note 163, at 36.

<sup>192</sup> Decision of the FCC point 4, supra note 163, at 36.

<sup>193</sup> CRAIG 36-39, supra note 120, at 26, TAKACS 111-127, supra note 2, at 1, HORVATH & ODOR 156-158, supra note 126, at 27, etc.

<sup>194</sup> Decision of the FCC point 20, supra note 163, at 36.

<sup>195</sup> Decision of the FCC point 9, supra note 163, at 36. Emphasis added by me, Miklos Klenanc.

importance for the council. Nevertheless it is true as well that the before cited findings implicitly contain the idea of impossibility for the Union to have its own sources of legitimacy which would prevail against the national sovereignty: the democratic foundation of the highest institutions of the French Republic will always have to be there in order to ensure the necessary “amount of democracy” in the European Union.

The German constitutional court elaborated the issue of EU’s legitimacy incomparably more than the other two courts whose decisions are examined in the present thesis<sup>196</sup>. As I already mentioned previously, the decision regarding Lisbon Treaty is not the first judgment of the German court concerning the European integration project. Nevertheless, in this decision it “set the legal boundaries for the European Union’s development as a constitutional construct”<sup>197</sup>. How it did this?

The court heavily relied on the EU-clause of the German constitution, according to which “the Federal Republic of Germany shall participate in the development of the European Union committed to democratic ... principles”<sup>198</sup>. In order to see whether the Lisbon Treaty is in conformity with the German constitution, the court examined the democratic foundation of the Union. It found that the “source of Community authority, and of the European constitution that constitutes it, are the peoples of Europe with their democratic constitutions in their states. The “Constitution of Europe” ... remains a derived fundamental order”<sup>199</sup>. Being so, it needs democratic underpinning, in the first place “provided by national parliaments and governments” and just complemented by the European Parliament<sup>200</sup>. This conclusion is a very important one concerning my findings regarding unwanted outsourcing of governmental powers. It actually emphasizes the importance of the possibility of member

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<sup>196</sup> Jancic 339-341, supra note 154 at 33.

<sup>197</sup> Jancic 340, supra note 154 at 33.

<sup>198</sup> Article 23 Section 1 of the German Basic Law.

<sup>199</sup> Decision of the German Federal Constitutional Court BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html) (hereinafter: Decision of the GCC) point 231.

<sup>200</sup> Decision of the GCC point 262.

states control. The court later on found that since the control over the EU's activity is still strong enough<sup>201</sup> the necessary democratic foundation is provided by the member states, so the Lisbon Treaty is in conformity with the German Basic Law<sup>202</sup>. What is important that the German constitutional court went further: after "assuming that (parliamentary) democracy exists only in the Member States"<sup>203</sup>, it stressed that "the democracy of the European Union cannot, and need not, be shaped in analogy to that of a state"<sup>204</sup>. On the long run, it ruled on the future of the European Union: since the main democracy-holders are the member states, too much transfer of their power to the EU would be unconstitutional under the German constitution<sup>205</sup>.

The view of the Hungarian constitutional court about the question of EU's democratic foundation is a very interesting one if the proper thoughts of the court are caught. The court deducts clearly how it understands the democratic legitimacy of the European Union. According to the Article 2 Section 1 of the Hungarian constitution, Hungary is an "independent, democratic state under the rule of law". Section 2 of the same article declares the principle of national sovereignty. This principle is interpreted by the court as meaning that public power shall be exercised solely on the basis of democratic legitimacy<sup>206</sup>. In order to have the democratic legitimacy requirement fulfilled it is necessary their framing to be traceable back to the ultimate source of public power<sup>207</sup>. Accordingly, it does not matter how long the "chain" of legitimacy is. (This conclusion will be important as well for the examination under the "Institutions" point of present thesis.)

The court's idea about whether there is an untouched legitimacy-chain can be read in its decision's last paragraph of point IV/2.3.2: "The constituent power complied with the

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<sup>201</sup> See findings of the Hungarian constitutional court very similar to this under 5.2.2 Powers.

<sup>202</sup> Decision of the GCC point 272.

<sup>203</sup> Jancic 340, supra note 154 at 33.

<sup>204</sup> Decision of the GCC point 272.

<sup>205</sup> See Jancic 339-341, supra note 154 at 33 agreeing with this finding.

<sup>206</sup> Decision of the HCC point IV/2.3.2 fourth paragraph, supra note 156, at 34.

<sup>207</sup> Decision of the HCC point IV/2.3.2 fifth paragraph, supra note 156, at 34.



criterion of origination from national sovereignty ... while preparing the accession to the European Union, by inserting the Article 2/A to the constitution.” This means that in the interpretation of the constitutional court the Hungarian legislator itself decided upon the question of EU’s democratic legitimacy. The court sticks to this idea through its whole decision: it did not examine the legitimacy-question, but basically argues in a manner from which it can be concluded that the Hungarian constituent power made the EU democratic, at least from the national point of view.

### 5.2.2 Powers

The French constitutional council starts its examination of the newly conferred powers from the member states to the EU with stating that, according to the EU-clause of the constitution, such a transfer (and the product of the exercise of these powers) can be constitutional: “The constituent power thus recognised the existence of a Community legal order integrated into domestic law...”<sup>208</sup> For the council the safeguard of the restrictions imposed upon the transfer of power by the EU-clause of the constitution<sup>209</sup> is the principle of subsidiarity<sup>210</sup>. Still, the constitutional council is not of an opinion that this safeguard is enough: “...the implementation of this principle may not suffice to preclude any transfers of powers authorized by Treaties from assuming a dimension or being implemented in a manner such as to adversely affect the fundamental conditions of the exercise of national sovereignty”<sup>211</sup>. Because of this, the council hold that “the clauses of the Treaty which transfer to the European Union powers concerning the fundamental conditions of the exercising national sovereignty in areas or in a manner other than those provided for by the

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<sup>208</sup> Decision of the FCC point 7, supra note 163, at 36.

<sup>209</sup> Article 88-1 of the 1958 French Constitution: „to exercise *some* of their [the member states’] power in common”. Emphasis added by me, Miklos Klenanc.

<sup>210</sup> Decision of the FCC point 16, supra note 163, at 36.

<sup>211</sup> Decision of the FCC point 3, supra note 17, at 36.

Treaties referred to in Article 88-2 require a revision of the Constitution”<sup>212</sup>. What is the conclusion? It is an important one: as I already mentioned before<sup>213</sup>, the EU-clause of the French constitution does not contain explicit reference to the decision-making by the supranational institutions<sup>214</sup>. Accordingly for the constitutional council it is important to have a general possibility for the government to control the decision-making in EU; this is in line with my findings as to the need to eliminate the preparatory/drafting democratic deficit by providing the national governments with effective means of control over the complete process of EU-legislation.

The German constitutional court approached the examination of power-transfer from the perspective where emphasis is put on the boundaries of the conferral. The court made it clear that „the constitutional requirements placed by the principle of democracy on the organisational structure and the decision-making procedures of the European Union depend on the extent to which sovereign responsibilities are transferred to the Union and the degree of political independence in the exercise of the sovereign powers transferred. Increased integration may be unconstitutional if the level of democratic legitimation is not commensurate with the extent and the importance of supranational power.”<sup>215</sup> According to the court the Union can exercise only limited competences, and the constitutionality of transferring new powers from the member states should always be checked against the substance of these powers: if they are so strongly related to the member states that the present level of EU’s democratic legitimacy is not enough to have the Union exercise these powers, the conferral is unconstitutional<sup>216</sup>. The problem with this reasoning is that the court did not give any particular reference point how it will check if the EU’s democracy is satisfactory or not. Still, there can be found one (although quite unclear) “handhold”: “if however, the

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<sup>212</sup> Decision of the FCC point 3, supra note 15, at 36.

<sup>213</sup> See 5.1.1 France.

<sup>214</sup> Grossman suggests similarly, see Grossman viiii, supra note 106, at 23.

<sup>215</sup> Decision of the GCC point 262.

<sup>216</sup> Jancic 356, supra note 154 at 33.

threshold were crossed to a federal state...”<sup>217</sup> According to this half sentence it can be concluded that the powers transferred to the Union may not make it a federal state; for this to happen it would be necessary to have a completely changed institutional setting for the EU, which provides a primary source of democratic legitimation, contrary to the present situation, where democratic underpinning of the member states is dominant.<sup>218</sup>

The Hungarian constitutional court did not perform a particular constitutionality analysis of Lisbon Treaty’s power-transfer<sup>219</sup>. What is more, it declared: “...the Treaty of Lisbon did not establish a European super-state”<sup>220</sup>. For the court it was enough to conclude that the Lisbon reform was conducted by means of international agreement between sovereign states, who agreed that they will share part of their sovereignty in form of supranational cooperation<sup>221</sup>. Still, the last sentence of the only one paragraph dealing explicitly (but just in general terms) with new powers of the EU contains an important underpinning for my findings from previous chapter and regarding the importance of governmental control through the complete decision-making process in the Union (although not concluding that there is a preparatory/drafting democratic deficit): it declares that the power-transfer is not problematic while the governments of member states have the possibility to control the Union’s activity<sup>222</sup>.

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<sup>217</sup> Decision of the GCC point 263.

<sup>218</sup> Jancic 356, supra note 154 at 33.

<sup>219</sup> Agoston Mohay, *Az Alkotmánybíróság döntése a Lisszaboni Szerződést kihirdető törvény alkotmányosságáról (The judgment of the Constitutional Court on the constitutionality of the act promulgating Treaty of Lisbon)* 3 KÖZJOGI SZEMLE 64 (2010).

<sup>220</sup> Decision of the HCC point IV/2.5 second paragraph, supra note 156, at 34.

<sup>221</sup> Decision of the HCC point IV/2.5 second paragraph, supra note 156, at 34.

<sup>222</sup> For detailed analysis see 5.2.3 Institutions.

### 5.2.3 Institutions

The French constitutional council did not put particular emphasis on the examination of EU's institution. The constitutional review was mostly conducted regarding the powers and functioning of the Union. Still, there is one important point of the decision which should be inspected more closely. In point 20 of its decision the council basically says that, as far as France is concerned, the democratically legitimized institutions of the EU are the intergovernmental ones in contrast to those supranationals: “[rules which confer] decision-taking power on the European Parliament, which is not an emanation of national sovereignty ... require a revision of the Constitution”. This is a very important finding from the perspective I introduced in previous chapter, regarding the outsourcing of governmental power, but regarding my modified views of democratic deficit issue as well. With this half-sentence the French constitutional council implicitly agrees with the findings of the Hungarian court as to the democratic foundation of EU's institutions, namely that an unbroken chain of democratic legitimacy should exist between them and the national sovereign (the people). If this democratic foundation exist, democratic deficit is not possible. I find the before cited statement of the French constitutional council to be one which explicitly strengthens my concept of the importance to have governmental control over the *entire* legislative procedure in the EU in order to avoid democratic deficit.

The German constitutional court is very harsh in its evaluation of the EU's institutional setup. It stated that “the European Union lacks ... a political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people”<sup>223</sup>. In line with this statement the court went further on saying that the German parliament has to “retain a formative influence on the

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<sup>223</sup> Decision of the GCC point 267.

political development[s]”<sup>224</sup>. It highlighted that this can be secured either by having the Bundestag “[retaining] responsibilities and competence of substantial political importance”<sup>225</sup> or by having the government “in a position to exert a decisive influence on European decision-making procedures”<sup>226</sup>. This reasoning (at least its second part) is almost word-by-word the same as the one of the Hungarian constitutional court. For my findings regarding the necessity of having democratic (and thus member state-provided) control during the whole process of EU-lawmaking, the before cited standpoint of the German court is a strong underpinning, especially having regard to the similarities in the Hungarian judgment as well. Although the German court did not find that under the Lisbon Treaty the decision-making process suffers from an alarming democratic deficit, I find that it emphasized my concerns regarding the drafting/preparatory deficit very clearly.

The Hungarian constitutional court did not perform an analysis of the EU-institutions. What it did instead is the examination of some of the national institutions in order to check whether they are still able to perform the majority of the tasks closely related to national sovereignty<sup>227</sup>. It can be read out from the decision that if this is still the case (i.e. if national competences are transferred to the EU’s institutions only to the “necessary extent”<sup>228</sup>) than accordingly the Lisbon Treaty is not unconstitutional, since it complies with the relevant (EU-) clause of the constitution.<sup>229</sup>

As I stated before, according to the Hungarian constitutional court the EU’s institutions should have democratic legitimacy, provided by the national institution through an uninterrupted chain of democratic underpinning. The (state) power exercised by the

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<sup>224</sup> Decision of the GCC point 246.

<sup>225</sup> Jancic 360, supra note 154 at 33.

<sup>226</sup> Decision of the HCC point IV/2.4.6, supra note 156, at 34.

<sup>227</sup> Decision of the HCC point IV/2.3 and further, supra note 156, at 34.. See similar reasoning in the Maastricht-decision of the German Constitutional Court: Boom 223, supra note 78, at 17.

<sup>228</sup> Article 2/A of the Hungarian Constitution.

<sup>229</sup> This is very much emphasized in the separate opinion of Dr. Trócsányi László. See as well Mohay 64, supra note 219, at 47.

national institutions (having the parliament on the top of the system) is not absolute: the parliament and other organs of the state as well can exercise their powers only with having specific competence-rules in the constitution<sup>230</sup> limiting them<sup>231</sup>. But under Article 2. of the constitution it is not enough to have institutions with specifically provided competences, it is necessary that these institutions exercise the public power on the base of democratic legitimacy<sup>232</sup>. The court concluded that this democratic foundation is provided if “the institutional, procedural and contentual safeguards are guaranteed for legislative process and rights-enforcement”<sup>233</sup>. These safeguards are present since “the governments of the member states are still able to govern and control its [EU’s] activity”<sup>234</sup>. Being this the situation the member states retain the decisive part of their sovereignty, “... the community’s (union’s) legal order does not empty (even after the Lisbon Treaty) the constitutional rules ensuring the independence, sovereignty of the state)...”<sup>235</sup>

It can be seen that the Hungarian court did not share my conclusions regarding the outsourcing of governmental power and the preparatory democratic deficit, although it did recognize the importance of the issue when in the reasoning highlighted the possibility of governmental control (in the drafting process as well<sup>236</sup>). Still, in my view, the court did not give substantial reasons why it believed that the possibility of appropriate and effective governmental control is provided.

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<sup>230</sup> It is an interesting issue that although here the Hungarian Constitutional Court says that competences of the Hungarian parliament are limited in the constitution, further on it is not a problem for the court to accept that the Lisbon Treaty confers new powers to national parliament. See analysis of this and the contrary opinion of the French Constitutional Council under point 5.2.5 National parliament.

<sup>231</sup> Decision of the HCC point IV/2.3.2 third paragraph, supra note 156, at 34.

<sup>232</sup> Decision of the HCC point IV/2.3.2 fourth paragraph, supra note 156, at 34.

<sup>233</sup> Decision of the HCC point IV/2.3.2 fourth paragraph, supra note 156, at 34.

<sup>234</sup> Decision of the HCC point IV/2.5 second paragraph, supra note 156, at 34.

<sup>235</sup> HCCJ point Concurring judgment of Dr. Trócsányi László, seventh paragraph, Decision of the HCC, supra note 156, at 34.

<sup>236</sup> See Decision of the HCC point IV/2.3.2 fourth paragraph, supra note 156, at 34.

## 5.2.4 Legislative process

The French constitutional council did scrutinize the rules regarding decision-making in the Union. It did so in two respects: regarding the “new manners of exercising powers”<sup>237</sup> and regarding the changes in qualified majority voting. The council emphasized very much the importance of governmental involvement<sup>238</sup>: if there is no absolute possibility for the national governments to be the masters of the decision-making, if the process is “depriving France of ... power to oppose a decision” than it goes against the sovereignty-principle (which is highly valued by the council), and rules making these changes possible require revision of the constitution<sup>239</sup>. Explicitly the council does talk only about the importance of having governments as final decision-makers. But implicitly it is incorporated in the reasoning the equally important role of governments as “absolute masters” of the decision-making<sup>240</sup>. This implicit conclusion could lead as to an other one: that the governments should have a constant possibility of being able to decisively influence the legislative process, and this can be achieved only if they are capable of exercising strong enough control already in the drafting process.

The German constitutional court dealt with the legislative process, and in particularly with the novelties (e.g. the bridging clauses, the flexibility clause, etc.) very much in detail. It would be not practical for the purpose of present analysis to deal with its findings separately, one-by-one. Much more important is the overall picture of the judgment: the court emphasized that it is concerned very much by the loss of German parliament’s and government’s influence in the decision-making process<sup>241</sup>. “The unanimity in the European Council or in the Council required by the bridging clauses for the amendment of the

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<sup>237</sup> Decision of the FCC subtitle for points 20-22., supra note 163, at 36.

<sup>238</sup> See Grossman viiii, supra note 106, at 23. “The more supranational elements in European integration have clearly been more difficult to accommodate to some of France’s institutional and political features...”

<sup>239</sup> Decision of the FCC point 20, supra note 163, at 36.

<sup>240</sup> Decision of the FCC point 19 and 23, supra note 163, at 36.

<sup>241</sup> Jancic 363, supra note supra note 154 at 33.

procedural provisions is not a sufficient guarantee for this because it may not always be sufficiently ascertainable for the representatives of the Member States in the European Council or in the Council to what extent the Member States' possibility of veto in the Council is thereby waived for future cases."<sup>242</sup> I find this quotation from the German judgment to be a good example that strengthens my arguments regarding the unwanted outsourcing of governmental power. Since the representatives of member states lose the possibility to effectively control the preparatory phase of decision-making, there is a substantial uncertainty as to the outcome of the process: here it is the preparatory/drafting deficit.

Just as regarding the newly transferred powers, the Hungarian constitutional court did not deal substantially neither with EU's legislative process in general terms nor with the newly introduced ones specifically. What it very briefly concluded is that it sees the newly introduced legislative procedures basically as safeguards of democracy at work in the Union.<sup>243</sup> Although the Hungarian court had the same starting point for its examination as the French constitutional council: the national sovereignty, it seems that it did not consider that the legislative procedures can have fundamental effect on sovereignty-issues. The French council on the contrary examined quite in detail especially the newly introduced procedures. The underlying reason for this difference in my opinion can be found if one considers on which basis the two courts conducted their examinations: the French constitutional council worked upon a general referral from the president regarding the constitutionality of the Lisbon Treaty, while the Hungarian court received petition concerning particular issues, none of them being related to the legislative process itself.

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<sup>242</sup> Decision of the GCC point 318.

<sup>243</sup> Decision of the HCC point IV/2.5 fourth paragraph, *supra* note 156, at 34. See Mohay agreeing, Mohay 64, *supra* note 219, at 47.



## 5.2.5 National parliaments

The Lisbon Treaty reinforced the role and power of the national parliaments both in the integration (possibility to oppose under the simplified revision procedure) and legislative process (for example mechanism for checking whether the subsidiarity rule was respected)<sup>244</sup>. The French constitutional council's decision deals with their strengthened role under a separate heading. Although it is argued that the involvement of national legislators should give a democratic push to the EU's decision-making<sup>245</sup>, it seems that for the council it is very much not evident that such a role could be performed automatically. After listing the new powers of national parliaments under the Lisbon Treaty, the council states that "it is necessary to decide whether such prerogatives may be exercised within the framework of the current provisions of the Constitution"<sup>246</sup>. The conclusion is that the competence of the French parliament "to oppose the implementation of a procedure of simplifies revision of the Treaties ... requires a revision of the Constitution". The reasoning can hardly be found, neither in the particular decision, nor in the decision of the constitutional council n° 2004-505 DC of November 19<sup>th</sup> 2004 pertaining to the "Treaty establishing a Constitution for Europe" the original refers to. Still it can be read out that the council was concerned very much with the close relation of the procedure with "matter[s] inherent to the exercise of national sovereignty"<sup>247</sup>.

Nevertheless, the above conclusions are not consistent ones. In point 27 of the judgment as well the council states that the "simplified revision procedure of treaties ... requires a revision of the Constitution". Here one can find a discrepancy: if findings under point 27 and 29 are read against each other, the result is that the simplified revision procedure

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<sup>244</sup> CRAIG 33-47., supra note 120, at 26.

<sup>245</sup> Id.

<sup>246</sup> Decision of the FCC point 28, supra note 163, at 36.

<sup>247</sup> Decision of the French Constitutional Council n° 2004-505 DC – November 19<sup>th</sup> 2004, Treaty establishing a Constitution for Europe, [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/2004\\_505dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2004_505dc.pdf) point 33.

once need constitutional revision because the national legislators (who should normally ratify the treaties) lose power and on the other hand revision is necessary because the national parliament gain power. Of course a final remark should be made: when assessing the findings of the French constitutional council regarding the powers of the French parliament one have to bear in mind that under the French constitution the parliament has limited powers: its competences are listed under Title IV<sup>248</sup>. Knowing this the findings of the council are not such a wonder<sup>249</sup>.

To summarize the above mentioned: according to the constitutional council's interpretation, the institutions of the French state can not exercise a "democratic plus"-giver role *per se*. For this it is necessary to have the enabling provisions of the constitution, and at the very basic instance: the constituent power<sup>250</sup>.

For the German constitutional court the national parliaments (and of course the German Bundestag in particular) are of much importance. As I showed previously, according to the German court's opinion legitimacy provided by the national parliaments is the most important, primary one, and all other ways of providing democratic underpinning (e.g. by the European Parliament) are secondary ones<sup>251</sup>. The German parliament is viewed as "the focal point of an interweaved democratic system"<sup>252</sup>. In the judgment, unlike in the French one, the new powers of the national parliaments are not contested, moreover it is criticized that they loose power in the course of reforms implemented by the Lisbon Treaty without having the European Parliament as EU-institution compensating for this<sup>253</sup>. Contrary to the findings of the Hungarian constitutional court (discussed in the followings) it is not the ultimate and only

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<sup>248</sup> 1958 French Constitution.

<sup>249</sup> Anyhow, under the French constitutional setting „French Members of Parliament ... leave EU policy-making largely to the Government..." See Grossman xi, supra note 106, at 23.

<sup>250</sup> Check my findings regarding Hungary and Article 2/A of the Hungarian Constitution under 5.2.1 Democratic legitimacy.

<sup>251</sup> Jancic 356, supra note 154 at 33.

<sup>252</sup> Decision of the GCC point 277.

<sup>253</sup> Decision of the GCC point 293.

question whether even one national parliament can disrupt in some cases the decision-making in the EU. It is equally important that the Bundestag has the effective means to control and influence the German government's position during the legislative process<sup>254</sup>. This finding of the court is an important one in connection to my own findings regarding the issue of drafting deficit: it emphasizes that member states should be able to control the decision-making process in its entirety. Although the court permitted "a different shaping of political opinion-forming"<sup>255</sup> in the EU, the outcome is democratic enough only if it has been previously scrutinized against the national standpoints.

The Hungarian constitutional court valued the increased importance of national parliaments very much differently than the French and German courts. In its (not that short) judgment there are only two paragraphs about the issue. Still, the argument of the court is worthy of being more closely examined. After stating that the Lisbon Treaty secured the possibility of intervention for the national parliaments in a wider circle<sup>256</sup>, it concludes that the newly introduced processes provide a safeguard for the Hungarian Parliament<sup>257</sup>: it becomes able to check whether its transferred powers are exercised just to the "necessary extent", according to the EU-clause of the Hungarian constitution<sup>258</sup>. But further on the court gives an interesting statement: "there are spheres ... where objections of even one of the national parliaments are enough to hinder the decision-making process"<sup>259</sup>. It seems that as far as the Hungarian constitutional court is concerned it is enough that there is the possibility that "even one" national parliament can basically veto the decision-making, it is not a must that the Hungarian legislator should be that particular one.

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<sup>254</sup> Decision of the GCC point 246.

<sup>255</sup> Decision of the GCC point 219.

<sup>256</sup> Decision of the HCC point IV/2.5 third paragraph, supra note 156, at 34.

<sup>257</sup> Mohay 64, supra note 219, at 47.

<sup>258</sup> Decision of the HCC point IV/2.5 fourth paragraph, supra note 156, at 34.

<sup>259</sup> Decision of the HCC point IV/2.5 fourth paragraph, supra note 156, at 34.

### 5.3 Summary of the comparison

After carefully reviewing, examining, comparatively analyzing the three constitutional court judgments it can be concluded that each constitutional court has a different approach towards the global issue of democratic deficit. Still, certain (sometimes remarkable) similarities can be observed, mostly thanks to the comparative constitutional method I used in present main chapter.

Although none of the courts explicitly came to the same conclusions as I did previously, naming a preparatory/drafting deficit to be present, partially caused by what I called unwanted outsourcing of governmental powers, my findings fit very much to the context of the decisions. The importance of “democracy-giver” role of the member states and their possibility to control the entire decision-making process (just to point out two very much relevant conclusions) are highly emphasized by the courts. In my view their findings are absolutely capable of accommodating my theoretical hypothesis. Where the difference lies is the pure fact that they did not find the present democratic deficit to be that dangerous to make the Treaty of Lisbon unconditionally unconstitutional.

In the following table I indicate my findings in an easily reviewable manner.

	<i>France</i>	<i>Germany</i>	<i>Hungary</i>
<b>Democratic legitimacy</b>	the highest institutions of the French Republic have to provide the necessary democratic underpinning of the European Union	the democratic foundation of the Union is provided by the member states, and the EU itself can never be democratic enough	the EU-clause of the constitution made the EU democratic for Hungary through unbroken chain of democratic legitimacy
<b>Powers</b>	general possibility for the government to control the decision-making in the EU is necessary	there is correlation between the possible conferral of powers and the present level of democracy in the Union	power-transfer is not problematic if the governments of member states have the possibility to control the Union’s activity

<b>Institutions</b>	democratically legitimized EU-institutions are the intergovernmental ones	it is necessary to have either the Bundestag or the federal government “in a position to exert a decisive influence on European decision-making procedures”	it deals with the national institutions, which have to be able “to govern and control [EU’s] activity”
<b>Legislative process</b>	the decision-making process may not deprive France of its power to oppose a decision	it is necessary to constantly have the member states as ones which exercise effective control over the decision-making	the Lisbon-introduced procedures are viewed as safeguards of EU-democracy at work
<b>National parliaments</b>	the institutions of the French state can not exercise a “democratic plus”-giver role <i>per se</i>	EU-decision making outcomes have to be previously scrutinized against the national standpoints	national parliaments’ role is viewed as a safeguard, so it is enough if any of them has the power to veto the decision-making

## Conclusion

In present thesis I tried to critically approach the issue of democratic deficit, and to see, after localizing it, what impact had the reforms introduced by Lisbon Treaty on this topic. In order to be able to make sure if my findings are correct and that they can fit to the context of the issue in practical terms as well, I did a comparative analysis of the related judgments of French, German and Hungarian constitutional courts.

After deciding to narrow the scope of my research to the legal viewpoint of the problem and invoking all the relevant EU-institutions of the decision-making process I tested their democratic foundations, before and after the Lisbon Treaty came into force. The close analysis of different arguments and the examination of the legal setting showed that there is an important question that is not examined heavily enough: instead of putting the Council as the main decision-making body to the center of the debate I argue that a) the Council's democratic foundation is secured through the democracy-giver function of the member states and that b) it is the Commission that lacks the necessary legitimacy. Since it has the monopoly of drafting power in the Union I maintain that a preparatory/drafting democratic deficit is present. Further on while the member states (and particularly their governments) are not in position to effectively control and influence the preparatory phase of the decision-making, they loose some of their competences, which I named as unwanted outsourcing of governmental powers. I as showed by examining the relevant provisions of the Lisbon Treaty and much of the literature, neither the unwanted outsourcing nor the preparatory deficit is cured by the Lisbon Treaty.

My goal was not to see how the unwanted outsourcing of governmental powers works in practice; it is a topic for a separate research. What I aimed to do was to make sure if my theoretical findings can fit in the context of the legal debate about the democratic deficit. For

this I chose the comparative constitutional method as seemingly good one for the analysis. After localizing points of comparison on the basis of checking where the democratic legitimacy of the Union is contested in the literature I proceeded with the examining the judgments and comparing the findings of French, German and Hungarian constitutional court regarding this issue on the occasion of acceptance of the Lisbon Treaty. I showed that both the concept of preparatory/drafting deficit and of the unwanted outsourcing of governmental powers can be well placed in the context of these constitutional court judgments: although they approach the problem from different angles and with varying views, each of them localized some (different) aspects of my theoretical findings. This is where the success of heavily using the comparative constitutional method comes out to daylight: by composing these different aspects into a broader picture<sup>260</sup> it can be said that the analyzed constitutional court judgments underpin my hypothesis.

If I was able to provide some new perspectives regarding the democratic deficit issue and if I made easier future research by introducing new terms and framework, as well as with the use of comparative approach while examining the before mentioned court decisions, my thesis reached its aim and the work I put into it was not useless.

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<sup>260</sup> For this purpose I use a comparative table, see 5.3 Summary of the comparison, at 56-57.

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